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Texas Lawyers' Professional Ethics
Fourth Edition
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The use of the masculine gender in parts of this manual is purely for literary convenience and should, of course, be understood to include the feminine gender as well.

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Disk Documentation
The Texas Young Lawyers Association proudly presents the fourth edition of *Texas Lawyers' Professional Ethics*. This handy desk reference brings together in one convenient volume the materials concerning legal ethics applicable to law practice in Texas. We believe this will be a valuable addition to any legal library and an aid to any lawyer faced with ethical considerations in the day-to-day practice of law.

Ethics and professional responsibility should be of paramount concern to all lawyers. Given the public’s skepticism of lawyers, the conduct of every attorney reflects on the profession as a whole. For this reason, this book is as timely today as when it was initially published in 1979 and revised in 1986 and 1997.

An extraordinary amount of work has gone into this edition as a result of the many substantial changes in the Disciplinary Rules of Professional Conduct and the Rules of Disciplinary Procedure over the past ten years. There have also been numerous new ethics opinions and more than a hundred judicial opinions addressing various aspects of the Disciplinary Rules. The Membership Services and Outreach Committee has worked tirelessly on this project to ensure that these revisions have been incorporated into this publication. I would like to express special appreciation to Bill Chriss and John Sutton for their thorough and insightful commentary on the Disciplinary Rules. Many thanks also to Alfonso Cabanas, Kelley Crisp, Stephanie Daley, Melissa Denard, Leah Golden, Matt Golden, Cyndia Hammond, Jason Horton, Michelle MacLeod, Everett New, Shivani Sharma, Jenny Wells, Brandy Wingate, and Kristie Wright for their tireless efforts in updating the voluminous annotations to the Disciplinary Rules, and to Karin Crump and Bill Miller for their encouragement of and support for this project. TYLA also appreciates the assistance provided to us by the staff of the TexasBarBooks Department of the State Bar of Texas.

David Anderson  
2007-08 Co-Chair  
TYLA Member Services and Outreach Committee
Chapter 1

Commentary on the Texas Disciplinary Rules of Professional Conduct Governing the Duties between Lawyer and Client

by William J. Chriss¹ and John F. Sutton, Jr.²

This chapter is designed to help the reader understand the ethical duties imposed by article I of the Texas Disciplinary Rules of Professional Conduct. Discussion is limited to the rules falling under that article for a number of reasons. First, that article contains almost all the rules informing the relationship between lawyer and client, such as those dealing with conflicts of interest and confidentiality of information. Later rules focus on the duties of the lawyer to the legal system or to society as a whole, and can be treated separately without any loss of coherence. In addition, the reader should note that efforts are currently underway to amend substantial portions of the rules.³ Many of those amendments deal with rules falling under articles II through VIII, including a new rule specifying a prohibition on sexual contact between lawyer and client, at least one version of which is proposed to be added as a new rule 5.07. What follows, then, is an explanation and brief analysis of the rules within article I, and the history and basic concepts that inform those rules.

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². John F. Sutton, Jr., is A.W. Walker Centennial Chair in Law Emeritus at the University of Texas School of Law, where he served as Dean from 1979 to 1984. He was the original reporter and principal draftsman for the Wright Committee that drafted the 1969 ABA Code of Professional Conduct, he served as a consultant to the Kutak Commission, which drafted the ABA Model Rules of Professional Conduct, and from 1970 to 1976 he was a member of the ABA Standing Committee on Ethics and Professional Responsibility.

³. The Texas Supreme Court appointed a Supreme Court Task Force on the Texas Disciplinary Rules of Professional Conduct on August 29, 2003, with the charge that it should study “the changes to the American Bar Association Model Rules of Professional Conduct adopted February 5, 2002, and compare these changes with the current Texas Disciplinary Rules of Professional Conduct as well as the rules of attorney conduct adopted by other states.” See Order Creating a Task Force on the Texas Disciplinary Rules of Professional Conduct, Tex. Sup. Ct. Misc. Docket No. 03-9147. The State Bar of Texas also appointed a Committee on the Texas Disciplinary Rules of Professional Conduct to “evaluate the Texas Disciplinary Rules of Professional Conduct and make suggestions to the Board of Directors of the State Bar concerning revisions that may be appropriate.” These two entities continue to work together to recommend amendments to the current rules consistent with the charge of the Texas Supreme Court.
I. History

Dean Roscoe Pound of the Harvard Law School wrote the first comprehensive history of American lawyers and their bar associations in 1953. According to Pound, it was after the Civil War that a new trend toward professional status among lawyers produced a crop of local lawyer clubs or “bar associations.” This trend, in turn, ultimately resulted in the formation of the American Bar Association in 1878. However, until the early twentieth century, the ABA comprised two percent or less of the practicing bar. Attendees were nominated and selected by their state bar associations to be invited to a meeting each summer at Saratoga Springs, New York. The ABA began to realize the limited reach of its efforts to “uphold the honor of the profession and . . . encourage cordial intercourse among the members of the American Bar,” and it embarked on an attempt to expand membership and become more relevant to the profession at large.

Beyond honor and cordiality, another avowed purpose of the ABA was “to promote uniformity of legislation throughout the union.” One of the earlier attempts at achieving this objective was the development of the first set of ABA Canons of Professional Ethics, adopted in 1908 as a proposed model for state bars to follow.

The 1908 ABA Canons were adapted from a number of sources developing during the 1880s and 1890s. These, in turn, were based on two earlier works. In 1814, a successful Baltimore lawyer named David Hoffman became the only professor of law at the University of Maryland. In 1817, he published the first edition of his textbook for law students, *A Course of Legal Study*, in which he attempted to synthesize and organize Anglo-American law into a “science of jurisprudence.” By 1836, Hoffman had ceased to teach in the law school, but he added additional material to his textbook, including an essay on appropriate student behavior in the form of fifty resolutions concerning “professional deportment.” There matters lay until 1854, when George Sharswood presented “A Compend of Lectures on the Aims and Duties of the Profession of Law Delivered Before the Law Class of the University of Pennsylvania,” in which he proposed duties that lawyers owed to the public, the court, their profession, and their clients. This series of lectures was republished in 1884 as “An Essay on Professional Ethics.” Three years later, Alabama became the first state to promulgate a written code of ethics governing the conduct of attorneys, and the conventional wisdom is that this first “Code of Ethics” was based on the prior work of Hoffman and Sharswood, particularly Sharswood’s essay. Over the next ten years, ten more states adopted written codes of ethics evidently based on the Alabama model. California, Oregon, Washington, and


Louisiana also adopted ethical codes for lawyers, but these were based on the oath required of advocates practicing in the Swiss Canton of Geneva.7

At each annual ABA convention in Saratoga Springs, one of the primary duties of the president of the organization was to report to the membership on significant changes in the governing law of each state and of the federal government. For example, in his 1903 address, President Francis Rawle spent substantial time discussing “Statutes Affecting the Legal Profession.” In that year, most of these statutes dealt with the creation of Boards of Law Examiners and the requirement of examination of applicants to the bar in connection both with their competence and their “moral character.” By 1905, the ABA continued this trend of professionalizing the bar by passing a resolution in favor of creating a model set of ethical rules for American lawyers. Pursuant to that resolution, thirty-two ABA Canons of Professional Ethics were ultimately adopted in 1908. However, by this time, thirty-one states had already adopted or were considering codes of ethics of their own. Thus, while the ABA Canons are sometimes seen as a watershed in the history of legal ethics, it must not be overlooked that this code was as much an effect as a cause.8 Some commentators add another factor as a possible contributor to the promulgation of the 1908 Canons. As one of these historians put it—

[t]he stimulus for the ABA’s Canons came not so much from a desire to control lawyer conduct as from a speech critical of the profession given at Harvard in 1905 by the country’s number one populist, President Theodore Roosevelt. Henry St. George Tucker, a wealthy Virginia lawyer, was then president of the ABA. Tucker was a political opponent of Roosevelt, and took personally the President’s criticism of corporate lawyers who made their living advising clients on ways to evade regulatory control. Tucker formed a committee to draft rules of conduct, but perhaps not surprisingly, the resulting Canons reflected more closely the concerns of wealthy “gentleman” practitioners than they did the views of the President.

Of the original 32 Canons, some clearly set a moral tone while others provided more specific regulatory principles.9

7. George Sharswood, A Compend of Lectures on the Aims and Duties of the Profession of Law Delivered Before the Law Class of the University of Pennsylvania (Philadelphia, T. & J. W. Johnson 1854); George Sharswood, An Essay on Professional Ethics, (Philadelphia, T. & J. W. Johnson 1884); Joy, supra; Zitrin & Langford, supra; Henry S. Drinker, Legal Ethics 23 (Columbia University Press 1953). According to Drinker, the ten states basing their original codes of ethics on the Alabama Code of Ethics were Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia, West Virginia, and Wisconsin.

8. Francis Rawle, Address of the President (American Bar Association, 1903); Joy, supra; Zitrin & Langford, supra.

The dichotomy between aspirational ethical canons on the one hand and “specific regulatory principles” on the other was exacerbated by attempts to amend and modify the canons over the ensuing decades. By the 1960s, the ABA Canons had expanded from thirty-two to forty-seven. In 1964, ABA President Lewis Powell, who would later serve on the United States Supreme Court, appointed a committee, known as the Wright Committee after its chairman, Ed Wright of Little Rock, Arkansas, to clarify and restate the ABA’s ethical standards. The result was passage of a new set of ethical standards, the ABA Code of Professional Responsibility, in 1969. The committee’s original reporter and principal draftsman was John F. Sutton, Jr., of The University of Texas School of Law, who was hired through the assistance of the ABA Foundation. He, in turn, hired Sarah Weddington as assistant reporter.10

In drafting the Code, Sutton had three primary things in mind. First and most important, he wanted to reformulate and distinguish between the aspirational moral concerns that he came to characterize as “ethical considerations” and enforceable regulatory standards that he came to denominate “disciplinary rules.” This was because frequent amendment and diverse state interpretation had caused the Canons to become a confusing, poorly drafted, and redrafted hodgepodge of the two concepts. Second, he wanted to word the mandatory, enforceable, disciplinary standards with sufficient specificity and clarity as to give fair notice and clear guidance to attorneys of what conduct would be forbidden, thus protecting unpopular, controversial, or merely unfortunate lawyers from arbitrary or discriminatory enforcement of overly vague rules. Third, there was a concern that the new Code avoid measures so draconian as to be unlikely of regular enforcement. It made little sense to draft a disciplinary standard that went so far beyond the ethical consensus of the profession that grievance committees and courts would be unwilling or unlikely to uniformly enforce it.11

Texas’s development of a code of legal ethics mirrored national trends. Texas was one of the states whose first ethical code was simple adoption by its Texas Bar Association of the 1908 ABA Canons of Professional Ethics the year after their promulgation. When the Texas legislature superseded the voluntary Texas Bar Association by adopting the State Bar Act creating the mandatory State Bar of Texas in 1939, the Texas Supreme Court was given supervisory authority over the entire profession. The court soon adopted a new set of Texas Canons of Ethics recommended by an advisory committee it had appointed. While these rules closely followed the original ABA Canons, significant departures from the Canons were required to protect local traditions, in particular that of broadly permitting lawyers to represent clients on a contingent fee basis.12

10. Zitrin & Langford, supra; Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility 4-5 (Thomson West 2007); Oral History of John F. Sutton, Jr., Tarlton Law Library Oral History Series (William J. Chriss, ed., University of Texas Jamail Center for Legal Research 2007). In addition to these published sources, this portion of the chapter relies on the personal knowledge and recollection of Dean Sutton.


Once the new Code of Professional Conduct was promulgated by the ABA in 1969, its disciplinary rules were adopted by the Texas Supreme Court in 1971, albeit with some important modifications. Ethical considerations (ECs) similar to the relevant ABA ECs were adopted the following year.13

While Sutton and the ABA Committee on Professionalism were able to promulgate separate ethical considerations and disciplinary rules within the ABA code, and while Texas followed suit, some state courts tried to enforce the ethical considerations as if they were disciplinary standards, the breach of which might result in lawyer discipline. Meanwhile, many lawyers expressed dissatisfaction with the Code’s division between “ethical considerations” and “disciplinary rules.” They argued for a simplified “restatement format” with disciplinary rules followed only by interpretive commentary. This confused situation, in part, resulted in the American Bar Association appointing a new committee known as the Kutak Commission. Another set of concerns prominent in the Commission’s formation was the post-Watergate view held by some in and out of the profession that lawyers’ duties of zealous and adversarial client representation should yield to a heightened responsibility to the justice system and the public at large. The Kutak Commission, which began work in 1977, submitted a somewhat controversial set of proposed new model rules in 1981, which eventually led, after some amendments by the ABA House of Delegates, to new ABA Model Rules of Professional Conduct adopted on August 2, 1983. These replaced the 1969 ABA Code of Professional Conduct. 14

After the Kutak Commission’s report and the adoption of new model rules by the ABA, the State Bar of Texas began considering whether to make corresponding changes in the Texas disciplinary rules. After several years of work and study, a new set of Texas rules, the one currently still in effect, was promulgated by the Texas Supreme Court. On January 1, 1990, these new Texas Disciplinary Rules of Professional Conduct (TDRPC), approved by a vote of the membership of the State Bar, went into effect. The most significant structural change between the new TDRPC and the 1971 Texas Code of Professional Responsibility was the elimination of the ECs in favor of a narrative commentary on each rule designed to help the practitioner interpret them.

Moreover, Texas’s long tradition of liberal representation of aggrieved ordinary citizens in tort cases continued to require that some specific rules be modified from the ABA model. For example, ABA model rule 1.5(a) sanctioning “unreasonable” fees was changed in Texas rule 1.04 to a prohibition on “unconscionable” fees, and Texas rule 1.04(f) continued the Texas tradition of allowing fees to be paid to referring or forwarding lawyers who did little or no work on a case, although ABA model rule 1.5(e) prohibited such payments.

While the basic rubric of ethical rules in Texas has remained unchanged since the adoption of the TDRPC in 1990, there have been significant changes to individual rules since that time. These changes have tended to bring Texas practice closer in line with the ABA Model Rules. For example, as recently as 2004–05, the Texas rules were amended to significantly limit referral fees and


to change provisions dealing with lawyer advertising. As was pointed out at the beginning of this chapter, this process of amendment continues, driven in large part by a desire to account for changes in the ABA’s model ethical standards. As the profession and the world in which it practices change, disciplinary standards follow suit.

II. The Preamble to the Texas Rules

Echoing Professor Sharswood’s 1854 essay, the preamble to the Texas Disciplinary Rules of Professional Conduct reiterates the tripartite aspect of lawyering. A lawyer not only represents clients but also has duties to the judicial branch of government as an “officer of the legal system,” and, furthermore, a lawyer is considered by the rules to be a special kind of citizen, “a public citizen having special responsibility for the quality of justice.” The preamble refers to lawyers as “guardians of the law.” The first part of the preamble, which is entitled “A Lawyer’s Responsibilities,” goes on to attempt to balance a lawyer’s responsibility to “zealously pursue clients’ interests” against the proviso that he use the law’s procedures “only for legitimate purposes and not to harass or intimidate others.”

In addition, as a specially defined public citizen, a lawyer “should” undertake a number of philanthropic and eleemosynary endeavors, including seeking improvement in the law and the administration of justice, cultivating knowledge of the law beyond its use for clients, and devoting “professional time and civic influence” in behalf of the poor and “sometimes persons who are not poor” who cannot afford or obtain adequate legal assistance.

While identifying and reinforcing these public and private roles to which lawyers should aspire, the preamble also acknowledges that the apparent conflict between these varied responsibilities is the ground from which “[v]irtually all difficult ethical problems arise.” The rules themselves claim to “prescribe terms for resolving such tensions. . . by stating minimum standards of conduct.” Lawyers, in applying the rules, are directed for interpretative guidance to the official comments published underneath each rule. Yet, paragraph 9 of the preamble provides that “[e]ach lawyer’s own conscience is the touchstone against which to test the extent to which his actions may rise above the [minimum] disciplinary standards prescribed by these rules.” Thus, while the preamble makes clear that these disciplinary rules constitute minimum standards the violation of which will result in sanction, it also proceeds from the assumption that the loss of respect and confidence of members of the profession and of society at large is “the ultimate sanction.” This por-

15. See Orders of the Supreme Court of Texas with respect to changes in the Texas Disciplinary Rules of Professional Conduct found in 67 Texas Bar Journal 838 (November 2004); 67 Texas Bar Journal 632 (September 2004); and 68 Texas Bar Journal 398 (May 2005).


17. TDRPC preamble para. 5.
Commentary on the TDRPC

The Preamble to the Texas Rules

tion of the preamble seems to conclude that such peer pressure is the engine that drives the law to be “a noble profession. This is its greatness and its strength . . . .” 18

The second part of the preamble concerns its scope. This section acknowledges that the disciplinary rules are not the only mandatory standards of conduct governing the actions of attorneys. Others include court rules and relevant statutes. By the same token, the rules do not purport to “exhaust the moral and ethical considerations that should guide a lawyer, for no worthwhile human activity can be completely defined by legal rules.” Although the rules cannot be a complete moral guide, and although there are other rules that lawyers must follow, paragraph 10 of the preamble makes clear that it is the TDRPC alone that “define proper conduct for purposes of professional discipline”; that is, it is only for violation of these rules that a lawyer may be disciplined in connection with his license and privilege to practice law. 19

Most of the duties arising under the rules attach only after the client has requested a lawyer to render legal services and the lawyer has agreed to do so. 20 One notable exception is the obligation of confidentiality, which may attach before the client-lawyer relationship is established. Paragraph 15 of the preamble attempts to disclaim any role for the TDRPC in determining standards of civil liability for lawyer malpractice. Although reported cases have affirmed that “a violation of State Bar rules does not create a private cause of action,” violations of the rules are nonetheless often evidentiary in determining whether an attorney violated the appropriate standard of reasonable care in such a suit. 21 And in determining whether disqualification is appropriate, courts look to

18. TDRPC preamble paras. 7, 9.

19. TDRPC preamble paras. 10, 11.

20. Note that we speak here of duties under the rules, not pursuant to common law. Throughout this chapter it is important to bear in mind the difference between lawyer discipline under the rules (i.e., the grievance system) and the possibility of damages liability to a client for legal malpractice under common law. For example, while the rules insulate a lawyer from discipline by limiting his duties to prospective clients, this may not be dispositive as to common law tort duties the same lawyer may owe a prospective client pursuant to court decisions in the relevant jurisdiction. See the discussion above and the accompanying footnote 21. In recognition of the conceptual difficulty here, the task forces currently working on amending the TDRPC are considering a new rule 1.16 titled “Duties to Prospective Clients.”

The Preamble to the Texas Rules

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the TDRPC “as guidelines that articulate considerations relevant to the merits of a motion to disqualify.”

The final portion of the preamble is a definition of seventeen different terms, from “adjudicatory official” to “tribunal.” Understanding these terms is crucial in applying the rules. For example, an adjudicatory official is defined as a person who serves on a tribunal. Tribunals, on the other hand, are defined quite broadly in the preamble. They include “any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy” (emphasis added), including not only courts, judges, magistrates, and agencies, but also “special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter.” Thus, the rules concerning adjudicatory officials and tribunals include such informal dispute resolution settings as mediation, supervised discovery conferences outside the courtroom, and the like.

III. The Client-Lawyer Relationship

A. Summary

Chapter 1 of the Disciplinary Rules is the longest chapter, and it contains the greatest number of rules. Under the general heading “Client-Lawyer Relationship” are the vast majority of the disciplinary rules applying to the lawyer’s duties to his clients. These include the duty of confidentiality, ethical requirements concerning fees, the level of care required in the representation of the client, communications with the client, conflicts of interest, and other similar matters.

B. Rule 1.01

This first rule of the Texas Disciplinary Rules of Professional Conduct sets forth the basic requirement of competent and diligent representation undergirding the remainder of the lawyer’s relations with the client. Subsection (a) of rule 1.01 prohibits a lawyer from working on a legal matter that the lawyer “knows or should know is beyond the lawyer’s competence.” There are only two exceptions to this general rule. The first is if the lawyer consults with the client about associating another lawyer who is competent in the matter and then does so. The second is the so-called “emergency exception” involving situations in which the client is in dire need of immediate assistance, and the lawyer undertakes to give only such limited help or advice as might be necessary under these emergency circumstances. Without the first exception, no new lawyer could ever work on or accept a first case. Without the second, the most desperate of clients might be unable to secure legal assistance at all.


23. TDRPC terminology.
Commentary on the TDRPC

The comment to the rule makes clear that a lawyer need not have special training or prior experience in order to be deemed competent to handle a particular type of problem, although the extent to which this generalization remains true diminishes with the increasing significance or complexity of the matter. A major lawsuit, a very serious accusation of crime, or an extremely complex transaction is more likely to demand greater prior knowledge or experience for a lawyer to be deemed competent to handle them. Thus, the comment to the rule builds in an inherent tension between the desire to maintain the status of the “general practitioner” and the need for narrowly focused specialists. Indeed, the comments explicitly recognize that lawyers almost always become more competent as a result of handling matters. This is because legal representation frequently requires additional study and investigation, regardless of the prior competence or experience of the handling attorney. However, if the lawyer’s additional study and preparation would cause unusual delay or expense, the lawyer should not proceed without informing the client of these circumstances and obtaining the client’s consent. If a lawyer accepts employment and later determines that he lacks the appropriate competence to handle the matter, that lawyer should withdraw.24

Subsections (b) and (c) of rule 1.01 go beyond competence and speak to the level of diligence required of an attorney, once a representation has been properly undertaken. Under subsection (b), a lawyer may not consciously neglect or disregard her professional responsibilities arising from a matter entrusted to her care. In addition, even in the absence of conscious neglect or disregard, a lawyer may be disciplined for “frequently failing to carry out completely” such professional obligations. This subsection of the rule prohibits any conscious neglect or inattentiveness to duty, as well as neglect or inattentiveness that does not rise to the level of willful conduct, but that occurs repeatedly over time. Even in the absence of willful conduct, that is, conduct amounting to common-law gross negligence, if there is a pattern of neglect discipline can and should be applied. Stated conversely, as the comment to the rule provides, a lawyer who acts in good faith is not subject to discipline under these provisions “for an isolated inadvertent or unskilled act or omission, tactical error, or error of judgment.”25

C. Rule 1.02: Scope and Objectives of Representation

This rule deals both with the proper division of authority and responsibility for a matter between the client and lawyer, and some of the major limitations upon what a client can ask a lawyer to do as part of the representation. Subsection (a) of the rule sets forth the general principle that lawyers must abide by their client’s decisions as to the purposes and general methods of the undertaking, including settlements, plea bargains, waivers of trial, and whether the client will testify. The remaining subsections of the rule set forth exceptions to the general rule.

These exceptions to the rule that a lawyer must follow the client’s instructions include subsection (b) regarding limitations imposed by the lawyer by agreement with the client after consultation, subsections (c) and (e) that state a lawyer may not participate in criminal or fraudulent conduct, subsection (d) that states a lawyer must not abide by client direction likely to result in substantial injury to the finances or property of another, subsection (f) that holds a lawyer may not act against

24. See TDRPC 1.01 cmt. 5.
25. See TDRPC 1.01 cmt. 7.
The Client-Lawyer Relationship

Commentary on the TDRPC

the disciplinary rules or other law, and subsection (g) that holds a lawyer need not follow direction from a client lacking mental or legal competence. Each of these exceptions requires a slightly different corrective action by the attorney. For example, when a lawyer believes the client to be incompetent, he must take reasonable action to secure appointment of a legal representative for the client or take other action appropriate in the circumstances. When a client expects representation that is improper under relevant law or otherwise, the lawyer must counsel with the client and attempt to dissuade the client from committing a criminal or fraudulent act. If the act has already been committed and the lawyer’s services have been used in committing it, the lawyer must make a reasonable effort to persuade the client to take corrective action.

In general, a lawyer always has the duty to dissuade a client from participating in, or directing the lawyer to participate in, criminal, fraudulent, or otherwise legally improper acts. However, a lawyer “may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good-faith effort to determine the validity, scope, meaning or application of the law.”26

The comment to the rule makes clear that the lawyer and client share authority and responsibility. While the client has the ultimate authority with respect to the major objectives of the relationship, the lawyer has responsibility for the means by which the client’s goals are achieved. These means include technical and legal tactics, except to the extent such matters result in unanticipated expense or other hardship to the client.

Because the rule concerning offers of settlement is qualified by the language “except as otherwise authorized by law,” the comment expands upon those exceptions. For example, lawyers representing plaintiffs in class-actions or defending persons protected by liability insurance policies may have different responsibilities or levels of authority with respect to recommending or entering into a settlement agreement. In some situations, a client may have contractually relinquished to a third party (such as an insurance company) the right to determine settlement of a case. A lawyer with knowledge of such matters who reasonably relies on them is not subject to discipline under the rule.

Different issues arise in connection with attempts to contractually limit the scope of an attorney’s representation, and these are dealt with in the comment as well. Specific reference is made to other rules of professional conduct, such as rule 1.01, and rule 1.15, which provides for circumstances under which a lawyer may decline employment or withdraw if the client insists upon a course of conduct that the lawyer considers repugnant or imprudent. Rule 1.02 reiterates this principle with respect to a lawyer imposing limitations on the representation at the beginning of the

26. TDRPC 1.02(c). An example of this distinction can be found in Tex. Comm. on Prof’l Ethics, Op. 514 (1996) that advised that lawyers should not surreptitiously record even those telephone conversations to which they were parties, but that since this was an ethical but not a legal rule, a lawyer may ethically advise a client to do what the attorney may not do, but “may not circumvent his or her ethical obligations by requesting that the client secretly record conversations . . . .” That opinion was overruled by Tex. Comm. on Prof’l Ethics Op. 575 (2006), advising that “in view of the fact that persons in Texas are generally not prohibited from making undisclosed recordings of their telephone conversations and that many businesses routinely record . . . with or without notice, the Committee does not believe that” it is unethical for lawyers to tape record conversations to which they are parties.
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relationship or during it, as long as the client consents after consultation. However, a lawyer is generally prohibited from getting the client to surrender the right to terminate the lawyer’s services or to “settle or continue litigation that the lawyer might wish to handle differently.”

Importantly, section 6 of the comment provides that a lawyer’s representation limited to a specific matter is terminated “when the matter has been resolved.” On the other hand, if a lawyer has represented a client over a substantial period of time in a variety of matters, it may be necessary for a lawyer to notify the client of the termination of the attorney-client relationship. The comment resolves any doubt about whether the relationship still exists in such a situation by placing the burden on the lawyer to clarify “preferably in writing” the existence or termination of the relationship “so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so.”

D. Rule 1.03: Communication

Together, client neglect under rule 1.02 and violations of this rule concerning required communication with the client produce the great majority of grievances against lawyers. Yet both rules are relatively simple. In fact, this rule is composed of only two sentences. They require that the lawyer keep the client “reasonably informed” and “promptly comply with reasonable requests for information.” Subsection (b) amplifies the general requirement by making clear that it is a lawyer’s duty to educate the client as necessary to allow the client to make informed decisions. The comment contains examples in specific scenarios. One includes providing the client with sufficient factual information to allow the client to make informed settlement decisions or plea-bargain decisions. In addition, when conducting negotiations on behalf of the client, unless there is not sufficient time to do so, a lawyer should review all of an agreement’s “important provisions” with the client before making such an agreement in his or her behalf. While the client sets the goals and the lawyer executes and determines the means, the comment to this rule further provides that the lawyer “ordinarily should consult the client on tactics that might injure or coerce others.”

E. Rule 1.04: Attorney’s Fees

Like the ABA Code and Model Rules, the Texas rules devote a lengthy entire article solely to the subject of attorney’s fees. While the original ABA 1908 Canons prohibited a lawyer obtaining or retaining a financial interest in litigation, a 1933 amendment ultimately authorized the charging of a contingent fee. Contingent fees are authorized by Texas rule 1.04, although they are required to be in writing, and the rule provides specific procedures that must be followed by attorneys representing clients in contingent fee matters.

Rule 1.04 was amended effective March 1, 2005, to radically limit the liberal Texas tradition concerning the payment of forwarding fees to referring lawyers who do not participate in the handling of a matter. The changes were a result of the work of three “referral fee task forces,” one

27. TDRPC 1.02 cmts. 4, 5.
28. TDRPC 1.02 cmt. 6.
29. TDRPC 1.03 cmts. 1, 2.
appointed by the Supreme Court of Texas “on civil litigation improvements” in August 2001, another appointed by the Texas Supreme Court in August 2003 to compare the Texas rules with the ABA Model Rules, and a third appointed by the State Bar of Texas.

Issue was joined when the first task force produced a new proposed rule 8(a) for the Texas Rules of the Civil Procedure. On October 9, 2003, the Supreme Court of Texas issued an order adopting amendments to the Texas Rules of Civil Procedure (TRCP), effective January 1, 2004, including the new rule 8a and changes to rule 42 governing class actions. Justices O’Neill and Schneider dissented from the October 2003 order announcing promulgation of TRCP 8(a) on the grounds that it was not related to the rules governing offers of settlement and class actions (the subject of amendments to rule 42 of the TRCP adopted on the same date), and arguing that since the proposed changes really dealt with professional conduct of attorneys, they should be amended “by professional conduct rules or by statute, and not as a matter of civil procedure . . . I encourage members of the bar and the public to offer comments on the procedure by which the Court has adopted this rule, as well as on the rule’s substance.”

TRCP 8 is a simple rule requiring clarity with respect to who the “attorney in charge” is for a party engaged in litigation. The proposed rule 8a was designed to engraft on this general rule specific rules with respect to referring attorneys, and, in order to keep within the spirit of the original rule 8, a substantial portion of the rule dealt with disclosing to the court the identity and compensation of referring lawyers who might not appear on the pleadings in the case. The State Bar of Texas asked the court to postpone the effective date of this new rule of civil procedure until it had an opportunity to appoint a special task force and conduct public hearings. The Texas Supreme Court deferred to the State Bar stating: “If this process satisfactorily addresses the issues that have been raised, proposed Rule 8a will be withdrawn.”

The State Bar then established its own referral fee task force which conducted six public hearings and solicited written comments. According to the State Bar task force, at the time Texas was the only jurisdiction that expressly allowed the payment of forwarding fees, and the weight of authority from other jurisdictions expressly prohibited it. In the spring of 2004, the State Bar task force proposed eliminating the “pure forwarding fee” and otherwise amending rule 1.04. The State Bar Board of Directors approved these recommendations (as well as proposed amendments to article 7 of the TDRPC concerning advertising), endorsed them over to the Supreme Court of Texas, and

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30. The Supreme Court Task Force on Civil Litigation Improvements was created by Supreme Court Miscellaneous Docket No. 01-9149 (August 24, 2001).


32. Id.

33. Id., at 4 (O’Neill, joined by Schneider, dissenting).

34. 67 Texas Bar Journal 838 (November 2004); Order Creating the Supreme Court Task Force on Civil Litigation Improvements, Supreme Court Miscellaneous Docket No. 01-9149 (August 24, 2001); Order Adopting Amendments to the Texas Rules of Civil Procedure, Supreme Court Miscellaneous Docket No. 03-9160 (October 9, 2003); Order Suspending Proposed Rule 8a of the Texas Rules of Civil Procedure, Supreme Court Miscellaneous Docket No. 03-9207 (December 23, 2003) (per curium).
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the court held a referendum of Texas lawyers on the new rules, which passed in late 2004. The changes to rule 1.04 went into effect on March 1, 2005.

The State Bar Referral Fee Task Force recommendations, endorsed by the Texas Supreme Court and approved by Texas lawyers in referendum, enacted substantial limitations on the payment of referral fees in Texas. Prior to these changes, rule 1.04 provided three circumstances under which a referral fee could be paid. The first contemplated a division in proportion to the professional services performed by each lawyer, the second allowed payment of fees to “forwarding lawyers” without further comment, and the third allowed any fee splitting that was authorized by written agreement with the client, if all lawyers assumed joint responsibility for the representation. Under any of the three referral fee scenarios contemplated by the prior rule, the client had to be advised of the fee split and not object to it. However, there was no requirement that either disclosure or consent be in writing.35

The new rule eliminated payment of the traditional forwarding fee. It retained the two other circumstances in which a referral fee could be paid and added that with respect to either, the client must “consent in writing to the terms of the arrangement prior to the time of the association or referral proposed.” That written consent must include the identity of all lawyers or law firms involved, the basis on which the fee will be divided, and the share of the fee that each lawyer or law firm will receive, or, “if the division is based on the proportion of services performed, the basis on which the division will be made.”36

The new rule also retained the exception long contained in other rules with respect to payments to former partners, associates, or retirees. Such separation or retirement agreements are not limited by the fee-splitting rule, rule 1.04. A similar exception exists in rule 5.04, where the sharing of attorney fees or fee interests is permitted with surviving spouses or heirs in the case of a lawyer’s death.37

A division of fees among lawyers from different firms, even if otherwise proper, is still subject to the general rule that the aggregate fee charged to a client for a particular matter may not be “illegal or unconscionable.”38 A fee is unconscionable only if “a competent lawyer could not form a reasonable belief that the fee is reasonable.” This standard is substantially more lenient toward attorneys than the standard employed by the ABA Model Code which subjects a lawyer to discipline for charging any “unreasonable fee.”39

35. TDRPC 1.04(f) (2003).
36. TDRPC 1.04(f) (2005).
37. See TDRPC 5.04(a).
38. TDRPC 1.04(a), (f)(3).
Both the ABA Model Code and the Texas Rules set forth the same eight factors to be utilized in evaluating the propriety of a fee, even though the standard (reasonableness versus unconscionability) to which these factors relate is substantially different. There is one exception. The eighth factor deals with whether the fee is fixed or contingent, and while the ABA rule leaves the matter at that, the Texas rule continues to further define contingent as “contingent on results obtained or uncertainty of collection,” as measured by the situation “before the legal services have been rendered.” One important fact often overlooked is that the eight factors listed in rule 1.04 are not exclusive, as evidenced by the use of the language “not to the exclusion of other relevant factors.” There may well be, and often are, other permissible considerations in setting or evaluating an appropriate fee.40

Texas has a provision, similar to one in the ABA Model Rules, that requires lawyers to advise clients of the rate or basis of the fee, “preferably in writing,” and that such disclosure be made prior to commencing work on the matter, or within a reasonable time afterwards. The ABA Model Rule adds that “any changes in the basis or rate of the fee or expenses shall also be communicated to the client.”41 Subsection (d) of rule 1.04 provides specific procedures that must be followed by a contingent fee attorney first with respect to execution of a fee agreement, and second with respect to providing the client a written statement at the conclusion of the representation. This subsection is substantially the same as the ABA Model Rule on the subject.42

In order to be enforceable, a contingent fee agreement must be in writing and must specify the exact method by which the fee will be determined. A separate provision of the Texas Government Code requires that a contingent fee contract be signed by both “the attorney and client.” The same section of the Government Code provides that a contingent fee contract is voidable at the client’s option if it is procured by conduct violating the Texas law or disciplinary rules regarding barratry.43 Subsection (b) of rule 1.04 provides that in addition to a written contract, a contingent fee attorney must provide the client with a written statement “describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.”44

The time-honored tradition of barring contingent fees in criminal cases is maintained in rule 1.04(e), and is reflected in the parallel provision of the ABA Model Rules. However, the model rules add a prohibition on such fees in domestic relations cases.45 The Texas Rules, while rejecting such an absolute prohibition, do contain a comment discouraging the use of contingent fees in domestic relations matters for the reason that they “may tend to promote divorce and may be inconsistent with a lawyer’s obligation to encourage reconciliation . . . [and] also may tend to create a conflict of interest between lawyer and client regarding the appraisal of assets obtained for

40. Model Rules of Prof’l Conduct R. 1.05(a)(1)–(8); TDRPC 1.04(b)(1)–(8).
41. Model Rules of Prof’l Conduct R. 1.05(b); TDRPC 1.04(c).
42. Model Rules of Prof’l Conduct R. 1.05(c); TDRPC 1.04(d).
43. Tex. Gov’t Code § 82.065.
44. TDRPC 1.04(d).
45. Model Rules of Prof’l Conduct R. 1.05(d); TDRPC 1.04(e).
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the client.” As a result, while no per se prohibition exists, the comment to rule 1.04 warns that “contingent fee arrangements in domestic relations cases are rarely justified.”

F. Rule 1.05: Confidentiality of Information

The obligation under the Texas Rules to say nothing with respect to any of the affairs of the client is much broader than many lawyers suppose. Rule 1.05 does not limit a lawyer’s duty of confidentiality to matters that are privileged by law or even to those matters the client wants kept secret. Rather, under this rule, except under certain limited circumstances, a lawyer must refrain from revealing any information “relating to a client or furnished by the client . . . acquired by the lawyer during the course of or by reason of the representation . . . .” The current ABA Model Rules have similarly broad provisions. The 1969 ABA Code of Professional Responsibility was more precise in limiting a lawyer’s obligations in this regard. ABA Disciplinary Rule 4-101 and Ethical Canon 4-1 made a distinction between confidences and secrets, a distinction no longer found in the ABA Model Rules or the Texas rules. Formerly, a “confidence” comprised information protected by the evidentiary attorney-client privilege, whereas a “secret” was unprivileged information that might embarrass or harm the client, or that the client had actually or impliedly requested to be kept confidential. The 1969 ABA Model Code only enjoined lawyers from revealing “confidences” or “secrets.” Beginning with the Kutak Commission of the 1970s, the impetus was to broaden the lawyer’s duty of nondisclosure. This momentum was continued in the promulgation of the Texas Disciplinary Rules of Professional Conduct.

Under rule 1.05, there is no category of information relating to a client, known to the lawyer “by reason of the representation” that a lawyer may generally disclose. Thus, the commonly held belief that lawyers may discuss client information if it is “already a matter of public record,” or “not privileged” or “already well-known” are incorrect. Rather, regardless of subject matter, information “relating to” the client and obtained as a result of the representation may never be discussed with anyone or otherwise revealed (except to employees of the lawyer’s own firm or the client’s own designated representatives) unless such disclosure is permitted by one of the specific exceptions within rule 1.05(c)–(f).

These exceptions to the general rule of confidentiality fall into two categories: permissive and mandatory. A lawyer is permitted to reveal confidential information if the client expressly authorizes it or consents to it after consultation. However, if the client wishes, the lawyer may be prohibited by the client’s specific instruction to communicate information even to members of his own firm or the client’s own representatives. The other permissive exceptions all relate to either the “self-defense” of the lawyer in a dispute with the client or the “crime and fraud” exception allowing a lawyer to reveal confidences to the extent necessary in order to prevent certain categories of criminal or fraudulent acts committed or which may be committed by a client. The only other exception is if the lawyer has reason to believe disclosure is necessary in order to comply with relevant law, and this is perhaps the broadest exception because it involves the greatest exercise of discretion by the attorney.

46. TDRPC 1.04 cmt. 9.

47. See Model Rules of Prof’l Conduct R. 1.6.
Subsection (d) of the rule provides additional circumstances under which a lawyer may reveal confidential information of a client, but only if it is unprivileged under relevant evidentiary or procedural law. The exceptions here generally involve a lawyer’s reasonable belief that disclosure is impliedly authorized or necessary to carry out the representation or is in the “self-defense” of the attorney, even to the extent of merely proving a claim for attorney’s fees.

Subsections (e) and (f) of the rule require a lawyer to reveal confidential information to the extent necessary to prevent a client from committing a criminal or fraudulent act when the lawyer has knowledge “clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm . . . .” Note that this exception is only operative in cases of criminal or fraudulent acts sufficiently serious as to probably result in death or substantial bodily harm. The mandatory exceptions also include and cross-reference those circumstances when rules 3.03 or 4.01 would require disclosure in order to avoid the lawyer becoming a party to fraud on the court or a third person when perpetuated by the client.

G. Rule 1.06: Conflict of Interest, General Rule

Subsections (a), (b), and (c) of rule 1.06 lay out the general framework for evaluating conflicts of interest. Rule 1.06(a) prohibits representing opposing parties in the same litigation, while rule 1.06(b) moves into a twofold prohibition on conflicts of interest unless a specific exception within the rule authorizes such representation. The twofold rubric generally prohibits representation of a person that “involves a substantially related matter in which that person’s interests are materially and directly adverse to the interest of another client of the lawyer or the lawyer’s firm” or if the lawyer’s representation of the person would be limited by the lawyer or his firm’s responsibilities to another client, a third person, or its own interests.

The exceptions noted in rule 1.06(c) are (1) if the lawyer has a belief, objectively reasonable under the circumstances, that the representation of each client will not be “materially affected” and (2) if the lawyer has obtained informed client consent to the dual representation. Informed client consent requires “full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.” While the rule does not require it, such consent and the explanations required to underlie it would best be documented in writing.

Subsection (d) of rule 1.06 similarly prohibits representation of one former client against another former client if the clients have been jointly represented by the lawyer with respect to the same matter in the past. Again, prior consent obtained from all parties to the dispute is a possible exception to the rule of disqualification.

Subsections (e) and (f) are housekeeping rules designed to clarify the obligations set out in the previous four subparagraphs. Subsection (e) deals with a lawyer finding himself already representing multiple clients in violation of the general rule. Under those circumstances, the rule advises the lawyer to “promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation . . . .” Because the preceding sections of rule 1.06 deal with the obligations of individual lawyers, subsection (f) clarifies the extent to which such obligations extend to that lawyer’s partners, associates, or firm. The rule is that what-
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ever a lawyer may not do, his current partners, associates, or other law firm colleagues may not do. This means that if a disqualified lawyer’s current partners or associates have no personal conflict of interest or other ethical problem with the firm’s representation of the client, they are nonetheless equally disqualified “while a member or associated with that . . . firm.”

The fundamental principle underlying the rule is the necessity of instilling in the client confidence in the lawyer’s absolute loyalty.48

H. Rule 1.07: Conflict of Interest: Intermediary

This “intermediary” rule was adapted from rule 2.2 of the 1983 ABA Model Rules. However, by 2002, the ABA House of Delegates had abolished this rule. The ABA Drafting Commission recommended the deletion of rule 2.2 because it became convinced that “neither the concept of ‘intermediation’ (as distinct from either ‘representation’ or ‘mediation’) nor the relationship between Rules 2.2 and 1.7 has been well understood.” The original idea was to provide ethical guidance to lawyers who wished to accommodate clients seeking multiple client representation to save time and cost. This was particularly common in business organization and real estate situations in which lawyers were asked by all partners or joint venturers, or by the parties to a transaction, to appropriately document or bring to fruition broad understandings about which formal agreement had not yet been reached. Apparently, the ABA felt the attempt to separately treat such situations from other multiple client representations created more confusion than guidance.49

Nonetheless, TDRPC 1.07 regarding “intermediation” remains, for the time being. Like its predecessor model rule, rule 1.07 is designed to set forth the prerequisites for a lawyer acting as an intermediary between clients. After stating these requirements, the rule adds additional provisos with respect to appropriate lawyer conduct after such an intermediary relationship has been formed. Subsection (a) prohibits a lawyer acting as an intermediary unless three requirements are all met. First, the lawyer must thoroughly and fully consult with each client concerning all the implications of the common representation and must then obtain each client’s informed written consent. Second, the lawyer must have an objectively reasonable belief that the matter will not require contested litigation, that each client’s best interests are served, that each client will be able to make adequately informed decisions, and that there is little risk of material prejudice to any client. Third, the lawyer must have an objectively reasonable belief that he can act impartially with respect to all the clients and without undue consideration of other responsibilities the lawyer may have to any one of the clients. Only if all of these requirements are met may the lawyer undertake the intermediary role.

The remaining subsections of the rule require active lawyer consultation with each client in aid of informed decisions, and lawyer withdrawal on the request of any of the clients or on any of the prerequisites of intermediary representation no longer being met. Furthermore, if such withdrawal is required, a lawyer cannot continue to represent any of the clients with respect to the instant mat-

48. See TDRPC 1.06 cmt. 1.

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ter. As in rule 1.06, the general conflict rule, a lawyer’s associates, partners, and other firm members are prohibited from doing anything that this rule would prohibit the lawyer from doing.

Perhaps the most troublesome part of the rule is the lack of clarity with respect to the entire intermediation relationship, and this also contributed to the ABA Drafting Committee’s discomfort with the rule. Subsection (d) of the Texas rule provides that a lawyer is acting as an intermediary any time that “the lawyer represents two or more parties with potentially conflicting interests” (emphases added). Arguably, this rule would then apply any time a lawyer represents more than one person or entity in a matter, whether husband and wife, parent and child, officer and corporation, partner and partnership, et cetera. Thus, the rule has extremely broad scope although it was originally intended to deal only with very limited, although reportedly common, practice situations. The task forces currently reviewing changes to the rules may resolve some of this uncertainty.

I. Rule 1.08: Conflict of Interest: Prohibited Transactions

To begin at the end, subsection (j) of this rule excludes from the definition of prohibited business transactions those that would qualify as “standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.” Thus, a lawyer representing a doctor could become the doctor’s patient, or one representing a grocery store’s owner could buy produce there.

Otherwise, this rule is designed to regulate the circumstances under which a lawyer can engage in transactions with a client beyond the attorney-client relationship itself. Subsection (a) of the rule lists the three requirements that must obtain for a lawyer to be able to enter into a business transaction with a current client. The first deals with the objective character of the transaction itself and the competence of the client. This involves the lawyer ensuring that the transaction itself is “fair and reasonable to the client” and also affirmatively disclosing to the client the terms of the transaction in a way that could be reasonably understood by him. The second requirement is that the client must be given a reasonable opportunity to seek the advice of independent counsel, so that the client relies not solely on information or advice from the current attorney in connection with the transaction. Finally, the client must consent in writing to the transaction. The terms of this general portion of the rule are quite broad and would authorize virtually any contractual arrangement or transaction between a lawyer and client as long as these three requirements are met.

However, the remainder of the rule prohibits a number of specific transactions between attorney and client, even if the above three requirements were to have been met.

For example, subsection (b) prohibits a lawyer who is not related to the client from preparing any document that would accomplish “any substantial gift” to the lawyer or any of his close relatives, and subsection (c) prohibits a lawyer from seeking or making an agreement with a client to obtain literary or media rights based in substantial part on the representation, unless “all aspects of the matter giving rise to the lawyer’s employment” are concluded.

Subsection (d) relates not to separate business transactions with a client, but to the extent to which a lawyer can provide financial assistance to a client in connection with the matter the lawyer is handling. Such assistance is totally prohibited with only two exceptions (1) advancing or guaran-
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Subsection (e) deals with other types of financial arrangements in connection with a representation. This subsection prohibits a lawyer accepting payment from a third person for representation of a client unless the client consents, the lawyer’s independent professional judgment and relationship with the client are not impaired, and rule 1.05 concerning confidentiality of communications is followed.

Subsection (f) deals with representation of multiple clients and prohibits a lawyer making an aggregate settlement in such a case, civil or criminal, unless each client is told the existence and nature of all claims or pleas involved and what each client will get or contribute to the agreement. While this subsection does not require written consent from each client, it does require consent, which is best documented in writing.

Subsection (g) prohibits a lawyer from attempting to limit his liability to a client for malpractice in advance or attempting to settle a claim for malpractice with a client or former client, with two exceptions. First, with respect to a prospective agreement, the client must be represented by another attorney in making the agreement. Second, with respect to settling an existing claim, an unrepresented client can make such a settlement, but only after the current lawyer has advised the client in writing that independent representation by another attorney would be appropriate under the circumstances.

Subsection (h) prohibits a lawyer from acquiring a lien or other proprietary interest in litigation the lawyer is conducting for a client except for a contingent fee interest pursuant to an appropriate written contract or the so-called “lawyer’s lien” on a client’s file or other property to secure other fees and expenses.50

J. Rule 1.09: Conflict of Interest: Former Client

This rule begins a series of three rules dealing with conflicts arising from successive employment for different clients or in different capacities. Rule 1.09 deals with the obligations that lawyers continue to have towards former clients. Subsection (a) states the rule with respect to whether a conflict of interest will disqualify a lawyer from representation adverse to a former client. The remaining two subsections, (b) and (c), speak to the extent that one lawyer’s disqualification or conflict situation is imputable to current or former partners or associates of that lawyer.

Under subsection (a), the basic rule is that a lawyer may not engage in representation that would be adverse to a former client if the current matter bears a substantial relationship to the previous representation or if the current matter is such that it will, in reasonable probability, require the lawyer to use or reveal confidences of a prior client in violation of rule 1.05. In addition, subsection (a)(1) prohibits a lawyer from a representation that would involve questioning the validity of the lawyer’s prior work for a former client. The considerations associated with “substantially related matters” and possible violations of prior confidentiality obligations are by far the most common grounds for possible disqualification under this rule.

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Unfortunately, whether a matter is substantially related to a prior one is almost always a fact-specific inquiry. The “substantially related” test was originally crafted prior to the adoption of the ABA Code of Professional Conduct in *T. C. Theatre Corp. v. Warner Brothers Pictures, Inc.* 51 That case also made the important holding with respect to confidentiality requirements that “the court will assume that during the course of the former representation, confidences were disclosed to the attorney bearing on the subject matter of the representation.” This presumption with respect to the communication of confidences in a prior relationship has been carried forward in Texas jurisprudence and amplified by another presumption, that the attorney previously employed and in possession of the confidences will “in turn share those same confidences with other attorneys in any firm with which she practices.” 52

With respect to the definition of “substantially related,” the guidance provided by courts interpreting the ethical rules in disqualification circumstances is that “superficial resemblance between issues is not enough.” 53

The general rule of disqualification applies only to lawyers who “personally” have formerly represented a client. Thus two additional subrules are required to describe circumstances under which other lawyers might be implicated by former client relationships of members of their current or former firm. Subsection (b) provides that whenever lawyers come together in a firm, each brings the prior confidences and substantially related relationships from previous representations, and these then taint her new firm associates or members, disqualifying them to the same extent as the lawyer alone. Subsection (c) deals with the converse situation, that is, the obligation of former partners or associates when a lawyer leaves a firm.

If a lawyer disqualified under rule 1.09 leaves a firm, those who remain behind generally do not continue to experience the first lawyer’s taint or disqualification, unless their future representations adverse to the former client involve a contest over the tainted lawyer’s services or work product or unless they would probably involve a violation of the confidentiality obligation to the former client under rule 1.05. Here again, though, the practitioner must beware the Texas presumption of shared confidences among firm members. Under rule 1.09(b) and (c), representations are either prohibited or not prohibited “without regard to the lawfirm’s attempt to screen from the current representation all lawyers who could not themselves represent the current client . . . because of their prior representation of the adverse party.” The question will be not whether the remaining lawyers were “screened off” from any such confidences, but rather whether the prior and current matters are sufficiently similar as to pose a risk that confidential information from a prior client possessed by the departed lawyer might be relevant to the current or new representation. If so, it is conclusively presumed that the former associates or partners are equally tainted.


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and disqualified. Thus, in a real sense, the substantial relationship test comes back into play here.54

The practical result of these provisions is to require that (1) lawyers entering into a firm together be cognizant of the prior representations of any of them in determining the applicability of rule 1.09, and (2) lawyers be cognizant of the prior representations of any firm in which they were formerly associated.

K. Rule 1.10: Successive Government and Private Employment

This rule deals with the duties of attorneys before, during, and after engaging in government service. Government service, in this context, means acting as a public officer or employee of a government agency or branch of government. The stated primary purpose of the rule is to prevent “a lawyer from exploiting public office for the advantage of a private client.”55 Under subsection (f) of the rule, other than a lawyer’s confidentiality obligations, the requirements of the rule relate only to a lawyer’s participation in a particular adjudicatory proceeding, controversy, or other “matter,” as opposed to general rule-making by a government agency or legislature. However, this subsection specifies that any action or transaction, whether or not constituting a “matter,” may also disqualify an attorney if the relevant governmental agency maintains conflict of interest rules concerning it.

The basic structure of the rule is threefold: (1) there are rules with respect to representing clients or acting in behalf of a government agency in a manner inconsistent with prior activity on the same “matter” for another client or agency, (2) there are requirements with respect to maintaining the confidentiality of information obtained during prior employment, regardless of whether any “matter” is involved, and (3) independently of these considerations, conflict of interest rules promulgated by a governmental agency with which the attorney has been employed must be respected.

The term matter has been defined as “a discrete and isolatable transaction or set of transactions between identifiable parties.” Relevant factors include whether or not the two scenarios being compared involve the same parties and partake of the same facts.56 Unlike the “former client” conflict of interest rule (rule 1.08), the test here is whether it is the same matter, not whether the matter is merely substantially related. Rule 1.10 prohibits a lawyer from representing a client in the same matter in which the lawyer participated substantially in behalf of a government agency. Conversely, a lawyer who represented a client in a matter, may not participate at all in that same matter as a governmental employee, unless it is an emergency situation such that no other governmental agent is “authorized to act in the lawyer’s stead in the matter.” In a situation in which the lawyer goes from being a government officer to being a private attorney, representation of a subsequent client is permitted under subsection (a) if “the appropriate government agency consents after consultation.” There is no converse provision, however, that would allow a former private client to consent to an attorney acting subsequently in the same matter as a government officer.

55. See TDRC 1.10 cmt. 1.
Rule 1.10 has its own imputation provisions. These are found in subsections (b) and (d). They provide that all lawyers associated in a firm with a disqualified lawyer, whether that disqualification is a result of representation in “the same matter” or possession of confidential information, may not knowingly accept or continue representation unless the disqualified lawyer is “screened from any participation in the matter and is apportioned no part of the fee therefrom.” If the disqualification is a result of subsequent representation in the same matter, the law firm must fulfill the additional requirement of giving written notice with reasonable promptness to the prior governmental agency. There is no equivalent imputation of disqualification from government service of a lawyer who is “associated with” a disqualified lawyer who formerly represented a private client and now is working for the same governmental agency.

L. Rule 1.11: Adjudicatory Official or Law Clerk

Similar to rule 1.10, rule 1.11 seeks to prevent corruption or misconduct related to the fact that many judges and other adjudicatory officials must attain their positions after first engaging in private practice, and that many also return to private practice on retirement from such judicial service. Thus, absent consent by all persons involved (including opposing parties), the rule simply prohibits representation of a person by any lawyer who has previously participated “personally and substantially” as an adjudicatory official “in connection with” that matter. The “personally and substantially” language is used in order to exclude from the rules’ requirements those judicial officials who only exercised remote or incidental administrative responsibility but never passed in any way on the merits of the case.57

Adjudicatory officials include “any . . . person engaged in a process of resolving a particular dispute or controversy” (emphasis added), including not only courts, judges, magistrates, and agencies, but also “special masters, referees, arbitrators, mediators . . . and comparable persons empowered to resolve or to recommend a resolution of a particular matter.”58 Under this rule, the same prohibitions apply to law clerks.

The imputation provisions of this rule differ slightly from rule 1.10. Here they require disqualification of the former adjudicatory official’s firm colleagues, unless the same “screening process is successfully undertaken,” but here written notice to opposing parties is always required.

The remainder of the rule deals with the problem of how adjudicatory officials who contemplate retirement, resignation, or other departure from office can obtain subsequent employment. Other than law clerks, who may do so on advising their judicial employer, all adjudicatory officials are prohibited from soliciting or “negotiating for” employment with any attorney or party in a pending matter in which the official is participating “personally and substantially.”

M. Rule 1.12: Organization as a Client

The legal fiction of corporate personhood creates special problems for lawyers who are retained in connection with the corporation’s business. Unlike natural persons, corporate persons can only be said to have a will, an understanding, or an agreement as a function of the aggregate scienters

57. See TDRPC 1.11 cmt. 1.

58. TDRPC terminology.
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of their shareholders as effectuated by their representatives, the corporate board of directors. The board of directors, in turn, further delegates and attenuates the identity of the corporate persona by delegating substantial authority over corporate affairs to paid executive officers and staff. Unlike the representation of a single natural person, the representation of a corporate person often involves divining the client’s desires and interests from a number of sometimes inconsistent human voices. How is a lawyer to proceed?

This rule begins by making clear that a corporate lawyer’s client is the corporation itself, as distinguished from the humans who claim to speak for it. Since the rule is not limited to corporations but extends to all forms of organizational clientele, such as partnerships and associations, the rule is the same with respect to those methods of organization. The question that next arises is what a lawyer’s duty to his organizational client requires when it begins to appear that its interests are different from those of the officers, directors, partners, or agents with whom he has contact. Rule 1.12(b) leaves matters to the lawyer’s discretion until a certain threshold of dysfunction occurs. That threshold is reached once the lawyer actually knows that someone associated with the organization has committed or intends to commit an improper act that will likely result in substantial injury to the organization and that is related somehow to the subject of the lawyer’s representation. Note that this rule is limited to acts damaging to the client and is silent with respect to acts likely to damage others. Improper conduct is any conduct that would breach a duty owed to the client or that would be illegal under circumstances in which the conduct might be imputed to the organization.

Subsections (a), (b), and (c) when read together provide that, when this threshold is met, the lawyer must take “reasonable remedial actions.” This rather amorphous prescription is further elucidated by some guiding principles. First, the best interest of the client is paramount. Second, a lawyer must only “proceed as reasonably necessary” while avoiding disrupting the organization or revealing client information to others. Third, unless required to do otherwise by relevant law, the lawyer should attempt first to remedy the situations within the organization. Finally, in determining a course of conduct, the lawyer should take into account “any . . . relevant considerations.”

N. Rule 1.13: Conflicts: Public Interest Activities

This rule briefly addresses situations in which a lawyer’s membership or position of authority in a nonprofit, charitable, or law-reform organization might be perceived as conflicting with his duty to his clients. Its scope is limited to providing guidance as to when a lawyer should abstain from action within or for the organization due to representation of a private client.

There are two situations in which a lawyer is required to remove himself from deliberation or activity of the organization. First, if participating in the action would result in the general conflict of interest prohibited by rule 1.06, the lawyer must abstain from acting. This generally means that if the organization’s actions would materially and adversely impact the lawyer’s client in a substantially related matter or if the lawyer’s duty to the organization might require him to take actions that would limit the effectiveness of his representation of the private client, he should withdraw from the action in favor of protecting the client’s interests. Second, if the organizational

59. TDRPC 1.12(c).
action or decision contemplated could result in material adverse impact on one of the organization’s clients whose interests are at odds with the lawyer’s private client, he must abstain from acting. Note that the basic thesis of the rule is that, in the event of conflict, a lawyer’s duty to a private client should prevail over obligations to an eleemosynary institution.

O. **Rule 1.14: Safekeeping Property**

There are occasions when lawyers will come into possession of money or other property in which more than one person claims an interest, whether the lawyer, his client, or a third person. This rule governs the lawyer’s obligations in that regard.

The requirements are several. First, under subsection (a), any money or other property belonging in whole or in part to someone else must not be commingled with the lawyer’s own funds or property. If money, it must be kept in a separate trust or escrow account; if client funds, it must be kept in an approved IOLTA trust account pursuant to Texas Supreme Court order. The comment to the rule provides that a lawyer must hold the property of others “with the care required of a professional fiduciary.”

Second, under subsection (b), a lawyer has an affirmative duty to notify a client or third person when he has received funds or other property in which the client or third person has an interest. In addition, the lawyer must promptly deliver any undisputed portion such property to the client or third person and, on request, render a full accounting of such property to such persons.

Third, under subsection (c), if there is a dispute as to ownership of, or entitlement to, any property held in trust by the lawyer, any portion of the fund in dispute must be kept separately in trust, with the undisputed portion being promptly distributed to those who are entitled to it. Problems can and do arise in connection with disputed claims to trust funds. The comment to rule 1.14 states that when a lawyer holds funds in which both his client and a third party claim an interest, he may refuse to turn over the disputed property to the client; however, the lawyer should not unilaterally assume to arbitrate or resolve any such dispute himself.

P. **Rule 1.15: Declining or Terminating Representation**

The final rule in article I deals with the subject of withdrawal from representation. Prior rules set out circumstances under which a lawyer must withdraw from a representation properly undertaken. This rule clarifies the requirements in such cases and adds circumstances under which a lawyer may, but need not, withdraw. Regardless of the situation, any withdrawing lawyer must take reasonable steps under the circumstances to protect the client’s interests, such as returning files and allowing time for employment of other counsel, before actually effecting withdrawal. The lawyer may retain portions of a file only under certain limited circumstances described in the rule.

Unless ordered to continue the representation by a tribunal, a lawyer must withdraw under three circumstances: first, if continuing the representation would result in violation of any other rule of

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count or applicable law such as rules 1.06(e), 1.07(c), or 3.08; second, if the lawyer’s physical, mental, or psychological fitness is materially impaired; or third, if the lawyer is fired, whether or not for cause. This latter provision emphasizes the client’s total freedom to have representation of his or her choosing, but that freedom does not, in itself, imply any waiver of the obligation to pay the lawyer the agreed fee or even a fee in quantum meruit.61

In addition, any lawyer may withdraw from any representation if—

1. the client persists in attempting to use the lawyer to further purposes that the lawyer reasonably believes may be criminal or fraudulent;

2. the lawyer discovers he has in the past been used to perpetrate a fraud or crime; or

3. the client has been reasonably warned that the lawyer will withdraw if the client does not fulfill some obligation to the lawyer, including payment of agreed fees, and the client continues to fail or refuse to fulfill the obligation.

Moreover, a lawyer may withdraw under a number of other broader and more subjective rubrics. These are options that many lawyers with troublesome clients unfortunately fail to recognize or avail themselves of when they have the right to do so and probably should do so.

First, any lawyer may withdraw for any reason at all, as long as the client’s interests are not materially adversely affected, such as for example where no time deadlines or other exigencies would prevent the client from obtaining other competent representation. Note that under the comment, the other permissive forms of withdrawal are allowed even though the withdrawal may have a “material adverse effect on the interests of the client,” as long as the lawyer takes reasonable steps to protect the client’s interests.62 Second, a lawyer may withdraw whenever a client insists on pursuing an objective which the lawyer has fundamental personal disagreement or which he subjectively feels to be morally repugnant or merely imprudent. Third, a lawyer may withdraw from a case or matter that comes to place unreasonable financial demands on the lawyer or that has been made unreasonably difficult by the client. A lawyer also may withdraw whenever “any other good cause for withdrawal exists.”

Finally, it is important to note subsection (c) of the rule, which provides that even if a lawyer is justified in withdrawal, it is always the case that the lawyer must continue the representation if ordered to do so “by a tribunal.” This rule, when read in context with relevant rules of procedure, effectively means that a lawyer who represents a party in litigation must obtain permission from the court before withdrawing.63

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61. TDRPC 1.15 cmt. 4.
62. TDRPC 1.15(b)(7), (d); TDRPC 1.15 cmt. 8.
63. TDRPC 1.15(c).
IV. Conclusion

Article I of the Texas Disciplinary Rules of Professional Conduct deals with the attorney-client relationship, its parameters, and the duties running between the parties to it. The article begins with a preamble and with rules stipulating the scope and nature of the relationship and the level of diligence required of the lawyer in pursuing the client’s objectives. It ends with a rule discussing the circumstances under which that relationship should or may be terminated. These rules are part of an ongoing search for the right balance between freedom and obligation, right and duty. They have been amended with increasing frequency over the recent past, and as society changes at an ever faster rate, that trend may well continue. The basic principles, however, of fidelity, trust, honesty, and service to the public will remain much as they were when the first codes of lawyer ethics were adopted over one hundred years ago.
Chapter 2

Texas Disciplinary Rules of Professional Conduct

Effective January 1, 1990

The Texas Disciplinary Rules of Professional Conduct are reprinted in Tex. Gov’t Code tit. 2, subtit. G app. A (State Bar R. art. X, § 9). This chapter contains rules and comments that were last amended by an order of the Supreme Court of Texas effective June 1, 2005.

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Preamble: A Lawyer’s Responsibilities

I. A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

2. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client’s affairs and reporting about them to the client or to others.

3. In all professional functions, a lawyer should zealously pursue client’s interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Texas Disciplinary Rules of Professional Conduct or other law.

4. A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs. A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary,
to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.

5. As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

6. A lawyer should render public interest legal service. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees is a moral obligation of each lawyer as well as the profession generally. A lawyer may discharge this basic responsibility by providing public interest legal services without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, the administration of justice, and by financial support for organizations that provide legal services to persons of limited means.

7. In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from apparent conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interests. The Texas Disciplinary Rules of Professional Conduct prescribe terms for resolving such tensions. They do so by stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of these Rules many difficult issues of professional discretion can arise. The Rules and their Comments constitute a body of principles upon which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment. In applying these rules, lawyers may find interpretive guidance in the principles developed in the Comments.

8. The legal profession has a responsibility to assure that its regulation is undertaken in the public interest rather than in furtherance of parochial or self-interested concerns of the bar, and to insist that every lawyer both comply with its minimum disciplinary standards and aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

9. Each lawyer’s own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical
conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

**Preamble: Scope**

10. The Texas Disciplinary Rules of Professional Conduct are rules of reason. The Texas Rules of Professional Conduct define proper conduct for purposes of professional discipline. They are imperatives, cast in the terms “shall” or “shall not.” The Comments are cast often in the terms of “may” or “should” and are permissive, defining areas in which the lawyer has professional discretion. When a lawyer exercises such discretion, whether by acting or not acting, no disciplinary action may be taken. The Comments also frequently illustrate or explain applications of the rules, in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules. The Comments do not, however, add obligations to the rules and no disciplinary action may be taken for failure to conform to the Comments.

11. The rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The rules and Comments do not, however, exhaust the moral and ethical considerations that should guide a lawyer, for no worthwhile human activity can be completely defined by legal rules.

12. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. For purposes of determining the lawyer’s authority and responsibility, individual circumstances and principles of substantive law external to these rules determine whether a client-lawyer relationship may be found to exist. But there are some duties, such as of that of confidentiality, that may attach before a client-lawyer relationship has been established.

13. The responsibilities of government lawyers, under various legal provisions, including constitutional, statutory and common law, may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state’s attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the “public interest” in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.
14. These rules make no attempt to prescribe either disciplinary procedures or penalties for violation of a rule.

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.

16. Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

Annotations

*In re City of Dallas*, No. 05-03-00516-CV, 2003 WL 21000387 (Tex. App.—Dallas May 5, 2003, orig. proceeding) (Trial court abused its discretion in holding that documents were not subject to city’s attorney-client privilege, where the evidence showed that a city attorney served as both negotiator for the city and as legal counsel; attorney-client privilege attaches to a lawyer acting in dual roles).

Terminology

“Adjudicatory Official” denotes a person who serves on a Tribunal.

“Adjudicatory Proceeding” denotes the consideration of a matter by a Tribunal.

“Belief” or “Believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

“Competent” or “Competence” denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

“Consult” or “Consultation” denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

“Firm” or “Law firm” denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.
“Fitness” denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer’s responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

“Fraud” or “Fraudulent” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

“Knowingly,” “Known,” or “Knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

“Law firm”: see “Firm.”

“Partner” denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.

“Person” includes a legal entity as well as an individual.

“Reasonable” or “Reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

“Reasonable belief” or “Reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

“Should know” when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

“Substantial” when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

“Tribunal” denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. “Tribunal” includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

I. Client-Lawyer Relationship

Rule 1.01 Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer’s competence, unless:
Texas Disciplinary Rules of Professional Conduct

Rule 1.01

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(c) As used in this Rule, “neglect” signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

Comment:

Accepting Employment

1. A lawyer generally should not accept or continue employment in any area of the law in which the lawyer is not and will not be prepared to render competent legal services. “Competence” is defined in Terminology as possession of the legal knowledge, skill, and training reasonably necessary for the representation. Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client.

2. In determining whether a matter is beyond a lawyer’s competence, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience in the field in question, the preparation and study the lawyer will be able to give the matter, and whether it is feasible either to refer the matter to or associate a lawyer of established competence in the field in question. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequences.

3. A lawyer may not need to have special training or prior experience to accept employment to handle legal problems of a type with which the lawyer is unfamiliar. Although expertise in a particular field of law may be useful in some circumstances, the appropriate proficiency in many instances is that of a general practitioner. A newly admitted lawyer can be as competent in some matters as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.
Rule 1.01 Texas Disciplinary Rules of Professional Conduct

4. A lawyer possessing the normal skill and training reasonably necessary for the representation of a client in an area of law is not subject to discipline for accepting employment in a matter in which, in order to represent the client properly, the lawyer must become more competent in regard to relevant legal knowledge by additional study and investigation. If the additional study and preparation will result in unusual delay or expense to the client, the lawyer should not accept employment except with the informed consent of the client.

5. A lawyer offered employment or employed in a matter beyond the lawyer’s competence generally must decline or withdraw from the employment or, with the prior informed consent of the client, associate a lawyer who is competent in the matter. Paragraph (a)(2) permits a lawyer, however, to give advice or assistance in an emergency in a matter even though the lawyer does not have the skill ordinarily required if referral to or consultation with another lawyer would be impractical and if the assistance is limited to that which is reasonably necessary in the circumstances.

Competent and Diligent Representation

6. Having accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client’s behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer. A lawyer’s workload should be controlled so that each matter can be handled with diligence and competence. As provided in paragraph (a), an incompetent lawyer is subject to discipline.

Neglect

7. Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Under paragraph (b), a lawyer is subject to professional discipline for neglecting a particular legal matter as well as for frequent failures to carry out fully the obligations owed to one or more clients. A lawyer who acts in good faith is not subject to discipline, under those provisions for an isolated inadvertent or unskilled act or omission, tactical error, or error of judgment. Because delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness, there is a duty to communicate reasonably with clients; see Rule 1.03.

Maintaining Competence

8. Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law. To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances. Isolated instances of faulty conduct or decision should be identified for purposes of additional study or instruction.
Annotations


McIntyre v. Commission for Lawyer Discipline, 169 S.W.3d 803 (Tex. App.—Dallas 2005, pet. denied) (Evidence supported trial court’s findings that lawyer knew or should have known that he was not competent to represent client in bankruptcy proceeding).

Bellino v. Commission for Lawyer Discipline, 124 S.W.3d 380 (Tex. App.—Dallas 2004, pet. denied) (Evidence was sufficient to support jury verdict that a lawyer had neglected a legal matter entrusted to him where lawyer promised to obtain green cards for clients within one year or refund his fees, failed to return clients’ telephone calls, failed to obtain green cards, and failed to refund his fees, and the INS denied the green card applications for abandonment).

Escobar v. State, 134 S.W.3d 338 (Tex. App.—Amarillo 2003, no pet.) (Appointed counsel had the responsibility to procure a copy of the record for a client to use in filing a pro se response to an Anders brief filed by the counsel).

Joyner v. Commission for Lawyer Discipline, 102 S.W.3d 344 (Tex. App.—Dallas 2003, no pet.) (Associating other lawyers into a matter without the prior informed consent of the client is a violation of Rule 1.01(a); failing to respond to discovery or appear at a hearing is a violation of Rule 1.01(b); and the lawyer whose name appears first on initial pleadings is the attorney in charge and, therefore, responsible to the client for the matter, even if other lawyers are brought into the matter to assist the attorney in charge).

Eureste v. Commission for Lawyer Discipline, 76 S.W.3d 184 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (A lawyer contracting to represent a client in connection with claims for workers’ compensation benefits is obligated to assist the client in obtaining all of the benefits available under the Texas Workers’ Compensation Act—medical, income, death, and burial—unless the lawyer’s contract with the client specifically limits that obligation).

Hawkins v. Commission for Lawyer Discipline, 988 S.W.2d 927 (Tex. App.—El Paso 1999, pet. denied) (Lawyer neglected the client’s defense by failing to advise the client and failing to appear on behalf of the client despite a court order to do so; expert testimony is not necessary for determining whether a lawyer’s conduct violated the disciplinary rules, because disciplinary proceedings are not malpractice cases where the standard of care is at issue).

Brown v. State Bar of Texas, 960 S.W.2d 671 (Tex. App.—El Paso 1997, no writ) (Court held that there was no evidence to support the trial court’s findings that lawyer had neglected a matter entrusted to her or failed to carry out her obligations to her clients where several months passed between the clients’ divorce hearings and the submission of final divorce decrees).

Wenzy v. State, 855 S.W.2d 47 (Tex. App.—Houston [14th Dist.] 1993, writ ref’d) (Under DR 1.15(c), counsel was ineffective for failing to represent defendant to the fullest of his abilities after a denial of counsel’s withdrawal motions, but was not ineffective for failing to object to admissions during punishment phase of trial).
Rule 1.01

Texas Disciplinary Rules of Professional Conduct

Clarke v. Ruffino, 819 S.W.2d 947, 949–51 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding [writ dism’d w.o.j.]) (Under DR 1.01 et seq., mere pro forma representation of client is not permissible, but attorney-client relationship existed for purposes of subsequent disqualification motion between purchaser who refinanced property and attorney who performed legal services on the refinancing, even if relationship was pro forma).

Gamez v. State Bar of Texas, 765 S.W.2d 827, 830–34 (Tex. App.—San Antonio 1988, writ denied) (Under DR 1-102(A)(5), failure to follow up on entry of divorce decree was not prejudicial to the administration of justice; under DR 1-102(A)(4) & (6), sending a nonofficial divorce judgment that differed from actual divorce judgment to client, and failure to discuss material issues of judgment with client, constituted misrepresentation and was a violation of the Rules; under DR 7-101(A), failure to obtain client’s approval of tax exemption order was in violation of the Code of Professional Responsibility).

Quintero v. Jim Walter Homes, Inc., 709 S.W.2d 225, 228–29, 232 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.) (Failure to fully advise clients in aggregate settlement about the existence and nature of all claims involved, total amount of settlement, and participation of each person in settlement violated DR 5-106 and, therefore, under DR 5-107, a builder was estopped from enforcing settlement because it was obtained in violation of the Code of Professional Responsibility).

Dickerson v. State, 685 S.W.2d 132, 133–34 (Tex. App.—Austin 1985, no writ) (Counsel violated DR 6-101 and EC 7-1 by neither filing brief nor presenting argument, thus constituting inadequate representation).

Gordon v. State, 641 S.W.2d 368, 369 (Tex. App.—Tyler 1982, no writ) (Defendant was not deprived of effective assistance of counsel when court denied motion to withdraw based on court-appointed counsel’s lack of competence).

State Bar of Texas v. O’Dowd, 553 S.W.2d 822, 824 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (Under DR 1-102(A)(1), (4), (5) & (6), where State Bar offered no evidence that attorney’s conduct had been dishonest, fraudulent, or otherwise, State Bar could not establish as a matter of law that such conduct was prejudicial to the administration of justice; under DR 1-102, DR 6-101, and DR 7-101(A)(2), jury’s negative findings on whether attorney’s conduct constituted willful neglect were not against great weight and preponderance of evidence).

Ethics Opinions 386, 412, 448, 476, 480, 533, 534, 551

Rule 1.02

Scope and Objectives of Representation

(a) Subject to paragraphs (b), (c), (d), and (e), (f), and (g), a lawyer shall abide by a client’s decisions:

(1) concerning the objectives and general methods of representation;

(2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;
(3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer’s client has committed a criminal or fraudulent act in the commission of which the lawyer’s services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.

(g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

Comment:

Scope of Representation

1. Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the objectives to be served by legal representation, within the limits imposed by law, the lawyer’s professional obligations, and the agreed scope of representation. Within those limits, a client also has a right to consult with the lawyer about the general methods to be used in pursuing those objectives. The lawyer should assume responsibility for the means by which the client’s objectives are best achieved. Thus, a lawyer has very broad discretion to determine technical and legal tactics, subject to the client’s wishes regarding such matters as the expense to be incurred and concern for third persons who might be adversely affected.

2. Except where prior communications have made it clear that a particular proposal would be unacceptable to the client, a lawyer is obligated to communicate any settlement offer to
the client in a civil case; and a lawyer has a comparable responsibility with respect to a proposed plea bargain in a criminal case.

3. A lawyer should consult with the client concerning any such proposal, and generally it is for the client to decide whether or not to accept it. This principle is subject to several exceptions or qualifications. First, in class actions a lawyer may recommend a settlement of the matter to the court over the objections of named plaintiffs in the case. Second, in insurance defense cases a lawyer’s ability to implement an insured client’s wishes with respect to settlement may be qualified by the contractual rights of the insurer under its policy. Finally, a lawyer’s normal deference to a client’s wishes concerning settlement may be abrogated if the client has validly relinquished to a third party any rights to pass upon settlement offers. Whether any such waiver is enforceable is a question largely beyond the scope of these rules. But see comment 5 below. A lawyer reasonably relying on any of these exceptions in not implementing a client’s desires concerning settlement is, however, not subject to discipline under this Rule.

Limited Scope of Representation

4. The scope of representation provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client. For example, a retainer may be for a specifically defined objective. Likewise, representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. Similarly, when a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The scope within which the representation is undertaken also may exclude specific objectives or means, such as those that the lawyer or client regards as repugnant or imprudent.

5. An agreement concerning the scope of representation must accord with the Disciplinary Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.01, or to surrender the right to terminate the lawyer’s services or the right to settle or continue litigation that the lawyer might wish to handle differently.

6. Unless the representation is terminated as provided in Rule 1.15, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer’s representation is limited to a specific matter or matters, the relationship terminates when the matter has been resolved. If a lawyer has represented a client over a substantial period in a variety of matters, the client may sometimes assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice to the contrary. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.
Criminal, Fraudulent and Prohibited Transactions

7. A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client’s conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

8. When a client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer may not reveal the client’s wrongdoing, except as permitted or required by Rule 1.05. However, the lawyer also must avoid furthering the client’s unlawful purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required. See Rule 1.15(a)(1).

9. Paragraph (c) is violated when a lawyer accepts a general retainer for legal services to an enterprise known to be unlawful. Paragraph (c) does not, however, preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.

10. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

11. Paragraph (d) requires a lawyer in certain instances to use reasonable efforts to dissuade a client from committing a crime or fraud. If the services of the lawyer were used by the client in committing a crime or fraud, paragraph (e) requires the lawyer to use reasonable efforts to persuade the client to take corrective action.

Client Under a Disability

12. Paragraph (a) assumes that the lawyer is legally authorized to represent the client. The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally effective appointment of the lawyer to represent a person. Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for the purpose of this rule.

13. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the client’s best interests. See Rule 1.05(c)(4), d(1) and (d)(2)(i) in
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regard to the lawyer’s right to reveal to the court the facts reasonably necessary to secure the guardianship or other protective order.

Annotations


Porter v. State, No. 74095, 2003 WL 1845082 (Tex. Crim. App. April 9, 2003) (In addition to the three express situations in which a lawyer must abide by a client’s decisions, Rule 1.02(b) allows a lawyer to limit the “scope, objectives and general methods of the representation if the client consents after consultation”; thus the lawyer’s failure to strike venirepersons based on the client’s express instructions not to do so does not constitute ineffective assistance of counsel).

Bellino v. Commission for Lawyer Discipline, 124 S.W.3d 380 (Tex. App.—Dallas 2004, pet. denied) (Rule 1.02 does not require a showing that a client made a decision to accept or reject a settlement offer where the lawyer never communicated the offer to the client).

Sanes v. Clark, 25 S.W.3d 800 (Tex. App.—Waco 2000, pet. denied) (Two lawyers who originally represented a client in a personal injury case were not entitled to their contingency fees after the client terminated them because one did not have a written contract and oral contracts for contingency fees are voidable, and the other had a clause in his contract allowing him to settle the client’s claims without their consent in violation of Rule 1.02 making that contract voidable as well).

Bloyed v. General Motors Corp., 881 S.W.2d 422 (Tex. App.—Texarkana 1994, no writ) (Attorneys owe duty to clients to make full and fair disclosure of every facet of proposed settlement, especially in class action, where clients are removed from day-to-day events surrounding litigation and wholly dependent on attorneys for information; thus, they should disclose the amount of attorneys’ fees sought).

Attorney General v. Steen, 833 S.W.2d 175, 176–77 (Tex. App.—Austin 1992) (Attorney General was found to be a mother’s attorney in interstate child support case under Rule 1.02, but did not have standing to perfect an appeal for himself as opposed to client), reinstated, rev’d and remanded, Smith v. Steen, 833 S.W.2d 178 (Tex. App.—Austin 1992, no writ).

Staples v. McKnight, 763 S.W.2d 914, 916–17 (Tex. App.—Dallas 1988, writ denied) (No evidence existed to support finding that client intended to offer perjured testimony; hence DR 2-110(C) did not require counsel to withdraw from representation).

State Bar of Texas v. O’Dowd, 553 S.W.2d 822, 824 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (Under DR 1-102(A)(1), (4), (5) & (6), where State Bar offered no evidence that attorney’s conduct had been dishonest, fraudulent, or otherwise, State Bar could not establish as a matter of law that such conduct was prejudicial to the administration of justice; under DR 1-102, DR 6-101, and DR 7-101(A)(2), jury’s negative findings on whether attorney’s conduct constituted willful neglect were not against great weight and preponderance of evidence).
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Rule 1.03

Augustson v. Linea Aerea Nacional-Chile S.A. (LAN-Chile), 76 F.3d 658 (5th Cir. 1996) (A lawyer is an agent of the client and is bound by the terms of their contractual agreement to abide by the decisions of a client regarding whether and for what amount to settle the client’s claims).

Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974) (Defendant did not get reasonably effective assistance of counsel because counsel was too poorly prepared to advise client to enter a guilty plea, hence plea was not made knowingly and voluntarily).

Ethics Opinions 409, 442, 533

Rule 1.03 Communication

(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.

Comment:

1. The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel either an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Comment 2 to Rule 1.02.

2. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. Moreover, in certain situations practical exigency may require a lawyer to act for a client without prior consultation. The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.

3. Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impractical, as for example, where the client is a child or suffers from mental disability; see paragraph 5. When the client is an organization or group, it is often impossi-
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ble or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

4. In some circumstances, a lawyer may be justified in delaying transmission of information when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. Similarly, rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.04(d) sets forth the lawyer’s obligations with respect to such rules or orders. A lawyer may not, however, withhold information to serve the lawyer’s own interest or convenience.

Client Under a Disability

5. In addition to communicating with any legal representative, a lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client’s own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children’s opinions regarding their own custody are given some weight. The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect. See also Rule 1.02(e) and Rule 1.05, Comment 17.

Annotations

Ex parte Alaniz, 583 S.W.2d 380, 384 (Tex. Crim. App. 1979) (Under DR 7-101(A)(1) & (3), there can be no strategic or technical benefit from attorney’s withholding exculpatory evidence from client).

McIntyre v. Commission for Lawyer Discipline, 169 S.W.3d 803 (Tex. App.—Dallas 2005, pet. denied) (Lawyer violated Rule 1.03 by failing to explain a matter to the extent necessary to permit his client to make informed decisions where lawyer never consulted with client about involuntary bankruptcy proceedings but nevertheless consented to the involuntary bankruptcy and filed schedule under penalty of perjury on behalf of client).

Bellino v. Commission for Lawyer Discipline, 124 S.W.3d 380 (Tex. App.—Dallas 2004, pet. denied) (Lawyer failed to keep his client reasonably informed and to explain a matter to permit the client to make informed decisions where the lawyer settled clients’ claims without their permission, lied about it, and then said the proceeds were in the registry of the court even though he had deposited the money into his own bank account).
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_Eureste v. Commission for Lawyer Discipline_, 76 S.W.3d 184 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (Lawyer’s obligations to keep the client informed and provide sufficient information for the client to make informed decisions are not met if the quality of the communications between a lawyer and his client are insufficient to keep the client informed about the status of the case and what the lawyer is doing).

_Hines v. Commission for Lawyer Discipline_, 28 S.W.3d 697 (Tex. App.—Corpus Christi 2000, no pet.) (Lawyer’s acceptance of money to represent the client, failure to file a necessary amendment to the client’s pleadings, failure to inform the client of her options, failure to protect the client’s interests, and failure to inform the client that the lawyer’s representation was terminated or that the lawyer believed the client’s previous lawyer was going to advise the client justified a finding that the lawyer did not keep the client adequately informed, despite the fact that the client did not have a written contract with the lawyer, the client had never paid for appellate representation, the lawyer was not the attorney of record in the matter, and no evidence of an adverse judgment against the client was presented).

_Bloyed v. General Motors Corp._, 881 S.W.2d 422 (Tex. App.—Texarkana 1994, no writ) (Attorneys owe duty to clients to make full and fair disclosure of every facet of proposed settlement, especially in class action, where clients are removed from day-to-day events surrounding litigation and wholly dependent on attorneys for information; thus, they should disclose the amount of attorneys’ fees sought).

_Gamez v. State Bar of Texas_, 765 S.W.2d 827, 830–34 (Tex. App.—San Antonio 1988, writ denied) (Under DR 1-102(A)(5), failure to follow up on entry of divorce decree was not prejudicial to the administration of justice; under DR 1-102(A)(4) & (6), sending a nonofficial divorce judgment that differed from actual divorce judgment to client, and failure to discuss material issues of judgment with client, constituted misrepresentation and was a violation of the Rules; under DR 7-101(A), failure to obtain client’s approval of tax exemption order was in violation of the Code of Professional Responsibility).

_Quintero v. Jim Walter Homes, Inc._, 709 S.W.2d 225, 228–29, 232 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.) (Failure to fully advise clients in aggregate settlement about the existence and nature of all claims involved, total amount of settlement, and participation of each person in settlement violated DR 5-106 and, therefore, under DR 5-107, a builder was estopped from enforcing settlement because it was obtained in violation of the Code of Professional Responsibility).

_Guillory v. State_, 646 S.W.2d 467, 469 (Tex. App.—Houston [1st Dist.] 1982, no writ) (Under DR 5-105, client’s appeal was abated where there was no evidence in record to indicate that counsel had informed clients of risk of conflict in representing client and brother).

_State Bar of Texas v. O’Dowd_, 553 S.W.2d 822, 824 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (Under DR 1-102(A)(1), (4), (5) & (6), where State Bar offered no evidence that attorney’s conduct had been dishonest, fraudulent, or otherwise, State Bar could not establish as a matter of law that such conduct was prejudicial to the administration of justice; under DR 1-102, DR 6-101, and DR 7-101(A)(2), jury’s negative findings on whether attorney’s conduct constituted willful neglect were not against great weight and preponderance of evidence).
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_Herring v. Estelle_, 491 F.2d 125, 128 (5th Cir. 1974) (Defendant did not get reasonably effective assistance of counsel because counsel was too poorly prepared to advise client to enter a guilty plea, hence plea was not made knowingly and voluntarily).

_In re Zuniga_, 332 B.R. 760 (Bankr. S.D. Tex. 2005) (Lawyers failed to keep client reasonably informed of status of her bankruptcy where they did not send her the necessary paperwork for more than two months after she contacted them, failed to provide her with a translator, and never met with her face-to-face).

Ethics Opinion 563

Rule 1.04  Fees

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3. the fee customarily charged in the locality for similar legal services;

4. the amount involved and the results obtained;

5. the time limitations imposed by the client or by the circumstances;

6. the nature and length of the professional relationship with the client;

7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and

8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is
to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(e) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is:

(i) in proportion to the professional services performed by each lawyer; or

(ii) made between lawyers who assume joint responsibility for the representation; and

(2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including:

(i) the identity of all lawyers or law firms who will participate in the fee-sharing arrangement, and

(ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and

(iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

(3) the aggregate fee does not violate paragraph (a).

(g) Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, shall be confirmed by an arrangement conforming to paragraph (f). Consent by a client or a prospective client without knowledge of the information specified in subparagraph (f)(2) does not constitute a confirmation within the meaning of this rule. No attorney shall collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way, except for:

(1) the reasonable value of legal services provided to that person; and
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(2) the reasonable and necessary expenses actually incurred on behalf of that person.

(h) Paragraph (f) of this rule does not apply to payment to a former partner or associate pursuant to a separation or retirement agreement, or to a lawyer referral program certified by the State Bar of Texas in accordance with the Texas Lawyer Referral Service Quality Act, Tex. Occ. Code 952.001 et seq., or any amendments or recodifications thereof.

Comment:

1. A lawyer in good conscience should not charge or collect more than a reasonable fee, although he may charge less or no fee at all. The determination of the reasonableness of a fee, or of the range of reasonableness, can be a difficult question, and a standard of “reasonableness” is too vague and uncertain to be an appropriate standard in a disciplinary action. For this reason, paragraph (a) adopts, for disciplinary purposes only, a clearer standard: the lawyer is subject to discipline for an illegal fee or an unconscionable fee. Paragraph (a) defines an unconscionable fee in terms of the reasonableness of the fee but in a way to eliminate factual disputes as to the fee’s reasonableness. The Rule’s “unconscionable” standard, however, does not preclude use of the “reasonableness” standard of paragraph (b) in other settings.

Basis or Rate of Fee

2. When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. If, however, the basis or rate of fee being charged to a regularly represented client differs from the understanding that has evolved, the lawyer should so advise the client. In a new client-lawyer relationship, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, in order to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding, and when the lawyer has not regularly represented the client it is preferable for the basis or rate of the fee to be communicated to the client in writing. Furnishing the client with a simple memorandum or a copy of the lawyer’s customary fee schedule is sufficient if the basis or rate of the fee is set forth. In the case of a contingent fee, a written agreement is mandatory.

Types of Fees

3. Historically lawyers have determined what fees to charge by a variety of methods. Commonly employed are percentage fees and contingent fees (which may vary in accordance with the amount at stake or recovered), hourly rates, and flat fee arrangements, or combinations thereof.
4. The determination of a proper fee requires consideration of the interests of both client and lawyer. The determination of reasonableness requires consideration of all relevant circumstances, including those stated in paragraph (b). Obviously, in a particular situation not all of the factors listed in paragraph (b) may be relevant and factors not listed could be relevant. The fees of a lawyer will vary according to many factors, including the time required, the lawyer’s experience, ability and reputation, the nature of the employment, the responsibility involved, and the results obtained.

5. When there is a doubt whether a particular fee arrangement is consistent with the client’s best interest, the lawyer should discuss with the client alternative bases for the fee and explain their implications.

6. Once a fee arrangement is agreed to, a lawyer should not handle the matter so as to further the lawyer’s financial interests to the detriment of the client. For example, a lawyer should not abuse a fee arrangement based primarily on hourly charges by using wasteful procedures.

Unconscionable Fees

7. Two principal circumstances combine to make it difficult to determine whether a particular fee is unconscionable within the disciplinary test provided by paragraph (a) of this Rule. The first is the subjectivity of a number of the factors relied on to determine the reasonableness of fees under paragraph (b). Because those factors do not permit more than an approximation of a range of fees that might be found reasonable in any given case, there is a corresponding degree of uncertainty in determining whether a given fee is unconscionable. Secondly, fee arrangements normally are made at the outset of representation, a time when many uncertainties and contingencies exist, while claims of unconscionability are made in hindsight when the contingencies have been resolved. The “unconscionability” standard adopts that difference in perspective and requires that a lawyer be given the benefit of any such uncertainties for disciplinary purposes only. Except in very unusual situations, therefore, the circumstances at the time a fee arrangement is made should control in determining a question of unconscionability.

8. Two factors in otherwise borderline cases might indicate a fee may be unconscionable. The first is overreaching by a lawyer, particularly of a client who was unusually susceptible to such overreaching. The second is a failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated. For example, a fee arrangement negotiated at arm’s length with an experienced business client would rarely be subject to question. On the other hand, a fee arrangement with an uneducated or unsophisticated individual having no prior experience in such matters should be more carefully scrutinized for overreaching. While the fact that a client was at a marked disadvantage in bargaining with a lawyer over fees will not make a fee unconscionable, application of the disciplinary test may require some consideration of the personal circumstances of the individuals involved.
Fees in Family Law Matters

9. 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 obtained for client. See also Rule 1.08(h). In certain family law matters, such as child custody and adoption, no res is created to fund a fee. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.

Division of Fees

10. A division of fees is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fees facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring or associating lawyer initially retained by the client and a trial specialist, but it applies in all cases in which two or more lawyers are representing a single client in the same matter, and without regard to whether litigation is involved. Paragraph (f) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes joint responsibility for the representation.

11. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (d) of this Rule.

12. A division of a fee based on the proportion of services rendered by two or more lawyers contemplates that each lawyer is performing substantial legal services on behalf of the client with respect to the matter. In particular, it requires that each lawyer who participates in the fee have performed services beyond those involved in initially seeking to acquire and being engaged by the client. There must be a reasonable correlation between the amount or value of services rendered and responsibility assumed, and the share of the fee to be received. However, if each participating lawyer performs substantial legal services on behalf of the client, the agreed division should control even though the division is not directly proportional to actual work performed. If a division of fee is to be based on the proportion of services rendered, the arrangement may provide that the allocation not be made until the end of the representation. When the allocation is deferred until the end of the representation, the terms of the arrangement must include the basis by which the division will be made.

13. Joint responsibility for the representation entails ethical and perhaps financial responsibility for the representation. The ethical responsibility assumed requires that a referring or associating lawyer make reasonable efforts to assure adequacy of representation and to provide adequate client communication. Adequacy of representation requires that the referring or associating lawyer conduct a reasonable investigation of the client’s legal matter and refer the matter to a lawyer whom the referring or associating lawyer reasonably believes is competent to handle it. See Rule 1.01. Adequate attorney-client communication requires that a referring or associating lawyer monitor the matter throughout the rep-
representation and ensure that the client is informed of those matters that come to that lawyer’s attention and that a reasonable lawyer would believe the client should be aware. See Rule 1.03. Attending all depositions and hearings or requiring that copies of all pleadings and correspondence be provided a referring or associating lawyer is not necessary in order to meet the monitoring requirement proposed by this rule. These types of activities may increase the transactional costs, which ultimately the client will bear and unless some benefit will be derived by the client, they should be avoided. The monitoring requirement is only that the referring lawyer be reasonably informed of the matter, respond to client questions, and assist the handling lawyer when necessary. Any referral or association of other counsel should be made based solely on the client’s best interest.

14. In the aggregate, the minimum activities that must be undertaken by referring or associating lawyers pursuant to an arrangement for a division of fees are substantially greater than those assumed by a lawyer who forwarded a matter to other counsel, undertook no ongoing obligations with respect to it, and yet received a portion of the handling lawyer’s fee once the matter was concluded, as was permitted under the prior version of this rule. Whether such activities, or any additional activities that a lawyer might agree to undertake, suffice to make one lawyer participating in such an arrangement responsible for the professional misconduct of another lawyer who is participating in it and, if so, to what extent, are intended to be resolved by Texas Civil Practice and Remedies Code, ch. 33, or other applicable law.

15. A client must consent in writing to the terms of the arrangement prior to the time of the association or referral proposed. For this consent to be effective, the client must have been advised of at least the key features of that arrangement. Those essential terms, which are specified in subparagraph (f)(2), are 1) the identity of all lawyers or law firms who will participate in the fee-sharing agreement, 2) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and 3) the share of the fee that each lawyer or law firm will receive or the basis on which the division will be made if the division is based on proportion of service performed. Consent by a client or prospective client to the referral to or association of other counsel, made prior to any actual such referral or association, but without knowledge of the information specified in subparagraph (f)(2) does not constitute sufficient client confirmation within the meaning of this rule. The referring or associating lawyer or any other lawyer who employs another lawyer to assist in the representation has the primary duty to ensure full disclosure and compliance with this rule.

16. Paragraph (g) facilitates the enforcement of the requirements of paragraph (f). It does so by providing that agreements that authorize an attorney either to refer a person’s case to another lawyer, or to associate other counsel in the handling of a client’s case, and that actually result in such a referral or association with counsel in a different law firm from the one entering into the agreement, must be confirmed by an arrangement between the person and the lawyers involved that conforms to paragraph (f). As noted there, that arrangement must be presented to and agreed to by the person before the referral or association between the lawyers involved occurs. See subparagraph (f)(2). Because paragraph (g) refers to the party whose matter is involved as a “person” rather than as a “client,” it is
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not possible to evade its requirements by having a referring lawyer not formally enter into an attorney-client relationship with the person involved before referring that person’s matter to other counsel. Paragraph (g) does provide, however, for recovery in quantum meruit in instances where its requirements are not met. See subparagraphs (g)(1) and (g)(2).

17. What should be done with any otherwise agreed-to fee that is forfeited in whole or in part due to a lawyer’s failure to comply with paragraph (g) is not resolved by these rules.

18. Subparagraph (f)(3) requires that the aggregate fee charged to clients in connection with a given matter by all of the lawyers involved meet the standards of paragraph (a)—that is, not be unconscionable.

Fee Disputes and Determinations

19. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by a bar association, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer’s fee, for example, in representation of an executor or administrator, or when a class or a person is entitled to recover a reasonable attorney’s fee as part of the measure of damages. All involved lawyers should comply with any prescribed procedures.

Annotations


Hoover Slovacek LLP v. Walton, 206 S.W.3d 557 (Tex. 2006) (Termination fee was unconscionable as a matter of law where client was financially penalized for changing counsel, where attorney had an impermissible proprietary interest in the client’s claims, and where the risks of representation were shifted entirely to the client’s detriment).

Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193 (Tex. 2002) (Rule 1.04 not violated by law firm’s attempt to recover referral fee for personal injury case after associate who was close friends with accident victim left the firm and referred the case to another firm).

Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999) (Attorneys could be required to forfeit all or part of their fees for breach of fiduciary duty, even if clients could not prove actual damages).

Main Place Custom Homes, Inc. v. Honaker, 192 S.W.3d 604 (Tex. App.—Fort Worth 2006, pet. denied) (Attorney’s hybrid-contingency fees were reasonable where (1) the case was one of the more difficult the attorney had tried, (2) the attorney was a specialist, (3) the case required more counseling because of its emotional nature, and (4) the case had been pending for two years, during which time the firm had not been compensated for all of its work).
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_Toshiba Machine Co., America v. SPM Flow Control, Inc._, 180 S.W.3d 761 (Tex. App.—Fort Worth 2005, pet. granted) (Attorneys’ fees of $1.5 million did not violate Rule 1.04 where firm took the risk of receiving only its $150,000 base if it lost the case and where the fee represented approximately 25 percent of the jury verdict, significantly less than the usual percentage in similar contingency fee cases).

_Everest Exploration, Inc. v. URI, Inc._, 131 S.W.3d 138 (Tex. App.—San Antonio 2004, no pet.) (Attorneys’ detailed testimony about their fees in relation to the factors set forth in Rule 1.04 supported finding that attorney’s fees awarded to the mining company were not grossly excessive and outrageous in comparison to time expended and fees charged by counsel).

_Acevedo v. Commission for Lawyer Discipline_, 131 S.W.3d 99 (Tex. App.—San Antonio 2004, no pet.) (Deemed admissions may be used to establish violation of the Rules of Professional Conduct; original jurisdiction over a disciplinary proceeding is vested in the supreme court, therefore the county in which the proceeding is actually conducted is a matter of venue, not jurisdiction; as such, the requirements of article V, section 7, of the Texas Constitution and section 74.094(e) of the Texas Government Code do not apply to disciplinary proceedings, and the presiding judge need not conduct its proceedings at the county seat of the county in which the case is pending).

_Rapp v. Mandell & Wright, P.C._, 127 S.W.3d 888 (Tex. App.—Corpus Christi 2004, pet. denied) (Rule 1.04’s prohibition on fee sharing except within limited circumstances prevents attorney’s fees from being shared between the primary lawyer in a matter and the lawyer’s former firm when the lawyer’s termination included the firm’s relinquishment, without reservation of rights as to fees or expenses, of any claim to the fees in the case).

_Castle Texas Production Ltd. Partnership v. Long Trusts_, 134 S.W.3d 267 (Tex. App.—Tyler 2003, pet. denied) (Sufficient evidence was offered to prove that defense attorney’s fees were $600,000 in total, but that remittitur was necessary and reasonable because the lawyer sought to recover only 75 percent of that amount for time spent pursuing a counterclaim).

_Union Gas Corp. v. Gisler_, 129 S.W.3d 145 (Tex. App.—Corpus Christi 2003, pet. denied) (Court could consider contingent fee contract as evidence of reasonable attorney’s fees award, when offered along with additional evidence, and award of attorney’s fees was not unconscionable or an abuse of discretion where it was based on conflicting evidence).

_Infonova Solutions, Inc. v. Griggs_, No. 04-02-00255-CV, 2003 WL 21467091 (Tex. App.—San Antonio June 25, 2003, no pet.) (Trial court properly applied the factors to be considered in determining reasonableness to a claim for fees under Tex. Civ. Prac. & Rem. Code § 38.001(8) and held that mere evidence of a contingency fee contract—without more—is insufficient to establish the reasonableness of attorney’s fees).

_Heritage Resources, Inc. v. Hill_, 104 S.W.3d 612 (Tex. App.—El Paso 2003, no pet.) (Trial court properly used defendant’s estimate to calculate award of plaintiff’s attorneys fees, where plaintiff failed to comply with first element of Rule 1.04 by failing to segregate his attorney’s fees among clients represented, lawsuits prosecuted, or causes of action).

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Allison v. Fire Insurance Exchange, 98 S.W.3d 227 (Tex. App.—Austin 2002, pet. granted, judgm’t vacated w.r.m. by agr.) (Evidence of the factors identified in Rule 1.04 must be presented to a jury, and the jury must be asked to award fees in a specific amount, not as a percentage of recovery—this evidence may be presented by expert testimony, and hourly time sheets are not required; however, even if the fees are reasonable and necessary, the reasonableness of the amount of the fees must be determined in light of the overall damages award).

City of Weatherford v. Catron, 83 S.W.3d 261 (Tex. App.—Fort Worth 2002, no pet.) (Award of attorney’s fees was not excessive because the jury was given an outline of the eight elements of Rule 1.04, there was sufficient evidence presented regarding attorney fees, and the jury awarded less than the plaintiffs’ attorney submitted).

Eureste v. Commission for Lawyer Discipline, 76 S.W.3d 184 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (Fees need not be expressly prohibited by statute to be illegal under Rule 1.04, and a fee that is not based on actual time expended for the specific client by the billing attorney or employee is a violation of the rule; further, a court can consider all relevant evidence in determining whether a resulting fee is reasonable or unconscionable and finding that the evidence did not support the lawyer’s contention that his fees were reasonable because he billed less than he would have billed for his actual work on behalf of the client).

Hanif v. Alexander Oil Co., No. 01-01-00954-CV, 2002 WL 31087247 (Tex. App.—Houston [1st Dist.] Sept. 19, 2002, no pet.) (Rule 1.04 neither requires that time records be kept nor precludes an estimate, and the trial court’s award was reasonably supported by counsel’s testimony regarding his estimation of fees where he relied on the factors set forth in Rule 1.04).

Hunt v. Baldwin, 68 S.W.3d 117 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (Appellant waived factual sufficiency review of jury’s zero award of attorney’s fees by failing to cite to the record, failing to cite to supporting authority, and failing to reference factors set out in Rule 1.04).

Sieber & Calicutt, Inc. v. La Gloria Oil & Gas Co., 66 S.W.3d 340 (Tex. App.—Tyler 2001, pet. denied) (Trial court did not abuse its discretion when it failed to award attorney’s fees, in part because the plaintiff’s expert failed to offer testimony that addressed all of the factors listed in Rule 1.04).

Marquez v. Providence Memorial Hospital, 57 S.W.3d 585 (Tex. App.—El Paso 2001, pet. denied) (Trial court properly considered the eight factors listed in Rule 1.04(b) and properly awarded attorney’s fees to the defendants where the affidavits supporting the request for attorney’s fees met the requirements of those eight factors in a medical malpractice case where the plaintiff failed to comply with Tex. Rev. Civ. Stat. art. 4590, § 13.01(d)).

Guity v. C.C.I. Enterprise, Co., 54 S.W.3d 526 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (Award of attorney’s fees in a summary judgment was improper where conflicting evidence of the reasonableness of such fees existed).

Checker Bag Co. v. Washington, 27 S.W.3d 625 (Tex. App.—Waco 2000, pet. denied) (All eight factors in Rule 1.04(b) do not have to be proved to award attorney fees).
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**Herring v. Bocquet**, 21 S.W.3d 367 (Tex. App.—San Antonio 2000, no pet.) (Evidence was sufficient to sustain $105,000 award of attorney’s fees to defendants where evidence showed that (1) plaintiffs’ approach in trial court was novel and required substantial work in response; (2) defendant’s counsel did not turn away other work; (3) defense counsel testified that his fee was reasonable and proper in light of the fee customarily charged in the locality for similar legal services; (4) defendants’ ability to access their property was threatened, defendants’ counsel was required to diligently refute all plaintiffs’ contentions to prevent defendants’ loss of rights, and defendants ultimately prevailed; (5) there were no time limitations in place; (6) defense counsel did not have a prior relationship with the defendants; (7) defense counsel had an excellent reputation in the community; and (8) defendants were charged on an hourly basis).

**Curtis v. Commission for Lawyer Discipline**, 20 S.W.3d 227 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (Attorney entered into unconscionable contingency fee contract with clients because additional contracts obligated clients to pay at least twice the contingency fee agreed to in the original contingency fee contract in addition to hourly rates ranging from $150 to $200 per hour).

**Love v. State Bar of Texas**, 982 S.W.2d 939 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (State Bar was not required to plead and prove that there was a pending disciplinary investigation against the lawyer before May 1, 1992, to prosecute him under the prior State Bar Rules).

**Commission for Lawyer Discipline v. Eisenman**, 981 S.W.2d 737 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (Attorney “charged” client for his services within the meaning of Rule 1.04(a) by placing in escrow part of the settlement proceeds recovered on behalf of client and identifying the amount as a disputed fee; the standard for finding a violation of Rule 1.04(a) is an objective standard and the subjective belief of two practicing attorneys that the fee was reasonable was not enough to negate unconscionableness as a matter of law; the record contained sufficient evidence that attorney violated Rule 1.04(d) by withholding part of settlement proceeds recovered on behalf of client and effectively changing the terms of contingency fee contract as a result, failing to put the changes in writing, failing to state method by which he calculated the fee, and failing to identify what expense would be deducted).

**Wade v. Commission for Lawyer Discipline**, 961 S.W.2d 366 (Tex. App.—Houston 1997, no pet.) (Attorney violated Rule 1.04 by failing to provide written contingent-fee agreement and failing to state who should pay litigation expenses).

**Chachere v. Drake**, 941 S.W.2d 193 (Tex. App.—Corpus Christi 1996, writ denied) (Fee splitting agreement was enforceable even though it was not disclosed to the client).

**Bond v. Crill**, 906 S.W.2d 103 (Tex. App.—Dallas 1995, no writ) (Attorney sought declaration of his rights on oral fee contract involving division of fees among lawyers not in the same firm. Appeals court held that plaintiff failed to prove that alleged agreement did not come within exception to the disclosure requirement. The case also cites a case for proposition that Disciplinary Rules may be used to determine whether referral agreement violates public policy.).
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*Cushnie v. State Bar of Texas*, 845 S.W.2d 358, 360 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (Under Rule 1.04(a), public reprimand for charging excessive fee was appropriate remedy).

*Polland & Cook v. Lehmann*, 832 S.W.2d 729, 736 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (Rule 1.04(f) does not require attorney to disclose his intention to divide legal fees or obtain client’s consent, although DR 2-107 does require such).

*Tesoro Petroleum Corp. v. Coastal Refining & Marketing, Inc.*, 754 S.W.2d 764, 766–67 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (Affidavit of attorney representing client constituted expert testimony regarding reasonableness of attorney’s fees and, therefore, a genuine issue of material fact existed about whether fee of 10 percent of principal amount was reasonable, precluding summary judgment).

