Committee on Disciplinary Rules and Referenda

Agenda

Date and Time: Wednesday, June 5, 2024 – 10:00 a.m. CDT by Teleconference

Join by Meeting Link: https://texasbar.zoom.us/j/85077778433
Or Join by Telephone: 888-788-0099 (Toll Free); Meeting ID: 850 7777 8433.

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1. Call to Order; Roll Call

2. Comments from the Chair

3. Discussion and Possible Action: Approval of the Minutes of the Last Meeting (Bates Numbers 000003 – 00005)

4. Discussion and Possible Action: Interim Report to the State Bar of Texas Board of Directors from Taskforce for Responsible AI in the Law (TRAIL) (Bates Numbers 000006 – 000083)

   Consider Initiation of the Rule Proposal Process and Possible Publication of Proposed Rule Amendments in the Texas Bar Journal and Texas Register; Consider Possible Amendments to and Recommendation of Comments to Proposed Rule

5. Discussion and Possible Action: Rule 1.04. Fees, Texas Disciplinary Rules of Professional Conduct (TDRPC) (Bates Numbers 000084 – 000090)

   Consider Initiation of the Rule Proposal Process and Possible Publication of Proposed Rule Amendments in the Texas Bar Journal and Texas Register; Consider Possible Amendments to and Recommendation of Comments to Proposed Rule

6. Discussion and Possible Action: Rule 1.14. Safekeeping Property, TDRPC (Bates Numbers 000084 – 000090)

   Consider Initiation of the Rule Proposal Process and Possible Publication of Proposed Rule Amendments in the Texas Bar Journal and Texas Register; Consider Possible Amendments to and Recommendation of Comments to Proposed Rule

7. Discussion and Possible Action: American Bar Association Model Rule of Professional Conduct (ABA MRPC) 1.16. Declining or Terminating Representation (Bates 000091 – 000132)

Consider Initiation of the Rule Proposal Process and Possible Publication of Proposed Rule Amendments in the Texas Bar Journal and Texas Register; Consider Possible Amendments to and Recommendation of Comments to Proposed Rule

8. Discussion and Possible Action: ABA MRPC 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law (Bates Numbers 000133 – 000189)

   Consider Initiation of the Rule Proposal Process and Possible Publication of Proposed Rule Amendments in the Texas Bar Journal and Texas Register; Consider Possible Amendments to and Recommendation of Comments to Proposed Rule

9. Discussion and Possible Action: Rule 9.01. Severability, TDRPC (Bates Number 000190)

   Consider Initiation of the Rule Proposal Process and Possible Publication of Proposed Rule Amendments in the Texas Bar Journal and Texas Register; Consider Possible Amendments to and Recommendation of Comments to Proposed Rule

10. Discussion and Possible Action: Changes to Texas Rules of Disciplinary Procedure (Bates Numbers 000191 – 000264)

    Consider Initiation of the Rule Proposal Process and Possible Publication of Proposed Rule Amendments in the Texas Bar Journal and Texas Register; Consider Possible Amendments to and Recommendation of Comments to Proposed Rules

11. Agenda Items for Next Meeting (Bates Numbers 000265 – 000336)

12. Adjourn

Under the Americans with Disabilities Act, an individual with a disability must have an equal opportunity for effective communication and participation in public meetings. Reasonable modifications and equal access to communications will be provided upon request. For assistance, please contact Haksoon Andrea Low at (877) 953-5535 or (512) 427-1323 at least five working days prior to the scheduled meeting so that appropriate arrangements can be made. Individuals with speech or hearing disabilities can contact Ms. Low by routing through Relay Texas at phone number 7-1-1 or another designated phone number provided at relaytexas.com.

MEETING OF THE
COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

May 1, 2024
By Teleconference

MINUTES

CALL TO ORDER OF THE MEETING AND ROLL CALL

Chair Kinard called the meeting to order at 10:02 a.m. CDT. Mr. Squires called the roll, and a quorum was present.