*USX Corp. v. Union Pacific Resources Co.*, 753 S.W.2d 845, 857–58 (Tex. App.—Fort Worth 1988, no writ) (Under DR 2-106, attorneys’ fees of $3 million for trial and $550,000 for appeal were not unreasonable in light of tremendous time and labor exerted in preparation for breach-of-contract trial where judgment was for $15,475,919).

*Nguyen v. Smith & Lamm, P.C.*, 714 S.W.2d 144, 148 (Tex. App.—Houston [1st Dist.] 1986, no writ) (Agreement to pay attorney a certain sum per hour was not proof of reasonableness, nor did a general statement by attorney that amount sought was reasonable and necessary support issue of reasonableness).

*Baron v. Mullinax, Wells, Mauzy & Baab, Inc.*, 623 S.W.2d 457, 461–62 (Tex. App.—Texarkana 1981, writ ref’d n.r.e.) (Agreement to divide fees with associate, who became a former associate during handling of case, did not violate DR 2-107 or any other law or public policy).

*Kuhn, Collins & Rash v. Reynolds*, 614 S.W.2d 854, 857–58 (Tex. Civ. App.—Texarkana 1981, writ ref’d n.r.e.) (Under DR 2-107, forwarding attorney was entitled to enforcement of fee-splitting agreement with handling law firm).

*Fox v. Boese*, 566 S.W.2d 682, 686 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref’d n.r.e.) (There was no reason why a jury would not be able to form correct opinion on reasonableness of fee-splitting arrangement where there was evidence as to per-hour value and number of hours attorney spent).


*Fleming v. Campbell*, 537 S.W.2d 118, 119–20 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref’d n.r.e.) (Fee contract was void, as against public policy as a matter of law under DR 2-107, where consideration was for referral of client to defense attorney prior to defense attorney’s promise to pay referral fee).
In re Wright, Nos. 03-50609, 04-50365, 2005 WL 1651655 (5th Cir. July 14, 2005) (Fee-sharing agreement was unenforceable where the agreement merely authorized the lawyer to retain other counsel but did not set out the fee-splitting arrangements and did not identify the counsel).

In re Zuniga, 332 B.R. 760 (Bankr. S.D. Tex. 2005) (Fee charged to bankruptcy client was unconscionable because attorneys did not have the “skill required to perform the legal services properly,” and that lawyers split fees in violation of Rule 1.04(f)).

In re Dixon, 143 B.R. 671, 677–80 (Bankr. N.D. Tex. 1992) (Lawfulness of fee arrangement under DR 9-102, DR 2-110(A)(3), and DR 2-106 could be independently reviewed by bankruptcy court, and unused portion of retainer constituted estate property regardless of how labeled).

In re Willis, 143 B.R. 428, 431–33 (Bankr. E.D. Tex. 1992) (Contingency fee arrangement constituted executory contract that was deemed rejected on lack of timely acceptance by trustee).

Ethics Opinions 386, 408, 409, 431, 433, 446, 450, 458, 459, 464, 465, 468, 542, 545, 546, 549, 563, 566

Rule 1.05  Confidentiality of Information

(a) “Confidential information” includes both “privileged information” and “unprivileged client information.” “Privileged information” refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. “Unprivileged client information” means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(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:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client’s representatives, or the members, associates, or employees of the lawyer’s law firm.

(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.
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(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:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client’s representatives, or the members, associates, and employees of the lawyer’s firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer’s associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used.

(d) A lawyer also may reveal unprivileged client information:

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer’s employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyer’s representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.
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(c) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

Comment:

Confidentiality Generally

1. Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought to employ the lawyer. Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance.

2. Subject to the mandatory disclosure requirements of paragraphs (e) and (f) the lawyer generally should be required to maintain confidentiality of information acquired by the lawyer during the course of or by reason of the representation of the client. This principle involves an ethical obligation not to use the information to the detriment of the client or for the benefit of the lawyer or a third person. In regard to an evaluation of a matter affecting a client for use by a third person, see Rule 2.02.

3. The principle of confidentiality is given effect not only in the Texas Disciplinary Rules of Professional Conduct but also in the law of evidence regarding the attorney-client privilege and in the law of agency. The attorney-client privilege, developed through many decades, provides the client a right to prevent certain confidential communications from being revealed by compulsion of law. Several sound exceptions to confidentiality have been developed in the evidence law of privilege. Exceptions exist in evidence law where the services of the lawyer were sought or used by a client in planning or committing a crime or fraud as well as where issues have arisen as to breach of duty by the lawyer or by the client to the other.

4. Rule 1.05 reinforces the principles of evidence law relating to the attorney-client privilege. Rule 1.05 also furnishes considerable protection to other information falling outside the scope of the privilege. Rule 1.05 extends ethical protection generally to unprivileged information relating to the client or furnished by the client during the course of or by reason of the representation of the client. In this respect Rule 1.05 accords with general fiduciary principles of agency.

5. The requirement of confidentiality applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.
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Disclosure for Benefit of Client

6. A lawyer may be expressly authorized to make disclosures to carry out the representation and generally is recognized as having implied-in-fact authority to make disclosures about a client when appropriate in carrying out the representation to the extent that the client’s instructions do not limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion. The effect of Rule 1.05 is to require the lawyer to invoke, for the client, the attorney-client privilege when applicable; but if the court improperly denies the privilege, under paragraph (c)(4) the lawyer may testify as ordered by the court or may test the ruling as permitted by Rule 3.04(d).

7. In the course of a firm’s practice, lawyers may disclose to each other and to appropriate employees information relating to a client, unless the client has instructed that particular information be confined to specified lawyers. Sub-paragraphs (b)(1) and (c)(3) continue these practices concerning disclosure of confidential information within the firm.

Use of Information

8. Following sound principles of agency law, subparagraphs (b)(2) and (4) subject a lawyer to discipline for using information relating to the representation in a manner disadvantageous to the client or beneficial to the lawyer or a third person, absent the informed consent of the client. The duty not to misuse client information continues after the client-lawyer relationship has terminated. Therefore, the lawyer is forbidden by subparagraph (b)(3) to use, in absence of the client’s informed consent, confidential information of the former client to the client’s disadvantage, unless the information is generally known.

Discretionary Disclosure Adverse to Client

9. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client’s information—usually unprivileged information—even though the client’s purpose is wrongful. On the other hand, a client who knows or believes that a lawyer is required or permitted to disclose a client’s wrongful purposes may be inhibited from revealing facts which would enable the lawyer to counsel effectively against wrongful action. Rule 1.05 thus involves balancing the interests of one group of potential victims against those of another. The criteria provided by the Rule are discussed below.

10. Rule 503(d)(1), Texas Rules of Civil Evidence (Tex.R.Civ.Evid.), and Rule 503(d)(1), Texas Rules of Criminal Evidence (Tex.R.Crim.Evid.), indicate the underlying public policy of furnishing no protection to client information where the client seeks or uses the services of the lawyer to aid in the commission of a crime or fraud. That public policy governs the dictates of Rule 1.05. Where the client is planning or engaging in criminal or fraudulent conduct or where the culpability of the lawyer’s conduct is involved, full protection of client information is not justified.
11. Several other situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.02(c). As noted in the Comment to that Rule, there can be situations where the lawyer may have to reveal information relating to the representation in order to avoid assisting a client’s criminal or fraudulent conduct, and sub-paragraph (c)(4) permits doing so. A lawyer’s duty under Rule 3.03(a) not to use false or fabricated evidence is a special instance of the duty prescribed in Rule 1.02(c) to avoid assisting a client in criminal or fraudulent conduct, and sub-paragraph (c)(4) permits revealing information necessary to comply with Rule 3.03(a) or (b). The same is true of compliance with Rule 4.01. See also paragraph (f).

12. Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.02(c), because to “counsel or assist” criminal or fraudulent conduct requires knowing that the conduct is of that character. Since the lawyer’s services were made an instrument of the client’s crime or fraud, the lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer’s participation was culpable. Sub-paragraph (c)(6) and (8) give the lawyer professional discretion to reveal both unprivileged and privileged information in order to serve those interests. See paragraph (g). In view of Tex.R.Civ.Evid. Rule 503(d)(1), and Tex.R.Crim.Evid. 503(d)(1), however, rarely will such information be privileged.

13. Third, the lawyer may learn that a client intends prospective conduct that is criminal or fraudulent. The lawyer’s knowledge of the client’s purpose may enable the lawyer to prevent commission of the prospective crime or fraud. When the threatened injury is grave, the lawyer’s interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information. As stated in sub-paragraph (c)(7), the lawyer has professional discretion, based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client’s commission of any criminal or fraudulent act. In some situations of this sort, disclosure is mandatory. See paragraph (e) and Comments 18–20.

14. The lawyer’s exercise of discretion under paragraphs (c) and (d) involves consideration of such factors as the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer’s relationship with the client and with those who might be injured by the client, the lawyer’s own involvement in the transaction, and factors that may extenuate the client’s conduct in question. In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by paragraphs (c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.

15. A lawyer entitled to a fee necessarily must be permitted to prove the services rendered in an action to collect it, and this necessity is recognized by sub-paragraphs (c)(5) and (d)(2)(iv). This aspect of the rule, in regard to privileged information, expresses the principle that the beneficiary of a fiduciary relationship may not exploit the relationship to the
detriment of the fiduciary. Any disclosure by the lawyer, however, should be as protective of the client’s interests as possible.

16. If the client is an organization, a lawyer also should refer to Rule 1.12 in order to determine the appropriate conduct in connection with this Rule.

Client Under a Disability

17. In some situations, Rule 1.02(g) requires a lawyer representing a client under a disability to seek the appointment of a legal representative for the client or to seek other orders for the protection of the client. The client may or may not, in a particular matter, effectively consent to the lawyer’s revealing to the court confidential information and facts reasonably necessary to secure the desired appointment or order. Nevertheless, the lawyer is authorized by paragraph (c)(4) to reveal such information in order to comply with Rule 1.02(g). See also paragraph 5, Comment to Rule 1.03.

Mandatory Disclosure Adverse to Client

18. Rule 1.05(e) and (f) place upon a lawyer professional obligations in certain situations to make disclosure in order to prevent certain serious crimes by a client or to prevent involvement by the lawyer in a client’s crimes or frauds. Except when death or serious bodily harm is likely to result, a lawyer’s initial obligation is to attempt to dissuade the client from committing the crime or fraud or to persuade the client to take corrective action; see Rule 1.02(d) and (e).

19. Because it is very difficult for a lawyer to know when a client’s criminal or fraudulent purpose actually will be carried out, the lawyer is required by paragraph (e) to act only if the lawyer has information “clearly establishing” the likelihood of such acts and consequences. If the information shows clearly that the client’s contemplated crime or fraud is likely to result in death or serious injury, the lawyer must seek to avoid those lamentable results by revealing information necessary to prevent the criminal or fraudulent act. When the threatened crime or fraud is likely to have the less serious result of substantial injury to the financial interests or property of another, the lawyer is not required to reveal preventive information but may do so in conformity to paragraph (c)(7). See also paragraph (f); Rule 1.02(d) and (e); and Rule 3.03(b) and (c).

20. Although a violation of paragraph (e) will subject a lawyer to disciplinary action, the lawyer’s decisions whether or how to act should not constitute grounds for discipline unless the lawyer’s conduct in the light of those decisions was unreasonable under all existing circumstances as they reasonably appeared to the lawyer. This construction necessarily follows from the fact that paragraph (e) bases the lawyer’s affirmative duty to act on how the situation “reasonably appears” to the lawyer, while that imposed by paragraph (f) arises only when a lawyer “knows” that the lawyer’s services have been misused by the client. See also Rule 3.03(b).
Withdrawal

21. If the lawyer’s services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.15(a)(1). After withdrawal, a lawyer’s conduct continues to be governed by Rule 1.05. The lawyer’s duties of mandatory disclosure under paragraph (e) are not affected by termination of the relationship. If disclosure during the relationship was permissive, disclosure thereafter remains permissive under paragraphs (6), (7), and (8) if the further requirements of such paragraph are met. Neither this Rule nor Rule 1.15 prevents the lawyer from giving notice of the fact of withdrawal, and no rule forbids the lawyer to withdraw or disaffirm any opinion, document, affirmation, or the like.

Other Rules

22. Various other Texas Disciplinary Rules of Professional Conduct permit or require a lawyer to disclose information relating to the representation. See Rules 1.07, 1.12, 2.02, 3.03 and 4.01. In addition to these provisions, a lawyer may be obligated by other provisions of statutes or other law to give information about a client. Whether another provision of law supersedes Rule 1.05 is a matter of interpretation beyond the scope of these Rules, but sub-paragraph (c)(4) protects the lawyer from discipline who acts on reasonable belief as to the effect of such laws.

Annotations


Judwin Properties, Inc. v. Griggs & Harrison, P.C., 981 S.W.2d 868 (Tex. App.—Houston [1st Dist.] 1998), pet. denied, 11 S.W.3d 188 (Tex. 2000) (per curiam) (Disciplinary rules are not enforceable through a negligence claim; violation of the rules does not give rise to a private cause of action nor does it create any presumption that a legal duty has been breached).

Helton v. State, 670 S.W.2d 644, 645–46 (Tex. Crim. App. 1984) (en banc) (Act of counsel in informing court that he could not ethically question witness because he understood that witness was going to offer perjured testimony did not amount to violation of rule prohibiting an attorney from disclosing confidential communications made to him).

Cruz v. State, 586 S.W.2d 861, 865 (Tex. Crim. App. 1979) (Statement signed by defendant was inadmissible because, by giving statement to police, attorney violated DR 4-101 prohibiting the divulging of confidential information obtained from a client).

Perez v. State, 129 S.W.3d 282 (Tex. App.—Corpus Christi 2004, no pet.) (Lawyer may disclose client’s confidential information “[t]o the extent revelation reasonably appears necessary to rec-
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tify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used”.

Pollard v. Merkel, 114 S.W.3d 695 (Tex. App.—Dallas 2003, pet. denied) (A lawyer shall not knowingly reveal confidential information of a former client to anyone else and shall not knowingly use confidential information of a former client to the disadvantage of the former client after the representation is concluded).

Brink v. State, 78 S.W.3d 478 (Tex. App.—Houston [14th Dist.] 2001, pet. ref’d) (Although defendant could have waived his right to conflict-of-interest-free counsel, he did not waive the conflict in this situation; furthermore, defendant’s waiver of the conflict alone may not have been sufficient because the lawyer’s former client needed to consent).

Contico International v. Alvarez, 910 S.W.2d 29 (Tex. App.—El Paso 1995, no writ) (Defendants in personal injury case moved to disqualify plaintiff’s lawyer because he had obtained copy of the report prepared by defendants during investigation. Trial court refused to disqualify but appeals court granted writ, holding trial court abused discretion. Even though appeals court did not find that the lawyer had actually committed misconduct, it found that his actions created a permissible presumption that he possessed defendants’ confidences.).

Plunkett v. State, 883 S.W.2d 349 (Tex. App.—Waco 1994, writ ref’d) (Attorney was obligated to inform court of the attorney’s belief that jury had been compromised by client who the attorney believed had paid jurors to guarantee hung jury).

Bernstein v. Portland Savings & Loan Ass’n, 850 S.W.2d 694, 701–02 (Tex. App.—Corpus Christi 1993, writ denied) (Attorney for broker was under no obligation, under Rules 1.05(b), (c)(7), (e), and Comment, to disclose information to savings and loan that had entrusted bonds to broker).

Volcanic Gardens Management Co., Inc. v. Paxson, 847 S.W.2d 343 (Tex. App.—El Paso 1993, no writ) (Cites DR 1.05: “When the lawyer has reason to believe it is necessary to do so to prevent the client from committing a criminal or fraudulent act” he may and in some instances must reveal confidential information. Further, the lawyer is prohibited from making false statements of material fact of law to court or third party “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.” Appeals court held trial court should have conducted in camera inspection to determine whether attorney-client communications were privileged or fell within above exceptions.).

Davis v. Stansbury, 824 S.W.2d 278, 282–83 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding) (Communications between a husband and partner involved only unprivileged information under Rule 1.05, and thus divorce court erred in disqualifying wife’s counsel on the basis that husband had received legal advice from counsel’s partner without determining if a conflict existed).

Clarke v. Ruffino, 819 S.W.2d 947, 950–51 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding [writ dism’d w.o.j.]) (Under Rules 1.05 and 1.09, attorney who represented client regarding property refinancing obtained confidential information, precluding his law firm from later representing a party adverse to client’s interest in property, where attorney obtained that confidential information during the course of representing client in the refinancing).

Hoggard v. Snodgrass, 770 S.W.2d 577, 582–83 (Tex. App.—Dallas 1989, no writ) (Under DR 4-101, a party moving for disqualification of attorney on the basis of possible disclosure of confidences from former representation must prove existence of prior attorney-client relationship).

Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295, 300 (Tex. App.—Dallas 1988, no writ) (Entire firm was disqualified, because attorney who had newly joined firm had confidential information regarding a former client who had adverse interests to new firm’s client in an identical case, even though a “Chinese wall” was erected pursuant to DR 4-101(B)).

Griffith v. Geffen & Jacobsen, P.C., 693 S.W.2d 724, 728 (Tex. App.—Dallas 1985, no writ) (Under DR 4-101 and DR 9-102, attorney could disclose confidential information if necessary to recover monies due).

Gleason v. Coman, 693 S.W.2d 564, 566 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.) (Counsel who represented husband in dissolution action between husband and wife and represented wife in subsequent dissolution action between husband and wife violated DR 4-101(B), which precludes a lawyer from knowingly revealing a confidence or using a confidence to client’s disadvantage, by using information obtained through representation of husband during representation of wife).

Lott v. Ayres, 611 S.W.2d 473 (Tex. Civ. App.—Dallas 1980, writ ref’d n.r.e.) (It could not be presumed that attorney breached duty owed former client by having gained confidential information in one proceeding when no substantial relationship existed between former and subsequent proceedings).

In re American Airlines, Inc., 972 F.2d 605, 621–28 (5th Cir. 1992) (Under Rules 1.05 and 1.09, motion to disqualify counsel was proper method for bringing conflict of interest issues to court’s attention, and law firm’s three prior representations of airline were grounds for disqualification because the three prior suits were substantially related matters), cert. denied, 507 U.S. 912 (1993).

In re Burton Securities, 148 B.R. 478, 480 (Bankr. S.D. Tex. 1992) (Law firm’s use of client confidences to draft creditor’s plan of reorganization or disclosure statement filed in former client’s bankruptcy case did not necessarily violate Rule 1.05, because confidential information may be disclosed to collect a fee).

In re Grand Jury Subpoena, 724 F. Supp. 458, 461 (S.D. Tex. 1989) (Revealing of confidential information during enforcement of grand jury subpoena seeking fee information did not amount to violation of the Code of Professional Responsibility, because an attorney may reveal confidential information when required by law or court).
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In re GHR Energy Corp., 60 B.R. 52, 54 (Bankr. S.D. Tex. 1985) (Disqualification of attorney was not warranted where confidential information gained about a party was gained during employment as an account officer and not as an attorney).

Ethics Opinions 105, 193, 204, 319, 378, 384, 442, 457, 463, 464, 472, 473, 479, 480, 532, 538, 544, 552, 556, 559, 563, 572, 575, 578

Rule 1.06 Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; or

(2) reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer’s firm may engage in that conduct.
Comment:

Loyalty to a Client

1. Loyalty is an essential element in the lawyer’s relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer must take effective action to eliminate the conflict, including withdrawal if necessary to rectify the situation. See also Rule 1.16. When more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by this Rule and Rules 1.05 and 1.09. See also Rule 1.07(c). Under this Rule, any conflict that prevents a particular lawyer from undertaking or continuing a representation of a client also prevents any other lawyer who is or becomes a member of or an associate with that lawyer’s firm from doing so. See paragraph (f).

2. A fundamental principle recognized by paragraph (a) is that a lawyer may not represent opposing parties in litigation. The term “opposing parties” as used in this Rule contemplates a situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party. Moreover, as a general proposition loyalty to a client prohibits undertaking representation directly adverse to the representation of that client in a substantially related matter unless that client’s fully informed consent is obtained and unless the lawyer reasonably believes that the lawyer’s representation will be reasonably protective of that client’s interests. Paragraphs (b) and (c) express that general concept.

Conflicts in Litigation

3. Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation are not actually directly adverse but where the potential for conflict exists, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist or develop by reason of substantial discrepancy in the parties’ testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 1.07 involving intermediation between clients.

Conflict with Lawyer’s Own Interests

4. Loyalty to a client is impaired not only by the representation of opposing parties in situations within paragraphs (a) and (b)(1) but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer’s own interests or responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b)(2)
addresses such situations. A potential possible conflict does not itself necessarily preclude the representation. The critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. It is for the client to decide whether the client wishes to accommodate the other interest involved. However, the client’s consent to the representation by the lawyer of another whose interests are directly adverse is insufficient unless the lawyer also believes that there will be no materially adverse effect upon the interests of either client. See paragraph (c).

5. The lawyer’s own interests should not be permitted to have adverse effect on representation of a client, even where paragraph (b)(2) is not violated. For example, a lawyer’s need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.01 and 1.04. If the probity of a lawyer’s own conduct in a transaction is in question, it may be difficult for the lawyer to give a client detached advice. A lawyer should not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Meaning of Directly Adverse

6. Within the meaning of Rule 1.06(b), the representation of one client is “directly adverse” to the representation of another client if the lawyer’s independent judgment on behalf of a client or the lawyer’s ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer’s representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests. Even when neither paragraph (a) nor (b) is applicable, a lawyer should realize that a business rivalry or personal differences between two clients or potential clients may be so important to one or both that one or the other would consider it contrary to its interests to have the same lawyer as its rival even in unrelated matters; and in those situations a wise lawyer would forego the dual representation.

Full Disclosure and Informed Consent

7. A client under some circumstances may consent to representation notwithstanding a conflict or potential conflict. However, as indicated in paragraph (c)(1), when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client’s consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the full disclosure necessary to obtain informed consent. For example, when the lawyer represents different clients in related matters and
one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

8. Disclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. While it is not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed.

9. In certain situations, such as in the preparation of loan papers or the preparation of a partnership agreement, a lawyer might have properly undertaken multiple representation and be confronted subsequently by a dispute among those clients in regard to that matter. Paragraph (d) forbids the representation of any of those parties in regard to that dispute unless informed consent is obtained from all of the parties to the dispute who had been represented by the lawyer in that matter.

10. A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

11. Ordinarily, it is not advisable for a lawyer to act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated and even if paragraphs (a), (b), and (d) are not applicable. However, there are circumstances in which a lawyer may act as advocate against a client, for a lawyer is free to do so unless this Rule or another rule of the Texas Disciplinary Rules of Professional Conduct would be violated. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in a matter unrelated to any matter being handled for the enterprise if the representation of one client is not directly adverse to the representation of the other client. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for declaratory judgment concerning statutory interpretation.

Interest of Person Paying for a Lawyer’s Service

12. A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty to the client. See Rule 1.08(e). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel’s professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer’s professional independence.
Non-litigation Conflict Situations

13. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer’s relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

14. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation may be permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

15. Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration it may be unclear whether the client is the fiduciary or is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

16. A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer’s resignation from the board and the possibility of the corporation’s obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer’s independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

17. Raising questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with great caution, however, for it can be misused as a technique of harassment. See Preamble: Scope.

18. Except when the absolute prohibition of this rule applies or in litigation when a court passes upon issues of conflicting interests in determining a question of disqualification of counsel, resolving questions of conflict of interests may require decisions by all affected clients as well as by the lawyer.
Annotations

In re A.F., 51 S.W.3d 848 (Tex. App.—Waco 2001), rev’d on other grounds, 113 S.W.3d 363 (Tex. 2003) (Where appellate counsel was appointed to represent husband and wife whose parental rights had been terminated, but he recognized a conflict of interest, court of appeals would abate appeal and remand to trial court to determine whether separate representation on appeal was required and, if so, whether appellate counsel could serve given prior representation of both parties).

Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990) (Rule 1.09 did not apply in determining whether former government official should be disqualified, and under Rule 1.10 and DR 9-101(b), former government official did not need to be disqualified because official needs actual knowledge regarding a prior substantial representation, and actual knowledge cannot be imputed to a former government official on the basis of job title or statutory authority).

Almanzar v. State, 702 S.W.2d 653, 656 (Tex. Crim. App. 1986) (No conflict of interest existed where attorney who represented three defendants in same action did not solicit grant of immunity for two defendants but acted in advisory role instead).

In re State ex rel. Rodriguez, 166 S.W.3d 894 (Tex. App.—El Paso 2005, no pet.) (Lawyer’s duty not to engage in a conflict of interest is owed to his clients and former clients, not nonclients).

In re Southwestern Bell Yellow Pages, Inc., No. 04-03-00944-CV, 2004 WL 1195832 (Tex. App.—San Antonio June 2, 2004, orig. proceeding) (Trial court abused its discretion in disqualifying law firm from representing corporation in breach of contract action where party requesting disqualification failed to prove that it suffered actual prejudice as a result of law firm’s concurrent representation; record did not show how disclosure to law firm of confidential information concerning party’s operating procedures would prejudice party requesting disqualification in breach of contract action, and record did not reveal nature of particular item of confidential information alluded to by general counsel of party requesting disqualification).

Aguirre v. Reyna, Nos. 13-99-745-CV, 13-00-123-CV, 2004 WL 35471 (Tex. App.—Corpus Christi Jan. 8, 2004) (Dual representation agreement was adequate, and plaintiff accepted and signed the agreement, thus no breach of duty or malpractice existed).

In re McCormick, No. 12-02-00231-CV, 2002 WL 31076557 (Tex. App.—Tyler Sept. 18, 2002, no pet.) (No attorney-client relationship established so as to require disqualification where contractor and owner negotiated terms of contract without assistance of counsel and then owner requested his attorney to draft the contract as owner related the terms to the attorney while the contractor was present).

In re Posadas USA, Inc., 100 S.W.3d 254 (Tex. App.—San Antonio 2001, no pet.) (Attorney was required to withdraw from representation of multiple clients in the same case, where one client disclosed information creating a conflict of interest with other clients and clients did not consent to continued representation).
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State Bar of Texas v. Dolenz, 3 S.W.3d 260 (Tex. App.—Dallas 1999, no writ) (Lawyer violated Rule 1.06 by executing promissory notes secured by first client’s collateral to pay for lawyer’s legal services, assigning notes to second client, then filing suit as second client’s lawyer against first client before terminating representation of first client).

Smirl v. Bridewell, 932 S.W.2d 743 (Tex. App.—Waco 1996, no writ) (The disqualification of a lawyer who was retained by another law firm as local counsel does not carry over to the law firm if the disqualified lawyer is not a partner, shareholder, or associate on the payroll of the law firm).

Medrano v. Reyes, 902 S.W.2d 176 (Tex. App.—Eastland 1995, no writ) (Where record conclusively established that the Medranos received a letter from the firm informing them that the firm was withdrawing, the firm was not liable for failing to file wrongful death action on Medranos’ behalf prior to running of the statute of limitations).

HECI Exploration Co. v. Clajon Gas Co., 843 S.W.2d 622, 627 n.5 (Tex. App.—Austin 1992, writ denied) (Under Rules 1.06 and 1.09, seller waived right to disqualify purchaser’s counsel based on conflict of interest, where seller failed to move for disqualification before allowing counsel to depose witnesses and continue representation for eleven months).

Haley v. Boles, 824 S.W.2d 796, 798 (Tex. App.—Tyler 1992, no writ) (Counsel for defendant in criminal case had conflict of interest forcing his withdrawal because one of counsel’s partners was married to prosecuting attorney assigned to case).

Ussery v. Gray, 804 S.W.2d 232, 233–34 (Tex. App.—Fort Worth 1991, no writ) (Under DR 5-105 and DR 9-101, Attorney General’s office was not required to be disqualified because of representation of the father in a separate suit filed against him to collect child support, in this paternity action filed by the mother, because the father did not demonstrate actual prejudice).

Conoco Inc. v. Baskin, 803 S.W.2d 416, 419–21 (Tex. App.—El Paso 1991, no writ) (Under Rule 1.06, counsel who represented defendant in prior suits, and who was representing plaintiff in this action, was not disqualified where defendant waived its disqualification by failing to move for it until four months after being alerted to the potential conflict).

Howard v. Texas Department of Human Services, 791 S.W.2d 313, 315 (Tex. App.—Corpus Christi 1990, no writ) (Under Rules 1.05, 1.06, and 1.09, attorney’s prior representation of mother in proceeding to modify conservatorship of her two children was in conflict with his desire to represent the two children ad litem in proceeding to terminate mother’s parental rights).

Adams v. Reagan, 791 S.W.2d 284, 291 (Tex. App.—Fort Worth 1990, no writ) (Defendant in class certification action had no standing to move to disqualify plaintiff’s lead counsel where defendant was never represented by plaintiff’s lead counsel).
Enstar Petroleum Co. v. Mancias, 773 S.W.2d 662, 664 (Tex. App.—San Antonio 1989, no writ) (Attorney whose former firm represented attorney’s opponent was vicariously disqualified from participation in the same litigation, but attorney’s new partners were not).

Callaway v. Barber, 760 S.W.2d 698, 700–01 (Tex. App.—Corpus Christi 1988, writ denied) (Under DR 2-110 and DR 5-105, attorney who was disqualified from representing one plaintiff should not have been forced to withdraw from representation of all plaintiffs because there was no evidence of any conflict in representing any other plaintiff in the action and remaining plaintiffs did not object to the attorney’s continued representation).

Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295, 300 (Tex. App.—Dallas 1988, no writ) (Entire firm was disqualified, because attorney who had newly joined firm had confidential information regarding a former client who had adverse interests to new firm’s client in an identical case, even though a “Chinese wall” was erected pursuant to DR 4-101(B)).

Mallou v. Payne & Vendig, 750 S.W.2d 251, 258 (Tex. App.—Dallas 1988, writ denied) (Under DR 5-105(B), court found that firm was improperly allowed to represent both creditor of one party and receiver of the parties’ homestead property).

Banks v. Boone, 691 S.W.2d 783, 784 (Tex. App.—Amarillo 1985, no writ) (Under DR 5-102, judge in marriage dissolution action was not required to order withdrawal of firm because husband intended to call partner in wife’s firm as witness).

Stocking v. Biery, 677 S.W.2d 792, 794 (Tex. App.—San Antonio 1984, no writ) (Mere announcement of intention to call opposing counsel as witness did not mandate disqualification of opposing counsel under DR 5-101 and DR 5-102).

In re H.W.E., 613 S.W.2d 71, 72 (Tex. Civ. App.—Fort Worth 1981, no writ) (Attorney was not precluded from representing multiple parties in suit unless the multiple parties’ interests were adverse, and mere potential conflict did not require withdrawal).

Lott v. Ayres, 611 S.W.2d 473 (Tex. Civ. App.—Dallas 1980, writ ref’d n.r.e.) (It could not be presumed that attorney breached duty owed former client by having gained confidential information in one proceeding when no substantial relationship existed between former and subsequent proceedings).

Empire Life & Hospital Insurance Co. v. Harris, 595 S.W.2d 904, 906 (Tex. Civ. App.—Austin 1980, no writ) (Under DR 5-105 and DR 9-101, counsel waived objection to conflict of interest by waiting until opposing counsel had presented all its evidence before moving to have all evidence stricken based on conflict).

John Doe v. A. Corp., 709 F.2d 1043, 1050 (5th Cir. 1983) (Corporation and benefit plan could waive any possible claim for conflict of interest based on joint representation under ABA Code DR 5-105).
Rule 1.06  Texas Disciplinary Rules of Professional Conduct

*In re Gutierrez*, 309 B.R. 488 (Bankr. W.D. Tex. 2004) (Representation of debtor in second Chapter 13 case did not create conflict of interest even though attorney held an unsecured claim against debtor for unpaid legal fees from debtor’s first Chapter 13 case).

*Milliken v. Grigson*, 986 F. Supp. 426 (S.D. Tex. 1997) (Client’s informed consent is sufficient to overcome a claim of conflicts of interest; plaintiff failed to establish an attorney-client relationship despite current contacts, both related and unrelated to the litigation, between plaintiff and lawyer).

*United States v. Phillips*, 952 F. Supp. 480 (S.D. Tex. 1996) (Criminal defendant’s attorney was disqualified based on an impermissible conflict of interest, where the attorney’s law firm represented a woman convicted of a similar offense whose conviction was on appeal and who had promised to testify for the government against the defendant in exchange for the government’s recommendation of a reduction in the woman’s sentence).


*In re Global Marine, Inc.*, 108 B.R. 998 (Bankr. S.D. Tex. 1987) (Law firm representing both parent and subsidiary companies in consolidated Chapter 11 proceeding was not engaged in actual conflict of interest).


**Rule 1.07  Conflict of Interest: Intermediary**

(a) A lawyer shall not act as intermediary between clients unless:

1. the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client’s written consent to the common representation;

2. the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients’ best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

3. the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
Texas Disciplinary Rules of Professional Conduct

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(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the inter-mediation.

(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.

(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer’s firm may engage in that conduct.

Comment:

1. A lawyer acting as intermediary may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. For example, the lawyer may assist in organizing a business in which two or more clients are entrepreneurs, in working out the financial reorganization of an enterprise in which two or more clients have an interest, in arranging a property distribution in settlement of an estate or in mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties’ mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

2. Because confusion can arise as to the lawyer’s role where each party is not separately represented, it is important that the lawyer make clear the relationship; hence, the requirement of written consent. Moreover, a lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. See also Rule 1.06(b).

3. The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

4. In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible. Moreover, a lawyer cannot undertake common representation of clients between whom contested litigation is reasonably expected or who contemplate conten-
tious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients’ interests can be adjusted by intermediation ordinarily is not very good.

5. The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client’s case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients’ interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

6. A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation, except as to such clients. See Rules 1.03 and 1.05. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the general rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

7. Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

8. In acting as intermediary between clients, the lawyer should consult with the clients on the implications of doing so, and proceed only upon informed consent based on such a consultation. The consultation should make clear that the lawyer’s role is not that of partisanship normally expected in other circumstances.

9. Paragraph (b) is an application of the principle expressed in Rule 1.03. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

10. Under this Rule, any condition or circumstance that prevents a particular lawyer either from acting as intermediary between clients, or from representing those clients individually in connection with a matter after an unsuccessful intermediation, also prevents any other lawyer who is or becomes a member of or associates with that lawyer’s firm from doing so. See paragraphs (c) and (e).
Withdrawal

11. In the event of withdrawal by one or more parties from the enterprise, the lawyer may continue to act for the remaining parties and the enterprise. See also Rule 1.06(c)(2) which authorizes continuation of the representation with consent.

Annotations

Ethics Opinions 228, 342, 399, 408, 441, 448, 449, 453, 519

Rule 1.08 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(c) Prior to the conclusion of all aspects of the matter giving rise to the lawyer’s employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents;
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(2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.05.

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

(g) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer’s fee or expenses; and

(2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

(i) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer’s firm may engage in that conduct.

(j) As used in this Rule, “business transactions” does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.

Comment:

Transactions between Client and Lawyer

1. This rule deals with certain transactions that per se involve unacceptable conflicts of interests.

2. As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others such as banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the
lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

3. A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (b) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

4. An agreement by which a lawyer acquires literary or media rights concerning the conduct of representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (c) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer’s fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.04 and to paragraph (h) of this Rule.

Person Paying for Lawyer’s Services

5. Paragraph (e) requires disclosure to the client of the fact that the lawyer’s services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.05 concerning confidentiality and Rule 1.06 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure. Where an insurance company pays the lawyer’s fee for representing an insured, normally the insured has consented to the arrangement by the terms of the insurance contract.

Prospectively Limiting Liability

6. Paragraph (g) is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

Acquisition of Interest in Litigation

7. This Rule embodies the traditional general precept that lawyers are prohibited from acquiring a proprietary interest in the subject matter of litigation. This general precept, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for contingent fees set forth in Rule 1.04 and the exception for certain advances of the costs of litigation set forth in paragraph (d). A special instance arises when a lawyer proposes to incur litigation or other expenses with an entity in which the lawyer has a pecuniary interest. A lawyer should not incur such expenses unless the client has entered into a written agreement complying with paragraph (a) that contains a full disclosure of the
nature and amount of the possible expenses and the relationship between the lawyer and the other entity involved.

Imputed Disqualifications

8. The prohibitions imposed on an individual lawyer by this Rule are imposed by paragraph (i) upon all other lawyers while practicing with that lawyer’s firm.

Annotations


Keck, Mahin & Cate v. National Union Fire Insurance Co. of Pittsburgh, 20 S.W.3d 692 (Tex. 2000) (Advising client in writing that independent representation would be advisable was not enough to rebut presumption of unfairness for a contract prospectively limiting attorney’s malpractice liability to the client).

National Union Fire Insurance Co. of Pittsburgh v. Keck, Mahin & Cate, 154 S.W.3d 714 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (Release of future claims based on past conduct is “prospective” within the meaning of Rule 1.08(g) but evidence was sufficient to show that the release was valid).

In re Slusser, 136 S.W.3d 245 (Tex. App.—San Antonio 2004, no pet.) (Rule 1.08 permits a lawyer to acquire a lien on real property to secure his fee).

Acevedo v. Commission for Lawyer Discipline, 131 S.W.3d 99 (Tex. App.—San Antonio 2004, no pet.) (Deemed admissions may be used to establish violation of the disciplinary rules; original jurisdiction over a disciplinary proceeding is vested in the supreme court, and thus the county in which the proceeding is actually conducted is a matter of venue, not jurisdiction, and the presiding judge need not conduct its proceedings at the county seat of the county in which the case is pending).

In re Hartigan, 107 S.W.3d 684 (Tex. App.—San Antonio 2003, no pet.) (Arbitration clause in an engagement agreement did not prospectively limit an attorney’s liability in violation of Rule 1.08(g)).

Olson v. Estate of Watson, 52 S.W.3d 865 (Tex. App.—El Paso 2001, no pet.) (Lawyer’s preparation of will for client that included testamentary gift of client’s entire estate to lawyer violated Rule 1.08(b)’s prohibition of substantial gifts from client).

Stephenson v. LeBoeuf, 16 S.W.3d 829 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (Attorney did not breach any fiduciary duty to client by making a claim to client’s funds in escrow because attorney was entitled to acquire a lien to secure payment of his fees).

Shields v. Texas Scottish Rite Hospital for Crippled Children, 11 S.W.3d 457 (Tex. App.—Eastland 2000, pet. denied) (Although the disciplinary rules do not give rise to a private cause of action, a court may use the rules to determine if a contract is contrary to public policy, and thereby
excuse performance under the contract; as such, the substantial bequest to the lawyer who drafted
the decedent’s will was invalid).

*Scrivner v. Hobson*, 854 S.W.2d 148, 151–52 (Tex. App.—Houston [1st Dist.] 1993, orig. pro-
ceeding) (Under Rule 1.08(f), when attorney represented joint clients in aggregate settlement,
client’s “file” became any and all documents pertaining to case).

*Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 228–29, 232 (Tex. App.—Corpus Christi
1985, writ ref’d n.r.e.) (Failure to fully advise clients in aggregate settlement about the existence
and nature of all claims involved, total amount of settlement, and participation of each person in
settlement violated DR 5-106 and, therefore, under DR 5-107, a builder was estopped from
enforcing settlement because it was obtained in violation of the Code of Professional Responsibil-
ity).

Ethics Opinions 228, 373, 386, 395, 396, 408, 417, 446, 448, 449, 465, 476, 532, 542, 571

**Rule 1.09  Conflict of Interest: Former Client**

(a) Without prior consent, a lawyer who personally has formerly represented a client in a mat-
ter shall not thereafter represent another person in a matter adverse to the former client:

1. in which such other person questions the validity of the lawyer’s services or work
   product for the former client;

2. if the representation in reasonable probability will involve a violation of Rule 1.05;
   or

3. if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members
of or associated with a firm, none of them shall knowingly represent a client if any one of
them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then
associated with that lawyer shall not knowingly represent a client if the lawyer whose
association with that firm has terminated would be prohibited from doing so by paragraph
(a)(1) or if the representation in reasonable probability will involve a violation of Rule
1.05.

**Comment:**

1. Rule 1.09 addresses the circumstances in which a lawyer in private practice, and other law-
yers who were, are or become members of or associated with a firm in which that lawyer
practiced or practices, may represent a client against a former client of that lawyer or the
lawyer’s former firm. Whether a lawyer, or that lawyer’s present or former firm, is prohib-
ited from representing a client in a matter by reason of the lawyer’s successive government
and private employment is governed by Rule 1.10 rather than by this Rule.
2. Paragraph (a) concerns the situation where a lawyer once personally represented a client and now wishes to represent a second client against that former client. Whether such a personal attorney-client relationship existed involves questions of both fact and law that are beyond the scope of these Rules. See Preamble: Scope. Among the relevant factors, however, would be how the former representation actually was conducted within the firm; the nature and scope of the former client’s contacts with the firm (including any restrictions the client may have placed on the dissemination of confidential information within the firm); and the size of the firm.

3. Although paragraph (a) does not absolutely prohibit a lawyer from representing a client against a former client, it does provide that the latter representation is improper if any of three circumstances exists, except with prior consent. The first circumstance is that the lawyer may not represent a client who questions the validity of the lawyer’s services or work product for the former client. Thus, for example, a lawyer who drew a will leaving a substantial portion of the testator’s property to a designated beneficiary would violate paragraph (a) by representing the testator’s heirs at law in an action seeking to overturn the will.

4. Paragraph (a)’s second limitation on undertaking a representation against a former client is that it may not be done if there is a “reasonable probability” that the representation would cause the lawyer to violate the obligations owed the former client under Rule 1.05. Thus, for example, if there were a reasonable probability that the subsequent representation would involve either an unauthorized disclosure of confidential information under Rule 1.05(b)(1) or an improper use of such information to the disadvantage of the former client under Rule 1.05(b)(3), that representation would be improper under paragraph (a). Whether such a reasonable probability exists in any given case will be a question of fact.

4A. The third situation where representation adverse to a former client is prohibited is where the representation involved the same or a substantially related matter. The “same” matter aspect of this prohibition prevents a lawyer from switching sides and representing a party whose interests are adverse to a person who disclosed confidences to the lawyer while seeking in good faith to retain the lawyer. The prohibition applies when an actual attorney-client relationship was established even if the lawyer withdrew from the representation before the client had disclosed any confidential information. This aspect of the prohibition includes, but is somewhat broader than, that contained in paragraph (a)(1) of this Rule.

4B. The “substantially related” aspect, on the other hand, has a different focus. Although that term is not defined in the Rule, it primarily involves situations where a lawyer could have acquired confidential information concerning a prior client that could be used either to that prior client’s disadvantage or for the advantage of the lawyer’s current client or some other person. It thus largely overlaps the prohibition contained in paragraph (a)(2) of this Rule.

5. Paragraph (b) extends paragraph (a)’s limitations on an individual lawyer’s freedom to undertake a representation against that lawyer’s former client to all other lawyers who are or become members of or associated with the firm in which that lawyer is practicing. Thus, for example, if a client severs the attorney-client relationship with a lawyer who remains in a firm, the entitlement of that individual lawyer to undertake a representation
against that former client is governed by paragraph (a); and all other lawyers who are or become members of or associated with that lawyer’s firm are treated in the same manner by paragraph (b). Similarly, if a lawyer severs his or her association with a firm and that firm retains as a client a person whom the lawyer personally represented while with the firm, that lawyer’s ability thereafter to undertake a representation against that client is governed by paragraph (a); and all other lawyers who are or become members of or associates with that lawyer’s new firm are treated in the same manner by paragraph (b).

6. Paragraph (c) addresses the situation of former partners or associates of a lawyer who once had represented a client when the relationship between the former partners or associates and the lawyer has been terminated. In that situation, the former partners or associates are prohibited from questioning the validity of such lawyer’s work product and from undertaking representation which in reasonable probability will involve a violation of Rule 1.05. Such a violation could occur, for example, when the former partners or associates retained materials in their files from the earlier representation of the client that, if disclosed or used in connection with the subsequent representation, would violate Rule 1.05(b)(1) or (b)(3).

7. Thus, the effect of paragraph (b) is to extend any inability of a particular lawyer under paragraph (a) to undertake a representation against a former client to all other lawyers who are or become members of or associated with any firm in which that lawyer is practicing. If, on the other hand, a lawyer disqualified by paragraph (a) should leave a firm, paragraph (c) prohibits lawyers remaining in that firm from undertaking a representation that would be forbidden to the departed lawyer only if that representation would violate subparagraphs (a)(1) or (a)(2). Finally, should those other lawyers cease to be members of the same firm as the lawyer affected by paragraph (a) without personally coming within its restrictions, they thereafter may undertake the representation against the lawyer’s former client unless prevented from doing so by some other of these Rules.

8. Although not required to do so by Rule 1.05 or this Rule, some courts, as a procedural decision, disqualify a lawyer for representing a present client against a former client when the subject matter of the present representation is so closely related to the subject matter of the prior representation that confidences obtained from the former client might be useful in the representation of the present client. See Comment 17 to Rule 1.06. This so-called “substantial relationship” test is defended by asserting that to require a showing that confidences of the first client were in fact used for the benefit of the subsequent client as a condition to procedural disqualification would cause disclosure of the confidences that the court seeks to protect. A lawyer is not subject to discipline under Rule 1.05(b)(1), (3), or (4), however, unless the protected information is actually used. Likewise, a lawyer is not subject to discipline under this Rule unless the new representation by the lawyer in reasonable probability would result in a violation of those provisions.

9. Whether the “substantial relationship” test will continue to be employed as a standard for procedural disqualification is a matter beyond the scope of these Rules. See Preamble: Scope. The possibility that such a disqualification might be sought by the former client or granted by a court, however, is a matter that could be of substantial importance to the present client in deciding whether or not to retain or continue to employ a particular
lawyer or law firm as its counsel. Consequently, a lawyer should disclose those possibilities, as well as their potential consequences for the representation, to the present client as soon as the lawyer becomes aware of them; and the client then should be allowed to decide whether or not to obtain new counsel. See Rules 1.03(b) and 1.06(b).

10. This Rule is primarily for the protection of clients and its protections can be waived by them. A waiver is effective only if there is consent after disclosure of the relevant circumstances, including the lawyer’s past or intended role on behalf of each client, as appropriate. See Comments 7 and 8 to Rule 1.06.

Annotations


*In re Cerberus Capital Management, L.P.*, 164 S.W.3d 379 (Tex. 2005) (Trial court abused its discretion by disqualifying relator’s counsel based on a conflict of interest where the real party in interest executed a written waiver of any conflict of interest).

*In re A.F.*, 51 S.W.3d 848 (Tex. App.—Waco 2001), rev’d on other grounds, 113 S.W.3d 363 (Tex. 2003) (Where appellate counsel was appointed to represent husband and wife whose parental rights had been terminated, but he recognized a conflict of interest, court of appeals would abate appeal and remand to trial court to determine whether separate representation on appeal was required and, if so, whether appellate counsel could serve given prior representation of both parties).

*In re Epic Holdings, Inc.*, 985 S.W.2d 41 (Tex. 1998) (orig. proceeding) (Where client and one member of law firm both acknowledged existence of attorney-client relationship, other member of same law firm could not disavow the relationship for purposes of disqualification; corporation, which was not a named defendant in lawsuit, was nevertheless “adverse” for purposes of disqualification because the corporation was at risk of being liable for part of the defendants’ legal fees or at risk of incurring its own legal expense to avoid that liability; plaintiff’s breach of fiduciary duty claims against corporation’s directors were substantially related to attorneys’ former work for defendants in creating the corporation, and genuine threat existed that attorneys may divulge confidential information).

*National Medical Enterprises v. Godbey*, 924 S.W.2d 123 (Tex. 1996) (An attorney whose firm had represented a hospital administrator could not later represent patients against the same hospital in a matter that was substantially related to the previous matter).

*Henderson v. Floyd*, 891 S.W.2d 252 (Tex. 1995) (When an attorney may have done actual work for his former firm’s client and was exposed to confidential information, he “personally represented” his associate’s client. His new firm was thus disqualified under DR 1.09 even though the attorney did not disclose any confidential information and his new firm shielded him from contact with the litigation).
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Metropolitan Life Insurance Co. v. Syntek Finance Corp., 881 S.W.2d 319 (Tex. 1994) (Supreme court held that court of appeals improperly substituted its judgment for that of trial court in concluding that trial court abused discretion in finding no substantial relationship between former and current representations. The case discusses the “substantial relationship” test).

Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990) (Rule 1.09 did not apply in determining whether former government official should be disqualified, and under Rule 1.10 and DR 9-101(b), former government official did not need to be disqualified because official needs actual knowledge regarding a prior substantial representation, and actual knowledge cannot be imputed to a former government official on the basis of job title or statutory authority).

In re Drake, 195 S.W.3d 232 (Tex. App.—San Antonio 2006, orig. proceeding) (Although lawyer was familiar with “inner workings” of past business client, Rule 1.09 was not violated where there were no specific factual similarities between the past representation and the new case).

In re McDaniel, No. 10-04-00166-CV, 2006 WL 408397 (Tex. App.—Waco Feb. 22, 2006, no pet.) (Rule 1.09 not violated where attorney was hired to draft an instrument without giving advice with respect to the instrument because the lawyer was acting in a nonlegal capacity).

In re Gerry, 173 S.W.3d 901 (Tex. App.—Tyler 2005, orig. proceeding) (Trial court did not abuse its discretion by disqualifying husband’s lawyer in divorce proceeding where wife had previously shared confidential information with another lawyer at the husband’s law firm).

In re Bivins, 162 S.W.3d 415 (Tex. App.—Waco 2005, orig. proceeding) (Lawyer’s prior representation of a husband in a deed transaction was substantially related to the lawyer’s representation of the wife in a subsequent divorce proceeding).

Pollard v. Merkel, 114 S.W.3d 695 (Tex. App.—Dallas 2003, pet. denied) (Rule 1.09 applies to an attorney who “personally has formerly represented a client in a matter,” and under Rule 1.09(a)(3) there is a conclusive presumption that the client’s confidences have been shared with the attorney; switching sides in the same divorce proceeding would involve use of “confidential information of a former client to the disadvantage of the former client after the representation is concluded” in violation of Rule 1.05(b)(3)).

COC Services, Ltd. v. CompUSA, Inc., No. 05-01-00865-CV, 2002 WL 1792479 (Tex. App.—Dallas Aug. 6, 2002, no pet.) (Attorney not disqualified from representing franchiser although he had previously worked for firm representing franchisee but had not personally performed legal work for franchisee).

In re Roseland Oil & Gas, Inc., 68 S.W.3d 784 (Tex. App.—Eastland 2001, no pet.) (Representation that would possibly place attorney in precarious position of being forced to make the choice between zealously representing his current clients and maintaining the confidentiality of information received from his former clients undermined the confidentiality of the attorney-client relationship and warranted his disqualification from representing any defendant in oil and gas lease litigation).
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In re Chonody, 49 S.W.3d 376 (Tex. App.—Fort Worth 2000, orig. proceeding) (Husband’s motion to disqualify wife’s attorney in divorce, based on attorney’s prior representation of husband in a criminal case involving domestic violence between the parties, was insufficient in that it did not explain how the factual matters in the divorce were related to the facts in the prior criminal case).

In re Butler, 987 S.W.2d 221 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding) (Where attorney represented corporate entity in prior lawsuit and later sued closely related corporate entity, court’s inquiry in determining existence of prior attorney-client relationship should focus on whether attorney had access to privileged and confidential information, not whether attorney represented same corporate entity; trial court did not abuse discretion in finding that attorney previously represented corporate entity where evidence showed that attorney previously represented corporate affiliate that shared office, personnel, and policies; for purposes of disqualification of attorney on ground of prior representation, subsequent case involved same or substantially related matter as prior case where both cases alleged breach of the duty to defend based on erroneous denial of coverage by essentially the same insurer).

Troutman v. Ramsay, 960 S.W.2d 176 (Tex. App.—Austin 1997, orig. proceeding) (Where attorney previously represented father in his wife’s probate proceedings and drafted a quitclaim deed for his son to sign, giving up son’s claim to certain property, trial court abused its discretion in refusing to disqualify attorney from representing the son in later suit against his father seeking a declaration that the father fraudulently obtained quitclaim).

Arteaga v. Texas Department of Protective & Regulatory Services, 924 S.W.2d 756 (Tex. App.—Austin 1996, writ denied) (A lawyer violates Rule 1.09 only if the subsequent representation is actually adverse and hostile to the former client; a mere potential conflict does not suffice if there is no actual conflict. Both parents argued against termination of parental rights, so their interests were not adverse).

Arzate v. Hayes, 915 S.W.2d 616 (Tex. App.—El Paso 1996, writ dism’d) (There is a rebuttable presumption that a nonlawyer who switches sides in ongoing litigation will share confidential information with members of the new firm and disqualification may be necessary if there is a genuine threat of disclosure; however, disqualification was not required because the evidence showed that precautionary measures were taken to safeguard plaintiff’s confidential information).

Wasserman v. Black, 910 S.W.2d 564 (Tex. App.—Waco 1995, no writ) (DR 1.09(a)(2) applies when an attorney represents multiple parties and conflicts arise among them, in addition to situations when an attorney wishes to represent a new client in litigation against a former client. When a party filed a motion to disqualify the attorney within two months after the conflict arose, the delay did not constitute a waiver.).

Contico International v. Alvarez, 910 S.W.2d 29 (Tex. App.—El Paso 1995, no writ) (Defendants in personal injury case moved to disqualify plaintiff’s lawyer because he had obtained copy of the report prepared by defendants during investigation. Trial court refused to disqualify, but appeals court granted writ, holding trial court abused discretion. Even though appeals court did not find that the lawyer had actually committed misconduct, it found that his actions created a permissible presumption that he possessed defendants’ confidences.).

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Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128 (Tex. App.—Corpus Christi 1995, orig. proceeding [leave denied]) (Defendant seeking to disqualify plaintiff’s attorney on ground that new partner had previously represented codefendant failed to meet the burden of showing sharing of confidential information. Thus trial court didn’t abuse discretion in denying motion, where no one other than attorney seeking disqualification had any memory of meeting among counsel for codefendants and defense attorney’s sealed affidavit didn’t reveal with any specificity confidences she claimed were revealed to codefendants. DR 1.09 is cited for the proposition: When it is established that attorney personally represented a client and now represents another adverse to former client in substantially related matter, the attorney shall be disqualified.).

Centerline Industries v. Knize, 894 S.W.2d 874 (Tex. App.—Waco 1995, no writ) (Former client may prohibit an attorney from representing another in a matter adverse to former client if matter is substantially related to matter of former representation, notwithstanding plaintiff’s contention that the rule only applied when disclosure of confidential information was threatened and no such threat existed here because disclosure had already been made in another proceeding).

Occidental Chemical Corp. v. Brown, 877 S.W.2d 27 (Tex. App.—Corpus Christi 1994, no writ) (Law firm that hired secretary who previously worked for firm representing adverse party in personal injury action satisfied its burden of rebutting presumption that client confidences were shared, and the firm would not be disqualified from representing defendants).

HECI Exploration Co. v. Clajon Gas Co., 843 S.W.2d 622, 627 n.5 (Tex. App.—Austin 1992, writ denied) (Under Rules 1.06 and 1.09, seller waived right to disqualify purchaser’s counsel based on conflict of interest, where seller failed to move for disqualification before allowing counsel to depose witnesses and continue representation for eleven months).

Davis v. Stansbury, 824 S.W.2d 278, 284–85 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding) (Under Rule 1.09, attorney who represented wife in first and second divorces had attorney-client relationship that preceded attorney’s partner’s meeting with husband in substantially related proceeding, disqualifying partner from representing husband without wife’s consent).

Clarke v. Ruffino, 819 S.W.2d 947, 950–51 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding [writ dism’d w.o.j.] (Under Rules 1.05 and 1.09, attorney who represented client regarding property refinancing obtained confidential information, precluding his law firm from later representing a party adverse to client’s interest in property, where attorney obtained that confidential information during the course of representing client in the refinancing).

Insurance Co. of North America v. Westergren, 794 S.W.2d 812, 814 (Tex. App.—Corpus Christi 1990, orig. proceeding) (Under Rules 1.06 and 1.09, court found that where counsel signed pleadings in prior substantially related proceeding, counsel should be disqualified from representing a contractor).

Howard v. Texas Department of Human Services, 791 S.W.2d 313, 315 (Tex. App.—Corpus Christi 1990, no writ) (Under Rules 1.05, 1.06, and 1.09, attorney’s prior representation of mother in proceeding to modify conservatorship of her two children was in conflict with his desire to represent the two children ad litem in proceeding to terminate mother’s parental rights).
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Home Insurance Co. v. Marsh, 790 S.W.2d 749, 753 (Tex. App.—El Paso 1990, orig. proceeding) (Under Rule 1.09, court held that a substantial relationship existed between allegations in a malpractice case against chiropractors and anticipated allegations to be raised by insurers in response to a suit by chiropractors, causing disqualification of attorneys who previously represented chiropractors).


Perillo v. Johnson, 205 F.3d 775 (5th Cir. 2000) (The standard for establishing actual conflict of interest on the part of defense counsel applies not only to cases involving concurrent representation but also to cases involving successive representation; here, counsel’s representation of a robbery defendant, who testified against Perillo, created actual conflict burdening his representation of Perillo, and counsel’s performance in Perillo’s trial was adversely affected by such actual conflict).

In re American Airlines, Inc., 972 F.2d 605, 614–15 (5th Cir. 1992) (Under Rules 1.05 and 1.09, motion to disqualify counsel was proper method for bringing conflict of interest issues to court’s attention, and law firm’s three prior representations of airline were grounds for disqualification because the three prior suits were substantially related matters), cert. denied, 507 U.S. 912 (1993).

City of El Paso v. Salas-Porras Soule, 6 F. Supp. 2d 616 (W.D. Tex. 1998) (Law firm’s representation of plaintiff to collect on final judgment rendered against defendant was substantially related to one of firm’s attorney’s prior representation of defendant concerning tax matters, meritng disqualification of firm).

United States v. Phillips, 952 F. Supp. 480 (S.D. Tex. 1996) (Possibility that confidential information would be disclosed or used warranted disqualification of criminal defendant’s attorney where (1) attorney’s firm represented a woman convicted of a similar offense who had promised to testify for the government against defendant in exchange for the government’s recommendation of a reduction in the woman’s sentence, and (2) defendant’s counsel would have to cross-examine his firm’s own client).

Ethics Opinions 453, 472, 519, 527, 538, 574, 578

Rule 1.10 Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.
Texas Disciplinary Rules of Professional Conduct  Rule 1.10

(b) No lawyer in a firm with which a lawyer subject to paragraph (a) is associated may knowingly undertake or continue representation in such a matter unless:

(1) The lawyer subject to paragraph (a) is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is given with reasonable promptness to the appropriate government agency.

c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows or should know is confidential government information about a person or other legal entity acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person or legal entity.

d) After learning that a lawyer in the firm is subject to paragraph (c) with respect to a particular matter, a firm may undertake or continue representation in that matter only if that disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

e) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter involving a private client when the lawyer had represented that client in the same matter while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(f) As used in this rule, the term “matter” does not include regulation-making or rule-making proceedings or assignments, but includes:

(1) Any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge accusation, arrest or other similar, particular transaction involving a specific party or parties; and

(2) any other action or transaction covered by the conflict of interest rules of the appropriate government agency.

(g) As used in this rule, the term “confidential government information” means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

(h) As used in this Rule, “Private Client” includes not only a private party but also a governmental agency if the lawyer is not a public officer or employee of that agency.
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(i) A lawyer who serves as a public officer or employee of one body politic after having served as a public officer of another body politic shall comply with paragraphs (a) and (c) as if the second body politic were a private client and with paragraph (e) as if the first body politic were a private client.

Comment:

1. This Rule prevents a lawyer from exploiting public office for the advantage of a private client.

2. A lawyer licensed or specially admitted in Texas and representing a government agency is subject to the Texas Disciplinary Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.06 and the protection afforded former clients in Rule 1.09. In addition, such a lawyer is subject to this Rule and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under paragraph (a) of this Rule.

3. Where a public agency and a private client are represented in succession by a lawyer, the risk exists that power or discretion vested in public authority might be used for the special benefit of the private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer’s professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client’s adversary obtainable only through the lawyer’s government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to avoid imposing too severe a deterrent against entering public service. Although “screening” is not defined, the screening provisions contemplate that the screened lawyer has not furnished and will not furnish other lawyers with information relating to the matter, will not have access to the files pertaining to the matter, and will not participate in any way as a lawyer or adviser in the matter.

4. When the client of a lawyer in private practice is an agency of one government, that agency is a private client for purposes of this Rule. See paragraph (h). If the lawyer thereafter becomes an officer or employee of an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency, the lawyer is subject to paragraph (e). A lawyer who has been a public officer or employee of one body politic and who becomes a public officer or employee of another body politic is subject to paragraphs (a), (c) and (e). See paragraph (i). Thus, paragraph (i) protects a governmental agency without regard to whether the lawyer was or becomes a private practitioner or a public officer or employee.

5. Paragraphs (b)(1) and (d)(1) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney’s compensation to the fee in the matter in which the lawyer is disqualified.
6. Paragraph (b)(2) does not require that a lawyer give notice to the governmental agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency or affected person will have a reasonable opportunity to ascertain compliance with Rule 1.10 and to take appropriate action if necessary.

7. Paragraph (c) operates only when the lawyer in question has actual as opposed to imputed knowledge of the confidential government information.

8. Paragraphs (a) and (e) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.06 and is not otherwise prohibited by law.

9. Paragraph (e)(1) does not disqualify other lawyers in the agency with which the lawyer in question has become associated. Although the rule does not require that the lawyer in question be screened from participation in the matter, the sound practice would be to screen the lawyer to the extent feasible. In any event, the lawyer in question must comply with Rule 1.05.

10. As used in paragraph (i), “one body politic” refers to one unit or level of government such as the federal government, a state government, a county, a city or a precinct. The term does not refer to different agencies within the same body politic or unit of government.

Annotations

Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990) (Rule 1.09 did not apply in determining whether former government official should be disqualified, and under Rule 1.10 and DR 9-101(b), former government official did not need to be disqualified because official needs actual knowledge regarding a prior substantial representation, and actual knowledge cannot be imputed to a former government official on the basis of job title or statutory authority).

Hernandez v. State, 24 S.W.3d 846 (Tex. App.—El Paso 2000, pet. ref’d) (The rules and comments suggest, but do not require, that a government lawyer be screened off from a case in which he or she previously represented a party and that where a government lawyer previously represented a party in litigation against the governmental entity, the lawyer must preserve his former client’s confidentiality under Rule 1.05).

Clarke v. State, 928 S.W.2d 709 (Tex. App.—Fort Worth 1996, no writ) (In criminal cases, trial court may not disqualify the district attorney’s office on the basis of a conflict of interest that does not rise to the level of a due process violation).

Marquez v. State Farm Lloyd’s of Dallas, Texas, 838 S.W.2d 828, 829–30 (Tex. App.—San Antonio 1992, no writ) (Under DR 9-101(b), former district attorney was not disqualified from representing insurer who was sued by insureds, who could potentially be charged with arson in transaction in question).
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Ethics Opinions 382, 451, 538, 544, 551, 574

Rule 1.11  
Adjudicatory Official or Law Clerk

(a) A lawyer shall not represent anyone in connection with a matter in which the lawyer has passed upon the merits or otherwise participated personally and substantially as an adjudicatory official or law clerk to an adjudicatory official, unless all parties to the proceeding consent after disclosure.

(b) A lawyer who is an adjudicatory official shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a pending matter in which that official is participating personally and substantially. A lawyer serving as a law clerk to an adjudicatory official may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the clerk has notified the adjudicatory official.

(c) If paragraph (a) is applicable to a lawyer, no other lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

   (1) the lawyer who is subject to paragraph (a) is screened from participation in the matter and is apportioned no part of the fee therefrom; and

   (2) written notice is promptly given to the other parties to the proceeding.

Comment:

1. This Rule generally parallels Rule 1.10. The term “personally and substantially” signifies that a judge who was a member of a multi-member court and thereafter left judicial office to practice law is not prohibited from representing a client in a matter pending in the court but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in matters where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comments to Rule 1.10.

2. The term “Adjudicatory Official” includes not only judges but also comparable officials serving on tribunals, such as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, as well as lawyers who serve as part-time judges. Compliance provisions B(2) and C of the Texas Code of Judicial Conduct provide that a part-time judge or judge pro tempore may not “act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.” Although phrased differently from this rule, those provisions correspond in meaning.

3. Some law clerks have not been licensed as lawyers at the time they commence service as law clerks. Obviously, paragraph (b) cannot apply to a law clerk until the clerk has been licensed as a lawyer. Paragraph (a) applies, however, to a lawyer without regard to
whether the lawyer had been licensed at the time of the service as a law clerk, and once that law clerk is licensed as a lawyer and joins a firm, paragraph (c) applies to the firm.

4. **Paragraph (c) does not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. It prohibits directly relating the lawyer’s compensation to the fee in the matter in which the lawyer is disqualified.**

*Annotations*

Ethics Opinions 429, 451, 541

**Rule 1.12 Organization as a Client**

(a) A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity’s duly authorized constituents, in the situations described in paragraph (b) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.

(b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:

1. an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;

2. the violation is likely to result in substantial injury to the organization; and

3. the violation is related to a matter within the scope of the lawyer’s representation of the organization.

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
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(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(d) Upon a lawyer’s resignation or termination of the relationship in compliance with Rule 1.15, a lawyer is excused from further proceeding as required by paragraphs (a), (b) and (c), and any further obligations of the lawyer are determined by Rule 1.05.

(e) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.

Comment:

The Entity as the Client

1. A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. Unlike individual clients who can speak and decide finally and authoritatively for themselves, an organization can speak and decide only through its agents or constituents such as its officers or employees. In effect, the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the organizational client.

2. As used in this Rule, the constituents of an organizational client, whether incorporated or an unincorporated association, include its directors, officers, employees, shareholders, members, and others serving in capacities similar to those positions or capacities. This Rule applies not only to lawyers representing corporations but to those representing an organization, such as an unincorporated association, union, or other entity.

3. When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.05. Thus, by way of example, if an officer of an organizational client requests its lawyers to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are covered by Rule 1.05. The lawyer may not disclose to such constituents information relating to the representation except for disclosures permitted by Rule 1.05.

Clarifying the Lawyer’s Role

4. There are times when the organization’s interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyers should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that
such person may wish to obtain independent representation. Care should be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned. Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

5. A lawyer representing an organization may, of course, also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.06. If the organization’s consent to the dual representation is required by Rule 1.06, the consent of the organization should be given by the appropriate official or officials of the organization other than the individual who is to be represented, or by the shareholders.

Decisions by Constituents

6. When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer’s province. However, different considerations arise when the lawyer knows, in regard to a matter within the scope of the lawyer’s responsibility, that the organization is likely to be substantially injured by the action of a constituent that is in violation of law or in violation of a legal obligation to the organization. In such circumstances, the lawyer must take reasonable remedial measure. See paragraph (b). It may be reasonably necessary, for example, for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization’s interest. At some point it may be useful or essential to obtain an independent legal opinion.

7. In some cases, it may be reasonably necessary for the lawyer to refer the matter to the organization’s highest responsible authority. See paragraph (c)(3). Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere, such as in the independent directors of a corporation. Even that step may be unsuccessful. The ultimate and difficult ethical question is whether the lawyer should circumvent the organization’s highest authority when it persists in a course of action that is clearly violative of law or of a legal obligation to the organization and is likely to result in substantial injury to the organization. These situations are governed by Rule 1.05; see paragraph (d) of this Rule. If the lawyer does not violate a provision of Rule 1.02 or Rule 1.05 by doing so, the lawyer’s further remedial action, after exhausting remedies within the organization, may include
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revealing information relating to the representation to persons outside the organization. If the conduct of the constituent of the organization is likely to result in death or serious bodily injury to another, the lawyer may have a duty of revelation under Rule 1.05(e). The lawyer may resign, of course, in accordance with Rule 1.15, in which event the lawyer is excused from further proceeding as required by paragraphs (a), (b), and (c), and any further obligations are determined by Rule 1.05.

Relation to Other Rules

8. The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule is consistent with the lawyer’s responsibility under Rules 1.05, 1.08, 1.15, 3.03, and 4.01. If the lawyer’s services are being used by an organization to further a crime or fraud by the organization, Rule 1.02(c) can be applicable.

Government Agency

9. The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See Preamble: Scope.

Derivative Actions

10. Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

11. The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer’s client does not alone resolve the issue. Most derivative actions are a normal incident of an organization’s affairs, to be defended by the organization’s lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer’s duty to the organization and the lawyer’s relationship with those managing or controlling its affairs.

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Annotations

*Sutton v. Mankoff*, 915 S.W.2d 152 (Tex. App.—Fort Worth 1996, writ denied) (A lawyer hired to represent an organization represents the organization, not the individual members).

*In re Office Products of America, Inc.*, 136 B.R. 675 (Bankr. W.D. Tex. 1992) (Under Rule 1.12(a), counsel for Chapter 11 debtor-in-possession did not have conflict resulting from representation of both debtor and debtor’s directors, officers, and shareholders).

Ethics Opinions 442, 451, 476, 564

**Rule 1.13 Conflicts: Public Interests Activities**

A lawyer serving as a director, officer or member of a legal services, civic, charitable or law reform organization, apart from the law firm in which the lawyer practices, shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision would violate the lawyer’s obligations to a client under Rule 1.06; or

(b) where the decision could have a material adverse effect on the representation of any client of the organization whose interests are adverse to a client of the lawyer.

**Comment:**

1. Lawyers are encouraged to serve as directors, officers or members of legal services, civic, charitable or law reform organizations, and, with two exceptions, they may do so notwithstanding that the organization either itself has interests adverse to a client of the lawyer or else serves persons having such adverse interests.

2. When the lawyer is a director, officer or member of a legal services organization, further problems can arise when a client served by the organization has interests adverse to those of a client served by the lawyer. A lawyer-client relationship with persons served by the organization does not result solely from the lawyer’s service in those capacities. Nonetheless, if the lawyer were to participate in an action or decision of the organization concerning that representation, a real danger of having this quality of the organizational client’s representation being dictated by its adversary would be presented. To avoid that possibility, paragraph (b) prohibits a lawyer’s participation in actions or decisions of the organization that could have a material adverse effect on the representation of any client of the organization, if that client’s interests are adverse to those of a client of the lawyer.

3. Law reform organizations (like civic and charitable organizations) generally do not have clients, in which event paragraph (b) does not apply. For reasons of public policy, it is not generally considered a conflict of interest for a lawyer to engage in law reform activities even though such activities are adverse to the interests of the lawyer’s private clients. A lawyer’s representation of a client does not constitute an endorsement of the client’s political, economic, social or moral views, nor does he forego his own. When the lawyer
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knows that the interests of a client may be materially benefitted by a law reform decision in which the lawyer participates, the lawyer should disclose that fact but need not identify the client.

Annotations
Ethics Opinions 443, 451

Rule 1.14  Safekeeping Property

(a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Such funds shall be kept in a separate account, designated as a “trust” or “escrow” account, maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and other person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. All funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separated by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately.

Comment:

1. A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer’s business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. Paragraph (a) requires that complete records of the funds and other property be maintained.

2. Lawyers often receive funds from third parties from which the lawyer’s fee will be paid. These funds should be deposited into a lawyer’s trust account. If there is risk that the client
may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer’s contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed to those entitled to receive them by virtue of the representation. A lawyer should not use even that portion of trust account funds due to the lawyer to make direct payment to general creditors of the lawyer of the lawyer’s firm, because such a course of dealing increases the risk that all the assets of that account will be viewed as the lawyer’s property rather than that of clients, and thus as available to satisfy the claims of such creditors. When a lawyer receives from a client monies that constitute a prepayment of a fee and that belongs to the client until the services are rendered, the lawyer should handle the fund in accordance with paragraph (c). After advising the client that the service has been rendered and the fee earned, and in the absence of a dispute, the lawyer may withdraw the fund from the separate account. Paragraph (c) does not prohibit participation in an IOLTA or similar program.

3. Third parties, such as client’s creditors, may have just claims against funds or other property in a lawyer’s custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

4. The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal service. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

5. The “client’s security fund” in Texas provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer.

Annotations

Bellino v. Commission for Lawyer Discipline, 124 S.W.3d 380 (Tex. App.—Dallas 2004, pet. denied) (Lawyer failed to hold a client’s funds separate from his own funds, failed to render a full accounting on behalf of his client, and failed to promptly deliver funds to a third party).

Paulsen v. State Bar of Texas, 55 S.W.3d 39 (Tex. App.—Austin 2001, pet. denied) (Compliance with IOLTA rules does not violate Rule 1.14 as there is no authority that clients are entitled to receive IOLTA interest).

Fry v. Commission for Lawyer Discipline, 979 S.W.2d 331 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (Attorney and client had dispute over ownership of proceeds from the sale of client’s home and that attorney violated Rule 1.14(a)–(c) by not maintaining client funds in his client trust account until the dispute was resolved).
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Brown v. Commission for Lawyer Discipline, 980 S.W.2d 675 (Tex. App.—San Antonio 1998, no pet.) (Consent is not an exception to Rule 1.14’s prohibition on commingling; lawyer was “in possession” of funds even though the account was in both lawyer’s and client’s names).

Wade v. Commission for Lawyer Discipline, 961 S.W.2d 366 (Tex. App.—Houston 1997, no pet.) (Evidence that clients had to sue former attorney to get accounting of fees and expenses was sufficient to establish violation of rule requiring prompt accounting of client funds).

Butler v. Commission for Lawyer Discipline, 928 S.W.2d 659 (Tex. App.—Corpus Christi 1996, no writ) (Defense attorney had an interest in the settlement and thus attorney had a duty to keep that portion of the settlement separate until there was an accounting and severance of that interest).

State Bar of Texas v. Gailey, 889 S.W.2d 519 (Tex. App.—Houston [14th Dist.] 1994, no writ) (No violation of DR 9-102A, now DR 1.14, though Bar wanted to make the attorney strictly liable if the monthly bank statement of the client trust fund reflected balance below that which attorney held in trust, regardless of whether bank failed to credit deposit timely, the client suffered no harm, and the attorney didn’t misappropriate funds).

Avila v. Havana Painting Co., 761 S.W.2d 398, 400 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (Under DR 9-102(B), evidence was sufficient to show that attorney breached his fiduciary duty by failing to deliver to client funds collected from client’s account debtor).

Griffith v. Geffen & Jacobson, P.C., 693 S.W.2d 724, 728 (Tex. App.—Dallas 1985, no writ) (Under DR 4-101 and DR 9-102, attorney could withhold client’s papers until amounts due were paid).

Archer v. State, 548 S.W.2d 71, 74 (Tex. Civ. App.—El Paso 1977, writ ref’d n.r.e.) (Under DR 9-102, depositing client’s funds into general business bank account and attempting to get client to sign false affidavit constituted violation of the Code of Professional Responsibility and warranted two-year suspension).

Barron v. Countryman, 432 F.3d 590 (5th Cir. 2005) (Advance payment retainer collected by debtor’s attorney in Chapter 13 case became attorney’s property on receipt and did not have to be held in separate trust account).

In re Dixon, 143 B.R. 671, 677–78 (Bankr. N.D. Tex. 1992) (Under DR 2-106 and DR 2-110(A)(3), attorney was ethically required to hold retainer funds in a trust account, regardless of how he labeled them, since attorney had knowledge of impending bankruptcy and likely dispute over ownership of funds).

Ethics Opinions 391, 404, 411, 421, 431, 444, 570

Rule 1.15 Declining or Terminating Representation

(a) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, except as stated in paragraph (c), from the representation of a client, if:
(1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;

(2) the lawyer’s physical, mental or psychological condition materially impairs the lawyer’s fitness to represent the client; or

(3) the lawyer is discharged, with or without good cause.

(b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes may be criminal or fraudulent;

(3) the client has used the lawyer’s services to perpetrate a crime or fraud;

(4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services, including an obligation to pay the lawyer’s fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

Comment:

1. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, and without improper conflict of interest. See generally Rules 1.01, 1.06, 1.07, 1.08, and 1.09. Having accepted the representation, a lawyer normally should
endeavor to handle the matter to completion. Nevertheless, in certain situations the lawyer must terminate the representation and in certain other situations the lawyer is permitted to withdraw.

Mandatory Withdrawal

2. A lawyer ordinarily must decline employment if the employment will cause the lawyer to engage in conduct that the lawyer knows is illegal or that violates the Texas Disciplinary Rules of Professional Conduct. Rule 1.15(a)(1); cf. Rules 1.02(c), 3.01, 3.02, 3.03, 3.04, 3.08, 4.01, and 8.04. Similarly, paragraph (a)(1) of this Rule requires a lawyer to withdraw from employment when the lawyer knows that the employment will result in a violation of a rule of professional conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may have made such a suggestion in the ill-founded hope that a lawyer will not be constrained by a professional obligation. Cf. Rule 1.02(c) and (d).

3. When a lawyer has been appointed to represent a client and in certain other instances in litigation, withdrawal ordinarily requires approval of the appointing authority or presiding judge. See also Rule 6.01. Difficulty may be encountered if withdrawal is based on the client’s demand that the lawyer engage in unprofessional conduct. The tribunal may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. See also Rule 1.06(e).

Discharge

4. A client has the power to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer’s services, and paragraph (a) of this Rule requires that the discharged lawyer withdraw. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

5. Whether a client can discharge an appointed counsel depends on the applicable law. A client seeking to do so should be given full explanation of the consequences. In some instances the consequences may include a decision by the appointing authority or presiding judge that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

Mentally Incompetent Client

6. If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer (see paragraphs 11 and 12 of Comment to Rule 1.02), and in any event the discharge may be seriously adverse to the client’s interests. The lawyer should make special effort to help the incompetent client consider the consequences (see paragraph 5 of Comment to Rule 1.03) and in some situations may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.02(e).
Optional Withdrawal

7. Paragraph (b) supplements paragraph (a) by permitting a lawyer to withdraw from representation in some certain additional circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client’s interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. A lawyer is not required to discontinue the representation until the lawyer knows the conduct will be illegal or in violation of these rules, at which point the lawyer’s withdrawal is mandated by paragraph (a)(1). Withdrawal is also permitted if the lawyer’s services were misused in the past. The lawyer also may withdraw where the client insists on pursuing a repugnant or imprudent objective or one with which the lawyer has fundamental disagreement. A lawyer may withdraw if the client refuses, after being duly warned, to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

8. Withdrawal permitted by paragraph (b)(2) through (7) is optional with the lawyer even though the withdrawal may have a material adverse effect upon the interests of the client.

Assisting the Client Upon Withdrawal

9. In every instance of withdrawal and even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. See paragraph (d). The lawyer may retain papers as security for a fee only to the extent permitted by law.

10. Other rules, in addition to Rule 1.15, require or suggest withdrawal in certain situations. See Rules 1.01, 1.05 Comment 22, 1.06(e) and 1.07(c), 1.11(c), 1.12(d), and 3.08(a).

Annotations


Villegas v. Carter, 711 S.W.2d 624, 626–27 (Tex. 1986) (Under DR 2-110(A)(2), client was entitled to continuance when his attorney withdrew, at no fault of client, and attorney refused to turn over files to substituted counsel).

Buntion v. Harmon, 827 S.W.2d 945, 948–49 n.3 (Tex. Crim. App. 1992, orig. proceeding) (en banc) (Under Rule 1.15(c), defendant was entitled to mandamus relief to vacate order replacing appointed counsel in capital murder trial where trial judge had offered no principled reason for replacing counsel other than his own feelings and preferences).

Ex parte Axel, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988) (en banc) (Under DR 2-110(A), withdrawal was improper where allegedly indigent defendant retained trial counsel who knew that
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defendant desired to file appeal but failed to assist in giving notice of appeal, particularly because there was issue as to defendant’s indigency when counsel withdrew).

_Ward v. State_, 740 S.W.2d 794, 797 (Tex. Crim. App. 1987) (en banc) (Indigent was denied effective assistance of counsel when his appointed attorney failed to properly withdraw under DR 2-110(A), even though he believed that his representation ceased after trial).

_Hahn v. Whiting Petroleum Corp._, 171 S.W.3d 307 (Tex. App.—Corpus Christi 2005, no pet.) (Lawyer had duty to give the defendant reasonable notice that he could not represent him because of a conflict of interest).

_In re Daniels_, 138 S.W.3d 31 (Tex. App.—San Antonio 2004, orig. proceeding) (Trial court abused its discretion in denying attorney’s motion to withdraw where attorney demonstrated that (1) the client failed to substantially fulfill its obligations under the parties’ agreement, including failing to pay fees; (2) the client’s nonpayment of fees would result in an unreasonable financial burden because prior delinquent payments and estimated fees for upcoming trial totaled approximately $55,000; and (3) the client and his mother rendered continued representation difficult through noncooperation, verbal attacks, and hiring another lawyer who threatened to sue the attorney).

_Acevedo v. Commission for Lawyer Discipline_, 131 S.W.3d 99 (Tex. App.—San Antonio 2004, no pet.) (Deemed admissions may be used to establish violation of the disciplinary rules; original jurisdiction over a disciplinary proceeding is vested in the supreme court, and thus the county in which the proceeding is actually conducted is a matter of venue, not jurisdiction, and the presiding judge need not conduct its proceedings at the county seat of the county in which the case is pending).

_Bellino v. Commission for Lawyer Discipline_, 124 S.W.3d 380 (Tex. App.—Dallas 2004, pet. denied) (Evidence was sufficient to support jury verdict that lawyer failed to return unearned fee where he had promised to obtain green cards for clients within one year or refund his fees but never did so).

_Eureste v. Commission for Lawyer Discipline_, 76 S.W.3d 184 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (Abrupt withdrawal from representation and failing to communicate the withdrawal clearly and adequately attend to the client’s interests is a violation of the lawyer’s duties on withdrawal).

_Hines v. Commission for Lawyer Discipline_, 28 S.W.3d 697 (Tex. App.—Corpus Christi 2000, no pet.) (Lawyer did not properly terminate his representation of the client by failing to communicate with the client despite the fact that the client did not have a written contract with the lawyer, the client had never paid for appellate representation, the lawyer was not the attorney of record in the matter, and no evidence of an adverse judgment against the client was presented).

_Hawkins v. Commission for Lawyer Discipline_, 988 S.W.2d 927 (Tex. App.—El Paso 1999, pet. denied) (Appointed lawyer’s obligation to continue representing a client when ordered to do so by a court offers the lawyer protection against charges of wrongdoing based on a lack of skill in criminal law; the language of Rule 3.04 entitling a lawyer to disobey an obligation to the court by
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doing so openly on an assertion that no valid obligation exists is a general rule that is not applicable when it is contrary to a court’s specific order that the lawyer to continue representing a client under Rule 1.15).

_Weiss v. Commission for Lawyer Discipline, 981 S.W.2d 8 (Tex. App.—San Antonio 1998, no pet)_. (Jury finding not supported by evidence that attorney violated Rule 1.15 by failing to return photographs to client because failure did not prejudice client’s case).

_Belt v. Commission for Lawyer Discipline, 970 S.W.2d 571 (Tex. App.—Dallas 1997, no pet.)_. (By giving client only thirty-one days to find other representation, lawyer did not protect client’s interest to the extent reasonably practicable on termination of his representation).

_Medrano v. Reyes, 902 S.W.2d 176 (Tex. App.—Eastland 1995, no writ)_. (Where record conclusively established that Medranos received a letter from the firm informing them that the firm was withdrawing, the firm was not liable for failing to file wrongful death action on Medranos’ behalf prior to running of the statute of limitations).

_Wenzy v. State, 855 S.W.2d 47 (Tex. App.—Houston [14th Dist.] 1993, writ ref’d)_. (Criminal defendant’s attorney abrogated duty to represent defendant to fullest ability. The attorney did not cross-examine any state witnesses, call any defense witnesses, or put on evidence, and waived final argument. Case reversed and remanded. Under above rule, “when ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating representation.”).

_Heard v. Liberty Mutual Fire Insurance Co., 828 S.W.2d 457, 459 (Tex. App.—El Paso 1992, writ denied)_. (Whether client had good cause to discharge attorney under Rule 1.15(a)(3) had no effect on fees due attorney).

_Vander Voort v. State Bar of Texas, 802 S.W.2d 332, 333–34 (Tex. App.—Houston [1st Dist.] 1990, writ denied)_. (Finding that withdrawal of counsel was improper under DR 2-110(A)(2) because attorney neither communicated his withdrawal to client nor delivered files to client was upheld by evidence presented).

_Staples v. McKnight, 763 S.W.2d 914, 916–17 & nn.1, 3 (Tex. App.—Dallas 1988, writ denied)_. (Absent any evidence that client intended to offer perjured testimony, no evidence existed to support finding that counsel had just cause or legal excuse to withdraw under DR 2-110(B) & (C) as required for counsel to recover on contingent fee agreement).

_Rocha v. Ahmad, 676 S.W.2d 149, 156 (Tex. App.—San Antonio 1984, writ dism’d)_. (Under DR 2-110 and after filing an answer on behalf of two parties, attorney could not decline to represent one party without withdrawing from case with leave of court).

_Augustson v. Linea Aerea Nacional-Chile S.A. (LAN-Chile), 76 F.3d 658 (5th Cir. 1996)_. (Just cause to withdraw under Rule 1.15 does not necessarily imply cause to receive compensation; just cause must exist for attorney’s withdrawal, and a fundamental disagreement between attorney and client regarding an objective that is within the purview of the client and is neither illegal nor frivolous, while possibly sufficient to allow the attorney to withdraw, is not sufficient to allow
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the attorney to withdraw and collect on their contingency agreement with the client; a client’s refusal to accept the advice of counsel to pursue settlement is not a constructive discharge of the counsel).

Ethics Opinions 374, 376, 395, 404, 411, 431, 464, 557, 565, 570

II. Counselor

Rule 2.01  Advisor

In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment:

Scope of Advice

1. A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

2. Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

3. A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer’s responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

4. Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer’s advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.
Offering Advice

5. In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client may require that the lawyer act if the client’s course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client’s affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client’s interest.

Intermediary

6. In regard to a lawyer serving as intermediary for clients with conflicting interests, see Rule 1.07.

Annotations

Canales v. National Union Fire Insurance Co., 763 S.W.2d 20, 23 (Tex. App.—Corpus Christi 1989, writ denied) (Not disclosing fee-sharing agreement was proper under DR 5-107(A)).

State v. Baker, 559 S.W.2d 145, 146 (Tex. Civ. App.—Austin 1977, writ ref’d n.r.e.) (Trial court’s exercise of discretion in determining punishment for disciplinary rules violation of DR 5-107 was binding on court of civil appeals).

Ethics Opinions 364, 373, 382, 417, 446, 476, 533, 543, 555, 557, 563

Rule 2.02 Evaluation for Use by Third Persons

A lawyer shall not undertake an evaluation of a matter affecting a client for the use of someone other than the client unless:

(a) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client; and

(b) the client consents after consultation.

Comment:

Definition

1. An evaluation may be performed at the client’s direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities
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laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

2. Lawyers for the government may be called upon to serve as advisors or as evaluators. A lawyer for the government serves as advisor when the lawyer is an advocate for a government agency or is a counselor for a government agency. When serving as an advisor the rule of confidentiality of information applies. See Rules 1.05 and 2.01.

3. A lawyer for the government serves as evaluator when the lawyer’s official responsibility is to render opinions establishing the limits on authorized government activity. In that situation this Rule applies.

4. In addition to serving as advisors or as evaluators, lawyers may be called upon to serve as investigators. When serving as investigator, the identity of the client is critical, because only the client has a confidential relationship with the lawyer. See Rule 1.05. Thus, a lawyer who makes an investigative contact with a non-client in circumstances which might cause the non-client to believe that the lawyer is representing him in the matter should make that non-client aware that rules concerning client loyalty and confidentiality are not applicable. See Rule 1.05. See also Rule 1.12(e).

Third Persons

5. When the evaluation is intended for the information or use of a third person, the evaluation involves a departure from the normal client-lawyer relationship. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer’s responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

6. The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. See Rule 1.02. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refused to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer’s obligations are determined by law, having reference to the terms of the client’s agreement and the surrounding circumstances.
Financial Auditor’s Requests for Information

7. When a question concerning the legal situation of a client arises at the instance of the client’s financial auditor and the question is referred to the lawyer, any response by the lawyer should be made in accordance with procedures recognized in the legal profession.

Annotations

First Municipal Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, 648 S.W.2d 410, 413–14 (Tex. App.—Dallas 1983, writ ref’d n.r.e.) (Under Restatement (Second) of Torts § 552 (1977), attorneys hired by vendor of computer system to prepare opinion of legality of an issue owed no duty to company providing financing for system).

Ethics Opinions 373, 417, 446, 476

III. Advocate

Rule 3.01 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

Comment:

1. The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, affects the limits within which an advocate may proceed. Likewise, these Rules impose limitations on the types of actions that a lawyer may take on behalf of his client. See Rules 3.02–3.06, 4.01–4.04, and 8.04. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change.

2. All judicial systems prohibit, at a minimum, the filing of frivolous or knowingly false pleadings, motions or other papers with the court or the assertion in an adjudicatory proceeding of a knowingly false claim or defense. A filing or assertion is frivolous if it is made primarily for the purpose of harassing or maliciously injuring a person. It also is frivolous if the lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law.

3. A filing or contention is frivolous if it contains knowingly false statements of fact. It is not frivolous, however, merely because the facts have not been first substantiated fully or because the lawyer expects to develop vital evidence only by discovery. Neither is it frivolous even though the lawyer believes that the client’s position ultimately may not prevail. In addition, this Rule does not prohibit the use of a general denial or other pleading to the extent authorized by applicable rules of practice or procedure. Likewise, a lawyer for a
defendant in any criminal proceeding or for the respondent in a proceeding that could result in commitment may so defend the proceeding as to require that every element of the case be established.

4. A lawyer should conform not only to this Rule’s prohibition of frivolous filings or assertions but also to any more stringent applicable rule of practice or procedure. For example, the duties imposed on a lawyer by Rule 11 of the Federal Rules of Civil Procedure exceed those set out in this Rule. A lawyer must prepare all filings subject to Rule 11 in accordance with its requirements. See Rule 3.04(c)(1).

Annotations

Jordan v. State, 979 S.W.2d 75 (Tex. App.—Austin 1998), aff’d, 36 S.W.3d 871 (Tex. Crim. App. 2001) (Brief filed by court-appointed lawyer met the Anders requirements for attorney’s withdrawal from appeal by presenting a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced).

Bond v. State, 176 S.W.3d 397 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (Lawyer’s argument concerning double jeopardy went beyond the limits of zealous advocacy and lawyer misrepresented facts, distorted the record, and falsely accused the trial court of unprofessional conduct).

Nguyen v. State, 11 S.W.3d 376 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (Retained counsel can move to withdraw from representation without the necessity of following Anders procedure when no meritorious basis for appeal exists).

Johnson v. State, 885 S.W.2d 641 (Tex. App.—Waco 1995, writ ref’d) (Defendant’s right to assistance of counsel doesn’t include right to have attorney urge frivolous appeals; if attorney considers appeal lacks merit, he must so inform client and refuse to prosecute appeal).

Ibarra v. State, 782 S.W.2d 234 (Tex. App.—Houston [14th Dist.] 1989, no writ) (Attorney’s failure to distinguish prior appeal arising from same facts before same court constituted “advanc[ing] a claim that is unwarranted under existing law” in violation of former DR 7-102(A)(2) [Note: this conduct would likely violate current Rule 3.01, especially in light of the similarity between Comment 2 thereto and former DR 7-102(A)(2).]).

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Rule 3.02 Minimizing the Burdens and Delays of Litigation

In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.

Comment:

1. This Rule addresses those situations where a lawyer or the lawyer’s client perceive the client’s interests as served by conduct that delays resolution of the matter or that increases the costs or other burdens of a case. Because such tactics are frequently an appropriate way
of achieving the legitimate interests of the client that are at stake in the litigation, only those instances that are “unreasonable” are prohibited. As to situations where such tactics are inconsistent with the client’s interests, see Rule 1.01. As to those where the lawyer’s conduct is motivated primarily by his desire to receive a larger fee, see Rule 1.04 and Comment, paragraph 6 thereto.

2. A lawyer’s obligations under this Rule are substantially fulfilled by complying with Rules 3.01, 3.03, and 3.04 as supplemented by applicable rules of practice or procedure. See paragraph 4 to the Comment to Rule 3.01.

Unreasonable Delay

3. Dilatory practices indulged in merely for the convenience of lawyers bring the administration of justice into disrepute and normally will be “unreasonable” within the meaning of this Rule. See also Rule 1.01(b) and (c) and paragraphs 6 and 7 of the Comment thereto. This Rule, however, does not require a lawyer to eliminate all conflicts between the demands placed on the lawyer’s time by different clients and proceedings. Consequently, it is not professional misconduct either to seek (or as a matter of professional courtesy, to grant) reasonable delays in some matters in order to permit the competent discharge of a lawyer’s multiple obligations.

4. Frequently, a lawyer seeks a delay in some aspect of a proceeding in order to serve the legitimate interests of the client rather than merely the lawyer’s own interests. Seeking such delays is justifiable. For example, in order to represent the legitimate interests of the client effectively, a diligent lawyer representing a party named as a defendant in a complex civil or criminal action may need more time to prepare a proper response than allowed by applicable rules of practice or procedure. Similar considerations may pertain in preparing responses to extensive discovery requests. Seeking reasonable delays in such circumstances is both the right and the duty of a lawyer.

5. On the other hand, a client may seek to have a lawyer delay a proceeding primarily for the purpose of harassing or maliciously injuring another. Under this Rule, a lawyer is obliged not to take such an action. See also Rule 3.01. It is not a justification that similar conduct is often tolerated by the bench and the bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay undertaken for the purpose of harassing or malicious injuring. The fact that a client realizes a financial or other benefit from such otherwise unreasonable delay does not make that delay reasonable.

Unreasonable Costs and Other Burdens of Litigation

6. Like delay, increases in the costs or other burdens of litigation may be viewed as serving a wide range of interests of the client. Many of these interests are entirely legitimate and merit the most stringent protection. Litigation by its very nature often is costly and burdensome. This Rule does not subject a lawyer to discipline for taking any actions not otherwise prohibited by these Rules in order to fully and effectively protect the legitimate interests of a client that are at stake in litigation.
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7. Not all conduct that increases the costs or other burdens of litigation, however, can be justified in this manner. One example of such impermissible conduct is a lawyer who counsels or assists a client in seeking a multiplication of the costs or other burdens of litigation as the primary purpose, because the client perceives himself as more readily able to bear those burdens than is the opponent, and so hopes to gain an advantage in resolving the matter unrelated to the merits of the client’s position.

Annotations

Resolution Trust Corp. v. Tarrant County Appraisal District, 926 S.W.2d 797 (Tex. App.—Fort Worth 1996, no writ) (RTC filed suit and on appeal asserted that the trial court lacked jurisdiction! DRs 3.01, 3.02, and 3.03 collectively prohibit lawyers from abusing the legal process with frivolous lawsuits, from actions that unreasonably increase the costs of litigation, and from failing to disclose to the court a material fact or a legal argument).

In re Office Products of America, Inc., 136 B.R. 675 (Bankr. W.D. Tex. 1992) (Discharged law firm is obligated to cooperate with discharging client in making change of representation as efficient as possible and is, therefore, entitled to recover costs incurred in transferring records, materials, and information relating to case to newly hired law firm).

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.

(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.
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Comment:

1. The advocate’s task is to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate’s duty of candor to the tribunal.

Factual Representations by a Lawyer

2. An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer. Compare Rule 3.01. However, an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or a representation of fact in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.02(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. See the Comments to Rules 1.02(c) and 8.04(a).

Misleading Legal Argument

3. Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but should recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(4), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Ex Parte Proceedings

4. Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of unprivileged material facts known to the lawyer if the lawyer reasonably believes the tribunal will not reach a just decision unless informed of those facts.

Anticipated False Evidence

5. On occasion a lawyer may be asked to place into evidence testimony or other material that the lawyer knows to be false. Initially in such situations, a lawyer should urge the client or other person involved to not offer false or fabricated evidence. However, whether such
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evidence is provided by the client or by another person, the lawyer must refuse to offer it, regardless of the client’s wishes. As to a lawyer’s right to refuse to offer testimony or other evidence that the lawyer believes is false, see paragraph 15 of this Comment.

6. If the request to place false testimony or other material into evidence came from the lawyer’s client, the lawyer also would be justified in seeking to withdraw from the case. See Rules 1.15(a)(1) and (b)(2), (4). If withdrawal is allowed by the tribunal, the lawyer may be authorized under Rule 1.05(c)(7) to reveal the reasons for that withdrawal to any other lawyer subsequently retained by the client in the matter; but normally that rule would not allow the lawyer to reveal that information to another person or to the tribunal. If the lawyer either chooses not to withdraw or is not allowed to do so by the tribunal, the lawyer should again urge the client not to offer false testimony or other evidence and advise the client of the steps the lawyer will take if such false evidence is offered. Even though the lawyer does not receive satisfactory assurances that the client or other witness will testify truthfully as to a particular matter, the lawyer may use that person as a witness as to other matters that the lawyer believes will not result in perjured testimony.

Past False Evidence

7. It is possible, however, that a lawyer will place testimony or other material into evidence and only later learn of its falsity. When such testimony or other evidence is offered by the client, problems arise between the lawyer’s duty to keep the client’s revelations confidential and the lawyer’s duty of candor to the tribunal. Under this Rule, upon ascertaining that material testimony or other evidence is false, the lawyer must first seek to persuade the client to correct the false testimony or to withdraw the false evidence. If the persuasion is ineffective, the lawyer must take additional remedial measures.

8. When a lawyer learns that the lawyer’s services have been improperly utilized in a civil case to place false testimony or other material into evidence, the rule generally recognized is that the lawyer must disclose the existence of the deception to the court or to the other party, if necessary rectify the deception. See paragraph (b) and Rule 1.05(h). See also Rule 1.05(g). Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal by the lawyer but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer would be aiding in the deception of the tribunal or jury, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.02(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

9. Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that in such cases, as in others, the lawyer should seek to persuade the client to refrain from suborning or offering perjurious testimony or other false evidence, there has been dispute concerning the lawyer’s duty when that per-
suasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

10. The proper resolution of the lawyer’s dilemma in criminal cases is complicated by two considerations. The first is the substantial penalties that a criminal accused will face upon conviction, and the lawyer’s resulting reluctance to impair any defenses the accused wishes to offer on his own behalf having any possible basis in fact. The second is the right of a defendant to take the stand should he so desire, even over the objections of the lawyer. Consequently, in any criminal case where the accused either insists on testifying when the lawyer knows that the testimony is perjurious or else surprises the lawyer with such testimony at trial, the lawyer’s effort to rectify the situation can increase the likelihood of the client’s being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

11. Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer’s questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This solution, however, makes the advocate a knowing instrument of perjury.

12. The other resolution of the dilemma, and the one this Rule adopts, is that the lawyer must take reasonable remedial measure which may include revealing the client’s perjury. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence.

False Evidence Not Introduced by the Lawyer

13. A lawyer may have introduced the testimony of a client or other witness who testified truthfully under direct examination but who offered false testimony or other evidence during examination by another party. Although the lawyer should urge that the false evidence be corrected or withdrawn, the full range of obligation imposed by paragraphs (a)(5) and (b) of this Rule do not apply to such situations. A subsequent use of that false testimony or other evidence by the lawyer in support of the client’s case, however, would violate paragraph (a)(5).
Duration of Obligation

14. The time limit on the obligation to rectify the presentation of false testimony or other evidence varies from case to case but continues as long as there is a reasonable possibility of taking corrective legal actions before a tribunal.

Refusing to Offer Proof Believed to be False

15. A lawyer may refuse to offer evidence that the lawyer reasonably believes is untrustworthy, even if the lawyer does not know that the evidence is false. That discretion should be exercised cautiously, however, in order not to impair the legitimate interests of the client. Where a client wishes to have such suspect evidence introduced, generally the lawyer should do so and allow the finder of fact to assess its probative value. A lawyer’s obligations under paragraphs (a)(2), (a)(5) and (b) of this Rule are not triggered by the introduction of testimony or other evidence that is believed by the lawyer to be false, but not known to be so.

Annotations


HL Farm Corp. v. Self, 820 S.W.2d 372 (Tex. App.—Dallas 1991), rev’d on other grounds, 877 S.W.2d 288 (Tex. 1994) (Attorney’s failure to call to court’s attention decision of another Texas court of appeals directly adverse to attorney’s client, because attorney thought case was wrongly decided, violated attorney’s duty of candor to court under Rule 3.03(a)(4)).

Duggan v. State, 778 S.W.2d 465 (Tex. Crim. App. 1989) (Codefendants giving testimony against other codefendant denied any agreement with State, jury was misled, and prosecutor’s failure to clarify relationship between prosecution and testifying codefendants or “cure” false testimony violated his ethical obligations under Rule 3.03(b)).

McIntyre v. Commission for Lawyer Discipline, 169 S.W.3d 803 (Tex. App.—Dallas 2005, pet. denied) (Lawyer violated Rule 3.03(a)(3) by filing verified motion in state court “on behalf of the bankruptcy trustee” where no trustee had been appointed at the time of the motion).

Howell v. Texas Workers’ Compensation Commission, 143 S.W.3d 416 (Tex. App.—Austin 2004, pet. denied) (Trial court’s sanction award of $13,000 was supportable, in part, based on attorneys’ lack of candor to the tribunal; attorneys represented that they had little or no involvement in filing of 723 lawsuits in Cameron County, yet later they admitted drafting the petitions and that the petitions were either signed by the attorneys, stamp-signed by the attorneys’ office, or signed by other counsel in Cameron County).

Texas-Ohio Gas, Inc. v. Mecom, 28 S.W.3d 129 (Tex. App.—Texarkana 2000, no pet.) (Lawyers were prohibited from knowingly making false statements of material fact to a tribunal, but sanctions were not imposed because of the possibility that errors were not made in bad faith).
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Sherman v. State, 12 S.W.3d 489 (Tex. App.—Dallas 1999, no pet.) (Lawyer’s compliance with the form but not the substance of an appellate rule was due to a misunderstanding on the lawyer’s part and not a knowing false statement of material fact in violation of Rule 3.03).

Weiss v. Commission for Lawyer Discipline, 981 S.W.2d 8 (Tex. App.—San Antonio 1998, no pet.) (Attorney violated Rule 3.03 by falsely claiming before a tribunal that he had not threatened his client with criminal prosecution and that all the language in his television ads had been reviewed by an ethics professor when only the disclaimer had been reviewed).

Cohn v. Commission for Lawyer Discipline, 979 S.W.2d 694 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (Lawyer’s statement to court that bankruptcy case had been reopened, when in fact it had not, constituted misrepresentations that were not remedied).

In re Colonial Pipeline Co., 960 S.W.2d 272 (Tex. App.—Corpus Christi 1997, orig. proceeding) (Relators issued order to show cause why they should not be sanctioned for acting in bad faith where their petition for writ of mandamus failed to cite to a controlling Texas Supreme Court case adverse to their position).

Olguin v. Jungman, 931 S.W.2d 607 (Tex. App.—San Antonio 1996, no pet.) (For the disqualification of a lawyer to be mandatory because the lawyer is serving as a witness, the lawyer’s testimony must be required for the movant’s defense and prejudicial to the testifying attorney’s client).

Resolution Trust Corp. v. Tarrant County Appraisal District, 926 S.W.2d 797 (Tex. App.—Fort Worth 1996, no writ) (RTC filed suit and on appeal asserted that the trial court lacked jurisdiction! DRS 3.01, 3.02, and 3.03 collectively prohibit lawyers from abusing the legal process with frivolous lawsuits, from actions that unreasonably increase the costs of litigation, and from failing to disclose to the court a material fact or a legal argument.).

Cap Rock Electric Cooperative, Inc. v. Texas Utilities Electric Co., 874 S.W.2d 92 (Tex. App.—El Paso 1994, no writ) (In light of the seriousness of trial court’s fact findings, i.e., the deliberate misleading of the trial court and counsel as to the existence of contracts, as well as the making, authenticating, and passing of unsigned “DRAFT” contracts as originals, when in fact the signed originals had been executed, the clerk of the court was directed to forward a copy of the opinion to the State Bar of Texas for review of the trial court’s findings of fact and conclusions of law, and for appropriate disciplinary actions, if deemed necessary).

Ex parte May, 852 S.W.2d 3 (Tex. App.—Dallas 1993, pet. ref’d) (Habeas corpus attorney who introduced statement of facts from trial did not knowingly fail, under Rule 3.03(a)(3), to bring to habeas judge’s attention unprivileged facts relevant to judge’s decision).

Volcanic Gardens Management Co., Inc. v. Paxson, 847 S.W.2d 343 (Tex. App.—El Paso 1993, no writ) (Cites DR 1.05: “When the lawyer has reason to believe it is necessary to do so to prevent the client from committing a criminal or fraudulent act” he may and in some instances must reveal confidential information. Further, the lawyer is prohibited from making false statements of material fact or law to court or third party “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.” Appeals
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court held trial court should have conducted in camera inspection to determine whether attorney-client communications were privileged or fell within above exceptions.

*Ibarra v. State*, 782 S.W.2d 234 (Tex. App.—Houston [14th Dist.] 1989, no writ) (Attorney’s failure to distinguish prior appeal arising from same facts before same court violated his duty to apprise court of adverse legal authority in controlling jurisdiction under Rule 3.03(a)(4)).

*American Airlines, Inc. v. Allied Pilots Ass’n*, 968 F.2d 523 (5th Cir. 1992) (In violation of Rule 3.03(a)(1), (a)(5), attorneys made false statements of material fact to court and offered and used evidence they knew to be false by presenting copies of purportedly signed declarations to court and urging court to rely on the declarations when, in fact, signed originals were neither on file nor in possession of attorneys).

*In re Zuniga*, 332 B.R. 760 (Bankr. S.D. Tex. 2005) (Lawyers made false statements of material fact to the court by inaccurately representing how fees would be split among them, as well as that fees had already been paid).

*Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 337 F. Supp. 2d 862 (N.D. Tex. 2004) (Lawyer’s representation to the court that software would be purged from the client’s computer systems violated the duty of candor to the court when such statement was not corrected after the client reinstated such items).

*In re Placid Oil Co.*, 158 B.R. 404 (Bankr. N.D. Tex. 1993) (Attorney, whose prior involvement with debtor obligated him to seek court approval before engaging to represent debtor in legal proceedings at issue, violated duty of candor to tribunal under Rule 3.03(a)(1) when he participated in drafting pleadings, formulating legal strategy, and offering expert testimony after representing to court and opposing party that he was participating “only as a fact witness, not as a professional”).

Ethics Opinions 389, 405, 442, 473, 480

Rule 3.04 Fairness in Adjudicatory Proceedings

A lawyer shall not:

(a) unlawfully obstruct another party’s access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

(b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;
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(2) reasonable compensation to a witness for his loss of time in attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(c) except as stated in paragraph (d), in representing a client before a tribunal:

(1) habitually violate an established rule of procedure or of evidence;

(2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness;

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, except that a lawyer may argue on his analysis of the evidence and other permissible considerations for any position or conclusion with respect to the matters stated herein;

(4) ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or

(5) engage in conduct intended to disrupt the proceedings.

(d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client’s willingness to accept any sanctions arising from such disobedience.

(e) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.

**Comment:**

1. The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like.

2. Documents and other evidence are often essential to establish a claim or defense. The right of a party, including the government, to obtain evidence through discovery or subpoena is
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an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions, including Texas, makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See Texas Penal Code, §§ 37.09(a)(1), 37.10(a)(3). See also 18 U.S.C. §§ 1501–1515. Falsifying evidence is also generally a criminal offense. Id. §§ 37.09(a)(2), 37.10(a)(1), (2). Paragraph (a) of this Rule applies to evidentiary material generally, including computerized information.

3. Paragraph (c)(1) subjects a lawyer to discipline only for habitual abuses of procedural or evidentiary rules, including those relating to the discovery process. That position was adopted in order to employ the superior ability of the presiding tribunal to assess the merits of such disputes and to avoid inappropriate resort to disciplinary proceedings as a means of furthering tactical litigation objectives. A lawyer in good conscience should not engage in even a single intentional violation of those rules, however, and a lawyer may be subject to judicial sanctions for doing so.

4. Paragraph (c) restates the traditional Texas position regarding the proper role of argument and comment in litigation. The obligations imposed by that paragraph to avoid seeking to influence the outcome of a matter by introducing irrelevant or improper considerations into the deliberative process are important aspects of a lawyer’s duty to maintain the fairness and impartiality of adjudicatory proceedings.

5. By the same token, the advocate’s function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or disruptive conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a tribunal but should avoid reciprocation.

6. Paragraph (d) prohibits the practice of a lawyer not disclosing a client’s actual or intended noncompliance with a standing rule or particular ruling of an adjudicatory body or official to other concerned entities. It provides instead that a lawyer must openly acknowledge the client’s noncompliance.

7. Paragraph (d) also prohibits a lawyer from disobeying, or advising a client to disobey, any such obligations unless either of two circumstances exists. The first is the lawyer’s open refusal based on an assertion that no valid obligation exists. In order to assure due regard for formal rulings and standing rules of practice or procedure, the lawyer’s assertion in this regard should be based on a reasonable belief. The second circumstance is that a lawyer may acquiesce in a client’s position that the sanctions arising from noncompliance are preferable to the costs of compliance. This situation can arise in criminal cases, for example, where the court orders disclosure of the identity of an informant to the defendant and the government decides that it would prefer to allow the case to be dismissed rather than to make that disclosure. A lawyer should consult with a client about the likely consequences of any such act of disobedience should the client appear to be inclined to pursue that course; but the final decision in that regard rests with the client.
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Annotations

_Elbaor v. Smith_, 845 S.W.2d 240 (Tex. 1993) (Under Rule 3.04(b), “Mary Carter” agreements are void as against public policy and constitute an offer of remuneration, through offset, in return for a settling party’s assistance or testimony).

_Duggan v. State_, 778 S.W.2d 465 (Tex. Crim. App. 1989) (Codefendants giving testimony against other codefendant denied any agreement with State, jury was misled, and prosecutor’s failure to clarify relationship between prosecution and testifying codefendants or “cure” false testimony violated his ethical obligations under Rule 3.04(b)).

_In re Bahn_, 13 S.W.3d 865 (Tex. App.—Fort Worth 2000, orig. proceeding) (Court of appeals would not consider argument by real parties in interest in mandamus proceeding, seeking to justify order disqualifying attorney on ground not presented to the trial court in motion to disqualify or at hearing, but only presented in motion for nunc pro tunc order).

_Hawkins v. Commission for Lawyer Discipline_, 988 S.W.2d 927 (Tex. App.—El Paso 1999, pet. denied) (The language of Rule 3.04 entitling a lawyer to disobey an obligation to the court by doing so openly on an assertion that no valid obligation exists is a general rule that is not applicable when it is contrary to a court’s specific order directing the lawyer to continue representing a client under Rule 1.15; expert testimony is not necessary for determining whether a lawyer’s conduct violated the disciplinary rules, because disciplinary proceedings are not malpractice cases where the standard of care is at issue).

_Love v. State Bar of Texas_, 982 S.W.2d 939 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (Lawyer violated Rule 3.04(c)(5) by showing up late to court, leaving without meeting with prosecutor as directed by the court, and making anti-Semitic remarks and threats toward the judge).

_Amelia’s Automotive, Inc. v. Rodriguez_, 921 S.W.2d 767 (Tex. App.—San Antonio 1996, no writ) (Unwarranted attacks against integrity of opposing counsel at trial violate DR 3.04 and are generally incurable and require reversal).

_Circle Y of Yoakum v. Blevins_, 826 S.W.2d 753 (Tex. App.—Texarkana 1992, writ denied) (Attorney’s jury argument that opposing counsel manufactured evidence and was untruthful, where medical record to which opposing counsel referred was in evidence, violated both the Rules of Civil Procedure and Rule 3.04(c)).

_Resolution Trust Corp. v. Bright_, 6 F.3d 336 (5th Cir. 1993) (Attorneys did not violate Rule 3.04(b) by attempting to persuade witness to adopt statements in draft affidavit that witness had not made, where attorneys informed witness that proposed affidavit contained information additional to what she had provided them, where attorneys cautioned witness to read proposed affidavit carefully, and where, despite attorneys’ “persistent and aggressive” efforts, witness ultimately signed an affidavit containing only statements she was willing to adopt as her own).

_American Airlines, Inc. v. Allied Pilots Ass’n_, 968 F.2d 523 (5th Cir. 1992) (In violation of Rule 3.04(b) attorneys falsified evidence by placing the notation “/s/” followed by purported
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declarant’s full name on a declaration to make it appear that some other copy had been properly signed by declarant when, in fact, declarant had never signed any copy of declaration).

*In re Cash Media Systems, Inc.*, 326 B.R. 655 (Bankr. S.D. Tex. 2005) (Attorney sanctioned for failing to associate himself with “bankruptcy law specialist” as required by court order, and noting that Rule 3.04(d) specifically requires that a lawyer shall not “knowingly disobey . . . a ruling by a tribunal”).

Ethics Opinions 415, 442, 458, 553

Rule 3.05 Maintaining Impartiality of Tribunal

A lawyer shall not:

(a) seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure;

(b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than:

(1) in the course of official proceedings in the cause;

(2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer;

(3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(c) For purposes of this rule:

(1) “Matter” has the meanings ascribed by it in Rule 1.10(f) of these Rules;

(2) A matter is “pending” before a particular tribunal either when that entity has been selected to determine the matter or when it is reasonably foreseeable that that entity will be so selected.

**Comment:**

Undue Influence

1. Many forms of improper influence upon tribunals are proscribed by criminal law or by applicable rules of practice or procedure. Others are specified in the Texas Code of Judicial Conduct. A lawyer is required to be familiar with, and to avoid contributing to a violation of, all such provisions. See also Rule 3.06.
2. In recent years, however, there has been an increase in alternative methods of dispute resolution, such as arbitration, for which the standards governing a lawyer’s conduct are not as well developed. In such situations, as in more traditional settings, a lawyer should avoid any conduct that is or could reasonably be construed as being intended to corrupt or to unfairly influence the decision-maker.

Ex Parte Contacts

3. Historically, ex parte contacts between a lawyer and a tribunal have been subjected to stringent control because of the potential for abuse such contacts present. For example, Canon 3A(4) of the Texas Code of Judicial Conduct prohibits many ex parte contacts with judicial officials. A lawyer in turn violates Rule 8.04(a)(6) by communicating with such an official in a manner that causes that official to violate Canon 3A(4). This rule maintains that traditional posture towards ex parte communications and extends it to the new settings discussed in paragraph 2 of this Comment.

4. There are certain types of adjudicatory proceedings, however, which have permitted pending issues to be discussed ex parte with a tribunal. Certain classes of zoning questions, for example, are frequently handled in that way. As long as such contacts are not prohibited by law or applicable rules of practice and procedure, and as long as paragraph (a) of this Rule is adhered to, such ex parte contacts will not serve as a basis for discipline.

5. For limitations on the circumstances and the manner in which lawyers may communicate or cause another to communicate with veniremen or jurors, see Rule 3.06.

Annotations

Remington Arms Co. v. Canales, 837 S.W.2d 624 (Tex. 1992) (Presentation of affidavits in support of privilege claim to court, without also providing copies to opposing counsel, constituted impermissible ex parte communications under Rule 3.05(b)).

In re J.B.K., 931 S.W.2d 581 (Tex. App.—El Paso 1996, no writ) (In a pending appeal, private communications between a lawyer and a staff member of an appellate court concerning the merits of the appeal are impermissible ex parte communications).

Marks v. Feldman, 910 S.W.2d 73 (Tex. App.—Dallas 1995, writ granted) (Ex parte in camera hearing violated U.S. and Texas Constitutions, Texas Rules, and case law. “Submitting a secret affidavit to gain the final word during judicial deliberations conflicts with decisions of Texas Supreme Court and codes of conduct. . . .”).

Rule 3.06 Maintaining Integrity of Jury System

(a) A lawyer shall not:

(1) conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a venireman or juror; or
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(2) seek to influence a venireman or juror concerning the merits of a pending matter by means prohibited by law or applicable rules of practice or procedure.

(b) Prior to discharge of the jury from further consideration of a matter, a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected or any juror or alternate juror, except in the course of official proceedings.

(c) During the trial of a case, a lawyer not connected therewith shall not communicate with or cause another to communicate with a juror or alternate juror concerning the matter.

(d) After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

(e) All restrictions imposed by this Rule upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

(f) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

(g) As used in this Rule, the terms “matter” and “pending” have the meanings specified in Rule 3.05(c).

Comment:

1. To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is not prohibited by this Rule so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Contacts with discharged jurors, however, are governed by procedural rules the violation of which could subject a lawyer to discipline under Rule 3.04. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

2. Vexatious or harassing investigations of jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.
3. Communications with or investigations of members of families of veniremen or jurors by a lawyer or by any one on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

4. Because of the extremely serious nature of any actions that threaten the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror, or a member of the family of either should make a prompt report to the court regarding such conduct. If such improper actions were taken by or on behalf of a lawyer, either the reporting lawyer or the court normally should initiate appropriate disciplinary proceedings. See Rules 1.05, 8.03, 8.04.

Annotations

*Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425 (Tex. 1998) (Rule 3.06 is not unconstitutionally overbroad and is not void for vagueness except for the word “embarrass”).

*Mize v. State*, 754 S.W.2d 732 (Tex. App.—Corpus Christi 1988, writ ref’d) (Prosecutor’s failure to disclose juror’s receipt of threatening phone call violated Rule 3.06(f)).

**Rule 3.07 Trial Publicity**

(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.

(b) A lawyer ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:

1. the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; or the expected testimony of a party or witness;

2. in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense; the existence or contents of any confession, admission, or statement given by a defendant or suspect; or that person’s refusal or failure to make a statement;

3. the performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or submit to an examination or test; or the identity or nature of physical evidence expected to be presented;

4. any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or
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(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(c) A lawyer ordinarily will not violate paragraph (a) by making an extrajudicial statement of the type referred to in that paragraph when the lawyer merely states:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;

(4) except when prohibited by law, the identity of the persons involved in the matter;

(5) the scheduling or result of any step in litigation;

(6) a request for assistance in obtaining evidence, and information necessary thereto;

(7) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(8) if a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Comment:

1. Paragraph (a) is premised on the idea that preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial. This is particularly so where trial by jury or lay judge is involved. If there were no such limits, the results would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. Thus, paragraph (a) provides that in the course of representing a client, a lawyer’s right to free speech is subordinate to the constitutional requirements of a fair trial. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legiti-
mate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

2. Because no body of rules can simultaneously satisfy all interests of fair trial and all those of free expression, some balancing of those interests is required. It is difficult to strike that balance. The formula embodied in this Rule, prohibiting those extrajudicial statements that the lawyer knows or reasonably should know have a reasonable likelihood of materially prejudicing an adjudicatory proceeding, is intended to incorporate the degree of concern for the first amendment rights of lawyers, listeners, and the media necessary to pass constitutional muster. The obligations imposed upon a lawyer by this Rule are subordinate to those rights. If a particular statement would be inappropriate for a lawyer to make, however, the lawyer is as readily subject to discipline for counseling or assisting another person to make it as he or she would be for doing so directly. See paragraph (a).

3. The existence of “material prejudice” normally depends on the circumstances in which a particular statement is made. For example, an otherwise objectionable statement may be excusable if reasonably calculated to counter the unfair prejudicial effect of another public statement. Applicable constitutional principles require that the disciplinary standard in this area retain the flexibility needed to take such unique considerations into account.

4. Although they are not standards of discipline, paragraphs (b) and (c) seek to give some guidance concerning what types of statements are or are not apt to violate paragraph (a). Paragraph (b) sets forth conditions under which statements of the types listed in subparagraphs (b)(1) through (5) would likely violate paragraph (a) in the absence of exceptional extenuating circumstances. Paragraph (c), on the other hand, describes statements that are unlikely to violate paragraph (a) in the absence of exceptional aggravating circumstances. Neither paragraph (b) nor paragraph (c) is an exhaustive listing.

5. Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.04(c)(1) and (d) govern a lawyer’s duty with respect to such Rules. Frequently, a lawyer’s obligations to the client under Rule 1.05 also will prevent the disclosure of confidential information.

Annotations

*Wilson v. State*, 854 S.W.2d 270 (Tex. App.—Amarillo 1993, pet. ref’d) (Under Rule 3.07(a), (b)(1), it was permissible for district attorney’s office to make statements regarding general background and character of eighteen persons arrested in drug raid; ethics rules do not prohibit district attorneys or police from discussing background events surrounding arrests or commission of crimes; and such general statements, none of which specifically identified defendant, did not prejudice defendant’s right to fair trial or violate restrictions on trial publicity).

*Susman Godfrey, L.L.P. v. Marshall*, 832 S.W.2d 105 (Tex. App.—Dallas 1992, orig. proceeding) (Under Rule 3.07(a), it was impermissible for attorney to know that client had written letter to
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directors of opposing party attempting to pressure them to have case dropped, where attorney did not attempt to prevent or discourage client from sending letter).

Rule 3.08 Lawyer as Witness

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer’s client, unless:

1. the testimony relates to an uncontested issue;
2. the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
3. the testimony relates to the nature and value of legal services rendered in the case;
4. the lawyer is a party to the action and is appearing pro se; or
5. the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer’s client, unless the client consents after full disclosure.

(c) Without the client’s informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer’s firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Comment:

1. A lawyer who is considering accepting or continuing employment in a contemplated or pending adjudicatory proceeding in which that lawyer knows or believes that he or she may be a necessary witness is obligated by this Rule to consider the possible consequences of those dual roles for both the lawyer’s own client and for opposing parties.

2. One important variable in this context is the anticipated tenor of the lawyer’s testimony. If that testimony will be substantially adverse to the client, paragraphs (b) and (c) provide the governing standard. In other situations, paragraphs (a) and (c) control.

3. A lawyer who is considering both representing a client in an adjudicatory proceeding and serving as a witness in that proceeding may possess information pertinent to the representation that would be substantially adverse to the client were it to be disclosed. A lawyer
who believes that he or she will be compelled to furnish testimony concerning such matters should not continue to act as an advocate for his or her client except with the client’s informed consent, because of the substantial likelihood that such adverse testimony would damage the lawyer’s ability to represent the client effectively.

4. In all other circumstances, the principal concern over allowing a lawyer to serve as both an advocate and witness for a client is the possible confusion that those dual roles could create for the finder of fact. Normally those dual roles are unlikely to create exceptional difficulties when the lawyer’s testimony is limited to the areas set out in sub-paragraphs (a)(1)–(4) of this Rule. If, however, the lawyer’s testimony concerns a controversial or contested matter, combining the roles of advocate and witness can unfairly prejudice the opposing party. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

5. Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that similar considerations apply if a lawyer’s testimony relates solely to a matter of formality and there is no reason to believe that substantial opposing evidence will be offered. In each of those situations requiring the involvement of another lawyer would be a costly procedure that would serve no significant countervailing purpose.

6. Sub-paragraph (a)(3) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony. Sub-paragraph (a)(4) makes it clear that this Rule is not intended to affect a lawyer’s right to self representation.

7. Apart from these four exceptions, sub-paragraph (a)(5) recognizes an additional exception based upon a balancing of the interests of the client and those of the opposing party. In implementing this exception, it is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. For example, sub-paragraph (a)(5) requires that a lawyer relying on that sub-paragraph as a basis for serving as both an advocate and a witness for a party give timely notification of that fact to opposing counsel. That requirement serves two purposes. First, it prevents the testifying lawyer from creating a “substantial hardship,” where none once existed, by virtue of a lengthy representation of the client in the matter at hand. Second, it puts opposing parties on notice of the situation, thus enabling them to make any desired response at the earliest opportunity.

8. This rule does not prohibit the lawyer who may or will be a witness from participating in the preparation of a matter for presentation to a tribunal. To minimize the possibility of unfair prejudice to an opposing party, however, the Rule prohibits any testifying lawyer who could not serve as an advocate from taking an active role before the tribunal in the presentation of the matter. See paragraph (c). Even in those situations, however, another
lawyer in the testifying lawyer’s firm may act as an advocate, provided the client’s informed consent is obtained.

9. Rule 3.08 sets out a disciplinary standard and is not well suited to use as a standard for procedural disqualification. As a disciplinary rule it serves two principal purposes. The first is to insure that a client’s case is not compromised by being represented by a lawyer who could be a more effective witness for the client by not also serving as an advocate. See paragraph (a). The second is to insure that a client is not burdened by counsel who may have to offer testimony that is substantially adverse to the client’s cause. See paragraph (b).

10. This Rule may furnish some guidance in those procedural disqualification disputes where the party seeking disqualification can demonstrate actual prejudice to itself resulting from the opposing lawyer’s service in the dual roles. However, it should not be used as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice. For example, a lawyer should not seek to disqualify an opposing lawyer under this Rule merely because the opposing lawyer’s dual roles may involve an improper conflict of interest with respect to the opposing lawyer’s client, for that is a matter to be resolved between lawyer and client or in a subsequent disciplinary proceeding. Likewise, a lawyer should not seek to disqualify an opposing lawyer by unnecessarily calling that lawyer as a witness. Such unintended applications of this Rule, if allowed, would subvert its true purpose by converting it into a mere tactical weapon in litigation.

Annotations

In re Sanders, 153 S.W.3d 54 (Tex. 2004) (orig. proceeding) (Rule 3.08 provides guidelines relevant to a disqualification determination even though the rule was promulgated as a disciplinary standard; trial court in a divorce and child custody action did not abuse its discretion in refusing to disqualify the husband’s attorney where the husband agreed to partially pay the attorney’s fees by performing remodeling work on the attorney’s law office).

Anderson Producing, Inc. v. Koch Oil Co., 929 S.W.2d 416 (Tex. 1996) (Attorney could still draft pleadings, engage in settlement negotiations, and assist with trial strategy after he learned that he would be a witness at trial).

Mauze v. Curry, 861 S.W.2d 869 (Tex. 1993) (Attorney who swore to and signed affidavit offering expert opinion testimony to defeat motion for summary judgment should have been disqualified from representing nonmovant at trial under Rule 3.08(a)).

Spears v. Fourth Court of Appeals, 797 S.W.2d 654 (Tex. 1990) (Under Rule 3.08(c), disqualification of attorney does not extend to other members of attorney’s firm if client consents to representation by other firm members after full disclosure; other members of attorney’s firm were not disqualified where client did not intend to call attorney as witness and opposing party said only that it might call attorney as rebuttal witness; it is inappropriate to use a Rule 3.08 motion as “tactical weapon” or to call attorney as witness in order to invoke the rule to disqualify her or her firm).
Ayres v. Canales, 790 S.W.2d 554 (Tex. 1990) (Trial court should require party seeking attorney’s or firm’s disqualification under Rule 3.08(a), (c) to demonstrate actual prejudice to itself resulting from attorney serving as both opposing counsel and as fact witness; nontestifying members of testifying attorney’s firm not disqualified under Rule 3.08(c), where client gave informed consent to their continued representation and opposing counsel failed to prove actual prejudice; attorney may represent himself without exception, under Rule 3.08(a)(4), even when he is expected to be called as witness; under Rule 3.08(a)(5), attorney permitted to represent client and serve as witness where he promptly notified opposing counsel of his “dual role” and where his withdrawal would work “substantial hardship” on client).

Powers v. State, 165 S.W.3d 357 (Tex. Crim. App. 2005) (To be in violation of Rule 3.08, a lawyer must be acting as an advocate and as a witness, not merely as a witness who is also employed by the counsel in a case; as such, a lawyer can testify as a fact witness in a case as long as he is not also serving as an advocate in the proceeding).

Gonzalez v. State, 117 S.W.3d 831 (Tex. Crim. App. 2003) (Evidence supported disqualification of attorney because there was a real possibility that attorney would be called to testify on a controversial and contested issue in the case and jurors would likely attach undue weight to attorney’s testimony; even if attorney did not testify, attorney’s personal knowledge of the events would likely confuse the jury by leading them to interpret counsel’s cross-examination or summation as unsworn testimony).

Harrison v. State, 788 S.W.2d 18 (Tex. Crim. App. 1990) (Defense counsel’s disqualification under Rule 3.08(a) not required by State’s possible calling of counsel to testify regarding witness’s credibility, where credibility issue did not impeach witness’s testimony regarding material facts).

In re McDaniel, No. 10-04-00166-CV, 2006 WL 408397 (Tex. App.—Waco Feb. 22, 2006, no pet.) (Rule 3.08 not violated where lawyer had no recollection of facts surrounding drafting of real estate lien assignment and where client did not recall whether she had told the lawyer the facts surrounding the assignment).

Biagas v. State, 177 S.W.3d 161 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (Prosecutor’s affidavit was properly admitted in connection with motion for new trial under exception to Rule 3.08 permitting a lawyer to testify if “the testimony relates to the nature and value of legal services rendered in the case”).

In re Bivins, 162 S.W.3d 415 (Tex. App.—Waco 2005, orig. proceeding) (Rule 3.08 should rarely be used as a basis for disqualification, and a party seeking disqualification must first demonstrate actual prejudice based on the lawyer’s testimony; where the husband in a divorce proceeding merely demonstrated potential prejudice, disqualification was improper).

Howell v. Texas Workers’ Compensation Commission, 143 S.W.3d 416 (Tex. App.—Austin 2004, pet. denied) (Trial court’s sanction award of $13,000 was supportable, in part, based on attorneys’ use of rules as a tactical weapon; attorneys called defense counsel as a witness at a temporary injunction hearing and then attempted to have defense counsel disqualified).
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In re Slusser, 136 S.W.3d 245 (Tex. App.—San Antonio 2004, no pet.) (Disqualification is inappropriate where opposing counsel does no more than announce an intention to call attorney as a fact witness).

In re Chu, 134 S.W.3d 459 (Tex. App.—Waco 2004, orig. proceeding) (Trial court did not abuse its discretion in denying father’s motion to disqualify attorney ad litem appointed to represent his children’s interest in suit, where father did not demonstrate what essential facts ad litem’s testimony would be necessary to establish).

Hampton v. State, No. 12-02-00272-CV, 2003 WL 1563557 (Tex. App.—Tyler Mar. 25, 2003, no pet.) (Defendant waived the issue of whether the trial court erred in denying his motion to disqualify the district attorney by failing to secure a ruling on his motion to disqualify prior to trial and by failing to present to his Rule 3.08 argument to the trial court).

In re Works, 118 S.W.3d 906 (Tex. App.—Texarkana 2003, no pet.) (Trial court did not abuse its discretion by denying motion of executor of decedent’s estate to disqualify counsel on basis that attorney’s prior representation of decedent was adverse to claims of decedent’s wife against decedent’s estate, where record failed to demonstrate that attorney’s prior representation of decedent bore a substantial relationship to his adverse representation of decedent’s wife in will contest).

In re Atherton, No. 05-02-01053-CV, 2002 WL 31160059 (Tex. App.—Dallas Sept. 30, 2002, orig. proceeding) (Trial court abused its discretion by disqualifying attorney from representing devisee under will on ground that attorney’s testimony was necessary to establish an essential fact on behalf of the devisee, where the uncontroverted evidence demonstrated that the attorney had no knowledge of the circumstances surrounding the will’s existence, preparation, or execution).

In re McCormick, No. 12-02-00231-CV, 2002 WL 31076557 (Tex. App.—Tyler Sept. 18, 2002, no pet.) (Rule 3.08 did not apply because the record did not reflect the substance of potential testimony or that such testimony, if offered, would be adverse to respondent).

Aghili v. Banks, 63 S.W.3d 812 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (Attorney’s affidavit could not be admitted as summary judgment proof because the attorney could not act as advocate and witness in same trial).

In re Bahn, 13 S.W.3d 865 (Tex. App.—Fort Worth 2000, orig. proceeding) (Trial court did not abuse its discretion in finding that attorney would be a witness testifying to an essential fact at trial where (1) attorney obtained personal knowledge of statutory violations by opposing party through presuit phone conversations with opposing party’s representatives; (2) although attorney filed a response to the motion to disqualify, he did not contest opposing party’s allegations at hearing on motion; and (3) circumstances showed that opposing party would suffer prejudice and jury would be confused about attorney’s dual roles; further, trial court did not abuse its discretion in disqualifying attorney, who sent notice of his intent to testify three days after motion to disqualify was filed and asserted hardship of client if attorney was disqualified, because notice was not “prompt”; however, trial court abused its discretion in disqualifying attorney from assisting with pretrial matters and in disqualifying attorney’s law firm).
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*Solomon v. State*, 999 S.W.2d 35 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (A defendant challenging a conviction based on Rule 3.08’s prohibition on a lawyer serving as an advocate and as a witness must demonstrate that the violation affected the substantial rights of the defendant or deprived him of a fair trial).

*In re A.M.*, 974 S.W.2d 857 (Tex. App.—San Antonio 1998, no pet.) (Disqualification of plaintiff’s counsel was not appropriate because (1) defense counsel could not evince a positive intent to call plaintiff’s counsel as a witness and (2) the final decision to disqualify plaintiff’s counsel came at the end of the proceedings and extended into future proceedings without any showing what those future proceedings were likely to entail).

*Schwartz v. Jefferson*, 930 S.W.2d 957 (Tex. App.—Houston [14th Dist.] 1996, no writ) (Trial court abuses its discretion in disqualifying a client’s attorney, even if the attorney has some factual knowledge of the underlying dispute, if the attorney will not take the witness stand).

*Health & Tennis Corp. of America v. Jackson*, 928 S.W.2d 583 (Tex. App.—San Antonio 1996, no writ) (An exception to the attorney-witness rule exists when the testimony relates solely to a matter of formality and there is no reason to believe that evidence will be offered in opposition to the testimony. When the attorney’s testimony related solely to the procedural issue of whether the lawsuit should be certified as a class action, he was not disqualified from continuing as counsel.).

*Spain v. Montalvo*, 921 S.W.2d 852 (Tex. App.—San Antonio 1996, orig. proceeding [leave denied]) (It was appropriate to disqualify an attorney under the attorney-witness rule in a conversion action against the former attorney when the new attorney would be a witness; however, it was not appropriate to bar the new attorney from assisting newest counsel in preparation for trial).

*House v. State*, 909 S.W.2d 214 (Tex. App.—Houston [14th Dist.] 1995, writ granted) (Assistant DAs testified in the punishment phase of criminal trial. While a technical violation of DR 3.08, it is not a basis to exclude the evidence at trial. DR 3.08 is to exclude counsel, not evidence.).

*Stanley v. State*, 880 S.W.2d 219 (Tex. App.—Fort Worth 1994, no writ) (Unlike its predecessor, DR 3.08 doesn’t prohibit one attorney in a DA’s office from prosecuting a criminal case in which another attorney from the same office will testify as a fact witness).

*May v. Crofts*, 868 S.W.2d 397 (Tex. App.—Texarkana 1993, no writ) (DR 3.08 should not be used as tactical weapon to deprive opposing party of right to be represented by lawyer of choice, because reducing rule to such use would subvert its purpose. To prevent such misuse, court should require party seeking disqualification to show actual prejudice to self resulting from an opposing lawyer’s service in dual roles.).

*Smith, Wright & Weed, P.C. v. Stone*, 818 S.W.2d 926 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding) (In suit alleging legal malpractice, deposition of person who was opposing attorney in underlying suit, the outcome of which was root of alleged malpractice, is permissible under Rule 3.08 and comments).
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Schwager v. Texas Commerce Bank, 813 S.W.2d 225 (Tex. App.—Houston [1st Dist] 1991, no writ) (Attorney who testified at trial prior to becoming licensed attorney was not disqualified, under Rule 3.08(a), from later serving as appellate counsel to party for whom he earlier testified).

Warrilow v. Norrell, 791 S.W.2d 515 (Tex. App.—Corpus Christi 1989, writ denied) (Under Rule 3.08(a)(5), exception to former DR 5-101(B)(4), which permits attorney to continue representation if withdrawal would work substantial hardship on client, generally contemplates an attorney who has some expertise in a specialized area of law; where attorney was called to give crucial fact testimony at trial, trial court’s failure to disqualify attorney under Rule 3.08(a)–(c) was abuse of discretion, but was not reversible error absent showing that attorney’s testimony substantially harmed party seeking disqualification or caused improper judgment to be rendered; trial court’s failure to order withdrawal of attorney who offered crucial expert opinion testimony at trial, under Rule 3.08(a), was reversible error).

Randell v. State, 770 S.W.2d 644 (Tex. App.—Amarillo 1989, pet. filed (no disposition noted)) (Calling district attorney to testify regarding a prior conviction was not grounds for disqualification under Rule 3.08(a)(1), (2)).

Gilbert McClure Enterprises v. Burnett, 735 S.W.2d 309 (Tex. App.—Dallas 1987, orig. proceeding) (Under Rule 3.08(a), (b), mere announcement by counsel X of his intention to call opposing counsel Y as witness is insufficient to require Y’s disqualification; there must be genuine need for Y’s testimony, and testimony must be material to X’s case and adverse to interest of Y’s client to require disqualification).

Ayus v. Total Rental Care, Inc., 48 F. Supp. 714 (S.D. Tex. 1999) (Lawyer cannot participate as counsel at trial in which lawyer will be called as witness because letters written by lawyer were an essential part of the plaintiff’s case, thus lawyer was disqualified, although his law firm was not disqualified).

Ethics Opinions 430, 439, 445, 447, 454, 468, 471, 475

Rule 3.09 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;
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(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

Comment:

Source and Scope of Obligations

1. A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate. This responsibility carries with it a number of specific obligations. Among these is to see that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause. See paragraph (a). In addition a prosecutor should not initiate or exploit any violation of a suspect’s right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pretrial, trial or post-trial rights from unrepresented persons. See paragraphs (b) and (c). In addition, a prosecutor is obliged to see that the defendant is accorded procedural justice, that the defendant’s guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor. See paragraph (d). Finally, a prosecutor is obliged by this rule to take reasonable measures to see that persons employed or controlled by him refrain from making extrajudicial statements that are prejudicial to the accused. See paragraph (e) and Rule 3.07. See also Rule 3.03(a)(3), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.04.

2. Paragraph (a) does not apply to situations where the prosecutor is using a grand jury to determine whether any crime has been committed, nor does it prevent a prosecutor from presenting a matter to a grand jury even though he has some doubt as to what charge, if any, the grand jury may decide is appropriate, as long as he believes that the grand jury could reasonably conclude that some charge is proper. A prosecutor’s obligations under that paragraph are satisfied by the return of a true bill by a grand jury, unless the prosecutor believes that material inculpatory information presented to the grand jury was false.

3. Paragraph (b) does not forbid the lawful questioning of any person who has knowingly, intelligently and voluntarily waived the rights to counsel and to silence, nor does it forbid such questioning of any unrepresented person who has not stated that he wishes to retain a lawyer and who is not entitled to appointed counsel. See also Rule 4.03.

4. Paragraph (c) does not apply to any person who has knowingly, intelligently and voluntarily waived the rights referred to therein in open court, nor does it apply to any person
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appearing pro se with the approval of the tribunal. Finally, that paragraph does not forbid a prosecutor from advising an unrepresented accused who has not stated he wishes to retain a lawyer and who is not entitled to appointed counsel and who has indicated in open court that he wishes to plead guilty to charges against him of his pre-trial, trial and post-trial rights, provided that the advice given is accurate; that it is undertaken with the knowledge and approval of the court; and that such a practice is not otherwise prohibited by law or applicable rules of practice or procedure.

5. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

6. Subparagraph (e) does not subject a prosecutor to discipline for failing to take measures to prevent investigators, law enforcement personnel or other persons assisting or associated with the prosecutor, but not in his employ or under his control, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.07. To the extent feasible, however, the prosecutor should make reasonable efforts to discourage such persons from making statements of that kind.

Annotations

Armstrong v. State, 850 S.W.2d 230 (Tex. App.—Texarkana 1993), aff’d, 897 S.W.2d 361 (Tex. Crim. App. 1995) (Question was whether a prosecutor had affirmative duty to disclose during voir dire his relationship with a juror. Defendant cited as authority EC 7-13, which has been repealed. DR 3.09 prescribes special responsibilities of the prosecutor, and it does not support defendant’s claim of special duty.).

Lehman v. State, 792 S.W.2d 82 (Tex. Crim. App. 1990) (Under Rule 3.09(a), it was impermissible for prosecutor to put unfounded allegations in indictment in attempt to “pad” charges against defendant and “make him look like a criminal”).

Wilson v. State, 854 S.W.2d 270 (Tex. App.—Amarillo 1993, pet. ref’d) (Under Rule 3.09(e), it was permissible for district attorney’s office to make statements regarding general background and character of eighteen persons arrested in drug raid; ethics rules do not prohibit district attorneys or police from discussing background events surrounding arrests or commission of crimes; and such general statements, none of which specifically identified defendant, did not prejudice defendant’s right to fair trial or violate restrictions on trial publicity).

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Rule 3.10 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative or administrative body in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.04(a) through (d), 3.05(a), and 4.01.
Comment:

1. In appearing before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure. A lawyer is required to disclose whether a particular appearance is in a representative capacity. Although not required to do so by Rule 3.10, a lawyer should reveal the identities of the lawyer’s clients, unless privileged or otherwise protected, so that the decision-making body can weigh the lawyer’s presentation more accurately. See Rule 4.01, Comment 1.

2. Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers.

3. As to the representation of a client in a negotiation or other bilateral transaction with a governmental agency, see Rules 4.01 through 4.04.

IV. Non-Client Relationships

Rule 4.01 Truthfulness in Statements to Others

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.

Comment:

False Statements of Fact

1. Paragraph (a) of this Rule refers to statements of material fact. Whether a particular statement should be regarded as one of material fact can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category. Similarly, under generally accepted conventions in negotiation, a party’s supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representation of material fact. Likewise, according to commercial conventions, the fact that a particular transaction is being undertaken on behalf of an undisclosed principal need not be disclosed except where non-disclosure of the principal would constitute fraud.
Rule 4.01  

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2. A lawyer violates paragraph (a) of this Rule either by making a false statement of law or material fact or by incorporating or affirming such a statement made by another person. Such statements will violate this Rule, however, only if the lawyer knows they are false and intends thereby to mislead. As to a lawyer’s duty to decline or terminate representation in such situations, see Rule 1.15.

Failure to Disclose a Material Fact

3. Paragraph (b) of this Rule also relates only to failures to disclose material facts. Generally, in the course of representing a client a lawyer has no duty to inform a third person of relevant or material facts, except as required by law or by applicable rules of practice or procedure, such as formal discovery. However, a lawyer must not allow fidelity to a client to become a vehicle for a criminal act or a fraud being perpetrated by that client. Consequently a lawyer must disclose a material fact to a third party if the lawyer knows that the client is perpetrating a crime or a fraud and the lawyer knows that disclosure is necessary to prevent the lawyer from becoming a party to that crime or fraud. Failure to disclose under such circumstances is misconduct only if the lawyer intends thereby to mislead.

4. When a lawyer discovers that a client has committed a criminal or fraudulent act in the course of which the lawyer’s services have been used, or that the client is committing or intends to commit any criminal or fraudulent act, other of these Rules require the lawyer to urge the client to take appropriate action. See Rules 1.02(d), (e), (f); 3.03(b). Since the disclosures called for by paragraph (b) of this Rule will be “necessary” only if the lawyer’s attempts to counsel his client not to commit the crime or fraud are unsuccessful, a lawyer is not authorized to make them without having first undertaken those other remedial actions. See also Rule 1.05.

Fraud by a Client

5. A lawyer should never knowingly assist a client in the commission of a criminal act or a fraudulent act. See Rule 1.02(c).

6. This rule governs a lawyer’s conduct during “the course of representing a client.” If the lawyer has terminated representation prior to learning of a client’s intention to commit a criminal or fraudulent act, paragraph (b) of this Rule does not apply. See “Fraud” under TERMINOLOGY.

Annotations

_ Flume v. State Bar of Texas_, 974 S.W.2d 55 (Tex. App.—San Antonio 1998, no pet.) (Attorney violated Rule 4.01 by knowingly serving opposing party a file-stamped temporary restraining order that contained a purported hearing date but that had not been signed by judge).

_ Volcanic Gardens Management Co., Inc. v. Paxson_, 847 S.W.2d 343, 347–48 (Tex. App.—El Paso 1993, no writ) (Crime/fraud exception to lawyer-client privilege includes commission or attempted commission of fraud on court or on third person and such information will not maintain confidentiality even via protective order under Rule 4.01).
Texas Disciplinary Rules of Professional Conduct

Rule 4.02

Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. App.—Corpus Christi 1978, writ ref’d n.r.e.) (Sole remedy for violation of DR 7-102 is through imposition of disciplinary measures through grievance hearing).

Resolution Trust Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993) (Attorney’s attempt to aggressively persuade witness that her initial version of a certain fact situation was not complete or accurate did not violate Rule 4.01).

American Airlines, Inc. v. Allied Pilots Ass’n, 968 F.2d 523, 527–28 (5th Cir. 1992) (Attorneys’ submission of declarations marked as conformed copies where they knew declarants had not signed them constituted false statement of fact to third party, violating Rule 4.01).

Ethics Opinions 33, 105, 130, 152, 189, 193, 201, 204, 315, 319, 337, 378, 384, 405, 412, 442, 473, 480

Rule 4.02 Communication with One Represented by Counsel

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(c) For the purpose of this rule, “organization or entity of government” includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

(d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.

Comment:

1. Paragraph (a) of this Rule is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations or entities of government and their respective counsel. It prohibits communications that in form are between a lawyer’s client and another person, organization or entity of government represented by counsel where, because of the lawyer’s involvement in devising and controlling their content, such com-
munication in substance are between the lawyer and the represented person, organization or entity of government.

2. Paragraph (a) does not, however, prohibit communication between a lawyer’s client and persons, organizations, or entities of government represented by counsel, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party. Consent may be implied as well as express, as, for example, where the communication occurs in the form of a private placement memorandum or similar document that obviously is intended for multiple recipients and that normally is furnished directly to persons, even if known to be represented by counsel. Similarly, that paragraph does not impose a duty on a lawyer to affirmatively discourage communication between the lawyer’s client and other represented persons, organizations or entities of government. Furthermore, it does not prohibit client communications concerning matters outside the subject of the representation with any such person, organization, or entity of government. Finally, it does not prohibit a lawyer from furnishing a “second opinion” in a matter to one requesting such opinion, nor from discussing employment in the matter if requested to do so. But see Rule 7.02.

3. Paragraph (b) of this Rule provides that unless authorized by law, experts employed or retained by a lawyer for a particular matter should not be contacted by opposing counsel regarding that matter without the consent of the lawyer who retained them. However, certain governmental agents or employees such as police may be contacted due to their obligations to the public at large.

4. In the case of an organization or entity of government, this Rule prohibits communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject of the representation and with those persons presently employed by such organization or entity whose act or omission may make the organization or entity vicariously liable for the matter at issue, without the consent of the lawyer for the organization or entity of government involved. This Rule is based on the presumption that such persons are so closely identified with the interests of the organization or entity of government that its lawyers will represent them as well. If, however, such an agent or employee is represented in the matter by his or her own counsel that presumption is inapplicable. In such cases, the consent by that counsel to communicate will be sufficient for purposes of this Rule. Compare Rule 3.04(f). Moreover, this Rule does not prohibit a lawyer from contacting a former employee of a represented organization or entity of a government, nor from contacting a person presently employed by such an organization or entity whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue.

Annotations

In re Users System Services, Inc., 22 S.W.3d 331 (Tex. 1999) (Rule 4.02 not violated where defense attorneys met with plaintiff at plaintiff’s request after plaintiff stated that he was no longer represented by counsel, even though plaintiff’s former attorney had not withdrawn from the case).
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Rule 4.02


_In re Baptist Hospitals of Southeast Texas_, 172 S.W.3d 136 (Tex. App.—Beaumont 2005, orig. proceeding) (Rule 4.02 not violated by the assertion of the work product privilege where attorney for landlord communicated with tenant’s representatives when he knew tenant was represented by counsel).

_Aguilar v. Trujillo_, 162 S.W.3d 839 (Tex. App.—El Paso 2005, pet. denied) (Lawyer violated Rule 4.02 by contacting a consulting expert retained by opposing counsel and such violation constituted an abuse of the discovery process, warranting sanctions).

_Aguilar v. Morales_, 162 S.W.3d 825 (Tex. App.—El Paso 2005, pet. denied) (Lawyer violated Rule 4.02 by contacting a consulting expert retained by opposing counsel and such violation constituted an abuse of the discovery process, warranting sanctions).

_In re Posadas USA, Inc._, 100 S.W.3d 254 (Tex. App.—San Antonio 2001, no pet.) (When a client makes unilateral statement to counsel for opposing party that he has terminated his own attorney-client relationship and wishes to engage in discussions without his “former” attorney present, he is still represented by counsel within context of professional responsibility anticontact rule until he has conveyed this decision to his attorney).

_Upchurch v. Albear_, 5 S.W.3d 274 (Tex. App.—Amarillo 1999, pet. denied) (Clients’ retained counsel negotiated a settlement, and clients were entitled to seek a second opinion about the settlement proposal; second attorney was not prohibited from advising the clients regarding the settlement proposal).

_Vickery v. Commission for Lawyer Discipline_, 5 S.W.3d 241 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (Attorney, who was a party to a divorce action, was subject to discipline for inducing his friend, who was also an attorney, to convey a settlement offer directly to the attorney’s wife, who was represented by counsel).

_Barham v. Turner Construction Co. of Texas_, 803 S.W.2d 731, 739 (Tex. App.—Dallas 1990, writ denied) (Contact with opposition through third party without attorney’s or client’s knowledge or instruction does not violate Rule 4.02).

_Henrich v. State_, 697 S.W.2d 841, 842–43 (Tex. App.—Dallas 1985, writ ref’d) (Telephone conversations were not obtained in violation of state law and did not violate DR 7-104).

_United States v. Heinz_, 983 F.2d 609, 613 (5th Cir. 1993) (Under DR 7-104(A)(1), ethical canons and corresponding Rules of Professional Conduct not applicable to government investigator, who in cooperation with codefendant tape-recorded conversation between defendant and codefendant).
Rule 4.02 Texas Disciplinary Rules of Professional Conduct

*United States v. Greig*, 967 F.2d 1018, 1023 (5th Cir. 1992) (Unethical meetings between defendant, defendant’s lawyer, and codefendant created actual conflict in violation of Model Rule 7-02).

*In re Medrano*, 956 F.2d 101, 102–03 (5th Cir. 1992) (Disbarment not upheld where insufficient evidence existed of who initiated communication in violation of Rule 4.02).

*Cramer v. Sabine Transportation Co.*, 141 F. Supp. 2d 727 (S.D. Tex. 2001) (Plaintiff failed to demonstrate that a prohibited ex parte conversation took place between defendants’ attorney and plaintiffs’ expert witness where there was no evidence that attorney initiated the meeting with the expert or encouraged the expert to disclose confidential matters or specific information related to his expert testimony).


Rule 4.03 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

**Comment:**

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer’s representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel. With regard to the special responsibilities of a prosecutor, see Rule 3.09.

Annotations

Ethics Opinions 130, 201, 335, 380, 387, 461, 474

Rule 4.04 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer shall not present, participate in presenting, or threaten to present:
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(1) criminal or disciplinary charges solely to gain an advantage in a civil matter; or

(2) civil, criminal or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness or potential witness therein.

Comment:

1. Although in most cases a lawyer’s responsibility to the interest of his client is paramount to the interest of other persons, a lawyer should avoid the infliction of needless harm.

2. Using or threatening to use the criminal process solely to coerce a party in a private matter improperly suggests that the criminal process can be manipulated by private interests for personal gain. However, giving any notice required by law or applicable rules of practice or procedure as a prerequisite to instituting criminal charges does not violate this Rule, unless the underlying criminal charges were made without probable cause.

3. Using or threatening to use the civil, criminal, or disciplinary processes to coerce a complainant, a witness, or a potential witness in a bar disciplinary proceeding is an implication that lawyers can manipulate the legal system to their personal advantage. Creating such false impressions is an abuse of the legal system that diminishes public confidence in the legal profession and in the fairness of the legal system as a whole.

Annotations

Vickery v. Commission for Lawyer Discipline, 5 S.W.3d 241 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (Attorney was subject to discipline for threatening to file criminal charges against his wife in order to obtain her agreement to settle divorce action).


Ethics Opinions 105, 193, 204, 319, 365, 378, 384, 442, 455, 457

V. Law Firms and Associations

Rule 5.01 Responsibilities of a Partner or Supervisory Lawyer

A lawyer shall be subject to discipline because of another lawyer’s violation of these rules of professional conduct if:

(a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or
Rule 5.01  Texas Disciplinary Rules of Professional Conduct

(b) The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency’s legal department in which the other lawyer is employed, or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer’s violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer’s violation.

Comment:

1. Rule 5.01 conforms to the general principle that a lawyer is not vicariously subjected to discipline for the misconduct of another person. Under Rule 8.04, a lawyer is subject to discipline if the lawyer knowingly assists or induces another to violate these rules. Rule 5.01(a) additionally provides that a partner or supervising lawyer is subject to discipline for ordering or encouraging another lawyer’s violation of these rules. Moreover, a partner or supervising lawyer is in a position of authority over the work of other lawyers and the partner or supervising lawyer may be disciplined for permitting another lawyer to violate these rules.

2. Rule 5.01(b) likewise is concerned with the lawyer who is in a position of authority over another lawyer and who knows that the other lawyer has committed a violation of a rule of professional conduct. A partner in a law firm, the general counsel of a government agency’s legal department, or a lawyer having direct supervisory authority over specific legal work by another lawyer, occupies the position of authority contemplated by Rule 5.01(b).

3. Whether a lawyer has “direct supervisory authority over the other lawyer” in particular circumstances is a question of fact. In some instances, a senior associate may be a supervising attorney.

4. The duty imposed upon the partner or other authoritative lawyer by Rule 5.01(b) is to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer’s known violation. Appropriate remedial action by a partner or other supervisory lawyer would depend on many factors, such as the immediacy of the partner’s or supervisory lawyer’s knowledge and involvement, the nature of the action that can reasonably be expected to avoid or mitigate injurious consequences, and the seriousness of the anticipated consequences. In some circumstances, it may be sufficient for a junior partner to refer the ethical problem directly to a designated senior partner or a management committee. A lawyer supervising a specific legal matter may be required to intervene more directly. For example if a supervising lawyer knows that a supervised lawyer misrepresented a matter to an opposing party in negotiation, the supervisor as well as the other lawyer may be required by Rule 5.01(b) to correct the resulting misapprehension.

5. Thus, neither Rule 5.01(a) nor Rule 5.01(b) visits vicarious disciplinary liability upon the lawyer in a position of authority. Rather, the lawyer in such authoritative position is exposed to discipline only for his or her own knowing actions or failures to act. Whether a lawyer may be liable civilly or criminally for another lawyer’s conduct is a question of law beyond the scope of these rules.
6. Wholly aside from the dictates of these rules for discipline, a lawyer in a position of authority in a firm or government agency or over another lawyer should feel a moral compunction to make reasonable efforts to ensure that the office, firm, or agency has in effect appropriate procedural measures giving reasonable assurance that all lawyers in the office conform to these rules. This moral obligation, although not required by these rules, should fall also upon lawyers who have intermediate managerial responsibilities in the law department of an organization or government agency.

7. The measures that should be undertaken to give such reasonable assurance may depend on the structure of the firm or organization and upon the nature of the legal work performed. In a small firm, informal supervision and an occasional admonition ordinarily will suffice. In a large firm, or in practice situations where intensely difficult ethical problems frequently arise, more elaborate procedures may be called for in order to give such assurance. Obviously, the ethical atmosphere of a firm influences the conduct of all of its lawyers. Lawyers may rely also on continuing legal education in professional ethics to guard against unintentional misconduct by members of their firm or organization.

Annotations

Ethics Opinions 455, 457, 522, 523

Rule 5.02 Responsibilities of a Supervised Lawyer

A lawyer is bound by these rules notwithstanding that the lawyer acted under the supervision of another person, except that a supervised lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional conduct.

Comment:

1. Rule 5.02 embodies the fundamental concept that every lawyer is a trained, mature, licensed professional who has sworn to uphold ethical standards and who is responsible for the lawyer’s own conduct. Accordingly, a lawyer is not relieved from compliance with these rules because the lawyer acted under the supervision of an employer or other person. In some situations, the fact that a lawyer acted at the direction or order of another person may be relevant in determining whether the lawyer had the knowledge required to render the conduct a violation of these rules. The fact of supervision may also, of course, be a circumstance to be considered by a grievance committee or court in mitigation of the penalty to be imposed for violation of a rule.

2. In many law firms and organizations, the relatively inexperienced lawyer works as an assistant to a more experienced lawyer or is directed, supervised or given guidance by an experienced lawyer in the firm. In the normal course of practice the senior lawyer has the responsibility for making the decisions involving professional judgment as to procedures to be taken, the status of the law, and the propriety of actions to be taken by the lawyers. Otherwise a consistent course of action could not be taken on behalf of clients. The junior
lawyer reasonably can be expected to acquiesce in the decisions made by the senior lawyer unless the decision is clearly wrong.

3. Rule 5.02 take a realistic attitude toward those prevailing modes of practice by lawyers not engaged in solo practice. Accordingly, Rule 5.02 provides the supervised lawyer with a special defense in a disciplinary proceeding in which the lawyer is charged with having violated a rule of professional conduct. The supervised lawyer is entitled to this defense only if it appears that an arguable question of professional conduct was resolved by a supervising lawyer and that a resolution made by the supervising lawyer was a reasonable resolution. The resolution is a reasonable one, even if it is ultimately found to be officially unacceptable, provided it would have appeared reasonable to a disinterested, competent lawyer based on the information reasonably available to the supervising lawyer at the time the resolution was made. “Supervisory lawyer” as used in Rule 5.02 should be construed in conformity with prevailing modes of practice in firms and other groups and, therefore, should include a senior lawyer who undertakes to resolve the question of professional propriety as well as a lawyer who more directly supervises the supervised lawyer.

4. By providing such a defense to the supervised lawyer, Rule 5.02 recognizes that the inexperienced lawyer working under the direction or supervision of an employer or senior attorney is not in a favorable position to disagree with reasonable decisions made by the experienced lawyer. Often, the only choices available to the supervised lawyer would be to accept the decision made by the senior lawyer or to resign or otherwise lose the employment. This provision of Rule 5.02 also recognizes that it is not necessarily improper for the inexperienced lawyer to rely, reasonably and in good faith, upon decisions made in unclear matters by senior lawyers in the organization.

5. The defense provided by this Rule is available without regard to whether the conduct in question was originally proposed by the supervised lawyer or another person. Nevertheless, the supervised lawyer is not permitted to accept an unreasonable decision as to the propriety of professional conduct. The Rule obviously provides no defense to the supervised lawyer who participates in clearly wrongful conduct. Reliance can be placed only upon a reasonable resolution made by the supervisory lawyer.

6. The protection afforded by Rule 5.02 to a supervised lawyer relates only to professional disciplinary proceedings. Whether a similar defense may exist in actions in tort or for breach of contract is a question beyond the scope of the Texas Rules of Professional Conduct.

Annotations

Ethics Opinions 400, 455, 457, 523

Rule 5.03 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:
Texas Disciplinary Rules of Professional Conduct

Rule 5.03

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(b) a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

(1) the lawyer orders, encourages, or permits the conduct involved; or

(2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency’s legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person’s misconduct.

Comment:

1. Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants act for the lawyer in rendition of the lawyer’s professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

2. Each lawyer in a position of authority in a law firm or in a government agency should make reasonable efforts to ensure that the organization has in effect measures giving reasonable assurance that the conduct of nonlawyers employed or retained by or associated with the firm or legal department is compatible with the professional obligations of the lawyer. This ethical obligation includes lawyers having supervisory authority or intermediate managerial responsibilities in the law department of any enterprise or government agency.

Annotations

Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831 (Tex. 1994) (Rule 5.03 does not require disqualification of new firm if paralegal moves. To the extent that the rules prohibit a lawyer from revealing confidential information, they also prohibit a supervising lawyer from ordering, encouraging, or permitting a nonlawyer to reveal such confidential information.)

Ethics Opinions 381, 438, 455, 457, 472
Rule 5.04 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share or promise to share legal fees with a non-lawyer, except that:

(1) an agreement by a lawyer with the lawyer’s firm, partner, or associate, or a lawful court order, may provide for the payment of money, over a reasonable period of time, to the lawyer’s estate to or for the benefit of the lawyer’s heirs or personal representatives, beneficiaries, or former spouse, after the lawyer’s death or as otherwise provided by law or court order.

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment:

1. The provisions of Rule 5.04(a) express traditional limitations on sharing legal fees with nonlawyers. The principal reasons for these limitations are to prevent solicitation by lay persons of clients for lawyers and to avoid encouraging or assisting nonlawyers in the practice of law. See Rules 5.04(d), 5.05 and 7.03. The same reasons support Rule 5.04(b).

2. The exceptions stated in Rule 5.04(a) involve situations where the sharing of legal fees with a nonlawyer is not likely to encourage improper solicitation or unauthorized practice of law. For example, it is appropriate for a law firm agreement to provide for the payment
of money after the death of a lawyer, or after the establishment of a guardianship for an incapacitated lawyer, to the estate of or to a trust created by the lawyer. A court order, such as a divorce decree, may provide, when appropriate, for the division of legal fees with a nonlawyer. Likewise, the inclusion of a secretary or nonlawyer office administrator in a retirement plan to which the law firm contributes a portion of its profits or legal fees is proper because this division of legal fees is unlikely to encourage improper solicitation or unauthorized practice of law.

3. Rule 5.04(a) forbids only the sharing of legal fees with a nonlawyer and does not necessarily mandate that employees be paid only on the basis of a fixed salary. Thus, the payment of an annual or other bonus does not constitute the sharing of legal fees if the bonus is neither based on a percentage of the law firm’s profits or on a percentage of particular legal fees nor is given as a reward for conduct forbidden to lawyers. Similarly, the division between lawyer and client of the proceeds of a settlement judgment or other award in which both damages and attorney fees have been included does not constitute an improper sharing of legal fees with a nonlawyer. Reimbursement by a lawyer made to a bona fide or pro bono legal services entity for its reasonable expenses in connection with the matter referred to or being handled by the lawyer does not constitute a division of legal fees within the meaning of Rule 5.04.

4. Because the lawyer-client relationship is a personal relationship in which the client generally must trust the lawyer to exercise appropriate professional judgment on the client’s behalf, Rule 5.04(c) provides that a lawyer shall not permit improper interference with the exercise of the lawyer’s professional judgment solely on behalf of the client. The lawyer’s professional judgment should be exercised only for the benefit of the client, free of compromising influences and loyalties. Therefore, under Rule 5.04(c) a person who recommends, employs, or pays the lawyer to render legal services for another cannot be permitted to interfere with the lawyer’s professional relationship with that client. Similarly, neither the lawyer’s personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer’s loyalty to the client.

5. Because a lawyer must always be free to exercise professional judgment without regard to the interests or motives of a third person, the lawyer who is employed or paid by one to represent another should guard constantly against erosion of the lawyer’s professional judgment. The lawyer should recognize that a person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of the lawyer. The lawyer should be watchful that such persons or organizations are not seeking to further their own economic, political, or social goals without regard to the lawyer’s responsibility to the client. Moreover, a lawyer employed by an organization is required by Rule 5.04(c) to decline to accept direction of the lawyer’s professional judgment from any nonlawyer in the organization.

6. Rule 5.04(d) forbids a lawyer to practice with or in the form of a professional corporation or association in certain specific situations where erosion of the lawyer’s professional independence may be threatened. The danger of erosion of the lawyer’s professional independence sometimes may exist when a lawyer practices with associations or organizations not covered by Rule 5.04(d). For example, various types of legal aid offices are adminis-
Rule 5.04 Texas Disciplinary Rules of Professional Conduct

A lawyer should not accept or continue employment with such an organization unless the board sets only broad policies and does not interfere in the relationship of the lawyer and the individual client that the lawyer serves. See Rule 1.13. Whenever a lawyer is employed by an organization, a written agreement that defines the relationship between the lawyer and the organization and that provides for the lawyer’s professional independence is desirable since it may serve to prevent misunderstanding as to their respective roles.

Annotations

State Bar of Texas v. Tinning, 875 S.W.2d 403 (Tex. App.—Corpus Christi 1994, writ denied) (Proof of date that allegation of misconduct was brought to attention of Bar’s counsel was required to support the finding that disciplinary proceeding was brought beyond four-year limitations period).

Atkins v. Tinning, 865 S.W.2d 533 (Tex. App.—Corpus Christi 1993, writ denied) (Though fee-splitting agreement between lawyer and private investigator for investigative work might subject the lawyer to discipline, agreement itself is not invalid just because it violates disciplinary rules).

Plumlee v. Paddock, 832 S.W.2d 757, 760 (Tex. App.—Fort Worth 1992, writ denied) (Lawyer’s arrangement to pay fee to ambulance company for personal injury referrals was illegal and unenforceable as a matter of law under Rule 5.04(a), preventing solicitation by lay persons of clients for lawyers and avoiding encouraging or assisting nonlawyers in the practice of law).

State Bar of Texas v. Faubion, 821 S.W.2d 203, 207–08 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (Court found that paying paralegal-investigator a percentage of legal fees recovered in cases worked on by paralegal-investigator, based upon involvement in a particular case, constituted “fee splitting,” violating Rule 5.04).

Lee v. Cherry, 812 S.W.2d 361, 363–64 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (Court decided that Rule 5.04(a) does not encompass fees due former attorney who performed all that was required of him prior to his resignation or disbarment under client-approved referral fee contract).

Baron v. Mullinax, Wells, Mauzy & Baab, Inc., 623 S.W.2d 457, 461–62 (Tex. App.—Texarkana 1981, writ ref’d n.r.e.) (Fee division based on splitting work on single lawsuit between firm and former member of firm did not violate DR 2-107 or Rule 5.04).

Ethics Opinions 377, 397, 410, 417, 432, 446, 450, 458, 459, 467, 531, 533, 543, 552, 558, 562, 568, 576

Rule 5.05 Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
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Rule 5.05

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Comment:

1. Courts generally have prohibited the unauthorized practice of law because of a perceived need to protect individuals and the public from the mistakes of the untrained and the schemes of the unscrupulous, who are not subject to the judicially imposed disciplinary standards of competence, responsibility and accountability.

2. Neither statutory nor judicial definitions offer clear guidelines as to what constitutes the practice of law or the unauthorized practice of law. All too frequently, the definitions are so broad as to be meaningless and amount to little more than the statement that “the practice of law” is merely whatever lawyers do or are traditionally understood to do. The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

3. Rule 5.05 does not attempt to define what constitutes the “unauthorized practice of law” but leaves the definition to judicial development. Judicial development of the concept of “law practice” should emphasize that the concept is broad enough—but only broad enough—to cover all situations where there is rendition of services for others that call for the professional judgment of a lawyer and where the one receiving the services generally will be unable to judge whether adequate services are being rendered and is, therefore, in need of the protection afforded by the regulation of the legal profession.

Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment; and the essence of the professional judgment of the lawyer is the lawyer’s educated ability to relate the general body and philosophy of law to a specific legal problem of a client.

4. Paragraph (b) of Rule 5.05 does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them. So long as the lawyer supervises the delegated work, and retains responsibility for the work, and maintains a direct relationship with the client, the paraprofessional cannot reasonably be said to have engaged in activity that constitutes the unauthorized practice of law. See Rule 5.03. Likewise, paragraph (b) does not prohibit lawyers from providing professional advice and instructions to nonlawyers whose employment requires knowledge of law. For example, claims adjusters, employees of financial institutions, social workers, abstractors, police officers, accountants, and persons employed in government agencies are engaged in occupations requiring knowledge of law; and a lawyer who assists them to carry out their proper functions is not assisting the unauthorized practice of law. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se, since a nonlawyer who represents himself or herself is not engaged in the unauthorized practice of law.
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5. Authority to engage in the practice of law conferred in any jurisdiction is not necessarily a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where doing so violates the regulation of the practice of law in that jurisdiction. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by individual states. In furtherance of the public interest, lawyers should discourage regulations that unreasonably impose territorial limitations upon the right of a lawyer to handle the legal affairs of a client or upon the opportunity of a client to obtain the services of a lawyer of his or her choice.

Annotations

Scruggs v. Houston Legal Foundation, 475 S.W.2d 604, 606 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref’d) (Tex. Rev. Civ. Stat. Ann. art. 320a-1 analog 2-107 analog 5.05) (Court of Appeals upheld trial court’s decision that legal aid society was not engaged in the “practice of law,” under Rules 5.04 and 5.05, simply by employing attorneys and making them available without charge to advise and represent indigents).

In re Zuniga, 332 B.R. 760 (Bankr. S.D. Tex. 2005) (Lawyers and law firm engaged in unauthorized practice of law by preparing bankruptcy proceedings where lawyers were not admitted in Texas or the Southern District of Texas).

Ethics Opinions 351, 364, 373, 377, 381, 400, 401, 403, 407, 417, 438, 458, 467, 472, 531

Rule 5.06 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceedings against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

Comment:

1. An agreement restricting the rights of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

2. Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.
Rule 5.08 Prohibited Discriminatory Activities

(a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.

(b) Paragraph (a) does not apply to a lawyer’s decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as “confidential information” under these Rules. See Rule 1.05(a), (b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:

(i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and

(ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure.

Comment:

1. Subject to certain exemptions, paragraph (a) of this Rule prohibits willful expressions of bias or prejudice in connection with adjudicatory proceedings that are directed towards any persons involved with those proceedings in any capacity. Because the prohibited conduct only must occur “in connection with” an adjudicatory proceeding, it applies to misconduct transpiring outside of as well as in the presence of the tribunal’s presiding adjudicatory official. Moreover, the broad definition given to the term “adjudicatory proceeding” under these Rules means that paragraph (a)’s prohibition applies to many settings besides con-
Rule 5.08  Texas Disciplinary Rules of Professional Conduct

The Rule, however, contains several important limitations and exemptions. The first, found in paragraph (a), is that a lawyer’s allegedly improper words or conduct must be shown to have been “willful” before the lawyer may be subjected to discipline.

3. In addition, paragraph (b) sets out four exemptions from the prohibition of paragraph (a). The first is a lawyer’s decision whether to represent a client. The second is any communication made by the lawyer that is “confidential” under Rule 1.05(a) and (b). The third is a lawyer’s communication that is necessary to represent a client properly and that complies with applicable rulings and orders of the tribunal as well as with applicable rules of practice or procedure.

4. The fourth exemption in paragraph (b) relates to the lawyer’s words or conduct in selecting a jury. This exemption ensures that a lawyer will be free to thoroughly probe the venire in an effort to identify potential jurors having a bias or prejudice towards the lawyer’s client, or in favor of the client’s opponent, based on, among other things, the factors enumerated in paragraph (a). A lawyer, should remember, however, that the use of peremptory challenges to remove persons from juries based solely on some of the factors listed in paragraph (a) raises separate constitutional issues.

VI. Public Service

Rule 6.01   Accepting Appointments by a Tribunal

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of law or rules of professional conduct;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.

Comment:

Appointment

1. A lawyer may be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services. For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.01,
or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client. Compare Rules 1.06(b), 1.15(a)(2), 1.15(b)(4). A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust. Compare Rule 1.15(b)(6). However, a lawyer should not seek to decline an appointment because of such factors as a distaste for the subject matter or the proceeding, the identity or position of a person involved in the case, the lawyer’s belief that a defendant in a criminal proceeding is guilty, or the lawyer’s belief regarding the merits of a civil case.

2. An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

Public Interest Service

3. The rights and responsibilities of individuals and organizations in Texas and throughout the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for all persons. Consequently, each lawyer engaged in the practice of law should render public interest legal service. Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.

Unpopular Causes

4. A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. Frequently, however, the needs of such a client for a lawyer’s services are particularly pressing and, in some cases, the client may have a right to legal representation. At the same time, either financial considerations or the same qualities of the client or the client’s cause that make a lawyer reluctant to accept employment may severely limit the client’s ability to obtain counsel. As a consequence, the lawyer’s freedom to reject clients is morally qualified. Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

5. An individual lawyer may fulfill the ethical responsibility to provide public interest legal service by accepting a fair share of unpopular matters or indigent or unpopular clients. History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse. Likewise, a lawyer should not reject tendered employment because of the personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community.
Rule 6.01 Texas Disciplinary Rules of Professional Conduct

Annotations

Hawkins v. Commission for Lawyer Discipline, 988 S.W.2d 927 (Tex. App.—El Paso 1999, pet. denied) (The duties imposed on a lawyer appointed to representation by Rule 6.01 control over the general provisions of Rule 1.01; therefore, when a lawyer is appointed by a court, the lawyer is obligated to become competent to handle the representation).

VII. Information About Legal Services

Rule 7.01 Firm Names and Letterhead

(a) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the names of a professional corporation, professional association, limited liability partnership, or professional limited liability company may contain “P.C.,” “L.L.P.,” “P.L.L.C.,” or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Nothing herein shall prohibit a married woman from practicing under her maiden name.

(b) A firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer occupying a judicial, legislative, or public executive or administrative position shall not be used in the name of a firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) A lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.

(e) A lawyer shall not advertise in the public media or seek professional employment by any communication under a trade or fictitious name, except that a lawyer who practices under a firm name as authorized by paragraph (a) of this Rule may use that name in such advertisement or communication but only if that name is the firm name that appears on the lawyer’s letterhead, business cards, office sign, fee contracts, and with the lawyer’s signature on pleadings and other legal documents.

(f) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.02(a).
Comment:

1. A lawyer or law firm may not practice law using a name that is misleading as to the identity of the lawyers practicing under such name, but the continued use of the name of a deceased or retired member of the firm or of a predecessor firm is not considered to be misleading. Trade names are generally considered inherently misleading. Other types of firm names can be misleading as well, such as a firm name that creates the appearance that lawyers are partners or employees of a single law firm when in fact they are merely associated for the purpose of sharing expenses. In such cases, the lawyers involved may not denominate themselves in any manner suggesting such an ongoing professional relationship as, for example, “Smith and Jones” or “Smith and Jones Associates” or “Smith and Associates.” Such titles create the false impression that the lawyers named have assumed a joint professional responsibility for clients’ legal affairs. See paragraph (d).

2. The practice of law firms having offices in more than one state is commonplace. Although it is not necessary that the name of an interstate firm include Texas lawyers, a letterhead including the name of any lawyer not licensed in Texas must indicate the lawyer is not licensed in Texas.

3. Paragraph (c) is designed to prevent the exploitation of a lawyer’s public position for the benefit of the lawyer’s firm. Likewise, because it may be misleading under paragraph (a), a lawyer who occupies a judicial, legislative, or public executive or administrative position should not indicate that fact on a letterhead which identifies that person as an attorney in the private practice of law. However, a firm name may include the name of a public official who is actively and regularly practicing law with the firm. But see Rule 7.02(a)(5).

4. With certain limited exceptions, paragraph (a) forbids a lawyer from using a trade name or fictitious name. Paragraph (e) sets out this same prohibition with respect to advertising in public media or communications seeking professional employment and contains additional restrictions on the use of trade names or fictitious names in those contexts. In a largely overlapping measure, paragraph (f) forbids the use of any such name or designation if it would amount to a “false or misleading communication” under Rule 7.02(a).

Annotations

Rodgers v. Commission for Lawyer Discipline, 151 S.W.3d 602 (Tex. App.—Fort Worth 2004, pet. denied) (Attorney’s advertisement of “Accidental Injury Hotline” was in violation of Rule 7.01 even if it was not facially deceptive).

Curtis v. Commission for Lawyer Discipline, 20 S.W.3d 227 (Tex. App.—Houston [14th Dist.] 2000, no writ) (Attorney violated Rule 7.01(d) by holding herself out as a partner with another attorney with whom she shared no such relationship and combining her name with that attorney’s name in a contingency fee contract, which provided that the client agreed to hire the “Law Office of” the two named attorneys).

Ethics Opinions 522, 529
Rule 7.02 Communications Concerning a Lawyer’s Services

(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) contains any reference in a public media advertisement to past successes or results obtained unless

(i) the communicating lawyer or member of the law firm served as lead counsel in the matter giving rise to the recovery, or was primarily responsible for the settlement or verdict.

(ii) the amount involved was actually received by the client,

(iii) the reference is accompanied by adequate information regarding the nature of the case or matter, and the damages or injuries sustained by the client, and

(iv) if the gross amount received is stated, the attorney’s fees and litigation expenses withheld from the amount are stated as well;

(3) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;

(4) compares the lawyer’s services with other lawyers’ services, unless the comparison can be substantiated by reference to verifiable, objective data;

(5) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official;

(6) designates one or more specific areas of practice in an advertisement in the public media or in a solicitation communication unless the advertising or soliciting lawyer is competent to handle legal matters in each such area of practice; or

(7) uses an actor or model to portray a client of the lawyer or law firm.

(b) Rule 7.02(a)(6) does not require that a lawyer be certified by the Texas Board of Legal Specialization at the time of advertising in a specific area of practice, but such certification shall conclusively establish that such lawyer satisfies the requirements of Rule 7.02(a)(6) with respect to the area(s) of practice in which such lawyer is certified.

(c) A lawyer shall not advertise in the public media or state in a solicitation communication that the lawyer is a specialist except as permitted under Rule 7.04.
(d) Any statement or disclaimer required by these rules shall be made in each language used in the advertisement or solicitation communication with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.

Comment:

1. The Rules within Part VII are intended to regulate communications made for the purpose of obtaining professional employment. They are not intended to affect other forms of speech by lawyers, such as political advertisements or political commentary, except insofar as a lawyer’s effort to obtain employment is linked to a matter of current public debate.

2. This Rule governs all communications about a lawyer’s services, including advertisements regulated by Rule 7.04 and solicitation communications regulated by Rules 7.03 and 7.05. Whatever means are used to make known a lawyer’s services, statements about them must be truthful and nondeceptive.

3. Sub-paragraph (a)(1) recognizes that statements can be misleading both by what they contain and what they leave out. Statements that are false or misleading for either reason are prohibited. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.

4. Sub-paragraphs (a)(2) and (3) recognize that truthful statements may create “unjustified expectations.” For example, an advertisement that truthfully reports that a lawyer obtained a jury verdict of a certain amount on behalf of a client would nonetheless be misleading if it were to turn out that the verdict was overturned on appeal or later compromised for a substantially reduced amount, and the advertisement did not disclose such facts as well. Even an advertisement that fully and accurately reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Those unique circumstances would ordinarily preclude advertisements in the public media and solicitation communications that discuss the results obtained on behalf of a client, such as the amount of a damage award, the lawyer’s record in obtaining favorable settlements or verdicts, as well as those that contain client endorsements.

5. Sub-paragraph (a)(4) recognizes that comparisons of lawyer’s services may also be misleading unless those comparisons “can be substantiated by reference to verifiable objective data.” Similarly, an unsubstantiated comparison of the 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
Rule 7.02 Texas Disciplinary Rules of Professional Conduct

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.

6. The inclusion of a disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client, but it will not necessarily do so. Unless any such qualifications and disclaimers are both sufficient and displayed with equal prominence to the information to which they pertain, that information can still readily mislead prospective clients into believing that similar results can be obtained for them without reference to their specific factual and legal circumstances. Consequently, in order not to be false, misleading, or deceptive, other of these Rules require that appropriate disclaimers or qualifying language must be presented in the same manner as the communication and with equal prominence. See Rules 7.04 (q) and 7.05(a)(2).

7. On the other hand, a simple statement of a lawyer’s own qualifications devoid of comparisons to other lawyers does not pose the same risk of being misleading and so does not violate sub-paragraph (a)(4). Similarly, a lawyer making a referral to another lawyer may express a good faith subjective opinion regarding that other lawyer.

8. Thus, this Rule does not prohibit communication of information concerning a lawyer’s name or firm name, address, and telephone numbers; the basis on which the lawyer’s fees are determined, including prices for specific services and payment and credit arrangements; names of references and with their consent, names of clients regularly represented; and other truthful information that might invite the attention of those seeking legal assistance. When a communication permitted by Rule 7.02 is made in the public media, the lawyer should consult Rule 7.04 for further guidance and restrictions. When a communication permitted by Rule 7.02 is made by a lawyer through a solicitation communication, the lawyer should consult Rules 7.03 and 7.05 for further guidance and restrictions.

9. Sub-paragraph (a)(5) prohibits a lawyer from stating or implying that the lawyer has an ability to influence a tribunal, legislative body, or other public official through improper conduct or upon irrelevant grounds. Such conduct brings the profession into disrepute, even though the improper or irrelevant activities referred to are never carried out, and so are prohibited without regard to the lawyer’s actual intent to engage in such activities.

Communication of Fields of Practice

10. Paragraphs (a)(6), (b) and (c) of Rule 7.02 regulate communications concerning a lawyer’s fields of practice and should be construed together with Rule 7.04 or 7.05, as applicable. If a lawyer in a public media advertisement or in a solicitation communication designates one or more specific areas of practice, that designation is at least an implicit representation that the lawyer is qualified in the areas designated. Accordingly, Rule 7.02(a)(6) prohibits the designation of a field of practice unless the communicating lawyer is in fact competent in the area.
11. Typically, one would expect competency to be measured by special education, training, or experience in the particular area of law designated. Because certification by the Texas Board of Legal Specialization involves special education, training, and experience, certification by the Texas Board of Legal Specialization conclusively establishes that a lawyer meets the requirements of Rule 7.02(a)(6) in any area in which the Board has certified the lawyer. However, competency may be established by means other than certification by the Texas Board of Legal Specialization. See Rule 7.04(b).

12. Lawyers who wish to advertise in the public media that they specialize should refer to Rule 7.04. Lawyers who wish to assert a specialty in a solicitation communication should refer to Rule 7.05.

Actor Portrayal Of Clients

13. Sub-paragraph (a)(7) further protects prospective clients from false, misleading, or deceptive advertisements and solicitations by prohibiting the use of actors to portray clients of a lawyer or law firm. Other rules prohibit the use of actors to portray lawyers in the advertising or soliciting lawyer’s firm. See Rules 7.04(g), 7.05(a). The truthfulness of such portrayals is extremely difficult to monitor, and almost inevitably they involve actors whose apparent physical and mental attributes differ in a number of material respects from those of the actual clients portrayed.

Communication in a Second Language

14. The ability of lawyers to communicate in a second language can facilitate the delivery and receipt of legal services. Accordingly, it is in the best interest of the public that potential clients be made aware of a lawyer’s language ability. A lawyer may state an ability to communicate in a second language without any further elaboration. However, if a lawyer chooses to communicate with potential clients in a second language, all statements or disclaimers required by the Texas Disciplinary Rules of Professional Conduct must also be made in that language. See paragraph (d). Communicating some information in one language while communicating the rest in another is potentially misleading if the recipient understands only one of the languages.

Annotations

State Bar of Texas v. Kilpatrick, 874 S.W.2d 656 (Tex. 1994) (Disbarment for a single but egregious incident of solicitation was not an abuse of discretion by trial court (case decided under old Rule 2-103, now DR 7.02)).

Rodgers v. Commission for Lawyer Discipline, 151 S.W.3d 602 (Tex. App.—Fort Worth 2004, pet. denied) (Evidence of actual confusion by an advertisement is not required to prove a violation of Rule 7.02).

Curtis v. Commission for Lawyer Discipline, 20 S.W.3d 227 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (Attorney made a false and misleading communication about the qualifications of another attorney by telling that attorney’s clients that she was seriously ill and would not be able
Rule 7.02 Texas Disciplinary Rules of Professional Conduct

to fulfill her duties in representing them when that attorney was never seriously ill nor otherwise physically or mentally unable to perform her duties to her clients).

*In re Zuniga*, 332 B.R. 760 (Bankr. S.D. Tex. 2005) (Lawyers made false and misleading statements on their Web sites concerning their qualifications and one attorney’s use of the words “we” and “our” on his firm’s Web site was confusing and misleading where the lawyer was a sole practitioner).

Ethics Opinions 521, 522, 529, 537, 550, 563

Rule 7.03 Prohibited Solicitations and Payments

(a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f) seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer’s advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization’s members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in-person or telephone or other electronic contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:

1. the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

2. the communication contains information prohibited by Rule 7.02(a); or

3. the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm, except that a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by Rule 1.04(f) or by paragraph (b) of this Rule.
(d) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a), (b), or (c).

(e) A lawyer shall not participate with or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(f) As used in paragraph (a), “regulated telephone or other electronic contact” means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.

Comment:

1. In many situations, in-person, telephone, or other prohibited electronic solicitations by lawyers involve well-known opportunities for abuse of prospective clients. Traditionally, the principal concerns presented by such contacts are that they can overbear the prospective client’s will, lead to hasty and ill advised decisions concerning choice of counsel, and be very difficult to police. The approach taken by this Rule may be found in paragraph (f), which prohibits such communications if they are initiated by or in behalf of a lawyer or law firm and will result in the person contacted communicating with any person by telephone or other electronic means. Thus, forms of electronic communications are prohibited that pose comparable dangers to face-to-face solicitations, such as soliciting business in “chat rooms” or transmitting an unsolicited, interactive communication to a prospective client that, when accessed, puts the recipient in direct contact with another person. Those that do not present such opportunities for abuse, such as pre-recorded telephone messages requiring a separate return call to speak to or retain an attorney or websites that must be accessed by an interested person and that provide relevant and truthful information concerning a lawyer or law firm, are permitted.

2. Nonetheless, paragraphs (a) and (f) unconditionally prohibit those activities only when profit for the lawyer is a significant motive and the solicitation concerns matters arising out of a particular occurrence, event, or series of occurrences or events. The reason this outright ban is so limited is that there are circumstances where the dangers of such contacts can be reduced by less restrictive means. As long as the conditions of sub-paragraphs (a)(1) through (a)(3) are not violated by a given contact, a lawyer may engage in in-person, telephone, or other electronic solicitations when the solicitation is unrelated to a specific occurrence, event, or series of occurrences or events. Similarly, subject to the same restrictions, in-person, telephone, or other electronic solicitations are permitted where the prospective client either has a family or past or present attorney-client relationship with the lawyer or where the potential client had previously contacted the lawyer about possible employment in the matter.

3. In addition, Rule 7.03(a) does not prohibit a lawyer for a qualified non-profit organization from in-person, telephone, or other electronic solicitation of prospective clients for pur-
poses related to that organization. Historically and by law, nonprofit legal aid agencies, unions, and other qualified nonprofit organizations and their lawyers have been permitted to solicit clients in-person or by telephone, and more modern electronic means of communication pose no additional threats to consumers justifying a more restrictive treatment. Consequently, Rule 7.03(a) is not in derogation of those organizations’ constitutional rights to employ such methods. Attorneys for such nonprofit organizations, however, remain subject to this Rule’s general prohibitions against undue influence, intimidation, overreaching, and the like.

### Paying for Solicitation

4. **Rule 7.03(b)** does not prohibit a lawyer from paying standard commercial fees for advertising or public relations services rendered in accordance with these Rules. In addition, a lawyer may pay the fees required by a lawyer referral service that meet the requirements of Occupational Code Title 5, Subtitle B, Chapter 952. However, paying, giving, or offering to pay or give anything of value to persons not licensed to practice law who solicit prospective clients for lawyers has always been considered to be against the best interest of both the public and the legal profession. Such actions circumvent these Rules by having a non-lawyer do what a lawyer is ethically proscribed from doing. Accordingly, the practice is forbidden by Rule 7.03(b). As to payments or gifts of value to licensed lawyers for soliciting prospective clients, see Rule 1.04(f).

5. **Rule 7.03(c)** prohibits a lawyer from paying or giving value directly to a prospective client or any other person as consideration for employment by that client except as permitted by Rule 1.08(d).

6. **Paragraph (d)** prohibits a lawyer from agreeing to or charging for professional employment obtained in violation of Rule 7.03. **Paragraph (e)** further requires a lawyer to decline business generated by a lawyer referral service unless the lawyer knows or reasonably believes that service is operated in conformity with statutory requirements.

7. References to “a lawyer” in this and other Rules include lawyers who practice in law firms. A lawyer associated with a firm cannot circumvent these Rules by soliciting or advertising in the name of that firm in a way that violates these Rules. See Rule 7.04(e).

### Annotations

**Ethics Opinions 519, 524, 537, 543, 548, 561, 562, 573**

### Rule 7.04 Advertisements in the Public Media

(a) A lawyer shall not advertise in the public media by stating that the lawyer is a specialist, except as permitted under Rule 7.04(b) or as follows:

1. A lawyer admitted to practice before the United States Patent Office may use the designation “Patents,” “Patent Attorney,” or “Patent Lawyer,” or any combination of those terms. A lawyer engaged in the trademark practice may use the designa-

(2) A lawyer may permit his or her name to be listed in lawyer referral service offices that meet the requirements of Occupational Code Title 5, Subtitle B, Chapter 952, according to the areas of law in which the lawyer will accept referrals.

(3) A lawyer available to practice in a particular area of law or legal service may distribute to other lawyers and publish in legal directories and legal newspapers (whether written or electronic) a listing or an announcement of such availability. The listing shall not contain a false or misleading representation of special competence or experience, but may contain the kind of information that traditionally has been included in such publications.

(b) A lawyer who advertises in the public media:

(1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement; and

(2) shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:

(i) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, “Board Certified, area of specialization—Texas Board of Legal Specialization;” and

(ii) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence, may include a factually accurate statement of such membership or may include a factually accurate statement, “Certified area of specialization name of certifying organization,” but such statements may be made only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar; and

(3) shall, in the case of infomercial or comparable presentation, state that the presentation is an advertisement;
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(i) both verbally and in writing at its outset, after any commercial interruption, and at its conclusion; and

(ii) in writing during any portion of the presentation that explains how to contact a lawyer or law firm.

(c) Separate and apart from any other statements, the statements referred to in paragraph (b) shall be displayed conspicuously and in language easily understood by an ordinary consumer.

(d) Subject to the requirements of Rules 7.02 and 7.03 and of paragraphs (a), (b), and (c) of this Rule, a lawyer may, either directly or through a public relations or advertising representative, advertise services in the public media, such as (but not limited to) a telephone directory, legal directory, newspaper or other periodical, outdoor display, radio, television, the Internet, or electronic, or digital media.

(e) All advertisements in the public media for a lawyer or firm must be reviewed and approved in writing by the lawyer or a lawyer in the firm.

(f) A copy or recording of each advertisement in the public media and relevant approval referred to in paragraph (e), and a record of when and where the advertisement was used, shall be kept by the lawyer or firm for four years after its last dissemination.

(g) In advertisements in the public media, any person who portrays a lawyer whose services or whose firm’s services are being advertised, or who narrates an advertisement as if he or she were such a lawyer, shall be one or more of the lawyers whose services are being advertised.

(h) If an advertisement in the public media by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay all or any portion of the court costs and, if a client may be liable for other expenses, this fact must be disclosed. If specific percentage fees or fee ranges of contingent fee work are disclosed in such advertisement, it must also disclose whether the percentage is computed before or after expenses are deducted from the recovery.

(i) A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period; but in no instance is the lawyer bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication.

(j) A lawyer or firm who advertises in the public media must disclose the geographic location, by city or town, of the lawyer’s or firm’s principal office. A lawyer or firm shall not advertise the existence of any office other than the principal office unless:
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(1) that other office is staffed by a lawyer at least three days a week; or

(2) the advertisement states:

   (i) the days and times during which a lawyer will be present at that office, or

   (ii) that meetings with lawyers will be by appointment only.

(k) A lawyer may not, directly or indirectly, pay all or a part of the cost of an advertisement in the public media for a lawyer not in the same firm unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.

(l) If an advertising lawyer knows or should know at the time of an advertisement in the public media that a case or matter will likely be referred to another lawyer or firm, a statement of such fact shall be conspicuously included in such advertisement.

(m) No motto, slogan or jingle that is false or misleading may be used in any advertisement in the public media.

(n) A lawyer shall not include in any advertisement in the public media the lawyer’s association with a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(o) A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:

   (1) states that the advertisement is paid for by the cooperating lawyers;

   (2) names each of the cooperating lawyers;

   (3) sets forth conspicuously the special competency requirements required by Rule 7.04(b) of lawyers who advertise in the public media;

   (4) does not state or imply that the lawyers participating in the advertising cooperative or venture possess professional superiority, are able to perform services in a superior manner, or possess special competence in any area of law advertised, except that the advertisement may contain the information permitted by Rule 7.04(b)(2); and

   (5) does not otherwise violate the Texas Disciplinary Rules of Professional Conduct.

(p) Each lawyer who advertises in the public media as part of an advertising cooperative or venture shall be individually responsible for:

   (1) ensuring that each advertisement does not violate this Rule; and
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(2) complying with the filing requirements of Rule 7.07.

(q) If these rules require that specific qualifications, disclaimers or disclosures of information accompany communications concerning a lawyer’s services, the required qualifications, disclaimers or disclosures must be presented in the same manner as the communication and with equal prominence.

(r) A lawyer who advertises on the Internet must display the statements and disclosures required by Rule 7.04.

Comment:

1. Neither Rule 7.04 nor Rule 7.05 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Advertising Areas of Practice and Special Competence

2. Paragraphs (a) and (b) permit a lawyer, under the restrictions set forth, to indicate areas of practice in advertisements about the lawyer’s services. See also paragraph (d). The restrictions are designed primarily to require that accurate information be conveyed. These restrictions recognize that a lawyer has a right protected by the United States Constitution to advertise publicly, but that the right may be regulated by reasonable restrictions designed to protect the public from false or misleading information. The restrictions contained in Rule 7.04 are based on the experience of the legal profession in the State of Texas and are designed to curtail what experience has shown to be misleading and deceptive advertising. To ensure accountability, sub-paragraph (b)(1) requires identification of at least one lawyer responsible for the content of the advertisement.

3. Because of long-standing tradition a lawyer admitted to practice before the United States Patent Office may use the designation “patents,” “patent attorney,” or “patent lawyer” or any combination of those terms. As recognized by paragraph (a)(1), a lawyer engaged in patent and trademark practice may hold himself out as concentrating in “intellectual property law,” “patents, or trademarks and related matters,” or “patent, trademark, copyright law and unfair competition” or any combination of those terms.

4. Paragraph (a)(2) recognizes the propriety of listing a lawyer’s name in legal directories according to the areas of law in which the lawyer will accept new matters. The same right is given with respect to lawyer referral service offices, but only if those services comply with statutory guidelines. The restriction in paragraph (a)(2) does not prevent a legal aid agency or prepaid legal services plan from advertising legal services provided under its auspices.

5. Paragraph (a)(3) continues the historical exception that permits advertisements by lawyers to other lawyers in legal directories and legal newspapers (whether written or electronic), subject to the same requirements of truthfulness that apply to all other forms of lawyer advertising. Such advertisements traditionally contain information about the name, location, telephone numbers, and general availability of a lawyer to work on particular legal
matters. Other information may be included so long as it is not false or misleading. Because advertisements in these publications are not available to the general public, lawyers who list various areas of practice are not required to comply with paragraph (b).

6. Some advertisements, sometimes known as tombstone advertisements, mention only such matters as the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, dates of admission to bars, the acceptance of credit cards, and fees. The content of such advertisements is not the kind of information intended to be regulated by Rule 7.04(b). However, if the advertisement in the public media mentions any area of the law in which the lawyer practices, then, because of the likelihood of misleading material, the lawyer must comply with paragraph (b).

7. Sometimes lawyers choose to advertise in the public media the fact that they have been certified or designated by a particular organization or that they are members of a particular organization. Such statements naturally lead the public to believe that the lawyer possesses special competence in the area of law mentioned. Consequently, in order to ensure that the public will not be misled by such statements, sub-paragraph (b)(2) and paragraph (c) place limited but necessary restrictions upon a lawyer’s basic right to advertise those affiliations.

8. **Rule 7.04(b)(2)** gives lawyers who possess certificates of specialization from the Texas Board of Legal Specialization or other meritorious credentials from organizations approved by the Board the option of stating that fact, provided that the restrictions set forth in subparagraphs (b)(2)(i) and (b)(2)(ii) are followed.

9. **Paragraph (c)** is intended to ensure against misleading or material variations from the statements required by paragraph (b).

10. **Paragraphs (e) and (f)** provide the advertising lawyer, the Bar, and the public with requisite records should questions arise regarding the propriety of a public media advertisement. **Paragraph (e)**, like paragraph (b)(1), ensures that a particular attorney accepts responsibility for the advertisement. It is in the public interest and in the interest of the legal profession that the records of those advertisements and approvals be maintained.

**Examples of Prohibited Advertising**

11. **Paragraphs (g) through (o)** regulate conduct that has been found to mislead or be likely to mislead the public. Each paragraph is designed to protect the public and to guard the legal profession against these documented misleading practices while at the same time respecting the constitutional rights of any lawyer to advertise.

12. **Paragraph (g)** prohibits lawyers from misleading the public into believing a non-lawyer portrayer or narrator in the advertisement is one of the lawyers prepared to perform services for the public. It does not prohibit the narration of an advertisement in the third person by an actor, as long as it is clear to those hearing or seeing the advertisement that the actor is not a lawyer prepared to perform services for the public.
13. Contingent fee contracts present unusual opportunities for deception by lawyers or for misunderstanding by the public. By requiring certain disclosures, paragraph (h) safeguards the public from misleading or potentially misleading advertisements that involve representation on a contingent fee basis. The affirmative requirements of paragraph (h) are not triggered solely by the expression of “contingent fee” or “percentage fee” in the advertisement. To the contrary, they encompass advertisements in the public media where the lawyer or firm expresses a mere willingness or potential willingness to render services for a contingent fee. Therefore, statements in an advertisement such as “no fee if no recovery” or “fees in the event of recovery only” are clearly included as a form of advertisement subject to the disclosure requirements of paragraph (h).

14. Paragraphs (i), (j), (k) and (l) jointly address the problem of advertising that experience has shown misleads the public concerning the fees that will be charged, the location where services will be provided, or the attorney who will be performing these services. Together they prohibit the same sort of “bait and switch” advertising tactics by lawyers that are universally condemned.

15. Paragraph (i) requires a lawyer who advertises a specific fee or range of fees in the public media to honor those commitments for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement itself specifies a shorter period. In no event, however, is a lawyer required to honor an advertised fee or range of fees for more than one year after publication.

16. Paragraph (j) prohibits advertising the availability of a satellite office unless the requirements of subparagraphs (1) or (2) are satisfied. Paragraph (j) does not require, however, that a lawyer or firm specify which of several properly advertised offices is its “principal” one, as long as the principal office is among those advertised and the advertisement discloses the city or town in which that office is located. Experience has shown that, in the absence of such regulation, members of the public have been misled into employing a lawyer in a distant city who advertises that there is a nearby satellite office, only to learn later that the lawyer is rarely available to the client because the nearby office is seldom open or is staffed only by lay personnel. Paragraph (j) is not intended to restrict the ability of legal services programs to advertise satellite offices in remote parts of the program’s service area even if those satellite offices are staffed irregularly by attorneys. Otherwise low-income individuals in and near such communities might be denied access to the only legal services truly available to them.

17. When a lawyer or firm advertises, the public has a right to expect that lawyer or firm will perform the legal services. Experience has shown that attorneys not in the same firm may create a relationship wherein one will finance advertising for the other in return for referrals. Nondisclosure of such a referral relationship is misleading to the public. Accordingly, paragraph (k) prohibits such a relationship between an advertising lawyer and a lawyer who finances the advertising unless the advertisement discloses the nature of the financial relationship between the two lawyers. Paragraph (l) addresses the same problem from a different perspective, requiring a lawyer who advertises the availability of legal services and who know or should know at the time that the advertisement is placed in the media.
that business will likely be referred to another lawyer or firm, to include a conspicuous statement of that fact in any such advertising. This requirement applies whether or not the lawyer to whom the business is referred is financing the advertisements of the referring lawyer. It does not, however, require disclosure of all possible scenarios under which a referral could occur, such as an unforeseen need to associate with a specialist in accordance with Rule 1.01(a) or the possibility of a referral if a prospective client turns out to have a conflict of interest precluding representation by the advertising lawyer. Lawyers participating in any type of arrangement to refer cases must comply with Rule 1.04(f).

18. Paragraph (m) protects the public by forbidding mottos, slogans, and jingles that are false or misleading. There are, however, mottos, slogans, and jingles that are informative rather than false or misleading. Accordingly, paragraph (m) recognizes an advertising lawyer’s constitutional right to include appropriate mottos, slogans, and jingles in advertising.

19. Some lawyers choose to band together in a cooperative or joint venture to advertise. Although those arrangements are lawful, the fact that several independent lawyers have joined together in a single advertisement increases the risk of misrepresentation or other forms of inappropriate expression. Special care must be taken to ensure that cooperative advertisements identify each cooperating lawyer, state that each cooperating lawyer is paying for the advertisement, and accurately describe the professional qualifications of each cooperating lawyer. See paragraph (o). Furthermore, each cooperating lawyer must comply with the filing requirements of Rule 7.07. See paragraph (p).

20. The use of disclosures, disclaimers and qualifying information is necessary to inform the public about various aspects of a lawyer or firm’s practice in public media advertising and solicitation communications. In order to ensure that disclaimers required by these rules are conspicuously displayed, paragraph (q) requires that such statements be presented in the same manner as the communication and with prominence equal to that of the matter to which it refers. For example, in a television advertisement that necessitates the use of a disclaimer, if a statement or claim is made verbally, the disclaimer should also be included verbally in the commercial. When a statement or claim appears in print, the accompanying disclaimer must also appear in print with equal prominence and legibility.

Annotations

State Bar of Texas v. McGee, 972 S.W.2d 770 (Tex. App.—Corpus Christi 1998, no pet.), abrogated by Subaru of America, Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212 (Tex. 2002) (Where attorney requested declaratory judgment that advertisements were proper under the disciplinary rules, and State Bar grievance committee had already convened to decide same issue, State Bar grievance committee had primary jurisdiction to make the initial decision on the matter).

Rodgers v. Commission for Lawyer Discipline, 151 S.W.3d 602 (Tex. App.—Fort Worth 2004, pet. denied) (The disclosures required by Rule 7.04 must appear in print advertising even if the advertisement is only for an informational hotline if that hotline refers callers to an attorney).

Ethics Opinions 521, 548, 561, 573
Rule 7.05 Texas Disciplinary Rules of Professional Conduct

Rule 7.05 Prohibited Written, Electronic, Or Digital Solicitations

(a) A lawyer shall not send, deliver, or transmit or knowingly permit or knowingly cause another person to send, deliver, or transmit a written, audio, audiovisual, digital media, recorded telephone message, or other electronic communication to a prospective client for the purpose of obtaining professional employment on behalf of any lawyer or law firm if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

(2) the communication contains information prohibited by Rule 7.02 or fails to satisfy each of the requirements of Rule 7.04(a) through (c), and (g) through (q) that would be applicable to the communication if it were an advertisement in the public media; or

(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) Except as provided in paragraph (f) of this Rule, a written, electronic, or digital solicitation communication to prospective clients for the purpose of obtaining professional employment:

(1) shall, in the case of a non-electronically transmitted written communication, be plainly marked “ADVERTISEMENT” on its first page, and on the face of the envelope or other packaging used to transmit the communication. If the written communication is in the form of a self-mailing brochure or pamphlet, the word “ADVERTISEMENT” shall be:

   (i) in a color that contrasts sharply with the background color; and

   (ii) in a size of at least 3/8" vertically or three times the vertical height of the letters used in the body of such communication, whichever is larger

(2) shall, in the case of an electronic mail message, be plainly marked “ADVERTISEMENT” in the subject portion of the electronic mail and at the beginning of the message’s text;

(3) shall not be made to resemble legal pleadings or other legal documents;

(4) shall not reveal on the envelope or other packaging or electronic mail subject line used to transmit the communication, or on the outside of a self-mailing brochure or pamphlet, the nature of the legal problem of the prospective client or non-client; and

(5) shall disclose how the lawyer obtained the information prompting the communication to solicit professional employment if such contact was prompted by a specific occurrence involving the recipient of the communication, or a family member of such person(s).
(c) Except as provided in paragraph (f) of this Rule, an audio, audio-visual, digital media, recorded telephone message, or other electronic communication sent to prospective clients for the purpose of obtaining professional employment:

(1) shall, in the case of any such communication delivered to the recipient by non-electronic means, plainly and conspicuously state in writing on the outside of any envelope or other packaging used to transmit the communication, that it is an “ADVERTISEMENT.”

(2) shall not reveal on any such envelope or other packaging the nature of the legal problem of the prospective client or non-client;

(3) shall disclose, either in the communication itself or in accompanying transmittal message, how the lawyer obtained the information prompting such audio, audio-visual, digital media, recorded telephone message, or other electronic communication to solicit professional employment, if such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s);

(4) shall, in the case of a recorded audio presentation or a recorded telephone message, plainly state that it is an advertisement prior to any other words being spoken and again at the presentation’s or message’s conclusion; and

(5) shall, in the case of an audio-visual or digital media presentation, plainly state that the presentation is an advertisement;

   (i) both verbally and in writing at the outset of the presentation and again at its conclusion; and

   (ii) in writing during any portion of the presentation that explains how to contact a lawyer or law firm.

(d) All written, audio, audio-visual, digital media, recorded telephone message, or other electronic communications made to a prospective client for the purpose of obtaining professional employment of a lawyer or law firm must be reviewed and either signed by or approved in writing by the lawyer or a lawyer in the firm.

(e) A copy of each written, audio, audio-visual, digital media, recorded telephone message, or other electronic solicitation communication, the relevant approval thereof, and a record of the date of each such communication; the name, address, telephone number, or electronic address to which each such communication was sent; and the means by which each such communication was sent shall be kept by the lawyer or firm for four years after its dissemination.

(f) The provisions of paragraphs (b) and (c) of this Rule do not apply to a written, audio, audiovisual, digital media, recorded telephone message, or other form, of electronic solicitation communication:
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(1) directed to a family member or a person with whom the lawyer had or has an attorney client relationship;  

(2) that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client’s specific existing legal problem of which the lawyer is aware;  

(3) if the lawyer’s use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or  

(4) that is requested by the prospective client.  

Comment:  

1. Rule 7.03 deals with in-person, telephone, and other prohibited electronic contact between a lawyer and a prospective client wherein the lawyer seeks professional employment. Rule 7.04 deals with advertisements in the public media by a lawyer seeking professional employment. This Rule deals with solicitations between a lawyer and a prospective client. Typical examples are letters or other forms of correspondence (including those sent, delivered, or transmitted electronically), recorded telephone messages, audiotapes, videotapes, digital media, and the like, addressed to a prospective client.  

2. Written, audio, audio-visual, and other forms of electronic solicitations raise more concerns than do comparable advertisements. Being private, they are more difficult to monitor, and for that reason paragraph (e) requires retention for four years of certain information regarding all such solicitations. See also Rule 7.07(a). Paragraph (a) addresses such concerns as well as problems stemming from exceptionally outrageous communications such as solicitations involving fraud, intimidation, or deceptive and misleading claims. Because receipt of multiple solicitations appears to be most pronounced and vexatious in situations involving accident victims, paragraphs (b)(1), (b)(2), (c)(1), (c)(4) and (c)(5) require that the envelope or other packaging used to transmit the communication, as well as the communication itself, plainly disclose that the communication is an advertisement, while paragraphs (b)(5) and (c)(3) require disclosure of the source of information if the solicitation was prompted by a specific occurrence.  

3. Because experience has shown that many written, audio, audio-visual, electronic mail, and other forms of electronic solicitations have been intrusive or misleading by reason of being personalized or being disguised as some form of official communication, special prohibitions against such practices are necessary. The requirements of paragraph (b) and (c) greatly lessen those dangers of deception and harassment.  

4. Newsletters or other works published by a lawyer that are not circulated for the purpose of obtaining professional employment are not within the ambit of paragraph (b) or (c).
5. This Rule also regulates audio, audio-visual, or other forms of electronic communications being used to solicit business. It includes such formats as recorded telephone messages, movies, audio or audio-visual recordings or tapes, digital media, the Internet, and other comparable forms of electronic communications. It requires that such communications comply with all of the substantive requirements applicable to written solicitations that are compatible with the different forms of media involved, as well as with all requirements related to approval of the communications and retention of records concerning them. See paragraphs (c), (d), and (e).

6. In addition to addressing these special problems posed by solicitations, Rule 7.05 regulates the content of those communications. It does so by incorporating the standards of Rule 7.02 and those of Rule 7.04 that would apply to the solicitation were it instead a comparable form of advertisement in the public media. See paragraphs (a)(2) and (3). In brief, this approach means that, except as provided in paragraph (f), a lawyer may not include or omit anything from a solicitation unless the lawyer could do so were the communication a comparable form of advertisement in the public media.

7. Paragraph (f) provides that the restrictions in paragraph (b) and (c) do not apply in certain situations because the dangers of deception, harassment, vexation and overreaching are quite low. For example, a written solicitation may be directed to a family member or a present or a former client, or in response to a request by a prospective client without stating that it is an advertisement. Similarly, a written solicitation may be used in seeking general employment in commercial matters from a bank or other corporation, when there is neither concern with specific existing legal problems nor concern with a particular past event or series of events. All such communications, however, remain subject to Rule 7.02 and paragraphs (h) through (o) of Rule 7.04. See sub-paragraph (a)(2).

8. In addition, paragraph (f) allows such communications in situations not involving the lawyer’s pecuniary gain. For purposes of these rules, it is presumed that communications made on behalf of a nonprofit legal aid agency, union, or other qualified nonprofit organization are not motivated by a desire for, or by the possibility of obtaining, pecuniary gain, but that presumption may be rebutted.

Annotations

Ethics Opinions 521, 537

Rule 7.06 Prohibited Employment

(a) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by any other person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.

(b) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by any of
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Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by any other person or entity that is a shareholder, partner, or member of, an associate in, or of counsel to that lawyer’s firm; or by any other person whom any of the foregoing persons or entities ordered, encouraged, or knowingly permitted to engage in such conduct.

(c) A lawyer who has not violated paragraph (a) or (b) in accepting employment in a matter shall not continue employment in that matter once the lawyer knows or reasonably should know that the person procuring the lawyer’s employment in the matter engaged in, or ordered, encouraged, or knowingly permitted another to engage in, conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9) in connection with the matter unless nothing of value is given thereafter in return for that employment.

Comment:

Selection of a lawyer by a client often is a result of the advice and recommendation of third parties—relatives, friends, acquaintances, business associates, and other lawyers. Although that method of referral is perfectly legitimate, the client is best served if the recommendation is disinterested and informed. All lawyers must guard against creating situations where referral from others is the consequence of some form of prohibited compensation or from some form of false or misleading communication, or by virtue of some other violation of any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9). Paragraph (a) forbids a lawyer who violated these rules in procuring employment in a matter from accepting or continuing employment in that matter. This prohibition also applies if the lawyer ordered, encouraged, or knowingly permitted another to violate these rules. Paragraph (b) also forbids a lawyer from accepting or continuing employment in a matter if the lawyer knows or reasonably should know that a member or employee of his or her firm or any other person has procured employment in a matter as a result of conduct that violates these rules. Paragraph (c) addresses the situation where the lawyer becomes aware that the matter was procured in violation of these rules by an attorney or individual, but had no culpability. In such circumstances, the lawyer may continue employment and collect a fee in the matter as long as nothing of value is given to the attorney or individual involved in the violation of the rule(s).

See also Rule 7.03(d), forbidding a lawyer to charge or collect a fee where the misconduct involves violations of Rule 7.03(a), (b), or (c).

Annotations

Ethics Opinion 537

Rule 7.07  Filing Requirements for Public Advertisements and Written, Recorded, Electronic, or Other Digital Solicitations

(a) Except as provided in paragraphs (c) and (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, no later than the mailing or sending by any means, including electronic, of a written, audio, audio-visual, digital or other electronic solicitation communication:
(1) a copy of the written, audio, audio-visual, digital, or other electronic solicitation communication being sent or to be sent to one or more prospective clients for the purpose of obtaining professional employment, together with a representative sample of the envelopes or other packaging in which the communications are enclosed;

(2) a completed lawyer advertising and solicitation communication application form; and

(3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such solicitations.

(b) Except as provided in paragraph (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, no later than the first dissemination of an advertisement in the public media, a copy of each of the lawyer’s advertisements in the public media. The filing shall include:

(1) a copy of the advertisement in the form in which it appears or will appear upon dissemination, such as a videotape, audiotape, DVD, CD, a print copy, or a photograph of outdoor advertising;

(2) a production script of the advertisement setting forth all words used and describing in detail the actions, events, scenes, and background sounds used in such advertisement together with a listing of the names and addresses of persons portrayed or heard to speak, if the advertisement is in or will be in a form in which the advertised message is not fully revealed by a print copy or photograph;

(3) a statement of when and where the advertisement has been, is, or will be used;

(4) a completed lawyer advertising and solicitation communication application form; and

(5) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such advertisements.

(c) Except as provided in paragraph (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas no later than its first posting on the internet or other comparable network of computers information concerning the lawyer’s or lawyer’s firm’s website. As used in this Rule, a “website” means a single or multiple page file, posted on a computer server, which describes a lawyer or law firm’s practice or qualifications, to which public access is provided through publication of a uniform resource locator (URL). The filing shall include:

(1) the intended initial access page of a website.
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(2) a completed lawyer advertising and solicitation communication application form; and

(3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be set for the sole purpose of defraying the expense of enforcing the rules related to such websites,

(d) A lawyer who desires to secure an advance advisory opinion, referred to as a request for pre-approval, concerning compliance of a contemplated solicitation communication or advertisement may submit to the Advertising Review Committee, not less than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a) or (b), or the intended initial access page submitted pursuant to paragraph (c), including the application form and required fee; provided however, it shall not be necessary to submit a videotape or DVD if the videotape or DVD has not then been prepared and the production script submitted reflects in detail and accurately the actions, events, scenes, and background sounds that will be depicted or contained on such videotapes or DVDs, when prepared, as well as the narrative transcript of the verbal and printed portions of such advertisement. If a lawyer submits an advertisement or solicitation communication for pre-approval, a finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding or disciplinary action but a finding of compliance is binding in favor of the submitting lawyer as to all materials actually submitted for pre-approval if the representations, statements, materials, facts and written assurances received in connection therewith are true and are not misleading. The finding of compliance constitutes admissible evidence if offered by a party.