Members Present: Chair M. Lewis Kinard; Timothy D. Belton; Amy Bresnen; Scott Brumley; Robert Denby (left at 10:30 a.m. and returned at 10:44 a.m.); Judge Phyllis Gonzalez; Jennifer Hasley; April Lucas (arrived at 10:04 a.m.); and Karen Nicholson.

State Bar of Texas Staff Present: Ray Cantu, Deputy Executive Director (arrived at 10:18 a.m.); Cory Squires, Staff Liaison; and Andrea Low, Disciplinary Rules and Referenda Attorney.

COMMENTS FROM THE CHAIR

Chair Kinard welcomed everyone to the meeting and thanked all who called in for their participation. He explained the Committee's purpose and mandate, directed the public to the Committee's website to find information about the Committee, and encouraged the public to participate in the process.

The Chair stated that he presented the Committee's Annual Report for 2023 at the meeting of the Board of Directors of the State Bar of Texas on April 19, 2024.

APPROVAL OF THE MINUTES OF THE LAST MEETING

Judge Gonzalez moved to approve the Minutes of the April 3, 2024, meeting. Mr. Brumley seconded the motion. The motion carried unanimously.

RULES 1.04 FEES. AND 1.14. SAFEKEEPING PROPERTY TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Ms. Bresnen, on behalf of the subcommittee, recommended that the Committee not vote to initiate any rule proposals at this time. She stated that the subcommittee preferred to take additional time to consider these rules.

The Committee took no action on these matters.

AMERICAN BAR ASSOCIATION MODEL RULE OF PROFESSIONAL CONDUCT (ABA MRPC) 1.16. DECLINING OR TERMINATING REPRESENTATION

Mr. Denby provided background on the changes to ABA MRPC 1.16, as adopted in August 2023. He recommended that the Committee consider the same issues and opined that the Committee may not want to adopt a similar rule, which may be ineffective against money laundering.

Committee members discussed whether existing disciplinary rules regarding fraud, misconduct, and candor toward the tribunal are sufficient. The Committee asked that the Chief Disciplinary Counsel present findings on grievances regarding lawyers who have not properly identified their clients at the next meeting.

The Committee took no action on this matter.

ABA MRPC 5.5. UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

The Committee agreed to consider this matter after the Supreme Court of Texas holds a hearing on May 6, 2024, to consider the rule proposals approved by the Bar membership.

RULE 9.01. SEVERABILITY TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Ms. Bresnen requested that the Committee pass on this matter but consider it in its future discussions of artificial intelligence.

INTERIM REPORT TO THE STATE BAR OF TEXAS BOARD OF DIRECTORS FROM TASKFORCE FOR RESPONSIBLE AI IN THE LAW (TRAIL)

Chair Kinard suggested that the Committee consider amendments to rules and interpretive comments based on the TRAIL report and examples from ethics committees and courts in California, Florida, North Carolina, and New Jersey. The Committee discussed current consideration of AI by the Texas legislature and judiciary. The Committee agreed to consider this further at the next meeting.

The Committee took no action on this matter.

RULES VOTE 2024 (REFERENDUM ORDERED BY SUPREME COURT OF TEXAS)

Ray Cantu, Deputy Executive Director of the State Bar of Texas, reported on the referendum. Mr. Cantu stated that the State Bar sent approximately 113,000 ballots to members, which resulted in a turnout of 18-19%.

Chair Kinard stated that he, Mr. Denby, and Ms. Bresnen will appear before the supreme court at a hearing on the rule proposals on May 6, 2024, at 3:00 p.m. Chair Kinard stated that the

Committee could submit recommendations for interpretative comments and renumbering to the supreme court.

AGENDA ITEMS FOR FUTURE MEETINGS

The Committee had no agenda items to add.

Ms. Lucas and Ms. Hasley agreed to follow up with the Chief Disciplinary Counsel regarding ABA MRPC 1.16 before adding this item to the agenda in the future.