(e) The filing requirements of paragraphs (a), (b), and (c) do not extend to any of the following materials, provided those materials comply with Rule 7.02(a) through (c) and, where applicable. Rule 7.04(a) through (c):

(1) an advertisement in the public media that contains only part or all of the following information:

(i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, electronic addresses, telephone numbers, office and telephone service hours, teletypewriter numbers, and a designation of the profession such as “attorney”, “lawyer”, “law office”, or “firm;

(ii) the particular areas of law in which the lawyer or firm specializes or possesses special competence;

(iii) the particular areas of law in which the lawyer or firm practices or concentrates or to which it limits its practice;

(iv) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;
(v) technical and professional licenses granted by this state and other recognized licensing authorities;

(vi) foreign language ability;

(vii) fields of law in which one or more lawyers are certified or designated, provided the statement of this information is in compliance with Rule 7.02(a) through (c).

(viii) identification of prepaid or group legal service plans in which the lawyer participates;

(ix) the acceptance or nonacceptance of credit cards;

(x) any fee for initial consultation and fee schedule;

(xi) other publicly available information concerning legal issues, not prepared or paid for by the firm or any of its lawyers, such as news articles, legal articles, editorial opinions, or other legal developments or events, such as proposed or enacted rules, regulations, or legislation;

(xii) in the case of a website, links to other websites;

(xiii) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;

(xiv) any disclosure or statement required by these rules; and

(xv) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;

(2) an advertisement in the public media that:

(i) identifies one or more lawyers or a firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event; and

(ii) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, and the fact of the sponsorship or contribution;

(3) a listing or entry in a regularly published law list;

(4) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card;
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(5) in the case of communications sent, delivered, or transmitted to, rather than accessed by, intended recipients, a newsletter, whether written, digital, or electronic, provided that it is sent, delivered, or transmitted only to:

(i) existing or former clients;

(ii) other lawyers or professionals; or

(iii) members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for, or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by a lawyer; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization;

(6) a solicitation communication that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client’s specific existing legal problem of which the lawyer is aware;

(7) a solicitation communication if the lawyer’s use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or

(8) a solicitation communication that is requested by the prospective client.

(f) If requested by the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media or written solicitation communication by which the lawyer seeks paid professional employment.

Comment:

1. Rule 7.07 covers the filing requirements for public media advertisements (see Rule 7.04) and written, recorded, or other electronic solicitations (see Rule 7.05). Rule 7.07(a) deals with solicitation communication sent by a lawyer to one or more specified prospective clients. Rule 7.07(b) deals with advertisements in the public media. Rule 7.07(c) deals with websites. Although websites are a form of advertisement in the public media, they require different treatment in some respects and so are dealt with separately. Each provision allows the Bar to charge a fee for reviewing submitted materials, but requires that fee be set solely to defray the expenses of enforcing those provisions.

2. Copies of non-exempt solicitations communication or advertisements in public media (including websites) must be provided to the Advertising Review Committee of the State
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Bar of Texas either in advance or concurrently with dissemination, together with the fee required by the State Bar of Texas Board of Directors. Presumably, the Advertising Review Committee will report to the appropriate grievance committee any lawyer whom it finds from the reviewed products has disseminated an advertisement in the public media or solicitation communication that violates Rules 7.02, 7.03, 7.04, or 7.05, or, at a minimum, any lawyer whose violation raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.03(a).

3. Paragraph (a) does not require that a lawyer submit a copy of each and every written solicitation letter a lawyer sends. If the same form letter is sent to several people, only a representative sample of each form letter, along with a representative sample of the envelopes used to mail the letters, need be filed.

4. A lawyer wishing to do so may secure an advisory opinion from the Advertising Review Committee concerning any proposed advertisement in the public media (including a website) or any solicitation communication in advance of its first use or dissemination by complying with Rule 7.07(d). This procedure is intended as a service to those lawyers who want to resolve any possible doubts about their proposed advertisements’ or solicitations’ compliance with these Rules before utilizing them. Its use is purely optional. No lawyer is required to obtain advance clearance of any advertisement in the public media (including a website) or any solicitation communication from the State Bar. Although a finding of non-compliance by the Advertising Review Committee is not binding in a disciplinary proceeding, a finding of compliance is binding in favor of the submitting lawyer as to all materials actually submitted for review, as long as the lawyer’s presentation to the Advertising Review Committee in connection with that advisory opinion is true and not misleading.

5. Under its Internal Rules and Operating Procedures, the Advertising Review Committee is to complete its evaluations no later than 25 days after the date of receipt of a filing. The only way that the Committee can extend that review period is to: (1) determine that there is reasonable doubt whether the advertisement or solicitation communication complies with these Rules; (2) conclude that further examination is warranted but cannot be completed within the 25-day period; and (3) advise the lawyer of those determinations in writing within that 25 day period. The Committee’s Internal Rules and Operating Procedures also provide that a failure to send such a communication to the lawyer within the 25-day period constitutes approval of the advertisement or solicitation communication. Consequently, if an attorney submits an advertisement in the public media (including a website) or a solicitation communication to the Committee for advance approval not less than 30 days prior to the date of first dissemination as required by these Rules, the attorney will receive an assessment of that advertisement or communication before the date of its first intended use.

6. Consistent with the effort to protect the first amendment rights of lawyers while ensuring the right of the public to be free from misleading advertising and the right of the Texas legal profession to maintain its integrity, paragraph (e) exempts certain types of advertisements and solicitation communications prepared for the purpose of seeking paid professional employment from the filing requirements of paragraphs (a), (b), and (c). Those
Rule 7.07

For the most part, the types of exempted advertising listed in sub-paragraphs (e)(1) to (e)(5) are objective and less likely to result in false, misleading or fraudulent content. Similarly the types of exempted solicitation communications listed in sub-paragraphs (e)(6) to (e)(8) are those found least likely to result in harm to the public. See Rule 7.05(f), and comment 7 to Rule 7.05. The fact that a particular advertisement or solicitation made by a lawyer is exempted from the filing requirements of this Rule does not exempt a lawyer from the other applicable obligations of these Rules. See generally Rules 7.01 through 7.06.

8. Paragraph (f) does not empower the Advertising Review Committee to seek information from a lawyer to substantiate statements or representations made or implied in advertisements or written communications that do not seek to obtain paid professional employment for that lawyer.

Annotations

Rodgers v. Commission for Lawyer Discipline, 151 S.W.3d 602 (Tex. App.—Fort Worth 2004, pet. denied) (The filing of advertisements with the State Bar Advertising Review Committee is required for the first dissemination of the advertisement after the effective date of Rule 7.07—July 29, 1995—even if the advertisement had previously been disseminated; the burden of proving that a lawyer’s advertisement is not a public service announcement is on the lawyer).

Medlock v. Commission for Lawyer Discipline, 24 S.W.3d 865 (Tex. App.—Texarkana 2000, no pet.) (Lawyer violated Rule 7.07(a) by failing to submit solicitation letter to Lawyer Advertisement and Solicitation Review Committee before or at time of mailing).

Ethics Opinion 548

VIII. Maintaining the Integrity of the Profession

Rule 8.01 Bar Admission, Reinstatement, and Disciplinary Matters

An applicant for admission to the bar, a petitioner for reinstatement to the bar, or a lawyer in connection with a bar admission application, a petition for reinstatement, or a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission, reinstatement, or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.05.
Comment:

1. The duty imposed by this Rule extends to persons seeking admission or reinstatement to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission or a petition for reinstatement, it may be the basis for subsequent disciplinary action if the person is admitted or reinstated, and in any event may be relevant in any subsequent application for admission or petition for reinstatement. The duty imposed by this Rule applies to a lawyer’s own admission, reinstatement or discipline as well as that of others. Thus, for example, it is a separate professional offense for a lawyer to knowingly make a material misrepresentation or omission in connection with a disciplinary investigation of the lawyer’s own conduct. Likewise, it is a separate professional offense for a lawyer to fail to respond to a lawful demand for information of a disciplinary authority inquiring into that lawyer’s professional activities or conduct. Cf. State Bar Rules, art. X, sec. 7(4). This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions, reinstatement or disciplinary authority of which the person involved becomes aware.

2. This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of Article 1, Section 10 of the Texas Constitution. A person relying on such a provision in response to a specific question or more general demand for information, however, should do so openly and not use the right of nondisclosure as an unasserted justification for failure to comply with this Rule. Cf. State Bar Rules, art. X, sec. 7(4).

3. A lawyer representing an applicant for admission or petitioner for reinstatement to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including those concerning the confidentiality of attorney-client communications. If such communications are protected under Rule 1.05, the lawyer need not and should not disclose them under this Rule. See also Rule 8.03(c).

Annotations

*Steinberg v. Commission for Lawyer Discipline*, 180 S.W.3d 352 (Tex. App.—Dallas 2005, no pet.) (Rule 8.01 permits disciplinary action against a lawyer who engaged in improper conduct during the reinstatement process).

*Weiss v. Commission for Lawyer Discipline*, 981 S.W.2d 8 (Tex. App.—San Antonio 1998, no pet.) (Attorney violated Rule 8.01 by knowingly failing to correct misrepresentations before his disciplinary grievance committee hearing).

*Rangel v. State Bar of Texas*, 898 S.W.2d 1 (Tex. App.—San Antonio 1995, no writ) (Failure to respond to grievance committee requests to provide information in connection with disciplinary actions clearly warrants disciplinary action).

*Board of Law Examiners v. Malloy*, 793 S.W.2d 753 (Tex. App.—Austin 1990, writ denied).
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_Minnick v. State Bar of Texas_, 790 S.W.2d 87 (Tex. App.—Austin 1990, writ denied) (Lawyer’s failure to produce bank records and other information in response to proper discovery requests and court order in disbarment trial was relevant factor under Rule 8.01(b) in determining appropriate measure of discipline).


_State Bar of Texas v. Roberts_, 723 S.W.2d 233, 234–35 (Tex. App.—Houston [1st Dist.] 1986, no writ) (Failing to respond to letters of State Bar regarding grievances violated State Bar Rules art. X, § 7 and Rule 8.01(b)).

Ethics Opinions 375, 456

Rule 8.02 Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Texas Code of Judicial Conduct.

(c) A lawyer who is a candidate for an elective public office shall comply with the applicable provisions of the Texas Election Code.

Comment:

1. Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

2. When a lawyer seeks judicial or other elective public office, the lawyer should be bound by applicable limitations on political activity.

3. To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Annotations

_State Bar of Texas v. Semaan_, 508 S.W.2d 429, 432 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.) (Lawyer’s criticism of judge in letter to newspaper was not professional misconduct under Rule 8.02(a) where criticism was expression of opinion and no issue of falsity or improper motive was involved).
Polk v. State Bar of Texas, 374 F. Supp. 784, 788 (N.D. Tex. 1974) (Lawyer not subject to discipline for derogatory remarks made about district attorney and judge while acting as private citizen).

Ethics Opinion 369

Rule 8.03 Reporting Professional Misconduct

(a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.

(b) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.

(c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of this Rule is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyer’s report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).

(d) This rule does not require disclosure of knowledge or information otherwise protected as confidential information:

   (1) by Rule 1.05 or

   (2) by any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.

Comment:

1. Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigations when they have knowledge not protected by Rule 1.05 that a violation of these rules has occurred. Lawyers have a similar obligation with respect to judicial misconduct. Frequently, the existence of a violation cannot be established with certainty until a disciplinary investigation has been undertaken. Similarly, an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Consequently, a lawyer should not fail to report an apparent disciplinary violation merely because he cannot determine its existence or scope with absolute certainty. Reporting a violation is especially important where the victim is unlikely to discover the offense.

2. It should be noted that this Rule describes only those disciplinary violations that must be revealed by the disclosing lawyer in order to avoid violating these rules himself. It is not
Rule 8.03 Texas Disciplinary Rules of Professional Conduct

intended to, nor does it, limit those actual or suspected violations that a lawyer may report. However, if a lawyer were obliged to report every violation of these rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. Similar considerations apply to the reporting of judicial misconduct. The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. The term “fitness” has the meanings ascribed to it in the Terminology provisions of these Rules.

3. A report of professional misconduct by a lawyer should be made and processed in accordance with Article X of the State Bar Rules. A lawyer need not report misconduct where the report would involve a violation of Rule 1.05. However, a lawyer should encourage a client to consent to disclosure where prosecution of the violation would not substantially prejudice the client’s interests. Likewise, the duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose past professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Annotations

Lopes v. State, 68 S.W.3d 286 (Tex. App.—Waco 2002, order) (Court has an obligation under the disciplinary rules to report a lawyer’s repeated failure to file briefs in a timely manner).

Falcon v. State, 933 S.W.2d 531 (Tex. App.—Amarillo 1995, no writ) (Court had an obligation to report counsel under DR 8.03 when counsel never filed brief after filing five motions to extend time for filing brief).

Gray v. State, 896 S.W.2d 572 (Tex. App.—Waco 1995, no writ) (Court of appeals reported an attorney’s conduct to State Bar of Texas, citing DR 8.03(a). The attorney did not file a brief for client, despite court’s repeated requests and repeated grants of extensions of time.).

Mylett v. Jeane, 910 F.2d 296 (5th Cir. 1990) (If defense counsel solicited plaintiff’s counsel to breach fiduciary duties to his client for his personal benefit, plaintiff’s counsel had obligation under Rule 8.03 to bring it to magistrate’s attention).

Ethics Opinions 386, 520, 522, 534

Rule 8.04 Misconduct

(a) A lawyer shall not:

(1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;
(2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(4) engage in conduct constituting obstruction of justice;

(5) state or imply an ability to influence improperly a government agency or official;

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(7) violate any disciplinary or disability order or judgment;

(8) fail to timely furnish to the Chief Disciplinary Counsel’s office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he or she in good faith timely asserts a privilege or other legal ground for failure to do so;

(9) engage in conduct that constitutes barratry as defined by the law of this state;

(10) fail to comply with section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorney’s cessation of practice;

(11) engage in the practice of law when the lawyer is on inactive status or when the lawyer’s right to practice has been suspended or terminated including but not limited to situations where a lawyer’s right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with Article XII of the State Bar Rules relating to Mandatory Continuing Legal Education; or

(12) violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.

(b) As used in subsection (a)(2) of this Rule, “serious crime” means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

Comment:

1. There are three principal sources of professional obligations for lawyers in Texas: these rules, the State Bar Act, and the State Bar Rules. Article X, section 7 of the State Bar Rules contains a listing of the grounds for discipline under those Rules.

2. Rule 8.04 provides a comprehensive restatement of all forms of conduct that will subject a lawyer to discipline under either these Rules, the State Bar Act or the State Bar Rules. In that regard, Rule 8.04(a)(1) is intended to correspond to article X, section 7(1) of the State
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Bar Rules; Rules 8.04(a)(2) and 8.04(b) are intended to correspond to the provisions of article X, sections 7(8) and 26 of those Rules; and Rules 8.04(a)(7)–(10) are intended to correspond to article X, sections 7(3), 7(5), 7(6) and 7(7), respectively, of the State Bar Rules. Rule 8.04(a)(11) of these Rules corresponds to a prohibition contained in the last (unnumbered) paragraph of article X, section 7.

3. The only two provisions of article X, section 7 not specifically referred to in Rule 8.04 are addressed by other Rules. In particular, article X, section 7(2)’s provision for imposing discipline on an attorney here for conduct resulting in that lawyer’s discipline in another jurisdiction is provided for by Rule 8.05 of these Rules. Similarly, article X, section 7(4)’s provision prohibiting a lawyer from failing either to provide information to a grievance or review committee, or to assert grounds for failure to do so, is made a subject of discipline by Rule 8.01 of these Rules. Violations of either of those Rules, in turn, subjects a lawyer to discipline pursuant to Rule 8.04(a)(1).

4. Many kinds of illegal conduct reflect adversely on fitness to practice law. However, some kinds of offenses carry no such implication. Traditionally in this state, the distinction has been drawn in terms of “serious crimes” and other offenses. See article X, sections 7(8) and 26 of the State Bar Rules. These Rules continue that distinction by making only those criminal offenses either amounting to “serious crimes” or having the salient characteristics of such crimes the subject of discipline. See Rules 8.04(a)(2), 8.04(b).

5. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to his fitness for the practice of law, as “fitness” is defined in these Rules. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations that legitimately could call a lawyer’s overall fitness to practice into question.

6. A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief, openly asserted, that no valid obligation exists. The provisions of Rule 1.02(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges to legal regulation of the practice of law.

7. Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust.

Annotations

*Musslewhite v. State Bar of Texas*, 786 S.W.2d 437, 443 (Tex. App.—Houston [14th Dist.] 1990, writ denied), cert. denied, 501 U.S. 1251 (1991) (Finding that attorney accepted new clients in violation of probation condition was sufficiently supported by evidence that clients hired him while probation was in effect, though clients belonged to class of plaintiffs already certified before prohibition went into effect).
Unauthorized Practice Committee v. Cortez, 692 S.W.2d 47 (Tex. 1985), cert denied, 474 U.S. 980 (1985) (Advising clients whether they qualified to file various petitions and applications with Immigration and Naturalization Service, and determining whether immigration forms should be filed at all, required legal skill and knowledge and therefore constituted unauthorized practice of law).

In re Humphries, 880 S.W.2d 402 (Tex. 1994) (Attorney’s felony tax evasion is an intentional crime under DR 8.04).

Board of Law Examiners v. Stevens, 868 S.W.2d 773 (Tex. 1994) (Willful failure to file income tax returns and to satisfy overdue judgment debts supported Board of Law Examiners’ finding that applicant lacked “good moral character”).

O’Quinn v. State Bar of Texas, 763 S.W.2d 397 (Tex. 1988) (Ban on in-person solicitation by lawyers or runners does not violate lawyers’ free speech rights or equal protection under the U.S. and Texas Constitutions).

State Bar of Texas v. Heard, 603 S.W.2d 829, 835 (Tex. 1980) (Mail fraud and conspiracy to commit mail fraud are crimes involving moral turpitude as a matter of law).

State v. Ingram, 511 S.W.2d 252, 253 (Tex. 1974) (Disbarment was not compulsory where lawyer had misappropriated client funds and lied about it to grievance committee but had not been convicted of a serious crime).

McIntyre v. Commission for Lawyer Discipline, 169 S.W.3d 803 (Tex. App.—Dallas 2005, pet. denied) (Lawyer violated Rule 8.04(a)(3) by filing pleadings and other documents in bankruptcy court that falsely represented that client knew about and consented to the bankruptcy proceeding).

Bellino v. Commission for Lawyer Discipline, 124 S.W.3d 380 (Tex. App.—Dallas 2004, pet. denied) (Lawyer violated Rule 8.04(a)(3) by settling client’s claims without her permission, failing to promptly disburse the settlement proceeds, and offering to disburse additional proceeds if the client would refrain from filing a grievance with the State Bar).

Keen v. State, 85 S.W.3d 405 (Tex. App.—Tyler 2002, pet. ref’d) (Prosecutor’s use of informants in criminal case did not violate Rule 8.04’s prohibition on conduct involving dishonesty, fraud, deceit, or misrepresentation).

Eureste v. Commission for Lawyer Discipline, 76 S.W.3d 184 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (Any conduct by a lawyer involving dishonesty, deceit, or misrepresentation is a violation of Rule 8.04, even if the conduct doesn’t amount to fraud because the lawyer lacked the intent to deceive, and specifically that signing or approving billing of time that was not actually worked is in fact fraudulent as well as dishonest, deceitful, and a misrepresentation; Rule 8.04, unlike Rule 7.02(a)(1), does not contain a requirement that the misrepresentations at issue be material, but the lawyer’s billing of clients for work that was not performed was material; a violation of any other Disciplinary Rule of Professional Conduct is sufficient to establish a violation of Rule 8.04(a)(1)).
Rule 8.04  Texas Disciplinary Rules of Professional Conduct

*Curtis v. Commission for Lawyer Discipline, 20 S.W.3d 227 (Tex. App.—Houston [14th Dist.] 2000, no pet.)* (Attorney knowingly engaged in conduct involving dishonesty or misrepresentation by misrepresenting material facts about another attorney’s health and qualifications in an effort to induce that attorney’s clients to execute additional employment contracts with her and by knowingly misrepresenting to clients that another attorney had authorized the execution of additional employment contracts and that it was common practice to execute multiple contracts with attorneys).

*Vickery v. Commission for Lawyer Discipline, 5 S.W.3d 241 (Tex. App.—Houston [1st Dist.] 1999, pet. denied)* (Attorney, who was a party to a divorce action, was subject to discipline for inducing his friend, who was also an attorney, to convey a settlement offer directly to the attorney’s wife, who was represented by counsel and to violate Rule 1.06 by representing both him and his wife in divorce action; lawyer was subject to discipline for misrepresentations in divorce proceeding to which he was a party, where he misrepresented (1) the location of his wife’s residence to obtain venue in another county, (2) the date of their separation, and (3) that the property division was just and equitable).

*Parker v. State Farm Mutual Automobile Insurance Co., 4 S.W.3d 358 (Tex. App.—Houston [1st Dist.] 1999, no pet.)* (Lawyer’s unauthorized endorsement of another’s name on a settlement check constituted a criminal act (forgery), violating Rule 8.04).

*Love v. State Bar of Texas, 982 S.W.2d 939 (Tex. App.—Houston 1998, no pet.)* (Attorney violated Rule 8.04 by directing anti-Semitic comments toward judge who had reset the attorney’s case for the next day after the attorney had been absent from court for two hours without explanation).

*Brown v. Commission for Lawyer Discipline, 980 S.W.2d 675 (Tex. App.—San Antonio 1998, no pet.)* (Lawyer acted dishonestly by failing to repay medical providers after promising to do so).

*Flume v. State Bar of Texas, 974 S.W.2d 55 (Tex. App.—San Antonio 1998, no pet.)* (Attorney violated Rule 8.04 by knowingly serving opposing party an ineffective temporary restraining order (TRO) containing a hearing date, which, when combined with manner of service, caused opposing counsel to believe that his client had been served with a valid TRO and by failing to serve opposing party with the valid TRO signed by judge and containing a different hearing date).

*Butler v. Commission for Lawyer Discipline, 928 S.W.2d 659 (Tex. App.—Corpus Christi 1996, no writ)* (Lawyer engaged in fraudulent and dishonest misconduct by promising an assignment of client’s settlement as payment for legal fees, then encouraging the client to refuse to pay those fees).

*Contico International v. Alvarez, 910 S.W.2d 29 (Tex. App.—El Paso 1995, no writ)* (Defendants in personal injury case moved to disqualify plaintiff’s lawyer because he had obtained copy of the report prepared by defendants during investigation. Trial court refused to disqualify but appeals court granted writ, holding trial court abused discretion. Even though appeals court did not find that the lawyer had actually committed misconduct, it found that his actions created a permissible presumption that he possessed defendant’s confidences.).
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Rangel v. State Bar of Texas, 898 S.W.2d 1 (Tex. App.—San Antonio 1995, no writ) (Failure to respond to grievance committee requests to provide information in connection with disciplinary actions clearly warrants disciplinary action).

Fadia v. Unauthorized Practice of Law Committee, 830 S.W.2d 162, 164 (Tex. App.—Dallas 1992, writ denied) (Publication and distribution of will manual constituted practice of law).

State Bar of Texas v. Faubion, 821 S.W.2d 203 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (Lawyer engaged in conduct involving misrepresentation under Rule 8.04(a)(3), where lawyer’s letterhead advertised board certification when certification had expired, even though there was no evidence of detrimental reliance).

Unauthorized Practice of Law Committee v. Jansen, 816 S.W.2d 813, 816 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (Public insurance adjustor who documented and presented first party claims for property damage to insurance companies, discussed measurement and documentation of claims with insurance company representatives, and advised clients that valuations placed on claims by insurance companies was or was not accurate, was not engaged in practice of law).

Minnick v. State Bar of Texas, 790 S.W.2d 87 (Tex. App.—Austin 1990, writ denied) (Disbarment was proper for attorney who misappropriated trust funds while acting in capacity of president of mortgage company).

Turton v. State Bar of Texas, 775 S.W.2d 712, 715–16 (Tex. App.—San Antonio 1989, writ denied) (Under Rule 8.04(a)(2), (b), aggravated assault with serious bodily injury is not, per se, a felony involving moral turpitude).

Lewis v. State, 773 S.W.2d 689, 692 (Tex. App.—Corpus Christi 1989, writ ref’d) (Court upheld conviction of justice of the peace who placed false statement in arrest warrant in violation of Texas statute against tampering with governmental records).


Brown v. Unauthorized Practice of Law Committee, 742 S.W.2d 34 (Tex. App.—Dallas 1987, writ denied) (Private insurance adjustor who negotiated client’s personal injury claims with insurance companies engaged in practice of law).

Hefner v. State, 735 S.W.2d 608, 625–26 (Tex. App.—Dallas 1987, writ ref’d) (Lawyer’s reliance on court opinions that order substituting counsel and order requiring client to deposit funds in registry of court were invalid, did not excuse lawyer’s conduct in misappropriating client’s funds).

Bray v. Squires, 702 S.W.2d 266, 270 (Tex. App.—Houston [1st Dist.] 1985, no writ) (Associates of law firm did not breach fiduciary duties to employer by making preparations for future business venture among themselves and planning to compete with firm).


Muniz v. State, 575 S.W.2d 408, 411 (Tex. Civ. App.—Corpus Christi 1979, writ ref’d n.r.e.) (Federal offenses of unlawfully conspiring to import marijuana, conspiring to possess with intent to distribute marijuana, and jumping bond are felony offenses involving moral turpitude).

State Bar of Texas v. O’Dowd, 553 S.W.2d 822, 824 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (State Bar offered no evidence that attorney had been fraudulent or deceitful by missing a hearing and could not, as a matter of law, establish a violation of DR 1-102(A)).

State v. McVicker, 553 S.W.2d 820, 821 (Tex. Civ. App.—Beaumont 1977, writ ref’d n.r.e.) (Under Rule 8.04(a)(2), (b), offense of willful failure to file income tax returns was not a misdemeanor involving theft, embezzlement, or fraudulent appropriation of money or other property).


State v. Baker, 539 S.W.2d 367, 375 (Tex. Civ. App.—Austin 1976, writ ref’d n.r.e.) (Lawyer in malpractice or disbarment suit is not liable for error in judgment if he acted in good faith and honest belief his advice and acts were well-founded and in best interest of clients).

Phagan v. State, 510 S.W.2d 655, 658–59 (Tex. Civ. App.—Fort Worth 1974, writ ref’d n.r.e.) (Upon disbarment, attorney became ineligible and disqualified to hold office of District Attorney).

State v. Laughlin, 286 S.W.2d 278, 279–80 (Tex. Civ. App.—San Antonio 1955, writ ref’d n.r.e.) (Supreme court’s removal of district judge from office did not constitute “conviction” for disbarment purposes).

Ethics Opinions 382, 405, 407, 412, 415, 444, 452, 460, 465, 470, 477, 522, 566

Rule 8.05 Jurisdiction

(a) A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined here for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04.

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority for:
Texas Disciplinary Rules of Professional Conduct

Rule 8.05

(1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state; and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.

Comment:

1. This Rule describes those lawyers who are subject to the disciplinary authority of this state. It includes all lawyers licensed to practice here, as well as lawyers admitted specially for a particular proceeding. This Rule is not intended to have any effect on the powers of a court to punish lawyers for contempt or for other breaches of applicable rules of practice or procedure.

2. In modern practice lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. In doing so, they remain subject to the governing authority of this state. If their activity in another jurisdiction is substantial and continuous, it may constitute the practice of law in that jurisdiction. See Rule 5.05.

3. If the rules of professional conduct of this state and that other jurisdiction differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction and these jurisdictions impose conflicting obligations. A related problem arises with respect to practice before a federal tribunal, where the general authority of the state to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them. In such cases, this state will not impose discipline for conduct arising in connection with the practice of law in another jurisdiction or resulting in lawyer discipline in another jurisdiction unless that conduct constitutes professional misconduct under Rule 8.04.

4. Normally, discipline will not be imposed in this state for conduct occurring solely in another jurisdiction or judicial system and authorized by the rules of professional conduct applicable thereto, even if that conduct would violate these Rules.

Annotations

Rule 8.05  

Texas Disciplinary Rules of Professional Conduct  

*State v. Pounds*, 525 S.W.2d 547, 552 (Tex. Civ. App.—Amarillo 1975, writ ref’d n.r.e.) (Nonresident attorneys licensed by this state may be disciplined by this state in disbarment action for acts committed while those attorneys were Texas residents).

Ethics Opinion 452

IX. Severability of Rules

**Rule 9.01  Severability**

If any provision of these rules or any application of these rules to any person or circumstances is held invalid, such invalidity shall not affect any other provision or application of these rules that can be given effect without the invalid provision or application and, to this end, the provisions of these rules are severable.

**Comment:**

The history of the regulation of American lawyers is replete with challenges to various rules on grounds of unconstitutionality. Because many of these Rules, particularly those in Article VII, are interrelated to an extent, the voiding of a particular rule or of a single provision in a rule could raise questions as to whether other provisions should survive. Rule 9.01 makes it clear that these Rules should be construed so as to minimize the effect of a determination that a particular application or provision of them is unconstitutional. The process of amending the Texas Disciplinary Rules of Professional Conduct is unusually difficult and time consuming and a decision invalidating one provision or application of a rule should not be expanded unnecessarily so as to invalidate other provisions or applications. These Disciplinary Rules have the specificity found in statutes, and it is appropriate for Rule 9.01 to contain a provision, frequently found in legislation, that reasonably limits the effect of the invalidity of one provision or one application of a rule.
Chapter 3

Summaries of the Opinions of the Committee on Professional Ethics, State Bar of Texas

This section contains summaries of the opinions of the Committee on Professional Ethics of the Supreme Court of Texas. The committee issues such opinions pursuant to written requests of Texas attorneys. After reviewing the fact situation related by the inquiring attorney, the committee determines whether the provisions of the Texas Disciplinary Rules of Professional Conduct apply to these facts. If so, the committee interprets the Rules and issues an advisory opinion—a formal opinion if the committee determines the situation to be of widespread interest, otherwise an informal opinion. Tex. Gov’t Code § 81.092 provides that opinions of the committee shall not be binding upon the Supreme Court of Texas. Courts have accorded committee opinions a degree of persuasiveness.

The full texts of all opinions are published in the Texas Bar Journal. Because of space limitations, however, only summaries of the opinions have been included in this volume. The summaries and titles of opinions 1–306 included herein (together with the full texts of these opinions) are set forth in 18 Baylor L. Rev. 195–368 (1966), and opinions 307–357 are set forth in 23 Baylor L. Rev. 827–98 (1972) and are used with permission. These summaries show the date of issuance (for Opinions 1–357) or of printing (358–end).

Ethics opinions issued before the adoption of the Code of Professional Responsibility in 1971 apply the forty-three Canons of Ethics then in effect. The text of these canons may be found in the appendix to title 14 in volume 1A of Texas Revised Civil Statutes Annotated following the repealed Code of Professional Responsibility; text may also be found at www.law.uh.edu/libraries/ethics/canons/index.html. The Code of Professional Responsibility was in turn supplanted by the Texas Disciplinary Rules of Professional Conduct, effective January 1, 1990. Opinions based on the Code of Professional Responsibility (through Opinion 463) and the Disciplinary Rules of Professional Conduct (Opinion 464 on) will refer to “Disciplinary Rules” (abbreviated DR) and “Ethical Considerations” (abbreviated EC). Most of the provisions found in the old canons and rules have been included in some form in the current Rules. Consequently, most of the opinions issued under the old canons remain in force under the current Rules.

OPINION 1 (December 1946)

Conflict of Interest—Court Clerks—An attorney serving as the clerk of any court of record who wishes to perform legal services in addition to his official duties is limited to office practice that has no connection with court proceedings.

Division of Fees—Court Clerks—A division of fees for court proceedings between an attorney while serving as the clerk of any court of record and another attorney is improper. Canons 6, 31.
OPINION 2 (December 1946)

Solicitation—Advertising—Professional Listings—Notice of Specialized Legal Service—Latin-American Business—Bar Journal—An ad in the Texas Bar Journal addressed to the members of the Bar, soliciting Latin-American business by stating “References; the lawyers of Travis County” and setting out the ability to read and write Spanish and English equally well, plus other qualifications, is improper. Canons 24, 39, 41, 42.

OPINION 3 (April 1947)

Solicitation—Professional Cards—An attorney may not put words such as “Safety thoughts: Wills save worry/Contracts save rights” on the back of his professional card. Canons 24, 39.

OPINION 4 (April 1947)

Solicitation—Professional Listings—Newspaper Advertisements—It is improper to publish professional listings as newspaper ads in a section or column not set aside for lawyers and listed as legal directory or legal guide. Canons 24, 39.

OPINION 5 (April 1947)

Solicitation—Professional Listings—Notice of Specialized Legal Service—Newspaper Announcements—A newspaper announcement that an attorney formerly serving in the attorney general’s office, or with some other department of state, is now engaged in private practice specializing in enumerated matters handled while with the state, is improper. Canons 24, 39, 41, 42.

OPINION 6 (April 1947)

Solicitation—Professional Listings—Telephone Directories—Attorneys may be listed in the classified section of telephone directories, provided no advertising matter is included. Canons 24, 39.

OPINION 7 (April 1947)


OPINION 8 (May 1947)

Solicitation—Advertising—Professional Listings—Bar Journal—An ad in the Texas Bar Journal soliciting tax matter by mail and stating that the attorney is licensed to practice before the Treasury Department and U.S. Tax Court is improper. Canons 24, 39.

OPINION 9 (June 1947)

Upholding the Honor of the Profession—Confidences of Clients—False Accusations—Discovery of Imposition and Deception—A Texas attorney falsely accused by a client, a
California attorney, in a California disciplinary proceeding against the client, has a duty to disclose the truth with respect to the false accusation. Canons 26, 34, 38. ABA Canons 29, 34, 41.

OPINION 10 (December 1947)

Solicitation—Advertising—Notice of Specialized Legal Service—Bar Journal—An ad in the Texas Bar Journal addressed to attorneys and offering a statewide specialized service in briefing and arguing civil cases on appeal in state and federal courts is improper. Canon 42.

OPINION 11 (February 1948)

Professional Cards—Legislators—An attorney may not state on his professional card that he is a state senator or state representative. Canon 39.

OPINION 12 (Spring 1948)

Articles on Legal Subjects—Newspapers—Magazines—Trade Journals—An attorney may write and sell for publication articles of a general nature on legal subjects for newspapers, magazines, or trade journals, provided he does not advise inquirers in respect to their individual rights.

Advertising—Free Legal Advice to Subscribers—An attorney may not allow his name to be carried in a magazine or other publication representing that he is an attorney for a named organization and will furnish free legal advice to its members. Canon 37. ABA Canon 40.

OPINION 13 (June 1948)

Judge Acting as Attorney—Employment—A county judge may practice law within the statutory limitations. Although the question is not covered in the Canons, Sec. 2 provides that the Canons “Shall be cumulative of all laws of the state of Texas relating to the professional conduct of lawyers and to the practice of law.”

OPINION 14 (April 1948)

Solicitation—Professional Listings—Newspaper Announcements—A newspaper announcement that an attorney who has been holding public office will not be a candidate for reelection, and that factually reports his services as a public officer, may not extol his professional attainments or ability, emphasize his special familiarity with a phase of the law, or include language susceptible of being understood as solicitation. Canons 24, 39.

OPINION 15 (December 1948)

Notice of Specialized Legal Service—An announcement of the association of two or more lawyers stating “Practice restricted solely to matters concerning oil and gas—real property—corporations—estates” is improper. Canon 42.
OPINION 16 (December 1948)

Judge Acting as Attorney—Employment—Where the matter has not been before him in his judicial capacity, a justice of the peace may practice criminal law in superior courts or in any county outside his own. It would be preferable, however, for him to refrain from so doing, even though no statute or Canon expressly prohibits it. Canon 6.

OPINION 17 (December 1948)

Negotiations with Opposite Party—Communications—An attorney is prohibited from communicating, for any purpose, with a party represented by counsel. An attorney may interview a potential witness, other than a party, even though the witness may be an employee of a party, where the attorney makes a full disclosure of his connection with the litigation and explains the purpose of the interview. Canon 9.

OPINION 18 (May 1949)

Conflict of Interest—Disclosure—An attorney, retained by an employer having worker’s compensation insurance, upon being questioned by the claimant as to the advisability of prosecuting his claim in the courts, should disclose his position with respect to the claim. He must represent his client with undivided fidelity and not divulge the client’s secrets or confidences.

Candor and Fairness—If the claimant makes known his dissatisfaction with the insurance company’s representatives, the employer’s attorney should advise him as a matter of courtesy to seek the advice of counsel. If the claimant inquires the name of an attorney in another town, the name should be divulged, if known. The attorney may state whether the named attorney is a good compensation attorney. Canons 6, 19.

OPINION 19 (November 1949)

Solicitation—Employment—An attorney may not solicit professional employment by strangers who are in the same class and have interests identical with or similar to those of unsolicited clients.

Solicitation—Employment—Reciprocal Basis—An attorney may not solicit employment from other attorneys on a reciprocal basis. Canon 24. ABA Canon 27.

OPINION 20 (November 1949)

Ill Feeling between Advocates—Insults—A gratuitous insult contained in a letter from one attorney to another does not violate any of the Canons, but it may call for action by a grievance committee. Canon 14.

OPINION 21 (November 1949)

Conflict of Interest—Employment—Intermediaries—An attorney for an insurance company may not act as attorney for claimants in a friendly suit by the claimants against the company. He may prepare the necessary papers for the adjustor. He may suggest names of
attorneys to represent claimants, provided he advises the adjustor to explain to the claimants that they will need an attorney, allow them to make their own selections, and make no recommendation unless the claimants so request. Canons 6, 32. ABA Canons 6, 35.

OPINION 22 (November 1949)

Candor and Fairness—Communications with Court—An attorney may not communicate with the court without making a full disclosure to opposing counsel and according him an opportunity to be present or to submit authorities. Canon 19. ABA Canon 22.

OPINION 23 (December 1949)

Conflict of Interest—Attorney in Public Employ—Employment—A member of a law firm who is county attorney in the county of the firm’s domicile, or his partner, may not defend a person then being prosecuted for a crime in another Texas county. Canon 6.

OPINION 24 (April 1950)

Solicitation—Advertising—Professional Listing—Newspapers—A newspaper ad stating “Real Estate mortgage notes bought and sold, business, residential, repair loans” accompanied by the name, address, and telephone number of an attorney is improper. Canons 24, 39.

OPINION 25 (April 1950)

Solicitation—Advertising—Professional Listing—Newspapers—Professional listings in a newspaper under a regular column headed “Legal Directory” are proper. However, the listings in question, placed in the classified ad section of a newspaper headed “Business Service Directory,” are improper. Canon 39.

OPINION 26 (April 1950)

Witnesses—Jurors—Letters—A letter by the successful attorney in a jury case to the jurors, complimenting them, assuring them that none of the matters they considered constituted misconduct, and advising them to refuse to talk to the defendant’s representative should he call upon them, is improper. Canons 20, 36. ABA Canon 39.

OPINION 27 (April 1950)

Retainer Agreements—An attorney may use a written “Retainer Agreement” in which he is employed by a client, for a stipulated fee payable in advance, to consult with and advise him as to his legal problems, and which sets out certain rights and limitations pertaining to the arrangement. Canon 11.

OPINION 28 (September 1950)

Solicitation—Advertising—Catalogs—An ad in a dog show catalog soliciting stud fees, accompanied by the names of an attorney and his firm, does not violate the Canons, but it
Opinion 28

Summaries of the Opinions of the Committee on Professional Ethics

would be better form and more professional if the names of the attorney and his firm were omitted. Canon 24.

OPINION 29 (October 1950)

Solicitation—Professional Listings—Newspapers—The publication of professional listings by attorneys (other than patent, copyright, and admiralty attorneys), listing only the attorney’s name, address, and telephone number, in “Professional Directory” classified columns of newspapers, is proper. Canons 24, 39.

OPINION 30 (October 1950)

Solicitation—Professional Listings—Telephone Directories—The listing of attorneys’ names and telephone numbers under the heading “Attorneys” or “Lawyers” in the classified section of telephone directories is proper.

Solicitation—Professional Listings—Telephone Directories—Neighboring Towns—Listing attorneys’ names and telephone numbers under the heading “Attorneys” or “Lawyers” in the classified section of telephone directories for neighboring towns where there are no attorneys is proper. Canons 24, 39.

OPINION 31 (October 1950)

Self Laudation—Dignity of the Profession—Letterheads—An attorney may not carry the names of deceased relatives on his letterhead. Canon 24. ABA Canons 27, 29.

OPINION 32 (October 1950)

Conflict of Interest—Criminal District Attorneys—Prosecution of Relatives—A criminal district attorney may not prosecute a relative. Canon 6.

OPINION 33 (February 1951)

Duty of Attorney to the Court—Candor and Fairness—Withholding Information—An attorney may not knowingly withhold from the court his knowledge that the wife in a divorce case is pregnant. Canons 1, 19.

OPINION 34 (March 1951)

Conflict of Interest—Letters to Opposing Party—An attorney who on behalf of a client writes a letter to the other party to a collision demanding damages and suggesting that she consult her insurance carrier, and who later signs his son’s name to another letter addressed to the same party recommending that she take out a policy with one of the companies represented by the son’s insurance agency, shows poor judgment and discretion. Canon 6.
OPINION 35 (March 1951)

*Judges—Bias*—A judge is not disqualified from a civil suit merely because his son represents one of the litigants. He should not sit in any case unless he is free from bias and the appearance thereof. Canon 6.

OPINION 36 (March 1951)

*Conflict of Interest—Employment—Wills*—When a will covering a minor part of an estate has been admitted to probate, an attorney who represented one of sixteen heirs in a contest of the will should not accept employment by the administrator of the residue estate when the administrator may have to decide questions involving a conflict of interest between the one heir and the remaining heirs. If the employment is accepted and a question arises concerning the interpretation of the will as to whether the assets of the residue estate should be sold to pay a bequest and the attorney in the will contest had received as his fee an undivided interest in all property covered by the will, the attorney should withdraw from the case. Canon 6.

OPINION 37 (May 1951)

*Conflict of Interest—Employment—Law Partner of County Attorney*—The law partner of a county attorney may not practice criminal law in the district court of the county in which his partner is county attorney. Canon 6.

OPINION 38 (May 1951)

*Solicitation—Advertising—Neon Signs*—A neon sign, approximately five feet long and two feet high, containing the attorney’s name and telephone number, over the entrance to his office in a suburban shopping center, is proper. Canon 24.

OPINION 39 (May 1951)

*Duty of Attorney to the Law—Homesteads*—An attorney who knows the property in question to be a homestead may not have the owner convey to a third party who reconveys to the owner retaining a vendor’s lien or who executes a mortgage and reconveys to the owner who assumes the mortgage. Canon 29.

OPINION 40 (June 1951)

*Solicitation—Advertising—Professional Listings—Newspapers*—An ad stating “Income Taxes/Be Safe, have your report made by a lawyer/Specialist income tax laws,” and including the lawyer’s address and telephone number, is improper. Canons 24, 39. ABA Canons 24, 43.

OPINION 41 (June 1951)

*Intermediaries*—Furnishing the regional attorney for the legal aid department of an employee’s union with a form containing a history of an employee’s accident, whether an attorney has been employed, and similar data, is improper.
Opinion 41  

**Solicitation—Stirring Up Litigation**—The regional attorney for the legal aid department of an employee’s union may not write an injured employee, advising him that he has a good case and not to hesitate to call upon him for assistance.

**Intermediaries**—The regional attorney for the legal aid department of an employee’s union may not report to the manager of the department that a response to a letter by the attorney, advising the employee not to hesitate to call upon the attorney for assistance, has not been received. Canons 24, 25, 27, 28, 32. ABA Canons 27, 28, 35.

**OPINION 42 (June 1951)**

**Unauthorized Practice of Law—Abstract and Title Companies**—A member of a law firm may maintain an office in the same quarters with an abstract and title company. His name may appear on the window above the word “attorney” and he may be listed in the telephone directory as having an office with the same address and telephone number as the company. His firm may do all the work for the company, including the legal papers required in connection with title policies, although the company never voluntarily advises a customer that he might use his own attorney, provided the company never refuses to permit the customer to have the papers prepared by his own attorney. Canon 43.

**OPINION 43 (July 1951)**

**Conflict of Interest—Employment**—An attorney may not represent both drivers who have had a collision, are prima facie guilty of negligence under a city ordinance, are arrested and charged with “Negligent Collision,” and have amicably settled their differences, in the prosecution of the criminal charges that were filed. Canon 6. ABA Canon 6.

**OPINION 44 (February 1952)**

**Solicitation—Advertising—Neon Signs**—Two neon signs, on two sides of a corner downtown building occupied by a law firm, containing the names of the lawyers in letters approximately two feet high, the entire sign extending ten to twelve feet along the side of the building, are improper. Canon 24.

**OPINION 45 (February 1952)**

**Employment—Judge Acting as Attorney**—A county judge may represent clients and friends in justice and county courts in counties outside his own county.

**OPINION 46 (February 1952)**

**Attorney as Surety**—An attorney may sign his name as surety for individuals indicted for felonies, as an attorney representing his clients or as a friend. Canon 6.

**OPINION 47 (February 1952)**

**Conflict of Interest—Employment—Wills**—In a declaratory judgment proceeding to determine whether a note (a substantial asset of a decedent’s estate) should be sold at a discount, an attorney acting as chief counsel of the independent executor of the estate and as
attorney for the sole maker and obligor of the note should withdraw from representing either party. A member of the chief counsel’s firm is in no better position than the chief counsel and may not represent a corporate defendant legatee.

Conflict of Interest—Employment—Wills—An attorney for persons charged with embezzlement from an executor may not represent the executor in a declaratory judgment proceeding to interpret a will.

Conflict of Interest—Employment—Wills—An attorney being paid a retainer fee by the plaintiff executor in a declaratory judgment proceeding to interpret a will may not represent a defendant legatee.

Conflict of Interest—Candor and Fairness—Confidences of Clients—Wills—An attorney who: (1) is paid a retainer fee by the plaintiff executor in a declaratory judgment proceeding to interpret a will, who represents a defendant legatee; and (2) attempts in open court to have the court incorporate in the judgment an order allowing the executor to sell the defendant (client) legatee’s devised property, the sale not raised by a pleading or answer or directed by the will and the client not wishing to sell, violates Canons 6, 19, and 34.

Judge’s Conduct—Declaratory Judgments—Whether the trial judge should have disqualified any of the attorneys in a declaratory judgment proceeding to interpret a will, when it is known to the parties in court, their attorneys, and the judge that plaintiff’s attorney also represented the person who wished to buy defendant legatee’s devised property, and that defendant’s attorney cooperating with plaintiff’s attorney introduces evidence suggesting the sale of the property, is an opinion outside the scope of the Canons and the functions of the committee. Canons 6, 19, 34. ABA Judicial Canons 11, 20, 34.

OPINION 48 (February 1952)

Conflict of Interest—Employment—County Attorneys in Private Practice—If a county attorney is consulted in his official capacity and not because of the prospective client’s knowledge of his skill and ability as a lawyer, he may not accept employment in a civil matter. He may not accept civil cases which would interfere with the full and efficient handling of his official duties. Canon 6.

OPINION 49 (March 1952)

Conflict of Interest—Employment—City Attorneys—A city attorney may practice criminal law in courts other than the corporation court.

Conflict of Interest—Employment—City Attorney—That a city attorney represented persons charged with a crime in courts other than the corporation court where city policemen testified as state’s witnesses is not in itself a violation of the Canons. Canon 6.
OPINION 50 (March 1952)

Partnerships—Unauthorized Practice of Law—Letterheads—A firm may not carry on its letterhead the name of a person as an associate prior to the time he has been admitted to practice in Texas. Canons 30, 43.

OPINION 51 (May 1952)

Solicitation—Advertising—Newspapers—It is improper to insert the name, phone number, and address of an attorney in the classified directory of a newspaper. Canon 24.

OPINION 52 (May 1952)

Notice of Specialized Legal Service—Letterheads—An attorney may carry on his letterhead “tax service.”

Notice of Specialized Legal Service—Professional Listings—Newspapers—An attorney specializing in tax matters may insert his name, address, telephone number, and “tax service” in the professional directory of a newspaper.

Professional Listings—Newspapers—A professional listing in a portion of a newspaper other than the professional directory is improper. Canons 24, 39, 41, 42.

OPINION 53 (September 1952)

Solicitation—Stirring Up Litigation—Power of Attorney—An attorney may not include in a power of attorney executed in his favor a provision by which the attorney assumes full responsibility and liability for all costs and expenses incident to any investigation and litigation that may be necessary. Canons 24, 25. ABA Canon 42.

OPINION 54 (September 1952)

Solicitation—Professional Cards—An attorney may not have at the top of his professional card, “If a deal is to be made where legal advice is needed, see an attorney first and save.” Canons 24, 39. ABA Canons 27, 43.

OPINION 55 (September 1952)

Confidences of Clients—Wills—An attorney who writes a will for a client and acts as one of the witnesses to it, which client executes a second will by another and is subsequently declared non compos mentis, may not disclose to the client’s son and guardian the circumstances of the execution of the first will, its contents, and the attorney’s opinion of the client’s mental condition at the time of its execution. The attorney could not be compelled by the court to make the disclosures. Canon 34.

OPINION 56 (January 1953)

Solicitation—Specialists—Tax—An attorney who specializes in tax matters may send monthly tax letters in his own envelopes to regular clients, provided the contents are con-
fined to rulings of the Treasury Department, the courts, and similar topics dealing with current tax matters. Canon 24.

OPINION 57 (January 1953)

*Negotiations with Opposite Party*—An attorney may not send a joint letter to the adverse attorney and his client stating that a compromise is possible and should be discussed, even where the adverse attorney has refused to consult his client about a settlement. Canon 9.

OPINION 58 (January 1953)

*Solicitation—Contracts with Municipalities*—An attorney may not contact municipal officials about securing a contract with the municipality to collect delinquent taxes owed by the citizens of the community. Canon 24. ABA Canon 27.

OPINION 59 (January 1953)

*Conflict of Interest—Employment*—A law firm in which two partners have consulted with and accepted employment from opposing parties to a dispute, each attorney being unaware that his partner had been consulted and employed by the opposing party, should withdraw from the case. Canon 6.

OPINION 60 (January 1953)

*Solicitation—Professional Cards*—An attorney may not publish a card in a local newspaper, giving his name, address, and telephone number, and reciting that he had been in that locality for twenty-five years. Canons 24, 39.

OPINION 61 (January 1953)

*Division of Fees*—An attorney who assisted the county auditor in the preparation of transcripts of proceedings in connection with the issuing and refunding of bonds by a commissioners court, none of the work being performed while the attorney was holding himself out as engaged in the practice of law, and who divided the compensation for the work with the county auditor, has not violated the Canons. Canon 31.

OPINION 62 (February 1953)

*Solicitation—Professional Listings—Notice of Specialized Legal Service—Telephone Directories*—An attorney who carries a listing under “Attorneys” in the yellow pages of the local telephone directory may not also carry a listing under “Title Service,” giving his name and soliciting title insurance. Canons 24, 39, 42.

OPINION 63 (February 1953)

*Division of Fees*—A law firm representing a client who holds property belonging to a person who disappeared several years ago may not forward this business to a missing persons law firm and share in their contingent fee in the event the person is located. Canon 31.
OPINION 64 (February 1953)

Offices in Different Cities—A law firm may maintain offices in more than one city in Texas.

Professional Listings—Letterheads—Attorney Not Licensed to Practice—An attorney or a law firm may list on letterheads, in directories, in Martindale-Hubbell, or any approved form of professional listing, a partner or an associate who is not licensed to practice in Texas, provided he is a licensed attorney in one or more states other than Texas, the listing is limited to the office of the firm where he is active, the listing correctly reflects his status as a partner or associate, that he is not licensed to practice in Texas, and that he is licensed in the state where he was first licensed.

Professional Listings—Multiple Listings—An attorney or a law firm maintaining offices in different cities in Texas may not carry in the biographical section of Martindale-Hubbell Directory separate biographical sketches under each city, including every associate and member of the attorney or firm, regardless of whether the associate or member resides and practices in the city. The listing, as to a particular city, should be confined to the associates and members who reside in, or who regularly come to and practice in, the city where they are listed. Canons 24, 39.

OPINION 65 (March 1953)

Conflict of Interest—Confidences of Clients—A member of a law firm may not represent a public utilities company before a city governing body while a member of the same firm serves the same city governing body in a legal advisory capacity. Canons 6, 34.

OPINION 66 (March 1953)

Conflict of Interest—Estates—An attorney representing the estate of a decedent may not file a claim on behalf of a third party against the estate and request an attorney’s fee from the estate for the collection of the claim. Canon 6.

OPINION 67 (March 1953)

Partnerships—Attorneys may not hold themselves out as partners when, in fact, they are not. Canon 30. ABA Canon 33.

OPINION 68 (March 1953)

Professional Cards—Notice of Specialized Legal Service—Legal Directories—Newspaper Solicitation—An attorney may insert “tax service” in a professional card in a legal directory, but professional cards may not be published in a newspaper. Canons 6, 24, 39, 42.

OPINION 69 (March 1953)

Employment—Attorney Ad Litem—An attorney appointed as attorney ad litem by the court for nonresident defendants cited by publication in a trespass-to-try-title case may, upon being contacted by the defendants and furnished with evidence that would be a defense to
plaintiff’s claim of limitation, following the entry of judgment for plaintiff, accept employment from the defendants and attempt to have the case reviewed and judgment set aside. Canon 6.

OPINION 70 (March 1953)

Solicitation, Indirect—An attorney may not, when rendering a statement for services, enclose in the same envelope a copy of a magazine article that he thinks should be brought to his client’s attention.

Solicitation, Indirect—An attorney may not mail a copy of a magazine article that he thinks should be brought to his client’s attention, without a letter or other enclosure, in the envelope which he uses in his regular course of business. Canon 24.

OPINION 71 (April 1953)

Conflict of Interest—Wills—An attorney who draws a will for a client may be named in the will as executor and attorney for the estate, provided no pressure is brought to bear on the client and the appointments represent the client’s wishes.

Conflict of Interest—Wills—An attorney who draws a will for a client and is named in the will as executor and attorney for the estate may not also be named as a beneficiary under the will. Canon 6.

OPINION 72 (April 1953)

Solicitation—Professional Cards—The words “Wills—Estates—Personal Injury—Insurance and Divorce” appearing on a professional card is improper. Canon 24.

OPINION 73 (May 1953)

Solicitation—Notice of Specialized Legal Service—Reply Cards—An attorney may not send a reply card to a life insurance company providing places to check the work desired as to annual statements and income tax returns and to “Organize New Company, Change Name, Change Premium Plan, Revise Policy, etc.” Canons 24, 42.

OPINION 74 (June 1953)

Conflict of Interest—Employment—Estates—An attorney, employed by various creditors of an estate to take out an administration and to collect their claims, may receive fees from the creditors for collecting their claims and also receive a fee from the estate for reducing an insurance policy to cash as an asset of the estate against the claim of a party who was not an heir or a creditor of the estate. Canon 6.

OPINION 75 (June 1953)

Advertising—Estates—Newspapers—An executor or administrator of an estate who within one month after receiving letters publishes in a newspaper printed in the county where the letters were issued a notice requiring all persons having claims against the estate to present
them within the time prescribed by law may, in addition to the information required by statute to be contained in the notice, include a line giving the name of the attorney who represents the estate. Canon 24.

OPINION 76 (September 1953)

Solicitation—Employment—Trusts—An attorney who has knowledge of an individual’s interest in a trust fund, of which interest the individual is ignorant, should acquaint the individual with the facts as to his interest in the trust fund, but, in passing on the information, may not make any suggestion as to employment. Canon 24.

OPINION 77 (September 1953)

Professional Cards—Letterheads—Notice of Specialized Legal Service—An attorney may carry on his professional card or letterhead “Tax Practice Exclusive,” or “State and Federal Income, Estate and Inheritance Tax Practices (Exclusive).” Canons 39, 42.

OPINION 78 (November 1953)

Negotiations with Opposite Party—Plaintiff’s attorney, in litigation growing out of an automobile collision, may not communicate directly with defendant, sending a copy of the letter to defendant’s attorney and defendant’s insurance carrier, offering to settle for a certain sum and advising that if the insurance company refuses to settle within policy limits, it must assume responsibility for a verdict in excess of policy limits. Canon 9.

OPINION 79 (November 1953)

Solicitation—Advertising—Manuscript Covers—A law firm may not permit the use of its manuscript covers showing name and location of the firm on abstract supplements and other work furnished by an abstract company in which a member of the firm is interested. Canon 24.

OPINION 80 (November 1953)

Solicitation—Advertising—Professional Cards—Rural and Suburban Directories—An attorney may not list his name and address in the advertising section of a “rural and suburban directory.” Canons 24, 39.

OPINION 81 (November 1953)

Solicitation—Abstract of Title—The committee is undecided whether an attorney who examines an abstract of title may stamp on the face of the abstract his firm’s name and address, followed by “Attorney at Law, examined by _____________.’’ Canon 24.

OPINION 82 (November 1953)

Conflict of Interest—Employment—City Alderman—An attorney who is a city alderman may not accept employment in criminal cases before the city court of his city. Canon 6.
OPINION 83 (November 1953)

*Professional Listings*—A professional listing may contain the names of six clients and state “list of references on request.” Canon 39.

OPINION 84 (November 1953)

*Wiretapping—Recording Telephone Conversations*—An attorney may record a telephone conversation without advising the person conversing with him that a recording is being made.

OPINION 85 (November 1953)

*Professional Cards*—An attorney may not include on his professional card that he is a claim representative, stating the name and address of the insurance company that employs him. Canon 39.

OPINION 86 (November 1953)

*Conflict of Interest—Garnishment*—An attorney for plaintiff in a garnishment may represent the garnishee, provided the consent of all concerned is obtained after full disclosure of all facts. Canon 6.

OPINION 87 (November 1953)

*Candor and Fairness—Taking Advantage of Opposite Counsel—Prosecuting Attorneys*—A prosecuting attorney may not have a defendant in a criminal case examined by doctors during the course of the trial without the knowledge or consent of defendant’s attorney. Canons 19, 22.

OPINION 88 (November 1953)

*Candor and Fairness*—An attorney may not file with the trial judge a brief covering the principal points involved in a pending action without furnishing a copy to opposing counsel. Canon 19.

OPINION 89 (November 1953)

*Conflict of Interest—Employment*—An attorney may handle on a contingent basis damage claims subrogated by the insured to the insurer.

*Conflict of Interest—Solicitation—Employment*—An attorney handling damage claims subrogated by the insured to the insurer may also handle the insured’s claim, provided the attorney is requested by the insured to handle his claim and full disclosure of pertinent facts is made and express consent of all concerned obtained. Canons 6, 24.
OPINION 90 (November 1953)

Trade Journals—An attorney may write articles of a legal nature for a trade publication, provided he does not advise inquirers in respect to their individual rights. Canons 24, 37.

OPINION 91 (November 1953)

Advertising Nonlegal Business—An attorney may advertise a legitimate business in which he is engaged, provided the advertisements do not, directly or indirectly, advertise him in his professional capacity. Canon 24.

OPINION 92 (November 1953)

Business—Participation—Advertising—An attorney may participate in the organization of a collection agency, or in any legitimate business, provided he does not advertise himself as an attorney in connection therewith.

Solicitation—An attorney may not call on a prospective client, present his card, and advise that he is engaged in and giving special attention to collections. Canon 24.

OPINION 93 (February 1954)

Solicitation—Classified Advertisements—Newspapers—A classified advertisement in a newspaper directed to inventors stating, “Protect your invention by applying for a patent,” giving the name and address of an attorney, is improper. Canon 24.

OPINION 94 (February 1954)

Employment—Attorney Receiving Information as Special Prosecutor Acting as Defense Counsel—An attorney whose employment was sought as special prosecutor by the prosecuting witness in a criminal case is prohibited from later accepting employment as defense counsel in the same case. Canon 6.

OPINION 95 (February 1954)

Solicitation—Advertising—Newspapers—A county bar association should not volunteer legal information in paid advertisements that may be construed as a bid for professional employment.

Stirring Up Litigation—Advertisements that may seemingly have as their purpose the encouraging of litigation should not be sponsored by a bar association. Canons 24, 25.

OPINION 96 (April 1954)

Solicitation—Professional Cards—Newspapers—The publishing of professional cards is limited to reputable law lists and directories. Canon 39.
OPINION 97 (April 1954)

Negotiations with Opposite Party—Offers of Compromise—An attorney representing a party injured in an automobile collision may write the tortfeasor, before suit is filed, and offer to compromise in his representative capacity his client’s claim without litigation for the amount of the tortfeasor’s liability insurance policy limits even though the tortfeasor is not represented by counsel regarding the accident. However, the attorney cannot suggest that if the offer of compromise is negligently rejected by the tortfeasor’s insurance carrier, the latter will be exposed to possible suit by the tortfeasor to recover any sums, in excess of the policy limits, paid by him under a judgment in favor of the injured party. Canon 9.

OPINION 98 (April 1954)

Solicitation—Professional Cards—It is improper for a professional card to indicate that an attorney deals in personal injury and worker’s compensation practice since those are not recognized specialties. Canons 24, 39.

OPINION 99 (April 1954)

Conflict of Interest—Attorney for Insurance Company—Unless full disclosure was made and consultation with other counsel suggested, it would be unprofessional, in a subrogation suit arising out of an automobile collision, for an attorney for the defendant’s liability insurance carrier that did not carry defendant’s collision insurance to advise the defendant that cancellation of his policy would result if he requested the Safety Responsibility Board to release the suspension of the nominal plaintiff’s registration tags, when the company that does carry defendant’s collision insurance does not wish to sue on subrogation and defendant himself wishes to release the suspension.

Negotiations with Opposite Party—It would be improper in the situation described above for the attorney for defendant’s liability insurance carrier to advise the nominal plaintiff that the defendant’s liability insurance carrier would gladly permit the defendant to release the suspension, should the nominal plaintiff’s collision carrier be persuaded to drop the suit. Canons 6, 9.

OPINION 100 (April 1954)

Retirement from Judicial Position by Partner—Advocate’s Position—An attorney should not become an advocate in a child custody case when his partner has previously acted in a judicial capacity in the matter. Canon 33.

OPINION 101 (April 1954)

Negotiations with Opposite Party—Offers to Settle—A letter written by plaintiff’s attorney to an unrepresented party who has been involved in an automobile collision with plaintiff, suggesting that the opposite party might escape personal liability by urging his insurance carrier to settle plaintiff’s claim within the former’s policy limits, and also suggesting that he consult a lawyer, is not improper. Canon 9.
OPINION 102 (April 1954)

Solicitation—Opening New Offices—Though it would be entirely proper for a firm to celebrate the opening of new offices by holding an open house for its clients and friends, to advertise the event would be improper. Canon 24.

OPINION 103 (September 1954)

Campaign Cards—A lawyer may indicate his profession on cards pursuant to his campaign for public office. Canons 24, 39.

OPINION 104 (September 1954)

Conflict of Interest—Partner’s Employment—One member of a firm may not represent the defendant in a suit to enforce a divorce decree where another partner, who subsequently joined the firm, had represented the plaintiff in obtaining the divorce originally, even though the plaintiff now has independent counsel. Canon 6.

OPINION 105 (October 1954)

Confidences of Clients—Federal Investigation—Where federal authorities are investigating alleged violations of federal wiretapping laws, an attorney is prohibited from disclosing information in his possession that was obtained by tapping the telephone wires of an adverse party, even though the information was obtained in that manner without the attorney’s knowledge. Canon 34.

OPINION 106 (October 1954)

Solicitation, Indirect—Advancing Money to Clients—Advancing money for living expenses during the pendency of a personal injury action in order to hold employment is improper. Canon 24.

OPINION 107 (October 1954)

Solicitation—Classified Advertisements—Telephone Directories—It is contrary to the principles of professional propriety for an attorney to list his name in boldfaced type in the classified section of a telephone directory. Canon 24.

OPINION 108 (January 1955)

Conflict of Interest—Private Practice by Judges—It would be improper for a city judge to accept employment to appear before the city council in requesting amendment of zoning regulations. Canon 6.

OPINION 109 (January 1955)

Conflict of Interest—Related Employment—Prosecuting a husband for child desertion precludes a district attorney from representing the wife in a divorce action due to the close relation of the two. Canon 6.
OPINION 110 (January 1955)

Solicitation—Acknowledging Contributions—Acknowledgment of contributions to the publication of school annuals and programs of civil affairs by a notation in the publications to the effect that the contributor was a lawyer is unprofessional, although it would be proper for the lawyer’s name alone to appear. Canon 24.

OPINION 111 (January 1955)

Conflict of Interest, Potential—Because of a potential conflict of interest in a suit for damages, an attorney should not represent a deceased party’s former wife who is the mother of minor children of the deceased and who has not remarried, while at the same time representing the deceased’s widow. Canon 6.

OPINION 112 (February 1955)

Notice of Specialized Legal Service—Announcements—Because administrative and labor law are not recognized specialties, an announcement to the effect that an attorney is specializing in those fields is improper, especially when it does not appear that the attorney will render his service directly and only to other attorneys. Canon 42.

OPINION 113 (August 1955)

Conflict of Interest—Firm’s Prior Employment—The state cannot consent to be represented by a district attorney who, prior to his election, was a member of a firm which had been employed by the defendants in the criminal proceedings. Canon 6.

OPINION 114 (August 1955)

Acting as a Landman—It is proper for an attorney acting as a landman to use stationery that does not indicate that he is an attorney. Canon 39.

OPINION 115 (August 1955)

Conflict of Interest—Representing Former Guardians—Representing a former guardian in administering an estate does not preclude an attorney from representing such guardian in a suit by a subsequently appointed guardian for contest of accounts. Canon 6.

OPINION 116 (September 1955)

Retirement from Judicial Position—Private Practice by Judges—Where an attorney is a city judge and also a member of a law firm, it would be improper for him or another member of his firm (1) to represent civil litigants in a suit ancillary to criminal proceedings determined by him in his capacity as city judge; (2) to represent defendants in a criminal action in another court where the arresting officers are city policemen; (3) to represent civil service employees of the city at hearings before the Civil Service Commission of the city; or (4) to represent defendants convicted in the city court upon appeal to a higher court. It would also be improper for the attorney to hear cases as city judge where the party involved is or has been a client of the firm. Canon 33. ABA Judicial Canon 31.
OPINION 117 (September 1955)

*Negotiations with Opposite Party—Obtaining Statements*—Obtaining a written statement from an opposite party in the absence of the attorney retained by the party is unprofessional. Inquiry as to whether he has retained counsel should be made and a reasonable opportunity to employ counsel should be given before a statement is obtained. Canon 9.

OPINION 118 (September 1955)

*Work Sheets*—It is proper for an attorney to retain work sheets and other related papers which do not affect a client’s rights or the exercise of those rights when requested to deliver the client’s complete file to newly retained counsel. He is privileged to make an inventory of the file before he delivers the items. Canon 7.

OPINION 119 (November 1955)

*Solicitation—Conducting Outside Business—Letterheads*—Though it is not unethical for an attorney to conduct another business that is completely divorced from his law practice, mention of his status and activities as a lawyer in the letterhead used for such nonrelated business would be improper. Canon 24.

OPINION 120 (November 1955)

*Solicitation—Stirring Up Litigation—Newspapers*—A classified advertisement in a newspaper stating, “IS IT WISE TO SETTLE?/If sued—or have a claim/A lawyer’s advice is helpful,” is improper. Canons 24, 25.

OPINION 121 (January 1956)

*Solicitation—Postage Meter Machines*—Using slogans that encourage civic participation, printed by postage meter machines, is not advertising. Canon 24.

OPINION 122 (January 1956)

*Solicitation—Classified Advertisements—Telephone Directories*—An attorney should not indicate that he is a member of a local bar association in the classified section of a telephone directory. Canon 24.

OPINION 123 (January 1956)

*Conflict of Interest—Representing and Suing Same Client*—Though it may not technically be a breach of ethics, representing a client in one suit and suing him in a different and unrelated action is looked upon unfavorably. Canon 6.

OPINION 124 (January 1956)

*Adverse Influence—Conflict of Interest*—It is an open question whether a firm may accept employment seeking parole or pardon of one in prison when a member of the firm was the
district attorney, before his retirement, who prosecuted and convicted the prospective client.

*Retirement from Judicial Position*—Where a man in prison seeks to employ a firm to obtain his parole or pardon, the committee is evenly divided on whether such employment should be accepted when a member of the firm is the district attorney who convicted the man but who is now in private practice. Canons 6, 33.

**OPINION 125 (March 1956)**

*Retirement from Judicial Position—Private Practice by Justices of Peace*—A justice of the peace should not act as an advocate either in civil or criminal proceedings that arise in his court or other courts. Canon 33.

**OPINION 126 (March 1956)**

*Conflict of Interest—County Attorneys as Special Prosecutors*—The Canons do not prohibit a county attorney from accepting employment as special prosecutor in a felony case even though he is charged with the responsibility of prosecuting misdemeanors in that county. Texas C. C. P. A. E. 26. Canon 6.

**OPINION 127 (March 1956)**

*Solicitation—Classified Advertisements—Telephone Directories*—Listing of names in the classified section of a telephone directory is limited to a section under the general head of “Attorneys” or “Lawyers.” Canon 24. ABA Canon 27.

**OPINION 128 (February 1956)**

*Partnerships—Accounting Firms*—An attorney may be employed by an accounting firm on a salaried basis to advise the firm, but this employment may not, under any circumstances, be used to enable the accounting firm to render legal advice or legal services to its clients. If the attorney received a percentage of the firm’s profits or loss for his services, this would be the equivalent of a partnership with the firm. Canon 30. ABA Canon 33.

**OPINION 129 (April 1956)**

*Solicitation—Settlements and Recoveries*—To display or carry photocopies of various sizeable checks obtained for clients through settlements or jury awards is improper. Canon 24. ABA Canon 27.

**OPINION 130 (June 1956)**

*Conflict of Interest—Advising Opposite Party*—Although it is proper for the attorney of an injured client to write the tortfeasor notifying him of the claim against him and suggesting that he seek counsel, the attorney may not advise him as to the law and the status he would have as a litigant.
Opinion 131 (June 1956)

*Defense of Those Accused of Crime*—An attorney representing the defendant in a criminal case is not required to call attention to a fatal defect in his client’s indictment. Canons 5, 19.

OPINION 132 (June 1956)

*Conflict of Interest—District Attorneys*—It is not improper for an attorney to serve as district attorney without severing his membership in a law firm as long as no member of the firm takes a civil or criminal case against the state or county. Canon 6.

OPINION 133 (June 1956)

*Solicitation—Signs*—Advertising to the public directly or through others by use of window signs or lettering to the effect that an attorney performs tax service is improper. However, an attorney may use a window sign or lettering that is modest and does not attract unusual attention to indicate the location of his office. Canons 24, 39.

OPINION 134 (June 1956)

*Solicitation—Printed Forms*—Providing printed forms of agreements for use in sales of real estate that show the names of the attorneys issuing them and also show their firm name as escrow agents is prohibited, even though the parties requesting the forms are the attorneys’ clients. Canon 24.

OPINION 135 (September 1956)

*Avoidance of Impropriety—Kinship or Influence*—Because a judge is disqualified only where he is connected with one or more of the parties to a suit, it is not a violation of the Canons for a son of the judge to try a criminal case or a civil suit on a contingent fee basis, in his father’s court. The committee is preempted from resolving questions involving judicial ethics but feels that judges should avoid every situation that might give the impression that his decisions were influenced by favoritism or bias.

*Contingent Fees*—It is improper for a judge to fix the attorney’s fees of his son, a lawyer in the case, because the attorney is a party for that purpose. Canons 6, 12. ABA Judicial Canons 4, 13.

OPINION 136 (September 1956)

*Concurrent Practice of Law and Accounting—Partnerships*—Although a lawyer may properly use his accounting knowledge in connection with his law practice, if he holds...
himself out to be a practicing accountant, he should not hold himself out as a lawyer at the same time. Partnerships between attorneys and members of other professions are prohibited where part of the partnership employment consists of the practice of law. Canon 30. ABA Canon 33.

OPINION 137 (September 1956)

Prosecution of Those Accused of Crime—Negotiations with Opposite Party—Because the defendant in a criminal action is a party, a district attorney may not attempt to elicit a statement or plea of guilty from the defendant nor submit him to a lie detector test or otherwise deal with the defendant without consent of his attorney when one has been engaged. The duty of a district attorney is not to convict, but to see that justice is done. Canons 5, 9.

OPINION 138 (December 1956)

Solicitation—City Directories—An attorney may properly have his telephone number appear in a city directory following his name and address even though the condition on its appearance is that he subscribe to the directory prior to its publication. Canon 24.

OPINION 139 (December 1956)

Negotiations with Opposite Party—Demanding Physical Examinations—Writing plaintiff and his attorney jointly and demanding that plaintiff submit to a physical examination does not violate the spirit of the prohibition against negotiations with the opposite party. However, extreme caution should be exercised when dealing with the other party represented by counsel in other matters. Canon 9.

OPINION 140 (March 1957)

Solicitation—Attorney as Surety—An attorney may not act as surety on his client’s bond in a criminal case, unless specifically authorized by the Court. Opinion 46, to the extent that it conflicts with this opinion, is overruled. Canon 24.

OPINION 141 (March 1957)

Solicitation—Bail Bonds—An attorney practicing criminal law may not engage in the business of making bail or other bonds in criminal cases, or be in any way connected with any company engaged in that business. Canon 24. ABA Canon 27.

OPINION 142 (March 1957)

Solicitation—Signs—Joint Occupants—An attorney who occupies an office with a bail bond company may not have his professional sign, even in small letters, beneath the company’s prominent sign advertising that it deals in bail bonds.

Stirring Up Litigation—It is improper for an attorney employed by a bail bond company to obtain writs of habeas corpus for the company’s customers, usually without the attorney seeing the customer.
Division of Fees—Attorney and Bondsmen—It is improper for an attorney employed by a bail bond company to obtain writs of habeas corpus for its bond customers when, usually, the attorney does not see the client until the case is set and until then the client has paid the attorney no fees whatsoever. Canons 24, 25, 31, 32, 43. ABA Canons 27, 35.

OPINION 143 (March 1957)

Prosecution of Those Accused of Crime—Conflict of Interest—Retirement from Public Employment—District Attorney Representing Civil Suitors—Where a district attorney is prosecuting a defendant in criminal proceedings growing out of a highway accident, it would be improper for him or members of the law firm to which he belongs to press a civil damage suit growing out of the same accident against the same defendant since his duty to the public is generally adverse to his duty to the client in the civil litigation.

Negotiations with Opposite Party—In prosecuting the criminal violation, the district attorney might be in a position to obtain information that, as an opposing attorney in a civil case, would not otherwise be available to him. This possibility precludes him from representing civil litigants in a suit arising out of the criminal violation. Canons 5, 6, 9, 33. ABA Canons 6, 9, 36.

OPINION 144 (March 1957)

Negotiations with Opposite Party—Practice by Nonlawyers—Nonlawyers on the staff of a district attorney seeking guilty pleas from those accused of crime without consulting the accused’s attorney beforehand is improper, as it is negotiation with the opposite party and furthers the practice of law by persons not members of the State Bar. Canons 9, 43.

OPINION 145 (March 1957)

Solicitation—Endorsement of Candidates for Office—An attorney may mail his endorsement of candidates for public office to persons unknown to him and indicate his name and address as well as that he is an attorney at law. However, to use anything more than his name, address, and his designation as an attorney, would be improper. Canons 24, 39. ABA Canons 27, 43.

OPINION 146 (May 1957)

Solicitation—Submitting Bids—Submitting a bid in response to a city’s general request looking to recodification of its ordinances would not be in keeping with the dignity of the profession. Canon 24.

OPINION 147 (May 1957)

Adverse Influence—Conflict of Interest—Wills—An attorney appointed as independent executor under a decedent’s will may properly represent all the devisees in a suit against a tenant of the estate, who is a stranger to the will, for the violation of one lease and the cancellation of another. Canon 6.
OPINION 148 (May 1957)

_Expediton—Employment of Legislators_—It is improper for defendant’s counsel to employ a member of the legislature as cocounsel for the sole purpose of securing a continuance of a case set for trial. Likewise, it would be improper for the legislator to accept such employment under those circumstances. Canon 18.

OPINION 149 (May 1957)

_Solicitation—Collecting Delinquent Accounts_—It is not improper to form and operate a corporation for the purpose of collecting delinquent accounts owed to lawyers, even though the company’s stock would be owned principally by lawyers and its board of directors would consist mainly of lawyers. Canon 24.

OPINION 150 (May 1957)

_Solicitation—Intermediaries—Loan Papers Prepared by Interested Firm_—Notwithstanding a borrower’s desire to use his own attorney, it is not improper for a building and loan association to demand that all papers incidental to its loan transactions be prepared by a law firm of its choice even though one of the firm’s members is an officer of the loan association, and the costs of the preparation are charged as part of the transactions. Canons 24, 32.

OPINION 151 (June 1957)

_Conflict of Interest—Private Practice by Judges_—Although there may be no sanction, it is improper for a county judge to represent the defendant in a wrongful death suit brought by the decedent’s widow in her own name and as guardian, when that county judge appointed the widow as guardian.

OPINION 152 (June 1957)

_Fraudulent Practices—Wills_—An attorney who inserts in a will, without the testator’s knowledge or consent, language appointing the attorney’s law firm to represent the estate, commits a fraudulent and dishonorable act within the meaning of Article XII, Section 8, State Bar Rules.

OPINION 153 (June 1957)

_Unauthorized Partnerships—Division of Fees—Employing Laymen_—An attorney under contract with a county to collect delinquent taxes cannot properly employ laymen to aid him in collecting such taxes without suit, where the layman is to be paid a percentage of the amount collected without suit. Canons 30, 31. ABA Canon 34.

OPINION 154 (June 1957)

_Solicitation—Classified Advertisements—Telephone Directories_—It is improper for an attorney to list his name in the normal order and in reverse order in the classified section of a telephone directory. Canon 24. ABA Canon 27.
OPINION 155 (June 1957)

Solicitation—Classified Advertisements—Telephone Directories—It is improper for an attorney to list his name in a form of type which distinguishes it from the normal listing of other attorneys in the classified section of a telephone directory. Canon 24.

OPINION 156 (June 1957)

Conflict of Interest—Advising on Merits of Client’s Cause—It is an open question whether it is improper for an attorney retained by an insurance company to defend its assured in a damage suit to fail to timely inform the assured of his rights against the company under the doctrine of G.A. Stowers Furniture Co. v. American Indemnity Co., 15 S.W.2d 544 (Tex. Comm. App. 1929, holding approved). Canons 6, 8.

OPINION 157 (June 1957)

Appearance of Attorney as Witness for Client—Where an attorney realizes shortly before trial that it will probably be necessary for him to become a witness and his attempts for postponement fail, it is not improper for him to continue to represent his client thereafter, nor after he testifies, in situations where the necessity arises during the procedure preliminary to the actual trial, provided he did not know such would be the case at the time he accepted the employment. Under the circumstances, the preliminary procedure is considered as part of the trial. Canon 16.

OPINION 158 (June 1957)

Conflict of Interest—Estates—An attorney who was employed by the sole beneficiary to handle probate matters of an estate whose administration has been substantially completed is not precluded by conflict of interest from representing the beneficiary in a suit to oust the executor even though the latter has paid the attorney his agreed fee for representing the estate. Canon 6.

OPINION 159 (September 1957)

Professional Colleagues—Intervention by Another Attorney—For an attorney to dismiss a suit at the behest of a client, without either one contacting the attorney who had been employed previously by the client to present it, is manifestly improper. Canons 7, 9.

OPINION 160 (September 1957)

Aiding the Practice of Law by Persons Not Members of the State Bar—Intermediaries—Letterheads—It is improper for an attorney to provide a bank or loan company with his letterhead stationery to be used by them for collection letters when the attorney has little or no contact with the debtor’s situation. Canon 43. ABA Canon 47.

OPINION 161 (September 1957)

Solicitation—Stirring Up Litigation—Reviving Cases—An attorney may not solicit employment from another lawyer to aid the other lawyer in a specific case nor in one
which the other lawyer has forgotten but which the former lawyer feels may be revived. Canons 24, 25, 39.

OPINION 162 (September 1957)

Retirement from Public Employment—Legislators—Where a legislator who is also an attorney secures passage of a resolution granting one innocent of a crime permission to sue the state for damages, the legislator is disqualified to prosecute the suit against the state. Canons 6, 33.

OPINION 163 (September 1957)

Negotiations with Opposite Party—Offers to Settle—Where a suit for damages arising out of an automobile accident has been filed and the opposite party has answered through an attorney representing the insurance company, it is improper for the attorney employed by the plaintiff to write the opposing party suggesting that he can demand his insurance company to settle the case within his collision policy limits, and that should the company fail to settle, he can make it pay for any amount over the policy limits that the plaintiff may recover from him. Canon 9.

OPINION 164 (March 1958)

Newspaper Discussion of Pending Legislation—Solicitation—Where newspaper articles relating the success of an attorney in securing settlements in personal injury litigation are based solely on the newspaper reporters’ observations or from sources other than the attorney mentioned therein, there is not impropriety. However, it would be improper for the attorney to write and/or approve them or instigate their publication. Canons 17, 24.

OPINION 165 (March 1958)

Solicitation—Football Programs—It is improper for an attorney to place a listing in a high school football program that gives his name and indicates that he is an attorney, although it would not be improper if the attorney were a candidate for public office and the listing indicated only the office he was seeking. Canon 24.

OPINION 166 (March 1958)

Conflict of Interest—Compensation—Payment of Fees by Opposite Party—The prohibition against conflicts of interest precludes an attorney who represents a landowner from accepting an offer by a party interested in obtaining an easement across the owner’s land, made through his counsel, to pay for the services the attorney will render to the owner during the transaction, unless he makes full disclosure to the owner and secures his express consent to the offered fee arrangement. Canons 6, 35.

OPINION 167 (March 1958)

Fixing Amount of Fees—Employment on Salary Basis—An attorney may accept employment by a company on a straight salary basis and may maintain offices in the building of the employing company.
**Opinion 167**

*Intermediaries*—An attorney may accept employment by an insurance company, mercantile business, or other lay agency to write collection letters, defend them in lawsuits, prosecute their claims, or perform other legal services that show no evidence of the employing company improperly controlling or exploiting the attorney. Canons 11, 32.

**OPINION 168 (March 1958)**

*Solicitation—Christmas Cards*—It is improper for an attorney to send Christmas cards to his clients indicating that he is an attorney at law either on the cards or their envelopes. Canon 24.

**OPINION 169 (March 1958)**

*Solicitation—Professional Cards—Notice of Specialized Legal Service—Newspapers*—For an attorney to run a card in a newspaper showing his name, that he is an attorney, and his field, would be improper. Canons 24, 39, 42.

**OPINION 170 (March 1958)**

*Negotiation with Opposite Party—Offers to Settle*—An attorney representing an injured party may not send a copy of a letter to the defendant, the original being sent to defendant’s lawyer employed by his insurance carrier, containing an offer to settle the injured party’s claim within the defendant’s insurance policy limits. Communication in any way with an opposing party who is represented by counsel regarding the subject of controversy is improper. Canon 9.

**OPINION 171 (March 1958)**

*Solicitation—Wills*—For an attorney preparing a will to insert a provision to the effect that the testator desires the attorney to act as counsel for the estate when the testator has not requested the insertion is improper. Canon 24.

**OPINION 172 (March 1958)**

*Professional Colleagues—Encroaching on Practice of Another*—When an attorney has been consulted by a client and learns that other counsel has already been engaged, the attorney should withdraw upon request of prior counsel.

*Division of Fees—Public Officer and Private Practitioner*—When the county attorney refers civil cases to another attorney and the attorneys split the fees, both attorneys act improperly. Canons 7, 31.

**OPINION 173 (March 1958)**

*Disqualification—Private Practice by Judges*—It is improper for a judge to disqualify himself to accept employment as an attorney in a probate matter handled in his court before a special judge.
Summaries of the Opinions of the Committee on Professional Ethics

**Opinion 179**

*Firm Names—Partner as Advocate before Judge*—If a member of a firm becomes a judge, his name should be deleted from the firm name. He cannot maintain a partnership and act in his judicial capacity upon cases filed in his court by his partner even though filed in his partner’s name only. Canons 30, 33.

**OPINION 174 (April 1958)**

*Solicitation*—Name of attorney followed by the words “Attorney at Law” on bank checks is not soliciting employment in violation of the Canons. Canon 24.

**OPINION 175 (April 1958)**

*Advertising*—Chamber of Commerce–approved advertisement of the assets and characteristics of the attorney’s community on the back of an attorney’s office envelopes does not violate the Canons. Canon 24.

**OPINION 176 (May 1958)**

*Conflict of Interest*—An attorney may not represent one party to a contract in a suit against the other party for breach where the attorney represented both parties in drafting the contract. Canons 6, 34.

**OPINION 177 (May 1958)**

*Intermediaries—Aiding the Practice of Law by Persons Not Members of the State Bar—Solicitation—Banks*—Preparation of a will by an attorney who is a trust officer of a bank violates the Canons. Canons 24, 32, 43.

**OPINION 178 (May 1958)**

*Intermediaries*—An attorney’s acceptance of employment from a lay intermediary and its members to perform legal services offered to its members by the intermediary is improper. An attorney’s acceptance of employment where the lay intermediary profits by the lawyer’s professional services is improper.

*Solicitation*—An attorney’s acceptance of employment from a lay intermediary to perform legal services to its members by the intermediary is improper. Canons 24, 32, 43.

**OPINION 179 (June 1958)**

*Conflict of Interest*—An attorney retained by an insurance company to defend it and the assured in a damage suit for an amount in excess of the policy limits must inform the assured of the holding in *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. Comm. App. 1929, holding approved). Canon 6.
OPINION 180 (June 1958)

Confidences of Clients—Isolated representations of a party by an attorney without obtaining confidential information does not disqualify the attorney from later suing such party. Canons 6, 34.

OPINION 181 (June 1958)

Solicitation—An attorney seeking employment by other attorneys to answer the call of the docket for those other attorneys is soliciting professional employment in violation of Canon 24.

OPINION 182 (June 1958)

Conflict of Interest—Solicitation—Wills—An attorney acting as independent executor, probating a will, handling the administration, and charging a reasonable fee does not violate the Canons. Canons 6, 24.

OPINION 183 (October 1958)

Conflict of Interest—Employment—District and County Attorneys and County Judges in Private Practice—It is improper for district or county attorneys or county judges to accept employment in any case in which they are (1) acting adversely to the state or the county; (2) forbidden by statute to act; (3) employed because of their official capacity and the advantages possibly attainable thereby; or (4) engaging in activities that would interfere with full and efficient performance of official duties. Such officials in their private practice are subject to the Canons of Ethics of the State Bar, which are cumulative of all laws of the state relative to the practice of law by state, county, and city officials who are licensed to practice law. They should not use in their private practice the official offices, telephones, or stenographers provided by the county without equitably compensating the county for such use. Canon 6.

OPINION 184 (October 1958)

Conflict of Interest—Employment—City Attorneys in Private Practice—A city attorney may occupy an office provided by the city in the city hall one afternoon each week and provide legal services at that time to city employees and other clients referred to him by city employees, provided his public office is not used to advance his private practice and his official duties are fully and efficiently performed. Canon 6.

OPINION 185 (October 1958)

Partnerships—Solicitation—Classified Advertisements—Telephone Directories—A law firm whose name contains the name of a deceased partner may not list the deceased partner’s name in the yellow pages of the telephone directory separate and apart from the firm name. It is improper for any attorney to so list the name of a deceased attorney. A listing in the firm name that includes the surname of the deceased partner is permissible provided Canon 30 is not otherwise violated. Canons 24, 30.
OPINION 186 (October 1958)

_Solicitation—Advertising—Credit and Collection Business_—It is improper for an attorney who has organized a credit and collection service independent of his law office to permit solicitation of business for such service by its manager through letters mentioning the attorney’s status, activities, and achievements in handling collections. Canon 24.

_Partnerships—Association with Nonattorney in Credit and Collection Service_—If the relationship between a nonattorney and an attorney in a collection service is that of a partnership in which part of the business is the practice of law, such association is improper. Canon 30.

OPINION 187 (October 1958)

_Conflict of Interest—Employment—Law Partner of County Attorney_—The law partner of a county attorney may not assist in the defense of a criminal case in the district court, regardless of whether the county attorney participates in the prosecution thereof. Canon 6.

OPINION 188 (October 1958)

_Advertising—Newspapers—Savings and Loan Association_—A savings and loan association may properly include in a newspaper advertisement a photograph of a practicing attorney who is a member of the board of directors and may mention the attorney’s status as a lawyer, his investment interests, and his position on the board of directors. Canon 24.

OPINION 189 (October 1958)

_Candor and Fairness—Misstatement of Residence Facts_—An attorney may not misstate intentionally the former residence of an out-of-state defendant in a civil damage suit for the purpose of obtaining service under the Texas nonresident motorist act. Canon 19.

OPINION 190 (December 1958)

_Advertising—Professional Listings—Telephone Directories_—It is improper for an attorney who is a resident of Louisiana and a member of both the Louisiana State Bar Association and the State Bar of Texas, but who engages in no Texas practice, to list himself in the customary telephone listings of attorneys in Texas cities. Canon 24.

OPINION 191 (December 1958)

_Solicitation—Classified Advertisements—Telephone Directories_—It is improper for an attorney to use bold-faced type in business listings in either the classified or alphabetical sections of telephone directories. Canon 24.

OPINION 192 (December 1958)

_Solicitation—Professional Listings—Newspaper Advertisements_—A newspaper advertisement stating that an attorney formerly serving on the tax staff of an accounting firm is now engaged in private practice, specializing in tax matters, is improper.
Solicitation—Professional Cards—Distribution of a professional card to both lawyers and laymen announcing that an attorney formerly serving with the U.S. Treasury Department and on the tax staff of an accounting firm is now engaged in private practice, specializing in tax matters, is improper. Canons 24, 39, 42.

OPINION 193 (February 1959)

Confidences of Clients—Clients Withholding Evidence of Crime—An attorney in receipt of information from a client that the client was an eyewitness to a crime may properly decline to reveal such knowledge to prosecuting officials if the client does not desire such notification and if the client’s silence does not violate a criminal statute. Under such circumstances the attorney improperly breaches his client’s confidence if he reveals his client’s knowledge of the crime to prosecuting officials without his client’s permission.

Confidences of a Client—The duty of loyalty owed by the attorney to his client generally controls over any duties under other Canons, in the event of conflict. Canon 34.

OPINION 194 (March 1959)

Advertising—Attorney Engaged in Another Full-Time Business—An attorney engaged full-time in another legitimate business, having withdrawn completely from the practice of law and rendering no legal services, may properly advertise that other business and indicate therein as part of his qualifications for that other business that he is a “licensed attorney.” Canon 24.

OPINION 195 (June 1960)

Partnerships—County Attorney and County Judge of Same County as Partners in Firm—It is generally improper for two attorneys to continue as partners when at the same time one is the county attorney and the other the county judge of the same county. Canon 30.

OPINION 196 (June 1960)

Solicitation—Stirring Up Litigation—Participation in Outside Business—“Feeding” of Law Business—The “feeding” of law business from an abstract company to an attorney who owns or manages the abstract company is improper.

Solicitation—Signs—Joint Occupants—An attorney who occupies an office in the same building with an abstract company owned or managed by the attorney may not have his professional sign at the front of the building below the abstract company’s more prominent sign at the top of the building.

Outside Business—Advertising—Newspapers—An attorney may have his name appear in a newspaper advertisement by an abstract company that he owns or manages, provided he does not list himself therein as an attorney, even though located in a sparsely populated community where he is well known as an attorney. Canons 24, 25.
OPINION 197 (June 1960)

Conflict of Interest—Employment—Law Partner of City Commissioner—One member of a law firm may not serve as chairman of the City Commission while his law partner accepts employment to represent clients with interests before the Commission. Canon 6.

OPINION 198 (June 1960)

Solicitation—Self-Laudation—Stationery—An attorney may not indicate on his stationery that he is a member of the American, state, and local bar associations. Canon 24.

OPINION 199 (June 1960)

Solicitation—Self-Laudation—Professional Cards—An attorney may not send an announcement card to other attorneys announcing his removal to “new and enlarged quarters,” his membership in the bar of specified courts, and membership in certain other civic and legal organizations. Canons 24, 39, 42.

OPINION 200 (June 1960)

Advertising—Professional Listings—Telephone Directories—A Texas lawyer may not list his name, Texas office address, and telephone number in the classified section of the Oklahoma City telephone directory under the general title “Patent Attorney” or any other title. Canons 24, 39, 41, 42.

OPINION 201 (June 1960)

Negotiations with Opposite Party—Attorney for Injured Party—An attorney representing a party who has been injured may write the opposing party who is not represented by an attorney, notifying him of a claim and suggesting that he seek counsel. However, the letter should not undertake to advise the tortfeasor as to the law and his status as a litigant. Canon 9.

OPINION 202 (June 1960)

Solicitation—Employment—Insurance—Subrogation—An attorney handling an insurer’s subrogation claim against a third party, in notifying the insured of the possible effect of pending litigation upon any possible claim of the insured for personal injuries, cannot suggest or assume that the insured should sue for his injuries, nor can the attorney offer his services to handle the insured’s personal injury claim along with the insurer’s subrogation claim for the property damage. Canons 24, 25.

OPINION 203 (June 1960)

Confidences of Clients—Contracts—Texas Canons neither prohibit nor compel an attorney to furnish to Y, without X’s consent, a copy of a partnership contract drafted by the attorney for client X, and under which X and Y operated as partners in the past, unless the attorney in drafting such contract was in fact representing both X and Y; in that case Y is entitled to a copy. Canons 6, 34.
OPINION 204 (June 1960)

Confidences of Clients—Wills—Intention to Commit Crime—When an attorney is made aware in confidence that a client is contemplating commission of a crime and later finds that the client has committed such crime, the attorney is not bound to respect confidences of the client. Whether the attorney should reveal such facts is a matter of personal and not legal ethics. Canons 6, 34.

OPINION 205 (October 1960)

Solicitation—Establishment of Referral Service by a Bar Group—Local Advertising of Referral Service—It is improper for a group of attorneys to organize a bar association and establish a referral service for its members only, particularly when an existing referral plan is already operating in the area; and such group may not run a series of spot announcements over local radio stations, which announcements state the name of the organization and a minimum consultation fee lower than the existing minimum consultation fee set by the already operating referral service; and neither may such announcements properly invite the radio audience to contact the radio station for further information. Canon 24.

OPINION 206 (December 1960)

Hospitality by Individual Lawyer to Judge—It is an open question whether an individual lawyer may with propriety give, in honor of a judge, a party to which many members of the bar in the area are invited. Canons 1, 3.

OPINION 207 (December 1960)

Practice of Law by District Judge—Solicitation and Referrals by District Judge—A district judge may not properly sign pleadings or otherwise counsel in a district court case prior to a trial. A district judge may not properly solicit business for any member, though under some circumstances he may properly refer individuals to a particular attorney. Canons 24, 25, 29.

OPINION 208 (December 1960)

Appearance of Attorney as Witness for Client—If an attorney accepts employment in a matter with no knowledge that he will be a material witness, and a situation arises, prior to trial, about facts as to which the attorney is a material witness and concerning which he may have to testify, it is not a violation of the Canons of Ethics for the attorney to continue with the employment which he has previously accepted. Canon 16.

OPINION 209 (December 1960)

Professional Announcement Cards—Listing of Former Positions Held—A former assistant United States Attorney may not properly include his former official position on a professional card announcing his entering into private practice. Canon 24.
OPINION 210 (December 1960)

Solicitation—Publication of Printed Christmas Greetings by District Judges—District judges may publish printed Christmas greetings in their local newspapers. Canons 24, 39.

OPINION 211 (December 1960)

Solicitation, Indirect—Investing in Stock of Company, Lending Money to Persons with Damage Suit Claims—It is not a violation of the Canons of Ethics for a firm of attorneys to invest in the stock of a loan company which lends considerable money to persons who have pending damage suit claims and from which company the clients of said law firm have borrowed money in the past, if such connection between the company and the attorneys is not used for the solicitation of business; nor is it a violation for said law firm to continue to send its clients, who might have a need to borrow money, to a loan company in which it owns stock, provided such practice is not engaged in with sufficient notoriety or regularity to constitute an indirect solicitation of business or advertisement on behalf of the firm of attorneys, or if it is not done for the purpose of, or as an aid to, securing employment in view of the barratry statute. Canons 24, 25.

OPINION 212 (August 1958)

Law Reviews—Identification of Contributing Authors by Listing Firm Names—The Canons of Ethics do not apply to law reviews published within this state. The policies of a law review are solely within its discretion. However, it is thought that the better practice for identifying contributing lawyer authors is to list only the lawyer’s name and the city in which he practices, and not include an indication of his firm’s name.

OPINION 213 (August 1958)

Candor and Fairness—Communications with Opposite Party—Offers to Settle—Pleadings—In a personal injury suit it is improper for plaintiff’s attorney to include in his original petition statements addressed to the court advising the judge of plaintiff’s prior unsuccessful attempts to settle his claim with defendant’s insurance company within the policy limits, and his continued willingness to so settle, and requesting the judge to instruct defendant’s attorney that for defendant’s protection against liability for any damages that might be awarded in excess of his policy limits he should make demand in writing upon the insurance company to settle within such policy limits. Canons 7, 9, 19.

OPINION 214 (September 1958)

Candor and Fairness—Withholding Information of Affirmative Defense—The lawyer representing a defendant husband in a divorce suit may properly withhold from the court facts constituting the affirmative defense of condonation.

Candor and Fairness—Using Affirmative Defenses to Influence Negotiations for Settlement—An attorney may properly use the existence of an affirmative defense to a divorce action in an attempt to favorably influence settlement negotiations. Canons 19, 29.
OPINION 215 (October 1958)

Intermediaries—Solicitation—Stirring Up Litigation—Charitable Institutions Requiring Employment of Designated Law Firm—A law firm may properly accept and handle all or any of the adoptions of children placed by a charitable home although the home requires the adopting parents to use only the firm designated by the home. Canons 24, 25, 32.

OPINION 216 (November 1958)

Banks as Executors Under Reciprocal Wills—Whether there would be a conflict of interest of a bank appointed executor of both estates in reciprocal wills of a husband and wife, where the remainders after life estates to the surviving spouse were to go to different persons, presents a question outside the scope of the Canons and the jurisdiction of the committee.

OPINION 217 (January 1959)

Conflict of Interest—Employment—County Attorneys in Private Practice—A county attorney in his private practice may not represent a father residing outside the state in a civil action for contempt of court for failure to support his children residing in the county, as required by a divorce decree, when the attorney for the mother intends to seek criminal prosecution of the father for such failure if the civil action does not accomplish the desired results. Canon 6.

OPINION 218 (January 1959)

Advertising—Solicitation—Newspaper Announcement of Change of Office Location—An attorney may not properly place a notice in a newspaper announcing a change of location of his office.

Advertising—Solicitation—Sending to Business Establishments Notices of Change of Office Location—An attorney may not send to business establishments such as taverns and clubs any notice of a change of his office location. Canon 24.

OPINION 219 (January 1959)

Conflict of Interest—Confidences of Clients—An attorney may not represent one partner of a partnership in a suit against the other partner arising out of the partnership relationship where the attorney originally prepared the partnership agreement, acted for both partners in the later sale of the business, and acted as trustee for both in the completion of the partnership’s affairs. Canons 6, 34.

OPINION 220 (March 1959)

County Judges in Private Practice—Employment—A county judge may not transfer to a county court at law a probate matter pending in the county court, and then continue to act as an attorney in the probate matter. Art. 319, Civil Statutes; Arts. 402, 403, Penal Code.
OPINION 221 (March 1959)

Advertising—Solicitation—Announcements of Change of Office Location—An attorney may properly mail to his regular clients a simple printed announcement of a change in location of his office. He may not publish such an announcement in a newspaper. The attorney may not mail such announcement to a general mailing list in the community, which list includes persons or firms not his regular clients, unless the announcement is “warranted by personal relations” with the nonclients.

Solicitation—Professional Cards—An attorney may properly list his telephone number in a simple printed announcement of a change in his office location mailed to his regular clients or to nonclients where “warranted by personal relations,” but he may not list his office hours.

Announcements—Notice of Specialized Legal Service—Advertising Nonlegal Business—An attorney may not include a reference to “title insurance service” in a simple printed announcement of a change in office location mailed to his regular clients or to nonclients where “warranted by personal relations,” whether “title insurance service” refers to a specialized law practice or to a business separate from his law practice.

Advertising—An attorney, one of several in a community, may not designate the building, which he owns and in which he offices, “Law Building” where no other lawyer or public or court official maintains an office in the building, none of the other tenants are engaged in occupations having any connection with the legal profession, and no other lawyer or association of lawyers owns any interest in the building.

Solicitation—Estates—Notices to Creditors—Newspapers—The signing by an attorney for an estate of a published notice to creditors of the estate is permitted and contemplated by law, does not constitute solicitation of professional employment, and is therefore proper and ethical. Canons 24, 39, 41, 42.

OPINION 222 (March 1959)

Solicitation—Announcement Cards—Notice of Specialized Legal Service—An attorney may not properly send a printed announcement card concerning the opening of law offices to other members of the local bar, which card states that the attorney will engage in “General Civil Practice—Collections.” Canons 24, 42.

OPINION 223 (March 1959)

Advertising—Solicitation—Newspaper Announcement of New Association of Attorney—It is unethical for attorneys to cause a newspaper notice to be published announcing the formation of an association by the attorneys and stating that one of them has changed his office address. Canon 24.
OPINION 224 (March 1959)

Advertising—Solicitation—Shrine Circus Programs—A lawyer may not publish his professional card in the “Business and Professional Directory” of a Shrine Circus program. Canons 24, 39.

OPINION 225 (March 1959)

Advertising—Solicitation—Volunteer Public Defenders—A lawyer may properly volunteer free legal advice and assistance to the indigent and needy as long as it is not done with the improper motive of self-advertisement. Canon 24.

OPINION 226 (March 1959)

Prosecution of Those Accused of Crime—Negotiations with Opposite Party—County Attorneys Testifying as to Direct Negotiations with Accused—A county attorney or his assistant may properly see and talk with a person in jail shortly after his arrest for the purpose of later testifying at the trial for the offense involved, provided the arrested person does not have an attorney at the time of the conversation. At the trial such official may testify when some other person in the office is assigned to prosecute the cause. Canons 5, 9, 16.

OPINION 227 (March 1959)

Partnerships—Partnership Composed of Licensed Member of State Bar and Out-of-State Lawyer—A member of the State Bar of Texas who is also admitted to practice in the District of Columbia may properly form a partnership with a lawyer admitted to practice in the District of Columbia only, the partnership to practice under a firm name that includes each partner’s name, provided the letterheads of the firm indicate the out-of-state lawyer practices only in the District of Columbia office of the firm, and provided there is no other misleading or deceptive circumstance that would lead anyone to believe the out-of-state partner is admitted to practice law in Texas. Canon 30.

OPINION 228 (April 1959)

Solicitation—Intermediaries—Lending Institution Requiring Use of Designated Attorney—A bank has the right to select its own attorneys and to require that those attorneys prepare the mortgage and promissory notes in connection with a loan made by the bank; the attorneys so selected may properly accept such employment and may advise prospective borrowers of this policy. Other papers such as deeds and curative matter should be prepared by the attorney selected by the borrower.

Conflict of Interest—Same Attorney for Both Parties in Real Estate Transaction—An attorney, after a full disclosure of the facts to all parties, may properly represent both the buyer and seller of real estate if the parties agree thereto.

Solicitation—The attorney for a buyer of real estate may not advise the seller that he is representing the buyer and will thus prepare the deed of trust and promissory notes, and
that he will prepare the deed for the seller either at buyer’s or seller’s expense according to their desires. Canons 6, 24, 32.

OPINION 229 (April 1959)

_Negotiations with Opposite Party—Demanding Physical Examinations_—Defense attorneys may properly send to plaintiffs copies of letters to plaintiff’s attorney requesting that plaintiff be examined by a physician of defendant’s choice, even though such request is made quite some time after suit has been filed. However, approval of this practice should not be construed generally as authorizing contact with the opposing party. Canon 9.

OPINION 230 (April 1959)

_Solicitation, Indirect—Advancing Money to Clients_—Advancing money to clients can be condemned in Texas only if there is some solicitation of employment. An advance to a prospective client for the purpose of obtaining employment is improper. Advancement of money after employment is unethical only if it occurs with such publicity, frequency, or notoriety as to constitute indirect solicitation of employment in other matters. It is immaterial that repayment is to be from proceeds of a claim. Canon 24.

OPINION 231 (April 1959)

_Fixing Amount of Fees—Retainer Agreements—Division of Fees_—An attorney may properly agree to employment by a client whereby the client will furnish office space and certain other overhead expenses, and will pay the attorney a guaranteed annual retainer, as reduced by the net amount of fees received by the attorney from other clients.

_Intermediaries_—An attorney may accept employment by a client for an annual retainer, as reduced by the net amount of fees received by the attorney from other clients, and may maintain offices on the premises of, and at the expense of, such client, provided the client does not improperly control or exploit the attorney or intervene between the attorney and his other clients. Canons 11, 31, 32.

OPINION 232 (June 1959)

_Conflict of Interest—Employment—Private Practice by Members of Texas State Highway Commission_—A lawyer who is a member of the State Highway Commission may defend his former client in a suit filed by the state against the former client for conspiracy to violate the Motor Carrier Act.

OPINION 233 (June 1959)

_Negotiations with Opposite Party—Direct Contact with City Council or City Manager_—The committee is divided equally on the question whether it violates Canon 9 for an attorney to negotiate directly with a city council or city manager rather than the attorney representing the city in the particular controversy. Canon 9.
OPINION 234 (May 1961)

Appearance of Attorney as Witness for Client—Trial Conducted by Attorney’s Law Partner—An attorney may not ethically represent a client in a litigated matter in which the attorney’s law partner will appear as a material witness. Canon 16.

OPINION 235 (May 1961)

Negotiations with Opposite Party—Demanding Physical Examinations—Defense counsel does not violate Canon 9 by writing a letter to plaintiff with a copy to plaintiff’s attorney, when the letter deals only with defendant’s request that plaintiff submit to a physical examination by a doctor of defendant’s choice.

OPINION 236 (May 1961)

Solicitation—Advertising—Publication of Professional Card in College Alumni Magazines or Newspapers—It is unethical for a lawyer to publish any paid professional advertisement in an alumni magazine or newspaper, even though it is in a section labeled “Alumni Business and Professional Directory.” Canons 24, 39.

OPINION 237 (May 1961)

Solicitation—Advertising—Membership in Chamber of Commerce Which Lists Its Members in Membership Directory According to Occupational Classification of Members—It is not unethical for a lawyer to belong to a chamber of commerce that in its membership directory lists members by occupation provided the lawyer joins the organization for the purpose of community service and not for personal advertisement. Canon 24.

OPINION 238 (July 1961)

Forwarding Fees—A forwarding fee may ethically be paid to an attorney not licensed to practice law in Texas, providing that attorney is authorized to perform the function of a “forwarding attorney” at the place where he is acting. Canons 31, 43.

OPINION 239 (July 1961)

Solicitation—Distribution by County Bar Association of Pamphlets Prepared by State Bar of Texas—A county bar association may properly distribute pamphlets of an educational nature prepared by the State Bar of Texas, and attorneys acting under the direction of such associations may properly mail such pamphlets to their clients, provided the pamphlets are mailed in unmarked envelopes or in envelopes marked as coming from the county bar association. Canon 24.

OPINION 240 (August 1961)

Solicitation—It would be ethical for a lawyer to volunteer to represent, and to represent, a convicted person in order to present to the proper court grounds or evidence which would show that the convicted person has been unjustly convicted in accordance with the law, provided (1) the convicted person authorizes the procedure in his behalf and (2) the attor-
ney who volunteers scrupulously avoids taking any compensation in any form for his services. Canon 24.

OPINION 241 (August 1961)

Solicitation—Advertising—Listings in Commercial Pages of Telephone Directory—Attorneys residing in one city may not properly list themselves in the commercial or yellow pages of a telephone book of another town, even though the other town is in the same county, has no attorneys, and the inhabitants of the town, as a general rule, take their legal problems to the attorneys of the city in question. Canons 24, 39.

OPINION 242 (August 1961)

Solicitation—Advertising—The name “Legal Clinic” may not properly be given to a building that is built by a group of attorneys and that is to be used by them as an office building. Canon 24.

OPINION 243 (September 1961)

Conflict of Interest—Retirement from Public Employment—No member of a law firm may represent a defendant, indicted on a criminal charge, if one of that firm’s members, while previously serving as an assistant county attorney, had handled or worked on the case concerning the defendant. Canons 6, 33.

OPINION 244 (November 1961)

Conflict of Interest—Employment—Representation of Employee and Employer—It is not improper, provided full disclosure is made, for an attorney to represent the employee in his worker’s compensation claim and also to represent both employee and employer in a personal injury case against a third person arising out of the same mishap. Canon 6.

OPINION 245 (November 1961)

Commingling of Client’s Funds in Member’s General Account—It is a strict compliance with the Canons of Ethics and the better and recommended practice that any check or money that is received by a member and in which his client has an interest be deposited in a trust account and disbursements made from it. Canon 10.

OPINION 246 (February 1962)

Solicitation, Direct or Indirect—An attorney may properly serve as chairman, or as a member, of a church’s committee on wills and legacies. Canon 24.

OPINION 247 (May 1962)

Advertising, Indirect—Self-Laudation—The line between proper and improper use of letterheads, envelopes, etc. by a member in connection with correspondence relating to a nonprofit or nonbusiness association is to be drawn at the point where the dominant purpose in the use of the stationery of the practicing lawyer appears to be advertisement or
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self-laudation that would or is intended to influence new, prospective, or old clients. Canon 24.

OPINION 248 (May 1962)

*Solicitation—Advertising, Indirect—Member as Attorney-in-Fact for a Surety Company*

It is not unethical for a member who does not practice criminal law to accept an appointment as attorney-in-fact for a surety company that writes bail bonds. Canon 24.

OPINION 249 (June 1962)

*Advertising*

When a lawyer is engaged in an independent activity that will, by its very nature, probably result in his counseling another person regarding matters of law, and when the activity is such that the other person is, directly or indirectly, employing or paying him for such counseling, the lawyer cannot, in his advertisements for the independent activity, refer to the fact that he is a lawyer nor to his legal training even though he is not generally holding himself out as a practicing lawyer. This opinion thus modifies Opinion 194. Canon 24. ABA Canon 27.

OPINION 250 (June 1962)

*Announcement Cards*

It is not improper for an attorney, A, who is a member of the State Bar of Texas and the New York Bar, to announce his association in a New York firm with B, a lawyer admitted in New York only, by the use of an announcement card listing A’s Texas office address and listing the New York address of the firm of A & B. Canon 24.

OPINION 251 (June 1962)

*Solicitation—Advertising, Indirect—Attorney as Surety*

It is not unethical for a lawyer to act as surety on his client’s criminal bond when there is no element of advertising, solicitation, touting, or serving as a “feeder” for his law practice, apparent or inherent in the action of the member. Opinion 140, to the extent that it conflicts with this opinion, is overruled. Canon 24.

OPINION 252 (June 1962)

*Conflict of Interest*

If an individual, tax-paying citizen seeks an injunction against the individual members of the commissioners’ court of the county in which he resides in order to prohibit their making illegal expenditures of county funds and if the county itself is made a party defendant, it would be unethical for the same attorneys who represent the individual commissioners to represent the county. Canon 6.

OPINION 253 (June 1962)

*Member Participating in Act Conducive to Unauthorized Practice of Law*

If a member is president of a corporation owning and operating an abstract company (though he takes no active part in the operation of the company) that prepares for its clients “Property Reports” on tracts of land, which reports consist of a list of mortgages, judgments and liens (other than taxes), tax information and remarks, and conclude with:
At the request of the party listed above, undersigned certifies that on date of ______________, 19___, I/we searched all the public records of affecting title to above property and that the above information is true and correct based on my personal examination of such records. There are no liens, judgments or encumbrances of record against above described property unless specifically noted herein.

Signature and Address of Person Preparing Report

Title of Person Preparing Report

Date Report Prepared

said member may not necessarily be contributing to the unauthorized practice of law, but the use by an abstract company of such a form of property report and certification is so conducive to the unauthorized practice of law that it would be unwise for a member to permit its use in an abstract company with which he is associated. Canon 43.

OPINION 254 (June 1962)

Advertising and Solicitation—A member who owns, with others, a building designed for the occupancy of only a limited number of lawyers and who calls the building “Lawyers Building” would not be violating the minimum ethical requirements of professional conduct, but he would not be conforming to the general ethical standards with which a member should comply even though he does not have to do so. Canon 24.

OPINION 255 (November 1962)

Advertising—An attorney, speaking as an individual and making an announcement over a local radio station for the purpose of urging the public to attend a golf tournament given for the benefit of charity, may not properly include in his announcement the statement, “We will not be practicing law next Friday. . . .” Canon 24.

OPINION 256 (February 1963)

Judge Borrowing Money from Lawyer—A ruling on the conduct of a judge of a court of record who borrows money from individual attorneys who practice in his court would require an opinion outside the scope of the present Canons and, consequently, the functions of this committee.

Lawyers Lending Money to Judges—Whether a lawyer’s lending money to a judge violates the Canons of Ethics is an open question depending upon the lawyer’s intent, the size of the loan, and other surrounding circumstances. Canon 3.

OPINION 257 (February 1963)

Disloyalty to the Law—Self-Laudation—Advertising and Solicitation, Indirect—It is unethical for a member to write to a discharged juror a letter that urges disloyalty to the
law and that contains elements of self-laudation, indirect advertising, and solicitation. Canons 24, 29.

OPINION 258 (March 1963)

Advertising and Solicitation—While it is not improper for a law firm to give an “open house” for its clients and friends at Christmas, if the invitation to such a party is commercial in tone the action of the law firm in sending such an invitation would constitute advertising and solicitation. Canon 24.

OPINION 259 (March 1963)

Conflict of Interest—If two attorneys share an office and use on their letterhead “Law Offices of A and B” and also sign pleadings in this manner in cases where either or both appear as counsel, even though each attorney maintains his files separately and fees are sometimes divided but sometimes not and their operations are such that it may be assumed that they are not partners, the relationship between them would nevertheless be considered so close that it would be unethical for one of the attorneys to accept employment by one party in a case when the attorney with whom he offices has discussed the case with but has declined employment by the opposing party in the case. Canon 6.

OPINION 260 (May 1963)

Insurance—Salaried Attorney—Conflict of Interest—Candor—Intermediaries—Solicitation—Though many situations can be visualized that would involve unethical conduct, it is not, per se, unethical for:

1. An attorney, who is employed by an insurance company and who files and handles subrogation suits for said company as well as defending liability cases in behalf of the company in the name of the insured up to the company’s limits of liability, to represent an insured in such subrogation suits for his deductible.

2. The attorney for the insurance company to carry the burden of the trial, when the insured signs pleadings and represents himself for his deductible amount.

3. Where an insured party is sued, and a defense is provided by the insurance company’s lawyer, for either:
   a. the insured to represent himself pro se on a counterclaim against the plaintiff, with the lawyer continuing representation for the defense; or
   b. the lawyer to represent the insured on the counterclaim, as long as the lawyer exercises caution with regard to the appearance of soliciting additional fees for representation on the counterclaim.
OPINION 261 (May 1963)

Solicitation—Advertising—New Offices—Open House—A law firm may not directly, or indirectly by cooperation with contractors and suppliers, advertise to the public at large, either by newspaper or mailed announcements, that an open house will be held in its new law offices. Canon 24.

OPINION 262 (August 1963)

Solicitation—Intermediaries—Conflict of Interest—An attorney who is employed full-time as the trust officer and vice president of a bank may not ethically handle probate and other legal matters for persons who are customers of the bank. Canons 6, 24, 32.

OPINION 263 (September 1963)

Partnerships—It is unethical for lawyers to practice together under a firm name, which name is used on their stationery, calling cards and office door, in the telephone directory, and in answering calls, when the lawyers are not in actual fact operating as a true partnership. Canon 30.

OPINION 264 (September 1963)

Solicitation—Adverse Influence—Conflict of Interest—Compensation, Commissions, and Rebates—It would be a violation of the Canons for a lawyer to enter into an agreement with an insurance company in which the lawyer accepts a legal fee for advising and encouraging his clients and friends to adopt a plan of insurance purportedly designed to save income and death taxes. Canons 6, 24, 35.

OPINION 265 (October 1963)

Solicitation—A member who solicits business for a friend in the hope of obtaining professional employment violates Canon 24.

OPINION 266 (October 1963)

Solicitation—Confidences of Clients—It is unethical for a member to purchase, sell, or advertise for sale a law practice with “established clientele.” Canons 24, 34.

OPINION 267 (October 1963)

Solicitation—Specialists—A member may not properly include on his letterhead the designation “Proctor in Admiralty.” Canons 24, 41.

OPINION 268 (October 1963)

Advertising—Professional Cards—A member who, although employed full-time in the legal department of a corporation, engages in private practice not incompatible with his duties, may not properly use the name of the corporation on his calling card that also designates the member as an “attorney at law.” Canons 24, 39.
OPINION 269 (October 1963)

Conflict of Interest—If it is permitted by substantive Texas law, it is not unethical for a member to collect commissions as the executor named in a will and also a fee as an attorney for the estate for legal services rendered outside the scope of his duties as executor; however, it would be unethical for the executor to make the final decision as to the amount he is to pay himself for an attorney’s fee. Canon 6.

OPINION 270 (October 1963)

Partnerships—Confidences of Clients—It is not unethical for members to rent offices in a building where businessmen also have offices and where a receptionist, telephone communication center, secretarial pool, conference room, and law library are furnished to be used in common by all tenants; provided there are no improper indications, as on shingles or signs on doors, that the individual practitioners constitute a firm, or that a lawyer and a nonlawyer are partners; and provided, further, that care is taken to preserve the confidences of the members’ clients. Canons 30, 34.

OPINION 271 (October 1963)

Justifiable and Unjustifiable Litigation—If a member knows that, under the law, his client has no lien on or valid claim to a certain parcel of land, it is improper for him to file a lis pendens merely to cloud title to the land in question. Canon 27.

OPINION 272 (November 1963)

Conflict of Interest—Partners of City’s Mayor—No member of a law firm, of which the mayor of a city is a member, may represent clients before the city’s corporation court, the judge of which is appointed by and removable at the will of the city commission. Canon 6.

OPINION 273 (November 1963)

Advertising and Self-Laudation—Letters to Newspaper—Identification of the Writer as Lawyer—When writing a letter to a newspaper for publication, a lawyer generally should refrain from identifying himself as a lawyer, and to identify himself as a lawyer is unethical if his purpose is to engage in indirect advertising and self-laudation. Canons 17, 24.

OPINION 274 (November 1963)

Conflict of Interest—Membership on Zoning Board of Adjustment—A lawyer may be a member of a city zoning board of adjustment and also represent clients before other city boards and the city council on matters not connected with the work of the zoning board of adjustment. Canon 6.

OPINION 275 (November 1963)

Solicitation—Outside Business—Joint Occupancy of Offices—Two members of a law firm ethically may be members of another partnership engaged in the oil business and conducting its business from the same offices, where the oil firm does not feed law practice to the
law firm, provided the arrangement is such that the lawyers are not advertised as lawyers in connection with the oil firm. Canons 24, 25, 30.

OPINION 276 (December 1963)

Unauthorized Practice of Law—Aiding a Lawyer, Not Admitted in Texas, to Perform Services of a Law Clerk and Services Permitted by His License to Practice before the U.S. Patent Office—While a Texas firm may not, by employing a lawyer not admitted to practice in Texas, aid him in the unauthorized practice of law, a Texas firm may employ a lawyer, prior to his admission to the Texas bar, as a law clerk and also to perform those services he is authorized to perform by virtue of his license to practice before the U.S. Patent Office. Canon 43.

OPINION 277 (January 1964)

Solicitation—Advertising—Listings in Business Guide and City Directories—A member should not permit his name to be listed under the classification “Attorneys—Legal Services” in a business and industrial guide published by a chamber of commerce and intended for business use by members of the chamber of commerce and by others who purchase the guide. A lawyer should not pay the publisher of a city directory for a special listing in distinctive type under the heading “Attorneys and Counsellors at Law.” Canons 24, 39.

OPINION 278 (March 1964)

Disloyalty to the Law—Letters to Jurors—A letter to a juror is improper if written for an improper purpose, such as the purpose of suggesting that the law unjustifiably kept important, relevant evidence from the jurors in a case previously before the jurors. Canon 29.

OPINION 279 (March 1964)

Collection Letters—Misleading Party Not Represented by Counsel—It is not unethical for a member who represents a creditor to write a letter to a debtor offering to settle for a stated sum and stating truthfully that he has been instructed to file suit immediately, even though the letter also encloses what is said to be a copy of a petition prepared for filing against the debtor. Canon 9.

OPINION 280 (March 1964)

Solicitation—Wills—Use of a statement in a will that the will is executed in duplicate originals and that one is retained by X, attorney, violates Canon 24.

OPINION 281 (March 1964)

Conflict of Interest—Tax Foreclosure—Representing Adverse Parties after Full Disclosure—A delinquent-tax attorney may not bring a tax suit against Y and others and represent Y in negotiations with other defendants. Canon 6.
OPINION 282 (March 1964)

Solicitation—Advertising Shingles—It is improper for a lawyer whose office is difficult to find to place a sign elsewhere displaying the lawyer’s name, profession, and directions for locating his office, and it is even more clearly improper to use such a sign when it also contains the name and profession of the lawyer’s spouse and the words “Notary Public.” Canon 24.

OPINION 283 (June 1964)

Advertising—Clients’ Newspaper Advertisements—A lawyer should not permit a client to identify him in a newspaper advertisement as the client’s attorney. Canon 24.

OPINION 284 (June 1964)

Advertising—Letterheads—The use on a lawyer’s letterhead of an emblem that is not self-laudatory and that is not calculated to solicit legal work is not forbidden by any canon of ethics, but the display of the emblem is frowned upon. Canon 24.

OPINION 285 (June 1964)

Advertising Shingles—A sign on the door to a lawyer’s office may not properly include the descriptive words “General Practice.” Canon 24.

OPINION 286 (June 1964)

Advertisement—Notice of Specialized Legal Service—European Claims—A member may not insert in the Texas Bar Journal a notice that he is engaged in handling European claims. Canon 42.

OPINION 287 (June 1964)

Partnership Names—Deceased Partner’s Name, Descriptive Use—A firm may continue to use the name of a deceased partner in its firm name and to show the name on its letterhead with suitable indication that such partner is deceased, if the action is in accord with custom in the general geographical area and if the use of the name does not tend to work any deception or imposition. This use of the name of a deceased partner should be discontinued whenever its continued use might be deceptive or misleading. Canon 30.

OPINION 288 (June 1964)

Conflict of Interest—Disagreements between Two Clients—When the interests of two clients of a law firm become divergent in regard to the matter being handled by the firm, the law firm may not represent one client against the other. Canon 6.

OPINION 289 (June 1964)

Solicitation—Advertising—Classified Telephone or City Directories—Listing as Specialist—Patent Attorneys—A registered U.S. patent attorney may list himself as a patent attor-
ney in the classified or city directory or in any other manner permitted by pertinent patent regulations, if he limits his practice to the scope of his license from the U.S. Patent Office; but the registered U.S. patent attorney who also practices law under or by reason of his Texas license may not list himself or his qualifications on letterheads or in a telephone directory or in any other way forbidden to other Texas lawyers. Except as provided in Canons 39 and 42 and the pertinent interpretative opinions, the fact that the scope of one’s practice is influenced by the existence of a limited license from another source such as the U.S. Patent Office is immaterial and may not be used as the basis of any direct or indirect solicitation or advertisement. Canons 24, 39, 41, 42.

OPINION 290 (June 1964)

Solicitation—Advertising Title Insurance Business—A practicing lawyer, X, who is also local agent of a title insurance company, may not distribute to real estate agents printed forms of an earnest money contract having printed on it the legend that it is furnished by the title insurance company and that X is its agent. Canon 24.

OPINION 291 (June 1964)


OPINION 292 (August 1964)

Contingent Fees in Divorce Cases—An attorney may properly contract for a contingent fee in a divorce case in Texas as long as the Texas courts recognize the validity and legality of a contingent fee contract in matrimonial actions. Canons 11, 12.

OPINION 293 (August 1964)

Division of Fees—Lawyer Serving as Independent Coexecutor—A statutory executor’s commission may be divided between two coexecutors, although one of them is a lawyer and the other is not. Canon 31.

OPINION 294 (September 1964)

Conflict of Interest—Confidences of Clients—Divorce Cases—An attorney who represented the wife in a prior divorce action, which was dismissed upon reconciliation, cannot ethically represent her husband in a subsequent divorce suit filed against her by the husband. Canons 6, 34.

OPINION 295 (September 1964)

Conflict of Interest—Two Taxing Agencies—Representation in a delinquent tax case of two taxing agencies by one attorney is not a per se violation of the Canons since there is not necessarily a conflict, but the attorney should be vigilant to detect any conflict between the interests of his two clients. Canon 6.
OPINION 296 (October 1964)

Conflict of Interest—County Attorneys—Eminent Domain—An assistant county attorney, with the express consent of all concerned given after a full disclosure of the facts, may represent property owners in eminent domain proceedings in which the county is in no way involved. Canon 6.

OPINION 297 (May 1965)

Negotiations with Opposite Party—Aiding Unauthorized Practice of Law—Conflict of Interest—It is unethical for plaintiff’s attorney to negotiate directly with an insurance adjuster without defense attorney’s consent. In a compensation case, it is not unethical to give such consent. In a negligence case, it is unethical to give such consent if the case involves an amount in excess of the policy limits. Canons 6, 9, 43.

OPINION 298 (May 1965)

Conflict of Interest—Suing Client While Representing Him in Another Case—It is unethical for an attorney employed by an insurer, while defending the defendant (under a non-waiver agreement) in a suit for damages resulting from a collision, to file a separate suit on behalf of the insurer against the insured for a judgment declaring that the policy was canceled prior to the collision. Canon 6.

OPINION 299 (May 1965)

Conflict of Interest—Suing Client While Representing Him in Another Case—It is unethical for an attorney, while his firm is representing a claimant in a worker’s compensation case, to prosecute a suit against that client for personal injuries to another person resulting from the same collision. Canon 6.

OPINION 300 (May 1965)

Solicitation—It is unethical for an attorney to permit his client, an agency for placing babies with adopting parents, to distribute a “Legal Adoption” circular suggesting that the attorney be employed to handle adoption cases. Canon 24.

OPINION 301 (May 1965)

Division of Fees—Referral Fee—It is unethical for an attorney who is executor of an estate to accept a fee for employing a law firm to represent the estate. Canon 31.

OPINION 302 (May 1965)

Disrespect to Court—It is unethical for a lawyer, who is brought before a justice of the peace in another state and who is charged with speeding, to give the justice of the peace a check for his fine and then place a “stop payment” on the check. Canons 1, 19, 29.
OPINION 303 (May 1965)

Solicitation—Advertising—Listings in Church Directory—It is not unethical for an attorney to permit a “listing” in his church directory containing his photograph, his home address and phone number, the name of his firm, and his business phone number. Canon 24.

OPINION 304 (May 1965)

Advertising—Lawyers’ Public Endorsement of Political Candidate—Whether a paid advertisement by lawyers in support of a political candidate may properly reflect that the endorsers are in fact lawyers depends upon whether their dominant purpose is to advertise themselves or is to lend strength to (and is germane to) the endorsement. Canons 24, 29.

OPINION 305 (August 1965)

Solicitation—Specialists—Letterheads—A member may not properly include on his letterhead the words “Land Titles, Wills and Probate Matters.” Canons 24, 39, 41, 42.

OPINION 306 (September 1965)

Advertising—Professional Cards—Military Titles—A member’s professional calling card may not properly include his military rank and retired status. Canons 24, 39.

OPINION 307 (November 1965)

Conflict of Interest—District Attorneys—County’s Suit on Fidelity Bond—A district attorney (or his law firm) may not ethically represent the bonding company defendant in a civil suit filed by a county situated in his district for misappropriation by a county official after presentation by the district attorney of the facts to a grand jury. Canon 6.

OPINION 308 (November 1965)

Conflict of Interest—Representing Insured in Stowers Case after Representing Plaintiff in Collision Case against Insured—Attorney as Witness—An attorney may ethically represent the insured in a Stowers case against the insurance carrier after having represented the plaintiff in a collision case against the insured if the judgment against the insured has been satisfied; but, because of the likelihood of conflict of interests, it would be unethical for the attorney to represent the insured in the Stowers case if the judgment has not been satisfied, unless both clients consent after full disclosure. It would also be unethical for an attorney who knows he will be a material witness to accept employment in the case. Canons 6, 16.

OPINION 309 (January 1966)

Solicitation—Stirring Up Litigation—Division of Fees—County Attorneys—When a county attorney is consulted in his official capacity about a criminal or civil matter, it is unethical for him to offer his services as a private lawyer; he may ethically refer the complainant to another lawyer but he cannot accept a referral fee. Canons 24, 25, 31.
OPINION 310 (January 1966)

Attorney’s Fees—Worker’s Compensation Settlement—Hospital Bills—Disbursing Client’s Money—Illegal Fees—it is unethical for a worker’s-compensation claimant’s attorney: (1) to retain as his fee out-of-settlement money and, by deduction from hospital bill payment, an amount in excess of the fee agreed to by the client and allowed by the court; or (2) to obtain the court’s approval, by concealment of the fee agreement, of a fee in excess of the agreed fee. Canons 1, 10, 19.

OPINION 311 (January 1966)

Fixing Amount of Fees—Minimum Fee Schedules—Solicitation—Habitual charging of fees less than those established in a recommended minimum fee schedule does not violate the Canon regarding fixing fees but might be evidence of unethical solicitation. Canons 11, 24, 25; ABA Canon 12.

OPINION 312 (January 1966)

Conflict of Interest—Prosecuting Attorney Representing Police Officer in Civil Suit—it is unethical for a prosecuting attorney to represent a police officer in a civil action for overtime wages when his duty might require investigation or prosecution of a criminal action arising out of the same facts. Canon 6.

OPINION 313 (January 1966)

Conflict of Interest—Partnerships—Withdrawal from Employment—it is unethical for a lawyer, without the defendant’s consent, to continue to represent a plaintiff in a lawsuit after becoming a partner in the law practice with another lawyer who formerly represented the defendant in investigating and handling the claim out of which the lawsuit arose. Canons 6, 34, 40.

OPINION 314 (January 1966)

Conflict of Interest—Representing Both Legal Guardian of Minor and Minor’s Father—it is unethical for a lawyer to represent both the legal guardian of a minor’s estate and the minor’s father in a damage suit for both personal injuries suffered by the minor and for the father’s loss of the minor’s services, without the consent of both the guardian and the father. Canon 6.

OPINION 315 (January 1966)

Violation of Law—Advising Criminal Client to Hide Temporarily—Whether it is unethical to advise a client who is charged with a crime to hide temporarily depends upon whether such advice, or the act advised, violates the law. Canon 29.

OPINION 316 (January 1966)

Solicitation—Gifts and Entertainment for Claims Adjusters—Whether it is unethical for a law firm to provide gifts and entertainment for claims adjusters and representatives of its
regular insurance company clients depends upon whether solicitation of future employment is indicated by all the facts and circumstances. Canon 24.

OPINION 317 (January 1966)

Conflicts of Interest—Representing Worker’s Compensation Claimant Who Is Adversary in Damage Suit—It is unethical for an attorney to accept employment to represent a vehicle driver in his worker’s compensation claim for injuries resulting from a collision when such driver is a defendant in a suit brought by the same attorney on behalf of a personal-injury plaintiff arising out of the same collision, except by express consent of all concerned after full disclosure.

Conflict of Interest—Representation of Defendant by Former Associate of Plaintiff’s Attorney—It is unethical for an attorney who, when suit was filed, was associated with a law firm representing the plaintiff in a lawsuit to participate later in the defense of the same suit. Canon 6.

OPINION 318 (October 1966)

Conflict of Interest—Criminal Practice by Law Firm of Which County Attorney Is Member—County attorney’s disqualification to defend criminal cases also disqualifies all members of his law firm. Tex. Code Crim. Proc. art. 2.08. Canon 6.

Solicitation—Letterheads—An attorney may not include the words “Civil Counsel” on his professional letterhead. Canons 24, 39.

OPINION 319 (October 1966)

Firm Names—Offices in Different States—Lawyers Licensed in Different States—A law firm composed of lawyers licensed in different states may maintain offices under the same firm name in several states provided there is a resident partner licensed in each state where an office is maintained and provided that all representatives of the firm name to the public make clear the states in which the members of the firm are licensed to practice. The scope of the firm’s practice is immaterial but caution must be exercised to avoid unauthorized practice by attorneys not licensed in each state. Canons 30, 43. ABA Canon 33.

Announcement Cards—Advertising—Cards announcing the opening of a Texas office and specifying a limitation of practice to law of another state are prohibited. Canons 24, 39, 42.

OPINION 320 (October 1966)

Advertising—Use of Attorney’s Name and Picture in Airline Advertising—An attorney may not ethically permit an airline to use his name and picture as part of its newspaper advertising. Canon 24.
OPINION 321 (October 1966)

Advertising—Classified Directories—An attorney may not ethically permit his name to be listed as an attorney in a statewide classified directory that is not an approved law list. Canons 24, 39.

OPINION 322 (October 1966)

Advertising—Holiday Greetings to Public by Lawyers Through Radio Spot Announcements, Newspaper Advertisements, and Circulars—It is unethical for an attorney to extend holiday greetings to the general public by radio spot announcements, newspaper advertisements, circulars or other advertising media. Canon 24.

OPINION 323 (October 1966)

Conflict of Interest—Criminal Practice by Attorney Associated with County Attorney in Civil Practice—Criminal Practice by Father of County Attorney—Private Employment or Court Appointment—County attorney’s disqualification to defend criminal cases extends to his partners or associates in all courts throughout the state whether privately employed or court-appointed. The father of county attorney is not per se disqualified to defend a criminal case prosecuted by his son but such practice should be discouraged. Canon 6.

OPINION 324 (December 1966)

Assumed Names—Solicitation—An attorney may not use any assumed name in connection with his law practice and he may not capitalize upon an assumed name by legally changing his name. Canons 24, 30.

OPINION 325 (December 1966)

Private Practice by Former County Judges—It is unethical for a former county judge to represent the state and county in appeals from the awards of special commissioners in condemnation suits when the condemnation proceedings originated during his tenure as county judge and he appointed the special commissioners. Canon 33.

OPINION 326 (December 1966)

Conflict of Interest—Defense of Damage Suit after Defense of Worker’s Compensation Suit Arising out of Same Accident—An attorney who defends a worker’s compensation case may not thereafter defend a damage suit by the same plaintiff for the same accident if the subrogation claim of the worker’s compensation carrier is involved. Canon 6.

OPINION 327 (December 1966)

Conflict of Interest—Probation Officers Acting as Defense Counsel—An attorney may not act as defense counsel in felony cases in the district where he is also the probation officer. Canons 4, 5, 6, 34.
OPINION 328 (December 1966)

*Political Campaign Contributions for Judicial Candidates*—It is ethical for attorneys to assist judicial candidates with respect to campaign expenses either by direct contributions or by soliciting contributions as long as there is no improper motivation. Canons 2, 3.

OPINION 329 (December 1966)

*Advertising—Legal Articles—Identification in Trade Journals*—An attorney who edits a trade journal or who writes legal articles for a trade journal may be identified by name only and may not ethically permit the publication of his picture, his identification as an attorney, biographical data showing his legal qualifications, his firm connection or address. Canons 24, 37. ABA Canons 27, 40.

OPINION 330 (December 1966)

*Power of Attorney in Personal Injury Cases—Duty of Full Disclosure—Control of Litigation—Conflict of Interest*—An attorney may not ethically take from his client in a personal injury case a power of attorney which vests in him absolute control of the case. Canons 6, 8.

OPINION 331 (December 1966)

*Advertising—Letterheads—“Tax Attorney” or “Tax Service”—Specialists*—An attorney may not use the terms “Tax Attorney,” “Tax Service,” or the like on his letterhead or card or in any announcement or directory except approved legal directories. Canons 24, 39, 41, 42.

OPINION 332 (August 1967)

*Conflict of Interest—Public Prosecutor Representing Civil Suitors*—It is improper for a public prosecutor (district attorney, county attorney, or city attorney) to represent any party in a civil matter arising out of an occurrence that also is the subject of criminal investigation or prosecution within the jurisdiction of such public prosecutor except in rare instances where his duties as prosecutor have been fully performed before actual or contemplated connection with the civil matter and where also no advantage has been obtained through the public office. Canons 5, 6, 9, 24, 25.

OPINION 333 (August 1967)

*Advertising—Shingle and Building Directory*—It is improper for an attorney who is also a state senator to place in his building directory and on his office door his title “State Senator” as well as “Attorney at Law.” Canons 24, 39.

OPINION 334 (August 1967)

*Advertising—Validating Parking Lot Tickets*—It is not unethical for an attorney to validate parking tickets, i.e., pay the parking fees of public parking facilities, for his clients unless such practice is so publicized as to constitute advertising. Canon 24.
OPINION 335 (October 1967)

*Communications with Opposite Party*—An attorney may ethically communicate with an opposing party who is not represented by counsel with respect to prospective litigation provided he does not mislead the opposing party in any way or undertake to advise him as to the law or his status as a litigant. Canon 9.

OPINION 336 (March 1968)

*Solicitation—Intermediaries—Conflict of Interest*—An attorney may serve both as attorney for a bank and as trust officer of the bank but he may not at the same time ethically handle legal matters for customers of the bank or maintain an office for outside law practice within the bank. Canons 6, 24, 32.

OPINION 337 (March 1968)

*Candor and Fairness—Communications with Opposite Party—Reference to Insurance Settlement Negotiations and Related Matters in Plaintiff’s Petition*—It is unethical for an attorney to include in plaintiff’s original petition allegations with respect to defendant’s liability insurance, settlement negotiations and related matters. Canons 9, 19.

OPINION 338 (March 1968)

*Solicitation—Advertising—Listings in Commercial Pages of Telephone Directory*—An attorney may be listed in the commercial or yellow pages of a telephone directory only in the city where he maintains his office. Within this rule, however, it is permissible to be listed in the commercial pages of a metropolitan area directory which includes the city where he maintains his office. Canons 24, 39.

OPINION 339 (March 1968)

*Improprieties of Clients—Negotiations with Opposite Party—Candor and Fairness*—An attorney should not, without the consent of opposing counsel, sanction an attempt of his client to communicate with the adverse party upon the subject matter of the controversy and the attorney should affirmatively discourage such conduct. Canons 9, 19. ABA Canons 9, 16, 22.

OPINION 340 (March 1968)

*Solicitation—Advertisement by Political Candidates*—An attorney seeking an elective public office may ethically advertise his political candidacy in publications of either general or limited distribution. Canon 24.

OPINION 341 (March 1968)

*Suing Client for Fee—Confidences of Clients*—When justice requires an attorney to sue a client for his fee it is not unethical for the attorney to use confidential information obtained from the client where clearly necessary to protect his rights. Canons 13, 34. ABA Canons 14, 37.
OPINION 342 (March 1968)

Communications with Opposite Party—Interviewing Witnesses and Obtaining Statements—It is not unethical for an attorney to interview and take statements from employees of an adverse party without consent of opposing counsel provided a full disclosure is made and provided further that the employee is not an officer or managing employee of the party and is not the person whose conduct gives rise to the controversy. Canon 9. ABA Canon 9.

OPINION 343 (September 1968)

Corporate Counsel—Legal Services for Parent, Subsidiary, and Related Companies—Intermediaries Aiding the Practice of Law by Nonlawyers—An attorney employed by one corporation may ethically render services for parent, subsidiary or other closely related corporations. Canons 32, 43. ABA Canons 35, 47.

OPINION 344 (September 1968)

Self-Laudation—Use of Titles “Doctor,” “Dr.,” and “J.D.”—An attorney engaged in, or intending to engage in, the practice of law, and holding a “J.D.” degree may not ethically use any of such titles orally or in writing, professionally or otherwise. Canon 24. ABA Canon 27.

OPINION 345 (September 1968)

Representation of Defendant in Criminal Case by Former Civil Assistant District Attorney—Conflict of Interest—Retirement from Public Employment—A former civil assistant in a district attorney’s office may ethically represent a defendant in a criminal case where the indictment was returned after his separation from the office, even though the offense allegedly occurred while he was in the office, provided he did not participate in the case in any way and did not obtain any information with respect thereto while on the district attorney’s staff. Tex. Code Crim. Proc. art. 2.08. Canons 6, 33. ABA Canons 6, 36.

OPINION 346 (June 1969)

Group Legal Services—Solicitation—Intermediaries—Unauthorized Practice of Law—An attorney may not knowingly allow an association or group to advertise to the members of the association or group that the attorney is competent and qualified and will advise them on their personal legal problems, which problems do not have any relation to the work, occupation or profession of the members of the association or group. Canons 24, 32, 43.

OPINION 347 (August 1969)

Solicitation—Indirect Advertising—Attorney as Surety on Criminal Bond—An attorney may act as surety on his client’s criminal bond, as long as the attorney-client relationship exists prior to the signing of the bond by the attorney. However, the attorney’s signing as a bondsman on a criminal bond, at a time when he does not represent his principal, and thereafter representing the principal as his attorney, is solicitation in violation of Canon 9.
24. Further, it is unethical for an attorney to allow his name to be shown to prisoners in the county jail on a list of bondsmen that are authorized by the court to write bonds. Canon 24.

OPINION 348 (October 1969)

Fee for Defending Indigent Parties—An attorney appointed to defend an indigent defendant in a criminal case may accept partial fee from the family, as well as fee from the court, as long as full disclosure is made. Canon 35.

OPINION 349 (October 1969)

Credit Cards—Solicitation—Advertising—Attorney’s Fees—An attorney may honor a reputable credit card or similar device in the payment of his fee, but may not display an emblem, window decal or desk emblem displaying his acceptance of such credit card. Canons 11, 24.

OPINION 350 (March 1970)

Solicitation—Advertising—Self-Laudation—An attorney who has received only one degree in law may not display certificates of his LL.B. degree and his Juris Doctor degree, and may not list both degrees when summarizing his academic background. Canon 24.

OPINION 351 (March 1970)

Compensation, Commissions, and Rebates—Division of Fees—Conflict of Interest—An attorney may receive from a bonding company engaged in writing of criminal bonds a percentage of the bond premium for referral, as long as there is a full disclosure to the client and the client consents. Canons 6, 31, 35.

OPINION 352 (March 1970)

Negotiations with Opposite Party—Interviewing Witness Represented by Attorney—When three persons are indicted for one alleged transaction, and all three are represented by an attorney, the attorney for one may not interview any of the others without the consent of the attorney representing the party sought to be interviewed. Canon 9.

OPINION 353 (July 1970)

Confidences of Clients—When an attorney is made aware in confidence that a client has in the past committed a crime, the attorney is prohibited from disclosing any of the information revealed to him by his client. Canon 34.

OPINION 354 (March 1971)

Titles on Professional Cards—An attorney who is also a municipal court judge may not on his professional card reflect his name as “Judge ________________, Attorney at Law,” with other information. Canons 24, 39.
OPINION 355 (March 1971)

*Communications with Opposite Party*—An attorney should not advise an opposing party represented by counsel as to the law involved in the controversy through the guise of a deposition. Canon 9.

OPINION 356 (March 1971)

*Public Official Stationery Used in Personal Civil Practice*—A district attorney should not use his official stationery in his personal civil practice. Canons 24, 39.

OPINION 357 (March 1971)

*Solicitation—Neon Signs*—A law firm violates Canon 24 by placing a neon sign with the firm’s name thereon outside of the firm’s office.

OPINION 358 (February 1972)

*Communications with Opposite Party*—An attorney should not, as a general rule, send copies of his correspondence with the opposing attorney to the opposing attorney’s client. Canon 9.

OPINION 359 (February 1972)

*Conflict of Interest*—A law firm may represent a savings and loan association and also a title insurance company which issues title insurance to the savings and loan association when full disclosure is made to both the savings and loan association and the title insurance company. Canon 6.

OPINION 360 (May 1972)

*Witnesses to Will*—Attorneys and/or their relatives and/or their employees may serve as witnesses to wills drafted by the attorney. Canons 24, 32; DR 2-103.

OPINION 361 (May 1972)

*Telephone Directory Listings*—A listing of a lawyer in the alphabetical and classified sections of the telephone directory or directories for the metropolitan area in which the lawyer resides or maintains his office or in which a significant part of his clientele resides is proper. DR 2-102(A)(5).

OPINION 362 (May 1973)

*Listings in Reputable Law Lists or Legal Directories*—An attorney may list any number of representative clients in a reputable law list or legal directory as long as it conforms to other requirements. DR 2-102(A)(6).
OPINION 363 (May 1973)

Attorney as Witness—An attorney should not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness except under certain circumstances. DR 5-101 and DR 5-102.

OPINION 364 (September 1973)

Divorce Kits—An attorney violates DR 1-102(a)(5), EC 2-2, EC 2-16, and EC 3-7 by furnishing “divorce kits” to certain clients to allow them to represent themselves in court. In the “kits,” the attorney would fill in the blanks in the petition, waiver, and judgment, and furnish such completed instruments to the client with written instructions as to filing, obtaining signatures, filing waiver, appearing in court to represent himself, and presenting his case to the court for judgment.

OPINION 365 (September 1973)

Threat of Additional Prosecution to Abate Appeal from Judgment of Conviction—Prosecuting attorney should not do any act or take any position calculated to deny criminal defendant’s right to a full and fair trial. DR 1-102 and DR 7-103.

OPINION 366 (June 1974)

Financial Interest in Bail Bond Business—It is not improper for a practicing attorney to have a financial interest in a bail bond business if he does not otherwise participate in the operation of the business and will not accept employment from a person whose bail bond has been written by the business.

OPINION 367 (June 1974)

Conflict of Interest—An attorney should not continue to represent a client after trial and appeal which results in a reversal and remand for a new trial if a former assistant district attorney, who participated extensively in the prosecution and appeal of such case, joins the attorney’s firm either as a partner or an associate, even though such former assistant district attorney agrees not to participate in the subsequent developments of the case. DR 5-105(D) and EC 9-3.

OPINION 368 (June 1974)

Representation of Law Partner or Associate Who Will Be a Party—Witness—It is not improper for an attorney to represent his law partner or associate in a suit where the partner or associate will be a party-witness in such suit. DR 5-101(B).

OPINION 369 (November 1974)

District Attorney Criticizing Trial Judge—The action of a district attorney in criticizing a trial judge at a press conference after trial by stating, “The actions of the judge were unethical and illegal and grounds for reversible error” does not violate any Disciplinary Rule, but is questionable under EC 8-6.
OPINION 370 (August 1974)

*Law Lists—Local Bar Associations—Statement as to Areas of Practice*—Under Canon 2, a local bar association may publish a list of its members and the area of law in which each member indicates a particular interest, provided such law list is published only to the members of the bar association and other lawyers in the area.

OPINION 371 (May 1975)

*Referral Services*—It is improper for a lawyer to assist or participate in a lawyer referral service unless the referral service is operated, sponsored or approved by a bar association representative of the general bar of the geographical area in which the association exists. DR 2-103(C), (D)(3).

OPINION 372 (November 1974)

*Solicitation—Advertising—Christmas Cards*—It is improper for an attorney to send Christmas cards which state that he is a practicing attorney either on the card or on the envelope to clients or the general public, though such a card may be sent to another attorney. DR 2-101.

OPINION 373 (November 1974)

*Attorney’s Participation in Lay Estate Planning*—An attorney’s regular, systematic and agreed participation in a layman-initiated scheme of “estate planning” wherein the lay estate planner regularly refers clients to the attorney for “drafting the necessary instruments” for customers of the estate planner constitutes unethical solicitation and can constitute unethical regulation of his professional judgment in rendering legal services and unethical aiding of a nonlawyer in the unauthorized practice of law. DR 2-103(B), (D), and (E); DR 3-101(A); and DR 5-107(B).

OPINION 374 (November 1974)

*Attorney’s Fees*—It is improper for a lawyer to secure a judgment for legal fees against his client in the same suit for which the client is being represented by the lawyer. DR 5-101(A), DR 2-110(C)(1)(d).

OPINION 375 (December 1974)

*Deceased Partner’s Name, Use on Letterheads*—It is proper for a firm to continue to use the name of a deceased partner in its firm name and/or to show the name on its letterhead with suitable indication that such partner is deceased, if the use of the name does not tend to work any deception or imposition. The use of the name of a deceased partner should be discontinued whenever its continued use might be deceptive or misleading. DR 2-102(A)(4), EC 2-11.
OPINION 376 (December 1974)

*Distributing Copies of Class-Action Complaint to Those Possibly Affected*—An attorney representing the defendant in a class action pending in federal district court would violate DR 2-104(A)(1), DR 2-104(A)(5), and EC 2-4 by distributing copies of the complaint to others who may be affected by such pending action and accepting employment from such others on a nonfee basis.

OPINION 377 (January 1975)

*Law Office Lease by Lending Institution Based on Gross or Net Income Disallowed*—An exclusive lease for law practice in a building owned, operated, and occupied by a lending institution based on the percentage of gross or net income of the attorney would be in violation of DR 3-102.

OPINION 378 (February 1975)

*Preserving Client’s Confidence in S.E.C. Investigation*—A lawyer owes a duty to his former client to preserve that client’s confidence and secrets in an investigation by the Securities and Exchange Commission unless released by DR 4-101(C) or DR 7-102(B).

OPINION 379 (December 1974; February 1975)

*Publicity—Name of Building*—The name “Justice Plaza” may not properly be given to a building which is owned by a group of attorneys although said building is occupied by the attorneys, as well as the county Legal Aid office. DR 2-101.

OPINION 380 (May 1975)

*Collection Letters*—It is improper for a collection letter to state in extensive detail the legal results of nonpayment. DR 7-104(A)(2).

OPINION 381 (June 1975)

*Legal Assistants, Correspondence*—It is proper for a legal assistant to write a letter on his law firm’s letterhead provided that he is a supervised employee of the law firm and that he signs as a legal assistant. DR 3-101(A).

OPINION 382 (June 1975)

*City Officials—Conflict of Interest*—EC 5-1, DR 8-101, EC 9-1, and DR 9-101 prohibit an attorney who is a mayor or member of a city council from (1) practicing in municipal court, (2) representing a defendant in county court in an appeal from a municipal court criminal case, (3) representing a defendant in a criminal case initiated by the police department of the city where the police officer will be a witness against such defendant, (4) representing a party with an interest adverse to the city in a civil case, and (5) representing a defendant in a criminal case instituted by another agency where a police officer acting in the course of his official duties will be a witness for the prosecution, unless there are other officers and/or witnesses who can testify to the same facts as the city police officer.
It is also improper for a partner or associate of a mayor or city council member to engage in any of the above acts. When not in conflict with its charter, state law, or federal law, a city may prescribe by ordinance conduct requirements for the city council members and the mayor more stringent than the State Bar of Texas, Rules and Code of Professional Responsibility of the State Bar of Texas.

OPINION 383 (December 1975)

*Office Signs or Placards Stating Nature of Practice*—An attorney’s use of small signs or placards in his office or waiting room informing the reader of the types of cases he handles constitutes unethical solicitation. DR 2-102(A); DR 2-103(A); and DR 2-104(A).

OPINION 384 (April 1976)

*Disclosure to Internal Revenue Service*—An attorney should not comply with a letter request from the Internal Revenue Service for information concerning a client’s personal injury lawsuit which had been settled unless released by DR 4-101(C). Canon 4; DR 4-101(B).

OPINION 385 (May 1976)

*Office and Building Signs*—It is a violation of the Code of Professional Responsibility for a lawyer to have an office sign that is (1) a free-standing sign not attached to a building; (2) a sign that extends above the roofline of the building; (3) a sign on an awning or canopy extending in front of the office; or (4) a sign in a lawyer’s office window not on or near the door of the office. DR 2-102(A)(3).

OPINION 386 (July 1976)

*Telephone Directory Listings*—A lawyer may list his telephone number in any telephone directory that includes the geographical area where he resides, where he maintains an office, and where a significant portion of his clientele resides. However, he may list no more than two telephone numbers unless he has more than one office in the geographical area covered by the telephone directory, in which event he can give one listing for each office. DR 2-102(A)(5).

OPINION 387 (June 1977)

*Duty Where Confidential Communication of Corporate Chief Executive Made to Retained Attorney for Corporation Reveals Criminal Activity and Breach of Duty by Corporate Officer*—If an attorney represents both an officer of a corporation and a corporation, he should withdraw from representing both if the officer discloses to the attorney facts amounting to a criminal offense and breach of duty to the corporation by the officer and by other corporate directors. DR 5-105. Under DR 4-101, the revelation of the past crime is privileged, and the attorney has no duty to reveal the confidential communication to anyone.
If the attorney represents only the corporation, EC 7-1 requires that the attorney report the known facts amounting to a criminal offense and breach of duty by the officer to the board of directors and stockholders of the corporation. If the corporation could be criminally liable, the attorney should not report the facts to the appropriate investigating authority. DR 4-101. If there is no corporate criminal liability, the attorney should report the facts to the appropriate investigating authorities.

OPINION 388 (July 1977)

Posting—Going Off Bail Bond for Client—An attorney who has personally posted a bail bond for a client whom he represents in the matter out of which the bail bond arose violates Canons 4, 5, and 7 of the Code of Professional Responsibility by revoking such bond and thereby causing his client to be placed in jail. Such attorney does not violate these Canons, however, if he knows that his client is planning to commit a crime or a fraud or is about to refuse to comply with the terms of the bond.

OPINION 389 (October 1977)

Disclosures Regarding Former Client—Under DR 4-101, EC 4-4, and EC 4-6, an attorney who formerly represented both business associates C and X cannot disclose to C’s new counsel the facts of any discussions with the attorney while the attorney-client relationship existed between the attorney and X. The attorney could disclose to C’s new counsel any statements made by X after the attorney-client relationship was terminated. Under DR 7-102, an attorney may testify during the trial of C as to any inconsistent testimony of X.

OPINION 390 (April 1978)

Legal Secretary’s Name on Law Firm Letterhead—A law firm violates DR 2-102 and EC 2-13 by including on its stationery letterhead the name of the legal secretary for the law firm.

OPINION 391 (April 1978)

Handling of Funds Received by an Attorney—DR 9-102—Under DR 9-102, an attorney must place into a trust account all unearned fees which are advanced by his client and all funds whose nature or ownership is questioned or disputed.

OPINION 392 (July 1978)

Recording Conversation Without Consent or Knowledge—Except under extraordinary circumstances, EC 1-5 and EC 9-6 prohibit an attorney from electronically recording a conversation with another party without first informing that party that the conversation is being recorded. Canon 1; EC 1-5, 9-6.

OPINION 393 (November 1978)

Advertising Availability as Consultant to Other Lawyers in Bar Journal—Under DR 2-105, it is proper for an attorney to place an announcement in the Texas Bar Journal, stat-
ing his availability as a consultant in a particular field of knowledge or as an associate of other lawyers. DR 2-105(A)(3).

OPINION 394 (April 1979)

*Public Legal Education Seminars*—Under EC 2-2, EC 2-5, and DR 2-104, a lawyer may participate in legal education seminars and programs provided he does not give advice to laymen concerning their specific individual problems and provided the program is for the benefit of the public rather than to obtain publicity of employment for lawyers.

*Promotion and Advertising*—To conform with EC 2-2, DR 2-101, and DR 2-105, promotional and advertising materials relating to seminars and educational programs should be dignified and designed to publicize the seminar or program rather than the lawyer participants. In such promotional materials, a lawyer may be identified by his picture, the topic on which he will speak, his name, the name of his law firm, his degrees and honors, and such general background information as may indicate he is qualified to speak on the topic assigned to him.

OPINION 395 (May 1979)

*Conferring with Prospective Clients—Substitute Counsel*—A lawyer ethically may confer with a prospective client who has solicited his advice, even though that client is already represented by other counsel. A lawyer may accept employment as substitute counsel if the client’s former lawyer has withdrawn or been terminated by the client.

*Refusal to Withdraw upon Discharge*—Under DR 2-110(B)(4), an employment contract between a lawyer and a client cannot in any way justify the lawyer’s refusal to withdraw upon being discharged by his client.

*Assertion of Attorney’s Lien*—A lawyer ethically may assert his attorney’s lien with respect to a client’s papers and property only when the attorney’s lien is enforceable under the law and, in any event, may not refuse to deliver the client’s papers and property to the client if retention of the file would prejudice the rights of the client.

OPINION 396 (May 1979)

*Disclosure of Settlement Offers*—Under EC 7-7, EC 7-8, and DR 6-101, an attorney must disclose to his client offers of settlement made by the opposing party in a lawsuit.

OPINION 397 (May 1979)

*Legal Services for Nonprofit Association*—A nonprofit association may enter into an agreement with a law firm whereby the firm will provide optional legal services to the association members and their families, provided that all charges for legal services are paid by the members directly to the attorney.
OPINION 398 (July 1979)

**Use of Trade Name by Law Firm Organized as Professional Corporation—DR 2-102**—A professional corporation is not allowed to use impersonal trade names in connection with its practice of law, because such trade names could mislead the public concerning the identity, responsibility, or status of those practicing thereunder. EC 2-11; DR 2-102(A).

OPINION 399 (February 1981)

**Testimony of a Prosecutor Called to Testify by Another Prosecutor from Same Office—DR 5-102**, which generally prohibits an attorney from continuing representation of a client after it becomes obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, is held to apply to the district attorney’s office and to all those who practice in the same office. This opinion overrules Opinion 226 insofar as the two opinions are in conflict. DR 5-102(A), DR 9-101.

OPINION 400 (July 1981)

**Use of Same Firm Name by Law Firm with Offices in Several States**—It is permissible for an out-of-state legal partnership to operate a Texas office under the same firm name, provided that the firm maintains a resident Texas licensed partner and provided the letterheads, listings, and all other representations of the firm make it clear which members and associates of the firm are not licensed to practice law in Texas. This does not in any way alter the rules against the practice of law in Texas by those who are not licensed in this state. DR 2-102(D); DR 3-101.

OPINION 401 (January 1982)

**Unauthorized Practice of Law**—It is improper for an attorney to allow nonlawyer personnel of a referring collection agency to commence collection activity on potential claims of creditor-clients before the attorney is called upon to exercise any professional judgment in connection with such potential claims. Canon 3; EC 3-6; EC 3-2; EC 3-3; DR 3-101(A).

OPINION 402 (January 1982)

**Circumstances under Which Lawyers May Be Listed as “Of Counsel” on Law Firm’s Letterhead**—An attorney designated as “Of Counsel” to a law firm should have a regular, continuing and substantial relationship with the law firm. An attorney’s mere availability for consultation with firm members or prior, sporadic association with the firm does not satisfy the requirement. An attorney may not be “Of Counsel” to more than two firms. DR 2-102(A)(4).

OPINION 403 (January 1982)

**Use of Law Firm Name on Legal Assistant’s Business Card**—It is permissible for a law firm to allow a legal assistant in its employ to have business cards with the firm name appearing on them, provided that the status of the legal assistant is clearly disclosed and
the law firm ensures that the cards meet the same standards of dignity and accuracy required for an attorney’s card.

OPINION 404 (September 1982)

Retention by Attorney of Interest on Funds Held in Escrow or in His Trust Account—It is not permissible for an attorney to use client money to earn interest for himself by placing such funds in an interest-bearing account. DR 9-102.

OPINION 405 (June 1983)

Attorney’s Accession to Client Demand that False Pleading Be Verified—It is clearly impermissible for an attorney to verify a false pleading under any circumstances. An attorney is barred from knowingly making a false statement of fact; assisting a client in illegal or fraudulent conduct; engaging in activity involving fraud, dishonesty or deceit; engaging in conduct reflecting adversely on the attorney’s fitness to practice law; or knowingly advancing a claim or defense that is unwarranted under existing law. Under Texas law false verification of a pleading is a form of perjury. No client has the power to make an attorney perjure himself or use the known perjury of another. DR 7-102(A); DR 1-102(A).

OPINION 406 (November 1983)

Information That May Be Placed on Letterhead or Professional Card—DR 2-101—A lawyer’s name may be shown on a Texas law firm’s letterhead when the lawyer is licensed to practice in another state but not yet licensed to practice in Texas, provided that the letterhead clearly indicates the lawyer’s inability to practice in Texas.

A Texas law firm’s letterhead may show that one of its member attorneys is licensed to practice in both Texas and another state even though the firm maintains an office only in Texas.

A lawyer who is also a C.P.A. may show the accounting qualification on his law firm’s letterhead and on his professional card.

This opinion overrules Opinion 50 and Opinion 291. DR 2-101(A).

OPINION 407 (November 1983)

Conduct Constituting Practice of Law in Texas—A law firm located in a foreign country may operate an office in Texas under its firm name to provide legal services solely with respect to the law of the foreign country, provided that (1) all persons regularly providing legal services in the Texas office are licensed to practice law in Texas, (2) the jurisdictions in which particular firm lawyers are licensed to practice are clearly identified, (3) the law firm has a registered agent for service of process in Texas, and (4) the law firm has a partner resident in the Texas office who is licensed to practice law in Texas. DR 2-102(C); DR 3-101(A).
OPINION 408 (January 1984)

Acceptance of Attorney’s Fees in Multiple Client Representation Situation—An attorney may accept a percentage of the title insurance premium in a multiparty real estate transaction, provided that the fee is reasonable under DR 2-106 and is paid only in connection with services actually rendered to the title company paying the fee. An attorney in such a situation is required to fully disclose the possible adverse effects of multiple representation to each of the prospective clients and only proceed with such representation when each client has consented after such disclosure and it is obvious that the attorney can adequately represent each client’s interest. DR 5-105; DR 2-106.

OPINION 409 (January 1984)

Retainer Agreements—Charging Interest on Unpaid Balances Owed by Client—It is permissible for an attorney to charge interest on unpaid balances of fees owed him by a client, provided that the interest charged is reasonable and the underlying fee is reasonable.

OPINION 410 (January 1984)

Attorney Participation in Barter Association—While accepting bartered goods as payment for legal services is allowed on a one-on-one basis, it is improper for an attorney to participate in a barter association where a percentage of the attorney’s compensation is paid to the association which openly promotes the use of the attorney’s services. DR 2-103.

OPINION 411 (January 1984)

Attorney’s Retaining Lien—An attorney may ethically assert a retaining lien on a client’s file after the client has refused to pay the attorney’s fees and expenses after having received a proper demand for payment, provided that the client’s legal rights are not prejudiced by enforcement of the lien. DR 2-110; DR 9-102(B)(4).

OPINION 412 (January 1984)

Issuance of Legal Opinion Recommending a Course of Action Alleged to Be Contrary to Legal Obligations of Members of Client-Organization—An attorney issued a legal opinion to an employee organization composed of peace officers employed by a political subdivision of the State of Texas. The legal opinion recommended that the organization’s members pursue a specific course of action, including acting in a manner contrary to certain orders issued by the director of the employer law enforcement agency. The proper standard for determining whether the attorney’s conduct was ethical depends on the state of mind of the attorney and the degree of competence and care exercised rather than on a simple determination of the correctness of the legal opinion.

The attorney will have acted unethically if he issued an erroneous legal opinion either with the knowledge that the opinion recommended unlawful conduct or as a result of his failure to act competently in the circumstances. The attorney will have acted ethically in spite of the erroneous nature of the legal opinion issued if the error was the result of honest mis-
take and not because of any failure to exercise due care. If the attorney issued a correct opinion his conduct would involve no violations of the Texas Code of Professional Responsibility. DR 6-101(A); DR 1-102(A); DR 7-102(A).

OPINION 413 (April 1984)

Advertising and Solicitation—An attorney who mails form letters to persons who have not previously been his clients, offering to sell them will forms and to give advice as to how to fill them out while disclaiming the establishment of an attorney-client relationship, has acted unethically in several respects. It is likely that the letter will reach persons who are unable to exercise reasonable judgment in employing an attorney. The letter’s disclaimer of the establishment of an attorney-client relationship is false and misleading, thus violating DR 2-103(D) and DR 2-101(A)(1) and (8). The mailing itself is not one of the forms of solicitation allowed by DR 2-103(A). Despite the disclaimer contained in the form letter, an attorney-client relationship is established if a recipient of the letter accepts the offer contained therein and thereafter relies upon the attorney’s instructions in completing the will form. DR 6-102 prohibits such an attempt by an attorney to exonerate himself from liability to his clients for malpractice.

OPINION 414 (April 1984)

Advertising and Solicitation—A direct-mail campaign by a lawyer consisting of mass mailings of advertisements or nonpersonalized letters constitutes a permissable form of public advertisement subject to the general rules prohibiting false or misleading advertisements by attorneys. However, a distinction is to be made if the direct-mail campaign involves the use of personalized letters to nonclients. Mailings of personalized letters to nonclients is permissible only if the lawyer takes all necessary steps to prevent the personalized solicitation from going to any person that is unable to exercise reasonable judgment in employing a lawyer or who has made known a desire not to receive such mailings. The lawyer utilizing such personalized letters mailed to nonclients must also make certain that the communication does not involve coercion, duress or harassment and that the communication satisfies the standards applicable to advertising by lawyers. EC 2-10; DR 2-101; DR-103(D).

OPINION 415 (May 1984)

Violation of Rules of Pleading as Violation of Code of Professional Responsibility—An attorney who habitually or intentionally violates Tex. R. Civ. P. 47(b) by the pleading of a dollar amount for unliquidated damages in an original pleading which sets forth a claim for relief does so in violation of the Code of Professional Responsibility. DR 7-106(C)(7); EC 7-25.

OPINION 416 (June 1984)

Advertising—Law Directories or Lists Not Approved by American Bar Association—Attorneys may advertise in law lists or directories not approved by any bar organization and may include their qualifications in such advertisements provided that the information
included comports with EC 2-10 and DR 2-101, which prohibit false or misleading advertising by attorneys.

OPINION 417 (June 1984)

*Representation of Collection Agency—Fee Splitting*—An attorney may accept employment by a collection agency provided that (1) all fees paid by the creditor for legal services are passed on to the attorney, (2) the attorney does not allow the collection agency to influence his representation of the creditor, and (3) the attorney acts as counsel for the creditor rather than the collection agency.

*Attorney Owning Financial Interest in Collection Agency from Which He Accepts Employment*—An attorney may not accept employment by or through a collection agency in which he owns a financial interest. DR 3-102(A); DR 5-107(B); DR 3-101(A); DR 2-103(E).

OPINION 418 (October 1984)

*Advertising*—An attorney may include in a public advertisement information about the degrees he has earned, the area of study for each degree, the school attended and date of graduation. An attorney may list in his public advertisement certifications by nationally recognized boards in nonlegal areas, provided that such information is stated in plain factual terms without further description or elaboration. An attorney may not hold himself out as a specialist unless he is a patent or trademark attorney (DR 2-104), or unless he complies with DR 2-101(C), which requires an accompanying statement in any description of an area of practice in an advertisement. The required accompanying statement depends upon whether the area of practice described is a recognized area of expertise by the Texas Board of Legal Specialization and whether the attorney is a Board certified specialist in the area.

OPINION 419 (December 1984)

*Representation of Criminal Defendants by Partners or Associates of Attorney Who Holds Office of County Attorney*—No partner or associate of a county attorney may represent a defendant in a criminal proceeding in any case in any court in Texas. DR 5-105.

OPINION 420 (December 1984)

*Advertising and Solicitation*—Printed brochures which are obviously prepared for mass distribution are not subject to the stricter rules governing solicitation communication merely because the brochures are mailed to named addressees. Such brochures are instead governed by the restrictions contained in DR 2-101, which generally prohibit the inclusion of potentially false or misleading information in attorney advertisements. DR 2-101; DR 2-103(D).
OPINION 421 (February 1985)

Interest on Clients’ Funds Held in Trust by Attorney—Use of Clients’ Funds Interest to Fund Program to Provide Indigents with Representation in Civil Cases—Attorneys may participate in the Texas Equal Access to Justice Program established by the Supreme Court of Texas, whereby interest on clients’ funds which are held only for a short time or which are nominal in amount is given to the program. The creation of the program constitutes an implicit determination by the Supreme Court of Texas that the interest earned on such funds is not the property of the clients. Attorneys owe no duty to notify clients or to obtain their consent before participating in the program.

OPINION 422 (February 1985)

Restrictive Covenants Concerning Attorney’s Future Practice—DR 2-108 prohibits a lawyer from being a party to or participating in any agreement with another lawyer that restricts the right of an attorney to practice law after termination of a relationship created by the agreement, except as a condition to the payment of retirement benefits. Except as a condition to the payment of retirement benefits, it is improper for a firm to require an associate to enter into an agreement containing any of the following provisions: (1) that upon leaving the firm the associate will not practice law; (2) that upon leaving the firm the associate will be prohibited from soliciting any of the firm’s current clients as otherwise may be permitted by the Code of Professional Responsibility; (3) that upon leaving the firm the associate will be prohibited from accepting employment from any of the firm’s current clients. It is improper for a law partnership agreement to prohibit an exiting partner from representing a client of the firm brought to the firm by a remaining partner, except as a condition to the payment of retirement benefits.

OPINION 423 (February 1985)

Conflict of Interest—Representation of Multiple Clients—A law firm that represents a bank acquired by a bank holding company which is being sued by another of the firm’s clients cannot continue the simultaneous representation of the bank and the other client, assuming that DR 5-105(C)’s exception does not apply. DR 5-105(C) permits the continued representation of clients with possibly conflicting interests if the consent of both clients is obtained after full and fair disclosure of the ramifications of such dual representation and it is obvious that the firm can adequately represent the interests of both clients. If the firm does not withdraw from representing both the bank and its other client who is suing the bank holding company, the law firm must strictly adhere to DR 4-101, which concerns the preservation of the secrets and confidences of past and present clients. EC 5-15; EC 5-16; DR 5-105; DR 4-101.

OPINION 424 (May 1985)

Inclusion of Job Title Descriptions in Lawyer’s Advertisement—A lawyer may include descriptions of jobs he previously held, provided that if such descriptions imply expertise within an area of law a proper disclaimer must also be included in the advertisement. If the area of law in which special expertise is implied is a recognized “area of law” by the Texas Board of Legal Specialization, the lawyer must state either that he is board certified in the
area, if such is the case, or that he is not certified by the Texas Board of Legal Specialization if he has not been so certified. If the area of law in which a special expertise is implied is not within one of the Board’s recognized areas of law, then the advertisement must state that the lawyer is not certified by the Texas Board of Legal Specialization and may include the statement that “No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area.” DR 2-101(C)(2).

OPINION 425 (May 1985)

Education of Public Regarding Legal Problems in Taxation by Means of Newspaper Column—A lawyer is permitted to author a newspaper column having as its goal the education of the public with respect to recognition of their legal problems. The lawyer should be careful to avoid giving the impression that a general solution will fit all similar fact situations and to caution lay readers not to attempt to solve their problems on the basis of information contained in the column. The lawyer should also seek to avoid publicity for himself or the appearance that he is recommending the service of any particular lawyer or law firm. EC 2-1; EC 2-2; EC 2-5.

OPINION 426 (September 1985)

Advertising—Signs—Inclusion of Nonlawyer Investigator’s Name on Law Firm’s Sign—It is impermissible for a law firm to include the name of a nonlawyer investigator, who is an independent contractor, on the firm’s outdoor sign, since to do so would create a substantial likelihood that some readers of the sign might think that the investigator was either a licensed attorney who specialized in investigatory activities or that the investigator’s activities were supervised by the lawyers in the law firm. DR 2-101(A).

OPINION 427 (September 1985)

Advertising—Inclusion of Law Firm’s Name and Address on Telephone Book Covers Mailed to New Residents of Community—It is permissible for a law firm to pay a fee for the inclusion of its name and address on telephone book covers mailed to new residents, provided that such communication does not contain false or misleading information, and provided further that the law firm makes certain that the materials sent to the addressee adequately disclose the fact that the listing is merely an advertisement paid for by the law firm rather than a recommendation of the firm’s services or an exclusive listing of law firms in the area. The materials in question are mass-produced rather than individualized communications and are therefore governed by DR 2-101’s rules concerning advertising by lawyers.

OPINION 428 (September 1985)

Legal Directories—Listing of Areas of Practice—A lawyer may list in a legal directory fields of law to which he devotes considerable time regardless of whether he is board certified in those fields. As long as the information is contained in a legal directory rather than an advertisement directed at the public at large, no disclaimer as to certification by the Texas Board of Legal Specialization is required. DR 2-104(3); DR 2-102.
OPINION 429 (December 1985)

Representation of Criminal Defendant by Lawyer Who Also Serves as Part-Time Associate City Judge—While a lawyer who is also a part-time city judge is not barred from representing a criminal defendant whose members of the city’s police department are or may be potential witnesses in the trial of the case, the lawyer’s ability to exercise independent professional judgment on behalf of his private client could be adversely affected by the fact that he is required to maintain a neutral stance toward policemen in his role as city judge. A practicing attorney who is also a part-time city judge should therefore not represent a person accused of crime where the police in that city are or may be potential witnesses. Canons 5, 8 and 9; EC 5-1.

OPINION 430 (June 1986)

Representation of One Attorney in District Attorney’s Office by Another Attorney in Same Office Where Representing Attorney May Be Called as Witness—DR 5-101(B)—An attorney in a district attorney’s office who is a defendant in a federal court suit relating to matters arising in the district attorney’s office may be represented by another attorney in the district attorney’s office unless an attorney in the office, other than the defendant attorney, will or ought to be called as a witness, and one of the exceptions set forth in DR 5-101(B) does not apply. If the question of testimony by an attorney in the office, other than the defendant attorney, arises after representation by another attorney in the office has begun, the standards of DR 5-102(A) and (B) will determine whether withdrawal is necessary.

OPINION 431 (September 1986)

Attorney’s Fees—Nonrefundable Retainer Fees—The attorney must distinguish between a true retainer fee (a payment to compensate the attorney for his commitment to provide certain services and forgo other employment opportunities) from a retainer fee that is actually an advance payment for services to be performed. Advance payment fees should be related to the services to be performed, and all unearned fees must be refunded to the client when the attorney withdraws from the case. A true retainer that is not excessive is deemed earned when received and may be deposited in the attorney’s account. However, if the attorney is discharged for cause or voluntarily withdraws before other employment opportunities have been lost, the attorney is required by DR 2-110 to promptly refund an equitable portion of the retainer. This opinion overrules Opinion 391 to the extent that it states that every retainer designated as nonrefundable is earned at the time it is received.

OPINION 432 (September 1986)

Contingent Fee Contracts—Disbarred or Suspended Attorneys—When an attorney is disbarred or suspended from the practice of law before the completion of a contingent fee contract, he is not entitled to collect either on the contract or in quantum meruit for services that have been rendered. His disbarment or suspension is tantamount to and has the same effect as a voluntary abandonment.
OPINION 433 (September 1986)

*Attorney’s Fees—Contingent Fees in Criminal Cases*—Where the total amount charged and payable by a client charged with a misdemeanor traffic violation is fixed when the attorney is hired, but the amount of the money netted by the attorney as his fee depends on the outcome of the traffic violation charge and the results of the representation by the attorney, the “fee arrangement” violates DR 2-106(C). Such an arrangement may also violate DR 5-101(A) if the client’s consent to the agreement is not made with full disclosure of the circumstances that could influence the attorney toward plea bargaining for a reduced fine rather than contesting the traffic offense.

OPINION 434 (September 1986)

*Advertising—Attorney’s Use of Assumed Name*—DR 2-102(A) and EC-11 prohibit the practice of law under a trade name. Opinion 398 prohibits practice under a trade name that does not contain the name or names of members of a law firm. An attorney may not practice under an assumed name or state that he is also known as his assumed name. This opinion affirms Opinion 324 and overrules Opinion 398 to the extent that it provides that a lawyer or a professional corporation may practice under any name that is not misleading as to the identity, responsibility, or status of those practicing thereunder or is otherwise false, fraudulent, misleading, or deceptive.

OPINION 435 (September 1986)

*Attorney’s Fees—Advertising—Solicitation—Barter-Exchange Agreements*—Even when the barter-exchange agreement eliminates many of the objectionable factors identified in Opinion 410, the essence of an attorney’s membership in a barter-exchange association is a transfer of value by an attorney to the exchange (membership fee or a percentage of trade credits paid by the attorney to other exchange members) in return for the exchange’s making the attorney’s name available to other exchange members and facilitating payments through barter for the attorney’s legal services. The lawyer’s participation in such an arrangement violates DR 2-103(C) and (E). This opinion does not apply to any barter arrangement that is an integral part of legal service activities of an organization that meets the requirements of DR 2-103(E)(1)–(5).

OPINION 436 (September 1986)

*Advertising—Assistant’s Name on Law Firm Letterhead*—A law firm’s letterhead may include a dignified and accurate listing of the name and any certification of a legal assistant with the designation that the person is a legal assistant and not licensed to practice law. This opinion overrules Opinion 390.

OPINION 437 (September 1986)

*Advertising—Name of Business Administrator on Law Firm’s Outside Sign*—The name of a business administrator who is a full-time employee of the law firm may be included on the law firm’s outside sign with the description that the person is a business administrator and is not licensed to practice law.
OPINION 438 (June 1987)

Employment—Practice by Nonlawyers—It is not permissible for a law firm to employ a nonlawyer accountant to perform unsupervised services that are frequently performed by lawyers because the law firm would be making false or misleading communication about the services performed by the law firm. DR 2-101(A). In this type of relationship, there is an inherent risk that the public will misunderstand the extent of legal services performed by the law firm. Not even identification on the law firm’s letterhead or business cards would eliminate the risk for misunderstanding.

OPINION 439 (June 1987)

Representation—Attorney as Material Witness for Client—An attorney who prepared a will and notarized the witnesses’ signatures may not continue to act as attorney for the independent executrix and sole beneficiary when a contest of the will questions whether the will was properly executed and whether the testatrix had testamentary capacity. A lawyer may not accept employment in a litigation matter if he knows or it is obvious that he or a lawyer in his firm will be called as a witness. DR 5-101, DR 5-102(A) and Opinion 234. An exception to this rule is when refusal of representation would work a substantial hardship on the client.

OPINION 440 (June 1987)

Advertising—Letterheads and Business Cards—Assertion of Specialization—A law firm’s letterhead and business cards may claim an area of specialization, such as “personal injury lawyers,” for the law firm as a whole only if all of the lawyers are in fact involved in that area of the law and the lawyers licensed in Texas responsible for such practice are listed with their certification status in that area. DR 2-101, DR 2-101(A), DR 2-101(B), and DR 2-101(C).

OPINION 441 (June 1987)

Conflict of Interest—Representation of Multiple Clients—An attorney in a county domestic relations office may not prosecute the wife in a contempt proceeding pursuant to a divorce action during or after prosecuting the husband for violating the terms of the same decree. DR 5-105(B). This opinion distinguishes Opinion 399 and DR 5-105(D) and finds that another attorney in the county domestic relations office may prosecute the husband provided that the attorney prosecuting the husband is screened from any involvement and no access is given to confidential information given by the wife in the prosecution of her husband.

OPINION 442 (July 1987)

Representation—Fraud—Attorney’s Obligations—An attorney has no duty to reveal a prior fraud unless (1) the client consents after full disclosure, (2) it is permitted under the disciplinary rules or required by law or court order, or (3) the client intends to commit a crime. DR 4-101. An attorney representing a client that has perpetrated a fraud must warn
the client that the client must testify truthfully and that if he perjures himself, the attorney will have to bring that fact to the court’s attention. DR 7-102.

OPINION 443 (September 1987)

*Representation—Community Service*—A county bar association may through its members offer legal advice to university students for a nominal fee. The bar association should set the fee and select the attorney to render the services. Further, an attorney may represent a student after the initial consultation as long as the student is informed, preferably in writing, that there is no obligation to employ the attorney. DR 2-103(E)(3) and Opinion 371.

OPINION 444 (September 1987)

*Retainer Agreements—Unclaimed Funds*—It is not unethical for an attorney operating a nonprofit legal service to request that a client consent that unclaimed funds be used to help other needy clients. DR 9-102. However, great care must be taken to avoid overreaching, the client must be fully informed about the consent he signs, and much effort must be made to contact the client upon termination of the relationship. The attorney, however, should be aware that the custody of unclaimed property may be a matter expressly reserved to the state under the provisions of Tex. Prop. Code § 72.001 *et seq.*

OPINION 445 (September 1987)

*Representation—Of Counsel—Partnerships*—An attorney who is publicly identified as “of counsel” to a partnership may not represent a client in a lawsuit against partners in the partnership to which he is of counsel. DR 1-105.

OPINION 446 (September 1987)

*Representation—Referrals*—An attorney may allow a financial planning organization to recommend him to members of the organization that are not represented by counsel, when there is no indication that the recommended lawyer formed the organization or that it is operated for the purpose of procuring legal work. DR 2-103.

OPINION 447 (January 1988)

*Representation—Attorney as Witness*—A law firm may not represent all defendants in a multiple defendant case when one of the defendants is a member of the firm and will be a material witness on contested fact issues. DR 5-101. This opinion distinguishes Opinion 368 on its facts because representation of a law firm member who was a party-witness was approved but representation by the firm of other parties was not then addressed.

OPINION 448 (January 1988)

*Dual Representation—Real Estate Transactions*—An attorney may represent both the buyer and the seller in a real estate transaction only if there is full disclosure by the lawyer of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each and both parties consent to the dual representation. DR 5-105, EC 5-14, EC 5-15, EC 5-16.
OPINION 449 (February 1988)

*Representation—Real Estate Transactions—Attorney’s Fees*—An attorney representing a client in a property dispute may take an undivided fee simple interest in the disputed property if it is done in good faith and with the client’s consent. DR 5-103.

OPINION 450 (February 1988)

*Attorney Relationships—Sharing Legal Fees*—A law firm may share a portion of its legal fees with an attorney designated “of counsel” if the attorney has a regular, continuing, and substantial relationship with the law firm. See DR 2-107 and Opinion 445.

OPINION 451 (March 1988)

*Advertising—Municipal Judges—Letterheads*—It is improper for a lawyer who is serving as a municipal judge to use his law firm’s letterhead to communicate with litigants on municipal court matters. DR 2-101, DR 8-101, DR 9-101, and Opinion 356.

OPINION 452 (March 1988)

*Advertising—Coupons for Discount Legal Fees*—An attorney is not permitted to advertise in a coupon book where he is offering one half hour of free consultation without certain disclosures. DR 2-101. Coupons have the capacity to mislead the potential client into believing he can solve his legal matter inexpensively, which may not be the case. If a coupon does not disclose the attorney’s regular rate and inform the potential client that additional time may be required to resolve the matter, it has the tendency to be misleading. DR 2-103.

OPINION 453 (March 1988)

*Representation—New Employment—Imputed Knowledge*—An attorney who changes firms does not disqualify the other attorneys at his new place of employment from representing their client who happens to be on the opposite side of a dispute with a client of the attorney’s previous place of employment. In other words, the knowledge of the business of the client obtained by his former partners and imputed to him is not imputed to his new partners.

OPINION 454 (November 1988)

*Representation—Attorney as Witness*—A special prosecutor must be brought in to prosecute a case where witnesses are lawyers that work in the district attorney’s office and their testimony may be contested. The prosecuting attorney in this case should request the court appoint a new counsel for the state to be in compliance with DR 5-101(B) and insure that the defendant receives a fair trial as well as protect the integrity of the district attorney’s office from any implication of partiality.
OPINION 455 (November 1988)

*Representation—Civil and Criminal Representation*—A lawyer representing a plaintiff in a civil matter should not assist in the prosecution of the defendants on criminal charges. DR 7-105. A lawyer’s assistance in presenting and prosecuting a criminal charge would be rendered suspect as long as the possibility of advantage therefrom exists in a pending civil suit.

OPINION 456 (September 1988)

*Advertising—Placards in Place of Business*—Displaying a placard in an autobody repair shop, which alerts the public to the availability of legal assistance, is a permissible form of professional advertising as long as DR 2-101, DR 2-102 and DR 2-103 are not violated.

OPINION 457 (September 1988)

*Confidential Communications—Collection of Legal Fees—Filing against Hot Check Writers*—An attorney may turn over a hot check written to him by a client as long as it is not done solely for the purpose of obtaining an advantage in a civil matter. DR 7-105. Any letter the attorney writes to the client in compliance with requirements of the district attorney’s office must be informative only as opposed to demanding or threatening.

OPINION 458 (October 1988)

*Fee Splitting—Contingent Fee Contracts with Witnesses*—An attorney may not aid, assist, or permit a client to enter into a contingent fee contract with a medical-legal consulting firm that will provide various services including expert testimony. DR 7-109(C). In essence, a client is paying for testimony when a consulting firm providing expert witnesses is compensated based on a percentage of the recovery.

OPINION 459 (December 1988)

*Fee Splitting—Restrictive Covenants*—A law firm may not have an employment contract with an associate, or a partnership agreement with a partner, that provides that upon leaving the firm the associate or partner would be required to pay the law firm a percentage of fees earned from clients they had at the law firm. DR 2-108(A). Similarly, any agreement categorizing a client and the client’s files as property of the law firm is improper when the categorization is done in order to have a claim for damages in order to inhibit a former employee or partner from accepting employment from the client. EC 1-1 provides that every person should have ready access to the independent professional services of a lawyer, making improper any agreement that inhibits a lawyer from accepting employment from a client.

OPINION 460 (December 1988)

*Advertising—Public Relations Agency*—An attorney may employ a public relations agency with the purpose being to obtain new clients as long as the fee is not based on client referral or case recovery. The public relations agency is the lawyer’s agent and the
attorney must bear the ultimate responsibility for the communications made on his behalf by the agency. DR 1-102(A)(2), DR 2-101; EC 3-6.

OPINION 461 (January 1989)

*Representation—Communications with Opposing Party’s Employers*—An attorney may interview a represented corporate defendant’s employee provided that the employee with whom communication is made is not an officer or managing employee of the corporate defendant and the conduct of the employee is not the subject of the controversy. However, the attorney must make a full disclosure of his connection with the lawsuit and explain the purpose for the interview. See *Opinion 342*. DR 7-104.

OPINION 462 (October 1989)

*Advertising—Magazine Subscriptions*—An attorney may provide magazines for a business’s waiting room with statements on plastic covers identifying the lawyer as long as there is on the same cover either a clear statement to the effect that the magazine arrangement is an advertisement by the lawyer, or an effective disclaimer so that persons reading the magazine cover would not reasonably believe the business to be recommending the lawyer identified as providing the magazines.

OPINION 463 (October 1989)

*Privilege—Communications with Prospective Clients*—An attorney may use information, that is neither confidential nor secret, garnered from a prospective client for the benefit of an existing client and to the detriment of the prospective client. In this case, the information was of public record.

OPINION 464 (November 1989)

*Privilege—Confidential Communications—Sale of Accounts Receivable*—An attorney may not sell his accounts receivable to a third-party factoring company unless each client involved has given his informed and uncoerced consent because selling the accounts would result in the disclosure of confidential information. DR 1.05.

OPINION 465 (January 1991)

*Conflict of Interest—Contingent Fee Contracts—Case Expenses*—An attorney may ethically own an interest in a lending institution which loans money to personal injury clients of the attorney as long as the attorney does not control the institution to the extent that the lending institution only makes loans to his clients. Furthermore, an attorney may pass on to the client finance charges of money borrowed for case expenses as long as the charges are fair, reasonable, and customary.

OPINION 466 (January 1991)

*Partnerships—Firm Names—Retirement Agreements*—A law firm and a retiring attorney may enter into an agreement limiting the attorney’s right to practice law. DR 5.06(a). However, the retiring attorney is not prohibited by the Disciplinary Rules from returning
to practice in contravention of the agreement. Furthermore, a law firm may continue to use the name of a retired lawyer in its name even if the retired lawyer returns to practice, provided that the law firm does not take any action that would cause its clients or the public to think the retired lawyer is continuing to practice law with the firm. DR 7.04.

OPINION 467 (May 1991)

Lease Agreements—Fee Splitting—A lawyer may not enter into an office lease agreement which requires the lawyer to pay an agreed percentage of the law firm’s gross receipts because such an agreement would create an incentive for the landlord to refer legal business to the law firm. See Opinion 377. DR 5.04(a).

OPINION 468 (July 1991)

Representation—Attorney as Witness—An attorney may represent a client in an action in which he is likely to be called as a witness provided that he gives prompt notice to the opposing attorney that he will testify and that his disqualification would work a substantial hardship on the client. DR 3.08.

OPINION 469 (March 1992)

Representation—Agreements for Reduced Legal Fees—A law firm may not enter into an agreement with a corporation under which the corporation would receive reduced legal fees in exchange for causing businesses it controls to use the law firm. DR 7.01(i).

OPINION 470 (March 1992)

Solicitation—Letters to Injured Parties—An attorney may mail a letter or brochure or both to a potential client known to be in need of particular legal services as long as whatever is sent complies with all of the requirements of DR 7.01. Further, an attorney who includes facts of an incident in a letter to a potential client may be required to prove the source and accuracy of those facts.

OPINION 471 (May 1992)

Representation—Attorney as Witness—A law firm may represent a client who has given his informed consent in an appeal from a trial at which an attorney in the law firm, other than the attorney who will argue the appeal before the appellate tribunal, testified as a fact witness on behalf of the client at the trial. DR 3.08.

OPINION 472 (May 1992)

Representation—Conflict of Interest—Legal Support Staff—A law firm is not automatically disqualified from representing a client when it hires a legal assistant who has worked for a lawyer representing the opposing party provided that the legal assistant’s supervising lawyer makes reasonable efforts to ensure that the assistant’s conduct is compatible with the professional obligations of the lawyer. DR 5.03.
OPINION 473 (May 1992)

Representation—Confidential Communications—Indigent Clients—DR 3.03(a) requires an attorney to disclose to the judge the fact that the client he was appointed to represent is no longer or was never indigent when such disclosure is necessary to avoid assisting a criminal or fraudulent act.

OPINION 474 (September 1992)

Representation—Communications with Represented Opposing Party—DR 4.02 prohibits communications by a lawyer for one party concerning a subject of the representation with persons having managerial responsibility on behalf of the opposing party.

OPINION 475 (September 1992)

Representation—Attorney as Witness—An attorney does not have to withdraw from representation of his client because the other side intends to call the attorney as a witness at trial. The attorney is not being called as a witness by his client and the attorney’s testimony will not be adverse to his client. DR 3.08.

OPINION 476 (October 1992)

Representation—Conflict of Interest—There is no conflict of interest where an attorney is a salaried employee of a membership organization hired to render legal services to the organization’s members and the attorney does not represent the board of directors of the organization as long as the organization does not interfere with the attorney’s judgment in handling the members’ problems. An attorney may accept compensation from one other than his client when the client consents, there is no interference in the lawyer-client relationship, and information relating to the representation of a client is protected. DR 1.08(e). DR 1.12 is inapplicable because the attorney is not representing the organization as an entity.

OPINION 477 (March 1993)

Representation—Mandatory Criminal Appointment Plan—It is not within the power or authority of the Committee on Professional Ethics to determine whether an attorney must comply with a mandatory program for providing legal representation for indigent persons in criminal cases. The Committee notes that the rules do provide that a lawyer may refuse to comply with an obligation imposed by law upon a good-faith belief, openly asserted, that no valid obligation exists. DR 8.04; see also DR 6.01.

OPINION 478 (March 1993)

Advertising—Firm Organization—Attorneys who share an office but are neither partners nor associates should avoid holding themselves out as a partnership by disclaiming partnership status. DR 7.04(d).
OPINION 479 (March 1993)

Confidential Communications—Firm’s Client List—A law firm may not disclose its clients’ names and the amounts owed by each client to a bank or any third party absent the clients’ informed consent. See Opinion 464. DR 1.05.

OPINION 480 (July 1993)

Confidential Communications—Fraudulent Acts—An attorney who subsequent to trial learns a material fact that the court was not made aware of is required to make a good-faith effort to persuade the former client to authorize him to inform the court of the fact, and if this is not successful, the attorney should disclose the fact to the court anyway. DR 3.03.

OPINION 481 (January 1994)

Fee Arrangements—Fee Splitting—An arrangement that provides for a finance company to remit 90 percent of an attorney’s bill directly to the client’s attorney is permissible as long as: (1) the participating attorney has no interest in the finance company; (2) the finance company does not recommend the attorney; (3) the amount retained by the finance company is disclosed to the client; (4) the amount borrowed by the client does not amount to an unconscionable fee for the legal services rendered; (5) the client consents to the necessary disclosure to the finance company; and (6) the law firm places in trust all amounts received from the finance company that have not yet been earned.

OPINION 482 (February 1994)

Representation—Conflict of Interest—Confidential Communications—A law firm representing three defendants in an action may not disclose damning information it obtains from one of its clients without that client’s informed consent. However, if the client perjures himself, the information must be disclosed, but only to the court. Furthermore, a law firm must withdraw from representing a client when it is forced to compromise its representation of that client in order to maintain the confidentiality of information obtained from another client. DR 1.09.

OPINION 483 (February 1994)

Representation—Conflict of Interest—Solicitation—Fee Splitting—A law firm may charge interest on loans extended to its clients. A law firm may refer clients to a finance company that the law firm owns provided that this ownership is fully disclosed. A law firm may purchase a partial ownership interest in medical equipment used on the firm’s clients and receive a share of the profits earned by the equipment. Please see this opinion and Opinion 465 for limitations on these practices.

OPINION 484 (February 1994)

Representation—Deceptive or Misleading Acts—An attorney may send a collection letter for its client when he knows that sending the letter will be the extent of his involvement in the matter, as long as the attorney exercises his or her professional judgment regarding the
validity and accuracy of the debt and makes certain that no misleading, deceptive, or false statements are contained in the collection letter. Further, the attorney must make sure that the letter does not advise the debtor concerning the law and that it does not provide details about what will happen in the future.

OPINION 485 (March 1994)

**Fee Agreements—Contingent Fee Agreement**—Accepting a child-support arrearage case on a contingent fee basis is not in violation of DR 1.04, provided that the percentage is reasonable, and the attorney discloses to the client all of his collection options. All dealings with the arrearages that are collected should comply with DR 1.14.

OPINION 486 (March 1994)

**Partnerships—Limited Liability**—There is no provision in the Texas Disciplinary Rules of Professional Conduct which prohibits attorneys from practicing law as a limited liability company under article 1528n of the Texas Miscellaneous Corporation Laws Act.

OPINION 487 (April 1994)

**Dual Representation—Confidential Communications**—An agreement providing that two defendants will be represented by the same law firm unless a conflict arises, in which case the law firm will withdraw as counsel for one defendant but not the other, and that confidential information will be disclosed to both parties during the joint representation, is permissible. DR 1.05 and DR 1.06.

OPINION 488 (April 1994)

**Representation—Attorney Conduct**—No disciplinary rule is violated when an attorney instructs his client to contact the client’s creditor and request a statement of his account. It does not matter whether the client’s creditor is represented by counsel. DR 4.01 and DR 4.02.

OPINION 489 (April 1994)

**Solicitation—Seminars**—It is proper for a law firm to participate in a seminar that has education as its purpose as long as the lawyer is competent on the subject, and the sponsoring law firm is disclosed in the advertisement. However, it is improper for the lawyer to answer questions of laymen concerning their specific problems. DR 7.01 and DR 7.04.

OPINION 490 (May 1994)

**Representation—Fee Splitting**—A lawyer who is a salaried employee of a bank may not participate in the preparation of loan application documents for bank customers if the bank charges the customers a specific fee for the lawyer’s services. On the other hand, it is permissible for that same lawyer to assist in the preparation of loan application documents for bank customers as long as there is no specifically identified fee charged to the loan applicants for the lawyer’s work. DR 5.04(a).
OPINION 491 (May 1994)

_Firm Names_—A law firm that split off from an existing law firm is prohibited from having as part of its name the name of a deceased partner from its prior law firm because the deceased lawyer was neither a member of the new firm, nor a member of a predecessor firm in a continuing line of succession. **DR 7.04.**

OPINION 492 (June 1994)

_Representation—Communications_—A city employee has an absolute right to be represented by his designated representative including an attorney, at any stage of the grievance procedure, either formal or informal. However, communications between the employee and the attorney not relating to the grievance procedure are subject to the the Disciplinary Rules regarding communication with one represented by counsel. **DR 4.02.**

OPINION 493 (June 1994)

_Partnerships—Fee Splitting_—A lawyer may not establish a limited liability partnership (LLP) or any other partnership with nonlawyers if one of the activities of the partnership would be to provide legal services. **DR 5.04.**

OPINION 494 (July 1994)

_Representation—Conflict of Interest_—Husband consulted with an attorney regarding a possible divorce in 1986. Wife hired attorney for her divorce from husband in 1992. Attorney cannot represent wife in her divorce proceeding because the attorney had an attorney-client relationship with husband and there were factual matters involved in the representation so related that there is a genuine threat that confidences gained in the former representation could be divulged in the current representation. **DR 1.05, DR 1.09.**

OPINION 495 (October 1994)

_Confidential Communications—Collections_—A lawyer may not ethically disclose confidential information to a collection agency to enable the agency to collect the fees owed to the lawyer, unless the lawyer complies with the requirements detailed in **Opinion 464** and **DR 1.05.**

OPINION 496 (November 1994)

_Representation—Conflict of Interest—Mediators_—During the pendency of a court-ordered mediation, neither the mediator nor the mediator’s law firm could undertake representation on behalf of or adverse to a party to the mediation in a matter unrelated to the mediation, unless the parties to the mediation agreed that such an adversarial role in the matter not being mediated would not compromise the mediator’s impartiality. Similarly, the mediator could not undertake representation on behalf of or adverse to a party to the mediation in a matter unrelated to the mediation arising after the mediation unless all parties to the proceeding consent after disclosure. All other lawyers in the mediator’s law firm would be precluded as well from representing any party to the mediation in a matter...
unrelated to the mediation unless the lawyer/mediator is screened from participation in the matter and is apportioned no part of the fee. DR 1.11.

OPINION 497 (November 1994)

Conflict of Interest—Representation—City Officials—An attorney serving as a city commissioner of a home-rule Texas city may not undertake representation in any of the following circumstances: (1) he may not represent persons charged with criminal offenses where the city’s police department participated in the investigation and/or arrest of the client; (2) he may not represent persons charged with criminal offenses where the members of the police department are the alleged victims of the defendant’s alleged criminal conduct; and (3) he may not represent persons charged with criminal offenses where the arrest and/or search warrant is issued by the city judge. DR 1.06.

OPINION 498 (January 1995)

Fee Splitting—Professional Independence—An attorney may not enter into an arrangement with a corporation that is not a professional corporation owned solely by licensed attorneys where the attorney is a salaried employee of the corporation, regularly provides legal services to the corporation’s customers, and the corporation receives compensation for those services. DR 5.04.

OPINION 499 (February 1995)

Misrepresentation to Tribunal—Meritorious Contentions—Truthfulness in Statements to Others—Responsibilities of Supervising Lawyer—A lawyer employed by a governmental agency may not knowingly mispresent to an opposing attorney and an administrative law judge that a factual basis for jurisdiction of an administrative proceeding exists. Also, a supervising attorney for the governmental agency violates DR 5.01 when he directs a subordinate attorney to represent to opposing counsel that a factual basis for jurisdiction existed when he knew it did not. DR 1.02, DR 3.01.

OPINION 500 (April 1995)

Conflict of Interest—Representation of Passenger and Driver—Traffic Accident—A lawyer may represent both passenger and driver in a car-crash case if he reasonably believes the representation of each party will not be materially affected and each party consents after full disclosure of any potential conflict and its consequences. If an impermissible conflict develops, however, the lawyer must withdraw to the extent necessary not to violate the Disciplinary Rules. DR 1.06.

OPINION 501 (May 1995)

Conflict of Interest—Representation of Husband in Divorce—Wife Consulted Former Partner—Lawyer C is no longer associated with lawyer A and possesses no confidential information imparted to lawyer A by the wife who consulted with but did not hire lawyer A to represent her when she filed for divorce. Lawyer C may represent the husband in the
Opinion 501

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divorce without violating DR 1.09(c). Nor is it probable that DR 1.05 or any other Disciplin ary Rule is violated by such representation. DR 1.09; DR 1.05; DR 1.06.

OPINION 502 (June 1995)

*Professional Independence—Lawyer Referral Service—Panel Lawyer May Remit Part of Fee to Service*—A nonprofit lawyer referral agency operating in compliance with Tex. Rev. Civ. Stat. art. 320(d), may collect, within the guidelines set forth in article 320(d), a reasonable fee earned by its referral panel attorneys. DR 5.04(a).

OPINION 503 (June 1995)

*Professional Independence—Sharing Legal Fees with Nonprofit Public Interest Organization*—A lawyer may not agree to share legal fees with a nonprofit public interest organization where the organization has referred a case to that lawyer and the lawyer was awarded attorney’s fees by judgment or settlement. DR 5.04.

OPINION 504 (July 1995)

*Candor and Fairness—Confidential Information about Client’s Prior Convictions*—A lawyer’s duty of candor to a court does not require defense counsel in a criminal case to correct inaccurate statements made in court by the prosecutor about prior convictions of the defendant, if neither the defendant nor his counsel made any false statements to the court about such matters. DR 3.03; DR 1.05.

OPINION 505 (July 1995)

*Restrictions on Right to Practice—Settlement Agreement Not to Solicit Third Parties to Prosecute Opposing Party*—A lawyer’s agreement not to solicit third parties to prosecute claims against the opposing party and not to share fees with anyone with respect to suits brought against the opposing party would be a limitation on the practice of law and therefore a violation of DR 5.06(b).

OPINION 506 (July 1995)

*Confidential Communication—Disclosing Information to Workers’ Compensation Commission*—An attorney may disclose unprivileged information on the general nature of attorney-client conferences when the Workers’ Compensation Commission requires the information to pay the attorney’s fee for services to the client. DR 1.05.

OPINION 507 (September 1995)

*Advertising and Solicitation*—An attorney may advertise in print media and to target prospective clients with a specific legal problem as long as the attorney complies with DR 7.02 (formerly 7.01). An attorney may not, expressly or impliedly, give or promise anything of value to a lay person to induce the referral of clients to the attorney. DR 7.02.
OPINION 508 (September 1995)

Conflict of Interest—Leasing Attorneys from Employee Leasing Company—Because of the potential for conflicts of interest between clients of different law firms, a law firm may not lease its employees, including lawyers who are members of the firm, from an employee leasing company that provides services and leases employees, including attorneys, to other law firms. DR 1.06.

OPINION 509 (September 1995)

Advertising—Suggestion of Professional Relationship—The use of an office door sign listing individual attorneys’ names separated only by commas suggests a professional relationship and, when there is no such relationship, misleads the public and violates DR 7.01(a) & (d) (formerly 7.04(a) & (d)).

OPINION 510 (November 1995)

Contingent Fee Arrangement with Attorney and Nonattorney Investigator—An attorney may participate in an arrangement under which the attorney’s client makes a contingent fee contract with a nonattorney investigator provided (1) the attorney explains to the client and his agreement contemplates the full implications of the arrangement; (2) the contingent fee arrangement with the investigator does not apply if the investigator becomes a witness in the case; (3) no witness receives any contingent payment; (4) the payment to the investigator is reasonable and is not a disguised means of sharing a legal fee with a nonlawyer; and (5) the attorney’s fee arrangement, in conjunction with that of the investigator, does not exceed the maximum permitted under DR 1.04(a). DR 3.04(b); DR 5.04(a); DR 1.04(a).

OPINION 511 (December 1995)

Conflict of Interest—Representation of Husband and Children—A law firm may not represent two children in a civil action concerning an auto accident in which the children’s mother was killed and their father was involved and is a possible defendant, if the firm also represents the father with respect to the mother’s estate and previously represented him with respect to criminal charges arising from the accident. These circumstances present a conflict of interest that cannot be waived. DR 1.06.

OPINION 512 (December 1995)

Conflict of Interest—Unauthorized Practice of Law—The in-house lawyer of a corporation may represent a joint venture in which the corporation is a venturer, though a potential conflict exists, if the corporation and venture consent after full disclosure and the lawyer reasonably believes that neither client’s representation will be materially affected. Nor will the lawyer be assisting the corporation in the unauthorized practice of law, provided the corporation/employer does not direct the lawyer in performing legal services for the joint venture and provided the venture or other venturers do not reimburse the corporation for more than its costs of the lawyer’s time devoted to the venture. DR 1.06; DR 1.07; DR 5.05.
OPINION 513 (January 1996)

*Employee of Attorney Testifying as Witness*—An attorney may not use an in-house accountant as a testifying expert witness unless the accountant’s testimony is the same nature as would allow an attorney to testify as an expert on a case in which he represents a party. DR 5.03; DR 3.08; DR 1.05.

OPINION 514 (February 1996)

*Secretly Recording Telephone Conversations*—A lawyer may not electronically record a conversation with another without first informing the other of the recording. But where the equities of the situation merit such advice, a lawyer may advise a client that Texas and federal law permit the client to electronically record conversations without first informing the other parties. DR 8.04.

OPINION 515 (July 1996)

*Contract Lawyer Placement Agency*—A lawyer may participate in an arrangement with a contract lawyer placement agency as long as (1) all client confidences are protected; (2) all conflict of interest requirements are met; (3) the lawyer is supervised by the law firm that hires him to the extent that all legal fees paid by the client are fees to the firm for its legal services and not fees for the unsupervised legal services of the attorney; and (4) the attorney is not part of any agreement that would restrict his right to practice law. DR 1.05; DR 1.06; DR 1.09; DR 5.04; DR 5.06.

OPINION 516 (July 1996)

*Representation—Out-of-State Attorney Practicing Solely in Federal Court*—No disciplinary action may be taken against anyone not licensed to practice law in Texas or not specially admitted by a Texas court for a particular proceeding. Representing clients in Texas solely before the U.S. Immigration Service and in federal courts would not be the unauthorized practice of law in Texas. But any representation that also involved Texas law might constitute unauthorized practice. And any licensed Texas attorney employing an out-of-state attorney is subject to discipline if he aids that attorney in the unauthorized practice of law. DR 8.05(a); DR 5.05.

OPINION 517 (September 1996)

*Confidential Communication—Telephone Records of Government Lawyer*—An attorney for a governmental entity subject to the Texas Open Records Act may not disclose telephone records with respect to representation of the entity unless a particular exception to DR 1.05 would allow the disclosure. DR 1.05.

OPINION 518 (September 1996)

*Contingent Fee*—An attorney may not enter into a contingent fee contract in which he is to be paid the greater of (1) the hourly fee normally charged for the same services or (2) the
usual percent of the amount recovered for the client on a contingent fee basis, unless extraordinary circumstances exist making such arrangement reasonable under DR 1.04.

OPINION 519 (March 1997)

Conflicts of Interest—Representation of Foreign Government Nationals—A law firm and its attorneys may cooperate with a foreign government to administer and support a legal aid office to provide legal services for foreign government nationals who are in Texas. The law firm may communicate and cooperate with the foreign government and the legal aid office in communicating with the foreign nationals concerning legal services. However, in the case of in-person and telephone communications directed to persons who have no prior relationship to the attorneys involved and relating to specific occurrences and events, the law firm and its attorneys may not accept employment on a fee-paying basis arising from such communications. DR 7.03(a); DR 1.06; DR 1.07; DR 1.09.

OPINION 520 (March 1997)

Suspected Misconduct—Reporting Requirements—Before reporting an alleged violation, the disclosing attorney must have knowledge that another attorney has in fact committed a violation of the rules. A report of misconduct must be based on objective facts that are likely to have evidentiary support. DR 8.03(a).

OPINION 521 (October 1997)

Solicitation—Form Letters and Videotapes to Potential Clients—An attorney may mail a nonpersonalized letter and nonpersonalized videotape to a prospective client whose identity was discovered through a newspaper article for the purpose of obtaining professional employment. However, the contents of the videotape must meet the standards set forth in DR 7.02, DR 7.04, and DR 7.05 to be constitutionally protected as commercial speech.

OPINION 522 (October 1997)

Misrepresentation of Attorney Qualifications—Law Firm’s Duty to Disclose—After inadvertently sending out false information regarding an attorney’s qualifications to clients or potential clients, a law firm should take reasonable remedial action, including but not limited to sending out new law firm resumes and informing all who received the resumes of the false or inaccurate information that the previous resume may have contained. The law firm must report the person who provided the false information to the appropriate disciplinary authorities. DR 7.01; DR 7.02; DR 5.01; DR 8.04; DR 8.03.

OPINION 523 (October 1997)

Negligent Legal Advice—Duty to Disclose—If, when performing legal work for a client, an associate in a law firm discovers that another attorney in the law firm clearly has performed negligent legal services for the client, the associate is obligated to inform the partners or shareholders of such negligence. If the associate then resigns from the firm before confirming that the client has been informed of the negligence, the former associate may insist that the partners or shareholders inform him in writing that the client has been told
of the negligent representation. If the partners or shareholders refuse to give a written assurance, the former associate must inform the client about the negligent representation. DR 5.01; DR 5.02.

OPINION 524 (May 1998)

Representation—Referrals—An attorney may accept a referral from a health-care provider who has solicited the referred patient through telemarketing solely for the purpose of providing health care. The attorney, however, must not participate in any arrangement with the health-care provider to circumvent DR 7.03(b).

OPINION 525 (May 1998)

Representation—Conflicts of Interest—Real Estate Transactions—A lender's attorney may not prepare a deed for use in a real estate transaction without having been requested or authorized to do so by the seller unless the attorney provides written notice to the seller that he has prepared the deed at the request of the lender, that he represents the lender and only the lender in the transaction, and that the seller is advised to consult his own legal counsel before signing the deed. If the lender's attorney knows that the seller has an attorney, the lender's attorney must send the draft deed to that attorney. If the lender's attorney initially does not know but later learns that the seller is represented by an attorney, he should send a copy of the draft deed to the seller's attorney promptly after acquiring such knowledge. DR 1.06.

OPINION 526 (May 1998)

Class Actions—Fee Splitting with Class Members—A law firm may not distribute to non-lawyer clients a portion of court-awarded legal fees for successful prosecution of an objection to a proposed class-action settlement on behalf of such clients. DR 5.04(a).

OPINION 527 (April 1999)

Conflicts of Interest—Former Clients—An attorney who has represented a former client may not represent a person in a matter adverse to the former client if such new representation would violate any of the provisions of DR 1.09(a). If an attorney is prohibited under DR 1.09(a) from accepting a representation adverse to a former client, each attorney currently associated with the disqualified attorney is vicariously prohibited from accepting the representation under DR 1.09(b). If an attorney who personally represented a former client leaves a law firm, the attorneys who remain at the firm are thereafter prohibited from knowingly representing a person adverse to that former client only if (1) an attorney presently associated with the firm is personally disqualified from accepting the representation under DR 1.09(a), (2) the firm's proposed representation involves the validity of the departed attorney's legal services or work product for such former client while he was associated with the firm, or (3) the proposed representation will with reasonable probability involve a violation of DR 1.05 with respect to the confidential information of such former client.
If an attorney terminates his association with a law firm and the firm retains as a client a
person whom the departing attorney personally represented while he was associated with
the firm, any subsequent representation by the departed attorney adverse to such former
client is governed by DR 1.09(a). And all attorneys currently associated with the departed
attorney are treated the same by reason of DR 1.09(b). The departed attorney and mem-
bers of his new firm can represent a person adverse to such former client only if the repre-
sentation does not violate DR 1.09(a)(1), (2), or (3).

OPINION 528 (April 1999)

Representation—Conflicts of Interest—Communications with Represented Opposing
Party—A law firm proposes to hire new attorney X who is married to the daughter of an
employee of the defendant corporation that the law firm has sued on behalf of current
clients of the law firm. The employee of the defendant corporation is not a party to the
lawsuit, his position in the defendant corporation does not involve him in management
decisions that relate to the subject matter of the litigation, and the law firm does not antici-
pare that the employee will be called as a fact or expert witness in the litigation. Also,
new attorney X will not be involved in the subject litigation.

Because this fact situation does not involve close relationships between the attorneys rep-
resenting adverse parties in litigation, the law firm's hiring of attorney X would not create
a conflict of interest. Attorney X will not be involved in the litigation, and his marital rela-
tionship to the daughter of a mid-level employee of the defendant, who is not a witness or
party in the litigation, is not sufficiently close and does not involve any factual consider-
ations so as to create any reasonable risk or appearance either of violating the confidential
information of the firm's clients or of limiting in any way the firm's ability to consider, rec-
ommend, or carry out any course of action on behalf of the clients. DR 1.06(b)(2); DR
4.02.

OPINION 529 (May 1999)

Use of Trade Name by Law Firm—An attorney may not practice law under a trade name
that includes, in addition to permitted names of attorneys, words that claim or imply qualities for the law firm beyond the fact that the firm provides legal services. This opinion supersedes Opinion 398. DR 7.01; DR 7.02.

OPINION 530 (October 1999)

Conflicts of Interest—Representation—Elected Officials—An attorney who is a county
commissioner may not represent a private client in any justice, statutory county, or district
court in that county in the absence of effective consent by all affected or potentially
affected clients. This conflict of interest also applies to all attorneys associated with the
attorney's law firm. DR 1.06.