ADJOURNMENT

Mr. Brumley moved to adjourn the meeting. Ms. Bresnen seconded the motion. The motion carried unanimously. The meeting was adjourned at 11:01 a.m. CDT.

Taskforce for Responsible AI in the Law

Interim Report to the State Bar of Texas Board of Directors

Introduction

In 2023, under the leadership of State Bar President Cindy Tisdale, the Taskforce for Responsible AI in the Law (TRAIL) was formed to address the growing impact of Artificial Intelligence (AI) in the legal profession. The taskforce has worked to identify ways that the emergence of new AI technology might affect the practice of law and how lawyers, judges, and the State Bar should respond. The work of TRAIL focuses on crafting guidelines, navigating challenges, and embracing the potential of AI within the legal profession.

This interim report represents an initial step in understanding the integration of AI within the legal profession. It highlights the taskforce's progress and ongoing efforts, underlining the complexity and scope of the work still required. This document serves as a marker of our current understanding and the groundwork laid, pointing towards a comprehensive and more detailed final report. The emphasis is on continued research, collaboration, and thoughtful development in this rapidly evolving landscape. Regulation and technology will both continue to evolve over the course of this work. None of the preliminary thoughts described below should be taken as any formal recommendation, but rather reflect preliminary concepts being considered by the taskforce.

Executive Summary

The TRAIL Interim Report includes a variety of recommendations being considered across different areas of legal practice, with a focus on the ethical and practical integration of AI. These proposals, while still under review and not finalized, cover:

1) **Cybersecurity**: encouraging awareness among lawyers about possible risks associated with using AI tools, including third party access to sensitive information
2) **Education and Legal Practice**: recommending the inclusion of AI topics in professional education for both lawyers and judges and proposing targeting or increasing attorney's continuing legal education (CLE) hours to include AI and technology issues germane to the practice of law
3) **Legislative, Regulatory, and Legal Considerations**: suggesting the review and monitoring of legislation, regulation, and case law relevant to AI in legal practice, and considering the development of AI-focused legislative proposals
4) **Ethical and Responsible Use Guidelines**: developing recommendations regarding generative AI use that address compliance with attorney ethics and advertising regulations, and offering guidance on the ethical use of AI in legal practice
5) **Access and Equity**: proposing support for legal aid providers in accessing AI technology and potential technologies to enhance individual access to the justice system
6) **Privacy and Data Protection**: examining the implications of privacy laws on AI and proposing best practices for handling personal data in AI applications
7) **AI Summits and Collaborative Efforts**: suggesting the organization of AI summits for knowledge sharing and collaboration among stakeholders

Mission Statement

The Taskforce for Responsible AI in the Law is focused on educating Texas practitioners and judges about the benefits and risks of AI and fostering the ethical integration of AI within the legal

profession. The mission of the taskforce is to explore the uncharted frontiers of AI in the legal profession, approaching this new world with caution and optimism and ensuring that technology serves the legal community and the public without compromising the values central to our profession. The taskforce will investigate how legal practitioners can leverage AI responsibly to enhance equitable delivery of legal representation in Texas while upholding the integrity of the legal system, and the taskforce will make recommendations to the State Bar's Board of Directors consistent with this goal.

Vision Statement

The taskforce envisions a future where the integration of AI in the legal profession is both innovative and principled. Striving to lead the way in Texas and beyond, our focus is on crafting standards and guidelines that enhance legal practice through AI, without sacrificing the core values of justice, fairness, and trust. In this bold new era, we will lead with care and optimism, ensuring that the transformative power of AI serves the legal community and the public with excellence and integrity.

Purpose of the Report

This report serves as an interim report to the Board of Directors concerning the work of the Taskforce for Responsible AI in the Law, its preliminary findings, recommendations that are under consideration, and proposed future activities of the taskforce.