OPINION 531 (December 1999)

Unauthorized Practice of Law—Market-Based Fees Charged by In-House Counsel—A
corporation may not charge wholly-owned subsidiaries “market-based fees” (fees compa-
OPINION 532 (September 2000)

Confidential Information—Third-Party Auditor—An attorney retained by an insurance company to represent an insured is obligated to protect the confidential information of the insured. The attorney's invoice or fee statement describing legal services rendered by the attorney constitutes "confidential information." Without first obtaining the informed consent of the insured, the attorney cannot, at the request of the insurance company paying his fees for the representation, provide fee statements to a third-party auditor describing legal services rendered by the attorney for the insured. DR 1.08(e); DR 1.05.

OPINION 533 (September 2000)

Representation—Litigation or Billing Guidelines—An attorney who is retained by an insurance company to defend its insured may not agree to litigation or billing guidelines that interfere with the attorney's exercise of his independent professional judgment in rendering such legal services to the client. DR 2.01; DR 5.04; DR 1.01; DR 1.02.

OPINION 534 (September 2001)

Representation—Competence—Reporting Requirements—An attorney representing a spouse in a divorce action and having responsibility for preparing a qualified domestic relations order (QDRO) in that action is required to act with competence in the preparation of the QDRO and to correct material defects in the QDRO if the defects are called to the attorney's attention by another attorney reviewing the proposed QDRO. An attorney for the employer affected by the QDRO, who learns that the attorney for a divorcing spouse has prepared and will not correct a materially defective proposed QDRO that may substantially compromise the interests of such attorney's client, would be required (subject to the obligations of the employer's attorney to protect client confidences) to report this violation to the appropriate disciplinary authority if the employer's attorney concluded that the divorce attorney's failure as to the QDRO raised a substantial question with respect to the divorce attorney's honesty, trustworthiness, or physical, mental, and psychological health necessary to discharge the attorney's obligations to clients. DR 1.01; DR 8.03.

OPINION 535 (September 2001)

Representation—Conflict of Interest—Criminal Defendant—An attorney may not participate in a court-sponsored “attorney of the day” program under which the attorney receives a flat fee for limited consultation with a criminal defendant on one day only if the criminal defendant elects to enter a plea of guilty at the conclusion of the consultation. DR 1.06.
OPINION 536 (May 2001)

Conflict of Interest—Referral or Solicitation Fees—An attorney may not receive referral or solicitation fees from an investment adviser that continue while the attorney’s client continues to receive services from the investment adviser because the attorney’s representation of the client would be adversely limited by the attorney’s own financial interests and his obligations to the investment adviser. DR 1.06.

OPINION 537 (May 2001)

Representation—Conflict of Interest—A trade association’s general counsel, at the request of some of the association’s members, may recommend competent and qualified outside counsel to represent association members in proposed litigation against a common supplier or inform members that other members have employed outside counsel in the matter if the general counsel complies with the requirements of DR 1.03, DR 1.05, DR 1.06, DR 1.07, and DR 1.12. If the association’s general counsel was acting on behalf of the outside counsel in making the communication to association members concerning the litigation and proposed employment of the outside counsel, the general counsel’s communication would be subject to the additional requirements of DR 7.02, DR 7.03, DR 7.05, and DR 7.06.

OPINION 538 (June 2001)

Representation—Conflict of Interest—Prosecuting Former Clients—An attorney, who is the newly elected district attorney, may not prosecute a motion to revoke probation in a case in which the attorney served as defense counsel in the original proceeding. Likewise, the attorney may not prosecute a former client in a new criminal proceeding without the former client’s consent. However, even if consent was obtained, the attorney may not offer into evidence a prior conviction in which the attorney acted as defense counsel for purposes of impeachment under Tex. R. Evid. 609, as character evidence under Tex. R. Evid. 404(b), or as punishment evidence under Tex. Code Crim. Proc. art. 37.07, § 3(a). DR 1.09; DR 1.06; DR 1.10; DR 1.05.

OPINION 539 (February 2002)

Representation—Conflict of Interest—An attorney (Spouse A) may not represent defendants in criminal cases in the county in which the attorney’s spouse (Spouse B) is an assistant district attorney unless Spouse A reasonably believes the representation of the criminal defendant will not be materially affected by Spouse’s A relationship to Spouse B and the criminal defendant consents to such representation by Spouse A after full disclosure of the existence, nature, implications, and possible adverse consequences of such representation and the advantages involved, if any. If Spouse A represents a criminal defendant in the county, Spouse B and each lawyer in the office of the district attorney is prohibited from representing the state in the case against Spouse A’s client unless Spouse B and each lawyer in the district attorney’s office reasonably believe the representation of the state will not be materially affected by Spouse B’s relationship to Spouse A and the state of Texas consents to representation by an attorney in the district attorney’s office.
after full disclosure of the existence, nature, implications, and possible adverse consequences of such representation and the advantages involved, if any. **DR 1.06.**

**OPINION 540 (February 2002)**

*Representation—Conflict of Interest—County Judge*—It is a conflict of interest for an attorney who is a county judge to represent a private client in any justice of the peace court, statutory county court, or district court in that county. This conflict of interest also extends to all attorneys associated with the private law firm in which the county judge practices. The county judge and attorneys associated with his law firm can accept or continue such representation only on the consent of the private client and the county to the representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the conflict of interest. **DR 1.06.**

**OPINION 541 (February 2002)**

*Representation—Conflict of Interest—Municipal Court Judge*—A municipal court judge may not represent a criminal defendant (1) in any proceeding in which he has passed on the merits, (2) in any matter in which he has otherwise participated personally and substantially as an adjudicatory official, (3) in any court on which the judge currently serves, or (4) if the city's police may be witnesses (or potential witnesses) in the trial of a case, unless the client and municipality give appropriate consent after full disclosure. **DR 1.06; DR 1.11.**

**OPINION 542 (February 2002)**

*Representation—Fixed Fee Arrangement*—An attorney may enter into a fee arrangement with an insurance company in which the attorney is compensated on a fixed fee basis for defined stages of representation in liability defense cases. The fee arrangement may not provide that the attorney is to pay the costs and expenses of the litigation. **DR 1.04; DR 1.08.**

**OPINION 543 (April 2002)**

*Representation—Agreements for Reduced Legal Fees—Health-Care Provider*—An attorney may not enter into an agreement with a health-care provider whereby the attorney will provide low cost legal services to the health-care provider's patients who have personal injury claims and who are receiving treatment from the health-care provider. **DR 7.03; DR 5.04; DR 2.01; DR 1.06.**

**OPINION 544 (April 2002)**

*City Officials—Former Law Firm Client*—An attorney who serves on a city council may participate in discussion and vote as a member of the city council on a matter with respect to which the attorney's former law firm is representing a client, provided that the attorney, while employed by the law firm, did not personally represent the client with respect to the matter and provided that the attorney can act on the matter without using confidential
information concerning the former law firm's client to the detriment of that client. DR 1.10(e); DR 1.05.

OPINION 545 (October 2002)

Contingent Fees—Governmental Taxing Unit—An attorney may not enter into a fee arrangement with a governmental taxing unit to collect its delinquent taxes if a portion or all of the statutory penalties designated for legal fees may be kept by the taxing unit rather than paid to the attorney if certain collection goals are not met. Retention by the taxing unit of any of the penalty imposed and collected for legal fees under section 33.07 of the Texas Tax Code would clearly be contrary to that section as interpreted by Op. Tex. Att’y Gen. Nos. JM-857 and JC-0443. The arrangement would be a contingent fee agreement that requires violation of section 33.07 of the Texas Tax Code on the occurrence of certain contemplated events and, therefore, would constitute a violation of DR 1.04(d).

OPINION 546 (December 2002)

Employment Agreements—Restrictions—An attorney and an associate employed by the attorney may enter into an employment agreement addressing the representation of clients and the treatment of fees collected after the associate attorney leaves the employing attorney. Such an agreement may not restrict, in any manner, a departed associate's right to practice law, for example, by restricting the departed associate's right to solicit the employing attorney's clients or by requiring the departed associate to pay to the employing attorney a portion of fees earned by the departed associate after departure. DR 1.04; DR 5.06.

OPINION 547 (January 2003)

Representation—Conflict of Interest—Referrals—A law firm may not enter into an arrangement with a group of medical professionals pursuant to which the group would fund the law firm's television advertising with the expectation (but not the obligation) that the law firm would refer clients to the medical group. DR 1.06.

OPINION 548 (January 2003)

Advertising/Solicitation—Sponsorship Listed on Nonprofit Entity's Web Site—A law firm may allow a nonprofit entity to list the law firm as a financial sponsor of the entity on its Web site if each sponsor that contributes the same amount receives similar recognition as a sponsor and if the Web site fully discloses that sponsors are listed because they have contributed money to the entity and that the entity is not endorsing the law firm or any other attorney or law firm listed on the site. DR 7.03; DR 7.04; DR 7.07.

OPINION 549 (August 2003)

Fee Splitting—Worker’s Compensation Carrier—An attorney representing a worker’s compensation claimant in a third-party action pursuant to a contingent fee arrangement may not collect a fee from the claimant based on the gross recovery, part of which is required to be paid to the worker’s compensation carrier. DR 1.04(a).
OPINION 550 (May 2004)

Self-Laudation—Use of Titles in Social and Professional Communications—An attorney who is a graduate of an accredited law school with a juris doctor or doctor of jurisprudence degree may use the titles "Dr.,” “Doctor,” “Doctor of Jurisprudence,” or "J.D." in social and professional communications as long as such use is not false or misleading in the specific circumstances. DR 7.02.

OPINION 551 (May 2004)

Representation—Two-Year Prohibition Following City Employment—An attorney who was formerly employed as an attorney by a city may be required to comply with a provision of a city's ethics code that prohibits all former city employees from representing any unrelated person before the city for compensation for a period of two years after termination of employment with the city. DR 1.10(a); DR 5.06.

OPINION 552 (August 2004)

Confidential Information—Third-Party Auditor—Fee Splitting—An attorney’s fee statement or invoice is confidential information that the attorney must protect, notwithstanding the payment of the attorney's fees by the insured's insurance company. The attorney may not deliver his fee statement or invoice to a third-party auditor, by any means or media, without the informed consent of the insured client, nor may the attorney pay a percentage of his attorney’s fee to a third-party auditor of the insurance company for auditing such statements. DR 1.05; DR 5.04.

OPINION 553 (August 2004)

Fee Splitting—Contingent Fee Contract with Expert Witness—An attorney may not offer the testimony of an expert witness whose employer has entered into a contingent fee contract with the attorney's client regarding the subject matter of the litigation. DR 3.04.

OPINION 554 (August 2004)

Representation—State Senator or Representative—An attorney currently serving as a state senator or representative may represent clients in city, county, and state courts in Texas, including those within his legislative district. DR 1.06.

OPINION 555 (December 2004)

Representation—Conflict of Interest—Part Ownership in Chiropractor’s Practice—An attorney may not enter into a business arrangement with a chiropractor if the attorney owns a portion of the chiropractor's practice, the attorney refers his clients to the chiropractor, and the attorney receives a share of the profits of the chiropractor's practice, including a share of the profits attributable to the clients referred by the attorney. DR 2.01; DR 1.06.
OPINION 556 (May 2005)

Confidential Information—Borrowed Employees of Collection Agency—Without the prior consent of each affected client, a law firm may not provide confidential client information to employees of a collection agency who are treated as borrowed employees of the law firm while assisting the law firm in collection matters. DR 1.05.

OPINION 557 (May 2005)

Representation—Disagreement with Client—In the case of a strong disagreement between an attorney and the attorney's client, because of which the client has sought the advice of a malpractice attorney, the attorney may continue to represent the client in the matter only if the attorney reasonably believes that continued representation will not be materially affected and the client consents after full disclosure as to the conflict of interest involved. The attorney may withdraw if the client insists on pursuing an objective with which the attorney has a fundamental disagreement or if the client makes the representation unreasonably difficult. If the attorney withdraws from representation, the attorney must comply with applicable procedural rules and take reasonably practicable steps to protect the client's interests. DR 2.01; DR 1.06; DR 1.15.

OPINION 558 (May 2005)

Fee Splitting—Finance Company—An attorney may not pay a percentage of the attorney's contingency fee to a finance company or other lender in connection with obtaining a loan. DR 5.04(a).

OPINION 559 (July 2005)

Confidential Information—Representation in Criminal Proceedings—An attorney who is appointed to represent a defendant in a criminal proceeding may not furnish to a court, in connection with obtaining payment for the attorney's services, a statement containing a detailed description of the attorney's services, including the subject matter of records and documents obtained and reviewed, the subjects of legal research, and the identity of persons contacted and interviewed, unless the defendant consents to the disclosure of such confidential information after consultation about the consequences of the disclosure. DR 1.05.

OPINION 560 (August 2005)

Conflict of Interest—Leasing Attorneys from Unaffiliated Employee Leasing Company — A law firm may contract with an employee leasing company for limited employee compensation and benefit services for the law firm’s employees as long as (1) the law firm maintains exclusive control over the hiring and termination of its employees, (2) there is no sharing of employees among the various clients of the employee leasing company, (3) the leasing company has no managerial or supervisory rights over the law firm’s employees, and (4) the leasing company has no access to client information. DR 1.06.
OPINION 561 (August 2005)

Advertising or Solicitation—Inclusion on Privately Sponsored Web Site—An attorney may not pay a fee to be listed on a privately sponsored Internet site that obtains information over the Internet from potential clients about their legal problems and forwards the information to one or more attorneys who have paid to be listed on the Internet site. DR 7.03; DR 7.04.

OPINION 562 (October 2005)

Lawyer Referral Service—Remitting Part of Fee to Federal Government Program—An attorney may participate in a federal government program administered by an agency that is part of the executive branch of the United States government, refers departments and agencies of the executive branch to attorneys who participate in the program, and requires each participating attorney to pay to the administering federal agency a fee equal to one percent of legal fees received by the attorney under the program. DR 5.04(a); DR 7.03.

OPINION 563 (October 2005)

Solicitation of Employment—Confidential Information—Contingent Fees—An attorney leaving employment with a law firm may solicit and accept employment from a client of the law firm for whom the attorney has rendered legal services, provided that the attorney complies with DR 1.03, DR 1.04, DR 1.05, DR 1.06, DR 2.01, and DR 7.02. An attorney is not permitted to use confidential information to the disadvantage of a client or to the attorney's own advantage vis-à-vis a client unless the client consents after consultation. An attorney who proposes to continue the representation of a client after leaving employment at a law firm, but on the basis of a contingent fee arrangement that may be financially disadvantageous to the client as compared to an hourly fee arrangement, must advise the client to seek independent advice from another attorney before entering into the proposed contingent fee arrangement.

OPINION 564 (October 2005)

Representation—Conflict of Interest—Real Estate Transactions—An attorney may represent a school district in its purchase of real estate from an individual who currently serves as a member of the board of directors of a bank that the attorney's law firm represents on other unrelated matters. DR 1.12; DR 1.06.

OPINION 565 (January 2006)

Representation—Appeals—An attorney must continue to represent a client in an appeal on a remaining matter in a case if the client has filed pro se motions seeking relief from a settlement of the case and grievances against the attorney unless the attorney is permitted under DR 1.15(b) to withdraw and the court does not require that the attorney continue the representation. DR 1.06; DR 1.15.
OPINION 566 (February 2006)

Fee Splitting—Receivers—An attorney who is appointed by a court to serve as a receiver may not pay a part of the receiver fees earned to attorneys representing the parties. DR 8.04; DR 1.04(f).

OPINION 567 (February 2006)

Representation—Conflict of Interest—City Council–Appointed Board Members—An attorney who represents a city may not render legal advice to a city ethics board concerning the investigation and determination of a complaint against a majority of the members of the city council. DR 1.06.

OPINION 568 (April 2006)

Contingent Fee—Fee Splitting with Subsequently Suspended or Disbarred Attorney—An attorney may share a contingent fee with a suspended or disbarred attorney if the fee-sharing agreement existed before the suspension or disbarment and the suspended or disbarred attorney fully performed all work in the matter before the suspension or disbarment. DR 5.04(a).

OPINION 569 (April 2006)

Representation—Conflict of Interest—Law-Related Business—An attorney may represent a client in a matter against a third party who was a customer of a law-related business owned by the attorney provided that the attorney fully complies with DR 1.06(b)(2) and, if necessary, DR 1.06(c) as to any possible conflict of interest that arises with respect to the interests of the client. DR 1.06.

OPINION 570 (May 2006)

Disclosure of Files to Former Client—An attorney must, on request, provide to a former client the notes from the attorney’s file for that former client except when (1) the attorney has the right to withhold the notes pursuant to a legal right such as a attorney's lien, (2) the attorney is required to withhold the attorney 's notes (or portions thereof) by court order, or (3) the attorney’s not withholding the notes (or portions thereof) would violate a duty owed to a third person or risk causing serious harm to the client. DR 1.14(b); DR 1.15(d).

OPINION 571 (May 2006)

Plea Agreements—Waiver of Postconviction Appeals—A prosecutor may include in a plea agreement a waiver of postconviction appeals based on claims of prosecutorial misconduct or ineffective assistance of counsel. However, obtaining such a waiver does not relieve the prosecutor from complying with DR 3.09 and does not preclude discipline for misconduct violations. Assuming that a waiver of claims of ineffective assistance of counsel in a plea agreement is not treated as an agreed limitation on possible future malpractice claims by the defendant against the attorney, a criminal defense attorney may advise a defendant with respect to a plea agreement that contains a waiver of postconviction...
appeals based on prosecutorial misconduct or ineffective assistance of counsel or from signing the plea agreement along with the defendant, provided that the defense attorney complies with DR 1.06(b) and DR 1.06(c) regarding any conflict of interest arising from the waiver of postconviction appeals based on ineffective assistance of counsel. DR 3.09; DR 1.08; DR 1.06(b).

OPINION 572 (May 2006)

Disclosure of Privileged Information—Independent Contractor—Unless the client has instructed otherwise, an attorney may deliver materials containing privileged information to an independent contractor, such as a copy service, hired by the attorney in the furtherance of the attorney's representation of the client if the attorney reasonably expects that the confidential character of the information will be respected by the independent contractor. DR 1.05.

OPINION 573 (July 2006)

Advertising or Solicitation—Internet Client-Lawyer Service—An attorney may participate in a privately sponsored Internet service that obtains information over the Internet from potential clients about their legal problems and forwards the information to attorneys who have paid to participate in the Internet service if the following requirements are met: (1) The selection of attorneys for a potential client is a wholly automated process performed by computers, without exercise of any discretion, based on the information provided by the potential client and the information provided by participating attorneys. (2) The service takes steps to ensure that a reasonable potential client understands that (a) only attorneys who have paid a fee to be included in the service will be given the opportunity to respond to the potential client and (b) the service makes no assertions about the quality of the attorneys. The service must not state that it is making referrals of attorneys or describe itself in such a way that would cause a reasonable potential client to believe the service is selecting, referring, and recommending the participating attorneys. The service must ensure that a reasonable potential client either understands that the service is open to all licensed attorneys or, if there are limits on the number or qualifications of attorneys who may participate in the service, understands the nature of those limits. (3) The fee charged by the service is a reasonable fee for the advertising and public relations services provided. (4) The service does not unreasonably limit or restrict, either directly or by means of a high fee structure, finely drawn geographic areas and legal practice areas, or otherwise, the number of attorneys it allows to participate for a given geographic area or legal practice area to such an extent that the service in effect is referring particular types of potential clients to particular attorneys. (5) Every initial communication sent by the attorney to a potential client that is identified through the service is advertising information sent by electronic means and clearly states that the communication to the potential client consists of advertising information, that the communication is being sent after identification of the client through the service based on geographic area and legal practice area, and that the attorney has paid a fee to participate in the service. (6) An attorney does not communicate in person, by telephone, or by other electronic means involving live, interactive communication with a potential client identified through the service unless and until the prospective client has requested such communication. DR 7.03(b); DR 7.04.
OPINION 574 (September 2006)

Representation—Conflict of Interest—Former State Agency Employee—An attorney who is a former employee of a Texas regulatory agency may represent a client in proceedings before the agency in a matter that originated during the attorney's employment with the agency but with respect to which the attorney had no personal and substantial participation as an employee of the agency. DR 1.10; DR 1.09.

OPINION 575 (November 2006)

Secretly Recording Telephone Conversations—An attorney may make an undisclosed recording of the attorney’s telephone conversations provided that (1) recordings of conversations involving a client are made to further a legitimate purpose of the attorney or the client, (2) confidential client information contained in any recording is appropriately protected by the attorney in accordance with DR 1.05, (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded, and (4) the recording is not contrary to a representation made by the attorney to any person. This opinion overrules Opinions 392 and 514. DR 1.05.

OPINION 576 (December 2006)

Contingent Fee—Fee Splitting Agreement with Lending Company—An attorney who represents a client in a contingent fee personal injury case may not enter into an agreement with a lending company owned by nonlawyers whereby the lending company would reimburse the attorney for litigation expenses in the case as incurred and the attorney would, in the event of a recovery in the case, repay the lending company the amount advanced by the lending company and pay a funding fee equal to a specified percentage of the amount recovered in the case but subject to an agreed maximum. DR 5.04(a).

OPINION 577 (March 2007)

Client Billing—A law firm may establish an hourly rate for a lawyer who is not a shareholder, partner, or associate but is otherwise “in” the firm (for example, of counsel, contract lawyer, part-time lawyer) and may use that hourly rate in billing clients for that lawyer’s work at a rate that is more than the law firm is paying the lawyer for that work. The law firm may identify that lawyer on the firm’s bills with a description of the work performed, the hours expended, and the lawyer’s hourly rate without distinguishing that lawyer from other lawyers in the firm and without disclosing the amount paid by the firm to that lawyer. However, when a law firm bills a client for legal services provided by a lawyer that is not “in” the firm (for example, outside patent counsel, local counsel), there will be a division of fees subject to the requirements of DR 1.04(f) unless the law firm bills the client precisely the amount that has been billed to the law firm by the lawyer. Additionally, the law firm would be prohibited from incorporating a nonfirm lawyer’s name, work, and time into its own bill unless it did so in a way that showed that the nonfirm lawyer was not in the firm. DR 7.01; DR 1.04.
Conflict of Interest—Former Clients—Confidential Information—A law firm may represent a municipality against another municipality that was a former client without prior consent of the former client if the litigation matter does not involve questioning the validity of the law firm’s services or work product for the former client, the proposed representation does not involve a matter that is the same or substantially related to the matter for which the firm represented the former client, and there exists no reasonable probability that the proposed representation would cause the law firm to violate the obligations of confidentiality owed to the former client under DR 1.05. If any lawyer in the law firm could not represent the municipality client in the proposed matter because of prior representation of a former client while the lawyer was in private law practice, the entire law firm would be prohibited from undertaking the representation. The representation would be prohibited without regard to the law firm’s attempt to screen from the current representation all lawyers who could not themselves represent the current client in the proposed matter because of their prior representation of the adverse party. DR 1.05; DR 1.09.
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Chapter 6

Commentary on the Texas Attorney Discipline System

by Stephanie Strolle

I. Introduction

The attorney discipline system in Texas is governed by the State Bar Act (Tex. Gov’t Code ch. 81), the Texas Disciplinary Rules of Professional Conduct (Tex. Gov’t Code tit. 2, subtit. G app. A), and the Texas Rules of Disciplinary Procedure (Tex. Gov’t Code tit. 2, subtit. G app. A-1). This chapter provides a general overview of the disciplinary process and highlights the key provisions of the Texas Rules of Disciplinary Procedure (hereinafter “TRDP”). This paper is a modified version of a paper previously presented by Linda Acevedo, First Assistant Disciplinary Counsel, and is used with her permission and thanks from this author.

II. Structure of the Disciplinary System

A. District Grievance Committees

The state of Texas is geographically divided into disciplinary districts with one or more grievance committees within each district. TRDP 2.01. The members of the district grievance committees are volunteers appointed by the State Bar president, and each committee must be composed of two-thirds attorneys and one-third public members. TRDP 2.02. The district grievance committees act through panels assigned by the chair of the committee, and these panels must be composed of two attorney members for each public member. TRDP 2.06. The district grievance committees are responsible for making determinations in summary disposition matters and conducting administrative evidentiary hearings. TRDP 2.07.

B. Commission for Lawyer Discipline

The Commission for Lawyer Discipline (the “Commission”) is a permanent committee of the State Bar of Texas and is not subject to dissolution by the State Bar of Texas Board of Directors. TRDP 4.01. The Commission is a twelve-member body composed of six attorneys appointed by the State Bar president and six public members appointed by the Supreme Court of Texas. TRDP 4.01.

1. Stephanie Strolle is Assistant Disciplinary Counsel in the San Antonio regional office of the State Bar of Texas Chief Disciplinary Counsel, handling evidentiary disciplinary hearings throughout the South Texas area. Ms. Strolle was previously in private practice concentrating in general civil and personal injury litigation in the San Antonio area for eleven years. She received her J.D. from St. Mary’s University School of Texas of Law in 1992 and a B.A. in Criminal Justice from the University of San Antonio in 1985.
Structure of Disciplinary System

The Commission is the client in all lawyer disciplinary proceedings that are not dismissed by summary disposition. TRDP 4.06A. While the Commission has other duties, the majority of its business is devoted to the consideration of discipline litigation matters. Generally, the Commission meets monthly and it is not subject to open meetings or open records provisions. TRDP 4.09.

C. The Chief Disciplinary Counsel

The Office of Chief Disciplinary Counsel is responsible for the administration of the discipline system. The Chief Disciplinary Counsel (CDC) reviews and screens all information relating to lawyer misconduct coming to his attention or to the attention of the Commission and represents the Commission in disciplinary matters before all courts and administrative bodies. TRDP 5.02. In addition to the central office in Austin, the Office of the Chief Disciplinary Counsel maintains regional offices in San Antonio, Houston, and Dallas.

D. The Board of Disciplinary Appeals

The Board of Disciplinary Appeals (BODA) is an adjudicatory body of twelve lawyers appointed by the Texas Supreme Court. TRDP 7.01. BODA’s role in the disciplinary system is extensive and substantial. See TRDP 7.08.

For example, BODA has exclusive original jurisdiction to hear and determine compulsory discipline, reciprocal discipline, and disability suspension actions. See TRDP 7.08G, H, I. BODA also has the authority to affirm or reverse classification decisions and under certain circumstances to transfer disciplinary proceedings and other matters from one grievance committee to another and exercises initial appellate review from final decisions of evidentiary panels of a grievance committee. See TRDP 7.08C–F. Finally, BODA is granted exclusive jurisdiction to consider and determine motions to revoke arising from judgments entered by evidentiary panels of the district grievance committees. TRDP 2.23.

Current information regarding recent BODA decisions and matters pending a hearing before BODA can be found on its Web site at www.txboda.org.

E. District Courts

Within the disciplinary framework, district courts are given the power to hear disciplinary trials de novo when a respondent attorney elects to have the complaint heard by a district court of proper venue. See TRDP 3.01–.16. District courts also have the authority to determine reinstatements (from disbarments, resignations, and disability suspensions), assumptions of practice, interim suspensions, and revocations, which arise from district court judgments. See TRDP 3.13, 11.01–.08, 12.06, 14.01.
III. Grievance Procedure

A. Classification

The filing of a grievance against a lawyer triggers the disciplinary process. See TRDP 2.10. There is no standing or privity requirement for a filing. Consequently, not only are grievances received from clients and former clients, but they are also received from opposing counsel, judges and court personnel, law partners and associates, or opposing parties, for example.

The CDC is required to review within thirty days each grievance and any supporting documentation submitted to determine whether the grievance constitutes an inquiry or a complaint. TRDP 2.10. An inquiry is any written matter concerning attorney conduct that, even if true, does not alleges professional misconduct or disability. TRDP 1.06S. In contrast, a complaint is a written matter that, either on the face thereof or on screening and investigation, alleges professional misconduct, a disability, or both. TRDP 1.06G. This initial review is made without the benefit of any response or information from the attorney against whom the complaint has been filed.

If the CDC determines that the grievance constitutes an inquiry only, the grievance is dismissed and both the respondent attorney and complainant who filed the grievance are notified of the dismissal. If the CDC determines that the grievance constitutes a complaint, the respondent is provided a copy of the complaint with notice to respond, within thirty days of receipt of the notice to the allegations. TRDP 2.10.

The complainant has the right to appeal a decision by the CDC to dismiss the grievance as an inquiry to BODA. If BODA affirms the decision, the complainant has the ability to refile the grievance one time with additional or new evidence. TRDP 2.10.

B. Just Cause Determination

Once a response is received from the respondent or if no response is received, a determination of just cause is made. “Just cause” is defined as “such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of Professional Misconduct requiring that a Sanction be imposed, or suffers from a Disability that requires either suspension as an attorney licensed to practice law in the State of Texas or probation.” TRDP 1.06U.

The CDC makes the determination of just cause within sixty days of the respondent’s response date. TRDP 2.12. If, after investigation, the CDC determines that just cause does not exist to proceed on the complaint, the CDC places the complaint on a summary disposition panel docket. TRDP 2.13. At this docket, the CDC will present the complaint to the summary disposition panel, which is composed of local grievance committee members, and the panel will determine whether the complaint should be dismissed or should proceed. Neither the complainant nor the respondent is present at the docket hearing, and there is no appeal from the panel’s decision. TRDP 2.13.
For all complaints not dismissed, either because the CDC determined just cause existed or the summary disposition panel determined that a complaint should proceed, the respondent is notified in writing of the factual allegations of misconduct and the disciplinary rules alleged to have been violated. TRDP 2.14D. The respondent has twenty days from receipt of this notice to elect whether the case will be heard by a district court or by an evidentiary panel of the grievance committee. TRDP 2.15.

If the respondent elects to proceed in district court, a disciplinary petition brought in the name of the Commission is filed with the Texas Supreme Court. TRDP 3.01. The supreme court appoints an active district judge who does not reside in the administrative judicial district in which the respondent resides to hear the case. TRDP 3.02. Once the judge is appointed, the petition and order of appointment are forwarded to the district clerk of the county of proper venue. TRDP 3.03. The disciplinary matter then proceeds as with other civil cases, including there being the right to a trial by jury. See TRDP 3.06. The Commission bears the burden of proof by a preponderance of the evidence, and the rules of civil procedure and evidence apply. See TRDP 3.08.

If the respondent elects to proceed before an evidentiary panel or makes no election, an evidentiary petition is filed in the name of the Commission with the panel. TRDP 2.17A. The panel may not include any person who served on a summary disposition panel that heard the complaint and the panel must have a ratio of two attorney members for every public member. TRDP 2.17.

In connection with evidentiary panel proceedings, the rules largely mirror the procedures in district court. See TRDP 2.17B–K, 2.22. The Commission must prove its allegations by a preponderance of the evidence, and the rules of civil procedure and evidence apply generally. TRDP 2.17L, M.

The evidentiary panel hearing is confidential. TRDP 2.16A. The purpose of this confidentiality is to allow for the imposition of a private reprimand or the consideration of a respondent’s disability. However, if the evidentiary panel finds misconduct has occurred and imposes a sanction beyond a private reprimand, the proceedings can be revealed to the public on request. TRDP 2.16E. On a finding of misconduct, the evidentiary panel is required to issue a judgment within thirty days that includes findings of fact, conclusions of law, and the sanctions imposed. TRDP 2.17P.

D. Sanctions

If a finding of professional misconduct is made against the respondent, an appropriate sanction is to be imposed. The sanction can include disbarment, suspension for a term certain, probation of a suspension (which may be concurrent with the period of suspension on such reasonable terms as are appropriate under the circumstances), public reprimand, or a private reprimand (available only in the evidentiary panel setting and not in district court). TRDP 1.06Y. In addition, the tribunal may require the respondent to pay restitution and reasonable attorney’s fees and all direct expenses associated with the proceedings, as an ancillary sanction. 1.06Ya, b.
Commentary on Texas Attorney Disciplinary System

E. Appeals

A judgment of disbarment entered by either a district court or an evidentiary panel cannot be superseded or stayed. A judgment of suspension may be stayed if the respondent can establish that his continued practice of law does not pose a continuing threat to the welfare of the respondent’s clients or the public. Any stay may be conditioned on reasonable terms, and there is no interlocutory appeal from a stay of a suspension, with or without conditions. TRDP 2.25, 3.14.

District court judgments can be appealed to the appropriate court of appeals and ultimately to the Texas Supreme Court on petition for review. TRDP 3.15.

An evidentiary panel judgment can be appealed to BODA, which reviews the appeal under the standard of substantial evidence. TRDP 2.24. BODA’s decisions are appealed directly to the Texas Supreme Court. TRDP 7.11. These appeals are reviewed under the standard of substantial evidence, and the court may affirm a BODA decision by order without a written opinion. TRDP 7.11.

F. Voluntary Mediation and Dispute Resolution

Dismissed matters, including inquiries, summary dismissals, and those matters dismissed by the evidentiary panel, are referred to a voluntary mediation and dispute resolution procedure. See TRDP 2.10, 2.13, 2.17P. The State Bar of Texas maintains the Client Attorney Assistance Program (CAAP) as a statewide dispute resolution program that assists clients and attorneys in resolving disputes that do not involve misconduct. Information on CAAP is available online at www.texasbar.com/caap.

IV. Other Disciplinary Actions

A. Compulsory Discipline

Attorneys who have been convicted of, or placed on probation with or without an adjudication of guilt for, certain crimes are subject to compulsory discipline. TRDP 8.01. These crimes include barratry, any felony involving moral turpitude, any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property, or any attempt, conspiracy, or solicitation of another to commit these crimes. TRDP 1.06Z. In addition, any crime involving misapplication of money or other property held as a fiduciary can result in compulsory discipline. TRDP 1.06T.

Compulsory proceedings are initiated with BODA, which determines all questions of law and fact. See TRDP 7.08G, 8.04. If BODA determines that the attorney is subject to compulsory discipline, it has the discretion to either suspend or disbar the attorney depending on the attorney’s criminal sentence. If the attorney’s conviction has become final and the attorney was not given probation, BODA must impose disbarment. TRDP 8.05. If, however, the attorney’s sentence is fully probated, BODA can either impose disbarment or a suspension during the term of criminal probation. If the attorney’s criminal probation is revoked, the attorney shall be disbarred. TRDP
8.06. In addition, an early termination of a criminal probation has no effect on any judgment entered pursuant to the compulsory discipline scheme. TRDP 8.07. Finally, if the attorney has appealed the criminal conviction, BODA is mandated to enter an interlocutory order of suspension pending the outcome of the criminal appeal. TRDP 8.04.

B. Reciprocal Discipline

Attorneys disciplined in other jurisdictions also face disciplinary action in Texas based on the discipline imposed in the other jurisdiction. These proceedings are filed with BODA, and a certified copy of the judgment or order from the other jurisdiction is considered prima facie evidence of the matters contained therein. In addition, a final adjudication of professional misconduct is conclusive subject to enumerated defenses that may be raised by the respondent in defense of the reciprocal discipline lawsuit. TRDP 9.01. If the respondent fails to file an answer, BODA is mandated to enter a judgment imposing identical discipline, to the extent practicable, with that imposed in the other jurisdiction. TRDP 9.03.

To avoid the imposition of identical discipline, the respondent must prove by clear and convincing evidence—

1. a procedural due-process violation in the other jurisdiction;
2. an infirmity of proof establishing misconduct in the other jurisdiction due to such a degree that BODA should not accept the decision as final;
3. the imposition of identical discipline would result in a grave injustice;
4. the misconduct established in the other jurisdiction warrants substantially different discipline in Texas; or
5. the misconduct for which the attorney was disciplined in the other jurisdiction does not constitute professional misconduct in Texas.

TRDP 9.04.

C. Disability Suspension

An attorney may be subject to an indefinite suspension if it is found that the attorney is suffering from a disability. “Disability” is defined as “any physical, mental, or emotional condition that, with or without a substantive rule violation, results in the attorney’s inability to practice law, provide client services, complete contracts of employment, or otherwise carry out his or her professional responsibilities to clients, courts, the profession, or the public.” TRDP 1.06I.

If during the investigation of a complaint, the CDC reasonably concludes that the attorney is suffering from a disability and is directed or authorized by the Commission, the CDC sends the complaint and any other documents or statement that support a finding of disability to BODA. BODA forwards all of the information to a district disability committee, composed of one attorney, one doctor of medicine or mental health-care provider holding a doctorate degree, and one disinterested public member. TRDP 12.02.
Commentary on Texas Attorney Disciplinary System

The district disability committee holds a de novo proceeding to receive evidence and determine whether the attorney is suffering from a disability. If there is no finding of disability, the entire record is returned to the CDC and the matter continues in the disciplinary process from the point at which it was referred. If the committee determines that the attorney is suffering from a disability, it certifies the finding to BODA. TRDP 12.03. On receiving the finding of disability, BODA immediately enters an order of indefinite suspension. TRDP 12.04.

The record of the proceedings on disability is sealed and remains confidential. However, the order of indefinite suspension is made public. TRDP 12.04. Any statute of limitation applying to a disciplinary matter is tolled during the period of any disability suspension. TRDP 12.05. An attorney may petition BODA or a district court for reinstatement and must show by a preponderance of the evidence that the reasons for suspension no longer exist and that termination of the suspension would be without danger to the public and the profession. See TRDP 12.06A, C.

D. Interim Suspension

The immediate interim suspension of an attorney may be sought if the CDC reasonably believes based on investigation of a complaint that an attorney poses a substantial threat of irreparable harm to clients or prospective clients and is authorized or directed by the Commission to seek the interim relief. TRDP 14.01. The basis for an interim suspension is (1) conduct by an attorney that includes all the elements of the types of crimes that subject a lawyer to compulsory discipline; (2) three or more acts of professional misconduct as defined in rule 8.04(a)(2)–(4), (6)–(8), (10) of the Texas Disciplinary Rules of Professional Conduct, whether actual harm or threatened harm is demonstrated or not; or (3) any other conduct by an attorney that, if continued, will probably cause harm to clients or prospective clients. TRDP 14.02.

In an interim suspension proceeding, the Commission files a petition with a district court, and a hearing is held within ten days. If the Commission proves by a preponderance of the evidence the required evidentiary standard, the district court is mandated to enter an order immediately suspending the attorney pending the final disposition of any disciplinary proceeding based on the conduct causing the harm. TRDP 14.01.

E. Revocation of Probated Suspensions

The Commission may seek the revocation of an attorney’s probated suspension by filing a motion to revoke with either a district court (for a district court judgment) or with BODA (for an evidentiary panel judgment). TRDP 2.23, 3.13. A hearing must be set within thirty days of service on the respondent, and, if the Commission proves a violation of probation, the probation is revoked and the attorney suspended from the practice of law for the full term of suspension without credit for any probationary time served. TRDP 2.23, 3.13.

F. Resignation in Lieu of Discipline

An attorney may resign from the practice of law in lieu of discipline. This is accomplished by the filing of a motion for resignation in lieu of discipline in the Supreme Court of Texas. TRDP 10.01. The CDC files a response stating whether the acceptance of the resignation is in the best interest of the public and the profession and setting forth a detailed statement of the professional miscon-
duct with which the attorney is charged. TRDP 10.02. The motion to resign is not effective until and unless accepted by the written order of the Texas Supreme Court. TRDP 10.04. A resignation in lieu of discipline is treated as a disbarment for all purposes, including client notification, discontinuation of practice, and reinstatement. TRDP 10.05.

G. Reinstatement After Disbarment or Resignation

A disbarred lawyer or one who has resigned in lieu of discipline may apply for reinstatement after five years from the date of the judgment of disbarment or of the Texas Supreme Court order accepting the resignation. However, a person who was disbarred or resigned in lieu of discipline by reason of a conviction or having been placed on probation without an adjudication of guilt for a compulsory discipline type crime cannot apply for reinstatement until five years following the date of completion of sentence, including any period of probation or parole. TRDP 11.01.

The petition for reinstatement is filed with the district court in the county of the person’s residence and is required to be verified and set forth specific information. TRDP 11.02. The petitioner must establish by a preponderance of the evidence that the best interests of the public and the profession, as well as the ends of justice would be served by the reinstatement. TRDP 11.03. If this burden is met, the district court renders judgment authorizing the petitioner to be reinstated on compliance within eighteen months from the date of judgment with the rules governing admission to the Bar by the Board of Law Examiners. The Board of Law Examiners is also directed to admit the petitioner to a regularly scheduled bar examination given to those individuals who have never before been licensed. TRDP 11.06. If a petition for reinstatement is denied on the merits, the petitioner must wait three years before refiling. TRDP 11.08.

H. Assumption of Practice

Occasionally, it becomes necessary for an attorney’s practice to be assumed because of the attorney’s disbarment, resignation, suspension, inactive status, mental or emotional disability, or death. In such instances, a client of the attorney, the CDC, or any other interested person may petition a district court in the county of the attorney’s residence to assume jurisdiction over the attorney’s law practice. TRDP 13.02.

If the court finds that its supervision is required, the court assumes jurisdiction and can appoint one or more attorneys to (1) examine the client matters, including files and records of the attorney’s practice; (2) notify persons and entities that appear to be clients of the attorney of the assumption of the law practice and suggest that they obtain other legal counsel; (3) apply for extension of time before any court or any administrative body pending the client’s employment of other legal counsel; (4) with the prior consent of the client, file such motions and pleadings on behalf of the client as are required to prevent prejudice to the client’s rights; (5) give appropriate notice to persons or entities that may be affected other than the client; or (6) arrange for surrender or delivery to the client of the client’s papers, files, or other property. TRDP 13.03A–F.

I. Enforcement of Judgments

Evidentiary panel judgments and judgments entered by BODA have the force of a final judgment of a district court. To enforce these judgments, the Commission may apply to a district court in the
county of the residence of the respondent and the district court has available to it all writs and processes, as well as the power of contempt, to enforce the judgment as if the judgment had been the court’s own. TRDP 15.01.

V. Resources


• The State Bar Act (Tex. Gov’t Code § 81.001 et seq.)

• Ethics Helpline (1-800-532-3947)

• State Bar of Texas Web Site (www.texasbar.com)

• Grievance Information Hotline (1-800-932-1900)
Chapter 7
Texas Rules of Disciplinary Procedure
Effective May 1, 1992


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Preamble

The Supreme Court of Texas has the constitutional and statutory responsibility within the State for the lawyer discipline and disability system, and has inherent power to maintain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline and disability in a manner that does not discriminate by race, creed, color, sex, or national origin. To carry out this responsibility, the Court promulgates the following rules for lawyer discipline and disability proceedings. Subject to the inherent power of the Supreme Court of Texas, the responsibility for administering and supervising lawyer discipline and disability is delegated to the Board of Directors of the State Bar of Texas. Authority to adopt rules of procedure and administration not inconsistent with these rules is vested in the Board. This delegation is specifically limited to the rights, powers, and authority herein expressly delegated.
PART I. GENERAL RULES

Rule 1.01. Citation

These rules are to be called the Texas Rules of Disciplinary Procedure and shall be cited as such.

Rule 1.02. Objective of the Rules

These rules establish the procedures to be used in the professional disciplinary and disability system for attorneys in the State of Texas.

Rule 1.03. Construction of the Rules

These rules are to be broadly construed to ensure the operation, effectiveness, integrity, and continuation of the professional disciplinary and disability system. The following rules apply in the construction of these rules:

A. If any portion of these rules is held unconstitutional by any court, that determination does not affect the validity of the remaining rules.

B. The use of the singular includes the plural, and vice versa.

C. In computing any period of time prescribed or allowed by these rules, the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Rule 1.04. Integration and Concurrent Application of the Rules

These rules apply prospectively to all attorney professional disciplinary and disability proceedings commenced on and after the effective date as set forth in the Supreme Court’s Order of promulgation. All disciplinary and disability proceedings commenced prior to the effective date of these rules as amended are governed by the Texas Rules of Disciplinary Procedure in effect as of the date of commencement of said disciplinary and disability proceedings.

Rule 1.05. Texas Disciplinary Rules of Professional Conduct

Nothing in these rules is to be be construed, explicitly or implicitly, to amend or repeal in any way the Texas Disciplinary Rules of Professional Conduct.
Rule 1.06. Definitions

A. “Address” means the address provided by the attorney the subject of a Grievance as shown on the membership rolls maintained by the Clerk of the Supreme Court at the time of receipt of the Grievance by the Chief Disciplinary Counsel.

B. “Board” means the Board of Directors of the State Bar of Texas.

C. “Chief Disciplinary Counsel” means the person serving as Chief Disciplinary Counsel and any and all of his or her assistants.

D. “Commission” means the Commission for Lawyer Discipline, a permanent committee of the State Bar of Texas.

E. “Committee” means any of the grievance committees within a single District.

F. “Complainant” means the person, firm, corporation, or other entity, including the Chief Disciplinary Counsel, initiating a Complaint or Inquiry.

G. “Complaint” means those written matters received by the Office of the Chief Disciplinary Counsel that, either on the face thereof or upon screening or preliminary investigation, allege Professional Misconduct or attorney Disability, or both, cognizable under these rules or the Texas Disciplinary Rules of Professional Conduct.

H. “Director” means a member of the Board of Directors of the State Bar of Texas.

I. “Disability” means any physical, mental, or emotional condition that, with or without a substantive rule violation, results in the attorney’s inability to practice law, provide client services, complete contracts of employment, or otherwise carry out his or her professional responsibilities to clients, courts, the profession, or the public.

J. “Disciplinary Action” means a proceeding brought by or against an attorney in a district court or any judicial proceeding covered by these rules other than an Evidentiary Hearing.

K. “Disciplinary Petition” means a pleading that satisfies the requirements of Rule 3.01.

L. “Disciplinary Proceedings” includes the processing of a Grievance, the investigation and processing of an Inquiry or Complaint, presentation of a Complaint before a Summary Disposition Panel, and the proceeding before an Evidentiary Panel.

M. “District” means disciplinary district.

N. “Evidentiary Hearing” means an adjudicatory proceeding before a panel of a grievance committee.

O. “Evidentiary Panel” means a panel of the District Grievance Committee performing an adjudicatory function other than that of a Summary Disposition Panel with regard to a
Disciplinary Proceeding pending before the District Grievance Committee of which the Evidentiary Panel is a subcommittee.

P. “Evidentiary Petition” means a pleading that satisfies the requirements of Rule 2.17.

Q. “General Counsel” means the General Counsel of the State Bar of Texas and any and all of his or her assistants.

R. “Grievance” means a written statement, from whatever source, apparently intended to allege Professional Misconduct by a lawyer, or lawyer Disability, or both, received by the Office of the Chief Disciplinary Counsel.

S. “Inquiry” means any written matter concerning attorney conduct received by the Office of the Chief Disciplinary Counsel that, even if true, does not allege Professional Misconduct or Disability.

T. “Intentional Crime” means (1) any Serious Crime that requires proof of knowledge or intent as an essential element or (2) any crime involving misapplication of money or other property held as a fiduciary.

U. “Just Cause” means such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of Professional Misconduct requiring that a Sanction be imposed, or suffers from a Disability that requires either suspension as an attorney licensed to practice law in the State of Texas or probation.

V. “Professional Misconduct” includes:

1. Acts or omissions by an attorney, individually or in concert with another person or persons, that violate one or more of the Texas Disciplinary Rules of Professional Conduct.

2. Attorney conduct that occurs in another state or in the District of Columbia and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct.

3. Violation of any disciplinary or disability order or judgment.

4. Engaging in conduct that constitutes barratry as defined by the law of this state.

5. Failure to comply with Rule 13.01 of these rules relating to notification of an attorney’s cessation of practice.

6. Engaging in the practice of law either during a period of suspension or when on inactive status.
7. Conviction of a Serious Crime, or being placed on probation for a Serious Crime with or without an adjudication of guilt.

8. Conviction of an Intentional Crime, or being placed on probation for an Intentional Crime with or without an adjudication of guilt.

W. “Reasonable Attorneys’ Fees,” for purposes of these rules only, means a reasonable fee for a competent private attorney, under the circumstances. Relevant factors that may be considered in determining the reasonableness of a fee include but are not limited to the following:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. The fee customarily charged in the locality for similar legal services;
3. The amount involved and the results obtained;
4. The time limitations imposed by the circumstances; and
5. The experience, reputation, and ability of the lawyer or lawyers performing the services.

X. “Respondent” means any attorney who is the subject of a Grievance, Complaint, Disciplinary Proceeding, or Disciplinary Action.

Y. “Sanction” means any of the following:

1. Disbarment.
2. Resignation in lieu of discipline.
3. Indefinite Disability suspension.
4. Suspension for a term certain.
5. Probation of suspension, which probation may be concurrent with the period of suspension, upon such reasonable terms as are appropriate under the circumstances.
6. Interim suspension.
7. Public reprimand.
8. Private reprimand.

The term “Sanction” may include the following additional ancillary requirements:
Rule 1.06. Texas Rules of Disciplinary Procedure

a. Restitution (which may include repayment to the Client Security Fund of the State Bar of any payments made by reason of Respondent’s Professional Misconduct); and

b. Payment of Reasonable Attorneys’ Fees and all direct expenses associated with the proceedings.

Z. “Serious Crime” means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

AA. “State Bar” means the State Bar of Texas.

BB. “Summary Disposition Panel” means a panel of the Committee that determines whether a Complaint should proceed or should be dismissed based upon the absence of evidence to support a finding of Just Cause after a reasonable investigation by the Chief Disciplinary Counsel of the allegations in the Grievance.

PART II. THE DISTRICT GRIEVANCE COMMITTEES

Rule 2.01. Disciplinary Districts and Grievance Committee Subdistricts

The State of Texas is geographically divided into disciplinary districts that are coextensive with the districts of elected Directors of the State Bar. One or more Committee subdistricts shall be delineated by the Board within each such District. From time to time, if the Commission deems it useful for the efficient operation of the disciplinary system, it shall recommend to the Board that a redelineation be made of one or more subdistricts within a District. All Committees within a single disciplinary district have concurrent authority within the District but once a matter has been assigned to a Committee, that Committee has dominant jurisdiction, absent a transfer.

Rule 2.02. Composition of Members

Each elected Director of the State Bar shall nominate, and the President of the State Bar shall appoint, the members of the Committees within the District that coincides with the Director’s district, according to rules and policies adopted from time to time by the Board. Each Committee must consist of no fewer than nine members, two-thirds of whom must be attorneys licensed to practice law in the State of Texas and in good standing, and one-third of whom must be public members. All Committee panels must be composed of two-thirds attorneys and one-third public members. Each member of the Committee shall reside within or maintain his or her principal place of employment or practice within the District for which appointed. Public members may not have, other than as consumers, any financial interest, direct or indirect, in the practice of law. There may be no ex officio members of any Committee.
Rule 2.03.  Time for Appointment and Terms

All persons serving on a Committee at the time these rules become effective shall continue to serve for their then unexpired terms, subject to resignation or removal as herein provided. Nominations to Committees shall be made annually at the spring meeting of the Board; all appointments shall be made by the President no later than June 1 of each year, provided, however, that if a vacancy on a Committee arises after June 1, the Director(s) shall nominate and the President shall appoint an eligible person to serve for the remaining period of the unexpired term. If any Director fails or refuses to make nominations in a timely manner, or the President fails or refuses to make appointments in a timely manner, the existing members of the Committees shall continue to hold office until the nominations and appointments are made and the successor member is qualified. One-third of each new Committee will be appointed for initial terms of one year, one-third for an initial term of two years, and one-third for an initial term of three years. Thereafter, all terms will be for a period of three years, except for appointments to fill unexpired terms, which will be for the remaining period of the unexpired term. Any member of a Committee who has served two consecutive terms, whether full or partial terms, is not eligible for reappointment until at least three years have passed since his or her last prior service. No member may serve as chair for more than two consecutive terms of one year each. All members are eligible for election to the position of chair.

Rule 2.04.  Organizational Meeting of Grievance Committees

The last duly elected chair of a Committee shall call an organizational meeting of the Committee no later than July 15 of each year; shall administer the oath of office to each new member; and shall preside until the Committee has elected, by a majority vote, its new chair. Members may vote for themselves for the position of chair.

Rule 2.05.  Oath of Committee Members

As soon as possible after appointment, each newly appointed member of a Committee shall take the following oath to be administered by any person authorized by law to administer oaths:

“I do solemnly swear (or affirm) that I will faithfully execute my duties as a member of the District grievance committee, as required by the Texas Rules of Disciplinary Procedure, and will, to the best of my ability, preserve, protect, and defend the Constitution and laws of the United States and of the State of Texas. I further solemnly swear (or affirm) that I will keep secret all such matters and things as shall come to my knowledge as a member of the grievance committee arising from or in connection with each Disciplinary Action and Disciplinary Proceeding, unless permitted to disclose the same in accordance with the Rules of Disciplinary Procedure, or unless ordered to do so in the course of a judicial proceeding or a proceeding before the Board of Disciplinary Appeals. I further solemnly swear (or affirm) that I have neither directly nor indirectly paid, offered, or promised to pay, contributed any money or valuable thing, or promised any public or private office to secure my appointment. So help me God.”
Rule 2.06. Assignment of Committee Members

Each member of a Committee shall act through panels assigned by the chair of the Committee for summary disposition dockets and evidentiary hearings. Promptly after assignment, notice must be provided to the Respondent by United States certified mail, return receipt requested, of the names and addresses of the panel members assigned to each Complaint. A member is disqualified or is subject to recusal as a panel member for an evidentiary hearing if a district judge would, under similar circumstances, be disqualified or recused. If a member is disqualified or recused, another member shall be appointed by the Committee chair. No peremptory challenges of a Committee member are allowed. Any alleged grounds for disqualification or recusal of a panel member are conclusively waived if not brought to the attention of the panel within ten days after receipt of notification of the names and addresses of members of the panel; however, grounds for disqualification or recusal not reasonably discoverable within the ten day period may be asserted within ten days after they were discovered or in the exercise of reasonable diligence should have been discovered.

Rule 2.07. Duties of Committees

Committees shall act through panels, as assigned by the Committee chairs, to conduct summary disposition dockets and evidentiary hearings. No panel may consist of more than one-half of all members of the Committee or fewer than three members. If a member of a panel is disqualified, recused or otherwise unable to serve, the chair shall appoint a replacement. Panels must be composed of two attorney members for each public member. A quorum must include at least one public member for every two attorney members present and consists of a majority of the membership of the panel, and business shall be conducted upon majority vote of those members present, a quorum being had. In matters in which evidence is taken, no member may vote unless that member has heard or reviewed all the evidence. It shall be conclusively presumed, however, not subject to discovery or challenge in any subsequent proceeding, that every member casting a vote has heard or reviewed all the evidence. No member, attorney or public, may be appointed by the chair for both the Summary Disposition docket and the Evidentiary Panel pertaining to the same disciplinary matter. Any tie vote is a vote in favor of the position of the Respondent.

Rule 2.08. Expenses

Members of Committees serve without compensation but are entitled to reimbursement by the State Bar for their reasonable, actual, and necessary expenses.

Rule 2.09. Notice to Parties

A. Every notice required by this Part to be served upon the Respondent may be served by U. S. certified mail, return receipt requested, or by any other means of service permitted by the Texas Rules of Civil Procedure to the Respondent at the Respondent’s Address or to the Respondent’s counsel.
Texas Rules of Disciplinary Procedure

Rule 2.11.

B. Every notice required by this Part to be served upon the Commission may be served by U. S. certified mail, return receipt requested, or by any other means of service permitted by the Texas Rules of Civil Procedure, to the address of the Commission’s counsel of record or, if none, to the address designated by the Commission.

C. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail or telephonic document transfer, three days shall be added to the prescribed period.

Rule 2.10. Classification of Inquiries and Complaints

The Chief Disciplinary Counsel shall within thirty days examine each Grievance received to determine whether it constitutes an Inquiry or a Complaint. If the Grievance is determined to constitute an Inquiry, the Chief Disciplinary Counsel shall notify the Complaint and Respondent of the dismissal. The Complainant may, within thirty days from notification of the dismissal, appeal the determination to the Board of Disciplinary Appeals. If the Board of Disciplinary Appeals affirms the classification as an Inquiry, the Complainant will be so notified and may within twenty days amend the Grievance one time only by providing new or additional evidence. The Complainant may appeal a decision by the Chief Disciplinary Counsel to dismiss the amended Complaint as an Inquiry to the Board of Disciplinary Appeals. No further amendments or appeals will be accepted. In all instances where a Grievance is dismissed as an Inquiry other than where the attorney is deceased or is not licensed to practice law in the State of Texas, the Chief Disciplinary Counsel shall refer the Inquiry to a voluntary mediation and dispute resolution procedure. If the Grievance is determined to constitute a Complaint, the Respondent shall be provided a copy of the Complaint with notice to respond, in writing, to the allegations of the Complaint. The notice shall advise the Respondent that the Chief Disciplinary Counsel may provide appropriate information, including the Respondent’s response, to law enforcement agencies as permitted by Rule 6.08. The Respondent shall deliver the response to both the Office of the Chief Disciplinary Counsel and the Complainant within thirty days after receipt of the notice.

Rule 2.11. Venue

Venue of District Grievance Committee proceedings shall be in accordance with the following:

A. Summary Disposition Panel Proceedings. Proceedings of a Summary Disposition Panel shall be conducted by a Panel for the county where the alleged Professional Misconduct occurred, in whole or in part. If the acts or omissions complained of occurred wholly outside the State of Texas, proceedings shall be conducted by a Panel for the county of Respondent’s residence and, if Respondent has no residence in Texas, by a Panel for Travis County, Texas.

B. Evidentiary Panel Proceedings. In an Evidentiary Panel proceeding, venue shall be in the county of Respondent’s principal place of practice; or if the Respondent
Rule 2.11. Texas Rules of Disciplinary Procedure

does not maintain a place of practice within the State of Texas, in the county of Respondent’s residence; or if the Respondent maintains neither a residence nor a place of practice within the State of Texas, then in the county where the alleged Professional Misconduct occurred, in whole or in part. In all other instances, venue is in Travis County, Texas.

Rule 2.12. Investigation and Determination of Just Cause

No more than sixty days after the date by which the Respondent must file a written response to the Complaint as set forth in Rule 2.10, the Chief Disciplinary Counsel shall investigate the Complaint and determine whether there is Just Cause.

Rule 2.13. Summary Disposition Setting

Upon investigation, if the Chief Disciplinary Counsel determines that Just Cause does not exist to proceed on the Complaint, the Chief Disciplinary Counsel shall place the Complaint on a Summary Disposition Panel docket. At the Summary Disposition Panel docket, the Chief Disciplinary Counsel will present the Complaint together with any information, documents, evidence, and argument deemed necessary and appropriate by the Chief Disciplinary Counsel, without the presence of the Complainant or Respondent. The Summary Disposition Panel shall determine whether the Complaint should be dismissed or should proceed. If the Summary Disposition Panel dismisses the Complaint, both the Complainant and Respondent will be so notified. There is no appeal from a determination by the Summary Disposition Panel that the Complaint should be dismissed or should proceed. All Complaints presented to the Summary Disposition Panel and not dismissed shall be placed on the Hearing Docket. The fact that a Complaint was placed on the Summary Disposition Panel Docket and not dismissed is wholly inadmissible for any purpose in the instant or any subsequent Disciplinary Proceeding or Disciplinary Action. Files of dismissed Disciplinary Proceedings will be retained for one hundred eighty days, after which time the files may be destroyed. No permanent record will be kept of Complaints dismissed except to the extent necessary for statistical reporting purposes. In all instances where a Complaint is dismissed by a Summary Disposition Panel other than where the attorney is deceased or is not licensed to practice law in the State of Texas, the Chief Disciplinary Counsel shall refer the Inquiry to a voluntary mediation and dispute resolution procedure.

Rule 2.14. Proceeding Upon a Determination of Just Cause

All rights characteristically reposed in a client by the common law of this State as to every Complaint not dismissed by the Summary Disposition Panel are vested in the Commission.

A. Client of Chief Disciplinary Counsel: The Commission is the client of the Chief Disciplinary Counsel for every Complaint not dismissed by the Summary Disposition Panel.

B. Interim Suspension: In any instance in which the Chief Disciplinary Counsel reasonably believes based upon investigation of the Complaint that the Respondent
poses a substantial threat of irreparable harm to clients or prospective clients, the Chief Disciplinary Counsel may seek and obtain authority from the Commission to pursue interim suspension of the Respondent’s license in accordance with Part XIV of these rules.

C. Disability: In any instance in which the Chief Disciplinary Counsel reasonably believes based upon investigation of the Complaint that the Respondent is suffering from a Disability to such an extent that either (a) the Respondent’s continued practice of law poses a substantial threat of irreparable harm to client or prospective clients; or (b) the Respondent is so impaired as to be unable to meaningfully participate in the preparation of a defense, the Chief Disciplinary Counsel shall seek and obtain client authority to refer the Complaint to the Board of Disciplinary Appeals pursuant to Part XII of these rules.

D. Notification of Complaint: For each Complaint not dismissed by a Summary Disposition Panel, the Chief Disciplinary Counsel shall give the Respondent written notice of the acts and/or omissions engaged in by the Respondent and of the Texas Disciplinary Rules of Professional Conduct that the Chief Disciplinary Counsel contends are violated by the alleged acts and/or omissions. Such notice shall be given by certified mail, return receipt requested, sent to the Respondent at the Address.

Rule 2.15. Election

A Respondent given written notice of the allegations and rule violations complained of, in accordance with Rule 2.14, shall notify the Chief Disciplinary Counsel whether the Respondent seeks to have the Complaint heard in a district court of proper venue, with or without a jury, or by an Evidentiary Panel of the Committee. The election must be in writing and served upon the Chief Disciplinary Counsel no later than twenty days after the Respondent’s receipt of written notification pursuant to Rule 2.14. If the Respondent timely elects to have the Complaint heard in a district court, the matter will proceed in accordance with Part III hereof. If the Respondent timely elects to have the Complaint heard by an Evidentiary Panel, the matter will proceed in accordance with Rules 2.17 and 2.18. A Respondent’s failure to timely file an election shall conclusively be deemed as an affirmative election to proceed in accordance with Rules 2.17 and 2.18.

Rule 2.16. Confidentiality

A. Disciplinary Proceedings are strictly confidential and not subject to disclosure, except by court order or as otherwise provided in this Rule 2.16.

B. The pendency, subject matter and status of a Disciplinary Proceeding may be disclosed by Complainant, Respondent or Chief Disciplinary Counsel if the Respondent has waived confidentiality or the Disciplinary Proceeding is based upon a conviction for a serious crime.
Rule 2.16.  Texas Rules of Disciplinary Procedure

C. While Disciplinary Proceedings are confidential, facts and evidence that are discoverable elsewhere are not made confidential merely because they are discussed or introduced in the course of a disciplinary proceeding.

D. The deliberations and voting of an Evidentiary Panel are strictly confidential and not subject to discovery. No person is competent to testify as to such deliberations and voting.

E. If the Evidentiary Panel finds that professional misconduct has occurred and imposes any sanction other than a private reprimand, all information, documents, statements and other information coming to the attention of the Evidentiary Panel shall be, upon request, made public. However, the Chief Disciplinary Counsel may not disclose work product or privileged attorney-client communications without the consent of the client.

Rule 2.17.  Evidentiary Hearings

Within fifteen days of the earlier of the date of Chief Disciplinary Counsel’s receipt of Respondent’s election or the day following the expiration of Respondent’s right to elect, the chair of a Committee having proper venue shall appoint an Evidentiary Panel to hear the Complaint. The Evidentiary Panel may not include any person who served on a Summary Disposition Docket panel that heard the Complaint and must have at least three members but must have no more than one-half as many members as on the Committee. Each Evidentiary Panel must have a ratio of two attorney members for every public member. Proceedings before an Evidentiary Panel of the Committee include:

A.  **Evidentiary Petition and Service:** Not more than sixty days from the earlier of receipt of Respondent’s election or Respondent’s deadline to elect to proceed before an Evidentiary Panel, the Chief Disciplinary Counsel shall file with the Evidentiary Panel an Evidentiary Petition in the name of the Commission. The Evidentiary Petition shall be served upon the Respondent in accordance with Rule 2.09 and must contain:

1. Notice that the action is brought by the Commission for Lawyer Discipline, a committee of the State Bar.

2. The name of the Respondent and the fact that he or she is an attorney licensed to practice law in the State of Texas.

3. Allegations necessary to establish proper venue.

4. A description of the acts and conduct that gave rise to the alleged Professional Misconduct in detail sufficient to give fair notice to the Respondent of the claims made, which factual allegations may be grouped in one or more counts based upon one or more Complaints.
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5. A listing of the specific rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking Sanctions.

6. A demand for judgment that the Respondent be disciplined as warranted by the facts and for any other appropriate relief.

7. Any other matter that is required or may be permitted by law or by these rules.

B. **Answer:** A responsive pleading either admitting or denying each specific allegation of Professional Misconduct must be filed by or on behalf of the Respondent no later than 5:00 p.m. on the first Monday following the expiration of twenty days after service of the Evidentiary Petition.

C. **Default:** A failure to file an answer within the time permitted constitutes a default, and all facts alleged in the Evidentiary Petition shall be taken as true for the purposes of the Disciplinary Proceeding. Upon a showing of default, the Evidentiary Panel shall enter an order of default with a finding of Professional Misconduct and shall conduct a hearing to determine the Sanctions to be imposed.

D. **Request for Disclosure:** The Commission or Respondent may obtain disclosure from the other party of the information or material listed below by serving the other party, no later than thirty days before the first setting of the hearing. The responding party must serve a written response on the requesting party within thirty days after service of the request, except that a Respondent served with a request before the answer is due need not respond until fifty days after service of the request. A party who fails to make, amend, or supplement a disclosure in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the panel finds that there was good cause for the failure to timely make, amend, or supplement the disclosure response; or the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other party. No objection or assertion of work product is permitted to a request under this Rule. A party may request disclosure of any or all of the following:

1. The correct names of the parties to the Disciplinary Proceeding.

2. In general, the factual bases of the responding party’s claims or defenses (the responding party need not marshal all evidence that may be offered at trial).

3. The name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person’s connection with the disciplinary matter.
Rule 2.17. Texas Rules of Disciplinary Procedure

4. For any testifying expert, the expert’s name, address, and telephone number; the subject matter on which the expert will testify, and the general substance of the expert’s mental impressions and opinions and a brief summary of the basis for them.

5. Any witness statements.

E. *Limited Discovery:* In addition to the Request for Disclosure, the Commission and the Respondent may conduct further discovery with the following limitations:

1. All discovery must be conducted during the discovery period, which begins when the Evidentiary Petition is filed and continues until thirty days before the date set for hearing.

2. Each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions.

3. Any party may serve on the other party no more than twenty-five written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.

4. Any party may serve on the other party requests for production and inspection of documents and tangible things.

5. Any party may serve on the other party requests for admission.

F. *Modification of Discovery Limitations:* Upon a showing of reasonable need, the Evidentiary Panel chair may modify the discovery limitations set forth in Rule 2.17E. The parties may by agreement modify the discovery limitations set forth in Rule 2.17E.

G. *Discovery Dispute Resolution:* Except where modified by these rules, all discovery disputes shall be ruled upon by the Evidentiary Panel chair generally in accord with the Texas Rules of Civil Procedure; provided, however, that no ruling upon a discovery dispute shall be a basis for reversal solely because it fails to strictly comply with the Texas Rules of Civil Procedure.

H. *Subpoena Power:* Commission or Respondent may compel the attendance of witnesses, including the Respondent, and the production of books, documents, papers, banking records, and other things by subpoena. The subpoena must notify the witness of the time, date, and place of appearance and must contain a description of the materials to be produced. Subpoenas must be in writing and signed and issued by the Evidentiary Panel chair. The party seeking the subpoena shall submit it in a proper form and is responsible for securing service. Any contest between the Commission and the Respondent about the materiality of the testimony or production
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sought by a subpoena shall be determined by the Evidentiary Panel chair, and is subject to review. Subpoenas must be served on witnesses personally or in accordance with Rule 21a of the Texas Rules of Civil Procedure. Proof of service shall be by certification of the server or by the return receipt. The subpoena is enforceable by the district court of the county in which the attendance or production is required. Witnesses shall be paid witness fees and mileage the same as for a district court.

I. Enforcement of Subpoenas and Examination Before a District Judge: If any witness, including the Respondent, fails or refuses to appear or to produce the things named in the subpoena, or refuses to be sworn or to affirm or to testify, the witness may be compelled to appear and produce tangible evidence and to testify at a hearing before a district judge of the county in which the subpoena was served. The application for such a hearing is to be styled “In re: Hearing Before The District Grievance Committee.” The court shall order a time, date, and place for the hearing and shall notify the Commission, the Respondent, and the witness. Unless the Respondent requests a public hearing, the proceedings before the court shall be closed and all records relating to the hearing shall be sealed and made available only to the Commission, the Respondent, or the witness. If the witness fails or refuses to appear, testify, or produce such tangible evidence, he or she shall be punished for civil contempt.

J. Right to Counsel: The Respondent and the Complainant may, if they so choose, have counsel present during any evidentiary hearing.

K. Alternative Dispute Resolution: Upon motion made or otherwise, the Evidentiary Panel Chair may order the Commission and the Respondent to participate in mandatory alternative dispute resolution as provided by Chapter 154 of the Civil Practice and Remedies Code or as otherwise provided by law when deemed appropriate.

L. Evidence: The Respondent, individually or through his or her counsel if represented, and the Commission, through the Chief Disciplinary Counsel, may, if they so choose, offer evidence, examine witnesses and present argument. Witness examination may be conducted only by the Commission, the Respondent, and the panel members. The inability or failure to exercise this opportunity does not abate or preclude further proceedings. The Evidentiary Panel chair shall admit all such probative and relevant evidence as he or she deems necessary for a fair and complete hearing, generally in accord with the Texas Rules of Evidence; provided, however, that admission or exclusion of evidence shall be in the discretion of the Evidentiary Panel chair and no ruling upon the evidence shall be a basis for reversal solely because it fails to strictly comply with the Texas Rules of Evidence.

M. Burden of Proof: The burden of proof is upon the Commission for Lawyer Discipline to prove the material allegations of the Evidentiary Petition by a preponderance of the evidence.
N. **Record of the Hearing:** A verbatim record of the proceedings will be made by a certified shorthand reporter in a manner prescribed by the Board of Disciplinary Appeals. In the event of an appeal from the Evidentiary Panel to the Board of Disciplinary Appeals, the party initiating the appeal shall pay the costs of preparation of the transcript. Such costs shall be taxed at the conclusion of the appeal by the Board of Disciplinary Appeals.

O. **Setting:** Evidentiary Panel proceedings must be set for hearing with a minimum of forty-five days’ notice to all parties unless waived by all parties. Evidentiary Panel proceedings shall be set for hearing on the merits on a date not later than 180 days after the date the answer is filed, except for good cause shown. If the Respondent fails to answer, a hearing for default may be set at any time not less than ten days after the answer date without further notice to the Respondent. No continuance may be granted unless required by the interests of justice.

P. **Decision:** After conducting the Evidentiary Hearing, the Evidentiary Panel shall issue a judgment within thirty days. In any Evidentiary Panel proceeding where Professional Misconduct is found to have occurred, such judgment shall include findings of fact, conclusions of law and the Sanctions to be imposed. The Evidentiary Panel may:

1. dismiss the Disciplinary Proceeding and refer it to the voluntary mediation and dispute resolution procedure;

2. find that the Respondent suffers from a disability and forward that finding to the Board of Disciplinary Appeals for referral to a district disability committee pursuant to Part XII; or

3. find that Professional Misconduct occurred and impose Sanctions.

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1 **So in order.**

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**Rule 2.18. Imposition of Sanctions**

The Evidentiary Panel may, in its discretion, conduct a separate hearing and receive evidence as to the appropriate Sanctions to be imposed. Indefinite Disability sanction is not an available Sanction in a hearing before an Evidentiary Panel. In determining the appropriate Sanctions, the Evidentiary Panel shall consider:

A. The nature and degree of the Professional Misconduct for which the Respondent is being sanctioned;

B. The seriousness of and circumstances surrounding the Professional Misconduct;

C. The loss or damage to clients;

D. The damage to the profession;
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E. The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found;

F. The profit to the attorney;

G. The avoidance of repetition;

H. The deterrent effect on others;

I. The maintenance of respect for the legal profession;

J. The conduct of the Respondent during the course of the Disciplinary Proceeding;

In addition, the Respondent’s disciplinary record, including any private reprimands, is admissible on the appropriate Sanction to be imposed. Respondent’s Disability may not be considered in mitigation, unless Respondent demonstrates that he or she is successfully pursuing in good faith a program of recovery or appropriate course of treatment.

Rule 2.19. Terms of Judgment

In any judgment of disbarment or suspension that is not stayed, the Evidentiary Panel shall order the Respondent to surrender his or her law license and permanent State Bar card to Chief Disciplinary Counsel for transmittal to the Clerk of the Supreme Court. In all judgments imposing disbarment or suspension, the Evidentiary Panel shall enjoin the Respondent from practicing law or from holding himself or herself out as an attorney eligible to practice law during the period of disbarment or suspension. In all judgments of disbarment, suspension, or reprimand, the Evidentiary Panel shall make all other orders as it finds appropriate, including probation of all or any portion of suspension.

Rule 2.20. Restitution

In all cases in which the proof establishes that the Respondent’s misconduct involved the misappropriation of funds and the Respondent is disbarred or suspended, the panel’s judgment must require the Respondent to make restitution during the period of suspension, or before any consideration of reinstatement from disbarment, and must further provide that its judgment of suspension shall remain in effect until evidence of satisfactory restitution is made by Respondent and verified by Chief Disciplinary Counsel.

Rule 2.21. Notice of Decision

The Complainant, the Respondent, and the Commission must be notified in writing of the judgment of the Evidentiary Panel. The notice sent to the Respondent and the Commission must clearly state that any appeal of the judgment must be filed with the Board of Disciplinary Appeals within thirty days of the date of the notice. If the Evidentiary Panel finds that the Respondent committed professional misconduct, a copy of the Evidentiary Petition and the judgment shall be
Rule 2.21.  

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transmitted by the Office of the Chief Disciplinary Counsel to the Clerk of the Supreme Court. The Clerk of the Supreme Court shall make an appropriate notation on the Respondent’s permanent record.

Rule 2.22.  

Post Judgment Motions

Any motion for new hearing or motion to modify the judgment must comport with the provisions of the applicable Texas Rules of Civil Procedure pertaining to motions for new trial or to motions to modify judgments.

Rule 2.23.  

Probated Suspension—Revocation Procedure

If all or any part of a suspension from the practice of law is probated under this Part II, the Board of Disciplinary Appeals is hereby granted jurisdiction for the full term of suspension, including any probationary period, to hear a motion to revoke probation. If the Chief Disciplinary Counsel files a motion to revoke probation, it shall be set for hearing within thirty days of service of the motion upon the Respondent. Service upon the Respondent shall be sufficient if made in accordance with Rule 21a of the Texas Rules of Civil Procedure. Upon proof, by a preponderance of the evidence, of a violation of probation, the same shall be revoked and the attorney suspended from the practice of law for the full term of suspension without credit for any probationary time served. The Board of Disciplinary Appeals’ Order revoking a probated suspension cannot be superseded or stayed.

Rule 2.24.  

Appeals by Respondent or Commission:

The Respondent or Commission may appeal the judgment to the Board of Disciplinary Appeals. Such appeals must be on the record, determined under the standard of substantial evidence. Briefs may be filed as a matter of right. The time deadlines for such briefs shall be promulgated by the Board of Disciplinary Appeals. An appeal, if taken, is perfected when a written notice of appeal is filed with the Board of Disciplinary Appeals. The notice of appeal must reflect the intention of the Respondent or the Commission to appeal and identify the decision from which appeal is perfected. The notice of appeal must be filed within thirty days after the date of judgment, except that the notice of appeal must be filed within ninety days after the date of judgment if any party timely files a motion for new trial or a motion to modify the judgment.

Rule 2.25.  

No Supersedeas

An Evidentiary Panel’s order of disbarment cannot be superseded or stayed. The Respondent may within thirty days from entry of judgment petition the Evidentiary Panel to stay a judgment of suspension. The Respondent carries the burden of proof by preponderance of the evidence to establish by competent evidence that the Respondent’s continued practice of law does not pose a continuing threat to the welfare of Respondent’s clients or to the public. An order of suspension must be stayed during the pendency of any appeals therefrom if the Evidentiary Panel finds that the Respondent has met that burden of proof. An Evidentiary Panel may condition its stay upon
reasonable terms, which may include, but are not limited to, the cessation of any practice found to constitute Professional Misconduct, or it may impose a requirement of an affirmative act such as an audit of a Respondent’s client trust account.

Rule 2.26. Disposition on Appeal

The Board of Disciplinary Appeals may, in any appeal of the judgment of an Evidentiary Panel within its jurisdiction:

A. Affirm the decision of the Evidentiary Panel, in whole or in part;

B. Modify the Evidentiary Panel’s judgment and affirm it as modified;

C. Reverse the decision of the Evidentiary Panel, in whole or in part, and render the judgment that the Evidentiary Panel should have rendered;

D. Reverse the Evidentiary Panel’s judgment and remand the Disciplinary Proceeding for further proceeding by either the Evidentiary Panel or a statewide grievance committee panel composed of members selected from state bar districts other than the district from which the appeal was taken;

E. Vacate the Evidentiary Panel’s judgment and dismiss the case; or

F. Dismiss the appeal.

Rule 2.27. Remand to Statewide Grievance Committee Panel

In determining whether a remand is heard by a statewide grievance committee panel, the Board of Disciplinary Appeals must find that good cause was shown in the record on appeal. The Board of Disciplinary Appeals shall randomly select the members of the statewide grievance committee panel from grievance committees other than the district from which the appeal was taken. Six such members shall be selected, four of whom are attorneys and two of whom are public members. The statewide grievance committee panel, once selected, shall have all duties and responsibilities of the Evidentiary Panel for purposes of the remand.

Rule 2.28. Appeal to Supreme Court of Texas

An appeal from the decision of the Board of Disciplinary Appeals on an Evidentiary Proceeding is to the Supreme Court of Texas in accordance with Rule 7.11.
Rule 3.01. Disciplinary Petition

If the Respondent timely elects to have the Complaint heard by a district court, with or without a jury, in accordance with Rule 2.15, the Chief Disciplinary Counsel shall file not more than sixty days after receipt of Respondent’s election to proceed in district court a Disciplinary Petition in the name of the Commission with the Clerk of the Supreme Court of Texas. The petition must contain:

A. Notice that the action is brought by the Commission for Lawyer Discipline, a committee of the State Bar.

B. The name of the Respondent and the fact that he or she is an attorney licensed to practice law in the State of Texas.

C. Allegations necessary to establish proper venue.

D. A description of the acts and conduct that gave rise to the alleged Professional Misconduct in detail sufficient to give fair notice to Respondent of the claims made, which factual allegations may be grouped in one or more counts based upon one or more Complaints.

E. A listing of the specific rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking Sanctions.

F. A demand for judgment that the Respondent be disciplined as warranted by the facts and for any other appropriate relief.

G. Any other matter that is required or may be permitted by law or by these rules.

The Disciplinary Petition must be filed with the Clerk of the Supreme Court of Texas.

Rule 3.02. Assignment of Judge

Upon receipt of a Disciplinary Petition, the Clerk of the Supreme Court of Texas shall docket the same and promptly bring the Petition to the attention of the Supreme Court. The Supreme Court shall promptly appoint an active district judge who does not reside in the Administrative Judicial District in which the Respondent resides to preside in the case. Should the judge so appointed be unable to fulfill the appointment, he or she shall immediately notify the Clerk of the Supreme Court, and the Supreme Court shall appoint a replacement judge. The judge appointed shall be subject to objection, recusal or disqualification as provided by law. The objection, motion seeking recusal or motion to disqualify must be filed by either party not later than sixty days from the date the Respondent is served with the Supreme Court’s order appointing the judge. In the event of
objection, recusal or disqualification, the Supreme Court shall appoint a replacement judge within thirty days.

Rule 3.03. Filing, Service and Venue:

After the trial judge has been appointed, the Clerk of the Supreme Court shall promptly forward the Disciplinary Petition and a copy of the Supreme Court’s appointing Order to the district clerk of the county of alleged venue. Upon receipt of the Disciplinary Petition and copy of the Supreme Court’s appointing Order, the district clerk shall transmit a copy of the Supreme Court’s appointing Order to the Chief Disciplinary Counsel. The Respondent shall then be served as in civil cases generally with a copy of the Disciplinary Petition and a copy of the Supreme Court’s appointing Order. In a Disciplinary Action, venue shall be in the county of Respondent’s principal place of practice; or if the Respondent does not maintain a place of practice within the State of Texas, in the county of Respondent’s residence; or if the Respondent maintains neither a residence nor a place of practice within the State of Texas, then in the county where the alleged Professional Misconduct occurred, in whole or in part. In all other instances, venue is in Travis County, Texas.

Rule 3.04. Answer of the Respondent

The answer of the Respondent must follow the form of answers in civil cases generally and must be filed no later than 10:00 a.m. on the first Monday following the expiration of twenty days after service upon the Respondent.

Rule 3.05. Discovery

Discovery is to be conducted as in civil cases generally, except that the following matters are not discoverable:

A. The discussions, thought processes, and individual votes of the members of a Summary Disposition Panel.

B. The thought processes of the Chief Disciplinary Counsel.

C. Any communication to or from the Chief Disciplinary Counsel that would be privileged in the case of a private attorney representing a private litigant.

Rule 3.06. Trial by Jury

In a Disciplinary Action, either the Respondent or the Commission shall have the right to a jury trial upon timely payment of the required fee and compliance with the provisions of Rule 216, Texas Rules of Civil Procedure. The Complainant has no right to demand a jury trial.
Rule 3.07.

**Trial Setting**

Disciplinary Actions shall be set for trial on a date not later than 180 days after the date the answer is filed, except for good cause shown. If the Respondent fails to answer, a default may be taken at any time appropriate under the Texas Rules of Civil Procedure. No motion for continuance, resetting, or agreed pass may be granted unless required by the interests of justice.

Rule 3.08.  **Additional Rules of Procedure in the Trial of Disciplinary Actions**

In all Disciplinary Actions brought under this part, the following additional rules apply:

A. Disciplinary Actions are civil in nature.

B. Except as varied by these rules, the Texas Rules of Civil Procedure apply.

C. Disciplinary Actions must be proved by a preponderance of the evidence.

D. The burden of proof in a Disciplinary Action seeking Sanction is on the Commission. The burden of proof in reinstatement cases is upon the applicant.

E. The parties to a Disciplinary Action may not seek abatement or delay of trial because of substantial similarity to the material allegations in any other pending civil or criminal case.

F. The unwillingness or neglect of a Complainant to assist in the prosecution of a Disciplinary Action, or a compromise and settlement between the Complainant and the Respondent, does not alone justify the abatement or dismissal of the action.

G. It shall be the policy of the Commission to participate in alternative dispute resolution procedures where feasible; provided, however, that Disciplinary Actions shall be exempt from any requirements of mandatory alternative dispute resolution procedures as provided by Chapter 154 of the Civil Practice and Remedies Code or as otherwise provided by law.

Rule 3.09. **Judgment**

If the trial court fails to find from the evidence in a case tried without a jury, or from the verdict in a jury trial, that the Respondent’s conduct constitutes Professional Misconduct, the court shall render judgment accordingly. If the court finds that the Respondent’s conduct does constitute Professional Misconduct, the court shall determine the appropriate Sanction or Sanctions to be imposed. If the court finds that the Respondent committed an act or acts of Professional Misconduct, the court shall direct transmittal of certified copies of the judgment and all trial pleadings to the Clerk of the Supreme Court. The Clerk of the Supreme Court shall make an appropriate notation on the Respondent’s permanent record. The trial court shall promptly enter judgment after the close of evidence (in the case of a nonjury trial) or after the return of the jury’s verdict. Mandamus
lies in the Supreme Court of Texas to enforce this provision, upon the petition of either the Respondent or the Chief Disciplinary Counsel.

Rule 3.10. Imposition of Sanctions

The trial court may, in its discretion, conduct a separate hearing and receive evidence as to the appropriate Sanctions to be imposed. Private reprimand is not an available Sanction. Indefinite Disability suspension is not an available Sanction. In determining the appropriate Sanctions, the court shall consider:

A. The nature and degree of the Professional Misconduct for which the Respondent is being sanctioned;
B. The seriousness of and circumstances surrounding the Professional Misconduct;
C. The loss or damage to clients;
D. The damage to the profession;
E. The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found;
F. The profit to the attorney;
G. The avoidance of repetition;
H. The deterrent effect on others;
I. The maintenance of respect for the legal profession;
J. The conduct of the Respondent during the course of the Committee action;
K. The trial of the case; and
L. Other relevant evidence concerning the Respondent’s personal and professional background.

In addition, the Respondent’s disciplinary record, including any private reprimands, is admissible on the appropriate Sanction to be imposed. Respondent’s Disability may not be considered in mitigation, unless Respondent demonstrates that he or she is successfully pursuing in good faith a program of recovery or appropriate course of treatment.

Rule 3.11. Terms of Judgment

In any judgment of disbarment or suspension that is not stayed, the court shall order the Respondent to surrender his or her law license and permanent State Bar card to Chief Disciplinary Counsel for transmittal to the Clerk of the Supreme Court. In all judgments imposing disbarment or
Rule 3.11. Texas Rules of Disciplinary Procedure

suspension, the court shall enjoin the Respondent from practicing law or from holding himself or herself out as an attorney eligible to practice law during the period of disbarment or suspension. In all judgments of disbarment, suspension, or reprimand, the court shall make all other orders as it finds appropriate, including probation of all or any portion of suspension. The continuing jurisdiction of the trial court to enforce a judgment does not give a trial court authority to terminate or reduce a period of active or probated suspension previously ordered.

Rule 3.12. Restitution

In all cases in which the proof establishes that the Respondent’s conduct involved misapplication of funds and the judgment is one disbarring or suspending the Respondent, the judgment must require the Respondent to make restitution during the period of suspension, or before any consideration of reinstatement from disbarment, and shall further provide that a judgment of suspension shall remain in effect until proof is made of complete restitution.

Rule 3.13. Probation Suspension—Revocation Procedure

If all or any part of a suspension from the practice of law is probated under this Part III, the court retains jurisdiction during the full term of suspension, including any probationary period, to hear a motion to revoke probation. If the Chief Disciplinary Counsel files a motion to revoke probation, it shall be set for hearing before the court without the aid of a jury within thirty days of service of the motion upon the Respondent. Service upon the Respondent shall be sufficient if made in accordance with Rule 21a of the Texas Rules of Civil Procedure. Upon proof by a preponderance of the evidence of a violation of probation, the same shall be revoked and the attorney suspended from the practice of law for the full term of suspension without credit for any probationary time served.


A district court judgment of disbarment or an order revoking probation of a suspension from the practice of law cannot be superseded or stayed. The Respondent may within thirty days from entry of judgment petition the court to stay a judgment of suspension. The Respondent carries the burden of proof by preponderance of the evidence to establish by competent evidence that the Respondent’s continued practice of law does not pose a continuing threat to the welfare of Respondent’s clients or to the public. A judgment of suspension shall be stayed during the pendency of any appeals therefrom if the district court finds that the Respondent has met that burden of proof. The district court may condition its stay upon reasonable terms, which may include, but are not limited to, the cessation of any practice found to constitute Professional Misconduct, or it may impose a requirement of an affirmative act such as an audit of a Respondent’s client trust account. There is no interlocutory appeal from a court’s stay of a suspension, with or without conditions.
Texas Rules of Disciplinary Procedure

Rule 4.02.

Rule 3.15. Exemption from Cost and Appeal Bond

No cost or appeal bond is required of the Chief Disciplinary Counsel or the Commission. In lieu thereof, when a cost or appeal bond would be otherwise required, a memorandum setting forth the exemption under this rule, when filed, suffices as a cost or appeal bond.

Rule 3.16. Appeals

A final judgment of the district court and any order revoking or refusing to revoke probation of a suspension from the practice of law may be appealed as in civil cases generally.

PART IV. THE COMMISSION FOR LAWYER DISCIPLINE

Rule 4.01. Composition and Membership

The Commission for Lawyer Discipline is hereby created as a permanent committee of the State Bar and is not subject to dissolution by the Board under Article VIII of the State Bar Rules. The Commission must be composed of twelve members. Six members shall be attorneys licensed to practice law in the State of Texas and in good standing as members of the State Bar. Six members shall be public members who have, other than as consumers, no interest, direct or indirect, in the practice of law or the profession of law. No person may serve as a member of the Commission while he or she is a member of a Committee, an officer or Director of the State Bar, an employee of the State Bar, or an officer or director of the Texas Young Lawyers Association; provided, however, the Chairman of the Board of the State Bar shall appoint a Director of the State Bar as an adviser to the Commission and a Director of the State Bar as an alternate adviser to the Commission, and the President of the Texas Young Lawyers Association shall appoint a Director of the Texas Young Lawyers Association as an adviser to the Commission. Members of the Commission and its advisers will be compensated for their reasonable, actual, and necessary expenses, and members, but not advisers, will be compensated for their work as determined by the Board to be appropriate.

Rule 4.02. Appointment and Terms

Except for initial appointments as set forth in Rule 4.03 hereof, Commission members will serve three-year terms unless sooner terminated through disqualification, resignation, or other cause. Terms begin on September 1 of the year and expire on August 31 of the third year thereafter. The lawyer members of the Commission are appointed by the President of the State Bar, subject to the Board’s concurrence, no later than June 1 of the year. The public members are appointed by the Supreme Court of Texas no later than June 1 of the year. Members may be removed by the Supreme Court, but only for good cause. Vacancies are to be filled in the same manner as term appointments but are only for the unexpired term of the position vacated. Members of the Commission are not eligible for reappointment to more than one additional three-year term.
Rule 4.03. Initial Appointments

Two lawyers shall initially be appointed for a term to expire on August 31 after at least twelve months of service; two lawyers shall initially be appointed for a term to expire on August 31 after twenty-four months of service; and two lawyers shall initially be appointed for a term to expire on August 31 after thirty-six months of service. One public member shall initially be appointed for a term to expire on August 31 after at least twelve months of service; one public member shall initially be appointed for a term to expire on August 31 after twenty-four months of service; and one public member shall initially be appointed for a term to expire on August 31 after thirty-six months of service. After the terms provided above, all terms shall be as provided in Rule 4.02.

Rule 4.04. Oath of Committee Members

As soon as possible after appointment, each newly appointed member of the Commission for Lawyer Discipline shall take the following oath to be administered by any person authorized by law to administer oaths:

“I do solemnly swear (or affirm) that I will faithfully execute my duties as a member of the Commission for Lawyer Discipline, as required by the Texas Rules of Disciplinary Procedure, and will, to the best of my ability, preserve, protect, and defend the Constitution and laws of the United States and of the State of Texas. I further solemnly swear (or affirm) that I will keep secret all such matters and things as shall come to my knowledge as a member of the Commission for Lawyer Discipline arising from or in connection with each Disciplinary Action and Disciplinary Proceeding unless permitted to disclose the same in accordance with the Rules of Disciplinary Procedure or unless ordered to do so in the course of a judicial proceeding or a proceeding before the Board of Disciplinary Appeals. I further solemnly swear (or affirm) that I have neither directly nor indirectly paid, offered, or promised to pay, contributed any money or valuable thing, or promised any public or private office to secure my appointment. So help me God.”

Rule 4.05. Chair

The President of the State Bar, subject to the concurrence of the Board, shall annually designate a lawyer member to chair the Commission and another member to serve as vice-chair, each for a one-year term.

Rule 4.06. Duties and Authority of the Commission

The Commission has the following duties and responsibilities:

A. To exercise, in lawyer disciplinary and disability proceedings only, all rights characteristically reposed in a client by the common law of this State for all Complaints not dismissed by a Summary Disposition Panel.
B. To monitor and, from time to time as appropriate, to evaluate and report to the Board on the performance of the Chief Disciplinary Counsel.

C. To retain special counsel or local counsel when necessary.

D. To recommend to the Board such educational programs on legal ethics and lawyer discipline as it may consider advisable.

E. To recommend to the Board an annual budget for the operation of the attorney professional disciplinary and disability system.

F. To meet monthly or at such other times, in such places, and for such periods of time as the business of the Commission requires.

G. To draft and recommend for adoption to the Board the Commission’s internal operating rules and procedures, which rules and procedures, as adopted by the Board, will then be submitted to the Supreme Court for approval and, after approval, be published in the Texas Bar Journal.

H. To recommend to the Board the removal, for cause, of members of Committees.

I. To refer to an appropriate disability screening committee information coming to its attention indicating that an attorney is disabled physically, mentally, or emotionally, or by the use or abuse of alcohol or other drugs.

J. To report to the Board, at each regular meeting, and to the Grievance Oversight Committee, at least annually, on the state of the attorney professional disciplinary and disability system and to make recommendations and proposals to the Board on the refinement and improvement of the system.

K. To formulate and recommend to the Board for adoption a system for monitoring disabled lawyers.

L. To notify each jurisdiction in which an attorney is admitted to practice law of any Sanction imposed in this State, other than a private reprimand (which may include restitution and payment of Attorneys’ Fees), and any disability suspension, resignation, and reinstatement.

M. To provide statistics and reports on lawyer discipline to the National Discipline Data Bank maintained by the American Bar Association.

N. To maintain, subject to the limitations elsewhere herein provided, permanent records of disciplinary and disability matters; and to transmit notice of all public discipline imposed against an attorney, suspensions due to Disability, and reinstatements to the National Discipline Data Bank maintained by the American Bar Association.
Rule 4.06. To make recommendations to the Board on the establishment and maintenance of regional offices as required for the expeditious handling of Inquiries, Complaints, and other disciplinary matters.

Rule 4.07. Meetings

A. Seven members shall constitute a quorum of the Commission, except that a panel of three members may consider such matters as may be specifically delegated by the Chair, or, in the absence of the Chair, the Vice-Chair, of the Commission. The Commission and each of its panels may act only with the concurrence of a majority of those members present and voting.

B. In any event in which the Commission shall conduct business in a panel of three members, at least one of the members assigned to each such panel shall be a public member of the Commission.

C. The Commission may, at the instance of the Chair, or, in the absence of the Chair, at the instance of the Vice-Chair of the Commission, conduct its business by conference telephone calls. Any action taken in a telephone conference must be reduced to writing and signed by each participant certifying the accuracy of the written record of action taken.

Rule 4.08. Funding

The State Bar shall allocate sufficient funds to pay all reasonable and necessary expenses incurred in the discharge of the duties of the Commission; of the Chief Disciplinary Counsel; of the Board of Disciplinary Appeals; of Committees and their individual members; and of witnesses. Further, the State Bar shall allocate funds to pay all other reasonable and necessary expenses to administer the disciplinary and disability system effectively and efficiently.

Rule 4.09. Open Meetings and Open Records:

The Commission is not a “governmental body” as that term is defined in Section 551.001(3) of V.T.C.A., Government Code, and is not subject to either the provisions of the Open Meetings Act or the Open Records Act.

PART V. CHIEF DISCIPLINARY COUNSEL

Rule 5.01. Selection

The General Counsel of the State Bar shall, subject to the provisions of this Rule, serve as the Chief Disciplinary Counsel under these rules. If the Commission determines that the General Counsel of the State Bar should no longer function as the Chief Disciplinary Counsel, then the
Commission shall notify the Board of such decision and, in the next succeeding fiscal year of the State Bar, funds shall be provided to the Commission sufficient for it to select and hire a lawyer as Chief Disciplinary Counsel and sufficient deputies and assistants as may be required to operate the disciplinary and disability system effectively and efficiently. The Commission’s determination must be made, if at all, and the notification herein provided must be given, if at all, during the months of January or February 1993, or during the same months of any odd numbered year thereafter. In such event, the Commission shall alone possess the right of selection, but nothing herein precludes its employment of the General Counsel or a member of the General Counsel’s staff for such positions.

**Rule 5.02. Duties**

In addition to the other disciplinary duties set forth in these rules, the Chief Disciplinary Counsel shall:

A. Review and screen all information coming to his or her attention or to the attention of the Commission relating to lawyer misconduct. Such review may encompass whatever active investigation is deemed necessary by the Chief Disciplinary Counsel independent of the filing of a writing.

B. Reject all matters and Inquiries not constituting a Complaint and so advise the Complainant.

C. Investigate Complaints to ascertain whether Just Cause exists.

D. Recommend dismissal of a Complaint, if appropriate, to a Summary Disposition Panel of appropriate venue.

E. Move the Board of Disciplinary Appeals to transfer a pending Disciplinary Proceeding from one Committee to another within the same District if the Committee fails or refuses to hear the Disciplinary Proceeding.

F. Move the Board of Disciplinary Appeals to transfer matters from one Committee to another, whether or not within the same District, when the requirements of fairness to the Complainant or the Respondent require.

G. Represent the Commission in all Complaints, Disciplinary Proceedings and Disciplinary Actions in which the Commission is the client.

H. When information regarding a Complaint becomes eligible for public disclosure under these rules, refer a Complaint and information related thereto to any other professional organizations or bodies that he or she deems appropriate for consultation on the nature of the Complaint, the events giving rise to the Complaint, and the proper manner of resolution of the Complaint. The Chief Disciplinary Counsel shall provide the Respondent written notice of the referral at the time it is made. Neither the Chief Disciplinary Counsel nor any person or body acting under these
Rule 5.02. Texas Rules of Disciplinary Procedure

rules is bound by any recommendation of another professional organization to which the Complaint or related information is referred under this Rule.

I. Present cases to Evidentiary Panels of Committees, or in a district court if such has been elected by the Respondent, as provided in these rules, unless disqualified from doing so under the Texas Disciplinary Rules of Professional Conduct.

J. Represent the Commission, if the need arises, before all courts and administrative bodies.

K. Notify the Respondent and the Complainant promptly of the disposition of each Complaint.

L. Upon receiving information of a violation of any term or condition of probation by an attorney suspended from the practice of law where all or any part of the suspension has been probated, file on behalf of the Commission a motion to revoke probation. The motion must state the terms or conditions of the probation and the conduct alleged to violate the same. The Chief Disciplinary Counsel shall cause a copy of the motion to be served on the attorney involved.

M. Perform such other duties relating to disciplinary and disability matters as may be assigned by the Commission.

Rule 5.03. Accountability

On disciplinary and disability matters, the Chief Disciplinary Counsel is accountable only to the Commission.

PART VI. PUBLIC INFORMATION AND ACCESS

Rule 6.01. Availability of Materials

The Commission shall ensure that sufficient copies of these rules, the Texas Disciplinary Rules of Professional Conduct, and forms for the filing of disciplinary Grievances are made available to the public. In addition, the Commission shall make available to the public a brochure, summarizing in plain language the disciplinary and disability system for attorneys in the State of Texas. Such brochure shall be made available in English and in Spanish.

Rule 6.02. Public and Media Inquiries

The Commission shall respond, as appropriate, to all public and media inquiries concerning the operation of the attorney professional disciplinary and disability system, but in so doing may not disclose information that is confidential or privileged. The Commission shall disclose, upon proper request, information in its custody or control that is neither confidential nor privileged.
Any attorney may waive confidentiality and privilege as to his or her disciplinary record by filing an appropriate waiver on a form to be prescribed by the Commission. The Commission shall maintain complete records and files of all disciplinary and disability matters and compile reports and statistics to aid in the administration of the system.

Rule 6.03. Telephone Inquiries

The Commission shall maintain a toll-free telephone number. The toll-free number shall be publicized to ensure that all Texas residents have access to it. Telephone inquiries about specific attorney conduct will not be taken, but the Commission will send a Grievance form to any person or entity inquiring by telephone.

Rule 6.04. Abstracts of Appeals

Any Disciplinary Proceeding appealed to the Board of Disciplinary Appeals shall be abstracted by the Board of Disciplinary Appeals. A copy of the abstract shall be made available to any person or other entity upon proper request and shall be published in the Texas Bar Journal. No information that is otherwise confidential may be disclosed in an abstract under these provisions.

Rule 6.05. Report to the Clerk of the Supreme Court

The final disposition of any Disciplinary Proceeding or Disciplinary Action resulting in the imposition of a Sanction other than a private reprimand (which may include restitution and payment of attorneys’ fees) shall be reported by the Commission to the Clerk of the Supreme Court of Texas.

Rule 6.06. Publication of Court Opinions

All cases involving the Professional Misconduct or Disability of an attorney appealed to the Courts of Appeal or to the Supreme Court of Texas must be published in the official reporter system. This provision takes precedence over the applicable Texas Rules of Appellate Procedure.

Rule 6.07. Publication of Disciplinary Results

The final disposition of all Disciplinary Proceedings and Disciplinary Actions shall be reported in the Texas Bar Journal, and shall be sent for publication to a newspaper of general circulation in the county of the disciplined attorney’s residence or office. Private reprimands (which may include restitution and payment of attorneys’ fees) shall be published in the Texas Bar Journal with the name of the attorney deleted. The Commission shall report all public discipline imposed against an attorney, suspensions due to Disability, and reinstatements to the National Discipline Data Bank of the American Bar Association.
Rule 6.08. Access to Confidential Information

No officer (except the General Counsel when acting in the capacity of Chief Disciplinary Counsel) or Director of the State Bar or any appointed adviser to the Commission shall have access to any confidential records, information, or proceedings relating to any Disciplinary Proceeding, Disciplinary Action, or Disability suspension. The Chief Disciplinary Counsel may provide appropriate information to law enforcement agencies, the Commission on Judicial Conduct and the Supreme Court’s Unauthorized Practice of Law Committee and its subcommittees.

PART VII. BOARD OF DISCIPLINARY APPEALS

Rule 7.01. Membership

The Board of Disciplinary Appeals is hereby established. Its members shall be appointed by the Supreme Court of Texas. The Board of Disciplinary Appeals shall consist of twelve lawyer members with not more than eight of such members being residents of Harris, Dallas, Tarrant, Travis, or Bexar Counties, Texas, and with no more than two members from any one county. The term of office of all members of the Board of Disciplinary Appeals shall be for three years. Members are eligible for appointment to one additional three-year term. Members appointed to fill an unexpired term shall be eligible for reappointment for two subsequent terms. Vacancies shall be filled by appointment of the Supreme Court of Texas. Each member shall continue to perform the duties of office until his or her successor is duly qualified. No person may simultaneously be a member of the Board of Disciplinary Appeals and either the Commission, the Board, or a Committee.

Rule 7.02. Initial Appointments

Three lawyers shall initially be appointed for a term to expire on August 31 after at least twelve months of service; three lawyers shall initially be appointed for a term to expire on August 31 after twenty-four months of service; and three lawyers shall initially be appointed for a term to expire on August 31 after thirty-six months of service. After the terms provided above, all terms shall be as provided in Rule 7.01.

Rule 7.03. Election of Officers

The Board of Disciplinary Appeals shall annually elect members as chair and vice-chair. The chair, or in his or her absence the vice-chair, shall perform the duties normally associated with that office and shall preside over all en banc meetings of the Board of Disciplinary Appeals.

Rule 7.04. Oath of Committee Members

As soon as possible after appointment, each newly appointed member of the Board of Disciplinary Appeals shall take the following oath to be administered by any person authorized by law to administer oaths:
“I do solemnly swear (or affirm) that I will faithfully execute my duties as a member of the Board of Disciplinary Appeals, as required by the Texas Rules of Disciplinary Procedure, and will, to the best of my ability, preserve, protect, and defend the Constitution and laws of the United States and of the State of Texas. I further solemnly swear (or affirm) that I will keep secret all such matters and things as shall come to my knowledge as a member of the Board of Disciplinary Appeals arising from or in connection with each Disciplinary Action and Disciplinary Proceeding unless permitted to disclose the same in accordance with the Rules of Disciplinary Procedure or unless ordered to do so in the course of a judicial proceeding or a proceeding before the Board of Disciplinary Appeals. I further solemnly swear (or affirm) that I have neither directly nor indirectly paid, offered, or promised to pay, contributed any money or valuable thing, or promised any public or private office to secure my appointment. So help me God.”

Rule 7.05. Quorum

Six members constitute a quorum of the Board of Disciplinary Appeals, except that a panel of three members may hear appeals and such other matters as may be specifically delegated to it by the Chair. The Board of Disciplinary Appeals and each of its panels may act only with the concurrence of a majority of those members present and voting.

Rule 7.06. Compensation and Expenses

Members of the Board of Disciplinary Appeals are entitled to reasonable compensation for their services and reimbursement for travel and other expenses incident to the performance of their duties.

Rule 7.07. Recusal and Disqualification of Members

Board of Disciplinary Appeals members shall refrain from taking part in any matter before the Board of Disciplinary Appeals in which recusal or disqualification would be required of a judge similarly situated.

Rule 7.08. Powers and Duties

The Board of Disciplinary Appeals shall exercise the following powers and duties:

A. Propose rules of procedure and administration for its own operation to the Supreme Court of Texas for promulgation.

B. Review the operation of the Board of Disciplinary Appeals and periodically report to the Supreme Court and to the Board.

C. Affirm or reverse a determination by the Chief Disciplinary Counsel that a statement constitutes an Inquiry as opposed to a Complaint.
Rule 7.08. Texas Rules of Disciplinary Procedure

D. Hear and determine appeals by the Respondent or the Commission on the record from the judgment of an Evidentiary Panel. The appellate determination must be made in writing and signed by the chair or vice-chair of the Board of Disciplinary Appeals, or other person presiding.

E. Transfer any pending Disciplinary Proceeding from one Committee to another within the same District if the one Committee fails or refuses to hear the Disciplinary Proceeding.

F. Transfer matters from one Committee to another, whether or not within the same District, when the requirements of fairness to the Complainant or the Respondent require.

G. Hear and determine actions for compulsory discipline under Part VIII.

H. Hear and determine actions for reciprocal discipline under Part IX.

I. Hear and determine actions for disability suspension under Part XII.

J. Exercise all other powers and duties provided in these rules.

Rule 7.09. Meetings

The Board of Disciplinary Appeals shall meet en banc at least once each year at the call of its chair. Its members may meet more often en banc at the call of the chair or upon the written request to the chair of at least three of the members of the Board of Disciplinary Appeals.

Rule 7.10. Conference Calls

The Board of Disciplinary Appeals may, at the instance of the chair, conduct its business by conference telephone calls. Any action taken in a telephone conference must be reduced to writing and signed by each participant certifying the accuracy of the written record of action taken.

Rule 7.11. Judicial Review

An appeal from a determination of the Board of Disciplinary Appeals shall be to the Supreme Court. Within fourteen days after receipt of notice of a final determination by the Board of Disciplinary Appeals, the party appealing must file a notice of appeal directly with the Clerk of the Supreme Court. The record must be filed within sixty days after the Board of Disciplinary Appeals’ determination. The appealing party’s brief is due thirty days after the record is filed, and the responding party’s brief must be filed within thirty days thereafter. Except as herein expressly provided, the appeal must be made pursuant to the then applicable Texas Rules of Appellate Procedure. Oral argument may be granted on motion. The case shall be reviewed under the substantial evidence rule. The Court may affirm a decision on the Board of Disciplinary Appeals by order without written opinion. Determinations by the Board of Disciplinary Appeals that a statement
Texas Rules of Disciplinary Procedure

Rule 8.04.

constitutes an Inquiry or transferring cases are conclusive, and may not be appealed to the Supreme Court.