Scope and Limitations

The material outlined in this interim report are preliminary thoughts, many of which will require additional investigation. The potential recommendations listed are currently under review and consideration by the taskforce and are reported here to give the board an opportunity to consider the possible recommendations and provide the taskforce with feedback and direction for its work. The topic of AI has attracted the attention of the media, academia, and government. It is a broad issue with implications for almost every facet of society. The taskforce's attention, however, is limited to consideration of the ramifications of AI for the practice of law.

Subcommittee Insights

The taskforce began its work by identifying issues in the legal profession that may be affected by AI. A subcommittee was assigned to each issue. The initial reports from the subcommittees are included as appendices to this report, and what follows is a summary of the issues identified by each subcommittee and the tentative recommendations that may be proposed at a later date for action by the State Bar of Texas or by other stakeholders in the legal sphere. These tentative recommendations are only proposals at this stage; the Taskforce has not reached a consensus on these proposals and is not asking the State Bar Board to take any action at this time.

Cybersecurity

Overview of the Issues

All lawyers and clients rely on information technology, the Internet, and cloud computing, which means that we all face exposure to cybercrime. Cybercriminals could use AI to be disruptive, spread malware, spread disinformation, and commit fraud and theft, but AI can also be a tool to help lawyers and clients predict or protect against cybercriminals' behavior in the future.

Potential Recommendations

The State Bar should help lawyers become more aware of the risks associated with cybercriminals and in particular the use of AI to hide cybercriminal behavior. The State Bar may wish to consider:

1) including cybersecurity and AI training in CLE events for all lawyers
2) creating an AI toolkit on the State Bar's website
3) publishing articles on cybersecurity threats to lawyers and law firms in the State Bar Journal and section publications

The State Bar should team up with the Chief Information Security Officer (CISO) community to learn more about their perspective on cybercriminals' use of AI.

Cybersecurity Concerns

Here are specific AI cybersecurity concerns that should be addressed:

Malware	Malware is software designed to disrupt, damage, or gain access to a computer system. Often employees unwittingly fall victim to email phishing attacks allowing in disruptive malware. Regular cybersecurity training of employees to prevent them from falling for email phishing attacks is recommended since cybercriminals use AI to fool individuals into opening or responding to fake emails.
Business Email Compromise ("BEC" or "Spearphishing")	When a cybercriminal sends an email or phone call posing as the CEO and requests that the CFO wire monies to a bank is an example of BEC. Cybercriminals are using AI regularly to hide their behavior, including using generative AI tools to replicate the voice of an executive to further their criminal act. Regular cybersecurity awareness training is also recommended.

Privacy

Overview of the Issues

How Does Privacy Law Apply to AI?

Privacy laws apply broadly to protect personal data, and AI is no exception. U.S. state consumer privacy laws and sectoral privacy laws may apply based on the involvement of personal data in any component of AI. International privacy laws applicable to many U.S.-based companies, by nature of the company processing international personal data, could also apply to AI. Notably, proposed legislation to regulate AI has acknowledged the application of privacy laws.

Where Is Personal Data in AI?

Personal data can be found in the data sets used to train AI. Personal data can also be input into an AI tool (e.g., submitting personal data in a prompt to ChatGPT). AI can also be used to make recommendations or inferences that affect privacy.

Potential Recommendations

The AI and Privacy Committee will continue its study of how privacy laws apply to AI and consider any specific implications for Texas lawyers in order to provide pragmatic recommendations to the Texas Bar. Contingent upon the committee's work, the taskforce may consider recommendations regarding the following:

1) how to identify when AI uses personal data
2) best practices for protecting personal data involved in AI

Ethics and Responsible Use

Overview of the Issues

The use of AI in the legal profession raises ethical issues that will need to be addressed by the legal profession.

Ethical Lapses and Misuse of Generative AI

Early instances of lawyers using generative AI in drafting have exposed the potential for ethical lapses due to the misuse of generative AI. Notable instances include:

1) In *Mata v. Avianca Airlines* lawyers submitted a brief with fabricated judicial decisions, leading to sanctions.
2) In *Ex Parte Lee*, a lawyer used a generative AI tool that created nonexistent case citations.
3) A Colorado lawyer was suspended for using fictitious cases from ChatGPT in a legal motion.
4) A Los Angeles law firm was sanctioned for using ChatGPT to draft briefs that included fabricated cases.

Risk of Ineffective Assistance of Counsel

There's a concern about the quality of legal representation, as evidenced by a case in Washington, D.C., where a defendant cited ineffective assistance due to their attorney using generative AI for a closing argument without disclosing financial ties to the AI's developer.

Violation of Ethical and Professional Conduct Rules

Texas lawyers face the risk of violating various disciplinary rules, including:

1) Rule 1.01 on providing competent representation
2) rules related to diligence, candor to the tribunal, supervision of work, and protecting client confidentiality
3) potential violation of Rule 1.05 regarding safeguarding client information, especially when using confidential data in AI prompts in unsecure environments
4) ethical considerations in charging reasonable fees for services enhanced by generative AI tools

Need for Ethical Guidance and Oversight

Ethical guidance and oversight are needed regarding the use of generative AI in legal practices. This includes publishing ethics opinions that address appropriate generative AI use and establish what constitutes reasonable fees and costs in relation to AI use and compliance with ethics and advertising regulations.

Recommendations from Other State Bar Associations

Various bar associations, including those in Florida and California, are proposing guidelines for lawyers using generative AI. These guidelines emphasize the need for lawyers to:

1) protect client confidentiality
2) provide diligent and competent representation
3) supervise both lawyers and nonlawyers in their use of AI
4) communicate adequately with clients about AI use
5) ensure compliance with relevant laws, including intellectual property law

Potential Recommendations

1) Consider having the State Bar of Texas (SBOT) Mandatory Continuing Legal Education (MCLE) Committee promulgate a change to the existing MCLE requirements, making it mandatory that 1.0 hour of an attorney's annual MCLE requirement be in technology.
2) Consider requesting that the Professional Ethics Committee of the State Bar of Texas prepare and issue an ethics opinion providing guidance to Texas practitioners on the ethical dimensions of use of generative AI. This might echo the subjects addressed by the Florida and California ethics proposals discussed in this report. In addition, such an opinion might be along the lines of the Professional Ethics Committee's Ethics Opinion 680 in 2018, which addressed attorneys' use of cloud computing technology, and which addressed multiple ethics concerns.
3) Consider requesting that Texas Bar CLE include that, for at least the next year, one of the subjects at any Texas Bar CLE program be in the area of generative AI use.
4) Consider recommending to the Texas Center for the Judiciary that an educational program on generative AI and its ethical dimensions be added to the center's course offerings for Texas judges. This would provide trial and appellate judges with necessary education on attorney use of generative AI and assist in consideration of potential measures for judicial oversight.
5) Consider recommending to the Supreme Court of Texas Rules Committee that it explore Texas Rules of Civil Procedure 13 on the Effect of Signing Pleadings, Motions, and Other Papers and evaluate whether additional language or guidance is necessary to provide Texas lawyers with additional information regarding AI-generated misinformation or hallucinations, as well as to provide Texas judges with adequate remedies regarding same.
6) Consider increasing Texas lawyers' awareness of the benefits and risks of generative AI by increasing the number of CLE offerings and publications regarding this subject. For example, this might include a special issue of the Texas Bar Journal exploring topics related to generative AI.
7) Consider recommending that the State Bar of Texas explore, with one or more AI vendors, a working relationship that would result in a benefit for use by Texas member lawyers. This might, for example, involve discounted access to AI tools, along the lines of the State Bar's previous relationship with Fastcase for legal research.
8) Consider recommending that the State Bar of Texas hold an annual or semi-annual "AI Summit," at which stakeholders from multiple State Bar-affiliated entities could gather to learn about generative AI and share best practices regarding its use. Such an event might also involve

reviewing the work of other state bars and/or other AI taskforces around the country and sharing information regarding the same.