Rule 7.12. Open Meetings and Open Records

The Board of Disciplinary Appeals is not a “governmental body” as that term is defined in Section 551.001 or Section 552.003 of V.T.C.A., Government Code, and is not subject to either the provisions of the Open Meetings Act\(^1\) or the Open Records Act.\(^2\)

\(^1\) V.T.C.A., Government Code § 551.001 et seq.
\(^2\) V.T.C.A., Government Code § 552.001 et seq.

PART VIII. COMPULSORY DISCIPLINE

Rule 8.01. Generally

When an attorney licensed to practice law in Texas has been convicted of an Intentional Crime or has been placed on probation for an Intentional Crime with or without an adjudication of guilt, the Chief Disciplinary Counsel shall initiate a Disciplinary Action seeking compulsory discipline pursuant to this part. The completion or termination of any term of incarceration, probation, parole, or any similar court ordered supervised period does not bar action under Part VIII of these rules as hereinafter provided. Proceedings under this part are not exclusive in that an attorney may be disciplined as a result of the underlying facts as well as being disciplined upon the conviction or probation through deferred adjudication.

Rule 8.02. Conclusive Evidence

In any Disciplinary Action brought under this part, the record of conviction or order of deferred adjudication is conclusive evidence of the attorney’s guilt.

Rule 8.03. Commencement of Suit

A Disciplinary Action under this part must be initiated by the filing of a petition with the Board of Disciplinary Appeals. The petition must allege the adjudication of guilt (or probation without an adjudication of guilt) of an Intentional Crime; allege that the Respondent is the same person as the party adjudicated guilty or who received probation with or without an adjudication of guilt for such Intentional Crime; and seek the appropriate discipline.

Rule 8.04. Procedure

The Board of Disciplinary Appeals shall hear and determine all questions of law and fact. When an attorney has been convicted of an Intentional Crime or has been placed on probation for an Intentional Crime without an adjudication of guilt, he or she shall be suspended as an attorney
Rule 8.04. Texas Rules of Disciplinary Procedure

licensed to practice law in Texas during the appeal of the conviction or the order of deferred adjudication. Upon introduction into evidence of a certified copy of the judgment of conviction or order of deferred adjudication and a certificate of the Clerk of the Supreme Court that the attorney is licensed to practice law in Texas, the Board of Disciplinary Appeals shall immediately determine whether the attorney has been convicted of an Intentional Crime or granted probation without an adjudication of guilt for an Intentional Crime. Uncontroverted affidavits that the attorney is the same person as the person convicted or granted probation without an adjudication of guilt are competent and sufficient evidence of those facts. Nothing in these rules prohibits proof of the necessary elements in such Disciplinary Action by competent evidence in any other manner permitted by law. The Board of Disciplinary Appeals shall sit, hear, and determine whether the attorney should be disciplined and enter judgment accordingly within forty-five days of the answer day; however, any failure to do so within the time limit will not affect its jurisdiction to act. Any suspension ordered during the appeal of a criminal conviction or probation without an adjudication of guilt is interlocutory and immediately terminates if the conviction or probation is set aside or reversed.

Rule 8.05. Disbarment

When an attorney has been convicted of an Intentional Crime, and that conviction has become final, or the attorney has accepted probation with or without an adjudication of guilt for an Intentional Crime, the attorney shall be disbarred unless the Board of Disciplinary Appeals, under Rule 8.06, suspends his or her license to practice law. If the attorney’s license to practice law has been suspended during the appeal of the criminal conviction, the Chief Disciplinary Counsel shall file a motion for final judgment of disbarment with the Board of Disciplinary Appeals. If the motion is supported by affidavits or certified copies of court documents showing that the conviction has become final, the motion shall be granted without hearing, unless within ten days following the service of the motion pursuant to Rule 21a of the Texas Rules of Civil Procedure, upon the attorney so convicted or his or her attorney of record, the attorney so convicted files a verified denial contesting the finality of the judgment, in which event the Board of Disciplinary Appeals will immediately conduct a hearing to determine the issue. If no Disciplinary Action is pending at the time the conviction becomes final, disbarment shall be initiated by filing a Disciplinary Action.

Rule 8.06. Suspension

If an attorney’s sentence upon conviction of a Serious Crime is fully probated, or if an attorney receives probation through deferred adjudication in connection with a Serious Crime, the attorney’s license to practice law shall be suspended during the term of probation. If an attorney is suspended during the term of probation, the suspension shall be conditioned upon the attorney’s satisfactorily completing the terms of probation. If probation is revoked, the attorney shall be disbarred. An early termination of probation does not result in reinstatement until the entire probationary period, as originally assessed, has expired.
Rule 8.07. Early Termination

An early termination of criminal probation shall have no effect on any judgment entered pursuant to Part VIII.

Rule 8.08. No Supersedeas

In compulsory discipline cases, either party shall have the right to appeal to the Supreme Court of Texas but no Respondent suspended or disbarred by the board of Disciplinary Appeals shall be entitled to practice law in any form while the appeal is pending and shall have no right to supersede the judgment by bond or otherwise.

PART IX. RECIPROCAL DISCIPLINE

Rule 9.01. Orders From Other Jurisdictions

Upon receipt of information indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction, the Chief Disciplinary Counsel shall diligently seek to obtain a certified copy of the order or judgment of discipline from the other jurisdiction, and file it with the Board of Disciplinary Appeals along with a petition requesting that the attorney be disciplined in Texas. A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action under this Part, subject to the defenses set forth in Rule 9.04 below.

Rule 9.02. Notice to the Respondent

Upon the filing of the petition, the Board of Disciplinary Appeals shall issue a notice to the attorney, containing a copy of the petition, a copy of the order or judgment from the other jurisdiction, and an order directing the attorney to show cause within thirty days from the date of the mailing of the notice why the imposition of the identical discipline in this state would be unwarranted.

Rule 9.03. Discipline to be Imposed

If the attorney fails to file his or her answer with the Board of Disciplinary Appeals within the thirty-day period provided by Rule 9.02, the Board of Disciplinary Appeals shall enter a judgment imposing discipline identical, to the extent practicable, with that imposed in the other jurisdiction. If the attorney files an answer, the Board of Disciplinary Appeals shall proceed to determine the case upon the pleadings, the evidence, and the briefs, if any.
Rule 9.04.  Defenses

If the Respondent files an answer, he or she shall allege, and thereafter be required to prove, by clear and convincing evidence, to the Board of Disciplinary Appeals one or more of the following defenses to avoid the imposition of discipline identical, to the extent practicable, with that directed by the judgment of the other jurisdiction:

A. That the procedure followed in the other jurisdiction on the disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process.

B. That there was such an infirmity of proof establishing the misconduct in the other jurisdiction as to give rise to the clear conviction that the Board of Disciplinary Appeals, consistent with its duty, should not accept as final the conclusion on the evidence reached in the other jurisdiction.

C. That the imposition by the Board of Disciplinary Appeals of discipline identical, to the extent practicable, with that imposed by the other jurisdiction would result in grave injustice.

D. That the misconduct established in the other jurisdiction warrants substantially different discipline in this state.

E. That the misconduct for which the attorney was disciplined in the other jurisdiction does not constitute Professional Misconduct in this state.

If the Board of Disciplinary Appeals determines that one or more of the foregoing defenses have been established, it shall enter such orders as it deems necessary and appropriate.

PART X. RESIGNATION IN LIEU OF DISCIPLINE

Rule 10.01. Disciplinary Resignation

Any person licensed to practice law in the State of Texas shall be permitted to file a motion for resignation in lieu of discipline, in a form promulgated by the Commission, in the Supreme Court of Texas, attaching thereto his or her Texas law license and permanent State Bar membership card.

Rule 10.02. Response of Chief Disciplinary Counsel

The Chief Disciplinary Counsel shall, within twenty days after service upon him or her of a motion for resignation in lieu of discipline, file a response on behalf of the State Bar (acting through the Commission) stating whether the acceptance of the resignation is in the best interest of the public and the profession and setting forth a detailed statement of the Professional Misconduct with which the movant is charged. The movant may, within ten days after service of such
response, withdraw the motion. If a motion to withdraw is not timely filed, the detailed statement of Professional Misconduct shall be deemed to have been conclusively established for all purposes.

Rule 10.03. Effect of Filing

The filing of a motion for resignation in lieu of discipline does not, without the consent of Chief Disciplinary Counsel, serve to delay or abate any then pending Grievance, Complaint, Disciplinary Proceeding, Disciplinary Action or disciplinary investigation.

Rule 10.04. Acceptance of Resignation and Notification

Any motion to resign in lieu of discipline under this part must be filed in the Supreme Court and is ineffective until and unless accepted by written order of the Supreme Court. The movant; the Evidentiary Panel Chair, if any; the Commission; and the Complainant, if any, shall be notified by the Chief Disciplinary Counsel of the Court’s disposition of such motion.

Rule 10.05. Effect of Resignation

Any resignation under this part shall be treated as a disbarment for all purposes, including client notification, discontinuation of practice, and reinstatement.

PART XI. REINSTATEMENT AFTER DISBARMENT OR RESIGNATION

Rule 11.01. Eligibility and Venue

A disbarred person or a person who has resigned in lieu of discipline may, at any time after the expiration of five years from the date of final judgment of disbarment or the date of Supreme Court order accepting resignation in lieu of discipline, petition the district court of the county of his or her residence for reinstatement; provided, however, that no person who has been disbarred or resigned in lieu of discipline by reason of conviction of or having been placed on probation without an adjudication of guilt for an Intentional Crime or a Serious Crime, is eligible to apply for reinstatement until five years following the date of completion of sentence, including any period of probation and/or parole. If, at the time the petition for reinstatement is filed, the disbarred person or person who has resigned in lieu of discipline is a nonresident of the State of Texas, then the petition shall be filed in Travis County, Texas.

Rule 11.02. Petition for Reinstatement

A petition for reinstatement shall be verified and shall set forth all the following information:

A. The name, age, and residential address of the petitioner.
Rule 11.02. Texas Rules of Disciplinary Procedure

B. The offenses, misconduct, or convictions upon which the disbarment or resignation was based.

C. The name of the body or entity where the Disciplinary Proceeding or Disciplinary Action was adjudicated and the identity of the Committee before whom the Just Cause hearing was held, if any.

D. A statement that the petitioner has made restitution to all persons, if any, naming them and their current addresses, who may have suffered financial loss by reason of the offenses, misconduct, or Serious Crimes for which the petitioner was disbarred or resigned, and that the petitioner has paid all costs and fines assessed in connection with the Disciplinary Proceeding or Disciplinary Action that resulted in his or her disbarment or resignation.

E. A statement that at the time of the filing of the petition the petitioner is of good moral character, possesses the mental and emotional fitness to practice law, and during the five years immediately preceding the filing of the petition, has been living a life of exemplary conduct.

F. A statement that the petitioner has recently read and understands the Texas Disciplinary Rules of Professional Conduct; that he or she has recently read and understands the Texas Lawyer’s Creed—A Mandate For Professionalism; that he or she has a current knowledge of the law; and that the public and profession will be served by the petitioner’s reinstatement.

G. A listing of the petitioner’s occupations from the date of disbarment or resignation, including the names and current addresses of all partners, associates, and employees, if any, and the dates and duration of all such relationships and employment.

H. A statement listing all residences maintained from the date of disbarment or resignation, and the current names and addresses of all landlords.

I. A statement of the dates, cause numbers, courts, and the general nature of all civil actions in which the petitioner was a party or in which he or she claimed an interest, and that were pending at any time from the date of disbarment or resignation.

J. A statement of the dates, cause numbers, courts, the general nature and disposition of all matters pending at any time from the date of disbarment or resignation and involving the prosecution of the petitioner for any crime, felony, or misdemeanor, together with the names and current addresses of all complaining persons in each such matter.

K. A statement whether any application for a license requiring proof of good moral character for its procurement was filed at any time after the disbarment or resignation and, for each application, the name and address of the licensing authority and the disposition of the application.
L. A statement explaining any proceeding after the date of disbarment or resignation concerning the petitioner’s standing as a member of any profession or organization or holder of any license or office that involved censure, removal, suspension of license, revocation of any license, or discipline of the petitioner and the disposition thereof, and the name and address of each authority in possession of the records.

M. A statement whether any allegations or charges, formal or informal, of fraud were made or claimed against the petitioner at any time after the disbarment or resignation and the names and current addresses of the persons or entities making such allegations or charges.

The petitioner has a duty to amend and keep current all information in the petition until the petition has been heard and determined by the trial court.

Rule 11.03. Burden of Proof

The petitioner has the burden of establishing by a preponderance of the evidence that the best interests of the public and the profession, as well as the ends of justice, would be served by his or her reinstatement. The court shall deny the petition for reinstatement if it contains any false statement of a material fact or if the petitioner fails to meet the burden of proof.

Rule 11.04. Notice and Procedure

The petitioner shall serve notice of a petition for reinstatement by U.S. certified mail, return receipt requested, on the Chief Disciplinary Counsel and shall publish the notice as a paid classified announcement in the Texas Bar Journal. After the filing of the petition and service, the Texas Rules of Civil Procedure shall apply except when in conflict with these rules. All questions of fact and law shall be determined by the trial court without the aid of a jury.

Rule 11.05. Relevant Factors to be Considered

In determining the petitioner’s fitness for reinstatement, in addition to any other relevant matters, the trial court may consider:

A. Evidence concerning the nature and degree of Professional Misconduct for which the petitioner was disbarred or resigned and the circumstances attending the offenses.

B. The petitioner’s understanding of the serious nature of the acts for which he or she was disbarred or resigned.

C. The petitioner’s conduct during the Disciplinary Proceeding and Disciplinary Action.

D. The profit to the petitioner and the hardship to others.
Rule 11.05. Texas Rules of Disciplinary Procedure

E. The petitioner’s attitude toward the administration of justice and the practice of law.

F. The petitioner’s good works and other accomplishments.

G. Any other evidence relevant to the issues of the petitioner’s fitness to practice law and the likelihood that the petitioner will not engage in further misconduct.

Rule 11.06. Judgment and Conditions

If the court is satisfied after hearing all the evidence, both in support and in opposition to the petition, that the material allegations of the petition are true and that the best interests of the public and the profession, as well as the ends of justice, will be served, the court may render judgment authorizing the petitioner to be reinstated upon his or her compliance within eighteen months from the date of the judgment with Rule II of the Rules Governing Admission to the Bar of Texas in effect as of the date upon which judgment authorizing reinstatement is entered. The judgment shall direct the Board of Law Examiners to admit the petitioner to a regularly scheduled bar examination in accordance with that board’s rules and procedures relating to the examination of persons who have not previously been licensed as lawyers in Texas or in any other state. No judgment of reinstatement may be rendered by default. If after hearing all the evidence the court determines that the petitioner is not eligible for reinstatement, the court may, in its discretion, either enter a judgment denying the petition or direct that the petition be held in abeyance for a reasonable period of time until the petitioner provides additional proof that he or she has satisfied the requirements of these rules. The court’s judgment may include such other orders as protecting the public and the petitioner’s potential clients may require.

Rule 11.07. Appeal and Readmission

When a judgment has been signed in any proceeding under this part, the petitioner and the Commission shall each have a right of appeal. If the petition is granted and an appeal is perfected, the trial court’s judgment shall be stayed pending resolution of the appeal. After the petitioner has complied with the terms of the judgment of reinstatement and with this part, he or she shall furnish the Commission with a certified copy of the judgment and evidence of compliance and shall pay all membership fees, license fees and assessments then owed and the costs of the reinstatement proceeding. Upon receipt of a certified copy of the judgment, evidence of compliance and proof of payment of all membership fees, license fees and assessments then owed, the Commission shall direct the Chief Disciplinary Counsel to issue a declaration of the petitioner’s eligibility for licensure to the Clerk of the Supreme Court. Upon receipt of such declaration, the Clerk of the Supreme Court shall enter the name of the petitioner on the membership rolls of the Supreme Court and shall issue a new Bar card and law license in the name of the petitioner reflecting as the date of licensure the date of the declaration of eligibility. Once the petitioner has taken the attorney’s oath, the new Bar card and law license shall be delivered by the Clerk of the Supreme Court to the petitioner.
Rule 11.08. Repetitioning

If a petition for reinstatement is denied after a hearing on the merits, the petitioner is not eligible to file another petition until after the expiration of three years from the date of final judgment denying the last preceding petition.

PART XII. DISABILITY SUSPENSION

Rule 12.01. Grounds for Suspension

Any person licensed to practice law in the State of Texas shall be suspended for an indefinite period upon a finding that the attorney is suffering from a Disability.

Rule 12.02. Procedure

Should the Chief Disciplinary Counsel reasonably believe based upon investigation of the Complaint that an attorney is suffering from a Disability and be authorized or directed to do so by the Commission, the Chief Disciplinary Counsel shall forward the Complaint and any other documents or statements which support a finding that the attorney is suffering from a Disability immediately to the Board of Disciplinary Appeals. Upon receipt of the Complaint and documents, the Board of Disciplinary Appeals shall forward it to a District Disability Committee to be composed of one attorney; one doctor of medicine or mental health care provider holding a doctorate degree, trained in the area of Disability; and one public member who does not have any interest, directly or indirectly, in the practice of the law other than as a consumer. The members of the District Disability Committee shall be appointed ad hoc by the chair of the Board of Disciplinary Appeals. The Board of Disciplinary Appeals may appoint any attorney to represent the interests of the disabled attorney.

Rule 12.03. District Disability Committee

The same rules regarding immunity, expenses, and confidentiality as apply to members of a Committee shall apply to the members appointed to a District Disability Committee. The District Disability Committee shall proceed in a de novo proceeding to receive evidence and determine whether the attorney is suffering from a Disability. In all cases where the referral has been made by the Chief Disciplinary Counsel, the Commission shall carry the burden of establishing by a preponderance of the evidence that the attorney suffers from a Disability. In all cases where the referral is made by an Evidentiary Panel, the party asserting that the attorney is suffering from a Disability shall carry the burden of establishing by a preponderance of the evidence that the attorney suffers from a Disability. The Respondent shall be given reasonable notice and shall be afforded an opportunity to appear before, and present evidence to, the District Disability Committee. If there is no finding of Disability by the District Disability Committee, the entire record and the finding of the District Disability Committee will be returned to the Chief Disciplinary Counsel and the matter shall continue in the disciplinary process from the point where it was referred to the Board of Disciplinary Appeals for the determination of Disability. If, however, there is a find-
Rule 12.03. Texas Rules of Disciplinary Procedure

ing of Disability, the District Disability Committee shall certify the finding to the Board of Disciplinary Appeals.

Rule 12.04. Board of Disciplinary Appeals’ Responsibilities

Upon receiving a finding of Disability from the District Disability Committee, the Board of Disciplinary Appeals shall immediately enter its order suspending the attorney indefinitely. The record of all proceedings on disability must be sealed and must remain confidential, except as to the Respondent; only the order of indefinite suspension is to be made public.

Rule 12.05. Effect on Limitations

Any statute of limitations applying to a disciplinary matter is tolled during the period of any Disability suspension.

Rule 12.06. Reinstatement After Disability Suspension

A. Venue: An attorney who has been indefinitely suspended under this part may have the suspension terminated by filing a verified petition with the Board of Disciplinary Appeals or a district court. Venue of a district court action is:

1. In the county, immediately prior to suspension, of the Respondent’s principal place of practice.

2. If the Respondent did not maintain a place of practice immediately before suspension within the State of Texas, in the county of the Respondent’s residence.

3. If neither A. nor B. applies, then in Travis County, Texas.

B. Petition and Service: The petition must set out the attorney’s name, address, the date, and the docket number of the suspension, a detailed description of his or her activities since the suspension, including employment, the details of any hospitalization or medical treatment, and any other matters the attorney believes entitles him or her to termination of the suspension. A copy of the petition shall be served by U.S. certified mail, return receipt requested, upon the Chief Disciplinary Counsel and the matter shall promptly thereafter be set for hearing. The petition must have the following documents attached: a certified copy of any court order pertaining to the petitioner’s competence; an affidavit from a mental health care provider as to the petitioner’s current condition; and a report from a physician as to the petitioner’s current condition if the suspension was based in whole or in part on the abuse or use of alcohol or other drugs. Such attachments shall not constitute evidence, per se, but the attachment of the same is a requirement of pleading. In an action for reinstatement under this part, either the petitioner or the Commission shall have the right to a jury trial upon timely payment of the required fee.
C. **Burden of Proof**: The petitioner has the burden to come forward and prove, by a preponderance of the evidence, that the reasons for suspension no longer exist and that termination of the suspension would be without danger to the public and the profession. The Board of Disciplinary Appeals or the district court, as the case may be, may order the petitioner to be examined by one or more health care providers trained in the area for which the attorney was suspended.

D. **Time for Filing Subsequent Petitions**: A first petition for termination of suspension may be filed at any time after the petitioner’s license has been suspended under this part. If the first petition is denied after a hearing, subsequent petitions may not be filed until the expiration of one year from the date of the denial of the last preceding petition.

E. **Judgment**: If the attorney meets the burden of proof, the Board of Disciplinary Appeals or the district court shall order a termination of the period of suspension, provided that whenever an attorney has been suspended for a period of two or more consecutive years, he or she may be required by the Board of Disciplinary Appeals or the district court, as the case may be, to obtain a passing grade on the multistate Professional Responsibility portion of the State Bar examination administered by the Board of Law Examiners, or take a prescribed course of study through a law school or through continuing legal education courses, or do both.

F. **Disability Probation**: The Board of Disciplinary Appeals or the district court, as the case may be, may order that an attorney be placed on probation if the attorney has demonstrated each of the following:

1. The ability to perform legal services and that the attorney’s continued practice of law will not cause the courts or profession to fall into disrepute.

2. The unlikelihood of any harm to the public during the period of rehabilitation and the adequate supervision of necessary conditions of probation.

3. A Disability that can be successfully arrested and treated while the attorney is engaged in the practice of law.

Probation shall be ordered for a specified period of time or until further order of the Board of Disciplinary Appeals or the district court, as the case may be, whenever a suspension is probated in whole or in part.

G. **Conditions**: The order placing an attorney on Disability probation must state the conditions of probation. The conditions must take into consideration the nature and circumstances of the Professional Misconduct and the history, character, and condition of the attorney. Any or all of the following conditions, and such others as the Board of Disciplinary Appeals or the district court deems appropriate, may be imposed:

1. Periodic reports to the Chief Disciplinary Counsel.
Rule 12.06. Supervision over client trust accounts as the Board of Disciplinary Appeals or the district court may direct.

3. Satisfactory completion of a course of study.

4. Successful completion of the multistate Professional Responsibility Examination.

5. Restitution.

6. Compliance with income tax laws and verification of such to Chief Disciplinary Counsel.

7. Limitations on practice.


9. The abstinence from alcohol or drugs.

10. Payment of costs (including Reasonable Attorneys’ Fees and all direct expenses) associated with the proceedings.


12. Participation in an Impaired Attorney Recovery and Supervision Program if such a program has been adopted by the Board of Directors of the State Board of Texas.

H. Administration: The Chief Disciplinary Counsel is responsible for the supervision of attorneys placed on Disability probation. Where appropriate, he or she may recommend to the Board of Disciplinary Appeals or to the district court, as the case may be, the modification of the conditions and shall report any failure of the probationer to comply with the conditions of probation. Upon a showing of failure to comply with the conditions of probation, the Board of Disciplinary Appeals or the district court, as the case may be, may revoke the probation or impose such other conditions deemed necessary for the protection of the public and the rehabilitation of the attorney.

Rule 12.07. Appeals

A final judgment of the Board of Disciplinary Appeals denying a petition for reinstatement may be appealed to the Supreme Court. If such an appeal is taken, it must be filed with the Clerk of the Supreme Court within fourteen days after the receipt by the appealing party of the determination of the Board of Disciplinary Appeals. Except as herein expressly provided, an appeal must be made pursuant to the then applicable Texas Rules of Appellate Procedure. Oral argument may be granted on motion. The case shall be reviewed under the substantial-evidence rule. The Court may affirm a decision of the Board of Disciplinary Appeals by order without written opinion. A
final judgment of a district court denying a petition for reinstatement may be appealed as in civil cases generally.


**PART XIII. CESSATION OF PRACTICE**

**Rule 13.01. Notice of Attorney’s Cessation of Practice**

When an attorney licensed to practice law in Texas dies, resigns, becomes inactive, is disbarred, or is suspended, leaving an active client matter for which no other attorney licensed to practice in Texas, with the consent of the client, has agreed to assume responsibility, written notice of such cessation of practice shall be mailed to those clients, opposing counsel, courts, agencies with which the attorney has matters pending, malpractice insurers, and any other person or entity having reason to be informed of the cessation of practice. If the attorney has died, the notice may be given by the personal representative of the estate of the attorney or by any person having lawful custody of the files and records of the attorney, including those persons who have been employed by the deceased attorney. In all other cases, notice shall be given by the attorney, a person authorized by the attorney, a person having lawful custody of the files of the attorney, or by Chief Disciplinary Counsel. If the client has consented to the assumption of responsibility for the matter by another attorney licensed to practice law in Texas, then the above notification requirements are not necessary and no further action is required.

**Rule 13.02. Assumption of Jurisdiction**

A client of the attorney, Chief Disciplinary Counsel, or any other interested person may petition a district court in the county of the attorney’s residence to assume jurisdiction over the attorney’s law practice. If the attorney has died, such petition may be filed in a statutory probate court. The petition must be verified and must state the facts necessary to show cause to believe that notice of cessation is required under this part. It must state the following:

A. That an attorney licensed to practice law in Texas has died, disappeared, resigned, become inactive, been disbarred or suspended, or become physically, mentally or emotionally disabled and cannot provide legal services necessary to protect the interests of clients.

B. That cause exists to believe that court supervision is necessary because the attorney has left client matters for which no other attorney licensed to practice law in Texas has, with the consent of the client, agreed to assume responsibility.
Rule 13.02. Texas Rules of Disciplinary Procedure

C. That there is cause to believe that the interests of one or more clients of the attorney or one or more interested persons or entities will be prejudiced if these proceedings are not maintained.

Rule 13.03. Hearing and Order on Application to Assume Jurisdiction

The court shall set the petition for hearing and may issue an order to show cause, directing the attorney or his or her personal representative, or if none exists, the person having custody of the attorney’s files, to show cause why the court should not assume jurisdiction of the attorney’s law practice. If the court finds that one or more of the events stated in Rule 13.02 has occurred and that the supervision of the court is required, the court shall assume jurisdiction and appoint one or more attorneys licensed to practice law in Texas to take such action as set out in the written order of the court including, but not limited to, one or more of the following:

A. Examine the client matters, including files and records of the attorney’s practice, and obtain information about any matters that may require attention.

B. Notify persons and entities that appear to be clients of the attorney of the assumption of the law practice, and suggest that they obtain other legal counsel.

C. Apply for extension of time before any court or any administrative body pending the client’s employment of other legal counsel.

D. With the prior consent of the client, file such motions and pleadings on behalf of the client as are required to prevent prejudice to the client’s rights.

E. Give appropriate notice to persons or entities that may be affected other than the client.

F. Arrange for surrender or delivery to the client of the client’s papers, files, or other property.

The custodian shall observe the attorney-client relationship and privilege as if the custodians were the attorney of the client and may make only such disclosures as are necessary to carry out the purposes of this part. Except for intentional misconduct or gross negligence, no person acting under this part may incur any liability by reason of the institution or maintenance of a proceeding under this Part XIII. No bond or other security is required.

PART XIV. INTERIM SUSPENSION

Rule 14.01. Irreparable Harm to Clients

Should the Chief Disciplinary Counsel reasonably believe based upon investigation of a Complaint that an attorney poses a substantial threat of irreparable harm to clients or prospective clients and be authorized or directed to do so by the Commission, the Chief Disciplinary Counsel
Texas Rules of Disciplinary Procedure

Rule 15.01.

shall seek the immediate interim suspension of the attorney. The Commission shall file a petition with a district court of proper venue alleging substantial threat of irreparable harm, and the district court shall, if the petition alleges facts that meet the evidentiary standard in Rule 14.02, set a hearing within ten days. If the Commission, at the hearing, meets the evidentiary standard and burden of proof as established in Rule 14.02, the court shall enter an order without requiring bond, immediately suspending the attorney pending the final disposition of the Disciplinary Proceedings or the Disciplinary Action based on the conduct causing the harm. The matter shall thereafter proceed in the district court as in matters involving temporary injunctions under the Texas Rules of Civil Procedure. If a temporary injunction is entered, the court may appoint a custodian under Part XIII. If, at the conclusion of all Disciplinary Proceedings and Disciplinary Actions, the Respondent is not found to have committed Professional Misconduct, the immediate interim suspension may not be deemed a “Sanction” for purposes of insurance applications or any other purpose.

Rule 14.02. Burden of Proof and Evidentiary Standard

The Commission has the burden to prove the case for an interim suspension by a preponderance of the evidence. If proved by a preponderance of the evidence, any one of the following elements establishes conclusively that the attorney poses a substantial threat of irreparable harm to clients or prospective clients:

A. Conduct by an attorney that includes all of the elements of a Serious Crime as defined in these rules.

B. Three or more acts of Professional Misconduct, as defined in subsections (a) (2) (3) (4) (6) (7) (8) or (10) of Rule 8.04 of the Texas Disciplinary Rules of Professional Conduct, whether or not actual harm or threatened harm is demonstrated.

C. Any other conduct by an attorney that, if continued, will probably cause harm to clients or prospective clients.

PART XV. MISCELLANEOUS PROVISIONS

Rule 15.01. Enforcement of Judgments

The following judgments have the force of a final judgment of a district court: final judgments of an Evidentiary Panel and judgments entered by the Board of Disciplinary Appeals. To enforce a judgment, the Commission may apply to a district court in the county of the residence of the Respondent. In enforcing the judgment, the court has available to it all writs and processes, as well as the power of contempt, to enforce the judgment as if the judgment had been the court’s own.
Rule 15.02. Effect of Related Litigation

The processing of a Grievance, Complaint, Disciplinary Proceeding, or Disciplinary Action is not, except for good cause, to be delayed or abated because of substantial similarity to the material allegations in pending civil or criminal litigation.

Rule 15.03. Effect on Related Litigation

Neither the Complainant nor the Respondent is affected by the doctrines of res judicata or estoppel by judgment from any Disciplinary Action.

Rule 15.04. Effect of Delay or Settlement by Complainant

None of the following alone justifies the discontinuance or abatement of a Grievance or Complaint being processed through the disciplinary system: (1) the unwillingness or the neglect of a Complainant to cooperate; (2) the settlement or compromise of matters between the Complainant and the Respondent; (3) the payment of monies by the Respondent to the Complainant.

Rule 15.05. Effect of Time Limitations

The time periods provided in Rules 2.10, 2.12, 2.15, 2.17C, 2.17E, 2.17P, 2.25, 3.02, 3.04, - 7.11, 9.02, 9.03, 10.02, 11.01, 11.08, and 12.06(d) are mandatory. All other time periods herein provided are directory only and the failure to comply with them does not result in the invalidation of an act or event by reason of the noncompliance with those time limits.

1 So in order.

Rule 15.06. Limitations, Rules and Exceptions

No attorney licensed to practice law in Texas may be disciplined for Professional Misconduct occurring more than four years before the time when the allegation of Professional Misconduct is brought to the attention of the Office of Chief Disciplinary Counsel, except in cases in which disbarment or suspension is compulsory. Limitations will not begin to run where fraud or concealment is involved until such Professional Misconduct is discovered or should have been discovered in the exercise of reasonable diligence by the Complainant.

Rule 15.07. Residence

For purposes of these rules, a person licensed to practice law in Texas is considered a resident of the county in Texas of his or her principal residence. A person licensed to practice law in Texas but not residing in Texas is deemed to be a resident of Travis County, Texas, for all purposes.
Rule 15.08. Privilege

All privileges of the attorney-client relationship shall apply to all communications, written and oral, and all other materials and statements between the Chief Disciplinary Counsel and the Commission subject to the provisions of Rule 6.08.

Rule 15.09. Immunity

No lawsuit may be instituted against any Complainant or witness predicated upon the filing of a Grievance or participation in the attorney disciplinary and disability system. All members of the Commission, the Chief Disciplinary Counsel (including Special Assistant Disciplinary Counsel appointed by the Commission and attorneys employed on a contract basis by the Chief Disciplinary Counsel), all members of Committees, all members of the Board of Disciplinary Appeals, all members of the District Disability Committees, all officers and Directors of the State Bar, and the staff members of the aforementioned entities are immune from suit for any conduct in the course of their official duties. The immunity is absolute and unqualified and extends to all actions at law or in equity.

Rule 15.10. Maintenance of Funds or Other Property Held for Clients and Others

Every attorney licensed to practice law in Texas who maintains, or is required to maintain, a separate client trust account or accounts, designated as such, into which funds of clients or other fiduciary funds must be deposited, shall further maintain and preserve for a period of five years after final disposition of the underlying matter, the records of such accounts, including checkbooks, canceled checks, check stubs, check registers, bank statements, vouchers, deposit slips, ledgers, journals, closing statements, accountings, and other statements of receipts and disbursements rendered to clients or other parties with regard to client trust funds or other similar records clearly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries, and disbursements of the funds or other property of a client.

Rule 15.11. Restrictions on Imposition of Certain Sanctions

A. Public reprimands shall not be utilized if:

1. A public reprimand has been imposed upon the Respondent within the preceding five (5) year period for a violation of the same disciplinary rule; or

2. The Respondent has previously received two or more public reprimands whether or not for violations of the same disciplinary rule within the preceding five year period.

B. Fully probated suspensions shall not be utilized if:
Rule 15.11.  

A. Texas Rules of Disciplinary Procedure

1. A public reprimand or fully probated suspension has been imposed upon the Respondent within the preceding five year period for a violation of the same disciplinary rule; or

2. The Respondent has previously received two or more fully probated suspensions whether or not for violations of the same disciplinary rule within the preceding five year period; or

3. The Respondent has previously received two or more sanctions of public reprimand or greater imposed for conflict of interest, theft, misapplication of fiduciary property, or the failure to return, after demand, a clearly unearned fee.

C. In the event that a fully probated suspension is not available under this rule, any sanction imposed shall be for no less than thirty days of active suspension.

Chapter 8

Processing a Grievance

GRIEVANCE FILED WITH CHIEF DISCIPLINARY COUNSEL (CDC)

INQUIRY (Dismissed)

Complainant may appeal to Board of Disciplinary Appeals (BODA)

BODA affirms

BODA reverses

COMPLAINT

Just Cause Determination by CDC

No Just Cause Determination by CDC

CDC presents case to Summary Disposition Panel (SDP) (district grievance committee) for vote to dismiss or proceed

SDP votes to proceed

SDP votes to dismiss: No appeal

Respondent notified of allegations and elects district court or evidentiary panel. Failure to elect: Evidentiary Panel

Evidentiary Panel

District Court Trial

Professional Misconduct found—Sanction imposed OR Dismissal

Commission or Respondent may appeal judgment to BODA

Professional Misconduct found—Sanction imposed OR Dismissal

Commission or Respondent may appeal judgment to state appellate court

Client Attorney Assistance Program (CAAP) for voluntary dispute resolution

BODA or state appellate court decision may be appealed to Supreme Court
Chapter 9

A Guide to the Texas Lawyer’s Creed: A Mandate for Professionalism

by

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I. Introduction

True professionalism cannot be legislated; there can be no substitute for integrity, morality, and commitment to public service. If we, as lawyers and judges, want to promote professionalism, then we must reflect our commitment to professionalism in our daily conduct and attitudes.

A few decades ago, when the three of us began practicing law, the practice was considerably different. Technology was not as advanced. Duplicating machines were not as fast, and portable telephones and fax machines did not exist. Lawyers scheduled depositions in the spirit of mutual accommodation: a lawyer wishing to schedule a deposition simply picked up the telephone and called the other attorney. This saved time and was considered the polite, courteous, and civil thing to do.

Today, unfortunately, “Rambo” litigators frequently use the tactic of scheduling depositions without calling the opposing lawyer. As a result, attorneys for the parties frequently meet for the first time when they present their first motion in court, usually near the beginning of the discovery process. These Rambo litigators taint the heritage of the profession⁴ and wring the enjoyment and pleasure from the law practice, which should be exciting, challenging, and rewarding. A lawyer should look forward to going to the office or the courtroom each day. Unfortunately, the Rambo litigators—with their hired-gun mentality and combative tactics—have taken the fun out of practicing law.

⁴. As Chief Justice Warren Burger pointed out, 33 of the 55 members of the Constitutional Convention in 1787 were lawyers. Burger, Tell the Story of Freedom, 72 A.B.A. J., May 1, 1986, at 54.
Introduction

This affliction is not unique to Texas. It is a disease that infects the entire practice of law throughout the United States. The American Bar Association considers the problem of professional discourtesy one of the greatest challenges facing the legal profession. Fortunately, many attorneys have answered the call to arms in the fight against this problem and are committed to winning the battle. In a judicial effort to confront the problem, the Supreme Court of Texas and the Court of Criminal Appeals entered an order on November 7, 1989, adopting “The Texas Lawyer’s Creed—A Mandate for Professionalism.” Thus, Texas became the first state in the nation with such a creed. Other states are now following Texas' lead in developing similar statements of goals.

This Article provides an overview and analysis of The Texas Lawyer’s Creed. Part II focuses on the major impetus behind the drafting of the Creed: the problem of the Rambo litigator. Part III contains the text of the Creed with our commentary. Finally, Part IV reviews other efforts to restore professionalism to the law practice.


6. The text of the order states:

The conduct of a lawyer should be characterized at all times by honesty, candor, and fairness. In fulfilling his or her primary duty to a client, a lawyer must be ever mindful of the profession’s broader duty to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals are committed to eliminating a practice in our State by a minority of lawyers of abusive tactics which have surfaced in many parts of our country. We believe such tactics are a disservice to our citizens, harmful to clients, and demeaning to our profession.

The abusive tactics range from lack of civility to outright hostility and obstructionism. Such behavior does not serve justice but tends to delay and often deny justice. The lawyers who use abusive tactics, instead of being part of the solution, have become part of the problem.

The desire for respect and confidence by lawyers from the public should provide the members of our profession with the necessary incentive to attain the highest degree of ethical and professional conduct. These rules are primarily aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

These standards are not a set of rules that lawyers can use and abuse to incite ancillary litigation or arguments over whether or not they have been observed.

We must always be mindful that the practice of law is a profession. As members of a learned art we pursue a common calling in the spirit of public service. We have a proud tradition. Throughout the history of our nation, the members of our citizenry have looked to the ranks of our profession for leadership and guidance. Let us now as a profession each rededicate ourselves to practice law so we can restore public confidence in our profession, faithfully serve our clients, and fulfill our responsibility to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals hereby promulgate and adopt “The Texas Lawyer’s Creed—A Mandate for Professionalism” as attached hereto and made a part hereof.

In Chambers, this 7th day of November, 1989.

7. Justice Cook served as the Chairman of the Supreme Court Committee on Professionalism; Fred Hagans and James H. Holmes, III served as the two co-chairmen of the Supreme Court Advisory Committee.
II. The Problem of the “Rambo” Litigator

During the past decade, a small group of lawyers turned away from courtesy, civility, and professionalism. These lawyers, who call themselves litigators, generate tremendous amounts of paper in short periods of time but generally try very few lawsuits in front of juries. When jurors do see these litigators in action, they generally frown upon their unprofessional courtroom conduct, as do most other lawyers.

Rambo litigators commit a number of sins. Their worst sin is that they spoil the fun of practicing law. They also drive the price of competent legal assistance beyond the means of middle America. Additionally, they crowd already-full motion dockets to the point where trial courts have less time to try actual lawsuits.

Quite commonly, the Rambo litigator uses calculated behavior to gain media attention, which attracts new business. These lawyers believe that if they can appear to be the biggest “bully on the block,” others will be intimidated by their obnoxious and belligerent behavior. This is far from the truth. In most cases, their behavior only makes the other lawyers more determined to stand by the traditions of courtesy and civility, which have been the hallmark of the profession. Most lawyers realize that to play the game of the Rambo litigator they must stoop to a level of integrity below that of the profession.

Some individuals blame the birth of the Rambo lawyer on the increased salaries being paid to beginning associates. These salaries, in turn, demand justification by higher numbers of billable hours each month. Others say the problem results from the increased competition for legal business among the ever-growing number of lawyers. And still others say that older lawyers no longer take the time to work with young lawyers under a mentor system to pass down the civil and courteous practices of the past. This failure to provide personalized training can result in new lawyers adopting the tactics of flamboyant and highly visible Rambo litigators.

The truth behind this concern is that the entire legal profession has played some role in the problem’s development. The judiciary, the law schools, the bar associations, and the law firms, both large and small, are all at fault to some extent. Tolerance of Rambo conduct has encouraged other lawyers to adopt similar practices. Whatever the cause, the problem lies with the legal profession; lawyers and judges must provide the remedy.

III. The Texas Lawyer’s Creed

In response to the problem of the Rambo litigator, Texas’ top two courts enacted The Texas Lawyer’s Creed. The following is the text of the Creed, with commentary to aid in understanding the

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9. Id.

10. Id. at 81.
The Texas Lawyer’s Creed

Creed. These comments are not meant to be exhaustive; they merely explain some of the ideas underlying The Texas Lawyer’s Creed and may be of some help to lawyers in the practice of law.

“The Texas Lawyer’s Creed—A Mandate for Professionalism”

I am a lawyer; I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this Creed for no other reason than it is right.

A. Section I: Our Legal System

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, “My word is my bond.”

Comment: This rule reinforces the integrity of the profession. Its practical application should result in a diminished need to spend time and effort on documentation for every agreement that may be reached between lawyers. Many agreements, such as those often involved in deposition scheduling, are short term and have no long-term binding effect. To demand documentation of every agreement of this type requires an excessive amount of time, which increases costs to clients and overloads the system with paperwork.

2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.

3. I commit myself to an adequate and effective pro bono program.

Comment: These two related rules focus on the lawyer’s duty to contribute to the social good. Lawyers have a responsibility to provide services for, or to assure that services are available to, people who cannot afford legal representation. This obligation to provide competent representation exists even though the client or his cause may not be popular. This concept incorporates the idea behind pro bono programs.

4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.

Comment: Lawyers have an obligation to educate the public about the lawyer’s role in society. Clients, the public, and other lawyers must realize that practicing law means more than making money or serving as a “gun for hire.” This goal requires emphasizing lawyers’ worthy endeavors rather than lawyers’ sensational, attention-grabbing conduct.

5. I will always be conscious of my duty to the judicial system.

Comment: This rule serves to remind lawyers that zealous advocacy does not excuse injudicious behavior. A lawyer has concomitant duties to the legal system and to the administration of justice.
A Guide to the Texas Lawyer’s Creed

The Texas Lawyer’s Creed

These duties require responsible zealous advocacy of a client’s position—not irresponsible or haphazard representation.

B. Section II: Lawyer to Client

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client’s legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.

Comment: Like rule I-4, this rule emphasizes the lawyers’ need to explain their position in the legal system to clients, particularly those who harbor a misconception or negative view of the lawyer’s role. Emphasis should be placed on the independence of lawyers; clients must understand that lawyers are not simply slaves to the clients’ goals and desires.

2. I will endeavor to achieve my client’s lawful objectives in legal transactions and in litigation as quickly and economically as possible.

Comment: This rule serves several purposes. First, it encourages lawyers not to succumb to helping clients achieve “legal extortion” or any other dubious objective. This involves accepting the idea that settlements are not a sign of weakness. Emphasis on early settlement can avoid the rote use of substantial amounts of discovery, which is often geared more toward increased billings than fair dispute resolution.11

This rule also requires lawyers to conduct discovery fairly and reasonably. Lawyers should give thought to other parties’ requests. In particular, lawyers should avoid blanket requests asking for every item or document, many of which clearly are not discoverable.12 Discovery should be directed toward that which is truly necessary to an analysis or evaluation of litigation and trial preparation.

3. I will be loyal and committed to my client’s lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.

Comment: Clients are seeking the well-reasoned advice of their lawyers. They deserve an independent and objective opinion, not simply a regurgitation of what they might like to hear.

4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.

Comment: It is the lawyer’s responsibility to educate clients on proper legal conduct of the lawyer. In the long run, proper and mannerly conduct by a lawyer gains more than Rambo tactics.


12. Id. at 721–23.
Clients must realize that the judicial system is designed to try to reach fair results based on the facts rather than results based on mere tactics.

5.  *I will advise my client of proper and expected behavior.*

Comment: This rule is the companion of the preceding rule; it focuses on the importance of appropriate behavior by clients during business or litigation proceedings. Lawyers should explain to clients how they should behave during settlement conferences or business negotiations, as well as how they should conduct themselves during depositions, hearings, or trials. Although clients need not eschew all emotion, they must avoid staged or theatrical behavior.

6.  *I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.*

Comment: This rule reinforces the independence of the lawyer. A lawyer, upon accepting employment by a client, does not become the client’s tool of destruction. Clients must remember that they are employing the lawyer to try to obtain a lawful result, not to extract revenge from those with whom the client disagrees. In addition, lawyers must remember that adverse parties and witnesses are also human beings, who should not be made to suffer intimidation, misrepresentation, or abusive behavior calculated to improperly affect their testimony.

7.  *I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.*

Comment: This rule emphasizes the lawyer’s role in controlling the proper implementation of discovery. A lawyer should not honor a client’s request to burden the opposing party with excessive discovery solely for the purpose of draining the adverse lawyer’s time and resources. Overbroad discovery requests or responses designed to increase costs and expenses for the other party are improper.  

8.  *I will advise my client that we will not pursue tactics which are intended primarily for delay.*

Comment: This rule coincides with the Texas Rules of Civil Procedure, which require that continuances be sought only in the pursuit of justice, not for purposes of delay. Motions should not be made as a tactical tool to disqualify other counsel or to delay proceedings. These tactics thwart the quick and efficient pursuit of justice.

9.  *I will advise my client that we will not pursue any course of action which is without merit.*

Comment: This rule focuses on the independence of lawyers and the requirement that lawyers act in good faith. If, in a lawyer’s judgment, a matter lacks merit, the lawyer should abandon that

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cause of action or defense. This, however, does not preclude a lawyer from exploring unpopular or difficult issues as long as they are pursued in good faith.

10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client’s lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

Comment: This rule focuses on discovery-related requests for continuances and extensions of time. Lawyers who arbitrarily refuse a request that they know the court will grant succeed only in creating animosity and increasing the expense to the opposing side by requiring that the opposing lawyer file a written motion and seek a hearing. As a result, the court’s time and file space are unnecessarily expended. However, continued or abusive requests should not be accommodated if they frustrate a client’s lawful objectives. The emphasis here, as in the other rules, is on fair and reasonable conduct coupled with good faith.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

Comment: This rule focuses on the quick and economical resolution of legal matters. Resolution of disputes by settlement without a trial does not signify weakness. The importance of litigation is not diminished by resolving matters fairly, equitably, and economically.

C. Section III: Lawyer to Lawyer

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer’s conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

Comment: This rule targets a Rambo tactic that has gained popularity with lawyers: the practice of not returning other lawyers’ telephone calls or responding to written requests. This failure particularly complicates efforts to schedule depositions, meetings, or hearings on mutually convenient dates. Scheduling becomes increasingly difficult as one lawyer tries to suggest dates but does not receive confirmation or response from the opposing lawyer. Lawyers have an obligation to recognize each lawyer’s time as a valuable resource. Failure to timely respond to requests results in wasted resources and unnecessary delay.

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

Comment: This rule applies to both litigation and commercial practices. In the commercial practice, lawyers must realize that no two lawyers will draft documents in exactly the same form or style. It is inefficient to spend time drafting, redrafting, and negotiating points that have no effect.

15. See also TEX. R. CIV. P. 13.
on the substance of the transaction. Similarly, in the litigation practice, lawyers should focus on the efficient, quick, and economical resolution of disputed matters. Lawyers should not waste time and energy on matters of form but, instead, should focus on substantive issues.

3. I will identify for other counsel or parties all changes I have made in documents submitted for review.

Comment: This rule specifically addresses a common Rambo tactic: redrafting a document to incorporate subtle, inconspicuous alterations that affect the substance of the document. Through this practice, unscrupulous lawyers attempt to conceal language that they would prefer opposing counsel not discover. Lawyers acting in good faith should direct opposing counsel’s attention to any changes made when documents are reviewed or redrafted.

4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

Comment: This rule is also directed at both commercial and litigation practices. Sometimes lawyers alter the terms of an agreement in ways that the parties never discussed or even contemplated. After reaching agreement, lawyers should avoid additional changes that were not agreed upon by the parties. If additional terms must be addressed, they should be dealt with during further negotiation, not after the lawyer has drafted the parties’ agreement.

This problem most often arises in the context of settlement. In many localities, defendants customarily pay the taxable court costs that the plaintiff has incurred. If, in a multiple-defendant lawsuit, the defendants do not discuss court costs when apportioning the settlement between themselves, the lawyer who ultimately drafts the agreement should not change the proportion with regard to court costs. Additionally, confusion may result if the settlement does not clearly address which expenses are included as court costs. Taxable court costs ordinarily include the original of a deposition (but not copies), as well as initial filing fees, service fees, and county fees.

5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.

Comment: This rule is aimed at dissuading lawyers from using the timeliness of notification or cancellation of hearings as a tactical maneuver in litigation. When hearings or motions are set, the lawyer should notify the opposing party as soon as practicable. In this age of telecopiers and fax machines, notification can usually occur at a very early stage. Specifically, it is inappropriate to wait until the date of a deposition to notify everyone that a particular client or client representative is not available. As soon as a lawyer realizes that a conflict exists or that someone is unavailable, the lawyer has an obligation to notify all involved.

6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.

Comment: This rule covers an area that is particularly important in the daily life of a lawyer, who must understand the legitimate objectives of the client and recognize whether a good-faith request
by opposing counsel would affect those objectives adversely. When a lawyer requests an extension of time in which to file answers to interrogatories, the opposing lawyer should not consent on a very technical basis so that an extension applies only to answers and not to the filing of objections.

Similarly, this situation may also arise when a lawyer requests thirty days in which to file an answer to a lawsuit but makes no mention of the filing of a special appearance or a plea to the jurisdiction. The lawyers should specifically discuss these other pleadings to avoid a miscommunication that could result in waiving such pleas.

Lawyers should be sensitive both to what they agree to and also to the reasonable understanding of the opposing party. They should not hide goals or motivations with misrepresentations. In applying this concept, lawyers should grant reasonable extensions of time and waive other formalities as long as these practices do not adversely affect the rights of their clients.

7. I will not serve motions or pleadings in any manner that unfairly limits another party’s opportunity to respond.

Comment: Many of these rules promote fair play. This rule is specifically aimed at what was historically known as the “Friday Night Special,” a motion prepared in advance that is filed after 5:00 p.m. on Friday and set for hearing on Monday morning. A lawyer should not try to gain tactical advantage by delaying the service of motions or pleadings, particularly in situations that require advance notice to file responses, garner evidence, prepare affidavit proof, or present live testimony. Even time limits set out in the Texas Rules of Civil Procedure are not always reasonable. For example, a lawyer may need more than twenty-one days to respond to a motion for summary judgment or more than seven days to answer a response to a motion for summary judgment. Lawyers should act reasonably in establishing response dates rather than mindlessly adhering to the dictates of the rules.

8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.

Comment: This rule is intended to reduce unnecessary paperwork and conserve court time. An example of its practical application would govern circumstances in which a defendant files special exceptions to a plaintiff’s pleading; plaintiffs often file lawsuits that seek damages simply in excess of the “minimum jurisdictional limits of the court.” A defendant is entitled to respond to that pleading with a special exception asking that the maximum amount be set forth with specificity. However, the defendant has no use for an unrealistic evaluation of the damages, particularly

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16. TEX. R. CIV. P. 166a(c) states that “the motion . . . shall be filed and served at least twenty-one days before the time specified for the hearing.”

17. An adverse party may file a written response to a motion “not later than seven days prior to” the hearing date. TEX. R. CIV. P. 166a(c).

18. TEX. R. CIV. P. 47(b).

19. See TEX. R. CIV. P. 47.
if the estimate would exceed insurance policy limits. Yet, a realistic assessment of damages is not ordinarily available at an early date. Therefore, special exceptions filed in objection to general pleadings should be resolved by agreement of the parties so that the exceptions are pled with specificity at a time and on a basis that is mutually agreeable. Again, lawyers should act reasonably and in good faith instead of demanding technical adherence to the procedural rules.

9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.

Comment: Like some of the previous rules, this rule focuses on the lawyer’s conduct. It emphasizes that lawyers can be civil and courteous, even when they disagree with other lawyers, and prohibits lawyers from circumventing the spirit of ethical guidelines through their clients or agents.

10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations or impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

Comment: This rule directs lawyers not to shift blame for an unfavorable result in a case by suggesting that the opposing counsel engaged in unethical conduct. This rule also warns that the clients’ ill will toward each other should not dilute or affect the independence of counsel.

11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about the counsel’s intention to proceed.

Comment: When a hearing is set, the presumption is established that a lawyer intends to be present. Before a hearing or ruling occurs without the presence of a participating lawyer, an effort should be made to determine whether the lawyer has been delayed, has accidentally forgotten the hearing, or has some other reason for not being in court. Otherwise, the effort spent in achieving the default judgment or dismissal may be wasted, and unnecessary costs incurred. If lawyers assume that the opposing counsel will generally act in the best interest of his or her client—a fair assumption—then a simple phone call to find out why the opposing lawyer is absent is not too great a burden for a lawyer to shoulder or the court to require.

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

Comment: One of the wrongs that this rule aims to correct is the overzealous attorney’s practice of drafting orders as they would like the orders to read, regardless of how the court ruled. These attorneys then submit the order to the court before the opposing counsel has a chance to review them. Conversely, the rule further requires lawyers to promptly respond when given the opportu-
nity to review and comment on a proposed order. Lawyers should not delay the entry of orders by allowing orders forwarded to them for review to sit unacknowledged on their desks.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

Comment: The rationale behind this rule prohibits conduct that constitutes ex parte contact with the court. Under no circumstances should a lawyer send correspondence or copies of correspondence to the court unless the court so directs. This problem can be particularly insidious when the lawyer tries to influence the court by presenting the opposing counsel in a bad light or tries to get the court to prejudge a situation without hearing both sides.

14. I will not arbitrarily schedule a deposition, Court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

Comment: This rule reminds lawyers to recognize economic and efficiency concerns. Lawyers waste time, resources and effort in rescheduling. One exception to this rule occurs when time constraints necessitate that the deposition be taken within a very short time frame. For example, there may be little or no time in which to arrange a deposition date that will accommodate everyone’s schedule when an expert, who had planned to be available for a trial, is suddenly unavailable and has a limited amount of time in which to be deposed before trial.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

Comment: This rule concides with the general efforts to accomplish the trial as efficiently and economically as possible without harming the rights or lawful objectives of a party. Undisputed facts of importance to the lawsuit can be agreed upon by all parties. Examples of these types of facts include the identity of the parents in a wrongful death case, the execution and authentication of a contract, the wage rate in worker’s compensation disputes, the amount of medical expenses incurred by a party, and the chain of custody in cases involving fungible products. This concept relates to the procedural rule that governs requests for admissions. Lawyers receiving requests for admissions should admit facts that are not in dispute, because the costs incurred by opposing counsel in proving those items may be taxed against the client.

16. I will refrain from excessive and abusive discovery.

Comment: This rule is related to both rule II-2, which deals with quick and economical litigation, and rule II-7, which deals with conduct intended to harass or drain the financial resources of the opposing party. This rule was drafted in direct response to the philosophy behind Rambo tactics. Its purpose is to remind lawyers that the representation of clients does not present a platform for punishing opposing lawyers or clients with whom they have a grievance.

17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose

of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.

Comment: This rule, like so many of the other rules, aims to limit the time and cost of litigation within reason.\(^{21}\) It responds to the Rambo tactic of disrupting a deposition by raising unfounded objections about the meaning of a particular word when no reasonable basis exists to question the commonly understood meanings.\(^{22}\) This rule also addresses a related tactic to disrupt a deposition: Some overzealous lawyers coach their witnesses to be difficult or unresponsive.\(^{23}\) Such conduct tears at the fabric of the administration of justice and is abhorrent to the highest principles of professionalism.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.

Comment: Seeking the court’s involvement to pursue obviously improper discovery uncovers the unworthy goal of coercion and intimidation.

19. I will not seek sanctions or disqualifications unless it is necessary for protection of my client’s lawful objectives or is fully justified by the circumstances.

Comment: This rule, like rule III-18, requires lawyers to not seek relief unless there is a good faith and rational basis for doing so. It responds to the recent wave of motions to disqualify counsel, particularly in commercial litigation. One of the Rambo litigator’s favorite tactics is to try to disqualify the lawyer chosen to represent the opposing party, not because of legitimate conflicts, but to harass the opposing side. Such conduct, which can be found in all areas of litigation practice, is reprehensible and denigrates the entire system of justice.

D. Section IV: Lawyer and Judge

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

Comment: Significantly, this rule addresses not only lawyers but also judges. A judge’s conduct can have just as adverse an effect on the symbol of justice as the attitude of lawyers toward a judge. Both lawyers and judges must recognize that their behavior reflects on the entire judicial

\(^{21}\) See also TEX. R. CIV. P. 1.

\(^{22}\) See The Law: Bare-Knuckles Litigation Jars Many in Dallas, N.Y. Times, May 13, 1988, at B6, col. 3.

\(^{23}\) See Brazil, Civil Discovery: Lawyers’ Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 AM. B. FOUND. RES. J. 787, 819.
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system. As role models in the judicial system, both are responsible for conducting themselves in a professional and respectful manner.

2. **I will conduct myself in court in a professional manner and demonstrate my respect for the Court and the law.**

Comment: Lawyers must show their respect for the law through their behavior toward judges. A common example of disrespect is a lawyer making objections while seated at the counsel table rather than while standing. Although most lawyers would not think that this conduct would occur, it frequently does.

This **rule** also recognizes the fiduciary relationship that a lawyer has to the judicial system. That relationship is greatly harmed if a lawyer intentionally or otherwise misstates the law or misrepresents a fact to the court.

3. **I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.**

Comment: Far too often, lawyers forget that members of the court staff also merit respect. They too have numerous pressures and deadlines to meet.

By the same token, however, court staffs must recognize the lawyers’ need to have access to information and should treat lawyers and their staffs with the same degree of civility and courtesy that is expected from the lawyers.

4. **I will be punctual.**

Comment: The import of this **rule** is best expressed by Professor James McElhaney: “Lawyers who are late to court do not win.”

This **rule** is also directed at judges. Just as lawyers are expected in court at the appointed hour, judges should also be on time. The system becomes more expensive and falls into disarray when a judge habitually fails to appear on time for scheduled hearings or trials. Arriving ten minutes late for a 9:00 a.m. docket affects not only those lawyers who are first up on the docket, but also the remainder of the docket.

5. **I will not engage in any conduct which offends the dignity and decorum of proceedings.**

Comment: Lawyers should make objections during trial without impugning the integrity of the court. Likewise, judges should make rulings without questioning the integrity and sincerity of the lawyers making objections. Acting in a professional manner in front of the jury has a very practical side effect: Many lawyers and judges feel that Rambo tactics cause lawyers to lose, rather than win, cases tried to juries. Rambo tactics may possibly intimidate and coerce opposing counsel, but they rarely persuade juries.

6. **I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.**

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Comment: This rule reemphasizes the fiduciary relationship between judges and lawyers. Not only must lawyers refrain from dishonesty, but judges must actively review the briefs presented and authorities cited by counsel.

7. I will respect the rulings of the Court.

Comment: Respect for the rulings of the court fosters respect for the judicial process. However, respecting the rulings of the court does not imply overlooking court improprieties. Although lawyers may have difficulty challenging a judge’s improper or injudicious acts, such conduct must be challenged. This challenge should be accomplished in a dignified and professional manner that avoids personal attacks on the judge. Lawyers should strongly consider raising such challenges outside of the presence of the jury.

A concern related to respect for the court is the need for judges to exercise caution in the demeanor of their rulings and their personal behavior while sitting on the bench, so as not to affect the outcome of cases.

8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

Comment: This rule also affects both judges and lawyers. It requires lawyers to give all the issues in a case, whether ultimate issues or peripheral matters, objective and studied analysis. Capricious or flippant behavior is improper. Judges have a similar obligation to studiously and impartially consider the contentions and positions of the parties and to review them with the judiciousness and dignity they deserve.

9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

Comment: Lawyers must recognize that judges and their staffs, as well as other lawyers and their staffs, have many matters competing for their time. The tremendous pressures that all parties feel can at times adversely affect relationships. Lawyers and judges must strive to respect the participants in all judicial proceedings and refrain from inconsiderate conduct that could affect the administration of justice and resolution of disputes.

IV. Efforts to Restore Professionalism

Understanding the Rambo litigator has been the first step in solving the dilemma. Many groups have labored during the first year since the enactment of The Texas Lawyer’s Creed to restore civility to the practice of law in Texas. In conjunction with The Texas Lawyer’s Creed, the bar associations in Dallas, Houston, Corpus Christi, and Austin have all enacted their own creeds of professionalism. The federal courts for the Northern District of Texas had previously enacted their
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Efforts to Restore Professionalism

own creed, which is alluded to in *Dondi Properties Corp. v. Commerce Savings and Loan Ass’n.*\(^\text{25}\) The Texas Trial Lawyers’ Association and the Texas Association of Defense Counsel collaborated to develop a creed for their two organizations. Because of these efforts, some have questioned whether there can be too many creeds. The answer is an emphatic no. There can never be too much professionalism.

Diverse groups have conducted numerous programs on professionalism to better acquaint their members with the advantages of civil behavior. The Texas Young Lawyers’ Association, working with the State Bar of Texas, has published articles on professionalism.\(^\text{26}\) The State Bar has set up a committee on professionalism,\(^\text{27}\) which is developing a one-day required course for new law-school graduates who seek a license in Texas. This course would be taught by leading attorneys throughout the state and would emphasize legal ethics and professionalism.

Many bar associations have printed their creeds and mailed them to all of their members. The Houston Bar Association had its creed framed and hung in the chambers or courtrooms of all Harris County district judges. Judge Jack E. Hunter of Corpus Christi posted his creed at two places in his courtroom. When problems in the courtroom arise, Judge Hunter directs the attorneys to read the appropriate portion of the creed. As a result, lawyers know the standards that they must abide by in Judge Hunter’s courtroom; they know that Judge Hunter does not tolerate the Rambo mentality and conduct. Not surprisingly, practice before Judge Hunter is conducted in a professional manner.

Just as Texas became the first state in the nation to adopt a creed to govern the conduct of all its attorneys, Texas also has become the first state to formally incorporate a center for legal ethics and professionalism. The Texas Center for Legal Ethics and Professionalism is located at St. Mary’s Law School in San Antonio.\(^\text{28}\)

Efforts to educate law students throughout Texas about legal professionalism are also being implemented. Copies of the Creed have been mailed to every law school in Texas by the Texas Bar Foundation and distributed by the deans of those schools to every student; courses at many law schools incorporate the Creed. Programs and debates have been sponsored by law schools throughout the state to illustrate the difference between those who practice Rambo tactics and those who believe in courtesy and civility. These debates feature panels composed of lawyers, judges, law professors, and experts on professionalism and ethics.

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25. 121 F.R.D. 284 (N.D. Tex. 1988) (per curiam). In this opinion, which adopts a standard of practice for lawyers, the court stated:

> Attorneys who abide faithfully by the standards we adopt should have little difficulty conducting themselves as members of a learned profession whose unswerving duty is to the public they serve and the system of justice in which they practice. . . . Malfeasant counsel can expect instead that their conduct will prompt an appropriate response from the court . . . .

*Id.* at 288 (footnote omitted).


Continued efforts seek to reach practicing lawyers. Programs, such as the Houston Bar Association’s “Dinner with the Judiciary,” 29 offer lawyers and judges an opportunity to discuss legal professionalism at length and in depth. The State Bar of Texas also actively promotes professionalism. Besides publishing numerous articles about professionalism in the state journal, every continuing legal education course book distributed by the State Bar this past year has contained a copy of the Creed.

As all these efforts indicate, leaders of the State Bar, members of the judiciary, and lawyers throughout Texas are working to restore professionalism to the law. Texas, as the first state to adopt a creed governing lawyers’ conduct, has become a role model for other states. As other states begin to implement similar programs, the problem of the Rambo litigator should fade and eventually become a predicament of the past.

V. Conclusion

Professionalism can be restored to the law profession: Lawyers who bring shame to the profession can persist in their ways only if we tolerate their conduct. Texas lawyers and judges are committed to whatever action is necessary to eliminate the problem of the Rambo litigator. Lawyers should practice their profession in such a manner that those who follow them will be able to say, “I am a lawyer, and I am proud of it.”

Rambo tactics insult the profession. Lawyers gain nothing from inflicting verbal assaults designed to denigrate or humiliate opposing lawyers on the basis of race, dress, name, speech, or other personal characteristics. Rude and insulting behavior in front of a lawyer and his client proves nothing except bad manners and unprofessionalism. This behavior simply wastes time, unnecessarily increases billable hours, and diminishes public confidence in the legal profession.

We, as lawyers and judges, must never forget that law is a profession. We must continually renew our commitment to the principles that make law a noble endeavor. The Texas Lawyer’s Creed and similar creeds are solid efforts and strong movements toward restoring the professionalism that has been lost. If we all strive to practice the profession in accordance with the various creeds that have been adopted, we can eliminate Rambo lawyers, renew a commitment to professionalism, have fun practicing law, and genuinely serve the public.

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29. The Houston Bar Association’s program assembled over forty federal and state judges and three hundred lawyers who spent three hours one evening having dinner and discussing professionalism. See At the Bar, The Houston Lawyer, Nov.–Dec. 1989, at 61.
Chapter 10

The Texas Lawyer’s Creed—A Mandate for Professionalism

Adopted November 7, 1989

ORDER OF ADOPTION

The conduct of a lawyer should be characterized at all times by honesty, candor, and fairness. In fulfilling his or her primary duty to a client, a lawyer must be ever mindful of the profession's broader duty to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals are committed to eliminating a practice in our State by a minority of lawyers of abusive tactics which have surfaced in many parts of our country. We believe such tactics are a disservice to our citizens, harmful to clients, and demeaning to our profession.

The abusive tactics range from lack of civility to outright hostility and obstructionism. Such behavior does not serve justice but tends to delay and often deny justice. The lawyers who use abusive tactics instead of being part of the solution have become part of the problem.

The desire for respect and confidence by lawyers from the public should provide the members of our profession with the necessary incentive to attain the highest degree of ethical and professional conduct. These rules are primarily aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon re-enforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

These standards are not a set of rules that lawyers can use and abuse to incite ancillary litigation or arguments over whether or not they have been observed.

We must always be mindful that the practice of law is a profession. As members of a learned art we pursue a common calling in the spirit of public service. We have a proud tradition. Throughout the history of our nation, the members of our citizenry have looked to the ranks of our profession for leadership and guidance. Let us now as a profession each rededicate ourselves to practice law so we can restore public confidence in our profession, faithfully serve our clients, and fulfill our responsibility to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals hereby promulgate and adopt “The Texas Lawyer’s Creed—A Mandate for Professionalism” as attached hereto and made a part hereof.

In Chambers, this 7th day of November, 1989.

THE TEXAS LAWYER’S CREED—A MANDATE FOR PROFESSIONALISM

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right.
I. Our Legal System

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, “My word is my bond.”
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
3. I commit myself to an adequate and effective pro bono program.
4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
5. I will always be conscious of my duty to the judicial system.

II. Lawyer to Client

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate legal means to protect and advance the client’s legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.
2. I will endeavor to achieve my client’s lawful objectives in legal transactions and in litigation as quickly and economically as possible.
3. I will be loyal and committed to my client’s lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.
4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.
5. I will advise my client of proper and expected behavior.
6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.
7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
8. I will advise my client that we will not pursue tactics which are intended primarily for delay.
9. I will advise my client that we will not pursue any course of action which is without merit.

10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. Lawyer to Lawyer

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer’s conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

3. I will identify for other counsel or parties all changes I have made in documents submitted for review.

4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.

6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.

7. I will not serve motions or pleadings in any manner that unfairly limits another party’s opportunity to respond.

8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.

9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor
knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.

10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel’s intention to proceed.

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

14. I will not arbitrarily schedule a deposition, court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

16. I will refrain from excessive and abusive discovery.

17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.

19. I will not seek sanctions or disqualification unless it is necessary for protection of my client’s lawful objectives or is fully justified by the circumstances.

IV. Lawyer and Judge

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.
1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.

3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.

4. I will be punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

7. I will respect the rulings of the Court.

8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.
Chapter 11

Commentary on Lawyer Advertising Rules

by Gene Major\(^1\)

Introduction

The rules governing lawyer advertising and the dissemination of information about legal services are contained in part VII of Texas Disciplinary Rules of Professional Conduct. Originally promulgated in 1995, the rules were amended becoming effective June 1, 2005. These regulations, referred to as the Lawyer Advertising Rules, specify the appropriate means for lawyers desiring to market their services to the public. Of particular importance is rule 7.07(a), which can be summarized as requiring attorneys to submit, with limited exceptions, all advertising, whether written, audio, audio-visual, digital, or in other electronic media, with the Advertising Review Committee of the State Bar of Texas to ensure compliance with the Lawyer Advertising Rules. The exceptions to the submission requirement are contained in rule 7.07(e).

The State Bar’s Advertising Review Department facilitates the regulatory functions performed by the Advertising Review Committee and offers information through the State Bar’s website concerning the Lawyer Advertising Rules, the committee’s interpretative comments to the rules, and the application and process on advertisement filing through the State Bar (see [http://www.texasbar.com/Template.cfm?Section=Advertising_Review](http://www.texasbar.com/Template.cfm?Section=Advertising_Review)).

Interpretative Comments

To assist lawyers advertising in the public media or soliciting prospective clients by written communications, the Advertising Review Committee has adopted Internal Interpretive Comments to be used by Advertising Review Department staff. The Interpretive Comments are designed to establish objective means for staff members to review advertisements or writings and to determine whether they comply with part VII of the Texas Disciplinary Rules of Professional Conduct. If the statements and representations contained in advertisements or writings comply with the Interpretive Comments, staff is authorized to approve them. The following list contains the Interpretative Comments, with the dates in parentheses indicating the date of original publication in the *Texas Bar Journal*.

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1. Gene Major has served as a compliance officer with the State Bar of Texas since 1998, when he moved from Chicago. He was formerly the Director of the Lawyer Referral Information Service and liaison for local bar association referral services with the State Bar. He has worked on various projects at the State Bar including the 1998 and 2004 Referendums. As the current Director of Advertising Review, Mr. Major works as the staff contact for the Advertising Review Committee and liaison with the Chief Disciplinary Counsel.
Interpretative Comments

1. Public Media Advertisement (Nov. 1995)

A public media advertisement is an advertisement broadcast or made available to the general public, such as those in telephone Yellow Pages, newspapers, or other periodicals, outdoor display, the Internet, radio, or television. Publications or information disseminated primarily to lawyers, such as legal newspapers, legal directories, firm brochures mailed to other lawyers, and online services provided to lawyers, are not considered to be in the public media.

2. Client Testimonials (Nov. 1995, revised June 2005)

Any person appearing or speaking as though he or she were a client of the advertising lawyer or firm in a public media advertisement must be an actual client of the lawyer or law firm whose services are being advertised. A lawyer or law firm may not avoid complying with part VII through the use of a client spokesperson. Further, a client presenting the facts or circumstances surrounding a case or matter may only appear as a client of the lawyer or firm relative to a case or matter in which he or she was a party. The name, address, and telephone number of the client appearing or speaking in a public media advertisement shall be identified to the committee. Interpretive Comment Number 25 details the requirements for factual substantiation required when an advertisement in the public media references results obtained or past successes.


When an unjustified expectation is created through use of a picture or image of cash, checks, or other monetary benefit, the inclusion of a disclaimer or information as described in this comment will not cure the violation of rule 7.02.


An advertisement that contains statements or representations that the lawyer or law firm will loan or advance specific sums of money to prospective clients is misleading and creates unjustified expectations in violation of rule 7.02(a)(1) and (2). Example: “We will advance or loan up to $2,000 to clients.” A lawyer may, however, include a statement in an advertisement or writing that actual litigation expenses, court costs, and other financial assistance may be advanced to a client.

5. Lawyer Announcements or Advertisements in Legal Directories Need Not Include Rule 7.04(a) or (b) Disclaimers or Statements (Nov. 1995)

An announcement stating new or changed associations, offices, or other matters relating to a lawyer or law firm, or an advertisement by a lawyer or law firm in a legal directory or legal newspaper containing information about the name, location, telephone number, and general availability of lawyers to work on particular legal matters or listing various areas of practice, need not include a disclaimer or statement required by section 7.04(a) or (b). See rule 7.04(a)(3).

It is presumed that a lawyer or law firm whose name is published in an advertisement is responsible for the content of the advertisement and therefore meets the requirements of section 7.04(b)(1). It is not necessary that the advertisement include a specific statement or tag line identifying a particular lawyer as having reviewed the content of the advertisement.

7. Organizations Certifying Lawyers as Possessing Special Competence

Pursuant to rule 7.04(b)(2)(ii), the Texas Board of Legal Specialization has accredited the following organizations certifying lawyers as possessing special competence: American Board of Certification (business bankruptcy law, consumer bankruptcy law, and creditors’ rights law), National Board of Trial Advocacy (criminal law, civil trial law, and Social Security disability law), National College of DUI Defense, Inc. (DWI/DUI defense law), and National Elder Law Foundation (elder law).


The person who portrays a lawyer whose services or whose firm’s services are being advertised shall be the lawyer whose services are being advertised. The inclusion of a disclaimer stating that the person is an actor does not cure the deficiency and still violates rule 7.04(g). In determining whether a person is portraying a lawyer whose services or whose firm’s services are being advertised, the advertisement as a whole, including the surrounding setting of the video (that is, if the setting is in a law library, courtroom, or office, as well as the statements and whether they are in the third person versus first person, and any other matters which may imply to the consumer that the person in an advertisement is a lawyer whose services are being advertised) will be considered.

10. Contingent Fees (Nov. 1995)

An advertisement that discloses the willingness or potential willingness of a lawyer to render services on a contingent fee basis must comply with rule 7.04(h). The advertisement must disclose whether the client will be obligated to pay all or a portion of court costs and whether a client may be liable for other expenses.

EXAMPLES:

A. “No fee if no recovery. Client is obligated for payment of court costs and expenses, regardless of recovery.”
B. “No attorney’s fees unless you recover. Court costs, litigation expenses, and medical bills are paid from your share of the recovery. If there is no recovery, you will not be responsible for any court costs or litigation expenses, except for unpaid medical bills.”

C. “No attorney’s fees, court costs, or expenses unless you recover.” (If this statement is used, a lawyer may be obligated to pay court costs, litigation expenses, and any medical expenses that might be incurred by the plaintiff.)


If by past experience or practice the lawyer who is advertising or disseminating a solicitation communication routinely or frequently refers to other lawyers certain types of cases advertised for, the soliciting lawyer is required to disclose such fact in accordance with rule 7.04(l). If an advertising or soliciting lawyer who by past experience or practice knows or should know that the case is likely to be referred to another lawyer, the soliciting lawyer should disclose the fact of the anticipated referral pursuant to rule 7.04(l).

12. Solicitation Communications and Self-Mailing Pamphlets or Brochures (Nov. 1995, revised June 2005)

For a written communication solicitation letter, the requirements of rule 7.05(b) are met if the word “ADVERTISEMENT” is printed at least one-fourth of an inch in height vertically on the envelope and first page of the written communication solicitation letter, provided the word is separate and apart from other text.

If a self-mailing pamphlet or brochure is mailed, the word “ADVERTISEMENT” must be printed at least three-eighths of an inch vertically or three times the vertical height of text font in the body of the communication and in a color that is in sharp contrast to background color. See rule 7.05(b)(1).

If the solicitation is an electronic mail message, the word “ADVERTISEMENT” must be plainly visible, in all caps, in the subject line of the electronic mail message and at the beginning of the message’s text.

The following elements are not required in a letter or brochure, an audio, audio-visual, digital media, or recorded telephone message, or other form of electronic solicitation communication that is disseminated only to persons or entities identified in rule 7.05(f)(1)–(4):

A. disclaimers or statements required by rule 7.04(a)–(c);

B. marking the communication “ADVERTISEMENT”; and

C. disclosure of how the lawyer obtained the information concerning the recipient’s name.

A brochure or pamphlet that is enclosed with a written solicitation letter is not required to be marked “ADVERTISEMENT” provided the first page of the letter and the face of the envelope are marked “ADVERTISEMENT” in compliance with rule 7.05. An attachment included in an electronic mail communication is not required to be marked “ADVERTISEMENT,” provided the subject line of the electronic mail message and the beginning of the message’s text are plainly marked “ADVERTISEMENT” in compliance with Rule 7.05.

If a brochure or pamphlet is the only item included in an envelope or electronic communication mailed to a prospective client, the brochure or pamphlet and the envelope or electronic communication must be plainly marked “ADVERTISEMENT.”


If a public media advertisement or solicitation communication refers to additional information that may be available to prospective clients, such as a taped message or an electronic, digital, or printed pamphlet that provides information concerning a person’s or entity’s legal rights, the additional information need not be submitted for preapproval or filed with the Advertising Review Committee. However, if the information contains matters designed primarily to solicit prospective clients by the lawyer or firm this information must be filed in accordance with rule 7.07. A lawyer who responds to a request for information by a prospective client with an individualized letter is not subject to the rule 7.05 governing written, electronic, or digital solicitation communications and is not required to file such letter. See also rule 7.03 regarding regulated telephone or other electronic contact.


17. The Internet and Similar Services Including Home Pages (Mar. 1996, revised May 2003)

Part VII of the Texas Disciplinary Rules of Professional Conduct applies to information disseminated digitally via the Internet. A digitally transmitted message that addresses the availability of a Texas lawyer’s services is a communication subject to rule 7.02 and, when published to the Internet, constitutes an advertisement in the public media.

A. Websites

A website on the Internet that describes a lawyer, law firm, or legal services rendered by them is an advertisement in the public media. For the purposes of part VII of the TDRPC, “website” means a single or multiple page file, posted on a computer server, which describes a lawyer or law
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firm’s practice or qualifications, to which public access is provided through publication of a uniform resource locator (URL).

Of the pages of a website subject to these rules, many may be accessible without use of the site’s own navigational tools. Of those pages, for the purpose of this Interpretative Comment, the “intended initial access page” is the page of the file on which navigational tools are displayed or, in the case that navigational tools are displayed on several pages, the page which provides the most comprehensive index capability on the site. The intended initial access page of a lawyer or law firm’s website shall include—

1. the name of the lawyer or law firm responsible for the content of the site;

2. if areas of law are advertised or claims of special competence are made on the intended initial access page or elsewhere on the site, a conspicuously displayed disclaimer regarding such claims in the language prescribed at rule 7.04(b); and

3. the geographic location (city or town) in which the lawyer or law firm’s principal office is located.

Publication of a link to a separate page bearing the required disclaimer or information required by rule 7.04(b) does not satisfy this requirement.

B. Compliance

Whether displayed on the intended initial access page or elsewhere on the site, the content of the site, including words, sounds, and images, shall conform to the requirements of part VII of the Texas Disciplinary Rules of Professional Conduct.

C. Records Retention

A copy of the intended initial access page, web-based display or banner ads and target page are subject to the retention requirements of rule 7.04(f).

D. Web-Based Display or Banner Ads

An image or images displayed through the vehicle of another’s website is an advertisement in the public media if the ad describes a lawyer or law firm’s practice or qualifications, whether viewed independently or in conjunction with the page or pages reached by a viewer through links offered by the ad (“target page”). The content of a web-based display or banner ad will be viewed in conjunction with the target page.

E. Filing Requirements

The filing requirements of rule 7.07 apply to the intended initial access page of a website as well as to web-based display or banner ads and their associated target page(s) and substantive revisions thereto. A web-based display or banner ad and the target page for the web-based display or banner ad will be considered a single communication for the purposes of rule 7.07. Unless they are
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exempt from being filed under rule 7.07, web-based display or banner ads together with their associated target pages and the intended initial access page of a website must be filed.

F. Web-Based Directories

A lawyer or law firm’s listing on a web-based directory that is accessible by the public shall be exempt from the filing requirements of rule 7.07 if it meets the requirements of rule 7.07(e)(1).

G. Internet Domain Names

Rule 7.01 prohibits lawyers and law firms from advertising or practicing under trade names. Therefore, an Internet domain name or URL may not be used as the name under which a lawyer or firm does business. A domain name that is a reasonable variation of the law firm name as permitted under rule 7.01 or that is a description of the lawyer or law firm may be used as a locator or electronic address only if such use does not violate provisions of rule 7.02.


A lawyer or firm with only one office will satisfy the requirement for disclosure of a principal office by including in all advertising and written solicitations the name of the city or town in which the office is located. A lawyer or firm with more than one office, regardless of the staffing of the other office(s), must include in all advertising the city or town that is the location of its principal office, but there is no requirement to designate such city or town as the principal office.

19. Disclosure of Information Prompting a Written Solicitation Communication (July 1996)

When making a disclosure required pursuant to rule 7.05(b)(5), the lawyer must disclose the specific information source on which the solicitation is based. For example:

A. If the lawyer obtained the prospective client’s name from police accident reports, the solicitation should state that the name was obtained from police accident reports rather than simply stating that it was obtained from “public records.”

B. If the prospective client’s name is obtained from a jail inmates list or booking log, that too should be specifically disclosed.

C. When the name of a prospective client is obtained from a foreclosure list in the Daily Commercial Recorder, foreclosure lists obtained from the Daily Commercial Recorder would be appropriate language to satisfy rule 7.05(b)(5).

20. Distinctions Between “Preapproval” and “Filing” (July 1996, revised June 2005)

A request for “PREAPPROVAL” means the submission of a public media advertisement or written, recorded, electronic, or other digital solicitation to the Advertising Review Committee pursu-
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According to rule 7.07(d), advertisers or law firms are required to submit advertisements or solicitations to the Advertising Review Committee at least thirty days prior to dissemination to the public. Preapproval is optional for the advertising lawyer, but not required. The purpose of preapproval is to ensure compliance with advertising rules and identify any violations prior to dissemination. Preapproval is mandatory for advertisements in telephone directories and similar directories, with requirements for submitting requests at least thirty days prior to the last date on which changes can be made to the advertisement before printing. Preapproval requests for advertisements and solicitations submitted for preapproval will be reviewed and returned to the advertising lawyer within twenty-five days of receipt, either with an approval or a request for corrections or additional information. Preapproval under this process is an “advisory opinion” of compliance under rule 7.07(d).

A “FILING” is the submission of any public media advertisement or written, recorded, electronic, or other digital solicitation to the Advertising Review Committee for review pursuant to rule 7.07(b). Rule 7.07(e) exempts certain advertisements and solicitations from filing requirements; however, filing is required for advertisements or solicitations not exempted under rule 7.07(e). If a filed advertisement or solicitation contains no violations, the advertiser will receive an approval, normally within forty-five days of receipt.


EXAMPLE ONE: An attorney files a nonexempt advertisement from a telephone directory or similar publication with the Advertising Review Committee as required by rule 7.07(b), and the advertisement contains a technical violation of the Lawyer Advertising Rules. (Violations not posing a potential risk of harm to the public are considered technical, such as violations of rules 7.04(c) and 7.04(j).) The attorney cannot correct the advertisement, nor can he permanently end dissemination due to the nature of the directory or publication.

RESULT ONE: If the attorney has not received a disapproval from the committee on any previous advertising, the advertisement in question will be referred to the State Bar disciplinary system based on the following conditions: The attorney certifies in writing to the Advertising Review Committee that he will correct the violations in any future publications of that ad, will file corrected advertising with the committee, and does so.

NOTE: If an attorney has received a previous disapproval from the committee on any material for any reason, the attorney will not have the opportunity to receive another disapproval but will be referred directly to the State Bar disciplinary system.

EXAMPLE TWO: An attorney files a nonexempt advertisement from a telephone directory or similar publication with the Advertising Review Committee as required by rule 7.07(b), and the advertisement contains a nontechnical violation of the Lawyer Advertising Rules. The attorney cannot correct the advertisement, nor can he permanently end dissemination due to the nature of the directory or publication.
RESULT TWO: Regardless of the disposition of the attorney’s previously filed ads, if any, the attorney in question will be referred to the State Bar disciplinary system.


Without objective substantiation, a lawyer may not advertise or utilize in a written, recorded, electronic, or other digital solicitation that a particular approach to a legal problem utilized by that lawyer is superior in comparison to other accepted and appropriate approaches to the same problem. Such advertisements, or written, recorded, electronic, or other digital solicitations, are potentially misleading and may create unjustified expectations in violation of rule 7.02(a)(1) and (3). Comparisons in advertisements or written, recorded, electronic, or other digital solicitations by lawyers for estate planning services frequently emphasize the exclusive use of revocable living trusts to transfer assets at death. In this context, a lawyer may not explicitly or implicitly advertise, for example, that:

A. Living trusts will always save the client money.
B. The use of a living trust in and of itself will reduce or eliminate estate taxes otherwise payable as result of the client’s death.
C. Estate tax savings can be achieved only by use of a living trust.
D. The use of a living trust will achieve estate tax savings that cannot be achieved using a will.
E. The probate process is always lengthy and complicated.
F. The probate process should always be avoided.
G. The use of a living trust will reduce the total expenses incurred compared to expenses incurred using other estate planning devices intended to address the same basic function.
H. The use of a living trust avoids lengthy delays experienced in the use of other estate planning devices intended to address the same basic function.
I. Lawyers use will writing as a loss leader.

These and other similar statements are potentially misleading and may create unjustified expectations in violation of rule 7.02(a)(1) and (3). Additionally, in such advertisements, or written, recorded, electronic, or other digital solicitations, references to the American probate system at large should be avoided because the Texas probate system is much different and typically much simpler. A lawyer is not prohibited from conducting seminars on estate planning in general and advertising or utilizing in a written, recorded, electronic, or other digital solicitation that at those seminars the advantages of revocable trusts will be discussed.
23. Notification of Death of Solo Practitioner to Practitioner’s Clients (Feb. 2004)

A written communication notifying the clients of a solo practitioner of the practitioner’s death may be exempt from the provisions of rules 7.05 and 7.07 if the communication provides nothing more than notification of the death, the relationship between the author of the letter and the deceased practitioner, and the location and availability of the deceased practitioner’s files. If a written communication notifying the clients of the death of a solo practitioner also contains content designed to communicate the qualifications or the availability of legal services of any lawyer or law firm, part VII of the Texas Disciplinary Rules of Professional Conduct apply.


When determining whether a communication concerning a lawyer’s services is false or misleading or creates an unjustified expectation as prohibited by rule 7.02(a), the communication will be viewed in its entirety.

25. Substantiation (June 2005)

Rule 7.02 establishes that the advertising attorney bears the burden of demonstrating that the information contained in the advertisement is substantiated by fact. The filing of a communication containing a reference to past successes or results must be accompanied by a written statement by the lawyer or an authorized representative of the law firm claiming credit for such success or result. The written statement shall include —

A. the name of the lead counsel in the matter giving rise to the recovery or an explanation of the relationship between the lawyer claiming credit for the result and the client on whose behalf the recovery was made;

B. the amount, in dollars, actually received by the client, whether the reference to the gross amount or results includes a reference to a dollar amount or not;

C. the name, address, and phone number of the client; and

D. the nature of the suit or claim and damages or injuries.

26. Reference to Past Successes or Results Obtained in an Advertisement in the Public Media (Dec. 2005)

When making any reference to past successes or results obtained in advertisements in the public media, an attorney or law firm must comply with the general rule contained in rule 7.02(a)(1), which prohibits communications that contain a material misrepresentation of fact or law or omit a fact necessary to make a statement not materially misleading. In addition, rule 7.02(a)(2) imposes an affirmative requirement that advertising lawyers and law firms include specific information when referring to past successes or results obtained.
1. A lawyer or lawyer firm publishing a claim of past successes or results obtained in an advertisement in the public media must include information sufficient to provide the basis for a reasonable person to understand the nature of the case, matter, or representation and the advertising lawyer or law firm’s role in it.
   
   a. When reference is made to past successes or results obtained by a lawyer or firm in a matter in which any or all of the descriptive elements of rule 7.02(a)(2)(i)–(iv) apply, the applicable elements must be incorporated into that reference.
   
   b. When reference is made to past successes or results obtained by a lawyer or firm in a matter where one or more of the descriptive elements of rule 7.02(a)(2)(i)–(iv) do not apply—either because of the nature of the matter or representation or for any other reason—the advertising lawyer or law firm must not only comply with the applicable elements, but must also comply with the requirement that sufficient information be included to avoid misleading a reasonable person. That lawyer bears the burden of providing in the advertisement the information required by the particular facts and circumstances of that representation and that communication.

2. If any reference is made to a sum of money, a particular type of relief, or some other amount or value, care must be taken to make clear the nature of the result, the role of the advertising lawyer or law firm, their relationship to that result, relief, or amount, and the net effect thereof.

3. Claims referencing cumulative results or successes must be accompanied by information sufficient to meet the advertising lawyer or law firm’s burden under rule 7.02(a)(2) with regard to each individual case, matter, or representation.

4. A disclaimer regarding the uniqueness of client matters will not cure a failure to provide adequate information about a claim of past successes or results obtained.

5. If a lawyer or law firm describes legal experience with reference to a specific matter without claiming responsibility for success or results obtained, that communication may not be subject to the requirements of rule 7.02(a)(2). In that instance, however, the general rules regarding communications about qualifications and services still apply, and the burden lies with the advertising lawyer or law firm to demonstrate that a reasonable person would not conclude that a claim of responsibility for a particular result is being made.

27. **Trade Names (Feb. 2006)**

Rule 7.01(e) prohibits a lawyer from advertising in the public media or seeking public employment by any communication under a “trade or fictitious name.” Texas Professional Ethics Opinion No. 529 authorizes the use of firm names such as “Jones, Smith & Doe,” “Jones, Smith & Doe, P.C.,” and “Law Offices of Jones, Smith & Doe.” Firm names such as “JonesLaw,” “Jones Law,” and “Jones Law, P.C.” are not permissible because the name claims or implies a quality of
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the firm beyond the fact that the firm renders legal services. Among other things, the use of the term “Law” as a noun, or as a part of a noun, in a firm name constitutes—in the absence of a firm lawyer named “Law”—an impermissible trade name.

Uniform Resource Locators (URLs) cannot be used as a trade name, but can be advertised as the Internet address for the lawyer or law firm as long as the requirement of the rules are met.

Review Process

The review process begins with the submission of the Lawyer Advertising and Solicitation Communications Application Form, available at http://www.texasbar.com/Template.cfm?Section=Advertising_Review&Template=/ContentManagement/ContentDisplay.cfm&ContentID=12339, together with copies of the advertisement and a nominal filing fee, to the Advertising Review Department. Submission of the form may be done prior to disseminating the advertisement to the public or concurrently with dissemination. Submission prior to dissemination allows for preapproval of the advertisement.

Preapproval

Preapproval is when a lawyer submits his material to the Advertising Review Department at least thirty days prior to first dissemination of the material. In the case of an advertisement for a telephone directory or similar publication, in order to request a preapproval, the lawyer must submit an advertisement to the Bar at least thirty days before the material is first disseminated. The Advertising Review Committee will review the advertisement for violations and respond to the applicant within twenty-five days from the date of receipt. The response will either approve the ad or provide a description of the different rule(s) violations. If violations are noted on the advertisement, the attorney is given twenty days to provide the corrected advertisement to the Advertising Review Committee, if he intends to disseminate the ad. A preapproval opinion issued by the Advertising Review Committee is binding in favor of the attorney in any subsequent disciplinary proceeding concerning the ad.

Filing

A filing occurs when a lawyer does not submit the advertisement at least thirty days before its first dissemination or if the advertisement is already in public dissemination. Once filed, the advertisement is reviewed for applicable violations, and if none are present, a written approval notice is sent to the attorney. If an advertisement has any violations, the nature of the violations will determine the next steps in the review process. The Advertising Review Committee either will inform the attorney of the violations or refer the matter to the State Bar’s Chief Disciplinary Counsel for entry into the disciplinary system. If the former occurs, the lawyer is then given ten days to stop dissemination of the advertisement immediately and respond back to the ARC with either a corrected ad or a notice that the advertisement’s dissemination had been permanently ended.

Once an ad has been approved by the ARC, the lawyer is not required to resubmit an advertisement unless a substantive modification is made to the ad, but not a simple change of street address.
Commentary on Lawyer Advertising Rules

Submission Requirements

or numeric phone number. However, any other addition, deletion, or text edit requires that the ad
be submitted with a new application form and filing fee.

Submission Requirements

The submission requirements for public media advertisements and solicitation communications
are outlined in rule 7.07 of the Texas Disciplinary Rules of Professional Conduct. A variety of
items must be submitted for each different type of advertisement or solicitation communication
sent to the Advertising Review Committee for review.

Print advertisements (magazine, newspaper, telephone directory, etc.) submissions must
contain—

1. one original and one copy of the advertisement;
2. one original and one copy of the completed application form;
3. a payment in the amount of $75 for each advertisement submitted; and
4. if the advertisement is presented in a language other than English, one original and
one copy of the translated material.

Television and radio advertisements submissions must contain—

1. one original and one copy of the script in English;
2. if in a language other than English, one original and one copy of the script in what-
ever language in which the advertisement is presented;
3. one original and one copy of the completed application;
4. a payment in the amount of $75 for each advertisement submitted; and
5. one recording of the advertisement either on DVD or VHS cassette for television
commercials or CD or cassette tape for radio, if submitted at the same time it is
aired on television or radio.

Internet advertisements submissions must contain the following—

1. one original and one copy of the printout of the initial access page (homepage) or
banner advertisement and website to which it is linked;
2. if in a language other than English, one original and one copy of the translation of
the materials indicated in number one;
3. one original and one copy of the completed application form; and
4. a payment in the amount of $75 for each advertisement submitted.
Submission Requirements

Solicitation communications materials (letters, e-mails, faxes, newsletters and brochures) submissions must contain—

1. one original and one copy of the written solicitation;
2. one original and one copy of the written solicitation in English, if the letter is in a language other than English;
3. one original and one copy of the envelope or packaging in which the solicitation will be sent to the recipient;
4. one original and one copy of the completed application form;
5. one original and one copy of the completed addendum; and
6. a payment in the amount of $75 for each advertisement submitted.

If submitting more than one advertisement, all $75 review fee payments can be consolidated onto one check.

If submitting more than one radio or television advertisement, the ads can be recorded onto one compact disc or audiocassette for radio advertisements or one DVD or VHS cassette for television advertisements.

Advertisements Published before the June 1, 2005, Revisions to Part VII

If an advertisement published prior to June 1, 2005, was compliant with the prior rules and had been filed as required by rule 7.07, the advertisement is not required to be submitted for review again, unless the change in the ad is required to bring the advertisement into compliance with the new rules.

If the advertising lawyer determines that no modifications to the ad are necessary to comply with the rules effective June 1, 2005, no filing is necessary. However, if challenged, the burden rests on the advertising attorney to demonstrate compliance.

If the advertising lawyer alters a previously approved advertisement to attain compliance with the rules, or for any other reason, and the change is substantive, the ad must be filed with a new application and fee.

To remedy any of the above situations, the preapproval process is available to review existing ads for compliance with the modified rules. Since each ad is unique, no general statement can address whether a particular alteration of an ad constitutes a substantive change or ensures compliance. When the ARC reviews whether an advertisement is false or misleading under these rules, each advertisement is viewed in its entirety.
Chapter 12

Internal Procedural Rules of the
Board of Disciplinary Appeals

Effective May 1, 1992

The Internal Procedural Rules of the Board of Disciplinary Appeals can be found in Texas Rules of Court—State (West) or at www.txboda.org/PDFs/BODAInternalProceduralRules.pdf.

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### SECTION 1. GENERAL PROVISIONS

**Rule 1.01**  
Definitions

- **(a)** “BODA” is the Board of Disciplinary Appeals.
- **(b)** “Chair” is the member elected by BODA to serve as chairperson.
- **(c)** “Classification” is the determination pursuant to Texas Rules of Disciplinary Procedure (“TRDP”) 2.10 by the Chief Disciplinary Counsel (“CDC”) whether a grievance constitutes a “complaint” or an “inquiry.”
- **(d)** “Clerk” is the Executive Director or other person appointed by BODA to assume all duties normally performed by the clerk of a court.
- **(e)** “Executive Director” is the Executive Director of BODA.
- **(f)** “Panel” is any three-member grouping of BODA.
- **(g)** “Party” is a complainant, respondent, or the CDC.

**Rule 1.02**  
General Powers

Pursuant to TRDP 7.08J, BODA shall have and exercise all the powers of either a trial court or appellate court, as the case may be, in hearing and determining disciplinary proceedings; except that BODA judgments and orders shall be enforced in accordance with TRDP 15.03.
Rule 1.03 Additional Rules in Disciplinary Matters

Except as varied by these rules and to the extent applicable, the Texas Rules of Civil Procedure (“TRCP”), Texas Rules of Appellate Procedure (“TRAP”), and Texas Rules of Evidence (“TRE”) apply to all disciplinary matters before BODA, except appeals from classification decisions, which are governed by Section 3 of these Internal Rules.

Rule 1.04 Appointment of Panels

(a) BODA may consider any matter or motion through appointment of a panel, except as specified in subpart (b) of this Rule. The chair may delegate appointment of panels for any BODA action to the executive director. Decisions shall be by a majority vote of the panel; however, any panel member may refer a matter for consideration by BODA sitting en banc. Nothing contained in these rules shall be construed to give a party the right to be heard by BODA sitting en banc.

(b) Any disciplinary matter naming a BODA member as Respondent shall be considered by BODA sitting en banc.

Rule 1.05 Record Retention

Records of appeals from classification decisions shall be retained by the BODA clerk for a period of at least three (3) years from the date of disposition. Records of other disciplinary matters shall be retained for a period of at least five (5) years from the date of final judgment, or for at least one (1) year after the date a suspension or disbarment ends, whichever is later.

Rule 1.06 Trial Briefs

In any disciplinary proceeding before BODA, all trial briefs and memoranda must be filed with the clerk no later than ten (10) days before the hearing, except upon leave of BODA.

Rule 1.07 Service

In any disciplinary proceeding before BODA initiated by service of a petition upon the respondent, service shall be by personal service, certified mail with return receipt requested and delivery restricted to respondent as addressee only, or in any other manner permitted by applicable rule(s) and authorized by BODA that is reasonably calculated under all the circumstances to apprise the respondent of the proceeding and to give him or her reasonable time to appear and answer. The CDC may serve a petition by certified mail itself without the appointment of a private process server. To establish service by certified or registered mail, the return receipt must contain the respondent’s signature.
Rule 1.08 Internal Procedural Rules of the Board of Disciplinary Appeals

Rule 1.08 Publication

The office of the CDC shall publish these rules as part of the TDRPC and TRDP and notify each respondent in a compulsory discipline, reciprocal discipline, revocation of probation, or disability matter filed with BODA where these rules are available.

Rule 1.09 Photocopying Costs

The clerk of BODA may charge to the requestor a reasonable amount for the reproduction of non-confidential documents filed with BODA. BODA may set a fee for the reproduction of documents. The fee shall include compensation for staff and recovery of actual production costs.

Rule 1.10 Abstracts

BODA may, in its sole discretion, periodically prepare abstracts of inquiries, grievances, or disciplinary proceedings for publication pursuant to Texas Gov’t Code § 81.072(b)(3) and Part VI of the TRDP.

Rule 1.11 Hearing Setting and Notice

(a) **Original Petitions.** For any compulsory case, reciprocal case, revocation of probation, or other matter initiated by the CDC filing a petition with BODA, the CDC may contact the BODA clerk for the next regular available hearing date before filing the original petition. The CDC may then include in the petition a hearing notice specifying the date, time, and place of the hearing. The hearing date must be at least thirty (30) days from the date that the petition is served on the respondent, except in the case of a petition to revoke probation.

(b) **Filing without notice.** The CDC may file any matter with BODA without first obtaining a hearing date so long as it thereafter serves notice on the respondent of the date, time, and place of the hearing in accordance with TRCP 21a (or other applicable TRCP) at least thirty (30) days before the hearing date, except in the case of a petition to revoke probation.

(c) ** Expedited settings.** If a party desires a hearing on a matter on a date other than the next regular available BODA hearing date, the party may request an expedited setting in a written motion setting out the reasons for the request. The expedited hearing setting must be at least thirty (30) days from the date of service of the petition, motion or other pleading, except in the case of a petition to revoke probation. BODA may grant or deny a request for an expedited hearing date in its sole discretion.

(d) **Setting notices.** BODA shall notify the parties by first class mail of any hearing date, other than a hearing set on the next regularly available hearing date as noticed in an original petition or motion.
Rule 1.13 Facsimile and Electronic Filing

(a) Any document required to be filed with BODA may be filed by facsimile transmission with a copy to the BODA clerk by first class mail. A document filed by facsimile will be considered filed the day it is received if received before 5:00 p.m. on a regular business day. Any document received by facsimile after 5:00 p.m. or received on a weekend or holiday officially observed by the State of Texas will be considered filed the next regular business day.

(b) Any document required to be filed with BODA may be filed by e-mailing a copy of the document file to the email address designated by BODA for that purpose with a copy sent to the BODA clerk by first class mail. A document filed by email will be considered filed the day it is received if received before 5:00 p.m. on a regular business day. Any document received by email after 5:00 p.m. or received on a weekend or holiday officially observed by the State of Texas will be considered filed the next regular business day. The date and time of receipt shall be determined by the date and time shown on the BODA clerk’s email.

(c) It is the responsibility of the party filing a document by facsimile or email to obtain the correct telephone number or email address for BODA and confirm that the document was received by BODA in legible form. Any document which is illegible or which cannot be opened as part of an email attachment by BODA will not be considered received or filed. Parties using facsimile or email filing must still comply with TRCP requirements for signatures.

(d) Papers will not be deemed filed if sent to any individual BODA member or other office or address.
Rule 1.14 Internal Procedural Rules of the Board of Disciplinary Appeals

Rule 1.14 Hearing Exhibits

Counsel should provide an original and twelve copies of any document, pleading, exhibit, or other material which the attorney intends to offer or otherwise make available to the BODA members at a hearing and not already filed with BODA prior to the hearing.

Rule 1.15 BODA Work Product and Drafts

Without limiting any exceptions or exemptions from disclosure contained in any other rules or statutes, a document or record of any nature, regardless of electronic or physical form, characteristics, or means of transmission, created or produced in connection with or related to BODA’s adjudicative decision-making process is not subject to disclosure or discovery. This includes documents prepared by any BODA member, by BODA staff or interns, or any other person acting on behalf of or at the direction of BODA.

SECTION 2. ETHICAL CONSIDERATIONS

Rule 2.01 Representing or Counseling Parties in Disciplinary Matters and Legal Malpractice Cases

(a) No current member of BODA shall represent a party with respect to any disciplinary action or proceeding. No current member of BODA shall testify voluntarily or offer to testify voluntarily on behalf of a party in any disciplinary action or proceeding.

(b) No current BODA member may serve as an expert witness providing opinions regarding the TDRPC.

(c) A BODA member may represent a party in a legal malpractice case, provided that he or she is later recused in accordance with these rules from any proceeding before BODA arising out of the same facts.

Rule 2.02 Confidentiality

(a) All BODA deliberations are confidential and shall not be disclosed by BODA members or staff. Classification appeals files and disability suspension files are confidential pursuant to the TRDP.

(b) If subpoenaed or otherwise compelled by law to testify in any proceeding, members of BODA shall not disclose matters discussed in conference concerning any disciplinary case, unless required to do so by a court of competent jurisdiction. If subpoenaed or otherwise compelled to attend any disciplinary proceeding, including depositions, a member of BODA shall promptly notify the chair of BODA and the CDC.
Rule 2.03 Disqualification and Recusal of BODA Members

(a) BODA members are subject to disqualification and recusal respectively as provided in TRCP 18b.

(b) BODA members may, in addition to recusals pursuant to (a) above, voluntarily recuse themselves from any discussion and voting for any other reason.

(c) Nothing in these rules shall impute disqualification to lawyers who are members of or associated with BODA members’ firms from serving on grievance committees or representing parties in disciplinary or legal malpractice cases; however, BODA members shall recuse themselves from any matter in which any lawyer who is a member of or associated with a BODA member’s firm represents a party in any disciplinary proceeding or before BODA.

Rule 2.04 Communications With BODA

Correspondence or other communications relative to any matter pending before BODA must be conducted with the clerk and shall not be addressed directly to or conducted with any BODA member.

SECTION 3. CLASSIFICATION APPEALS

Rule 3.01 Notice of Appeal

(a) If the grievance filed by the complainant is not classified as a complaint, the CDC shall notify the complainant of his or her rights to appeal as set out in TRDP 2.10 or other applicable rule.

(b) To facilitate the potential filing of an appeal, the CDC shall send the complainant an Appeal Notice form with the classification disposition which shall include, but is not limited to, the docket number of the matter, the time deadline for appealing as set out in TRDP 2.10 or other applicable provision, and information for mailing or faxing the Appeal Notice to BODA.

Rule 3.02 Complaint on Appeal

BODA shall review only the original grievance on appeals from classification decisions. The CDC shall forward a copy of the complete grievance to BODA with supporting documentation as originally filed. BODA shall not consider any supplemental information which was not reviewed as part of the original screening and classification decision.
Rule 3.03 Notice of Disposition

BODA shall mail complainant, respondent, and the CDC written notice of the decision of the appeal by first class mail to the addresses provided BODA by the CDC in the appeal transmittal.

SECTION 4. APPEALS FROM EVIDENTIARY PANEL HEARINGS

Rule 4.01 Signing, Filing, and Service

(a) **Signing.** Each brief, motion or other paper filed shall be signed by at least one attorney for the party or by the party *pro se* and shall give the State Bar of Texas identification number, mailing address, telephone number, email address, and telecopier number, if any, of each attorney whose name is signed thereto, or of the party (if applicable).

(b) **Number of Copies.** Each party shall file an original and two (2) copies of all briefs and motions with the clerk. Only one copy of the clerk’s record and reporter’s record shall be filed.

(c) **Service.** Copies of all papers other than the record filed by any party shall, at or before the time of filing, be served on all other parties as required and authorized by the TRAP.

Rule 4.02 Computation of Time

(a) **Beginnings of Periods.** The date the chair of the evidentiary panel signs its decision shall constitute the date of notice under TRDP 2.21.

(b) **TRAP Followed.** Computation of time for purposes of this section shall follow TRAP 4.1 and 9.2(b).

Rule 4.03 Record on Appeal

(a) **Contents.** The record on appeal shall consist of a clerk’s record and where necessary to the appeal, a reporter’s record.

(b) **Stipulation as to Record.** The parties may designate parts of the clerk’s record and reporter’s record to be included in the record on appeal by written stipulation filed with the custodian of records of the evidentiary panel.

(c) **Responsibility for Filing Record.** The custodian of records of the evidentiary panel is responsible for preparing, certifying, and timely filing the clerk’s record if a notice of appeal has been filed. The court reporter is responsible for timely filing the reporter’s record if a notice of appeal has been filed, the appellant has
requested that the reporter’s record be prepared, and the party responsible for initiating the appeal has paid the reporter’s fee or has made satisfactory arrangements with the reporter. The party initiating the appeal shall pay the cost of preparing the record.

(d) **Clerk’s Record**

1. Unless otherwise stipulated by the parties, the clerk’s record on appeal shall include all papers on file with the evidentiary panel, including, but not limited to, the election letter, all pleadings upon which the hearing was held, the docket sheet, the evidentiary panel’s charge, the final hearing order with attachments or exhibits, any findings of fact and conclusions of law, all other pleadings, the judgment or other order(s) appealed from, the notice of decision sent each party, any post-submission pleadings and briefs, and any notice of appeal.

2. Upon receipt of a copy of the notice of appeal, the custodian of records in the individual CDC office which conducted the evidentiary hearing shall prepare and transmit the clerk’s record to BODA. If the CDC is unable for any reason to prepare and transmit the clerk’s record by the due date, it shall promptly notify BODA and the parties, explain the reason(s) why it cannot be timely filed, and give the date by which it expects the clerk’s record can be filed.

3. The clerk’s record should be in the following form:

   (i) contain a detailed index identifying each document included in the record, the date of filing, and the page where it first appears;

   (ii) arranged in ascending chronological order by document by date of filing or occurrence;

   (iii) tabbed with heavy index tabs to show the beginning of each document;

   (iv) consecutively numbered in the bottom right-hand corner of the pages;

   (v) bound together so that the record will lie flat when opened; and

   (vi) contain the custodian’s certification that the documents contained in the clerk’s record are true and correct copies and are all the documents required to be filed.

(e) **Reporter’s Record.** The appellant, at or before the time prescribed for perfecting the appeal, shall make a written request to the official reporter for the reporter’s record, designating the portion of the evidence and other proceedings to be included. A copy of such request shall be filed with the evidentiary panel and
Rule 4.03 Internal Procedural Rules of the Board of Disciplinary Appeals

BODA and be served on the appellee. The reporter’s record shall be certified by the official court reporter.

(f) **Non-Stenographic Recordings.** All testimony and evidence may be recorded at the evidentiary hearing by means other than stenographic recording, including videotape recordings; however, the non-stenographic recording shall not dispense with the requirement of a stenographic transcription of the hearing. In appeals to BODA, the non-stenographic recording must be transcribed and the transcription filed as the reporter’s record.

(g) **Other Requests.** At any time before the clerk’s record is prepared or within ten (10) days after service of a copy of appellant’s request for the reporter’s record, any party may request additional portions of the evidence and other proceedings to be included therein.

(h) **Inaccuracies or Defects.** Any inaccuracies in the record may be corrected by an agreement of the parties. Any dispute regarding the reporter’s record shall be submitted by BODA to the evidentiary panel for resolution and to conform the reporter’s record.

Rule 4.04 Time to File Record

(a) **Timetable.** The clerk’s record and reporter’s record (including a non-stenographic recording which has been transcribed) shall be filed with the BODA clerk within thirty (30) days after the date the notice of appeal is received by BODA. Failure to file either the clerk’s record or the reporter’s record within such time shall not affect BODA’s jurisdiction, but shall be grounds for BODA exercising its discretion to dismiss the appeal, affirm the judgment appealed from, disregard materials filed late, or to apply presumptions against the appellant.

(b) **If No Record Filed**

(1) If the clerk’s record or reporter’s record has not been timely filed, the BODA clerk must send notice to the party responsible for filing it, stating that the record is late and requesting that the record be filed within thirty (30) days. The BODA clerk must send a copy of this notice to all the parties and the evidentiary panel.

(2) If no reporter’s record is filed due to appellant’s fault, and if the clerk’s record has been filed, BODA may, after first giving the appellant notice and reasonable opportunity to cure, consider and decide those issues or points that do not require a reporter’s record for a decision. BODA may do this if no reporter’s record has been filed because:

(i) the appellant failed to request a reporter’s record; or
(ii)(a) appellant failed to pay or make arrangements to pay the reporter’s fee to prepare the reporter’s record; and

(b) the appellant is not entitled to proceed without payment of costs.

(c) Supplemental Record. If anything material to either party is omitted from the clerk’s record or reporter’s record BODA may, upon written motion of a party or upon its own motion, direct a supplemental record to be certified and transmitted by the CDC or the official court reporter.

Rule 4.05 Copies of the Record

The record shall not be withdrawn from the custody of the BODA clerk. Any party may obtain a copy of the record or any designated part thereof by making written request to the clerk and paying copying charges.

Rule 4.06 Requisites of Briefs

(a) Appellant’s Filing Date. Appellant’s brief must be filed within thirty (30) days after the later of the date on which the clerk’s record or the reporter’s record was timely filed.

(b) Appellee’s Filing Date. Appellee’s brief must be filed within thirty (30) days after the filing of appellant’s brief.

(c) Contents. Briefs shall contain:

(1) a complete list of the names and addresses of all parties to the final decision and their counsel;

(2) a table of contents with page references where the discussion of each point relied upon may be found and also an index of authorities alphabetically arranged, together with reference to the pages of the brief where the same are cited. The subject matter of each point or group of points shall be indicated in the table of contents;

(3) a brief general statement of the nature of the cause or offense and the result;

(4) a statement of the points upon which an appeal is predicated or the issues presented for review;

(5) a brief of the argument;

(6) prayer for relief; and,
Rule 4.06 Internal Procedural Rules of the Board of Disciplinary Appeals

(7) an appendix consisting of copies of pertinent parts of the record upon which the party relies.

(d) **Length of Briefs.** Briefs shall be typewritten or otherwise legibly printed on letter-size (8½" x 11") paper and shall not exceed fifty (50) pages in length, exclusive of pages containing names and addresses of parties, table of contents, index of authorities, points of error, and any addenda or appendix containing statutes, rules, regulations, etc., except upon leave of BODA.

(e) **Amendment or Supplementation.** Briefs may be amended or supplemented upon leave of BODA.

(f) **Failure to File a Brief.** If the appellant fails to timely file a brief, BODA may:

(1) dismiss the appeal for want of prosecution, unless the appellant reasonably explains the failure and the appellee is not significantly injured by the appellant’s failure to timely file a brief; or

(2) decline to dismiss the appeal and give further direction to the case as it considers proper.

Rule 4.07 Oral Argument

(a) **Request.** A party desiring oral argument before BODA shall request same in writing and include the request in the notice of appeal or on the front cover of that party’s first brief. BODA may grant or deny the request in its sole discretion. If oral argument is granted, the clerk shall notify the parties of the time and place for submission. BODA may also advance cases without oral argument or direct parties on its own initiative to appear and submit oral argument on a case. The parties may agree to submit the case without argument after requesting same.

(b) **Time Allowed.** Each party shall have twenty (20) minutes in which to argue. BODA may, upon request of a party or in its discretion, extend or shorten the time allowed for oral argument.

Rule 4.08 Motions Generally

An application for an order or other relief shall be made by filing a motion with the BODA clerk for same supported by sufficient cause with proof of service on all other parties. The motion shall state with particularity the grounds on which it is based and set forth the relief sought. All supporting briefs, affidavits, or other papers shall be served and filed with the motion. A party may file a response to a motion at any time before BODA rules on the motion or by any deadline set by BODA. BODA may determine a motion before a response is filed.
Rule 4.09 Motions for Extension of Time

(a) **When Due.** Any request for extension of time other than to file a brief must be filed with the BODA clerk no later than fifteen (15) days after the last day allowed for filing the item in question.

(b) **Contents.** All motions for extension of time shall be in writing, comply with BODA Internal Procedural Rule 4.08, and specify the following:

1. the date of notice of decision of the evidentiary panel, together with the number and style of the case;
2. if the appeal has been perfected, the date when the appeal was perfected;
3. the original deadline for filing the item in question;
4. the length of time requested for the extension;
5. the number of extensions of time which have been granted previously regarding the item in question; and,
6. the facts relied upon to reasonably explain the need for an extension.

(c) **For Filing Reporter’s Record.** When an extension of time is requested for filing the reporter’s record, the facts relied upon to reasonably explain the need for an extension must be supported by an affidavit of the court reporter, which shall include the court reporter’s estimate of the earliest date when the reporter’s record will be available for filing.

Rule 4.10 Decision and Judgment

(a) **Decision.** BODA may affirm in whole or in part the decision of the evidentiary panel, modify the panel’s finding(s) and affirm the finding(s) as modified, reverse in whole or in part the panel’s finding(s) and render such decision as the panel should have rendered, or reverse the panel’s finding(s) and remand the cause for further proceedings to be conducted by:

1. the panel that entered the finding(s); or,
2. a statewide grievance committee panel appointed by BODA and composed of members selected from the state bar districts other than the district from which the appeal was taken.

(b) **Opinions.** BODA may render judgment with or without written opinion.

(c) **Notice of Orders and Judgment.** When BODA renders judgment or grants or overrules a motion, the clerk shall give notice to the parties or their attorneys of
Rule 4.10  
Internal Procedural Rules of the Board of Disciplinary Appeals

record of the disposition made of the cause or of the motion, as the case may be. The notice shall be given by first-class mail and be marked so as to be returnable to the clerk in case of nondelivery.

(d) **Mandate.** In every case where BODA reverses or otherwise modifies the judgment appealed from, BODA shall issue a mandate in accordance with its judgment and deliver it to the evidentiary panel.

Rule 4.11  
Involuntary Dismissal

Under the following circumstances and on any party’s motion or on its own initiative after giving at least ten days’ notice to all parties, BODA may dismiss the appeal or affirm the appealed judgment or order. Dismissal or affirmance may occur if the appeal is subject to dismissal

(a) for want of jurisdiction;
(b) for want of prosecution; or
(c) because the appellant has failed to comply with a requirement of these rules, a court order, or a notice from the clerk requiring a response or other action within a specified time.

**SECTION 5. PETITIONS TO REVOKE PROBATION**

Rule 5.01  
Initiation and Service

(a) Before filing a motion with BODA seeking to revoke the probation of an attorney who has been sanctioned, the CDC shall contact the BODA clerk to confirm whether the next regular available hearing date will comply with the thirty-day requirement of TRDP. The chair may designate a three-member panel to hear the motion, if necessary, to meet the thirty-day requirement of TRDP 2.23.

(b) Upon filing of the motion, the CDC shall serve the respondent in accordance with TRDP 2.23 with the motion and supporting documents, if any, in accordance with the TRCP and these rules. The CDC shall notify BODA of the date service is obtained on the respondent.

Rule 5.02  
Hearing

Within thirty (30) days of service of the motion on the respondent, BODA shall docket and set the matter for a hearing and notify the parties of the time and place for the hearing; however, upon a showing of good cause by a party or upon its own motion, BODA may continue the case to a future hearing date as circumstances require.
SECTION 6. COMPULSORY DISCIPLINE MATTERS

Rule 6.01 Initiation of Proceeding

Pursuant to TRDP 8.03, the CDC shall file a petition for compulsory discipline with BODA and serve the respondent in accordance with the TRDP and Rule 1.07 above.

Rule 6.02 Notice of Decision

The BODA clerk shall mail a copy of the judgment to the parties within ten (10) days from the date the decision is signed by the chair. Transmittal of the judgment shall include all information required by the TRDP and the Supreme Court.

SECTION 7. RECIPROCAL DISCIPLINE MATTERS

Rule 7.01 Initiation of Proceeding

(a) Pursuant to TRDP 9.01 and 9.02, the CDC shall file a petition for reciprocal discipline with BODA when information is received indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction.

(b) The petition shall request that the respondent be disciplined in Texas and have attached to it any information concerning the disciplinary matter from the other jurisdiction including a copy of the order or judgment, if any, rendered against the respondent. The CDC shall serve the respondent in accordance with Rule 1.07 above.

Rule 7.02 Order to Show Cause

Upon the filing of the petition with BODA, the chair shall immediately issue a show cause order including a hearing setting notice and forward it to the CDC, who shall serve the order on the Respondent. The CDC shall notify BODA of the date service is obtained.

Rule 7.03 Attorney’s Response

If, on or before the thirtieth day after service of the show cause order and hearing notice by the CDC, the respondent does not file an answer but thereafter appears at the hearing, BODA may, at the discretion of the chair, receive testimony from the respondent relating to the merits of the petition for reciprocal discipline.
Rule 8.01.内部程序规则的纪律委员会听证会

SECTION 8. DISTRICT DISABILITY COMMITTEE HEARINGS

Rule 8.01 Appointment of District Disability Committee

(a) If the evidentiary panel of the grievance committee finds pursuant to TRDP 2.17P(2) or the CDC believes pursuant to TRDP 2.14C that a respondent is suffering from a disability, the rules in this section shall apply to the District Disability Committee de novo proceeding help pursuant to TRDP Part XII.

(b) Upon receiving an evidentiary panel’s finding or the CDC’s report that an attorney is believed to be suffering from a disability, the BODA chair shall appoint a District Disability Committee in compliance with TRDP 12.02 and designate a chair. The BODA clerk shall notify the CDC and respondent that a committee has been appointed and notify the respondent where the procedural rules governing disability proceedings are available.

(c) A respondent notified to appear at a District Disability Committee hearing may, at any time, waive that hearing in writing and enter into an agreed judgment of indefinite disability suspension or probated suspension, provided that the respondent is competent to so waive the hearing. If the respondent is not represented, the waiver shall include a statement by the respondent that he has been advised of his right to have counsel appointed for him; and that he waives that right.

(d) All pleadings, motions, briefs, or other matters to be filed with the District Disability Committee shall be filed with the BODA clerk.

(e) Should any member of the District Disability Committee become unable to serve, the BODA chair may appoint a substitute member.

Rule 8.02 Hearing Order

(a) Upon being notified that the District Disability Committee has been appointed by BODA, the CDC shall, within twenty (20) days, file with the BODA clerk and then serve upon the respondent either in person or by certified mail, return receipt requested with delivery restricted to the respondent as addressee with a copy by first class mail, a proposed hearing order containing a list of names and addresses of all witnesses expected to be called to testify before the District Disability Committee and all exhibits expected to be offered. If service is by certified mail, the return receipt with the respondent’s signature must be filed with the BODA clerk.

(b) The respondent shall, within twenty (20) days after receiving the CDC’s proposed hearing order, file with the BODA clerk and serve the CDC by certified mail a proposed hearing order including a list of names and addresses of all witnesses expected to be called to testify before the District Disability Committee and all exhibits expected to be offered. Respondent’s failure to timely file the proposed
hearing order will not affect the responsibility of the District Disability Committee to issue a final hearing order.

(c) The District Disability Committee chair may adopt either the CDC’s proposed hearing order, the respondent’s proposed hearing order, or an order of his or her own. The BODA clerk shall prepare the final hearing order at the instruction of the District Disability Committee chair and send to the parties by first class mail. The BODA clerk shall set the final hearing date at the instruction of the chair. The adopted order shall be the final hearing order and shall contain a date, time, and place for the hearing. That order may contain provisions requiring a physical or mental examination of the respondent.

(d) Requests for an extension of time to file the proposed hearing order by either party must be by written motion filed with the BODA clerk.

Rule 8.03 Provisions for Physical or Mental Examinations

(a) Upon motion by the CDC or upon its own motion, the District Disability Committee may order the respondent to submit to a physical and/or mental examination by a qualified health care or mental health care professional. The respondent shall be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination. Any objections(s) to the motion for an exam and request for a hearing shall be filed with the BODA clerk within fifteen (15) days of receipt of the motion.

(b) The examining professional shall file with the BODA clerk his detailed written report setting out findings, including results of all tests made, diagnoses and conclusions, and deliver a copy to the CDC and to the respondent.

(c) Nothing contained herein shall be construed to limit the respondent’s right to an examination by a professional of his choice in addition to any exam ordered by BODA.

Rule 8.04 Ability to Compel Attendance

The Respondent and the CDC may, if they so choose, confront and cross-examine witnesses at the hearing. Compulsory process to compel the attendance of witnesses, enforceable by an order of a district court of proper jurisdiction, is available to the respondent and the CDC, by requesting a subpoena be issued as provided in TRCP 176.

Rule 8.05 Respondent’s Right to Counsel

(a) The notice to the respondent that a District Disability Committee has been appointed and the notice transmitting the CDC’s proposed hearing order shall state
Rule 8.05 Internal Procedural Rules of the Board of Disciplinary Appeals

that the respondent may request appointment of counsel by BODA to represent him or her at the disability hearing.

(b) If the respondent wishes to have counsel appointed pursuant to TRDP Rule 12.02, a written request must be filed with the BODA clerk within sixty (60) days of the date respondent receives the CDC’s proposed hearing order. Any request for appointment of counsel after sixty (60) days from the date of receipt of the proposed hearing order must show good cause for the failure to do so timely and that the request is not sought for delay only.

Rule 8.06 Limited Discovery

(a) In the sole discretion of the District Disability Committee, limited discovery is permissible upon a clear showing of good cause and substantial need. The parties seeking discovery must file with the BODA clerk a verified written request for discovery showing good cause and substantial need with the proposed hearing order.

(b) If good cause and substantial need are demonstrated, the District Disability Committee shall by written order permit the discovery, including in the final hearing order limitations or deadlines on the discovery. Such discovery, if any, as may be permitted, must be conducted by methods provided in the TRCP in effect at the time and may upon motion be enforced by a district court of proper jurisdiction.

(c) A decision of a District Disability Committee on a discovery matter may be reviewed only on appeal of the entire case. A reversal of the case may not be based upon the granting or denial of a discovery request without a showing of material unfairness or substantial harm.

Rule 8.07 Hearing

(a) The party seeking to establish the disability must prove by a preponderance of the evidence that the respondent is suffering from a disability as defined in the TRDP. The chair of the District Disability Committee shall admit all such probative and relevant evidence as he or she deems necessary for a fair and complete hearing, generally in accord with the TRE; provided, however, that the admission or exclusion of evidence shall be in the sole discretion of the chair. No ruling on evidence shall be a basis for reversal solely because it fails to strictly comply with the TRE.

(b) Such proceedings shall begin and conclude no earlier than thirty (30) days from the date the respondent receives the CDC’s proposed hearing order nor later than ninety (90) days from that date; however, failure to do so does not affect the jurisdiction of the District Disability Committee to act. Nothing herein shall be construed to limit the parties’ right to request a continuance of the hearing for good cause.
(c) If the Committee is unable for any reason to hold a hearing within ninety (90) days of the date the respondent receives the proposed hearing order, BODA may appoint a new committee to handle the case.

Rule 8.08 Notice of Decision

The District Disability Committee shall certify its finding and any recommendations to BODA which shall issue the final judgment in the matter.

Rule 8.09 Confidentiality

All proceedings before the District Disability Committee are closed to the public. All matters before the District Disability Committee are confidential and are not subject to disclosure, except as allowed by the TRDP or as may be required in the event of an appeal to the Supreme Court.

SECTION 9. DISABILITY REINSTATEMENTS

Rule 9.01 Petition for Reinstatement

(a) An attorney under an indefinite disability suspension may, at any time after he or she has been suspended, file a verified petition with BODA to have the suspension terminated and to be reinstated to the practice of law. All such petitions shall be filed with the BODA clerk. The petitioner shall also serve a copy of the petition on the CDC as set forth in TRCP 12.06. After the petition is filed, the TRCP shall apply except when in conflict with these rules. Service shall be in accordance with the TRDP and these rules.

(b) The petition shall set forth the information required by TRDP 12.06. If the judgment of disability suspension contained terms or conditions relating to misconduct by the petitioner prior to the suspension, the petition shall affirmatively demonstrate that those terms have been complied with or explain why they have not been satisfied. The petitioner has a duty to amend and keep current all information in the petition until the final hearing on the merits. Failure to do so may result in dismissal without notice.

(c) Disability reinstatement proceedings before BODA are not confidential; however, BODA may seal all or any part of the record of the proceeding.

Rule 9.02 Discovery

The parties shall have sixty (60) days from the date of the filing of the petition for reinstatement in which to conduct discovery. The matter shall be set for a hearing by the BODA clerk on the next available hearing date after the expiration of the sixty (60) days, and the clerk shall so notify the
Rule 9.02 Internal Procedural Rules of the Board of Disciplinary Appeals

parties of the time and place of the hearing. Nothing contained herein shall preclude either party from requesting a continuance for good cause.

Rule 9.03 Physical or Mental Examinations

(a) BODA may order the petitioner seeking reinstatement to submit to a physical and/or mental examination by a qualified health care or mental health care professional upon written motion of the CDC or its own motion. The petitioner shall be served with a copy of the motion and given at least seven (7) days to respond. BODA may grant or deny the motion with or without a hearing.

(b) The petitioner shall be given reasonable notice of the examination by written order specifying the name, address and telephone number of the person conducting the examination.

(c) The examining professional shall deliver to BODA and the parties a copy of a detailed written report setting out findings, including results of all tests made, diagnoses and conclusions.

(d) If the petitioner fails to submit to an examination as ordered, BODA may dismiss the petition without notice.

(e) Nothing contained herein shall be construed to limit the petitioner’s right to an examination by a professional of his choice in addition to any exam ordered by BODA.

Rule 9.04 Judgment

If, after hearing all the evidence, BODA determines that the petitioner is not eligible for reinstatement, BODA may, in its discretion, either enter an order denying the petition or direct that the petition be held in abeyance for a reasonable period of time until the petitioner provides additional proof as directed by BODA. The judgment may include such other orders as protecting the public and the petitioner’s potential clients may require.

SECTION 10. APPEALS FROM BODA TO THE SUPREME COURT

Rule 10.01 Docketing by the Clerk

(a) All appeals to the Supreme Court from determinations by BODA on a decision of a District Grievance Committee’s evidentiary panel concerning the imposition or failure to impose sanctions, appeals from determinations on compulsory discipline, reciprocal discipline, revocations of probation, and disability suspensions will be docketed by the clerk of the Supreme Court in the same manner as petitions for review.
Rule 10.02

(b) No fee shall be charged by the clerk for filing any appeal from BODA decisions.

(c) The notice of appeal must be filed directly with the clerk of the Supreme Court within fourteen (14) days after receipt of notice of a final determination by BODA. The record must be filed within sixty (60) days after BODA's determination. The appealing party’s brief is due thirty (30) days after the record, and the responding party’s brief must be filed within thirty (30) days thereafter.

(d) The BODA clerk shall include the information contained in subpart (c) above with transmittal of each final determination to the parties.

Rule 10.02 Appellate Rules to Apply

(a) The TRAP will apply to these appeals to the extent they are relevant. Oral argument may be granted on motion. The case shall be reviewed under the substantial evidence rule. The Court’s decisions on sanctions, compulsory discipline, reciprocal discipline, revocations of probation, and disability suspension cases will be announced on the Court’s orders. Following review by the Court, these appeals will be available for public inspection in the office of the Clerk of the Supreme Court, unless the file or some portion thereof is confidential under the TRDP.

(b) The Court may affirm a decision of BODA by order without written opinion.
Chapter 13

Texas Access to Justice Foundation
Interest on Lawyers’ Trust Accounts (IOLTA) Program

by Joyce Lindsey

Texas attorneys play a vital role in ensuring that all Texans are afforded equal access to the justice system. From making charitable contributions to legal aid organizations to providing pro bono or reduced-fee legal advice and representation, Texas attorneys consistently demonstrate their commitment on an ongoing basis to the provision of civil legal aid.

In 1984, the Supreme Court of Texas created the Interest on Lawyers’ Trust Accounts (IOLTA) Program as a mechanism for funding legal aid. Through the program, interest earned on these accounts is used to provide civil legal aid to the poor. The Texas Access to Justice Foundation administers the program and grants the funds to nonprofit organizations that provide free legal aid.

The Texas IOLTA Program currently helps to provide much-needed services without taxing the public and at no cost to lawyers or their clients. Only client funds that are nominal or held for a short period of time may be deposited into IOLTA accounts. The Rules Governing the Operation of the Texas Access to Justice Foundation, adopted by the Supreme Court of Texas in 1984, prohibit the use of IOLTA funds to directly fund class-action suits, lawsuits against governmental entities, or lobbying for or against political candidates or issues.

All fifty states and the District of Columbia have approved IOLTA programs. In Australia and Canada, where the IOLTA concept originated, the programs have been operating since the 1960s. For more information about other IOLTA programs, visit www.iolta.org.

The Mechanics of IOLTA

Attorneys routinely receive client funds, such as unearned retainers or settlements, which they place in financial institutions. Since the funds are being held for the benefit of the client, attorneys must place these funds in an account separate from their general operating account or any personal account.

If the client funds will generate interest sufficient to offset the expense of investing them in a separate account for the client, the attorney should invest the funds for the client.

1. Joyce Lindsey is the Associate Director of the Texas Access to Justice Foundation. She has worked for the Foundation since it was created by the Supreme Court of Texas in 1984. Before joining the Foundation, she was an accountant for the State Bar of Texas for eight years. Joyce has spoken numerous times to bar associations, banks, and other interested parties about the mission of the Foundation and the Interest on Lawyers’ Trust Accounts (IOLTA) Program. When not working with attorneys and bankers, Joyce enjoys cooking, traveling, gardening, and playing with her grandchildren.
Licensed attorneys who maintain client trust funds that are nominal in amount or are reasonably anticipated to be held for a short period of time must attempt in good faith to locate an interest-bearing account that would generate interest greater than service charges.

**Issues that Determine Whether an Account Will Generate Net Interest:**

- Interest rate paid on the account
- Amount of service fees charged on the account
- Minimum balance requirements on the account
- Average daily balance in the account

While there are many factors that should be considered in determining whether an attorney needs an IOLTA account, the following IOLTA check-off may serve as a guide.

**IOLTA Check-Off:**

- The attorney handles client funds that are nominal or will be held for a short period of time. ☐ Yes  ☐ No

  If the answer is “no,” the attorney does NOT need an IOLTA account. If the answer is “yes,” continue with the following questions.

- The client funds that the attorney handles are sufficient to generate net interest when pooled with other client funds, but could not generate sufficient interest for a single client. ☐ Yes  ☐ No

- The client funds that the attorney handles are sufficient to offset service charges or other fees associated with the account. ☐ Yes  ☐ No

- If the attorney answers “yes” to each of these questions, he must maintain an IOLTA account.

**Opening an IOLTA Account:**

If an attorney determines that he must maintain an IOLTA account, the following steps should be taken to open the account:

1. The attorney must place IOLTA accounts at eligible financial institutions—those that pay on IOLTA interest rates comparable to rates paid to similarly situated, non-IOLTA customers. These financial institutions are listed at www.teajf.org.

2. Attorneys may not open IOLTA accounts at nonparticipating institutions. Institutions may contact the Texas Access to Justice Foundation for a bank code and packet of instructions and forms to begin the eligibility process.
Texas Access to Justice Foundation IOLTA Program  

3. The attorney must open an interest-bearing IOLTA account in his or the law firm’s name and with the Texas Access to Justice Foundation’s tax identification number. The Foundation will pay reasonable service charges on the IOLTA account. However, the Foundation does not pay for checks, wire transfers, or other business expenses associated with the account.

4. The attorney and financial institution must complete the IOLTA notice to financial institution form (available at [www.teajf.org](http://www.teajf.org)) at the bank and return it to the Texas Access to Justice Foundation via fax at 512-469-0112 or mail to P.O. Box 12886, Austin, Texas 78711-2886.

Eligible Financial Institutions

The Supreme Court of Texas has amended the IOLTA rules to require Texas attorneys to place their IOLTA accounts at eligible institutions—those that pay interest rates on IOLTA comparable to rates paid on similarly situated, non-IOLTA accounts.

The Texas Access to Justice Foundation has certified more than 540 financial institutions as eligible institutions.

Prime Partners

Certain financial institutions have chosen to participate in IOLTA at a higher level. These prime partners go above and beyond eligibility requirements to foster the IOLTA program, by paying a net yield of 70 percent or more of the federal funds target rate. They are committed to ensuring the success of the IOLTA program and increased funding for legal aid.

For a complete list of eligible financial institutions and prime partners, as well as information on opening IOLTA accounts, visit [www.teajf.org](http://www.teajf.org) or call 512-320-0099.

Changes in Account Status

Attorneys and law firms must notify the Texas Access to Justice Foundation in writing if an account is closed, a name on the account is changed, or an attorney changes firms. Changes can be faxed 512-469-0112.

Unclaimed Property

If an attorney or law firm has unclaimed property (the person to whom the funds belong is unknown or the individual cannot be located) in an IOLTA account, refer to Texas Property Code chapters 72 and 74 for instructions on how to handle disbursing these funds.
Rules Governing the Operation of the Texas Access to Justice Foundation

The Rules Governing the Operation of the Texas Access to Justice Foundation can be found in Texas Rules of Court—State (West) or at www.teajf.org/about/docs/Rules_Govern_TEAJF.pdf.

Rule 1. Establishment of the Texas Access to Justice Foundation

The Texas Equal Access to Justice Program (the “Program”), Article XI of the State Bar Rules adopted and promulgated by the Supreme Court of Texas by Order dated April 30, 1984, shall be administered by the Texas Access to Justice Foundation (the “Foundation”), a Texas Non-Profit Corporation.

Rule 2. Articles of Incorporation and Bylaws

The Articles of Incorporation and Bylaws of the Foundation shall be as set forth in Attachments 1 and 2, respectively, hereto.

Rule 3. Directors of the Foundation

Directors of the Foundation shall be appointed and their terms of office fixed as set forth in Attachment 2. The initial directors of the Foundation are named in Attachment 1.

Rule 4. Deposit of Certain Client Funds

An attorney licensed by the Supreme Court of Texas, receiving in the course of the practice of law in this state, client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time, must establish and maintain a separate interest or dividend-bearing insured depository trust account at an eligible institution and deposit such funds in the account such funds. “Interest or dividend-bearing insured depository trust account” means a federally insured checking account or investment product, including a daily financial institution repurchase agreement or a money market fund at an eligible institution as defined in Rule (7). A daily financial institution repurchase agreement must be fully collateralized by, and an open-end money market fund must consist solely of United States Government Securities. A daily financial institution repurchase agreement may be established only with an eligible institution that is deemed to be “well capitalized” or “adequately capitalized” as defined by applicable federal statutes and regulations. An open-end money market fund must hold itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940 and have total assets of at least $250,000,000.

The funds covered by this rule shall be subject to withdrawal upon request and without delay. All IOLTA-eligible client funds may be deposited in a single unsegregated account. Attorneys who practice in a law firm or for a professional corporation may utilize the interest-bearing trust account of such firm or corporation to comply with Rule 4. No funds belonging to the attorney or law firm, except funds reasonably sufficient to pay for fees or obtain a waiver of fees or to keep
the account open may be deposited in such an account. The interest earned on the account shall be paid in accordance with and used for the purposes set forth in these Rules. The Foundation shall hold the entire beneficial interest in the interest earned. Funds to be deposited under these Rules shall not include those funds evidenced by a financial institution instrument, such as a draft, until the instrument is fully credited to the financial institution in which the account is maintained. The term “draft” as herein used is defined in Section 3.104(b)(1) of the Texas Business and Commerce Code. A draft or similar instrument need not be treated as a collected item unless it is the type of instrument which the financial institution generally treats as a collected item. Nothing in this or any other of these Rules prohibits the deposit of client funds into a general account or changes the legal relationship between depositor and financial institution from that established by contract or by applicable state and federal law.

Rule 4A. Attorneys Who Do Not Handle Client Trust Funds

Licensed attorneys who do not handle client trust funds are not required to establish an IOLTA account. Such attorneys must nevertheless advise the Foundation during the annual IOLTA compliance process that they do not handle client trust funds.

Rule 4B. Accounts Unable to Generate Net Interest

Licensed attorneys who maintain client trust funds that are nominal in amount or are reasonably anticipated to be held for a short period of time must attempt in good faith to locate an interest bearing account that would generate interest greater than service charges. If such an account cannot be located, the attorney must notify the Foundation during the annual IOLTA compliance process. Such attorney is required to maintain a non-interest bearing client trust account for such funds.

Rule 5. Annual Notice to Foundation

Licensed attorneys must advise the Foundation annually (either electronically or in writing) as to their IOLTA status as provided in Rule 23.

Rule 5A. Notice to Foundation of Change in Status

Licensed attorneys must notify the Foundation either electronically or in writing within thirty (30) days of any change in IOLTA status.

Rule 5B. Notice to Foundation of Closed Account

An attorney, law firm, or professional corporation engaged in the practice of law and maintaining accounts provided for in these Rules must notify the Foundation either electronically or in writing within thirty (30) days of the closing of such account(s).
Rule 5C.  Deleted May 1, 1991, eff. Jan. 1, 1992

Rule 6.  Funds Eligible for the Program

The funds of a particular client are nominal in amount or held for a short period of time, and thus eligible for use in the Program, if such funds, considered without regard to funds of other clients which may be held by the attorney, law firm or professional corporation, could not reasonably be expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain interest on such funds for the client. Also to be considered are the nature of the proceeding or transaction involved and the likelihood of delay in the need for such funds in such proceeding or transaction. The attorney, law firm or professional corporation should exercise good faith judgment in determining initially whether client funds should be included in the Program and should review at reasonable intervals whether changed circumstances require further action with respect to such funds.

Rule 7.  Accounts to be Maintained at Eligible Institutions

An Account established at an eligible institution pursuant to Rule 4 shall be a trust account from which withdrawals or transfers may be made on demand (subject only to any notice period which the financial institution is required to reserve by law or regulation) established in any bank, savings bank, credit union, savings and loan association authorized by federal or state law to engage in business in Texas, which is insured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund, or an investment company which is registered with the Securities & Exchange Commission and the State Securities Commission (as may be required). The determination of whether or not an institution is an eligible institution and whether it is meeting the requirements of this rule shall be made by the Texas Access to Justice Foundation, which must maintain a current list of eligible institutions on its website. Participation by banks, savings and loans associations, credit unions, and investment companies in the IOLTA Program is voluntary. Attorneys may not maintain an IOLTA trust account at a financial institution which does not meet the requirements of this rule and is therefore not an eligible institution. An eligible institution that elects to offer and maintain IOLTA accounts is one that meets the requirements of this rule, including the following:

(a)  The eligible institution shall pay no less on its IOLTA accounts than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, an eligible institution may consider, in addition to the balance in the IOLTA account, factors customarily considered by the institution when setting interest rates or dividends for its non-IOLTA customers; provided, however, that such factors shall not discriminate between IOLTA accounts and non-IOLTA accounts, nor shall such factors include or consider the fact that the account is an IOLTA account. An eligible institution will satisfy these requirements if it pays the following rates or offers the following products on its IOLTA accounts:
(1) The eligible institution may offer, and the attorney or law firm may request, a sweep account that provides a mechanism for the overnight investment of balances in the IOLTA account in an interest-bearing or dividend-bearing account that is a daily financial institution repurchase agreement or a money-market fund.

(2) An eligible institution may choose to pay the higher interest or dividend rate on an IOLTA account in lieu of establishing it as a higher rate product.

(3) An eligible institution may choose to offer a “safe harbor” yield rate that is equal to 60% of the Federal Funds Target Rate on high balance accounts as reported in the Wall Street Journal on the first calendar day of the month.

(4) A yield rate specified by the Foundation, if the Foundation so chooses, which is agreed to by the financial institution. The yield rate would be in effect for and remain unchanged during a period of no more than twelve months from the inception of the agreement between the financial institution and the Foundation.

(b) Nothing in this rule shall preclude an eligible institution from paying a higher interest rate or dividend than described above or electing to waive any fees and service charges on an IOLTA account.

(c) Interest and dividends shall be calculated in accordance with the eligible institution’s standard practices for non-IOLTA customers.

(d) Allowable reasonable fees are the only fees and service charges that may be deducted by an eligible institution from interest earned on an IOLTA account. Allowable reasonable fees may be deducted from interest or dividends on an IOLTA accounts only at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on an IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the sole responsibility of, and may only be charged to, the attorney or law firm maintaining the IOLTA account.

Rule 8. Directions to the Eligible Institution

The eligible institution shall be directed by the attorney, law firm or professional corporation establishing the account:

(a) To remit, at least quarterly, interest earned on the average daily balance in the account, net of allowable reasonable fees, if any, to the Foundation. “Allowable reasonable fees” for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable IOLTA account administrative or maintenance fee. All other fees are the responsibility of, and may be charged to, the lawyer maintaining the IOLTA
Rule 8. Rules Governing the Operation of the Texas Access to Justice Foundation

account. Fees or charges in excess of the interest or dividends earned on the account for any month or quarter shall not be deducted from interest or dividends earned on other IOLTA accounts or from the principal of the account.

(b) To transmit to the Foundation with each remittance a statement showing the name of the attorney, law firm or professional corporation with respect to which the remittance is sent, the rate or rates of interest attributable to each IOLTA account, the amount and type of fees and service charges deducted, if any, and the average account balance for the account during the period for which the report is made and such other information as is reasonably required by the Texas Access to Justice Foundation.

(c) To transmit to the depositing attorney, law firm or professional corporation at the same time a report is sent to the Foundation, a report in accordance with normal procedures for reporting to depositors; and

Rule 9. Organizations Eligible for Grants

The Foundation shall make grants to organizations, not individuals. Prior to making its first grant of funds, the Board of Directors of the Foundation shall promulgate a policy, consistent with these Rules, which shall state the criteria to be met by an organization to qualify for a grant. Such criteria shall provide, among other criteria to be specified by the Board of Directors, that the organization must be exempt from taxation under Section 501(c)(3) of the United States Internal Revenue Code, as amended, or corresponding provisions of any subsequent United States Internal Revenue law or laws, have as a primary purpose the delivery of legal services to low-income persons pursuant to income and type of case criteria acceptable to the Board of Directors, be current in all filings required to be made by it with any governmental authority, maintain open records and conduct open meetings (subject to reasonable limitations for an organization of its type), be an equal employment opportunity employer, and be able to demonstrate that it can utilize any funds granted to it in a manner consistent with these Rules and policies adopted by the Board of Directors of the Foundation. Nothing herein shall be deemed to impair any attorney-client relationship.

Rule 10. Persons Eligible to Benefit from Grants

Organizations receiving grants of funds from the Foundation shall use such funds to provide legal services to individual indigent persons or client groups, associations, and nonprofit organizations. Prior to the making of its first grant, and at least annually thereafter, the Board of Directors of the Foundation shall adopt criteria relating to income, assets and liabilities defining the indigent persons eligible to benefit from Foundation grants. In representing a client group, association, or nonprofit organization, the grantee must comply with all of the other provisions of these Rules and is subject to all of the prohibitions contained herein. A client group, association, or nonprofit organization is eligible if it is (1) primarily composed of individual indigent persons; or (2) the organization’s primary purpose is in furtherance of the interests of indigent persons and is seeking legal assistance on a matter relating to such purpose.
Rules Governing the Operation of the Texas Access to Justice Foundation

Rule 11. Criteria for Grants

Prior to making its first grant of funds, the Board of Directors of the Foundation shall promulgate a policy, consistent with these Rules, which shall state the criteria to be made for a grant from the Foundation. Such criteria shall provide, among other criteria to be specified by the Board of Directors, that the funds granted by the Foundation may not be used to duplicate a service already funded by another entity or in place of other funds available for the same purpose.

Rule 12. Use of Funds Limited to Cases Which Cannot Generate Fees

Funds granted by the Foundation to organizations to provide legal services to the indigent in civil matters may not be used for any case or matter that, if undertaken on behalf of an indigent person by an attorney in private practice, might reasonably be expected to result in payment of a fee for legal services from an award to a client, from public funds, or from the opposing party.

Rule 13. Exception to Rule 12

The provisions of Rule 12 shall not be applicable in any case where the organization receiving funds granted by the Foundation determines in good faith that the indigent person seeking legal assistance has made reasonable efforts to obtain the services of an attorney in private practice for the particular matter (including contacting attorneys in private practice in the county of residence of the indigent person who normally accept cases of a similar nature), and has been unable to obtain such services because the potential fee is inadequate, is likely to be uncollectible, would substantially consume any recovery by the client, or because of any other reason which the organization, acting in good faith, believes prevents the client from obtaining the services of a private attorney.

Rule 14. Funding of Certain Suits and Activities Not Permitted

No funds shall be granted by the Foundation to directly fund class action suits, lawsuits against governmental entities, or lobbying for or against any candidate or issue. Provided, however, that funds may be granted to finance suits against governmental entities on behalf of individuals in order to secure entitlement to benefits such as, but not limited to, social security, aid to families with dependent children, food stamps, special education for the handicapped, Medicare, Medicaid, subsidized or public housing, or other economic, shelter or medical benefits provided directly to indigent individuals.

Rule 15. Records and Reports of Grantees

The Foundation shall require, as a condition to the granting of funds to any organization or program, that adequate provision be made for reports to the Foundation as to the actual use of the funds so granted and for audit of such reports. Each such organization or program receiving funds from the Foundation shall keep its financial records in accordance with generally accepted accounting principles for organizations of its type and shall furnish reports to the Foundation in such form and containing such information as shall be reasonably requested pursuant to policies adopted by the Board of Directors of the Foundation.
Rule 16. **Rules Governing the Operation of the Texas Access to Justice Foundation**

**Rule 16. Cessation of Funding**

The Foundation may cease funding an organization which fails to act in accordance with the requirements of the Order of the Supreme Court of Texas creating the Program, these Rules or the policies adopted by the Board of Directors of the Foundation as provided in these Rules. The Board of Directors of the Foundation shall adopt appropriate procedures to be followed when it has been determined to cease funding an organization, including reasonable notice to the organization involved, an opportunity to correct any deficiency (if reasonably possible to do so) and a hearing before the Board of Directors.

**Rule 17. Administrative Costs of Foundation**

The Foundation may expend funds for administrative costs of the Program, including any costs incurred after April 30, 1984, and may provide a reasonable reserve for administrative costs.

**Rule 18. Records of the Foundation**

The records of the Foundation, including applications for funds, whether or not granted, shall be open for public inspection at reasonable times and subject to reasonable restrictions dictated by the operational needs of the Foundation. The Foundation shall maintain its books of account in accordance with generally accepted accounting principles for organizations of its type and shall maintain written minutes of meetings of its Board of Directors and committees. It shall also maintain such other records as are within reasonable policies established by its Board of Directors.

**Rule 19. Initial Distribution of Funds by the Foundation**

The initial distribution of funds under the Program shall be made at a time when, in the determination of the Board of Directors of the Foundation, there are sufficient funds to provide an adequate distribution.

**Rule 20. Other Interest-Bearing Accounts**

Participating in the Program does not prohibit an attorney, law firm or professional corporation engaged in the practice of law from establishing one or more interest-bearing accounts or other investments permitted by the Texas Code of Professional Responsibility (Article X, Section 9, State Bar Rules) with the interest or dividends earned on the accounts or investments payable as directed by clients for whom funds are not deposited in accordance with these Rules.

**Rule 21. Compliance With Code of Professional Responsibility**

Neither the Foundation nor any organization or program to which it grants funds may take an action or require an attorney to take an action in violation of the Code of Professional Responsibility (Article X, Section 9, State Bar Rules) or in violation of any other code of professional responsibility adopted by this state for attorneys.
Rule 22. Attorney Liability

Nothing in these Rules affects the obligations of attorneys, law firms or professional corporations engaged in the practice of law with respect to client funds other than client funds reasonably determined to be “nominal in amount” or reasonably anticipated to be held for a “short period of time,” as those terms are defined by these Rules. An attorney, law firm or professional corporation is not liable in determining which funds are nominal in amount or on deposit for a short period of time if the determination is made in good faith in accordance with these Rules.

Rule 23. Compliance

(a) On or after March 1 of each year, all attorneys licensed by the Supreme Court of Texas shall report IOLTA compliance in a manner to be prescribed by the Texas Access to Justice Foundation and the State Bar of Texas. Such compliance statements may require such information as is deemed reasonably necessary by the Foundation and the State Bar of Texas.

(b) An annual compliance statement must be completed and returned it to the Foundation by the date stated on the compliance statement. If the compliance statement is timely filed, indicating compliance, there will be no acknowledgement. The presumption of compliance after timely filing shall obtain, absent some evidence to the contrary.

(c) Should a compliance statement filed by an attorney fail to evidence compliance, the Foundation shall contact the attorney and attempt to resolve administratively the non-compliance.

(d) The Foundation shall furnish annually to the State Bar of Texas a list of all attorneys licensed by the Supreme Court of Texas (i) who have not timely filed a compliance statement or (ii) as to whom the Foundation has been unable administratively to resolve any impediment to the proper filing of a compliance statement. The State Bar of Texas shall send to each person so reported, by certified mail, return receipt requested, a non-compliance notice. Should the attorney fail or refuse to file the compliance statement within thirty (30) days of such notice, the State Bar of Texas shall so notify the Clerk of The Supreme Court of Texas, and the attorney shall be immediately suspended as an attorney licensed to practice law in the State of Texas until a compliance statement is filed.

Rule 24. Review and Appeal

(a) An attorney may file a written request based upon good cause for exemption from compliance with any of the requirements of these Rules, an extension of time for compliance, an extension of time to comply with a deficiency notice, or an extension of time to file an annual compliance statement. Such request shall be reviewed and determined by a Committee established by the State Bar or by such committee as the chairperson may, from time to time, designate. The attorney shall be promptly notified of the decision by the Committee.
Rule 24.  Rules Governing the Operation of the Texas Access to Justice Foundation

(b) “Good cause” shall exist when an attorney is unable to comply with this Article because of extraordinary hardship or extenuating circumstances which were not willful on the part of the attorney and were beyond his or her control.

(c) Should the decision of the Committee be adverse to the attorney, the attorney may request the Board of Directors of the State Bar to review the decision by making such request in writing to the Executive Director of the State Bar within thirty days of notification of the decision of the Committee. The Chairman of the Board may appoint a committee of the Board to review the decision of the Committee and make a recommendation to the Board. The decision shall be made by the Board.

(d) Should the decision of the Board be adverse to the attorney, the attorney may appeal such decision by filing suit within thirty days of notification of the Board’s action, failing which the decision of the Board shall be final. Such suit shall be brought against the State Bar, and shall be filed in a district court in Travis County, Texas. Trial shall be de novo, but the burden of proof shall be on the attorney appealing, the burden shall be by a preponderance of the evidence, and the attorney shall prove the existence of “good cause” as defined herein. The trial court shall proceed to hear and determine the issue without a jury. Either party shall have a right to appeal.

(e) Any suspension of an attorney shall be vacated during the administrative review process and while any suit filed is pending.

Rule 25.  Return to Former Status

Any attorney whose license to practice law has been suspended under the terms of these Rules who after the date of suspension files a report with the Foundation showing compliance shall be entitled to have such suspension promptly terminated and be returned to former status. Return to former status shall be retroactive to the inception of suspension, but shall not affect any proceeding for discipline of the member for professional misconduct. The State Bar shall promptly notify the Clerk that an attorney formerly suspended under these Rules has now complied with these Rules.

Rule 26.  Confidentiality

The files, records, proceedings, as they relate to the compliance or noncompliance of any attorney with the requirements of these Rules, shall be confidential and shall not be disclosed except upon consent of the attorney affected or as directed in the course of judicial proceeding by a court of competent jurisdiction.
Chapter 14

Texas Minimum Continuing Legal Education Rules
(Article XII, State Bar Rules)


Section 1. Purpose

The purpose of minimum continuing legal education requirements is to ensure that every active member of the State Bar of Texas pursues a plan of continuing legal education throughout his or her career in order to remain current on the law in our rapidly changing society.

Section 2. Definitions

(A) “MCLE” means Minimum Continuing Legal Education.

(B) “Committee” means the Committee on Minimum Continuing Legal Education.

(C) “Committee member” is a member of the Committee on Minimum Continuing Legal Education.

(D) “MCLE Department” means the departmental staff of the State Bar of Texas with the responsibility of administering all aspects of the MCLE program as determined by this Article and any regulations established pursuant hereto.

(E) “The Director” means the Director of the MCLE Department of the State Bar of Texas.

(F) “Continuing legal education activity” means any organized legal educational activity accredited by the Committee.

(G) “CLE Credit Hours” means the actual amount of instruction time for an accredited continuing legal education activity expressed in terms of hours rounded to the nearest one-quarter hour. The number of CLE credit hours shall be based on sixty (60) minutes of instruction per hour, unless otherwise specified herein.

(H) “Self-study” includes individual viewing or listening to audio, video, or digital media, reading written material, or attending organized in-office educational programs, or such other activities as may be approved by the Committee.
Section 2. Texas Minimum Continuing Legal Education Rules

(I) “Accredited sponsor” means any provider who receives presumptive approval of the Committee to conduct continuing legal education activities that satisfy the requirements of this Article.

(J) “Accredited CLE Activity” means any CLE activity that receives MCLE accreditation under the MCLE Rules, Regulations, and accreditation criteria adopted by the MCLE Committee.

(K) “MCLE compliance record” means the official record of a member’s CLE credit hours earned during any MCLE compliance year that shall be maintained by the MCLE Department and used to verify a member’s compliance with the MCLE requirements. It shall be the responsibility of each member to ensure that his/her MCLE compliance record is accurate and complete.

(L) “MCLE compliance year” means the twelve (12) month period that begins each year on the first day of an attorney’s birth month and ends on the last date of the month that immediately precedes the attorney’s birth month in the following year.

(M) “MCLE reporting month” means the birth month during which the attorney is required to show completion of CLE requirements. If an extension has been granted in accordance with the Article (Section 9), the reporting month shall mean the month immediately following the last date of the extension and shall replace the birth month for that current compliance year.

(N) “MCLE Annual Verification Report” means the written report containing a listing of all CLE credit hours recorded in a member’s MCLE compliance record for an MCLE compliance year. This report shall be furnished to each member annually by the MCLE Department.

(O) “Preferred Address” means the member’s physical address, post office box, E-mail address or other address, that is on file with the State Bar of Texas Membership department and that is designated as the member’s preferred address for receiving written notifications.

(P) “Secondary Address” means any or all of the member’s physical addresses, post office boxes, E-mail addresses, or other addresses on file with the State Bar of Texas Membership department and that are not designated as the member’s preferred address for receiving written notifications.

Section 3. Committee on Minimum Continuing Legal Education

(A) There is hereby established the Committee which shall be composed of twelve (12) members. Nine (9) of the members shall be residents of this State who are active members of the State Bar, at least two (2) of whom shall be under the age of thirty-six (36) years as of June 1 of the year being appointed. Of the nine (9) attorney members, not more than two
Texas Minimum Continuing Legal Education Rules

Section 4.

(2) shall be judges. The remaining three (3) members of the Committee shall be residents of this State who are not attorneys. The President-Elect, with the approval of the Board, shall appoint any Committee members whose term will begin at the beginning of the bar year during which he or she will be President. Should a vacancy on the Committee occur during the bar year, the President, with the approval of the Board, shall appoint a successor to fill the unexpired term. Each member of the Committee shall continue to serve until his or her successor is appointed and qualified. The President-Elect shall designate one (1) of the attorney members of the Committee to serve as chairperson during his or her term as President. The Board may remove a member of the Committee for good cause. No Committee member shall be appointed for more than two (2) terms. Committee members shall serve without compensation, but shall be reimbursed for reasonable and necessary expenses incurred in the performance of their official duties.

(B) The State Bar shall employ such staff as may be necessary to perform the record keeping, auditing, reporting, accreditation, and other functions required by these rules.

(C) The Committee, subject to these rules and such regulations as it may propose and may be adopted by the Board, shall administer the program of minimum continuing legal education established by this Article. It may propose regulations and prepare forms not inconsistent with this Article pertaining to its function and modify or amend the same from time to time. All such regulations, forms, modifications or amendments shall be submitted to the Board for approval, and upon such approval, shall be published in the Texas Bar Journal.

Section 4. Accreditation

(A) The Committee shall develop criteria for the accreditation of continuing legal education activities and shall designate the number of hours to be earned by participation in such activities, as approved by the Committee. In order for an activity to be accredited, the subject matter must directly relate to legal subjects and the legal profession, including professional responsibility, legal ethics, or law practice management. The Committee may, in appropriate cases, extend accreditation to qualified activities that have already occurred. The Committee shall not extend credit to activities completed in the ordinary course of the practice of law, in the performance of regular employment, as a volunteer service to clients or the general public, as a volunteer service to government entities, or in a member’s regular duties on a committee, section, or division of any bar-related organization. The Committee may extend accredited status, subject to periodic review, to a qualified sponsor for its overall continuing legal education curriculum. No examinations shall be required.

(B) Self-study credit may be given for individual viewing or listening to audio, video or digital media, reading written material, attending organized in-office educational programs, or such other activities as may be approved by the Committee. No more than five (5) hours of credit may be given during any compliance year for self-study activities. Time spent viewing or listening to audio, video or digital media—as an organized CLE activity approved
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by the Committee—counts as conventional continuing legal education and is not subject to the self-study limitation.

(C) Credit may be earned through teaching or participating in an accredited CLE activity. Credit shall be granted for preparation time and presentation time, including preparation credit for repeated presentations.

(D) Credit may be earned through legal research-based writing upon application to the Committee provided the activity (1) produced material published or to be published in the form of an article, chapter, or book written, in whole or in part, by the applicant; (2) contributed substantially to the continuing legal education of the applicant and other attorneys; and (3) is not done in the ordinary course of the practice of law, the performance of regular employment, or as a service to clients.

(E) The Committee may, in appropriate cases, charge a reasonable fee to the sponsor for accrediting CLE activities.

(F) A member who holds a full-time faculty position in any law school which is approved by the American Bar Association may be credited as fulfilling the requirements of this article, except as to the minimum requirements for CLE in legal ethics and professional responsibility. A member who holds a part-time faculty position in any such law school may claim participatory credit for the actual hours of class instruction time not to exceed twelve (12) hours per compliance year, except as to the minimum requirements for CLE in legal ethics and professional responsibility.

(G) The Committee shall grant exemption from this Article to any emeritus member of the State Bar of Texas. (Emeritus as defined by the State Bar Act, Section 81.052(e)).

(H) Credit to meet the minimum educational requirement shall be extended to attorneys who are members of the Senate and House of Representatives of present and future United States and Texas Legislatures for each regular session in which the attorney member shall serve.

(I) No credit shall be given for activities directed primarily to persons preparing for admission to practice law.

(J) Credit, not to exceed thirty (30) hours in any compliance year, may be earned for attending a law school class after admission to practice in Texas provided (1) that the member officially registered for the class with the law school, and (2) that the member completed the course as required by the terms of registration. Credit for approved attendance at law school classes shall be for the actual number of hours of class instruction time the member is in attendance at the law school course.
Section 5. Compliance Year

(A) Each member’s compliance year shall begin on the first day of the month in which his or her birthday occurs.

(B) The initial compliance year for each member shall be the 24-month period that begins on the first birth month following the date of admission.

Section 6. Minimum Educational Requirements

(A) Every member shall complete fifteen (15) hours of continuing legal education during each compliance year as provided by this article. No more than five (5) credit hours may be given for completion of self-study activities during any compliance year.

(B) At least three (3) hours of the fifteen (15) hours shall be devoted to legal ethics/professional responsibility subjects. One (1) of the three (3) legal ethics/professional responsibility hours may be completed through self-study.

(C) All persons admitted, and any person who has been suspended, disbarred, or who has resigned pursuant to Article X of the State Bar Rules, or who has resigned pursuant to Article III of the State Bar Rules, or who has been suspended pursuant to Section 8 of this Article, or who has taken inactive status pursuant to Section 81.052, Texas Government Code, and who desires to return to active status shall be required, in addition to such other requirements as the State Bar Rules may contain, to comply with the requirements of Section 6(A) and 6(B) hereof.

(D) Accredited continuing legal education and self-study completed within a 12 month period immediately preceding a member’s initial compliance year may be used to meet the educational requirement for the initial compliance year. Exception: Credit for the educational activity entitled “The Guide to the Basics of Law Practice,” sponsored by the Texas Center for Legal Ethics and Professionalism, completed anytime during the third year of law school or during the initial compliance year, may be used toward meeting the educational requirements for the initial compliance year.

(E) Accredited continuing legal education and self-study completed during any compliance year in excess of the minimum fifteen (15) hour requirement for such period will be applied to the following compliance year’s requirement. This carryover provision applies to one (1) year only.

Section 7. Credit Computation

(A) Credit for attending accredited continuing legal education activities shall be based on net actual instruction time, which may include organized lecture, panel discussion, audio,
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video, and digital media presentations and organized question-and-answer periods. Sponsors are encouraged to calculate the number of hours of credit that should be given for any activity offered, using the above guide, and indicate the number on the activity brochure. Fractional hours should be stated as decimals.

(B) Credit for viewing or listening to audio, video, or digital media shall be based on the running time of the recording.

(C) Credit for reading approved material or attending in-office educational programs shall be based on actual time spent.

Section 8. Compliance

(A) Two months prior to the end of the MCLE compliance year, the Director shall send a preliminary MCLE Annual Verification Report to each member’s Preferred Address for who said MCLE compliance year applies. Upon receipt of the MCLE Annual Verification Report, the member shall review the report for accuracy and completeness. If the report accurately reflects the member’s MCLE compliance record for the current MCLE compliance year, and it shows that the minimum CLE credit hours requirements have been met, then no additional action is required by the member. If the Report does not accurately and completely reflect a member’s CLE credits, then the member shall correct his or her record according to the instructions on the Report. To avoid fines and/or suspension, all CLE credit hours, corrections and additions to the MCLE record shall be completed, filed and received by the MCLE Director on or before the end of the compliance year.

(B) On or about the first day of the birth month, the Director shall make available to the member, a report of amendments that have been made to the MCLE record for the compliance year that ended immediately prior to said birth month. The Director shall also notify any member who has not completed MCLE requirements for the compliance year that ended immediately prior to said birth month. A member who has not completed his or her CLE requirements by the first day of the birth month, will receive an automatic grace period through the last day of the birth month to complete and report any remaining CLE credits. Members shall not be fined or penalized for completing and reporting CLE credits by the last day of the birth month (grace period).

(C) On or about the twelfth (12th) day of the month immediately following a member’s birth month, the Director shall notify all members who are in non-compliance for the MCLE compliance year just ended to advise such members of their non-compliance status. Such notice shall be in the form of a written notice, and sent to each member at the Preferred Address and via one (1) Secondary Address (if any) that is then on file with the Membership Department of the State Bar.

(D) On or about the first (1st) day of the third month immediately following a member’s birth month, the Director shall send final notice to any member who has not cured their non-compliance status. Such notice shall be in the form of a written notice, and sent to each
member at the Preferred Address and via one (1) Secondary Address (if any) that is then on file with the Membership Department of the State Bar.

(E) If by the last business day of the fourth month following the birth month (or reporting month if the member has been granted an extension in accordance with this article for completion of CLE requirements) the member has still not cured his or her non-compliance, the member shall be automatically suspended from the practice of law in Texas as directed by Order of the Supreme Court dated December 23, 2002.

(F) Upon the execution of suspension, the Director shall cause to be sent a written notification to each member who is suspended from practice by the order. Said notification shall be sent to each member at his or her Preferred Address and via one (1) Secondary Address (if any) that is then on file with the Membership Department of the State Bar.

Section 9. Review and Appeal

(A) A member may file a written request for exemption from compliance with any of the requirements of this Article, an extension of time for compliance, an extension of time to comply with a deficiency notice, or an extension of time to file an annual activity report. Such request for excuse or for extension shall be reviewed and determined by the Committee or by such of its members as the chairperson may, from time to time, designate. The member shall be promptly notified of the Committee’s decision.

(B) “Good cause” shall exist when a member is unable to comply with this Article because of illness, medical disability, or other extraordinary hardship or extenuating circumstances that were not willful on the part of the member and were beyond his or her control.

(C) Should the decision of the Committee be adverse to the member, the member may request the Board of Directors of the State Bar to review the decision by making such request in writing to the Executive Director of the State Bar within thirty days of notification of the decision of the Committee. The Chairman of the Board may appoint a committee of the Board to review the decision of the Committee and make a recommendation to the Board. The decision shall be made by the Board.

(D) Should the decision of the Board be adverse to the member, the member may appeal such decision by filing suit within thirty (30) days of notification of the Board’s action, failing which the decision of the Board shall be final. Such suit shall be brought against the State Bar, and shall be filed in a district court in Travis County, Texas. Trial shall be de novo, but (1) the burden of proof shall be on the member appealing; (2) the burden shall be a preponderance of the evidence; and (3) the member shall prove the existence of “good cause” as defined herein. The trial court shall proceed to hear and determine the issue without a jury. Either party shall have a right to appeal.

(E) Any suspension of a member under this Article shall be vacated during the administrative review process and while any suit filed is pending.
Section 10. Return to Former Status

Any member whose license to practice law has been suspended under the terms of this Article who after the date of suspension files an activity report with the MCLE Director showing compliance and who has paid all applicable fees associated with non-compliance and suspension, shall be entitled to have such suspension promptly terminated and be returned to former status. Return to former status shall be retroactive to the inception of suspension, but shall not affect any proceeding for discipline of the member for professional misconduct. The MCLE Director shall promptly notify the Clerk that a member formerly suspended under this Article has now complied with this Article.

Section 11. Exemption of Certain Judges

Judges subject to Supreme Court Order for Judicial Education dated August 21, 1985, Supreme Court Order for Judicial Education for Retired or Former District Judges dated July 2, 1986, and federal judicial officers, shall be exempt from these requirements.

Section 12. Confidentiality

A member who reports attendance credits individually to the MCLE Director, without the sponsoring organization’s knowledge, automatically consents to release of his or her name to the sponsoring organization for the sole purpose of reconciling attendance records. Otherwise, the files, records and proceedings of the Committee, as they relate to the compliance or noncompliance of any member with the requirements of this Article, shall be confidential and shall not be disclosed except upon consent of the member affected or as directed in the course of judicial proceeding by a court of competent jurisdiction.

Section 13. Effective Date

The effective date of amendments to this Article shall be January 1, 2005.
Texas Minimum Continuing Legal Education Regulations

The Texas Minimum Continuing Legal Education Regulations can be found at www.texasbar.com/Template.cfm?Section=Minimum_Continuing_Legal_Ed.

1.0 MCLE Compliance Year

1.1 The definitions set forth in Article XII, State Bar Rules, Section 2, shall apply to these Texas MCLE Regulations.

1.2 Each member’s initial MCLE compliance year shall begin on the first day of the member’s birth month that occurs after the licensing date and shall end twenty-four (24) months later on the last day of the month immediately preceding the member’s birth month.

1.3 The minimum CLE credits needed for a regular one-year MCLE compliance year are required to be completed during the initial 24-month MCLE compliance year. Only CLE credits completed within this 24-month period and during the 12-month period immediately preceding the initial compliance year may be used toward meeting the compliance requirements of the initial compliance year. The sole exception shall be for “The Guide to the Basics of Law Practice” sponsored by the Texas Center for Legal Ethics and Professionalism, which may be completed earlier for participatory credit.

1.4 A member’s minimum CLE requirements should be completed by the last day of the MCLE compliance year for any given year. However, if a member has not completed the minimum CLE requirements by the last day of any given MCLE compliance year, then that member shall be given an automatic grace period up to the last day of their birth month, or reporting month if an extension has been granted in accordance with these regulations and Article XII, to complete the minimum requirements without penalty. If the minimum credits are not completed or reported until after the end of the member’s birth month for that year, then a penalty will be required as specified below in Section 7.3.

2.0 Categories of Credit

2.1 Participatory Credit.

Participatory credit is CLE credit that is obtained from attending a CLE activity that is conducted in a forum or setting that allows attorneys to participate or interact with one another or with the instructor. Participatory credit may be obtained from attending CLE activities that foster the free exchange of information and ideas among the participants as specified in Sections 2.1.1 and 2.1.2 below. A minimum of ten (10) Participatory credit hours are required for each MCLE compliance year.
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2.1.1 Group Participatory Credit may be claimed for any of the following types of CLE activities:

a. attending in person (through non-electronic means) accredited CLE activities, including seminars, courses, conferences, lectures, panel discussions, question-and-answer periods, in-house education, audio, video and digital media presented in an organized presentation (Article XII, Section 4A);

b. speaking at accredited CLE activities, including preparation time and presentation time with additional preparation credit for repeated presentations (Article XII, Section 4C);

c. writing, as an author or co-author, materials published or to be published in the form of an article, chapter or book which contributed substantially to the continuing legal education of the author or co-author and other attorneys and which was not done in the ordinary course of the practice of law, the performance of regular employment or as a service to clients (Article XII, Section 4D);

d. participating in a Mentor Program that is either sponsored or cosponsored by the State Bar of Texas or otherwise approved by the MCLE Committee, is open to all members of the State Bar, and is completed in conjunction with MCLE approved training. The purpose of the approved training/mentoring relationship shall be the preparation of participants for providing pro-bono services or for managing professional responsibility challenges and shall consist of substantive legal training as opposed to coaching or personal encouragement. A maximum of five (5) hours, including one (1) ethics hour, per compliance year may be claimed for the actual amount of time spent in the mentoring relationship. Mentor programs shall be submitted to the MCLE department in accordance with MCLE Regulations, Sections 10.2 and 10.8; and

e. teaching, lecturing or speaking in the position of a part-time faculty in any law school which is approved by the American Bar Association, except as to the minimum requirements for CLE in legal ethics and professional responsibility (Article XII, Section 4F);

f. attending in person (through non-electronic means) instruction at an ABA accredited law school after admission to practice. Credit shall be for the actual hours of in-class instruction and shall not
exceed thirty (30) hours per compliance year. (Article XII, Section 4J).

2.1.2 Interactive Participatory Credit is participatory credit obtained from accredited CLE activities in which attorneys are able to participate together through electronic or other processes. Credit may be claimed for participating in any of the following activities that encourage interaction, discussion and contribution:

a. live interactive webcast and teleconferences;

b. pre-recorded, on-demand web based programming and teleconferences including interactive audio, video and digital media and which include and promote discussion forums or other viable options for interaction and discussion, subject to approval of the MCLE Committee; and

c. other such interactive CLE activities as may be developed through advanced technology, subject to approval of the MCLE Committee.

2.1.3 Non-qualifying Activities.

An activity that is done in the ordinary course of the practice of law, the performance of regular employment, or as a volunteer service to clients, government entities, bar organizations or the general public shall not receive participatory credit. An activity associated with membership or attendance at committee meetings, business meetings or work sessions shall not receive participatory credit.

2.2 Self-Study Credit.

Self-Study Credit is CLE credit that is obtained from any type of CLE activity that is performed by an individual attorney acting alone or while attending non-accredited professional educational activities. A maximum of five (5) Self-Study credit hours can be applied toward each MCLE compliance year. Self-Study Credits may be claimed for any of the following types of CLE activities:

a. reading materials specifically prepared for an accredited activity;

b. reading substantive legal articles in recognized legal publications;

c. reading digests, advance sheets, cases, treatises, statutes, and regulations;

d. viewing videotapes or digital media produced for legal education purposes in a non-interactive environment;
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e. listening to audiotapes or digital media produced for legal education purposes in a non-interactive environment;

f. attending professional educational activities that train participants in the use of non-legal software or teach non-legal skills such as stress management, time management, personal relational management, career management, rainmaking, marketing, accounting, general office management, and communication skills;

g. attending professional educational activities that present business, technical or scientific knowledge including programs dealing with general business management concerns, medical or engineering knowledge and concepts, or other educational activities dealing with topics relevant to specific areas of law practice;

h. serving as a judge or evaluator in any type of mock trial, moot court or client counseling competition, class or program; and

i. speaking or writing, including presentation, preparation and composition time for any of the self-study activities enumerated above (a-h).

3.0 Minimum Educational Requirements

3.1 Fifteen total hours of accredited continuing legal education credit are required to be completed during each MCLE compliance year (including the initial 24-month compliance year) in order to meet the minimum educational requirements set out in Article XII, Section 6A, State Bar Rules.

3.2 A minimum of three (3) of the required fifteen (15) hours of CLE must be completed in the subject areas of legal ethics and/or professional responsibility. Two (2) hours of this minimum 3-hour requirement must be completed in the form of participatory credit. One (1) of this minimum 3-hour requirement may be completed in the form of self-study credit (Article XII, Section 6B).

3.3 Carry-forward CLE Credit Hours. A member may carry forward CLE credit hours earned in excess of the minimum 15-hour requirement to the following year’s requirement up to a maximum limit of fifteen (15) credit hours. Members may only carry forward excess credit earned to the next MCLE compliance year. Legal ethics or professional responsibility credit will carry forward similarly (Article XII, Section 6E).

3.4 CLE credit hours are computed based on actual time spent in an activity (actual instruction time, reading time, running time of tapes, audio, video or digital media) reported in hours to the nearest one-quarter hour and reported in decimals (Article XII, Section 7A and 7B). Sponsors shall compute CLE credit hours for accredited
activities based on this formula and shall identify the number of hours on the application form prescribed by the MCLE Committee (Article XII, Section 7A).

The individual attorney will need to compute CLE credit hours in instances of self-study programs, preparation and presentation time for speakers, composition time for authors as well as instances where the attorney attends part of a session of a planned activity (Article XII, Section 7B and 7C).

4.0 Continuing Legal Education Activities Sources

4.1 Audio, video or digital media presented as an accredited CLE activity shall be considered Group Participatory credit or Interactive Participatory credit. Audio, video or digital media used on an individual basis shall be considered Self-Study credit (Article XII, Section 4B).

4.2 In-house Educational Activities applicable to Self-Study credit shall include those non-accredited activities that are offered by law firms or corporations that are solely for the benefit of their own employees (Article XII, Section 4B).

4.3 In-house Educational Activities applicable to Participatory credit shall include those activities that are offered by local, state and federal government agencies, the military, and law firms or corporations, provided each program is accredited in advance and is a structured continuing legal education activity.

5.0 Special Cases and Exemptions

An exemption or special case status shall apply to the entire MCLE compliance year (first day of the birth month through the last day of the month immediately preceding the birth month). Any change in status during the compliance year shall be promptly reported to the MCLE Director on the appropriate reporting form.

5.1 Full-time Faculty Members of ABA accredited law schools are allowed to claim a special CLE credit equal to the amount of the minimum requirements of Article XII, except for the minimum requirement for CLE in legal ethics or professional responsibility as specified in Section 3.2 above.

5.1.1 The member shall give written notification to the MCLE Director indicating his/her full-time teaching status and the law school of which he or she is a faculty member. Annually, the member will be required to complete three (3) hours of legal ethics (Article XII, Section 4F) and report this credit as outlined below in Section 6.5.

5.2 Judicial Exemption.

Judges subject to Supreme Court Order for Judicial Education dated August 21, 1985, Supreme Court Order for Judicial Education for Retired or Former District Judges dated July 2, 1986, and federal judicial officers are eligible to claim an exemption from these requirements.
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5.2.1 Judges exempt from the Rules are requested to give written notification to the MCLE Director in order to claim this exemption.

5.3 Non-practicing Exemption.

5.3.1 Members who have not engaged in the practice of law in Texas during the entirety of an MCLE compliance year are eligible to claim an exemption from the MCLE requirements. Members who are engaged in the practice of law at the beginning of a MCLE compliance year but who later cease from practice during that compliance year are not eligible for this non-practicing exemption.

5.3.2 For purposes of this section, ‘practice of law’ shall mean: (1) the preparation of any kind of pleading or other paper incident to actions and special proceedings on behalf of a client before judges, courts and administrative agencies, (2) the preparation or presentation of any kind of legal instrument, and (3) in general, the giving of advice to clients and taking any form of action for them in matters connected with the law. All of these enumerated services shall be considered practicing law regardless of whether a fee is charged or collected. However, a member who renders any of these enumerated services on behalf of his/her own personal or immediate family interests shall not be considered to be practicing law for purposes of this definition.

5.3.3 Members who serve as judicial law clerks in Texas, including federal judicial law clerks, are not eligible for this non-practicing exemption.

5.4 A member who is on Inactive membership status with the State Bar during the entire MCLE compliance year shall be exempt from the MCLE requirements. Members whose membership status is Active at the beginning of a MCLE compliance year but who later change to Inactive status during the course of that compliance year are not eligible for this exemption.

5.4.1 Members who change to Inactive membership status during the course of the compliance year may defer the completion of any remaining MCLE requirements (including payment of penalties for late filing) for that compliance year. Upon activation of membership status, members shall be given ninety (90) days to complete and report all deferred MCLE requirements. Failure to complete deferred requirements during this 90-
day period, will subject the member to suspension in accordance with Article XII.

5.5 A member who has been disbarred, who has no permanent license or who has resigned from membership in the State Bar shall be exempt from the MCLE requirements.

5.6 Legislature/Congress.

Any member who is either (a) a member of the Texas Legislature during any MCLE compliance year, or (b) a member of the U.S. Congress during any MCLE compliance year is eligible to be automatically credited with the minimum number of CLE credits required by the MCLE Rules.

5.7 Legislature Attorney.

Any member who is employed as an attorney in one of the capacities specified in Section 81.113 of the Texas Government Code (as amended) for the Texas Legislature or U.S. Congress, is eligible to be automatically credited with the minimum number of CLE credits required by the MCLE Rules, except for the minimum requirements in legal ethics or professional responsibility as specified in Section 3.2 above.

5.8 Hardship Exemption.

Any member who is unable to satisfy the minimum CLE requirements during any MCLE compliance year as a result of undue hardship caused by illness, medical disability or other extraordinary or extenuating circumstances beyond the control of the member may apply for a hardship exemption from the MCLE requirements for that compliance year. Undue hardship generally will not include financial hardship or lack of time due to a busy professional or personal schedule.

5.9 Age Exemption.

Any member who is 70 year of age or older, shall be exempt from MCLE requirements. Members who are 69 years of age during the compliance year and who turn 70 years of age at the end of the compliance year will be required to comply with MCLE requirements.

5.10 Self-study Allowance.

Any member who is unable to satisfy the minimum CLE requirements during any MCLE compliance year due to extraordinary or extenuating circumstances beyond the control of the member may apply to have the maximum limit on self-study credit hours specified in Section 2.2 above waived, such that all of the remaining CLE credit hours for that compliance year can be completed through self-study credit.
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5.11 Extensions.

A member may file a written petition requesting an extension of the member’s MCLE compliance year for a maximum of ninety (90) days past the last day of the member’s birth month when circumstances exist that prevent the member from being able to comply with the MCLE requirements for the compliance year. “Good Cause” for an extension may exist in the event of illness, medical disability or other extraordinary hardship or extenuating circumstances beyond the control of the member. An extension generally will not be allowed due to financial hardship or lack of time due to a busy professional or personal schedule.

5.11.1 No extension shall be allowed unless it is requested prior to the last day of the member’s birth month. A member seeking an extension shall submit a written request to the MCLE Committee detailing the circumstances for such request. If an extension is granted, CLE hours completed during the extension period and used toward meeting requirements for the immediately preceding compliance year, may not be used again toward the next compliance year’s requirements. Hours that are completed in excess of the 15-hour minimum requirement shall carry-forward as outlined in Section 3.3. A written notification of the determination made on each extension request will be sent to the member making such request.

6.0 Procedures for Reporting CLE Credit Hours

6.1 Attendance Records for Accredited CLE Activities. CLE sponsors are required to timely submit Texas member attendance records to the MCLE Director for each accredited CLE activity. CLE sponsors are not responsible for meeting individual attorney reporting deadlines.

6.2 CLE attendance information shall be submitted to the MCLE Director by the CLE sponsor via 1) State Bar of Texas CLE Attendance Form, 2) approved Internet attendance submission, 3) approved electronic attendance file submission, or 4) any other attendance submission format developed through advanced technology, subject to approval of the MCLE Committee.

6.3 The MCLE Director shall not accept CLE attendance certificates or attendance lists submitted in unapproved formats.

6.4 Reporting Attendance to CLE Sponsors by Members

6.4.1 Each member shall report his or her attendance to the CLE sponsor by one of the following approved methods:

a) by completing a State Bar of Texas CLE Attendance Form while in attendance at an accredited CLE activity. The State Bar of Texas Attendance Form should be provided by the CLE sponsor
of an MCLE accredited activity. The member must complete the attendance form while in attendance and leave the completed form with the sponsor for submission to the State Bar for inclusion in the member’s MCLE compliance record; or

b) by signing an electronic transfer attendance list or roster that will be used by the CLE sponsor to report credits directly to the MCLE Director via the Internet, electronic file transfer, or other transfer format developed through advanced technology, subject to approval of the MCLE Committee.

6.4.2 If a member is unable to complete a State Bar of Texas CLE Attendance Form or sign an electronic transfer attendance list while in attendance at an accredited CLE activity, the member shall report CLE credits to the MCLE Director via either 1) the State Bar of Texas MCLE Internet reporting site or 2) completion and submission of a CLE Credit Input Form to be obtained from the MCLE Department.

6.4.3 A member who by-passes reporting to the CLE sponsor, either intentionally or unintentionally, and reports attendance directly to the MCLE Director, automatically consents to the release of his or her name to the sponsoring organization for the sole purpose of reconciling attendance records. (Article XII, Section 12).

6.5 Members are responsible for timely reporting of all other types of CLE credit hours for recording on their MCLE compliance record via one of the approved member reporting formats outlined in 6.4.2 above.

6.6 A member who completes CLE hours during the birth month, non-compliance period (Section 7 below), or reporting month if an extension has been granted, to meet requirements for the immediately preceding compliance year, is responsible for timely reporting these credits to the MCLE Director via one of the approved member reporting formats outlined in 6.4.2 above.

7.0 Non-Compliance Procedures

7.1 General.

“Non-Compliance” shall mean failure to comply with the requirements of Article XII of the State Bar Rules or these regulations, and may include, but is not limited to lack of adequate credit hours, failure to report to the Director completed credit hours, credit hours reported for non-accredited CLE activities, inclusion of credit hours for activities not defined in the categories of credit, failure to pay fees or fines, and/or lack of ethics credit. The Director shall send to members in Non-Compliance a Non-Compliance Notice stating the specific reasons for Non-Compliance and also stating that the member has three months after the member’s birth month (or reporting month if an extension has been granted), to file with the
Director a statement clarifying the reason for Non-Compliance, which is satisfactory to the Director, or to otherwise demonstrate compliance with the requirements. The Non-Compliance Notice shall include a notice that the member will be subject to suspension from the practice of law if the minimum CLE requirements are not completed within the three-month period following the member’s birth month. For purposes of this Section 7, MCLE Credit hours shall be deemed to have been reported to the Director, only when the Director receives a properly completed MCLE member reporting form as outlined in Section 6.4.2 above, reflecting the completed credit hours.

7.2 Grace Period.

Members who, as of the last day of their MCLE compliance year, have not completed their minimum CLE credit hours and reported same to the Director, or who are otherwise in Non-Compliance as described in Section 7.1, shall be given until the last day of their birth month as a grace period as specified in Section 1.4 above. Members may use this grace period to complete the remaining number of credit hours needed for the compliance year in question, and report the completion of the credit hours to the Director without incurring a penalty or Non-Compliance Fee. CLE credit hours completed during the Grace Period in excess of the number needed to complete the requirements for the compliance year in question, may be carried forward to meet the minimum CLE requirements for the next compliance year. Completed CLE credit hours must be properly reported to the Director within the Grace Period for a member to avoid paying a Non-Compliance Fee.

7.3 Non-Compliance Fee.

A member who is not exempt from the full MCLE requirements, and who fails to complete the minimum CLE credit hours and properly report the completion of those hours to the Director, or is otherwise in Non-Compliance as described in Section 7.1, as of the last day of the member’s birth month (or reporting month if an extension that has been granted) shall pay a Non-Compliance Fee. The Non-Compliance Fee shall be determined by the date upon which the Director receives the member’s report of the completed hours, as follows: (a) $100 if received within one month after the member’s birth month; (b) $200 if received within two months after the member’s birth month; and (c) $300 if received thereafter, but before suspension of the member. Payment of the Non-Compliance Fee, before suspension of the member, is required in order to bring a member’s MCLE record into compliance. Failure to pay the Non-Compliance Fee shall be considered to be Non-Compliance with the MCLE requirements and will subject the member to suspension as specified below.

7.4 Notices to Members.

Any notice required to be given to a member pursuant to this Section 7, shall be deemed to be effective when sent to the member at the Preferred Address for the member as then reflected in the membership records of the State Bar.
8.0 Suspension of License

8.1 Members who fail to comply with the minimum CLE requirements, after having been given all the required notices as set forth in Section 8, Article XII, State Bar Rules, or who fail to pay the Non-Compliance fee specified in Section 7.3 above, or who are otherwise in Non-Compliance as described in Section 7.1 above, shall be suspended from the practice of law in accordance with Section 8(E), Article XII, State Bar Rules.

9.0 Reinstatement

9.1 A member whose license to practice law has been suspended due to Non-Compliance may be reinstated by completing the CLE credit hours needed to fulfill the remaining requirements for the MCLE compliance year for which the member was suspended, and by paying a reinstatement fee of $400.00 to the State Bar. A member may complete the necessary CLE credit hours during the period of suspension to meet the requirements for the year or years of non-compliance. These credit hours may not be counted toward meeting the current year’s requirement.

9.2 The Director, upon receipt of proper documentation showing that a suspended member has satisfied the CLE credit hours that were outstanding for the MCLE compliance year(s) for which the member was in Non-Compliance and suspended, and payment of the reinstatement fee(s) specified in Section 9.1 above, shall notify the Clerk of the Supreme Court of the receipt of such documentation and fees, requesting that the member may be reinstated. Upon reinstatement of the member by the Supreme Court of Texas, the Director will then notify the member of reinstatement.

9.3 Notices to Members. Any notice required to be given to a member pursuant to this Section 9, shall be deemed to be effective when sent to the member at the Preferred Address for the member as then reflected in the membership records of the State Bar.

10.0 Accreditation of CLE Activities

10.1 The following Standards will govern the approval of continuing legal education activities by the Committee.

10.1.1 The activity shall have significant intellectual or practical content for attorneys.

10.1.2 The activity shall constitute an organized program of learning dealing with matters directly related to legal subjects and the legal profession,
including professional responsibility, legal ethics or law practice management.

10.1.3 The activity shall be conducted by an individual or group qualified by practical or academic experience in a suitable facility.

10.1.4 Sponsors shall indicate in promotional materials the purpose of the activity, identify the instructors, the time devoted to each topic, and the intended audience. Some means of evaluation by participants is encouraged.

10.1.5 While written materials need not be distributed for every activity, thorough, high quality written materials should be distributed to all participants at or before the time the activity is offered whenever practicable.

10.1.6 A list of all participants for each activity shall be maintained by the sponsor for a period of at least two years. Attendance records are to be sent to the Director in a form to be designated by the Committee as outlined in Sections 6.1 and 6.2 above, following the end of each activity.

10.1.7 For CLE activities that have received accreditation for MCLE, the sponsors of those activities shall indicate in promotional materials that such activity has been accredited for MCLE by including the following statement:

“This course has been approved for Minimum Continuing Legal Education credit by the State Bar of Texas Committee on MCLE in the amount of ____ credit hours, of which ____ credit hours will apply to legal ethics/professional responsibility credit.”

10.1.8 For CLE activities in which an application for accreditation has been filed but accreditation has not yet been granted, the sponsors of those activities shall include the following statement in promotional materials:

“An application for accreditation of this activity has been submitted to the MCLE Committee of the State Bar of Texas and is pending.”

10.1.9 Activities which fail to comply with the notice provisions required in Sections 10.1.7 and 10.1.8 above may subject the sponsors of these activities to sanctions.

10.1.10 The activity must have at least one-half (.50) hour of instructional time.

10.1.11 The activity must be open to a member of the MCLE Committee or its designee at no cost (except for meals, lodging or similar out-of-pocket costs attributable on an individual basis) for purposes of monitoring the
quality of the CLE activity and compliance with the MCLE rules and regulations.

10.1.12 The MCLE Committee shall review member complaints concerning CLE sponsors and CLE activities. If the Committee determines that a response is necessary from the sponsor, the sponsor will be notified in writing and provided a copy of the complaint. If the sponsor has not resolved the complaint to the satisfaction of the MCLE Committee within sixty (60) days after the notice, the Committee may, at its discretion, suspend further accreditation of any applications filed by said sponsor until the matter is satisfactorily resolved.

10.2 Procedure for Applying for Accreditation of CLE Activities for Non-Accredited Sponsors

CLE activities may be accredited upon the written application of sponsors, on an individual program basis, or by attorneys on an individual program basis for out-of-state activities. All applications for accreditation of a CLE activity by a Non-Accredited Sponsor shall:

a. Be submitted at least thirty (30) days, and preferably longer, in advance of the course, although the Committee may grant approval on applications filed less than 30 days prior or retroactive approval if the proper penalty for late filing is paid, as specified below;

b. Be submitted on a form provided by the Committee;

c. Contain all information requested on the form;

d. Be accompanied by a sample brochure or course outline that describes the course content, identifies the instructors, lists the time devoted to each topic, and shows each date and location at which the program will be offered;

e. Include a detailed calculation of the total CLE hours and legal ethics/professional responsibility credit hours; and

f. Include designation on the course outline or brochure of any parts or sessions of the CLE activity that are sought to be accredited for legal ethics/professional responsibility.

10.2.2 A separate application is required for each activity unless the activity is being repeated in exactly the same format on different dates and/or different locations and is open to attendance by any attorney. Repeat presentations may be added to an existing application for a twelve month period. For example: If the date of the first presentation is May 25, repeat...
presentation dates through April 30 of the following year may be added to the existing application.

10.2.3 In-house CLE activities, repeated at different firms or organizations in which attendance is restricted to the attorneys and guests of each separate organization, shall be considered separate CLE activities and shall be submitted separately.

10.3 Accreditation of Sponsoring Organizations

The MCLE Committee may extend approval to a sponsoring organization for all of the CLE activities presented by such organization that conform to Section 10.1.

10.3.1 Eligibility/Requirements for Accredited Sponsor Status

Eligibility for Accredited Sponsor status shall be extended to local or district bar associations, state and national legal organizations, ABA/AALS accredited law schools, state bar associations, law firms or corporate legal departments and other nonprofit and commercial organizations that consistently provide CLE to the legal community. In order to be eligible, the organization must have a demonstrable history of (1) consistently providing quality CLE programming for lawyers that meets the requirements of Article XII of the State Bar Rules, these Regulations and the Accreditation Standards for CLE Activities for a period of at least two years, and (2) providing ten or more CLE activities per calendar year.

10.3.2 Application for Accredited Sponsor Status

In order to obtain Accredited Sponsor status, an organization must submit an Application for Accredited Sponsor Status (“Application”) approved by the MCLE Committee. The Application may require the sponsor to submit information regarding its organization, purpose, history of providing CLE activities, or such additional information that the MCLE Committee may deem relevant. Approval of Accredited Sponsor status will be based upon information received with the application, such other information the MCLE Committee shall deem relevant and historical information contained within the MCLE data base including, but not limited to, course submission and attendance history, approvals and denials of accreditation, complaints concerning past programs or the marketing thereof, and payment history of the sponsor.

10.3.3 Responsibilities of Accredited Sponsors

Accredited Sponsors shall provide specific information to the MCLE Department related to each CLE activity at least 30 days prior to the day
the activity commences on a form provided by the Department. This information shall include, but is not limited to the following:

a. activity title;
b. date(s) and location(s) of the activity;
c. participatory credit hours, including ethics credit hours;
d. method of presentation; and
e. registration contact and registration fee information;

Accredited Sponsors shall keep course materials for two years, which shall include a brochure or outline that describes the course content, identifies the instructors, lists the time devoted to each topic, each date and location of the presentation, and attendance records showing lawyer attendees and the number and description of non-lawyer attendees. The Accredited Sponsor, upon request of the MCLE Director, shall immediately submit this information for review. Additional responsibilities of Accredited Sponsors include the timely submission of attendance information, amendments to CLE hours, dates, and/or locations for each activity submitted, and payment of all applicable accreditation and late filing fees for each activity.

10.3.4 Benefits of Accredited Sponsor Status

Accredited Sponsors may participate in the following benefits of Accredited Sponsor status:

a. Accredited Sponsors may indicate in promotional materials that they are accredited by including the following statement in promotional materials: “____________, is an accredited sponsor, approved by the State Bar of Texas, Committee on MCLE.”

b. Accredited sponsors may submit payment of required accreditation and late filing fees upon receipt of invoice from the MCLE Director.

c. Accredited Sponsors need not comply with State Bar MCLE Regulations 10.2(a) through (f).

10.3.5 Renewal/Revocation

Accredited Sponsors shall be reviewed for renewal of Accredited Sponsor status after an initial two-year period of accreditation, and again after each subsequent five-year period of accreditation, or at such other times as the MCLE Committee shall deem reasonable. The Committee may
revoke accreditation at any time when the MCLE Committee finds that a sponsor has not complied with the responsibilities of Accredited Sponsor status (Section 10.3.3 above). Additional conditions which may cause revocation of Accredited Sponsor status shall include, but are not limited to:

a. submission of an activity or activities that do not qualify for MCLE accreditation as set forth in the Accreditation Standards for CLE Activities and interpreted by the MCLE Committee;

b. submission of jointly sponsored activities, or activities sponsored by other organizations; or

c. unresolved complaint(s) documented against the Accredited Sponsor or an activity offered by an Accredited Sponsor.

10.3.6 Responsibilities of MCLE Director

The MCLE Director shall provide course numbers for each Accredited Sponsor CLE activity, that is submitted to the MCLE Department upon the appropriate form and in compliance with the requirements of Section 10.3.3 (a) through (e).

10.3.7 Specific Restrictions

An Accredited Sponsor shall not sponsor a CLE activity with any other organization. An organization that has been granted Accredited Sponsor Status may co-sponsor a CLE activity with another entity, but that CLE activity must be provided as though the Accredited Sponsor were not an Accredited Sponsor.

10.4 Approval of In-House Education Activities.

Courses by local, state and federal government agencies, the military, law firms, either individually or in connection with other law firms, corporate legal departments, or similar entities primarily for the education of their members may be accredited for MCLE credit under the Rules and Regulations applicable to any other sponsor and the requirements set forth in Sections 10.1 and 10.2 above, plus the following additional conditions:

a. The courses shall be submitted for approval on a course-by-course basis at least 30 days prior to the date of the activity, rather than on an accredited sponsor basis;

b. Experienced instructors must contribute to the teaching and efforts should be made to achieve a balance of in-house and outside instructors;
c. The course must be scheduled at a time and location so as to be free of interruptions from telephone calls and other office matters.

10.5 Attorney Request for Accreditation of Out-of-State CLE Activity.

A member of the State Bar of Texas may seek credit for a group participatory out-of-state CLE activity that has not been previously submitted and approved by the CLE sponsor by completing an application form to be provided by the Committee. The application may be submitted either before or after the activity is conducted and shall include a brochure or other outline describing the course content, identifying the instructors, listing the topics by title, and showing the time schedule for each topic. An accreditation fee of $15 per request shall be imposed upon the member and shall be submitted at the time of request.

10.6 Request for Teaching Credit.

Credit may be earned for teaching in an approved CLE activity. To receive credit, the member shall submit an application for teaching credit on a form to be provided by the Committee.

10.6.1 Presentation and preparation time will qualify for CLE credit on the basis of hour-for-hour credit for each hour spent in preparation and the actual time of presentation. Credit for repeat presentations shall qualify for additional time spent in preparation only.

10.7 Request for Writing Credit.

Credit may be earned for research-based writing activities, provided the activity (1) produced material published or to be published in the form of an article, chapter or book written, in whole or in part, by the applicant; (2) contributed substantially to the continuing legal education of the applicant and other attorneys; and (3) is not done in the ordinary course of the practice of law, the performance of regular employment, or as a service to clients. To receive credit, the member shall submit an application for writing credit on a form to be provided by the Committee.

10.7.1 In granting credit for research-based writing, the Committee shall consider the following factors: (1) the content, level and length of the materials; (2) the originality of the materials with the individual applicant; and (3) the nature of the publication in which they appear, if any.

10.8 Accreditation and Late Filing Fees

10.8.1 Accreditation Fee Paid by Sponsors of CLE Activities.

An accreditation fee shall be required for each CLE activity for which a sponsor seeks MCLE accreditation for such activity pursuant to these regulations, unless exempted as set out in Section 10.8.3 of this regulation. A series of CLE activities that occurs on non-consecutive dates
Section 10.0  
Texas Minimum Continuing Legal Education Regulations

shall be considered as separate activities and shall be submitted separately with an accreditation fee required for each application.

10.8.2 The accreditation fee shall be calculated at the rate of $10.00 per approved credit hour or $5.00 per Texas attendee, whichever is less, with the minimum fee of $25.00 to be paid for each CLE activity. Payment of this minimum fee shall accompany each application for accreditation submitted by a sponsor. Applications for accreditation submitted without payment of this minimum fee shall be returned to the sponsor without being processed for accreditation. If the CLE activity is subsequently accredited, the balance of the accreditation fee, if any shall be paid by the sponsor within thirty (30) days after conclusion of the corresponding CLE activity.

10.8.3 Exemption.

An exemption from payment of the accreditation fee specified in 10.8.1 above shall be allowed for each accredited CLE activity that is solely sponsored by a local or district bar association for which no separate attendance fee is charged. For purposes of this subsection, “local or district bar association” shall mean a bar association contained within a particular geographical area of a city, county or state judicial district and that is open for membership to the entire general lawyer population within such area.

10.8.4 Accreditation Fee Paid by Members for Out-of-State CLE Activities.

An accreditation fee shall be required for any out-of-state CLE activity (not previously accredited through an application by the sponsor of the activity) for which a member seeks accreditation on an individual basis pursuant to these regulations. A separate application and accreditation fee shall be required for each member who attends the activity and who desires to receive MCLE credit for such activity. A series of CLE activities that occurs on non-consecutive dates shall be considered as separate activities and shall be submitted separately with an accreditation fee required for each application.

10.8.5 The amount of this accreditation fee shall be $15.00 for each application for accreditation submitted regardless of the number of credit hours allowed for the CLE activity.

10.8.6 This fee shall be paid directly by each individual member requesting accreditation for the out-of-state activity. Payment of the fee must accompany the application. Individual applications for accreditation sub-
mitted without proper payment of the $15.00 fee shall be returned without being processed for accreditation.

10.8.7 A penalty for late filing in the amount of $50 must be paid for each accreditation application filed by a CLE sponsor if the application is not received in the office of the MCLE Department at least fifteen (15) calendar days prior to the starting date of the CLE activity specified on the accreditation application. The late filing deadline will be calculated by starting with the date that is one calendar day immediately prior to the starting date of the CLE activity, and counting backward 15 calendar days; the resulting date is the late filing deadline, and the application must be received by the close of business on that date in order to avoid this late filing fee.

10.8.8 When applicable, this penalty for late filing shall be required on all applications regardless of whether or not an accreditation fee is required. This penalty for late filing shall not apply to accreditation applications filed by individual members for out-of-state CLE activities.

10.9 Initial Accreditation Determination.

An applicant for accreditation shall bear the burden of proof that the program is entitled to receive MCLE accreditation, including the burden as to the amount and type of credit to be received. A lack of information is a sufficient basis to deny accreditation. The Director of MCLE is empowered to review and pass upon applications and to grant or deny accreditation. The Director has the discretion to refer an application to the Committee or to a panel of the Committee members as the chairperson may, from time to time designate; and, a panel to which an application has been referred may in turn refer the application to the full Committee for determination. Minimum accreditation application fees and late fees are nonrefundable even if accreditation is denied.

10.10 Denial of Accreditation and Internal Committee Review Process.

Upon denial of accreditation, the applicant shall be notified in writing that the applicant may seek reconsideration. Within 30 days after notification has been mailed that credit has been denied, the applicant must file with the MCLE Director a written appeal and a non-refundable filing fee in the amount of $25 for sponsor submitted appeals and $15 for member submitted appeals, or the denial of accreditation shall be final. Checks for filing fees shall be made payable to the order of the State Bar of Texas. The written appeal shall set forth, or include in a separate brief, argument as the applicant wishes to make as to why credit should be granted and the initial decision was erroneous. The appeal and separate brief, if any, may be submitted in letter form. The applicant may submit additional documents or other evidence that was not presented previously. Based upon the additional information submitted, the Director has the discretion to grant the appeal and grant accreditation without referring the matter to the MCLE Committee, except when the MCLE
Committee made the initial determination. The Director may refer the appeal to the Committee or to a panel of the Committee members as the chairperson may, from time to time designate; however, if the initial determination to deny credit was made by a panel, reconsideration may not be conducted by a panel. The applicant may appear before the Committee to give oral argument. Written notification of the decision of the MCLE Committee regarding the appeal shall be mailed to the applicant. Upon timely exhaustion of the internal Committee review procedures as set forth in this paragraph, the applicant may appeal a denial of credit to the Board of Directors of the State Bar of Texas as provided below.

10.11 Review by the Board of Directors.

10.11.1 Request for Review to the Board of Directors.

Within 30 days after the mailing of written notification that the appeal was denied in whole or part, an applicant may file a written request for review with the Executive Director of the State Bar of Texas, together with a non-refundable filing fee of $25.00. Failure to timely file the request for review and pay the filing fee waives review and causes the decision of the MCLE Committee to be final. The request for review shall set forth the reasons why the applicant believes that the determination to deny credit was erroneous and credit should be granted. Letter form of the request for review is sufficient, and the request for review shall not exceed 10 typewritten, double-spaced pages in length. The applicant may not submit new documentation or information regarding the program, for the review must be based only on the record submitted to, and considered by, the MCLE Committee. The MCLE Committee shall have 30 days after the filing of the request for review in which it may reverse its decision. If the decision is not reversed, the MCLE Committee shall prepare a record of the proceedings, which shall include the application for accreditation and other documents or evidence submitted to the MCLE Committee prior to its reconsideration, relevant correspondence, the appeal and any written argument presented to the MCLE Committee. The MCLE Committee shall set forth a summary of the record of the proceedings before the MCLE staff and Committee, together with the response of the Committee to the request for appeal, which may include the factors and reasons considered in making its decision as well as argument and other matters that the Committee believes are relevant including the impact that granting credit would have on other programs.

10.11.2 Referral to Appeals Committee; Standard of Review.

If the request for review is filed timely, the Executive Director shall forward the request for review, the record of the MCLE Committee proceedings, and the response by the MCLE Committee to the Appeals-Grant Review Subcommittee of the Board of Directors of the State Bar
of Texas. The Appeals-Grant Review Subcommittee shall review such materials and may hear oral argument from the applicant and the MCLE Committee or its representatives. The Appeals-Grant Review Subcommittee shall uphold the decision of the MCLE Committee unless the applicant proves by a substantial evidence standard that the decision of the MCLE Committee was incorrect. The Appeals-Grant Review Subcommittee may not substitute its judgment for that of the MCLE Committee and may consider only the record on which the MCLE Committee based its decision. The MCLE Committee’s findings, inferences and conclusions are presumed to be supported by substantial evidence, and the applicant bears the burden of showing a lack of substantial evidence.

10.11.3 Recommendation of Appeals Committee and Board Action.

The Appeals-Grant Review Subcommittee shall make its recommendation to the Board of Directors of the State Bar of Texas. The final decision on the appeal shall be made by the Board of Directors. Within 15 days after the Board’s determination, the Executive Director shall notify the applicant and the Director of MCLE of the Board's decision.

11.0 Effective Date

The effective date for this set of regulations shall be November 1, 2007.
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Texas Lawyers’ Professional Ethics (4th Ed.)
on Disk, v. 1.1

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Contents of the CD

The PDF file “Ethics” on the CD is an exact representation of the printed book. The file is fully word-searchable, and internal cross-references, summaries of ethics opinions, comparison tables, tables of contents, and the index are all hyperlinked to allow for easy, rapid navigation to substantive topics of interest. The “Ethics” file also contains, in addition to links to Internet URLs and e-mail addresses, external links to Texas cases cited (S.W.2d & S.W.3d) and the opinions of the Committee on Professional Ethics of the Supreme Court of Texas. For instructions on browsing the PDF files and using links, see “Usage Tips for the PDF File” below.

Automatic Installation

On insertion of the CD in your CD drive, a setup program should automatically launch. If the setup program does not launch, go to the Start menu, select Run, type D:\setup (assuming that D:\ is your CD drive), and click OK. The setup program should then launch. You may cancel the operation at any time during the installation process.

Note: The automatic installation will not run on a Macintosh computer. If you want to install the book on a Macintosh computer, proceed to the manual installation instructions below.

Manual Installation

If you cannot use (or decide not to use) the setup program but want to copy the book to your computer, follow the instructions in the appropriate section (“Manual installation for Windows” or “Manual installation for Macintosh”) below.
Note that, although you may rename the Texas Lawyers Professional Ethics folder anything you like after copying it to or creating it on your hard drive, you should not rename any files or folders within the Texas Lawyers Professional Ethics folder or alter their file structure, or some of the book’s links will not work.

Contents of the CD’s Texas Lawyers Professional Ethics folder: Following are explanations of each folder and file in the Texas Lawyers Professional Ethics folder on the CD:

• Cases folder: Texas cases cited (S.W.2d & S.W.3d) as PDF files accessible via links in the “Ethics” PDF file
• Opinions folder: opinions of the Committee on Professional Ethics of the Supreme Court of Texas as PDF files accessible via links in the “Ethics” PDF file
• “Ethics” PDF file: the entire printed book as a single, fully hyperlinked, word-searchable PDF file
• “StartHere” PDF file: this disk documentation as a single PDF file

Manual installation for Windows: To install the book on your hard drive, follow the instructions below. Note that these instructions assume that C:\ is your hard drive and D:\ is your CD drive.

1. Insert the CD in your CD drive, and if the setup program window appears, click Exit to close the window.
2. Start Windows Explorer or My Computer, single-click (highlight) D:\, right-click, and select Explore.
4. Navigate up one level using the Back button in Windows Explorer or My Computer; double-click C:\; navigate to the desired location on your hard drive; and from the menu bar, select Edit, Paste.

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1. Insert the CD in your CD drive and double-click the disk icon.
2. Single-click (highlight) the CD’s Texas Lawyers Professional Ethics folder.
3. Drag the folder to the desired location on your hard drive.

Usage Tips for the PDF File

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vertical bar separating the bookmarks from the main body of the book can be dragged to resize the bookmarks window.

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APPLICATION FORM
LAWYER ADVERTISING AND SOLICITATION COMMUNICATIONS

Effective July 29, 1995, Part VII of the Texas Rules of Disciplinary Procedure require that a lawyer file with the Advertising Review Committee a copy of all public media advertisements and solicitation communications, except those exempt by Rule 7.07(d), contemporaneously with first dissemination or mailing. If desired, pre-approval may be obtained by submitting a copy of the advertisement or writing at least 30 days prior to its first dissemination or mailing. (If pre-approval is requested for an advertisement that is to be placed in a telephone directory or similar publication, the ad must be submitted at least 30 days prior to the printing deadline of the publication rather than 30 days prior to dissemination date of the publication.) If a pre-approval is requested, a response will be mailed within 25 days of the date of receipt of a completed application packet.

INSTRUCTIONS FOR SUBMISSION OF A COMPLETE APPLICATION PACKET

1. Complete Application in full. Please print or type. Application may be reproduced.

2. Attach advertisement or solicitation communication.
   > For a solicitation letter, attach a sample of the letter and the envelope in which it will be mailed.
   > For a television or radio ad, attach a detailed production script, including ad title or number, and an audio or video disk/tape.
   > If requesting pre-approval of a TV or radio ad that has not yet been produced, a production script can be submitted without a video or audio disk or tape.
   > For an ad or letter in any language other than English, attach a complete, accurate English translation along with the script in the original language.
   > For a website, include URL address and two printed copies of the initial access page.

3. Enclose check in the amount of $75.00 payable to the State Bar of Texas for each ad or writing.

4. Mail original and one copy* of each completed application packet to:
   Advertising Review Committee
   State Bar of Texas
   P.O. Box 12487
   Austin, TX 78711-2487
   *Note exception: It is not necessary to include an additional copy of the video or audio disk or tape submitted for TV or radio commercials.

   A separate application packet must be submitted for each advertisement or writing. If submitting more than one packet at a time, TV or radio commercials may be combined onto one disk/tape. Filing fees may be combined into one check. Incomplete application packets will be returned. They will not be docketed for review.

   For questions concerning filing requirements or to request a Lawyer Advertising Information Packet, call 1-800-566-4616.

---

Lawyer*: ___________________________ Bar Card #: ___________________________
Firm: ______________________________
Firm’s Principal Office Address*: ______________________________
Phone*: ___________________________ Fax: ______________________________ E-mail: ______________________________

Nature of advertisement or solicitation communication*:

A. _____ Letter (Complete Addendum Form)  D. _____ Brochure Newsletter (Complete Addendum Form)  G. _____ Other (Billboards, etc.)
B. _____ Telephone Directory  E. _____ Television/Radio
C. _____ Magazine/Newspaper  F. _____ Website, URL: ______________________________

It is extremely important that you review the explanation of the difference between filing and pre-approval at top of this page before answering the following question:

Does applicant seek pre-approval?*  Yes (pre-approval) _______  No (filing) _______

* Required Fields
If you answered No, state the date the advertisement or solicitation was first disseminated or mailed. ________________

Is it likely that a case or matter resulting from the advertisement or solicitation will be referred to another lawyer or law firm?* Yes ____ No ____

Does the advertisement or solicitation disclose or allude to a specific fee, range of fees, or that the lawyer or law firm will render fees on a contingent fee basis?* Yes ____ No ____

Does the advertisement or solicitation disclose the existence of an office other than the firm’s principal office?* Yes ____ No ____
If you answered Yes, is the satellite office staffed by a lawyer at least three days per week? Yes ____ No ____

Does the advertisement or solicitation designate or allude to one or more specific areas of practice?* Yes ____ No ____
If you answered Yes, is the lawyer board certified in the areas of practice advertised? Yes ____ No ____

Has another lawyer or law firm paid any part of the advertisement or solicitation?* Yes ____ No ____
If you answered Yes, identify the lawyer or law firm. ________________________________

In what geographic location(s) will the material be disseminated?*

Identify any lawyers depicted in the submitted material.*

Identify any actual clients depicted in the submission along with such clients’ addresses and phone numbers.*

__________________________________________________________

Note: The Advertising Review Department may request substantiation of any statement or representation made in the submitted advertisement or solicitation communication.

Payment by credit card: Name of cardholder _________________________ (circle one) AMEX  MC  Visa  $_____

Number:_____________________________ Date of Expiration _______________________

ATTEST: I HAVE REVIEWED THE ADVERTISEMENT OR WRITING SUBMITTED AS REQUIRED BY RULE 7.04(e) OR 7.05(c), TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT. THE REPRESENTATIONS CONTAINED THEREIN AND THE INFORMATION IN THIS APPLICATION ARE TRUE AND CORRECT.

__________________________________________________________  ______________________________
Signature of Applicant                  Date

FOR COMMITTEE USE ONLY

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This form (updated 4-17-07) supersedes all prior forms.

* Required Fields