Judiciary

Overview of the Issues

The use of AI in the courts raises ethical and practical issues that should be addressed. These issues include the following.

Standing Orders Prohibiting Litigants from Using GenAI tools Is Not Generally Helpful

Because some attorneys have submitted briefs that contain nonexistent cases, some courts have been entering standing orders that require parties to certify whether any generative AI tool has been used and that all arguments, cited cases and exhibits have been reviewed by a human prior to filing. Because many legal research tools will (or already do) incorporate generative AI into their product, these standing orders may result in litigants disclosing their use of Westlaw, Lexis, Grammarly, etc. This is likely an unhelpful feature, and courts already have the ability to appropriately sanction an attorney for filing a motion or brief that contains false statements. It may also discourage the development and adoption of tools that, used properly, could enhance legal services.

Use of Generative AI Tools by Judges, Law Clerks, and Court Staff

The Texas Code of Judicial Conduct is written using broad language. Arguably, a judge relying solely on an AI tool with no subsequent verification would violate Canon 1 of the Texas Code of Judicial Conduct (upholding the integrity and independence of the judiciary).

AI tools may be helpful in drafting rough drafts of any order, but it is advisable that generative AI tools that have been developed for legal use be utilized, rather than generic generative AI tools that may be developed with nonlegal related material and may not be updated regularly with recent cases and statutes.

Confidentiality and Privacy Concerns

If the decision is made to use a nonlegal developed generative AI tool, caution should be exercised to ensure that only public information is entered and that no sealed, personal health information, or sensitive personally identifiable information is inserted into any prompt.

Security Concerns

As with all software or apps that are installed onto court-issued computers, tablets or other devices, it is recommended that any generative AI tools be vetted prior to use. The terms of service of any generative AI tool should be reviewed for industry standard commitments to quality and relevant representations and warranties, including to determine what, if anything, is done with prompts or documents ingested into the tool. How was the tool validated for accuracy and completeness? Are the prompts or documents used to further train the AI tool? Upon the matter's conclusion, how are the prompt histories or documents ingested into the system deleted? What representations are made regarding the AI developer’s cybersecurity measures?

Training

Judges should make law clerks and staff aware of what, if any, acceptable use of generative AI tools the judge authorizes. If the judge allows law clerks and staff to use appropriate legal-based

generative AI tools, judges and court personnel should be trained on how to use the tool (i.e., how to adequately create prompts).

Evidentiary Issues

An immediate evidentiary concern emerges from "deepfakes." Using certain AI platforms, one can alter existing audio or video. Generally, the media is altered to give the appearance that an individual said or did something they did not. The technology has been improving rapidly.

What is more, even in cases that do not involve fake videos, the very existence of deepfakes will complicate the task of authenticating real evidence. The opponent of an authentic video may allege that it is a deepfake in order to try to exclude it from evidence or at least sow doubt in the jury's minds. Eventually, courts may see a "reverse CSI effect" among jurors. In the age of deepfakes, jurors may start expecting the proponent of a video to use sophisticated technology to prove to their satisfaction that the video is not fake. More broadly, if juries—entrusted with the crucial role of finders of fact—start to doubt that it is possible to know what is real, their skeptic
ism could undermine the justice system as a whole.

Although technology is now being created to detect deepfakes (with varying degrees of accuracy), and government regulation and consumer warnings may help, no doubt if evidence is challenged as a deepfake, significant costs will be expended in proving or disproving the authenticity of the exhibit through expert testimony.

In cases where a party challenges an exhibit as a deepfake or not authentic, judges should consider holding a pretrial hearing to consider the parties' arguments and any expert testimony.

Pro Se Litigants and Generative AI

While there has already been substantial publicity about inaccurate ChatGPT outputs and why attorneys must always verify any draft generated by any AI platform, the bench must also consider the impact of the technology on pro se litigants who use the technology to draft and file motions and briefs. No doubt pro se litigants have turned to forms and unreliable internet material for their past filings, but ChatGPT and other such platforms may give pro se litigants unmerited confidence in the strength of their filings and cases, create an increased drain on system resources related to false information and nonexistent citations, and result in an increased volume of litigation filings that courts may be unprepared to handle.

Potential Recommendations

1) As nonlawyers, pro se litigants are not subject to the Rules of Professional Conduct, but they remain subject to Tex. R. Civ. P. 13. The current version of Rule 13, however, requires that the pro se litigant arguably know, in advance of the filing of a motion, that the pleading is groundless and false. The Texas Supreme Court Rules Advisory Committee may wish to consider whether Rule 13 should be modified.
2) Consider recommending that the State Bar post information for the public on its website about the responsible use of AI by pro se litigants.
3) Consider developing a list of "best practices" for the use of AI in the courts.
4) Consider developing or providing verified tools to guide constructive use of generative AI for pro se litigants.

Governance

Overview

The governance of AI entails rules and standards surrounding the responsible development and use of AI, and the enforcement of such rules. Industry leaders have acknowledged that AI governance or regulation is important and necessary to protect the public. AI governance also includes “soft law” principles that should be used for the development of technology used for the provision of legal services, in courts, or to increase access to justice.

Current State of AI Governance Initiatives

Since 2022, there has been proposed legislation to regulate the use of AI in numerous jurisdictions across the world. Certain trends in the proposed legislation have arisen.

Defining AI

Some of the proposed definitions of AI attempt to focus on generative AI and large language models. There is concern over definitions that are too broad and include common technology like the calculator or that, conversely, are too narrow and could be outdated before the law goes into effect. For example, older types of AI, such as machine learning, can also present risk in legal practice.

High Risk Use of AI

Proposed legislation tends to focus on a risk-based approach where a high-risk use of AI would result in legally significant or similar effects on the provision or denial of (or access to) employment, education, housing, financial or healthcare services, and other significant goods, services, and rights. Variations of the term “legally significant or similar effects” have spread from the E.U. to the U.S. and appear to be a likely standard of measuring the effects of decisions by AI. Whether humans are involved in the decision making also impacts the level of risk. Governance of AI often turns on separating low, medium, and high-risk use cases and applying rules fit to risk level.

Transparency

Proposed legislation in the U.S. and in other countries often seeks to incorporate obligations on deployers and/or developers to make public disclosures of the training data, personal information collected, decision-making process, and impact of the AI output. Competing concerns include intellectual property rights of developers and deployers.

Assessments

Higher risk uses of AI can trigger obligations to conduct and document risk assessments and pre- and post-launch impact testing. In some high-risk cases, red teaming (adversarial testing) of generative AI may become a standard for developers or potentially deployers.

Other Law

Proposed legislation does not purport to override other existing laws like HIPAA, COPPA, consumer privacy, confidentiality, etc.

Issues for Consideration

It is currently unknown what exactly will be required of lawyers and law firms who utilize AI tools. For example, an assessment of high-risk uses of AI and disclosure of AI-based decisions may be required based on proposed legislation.

It is possible that many attorneys and/or law firms could qualify as a deployer of AI, and the use of AI without meeting the prerequisites imposed by statutory obligations such as making appropriate disclosures and conducting a risk assessment could result in a risk of financial and reputational harm.

Potential Recommendations

The AI and Governance Subcommittee will continue studying any proposed AI legislation and other AI governance initiatives to develop pragmatic recommendations to the Texas Bar. The subcommittee will also consider principles and norms that should guide the development of legal AI tools. Contingent upon this committee's work, the taskforce may consider recommendations regarding the following:

1) the tracking and monitoring of legislation and governmental agency regulations for potential publication to Texas attorneys, so that they can use AI in accordance with legal obligations
2) identification of governance trends and the possible consideration of AI-focused legislative proposals in Texas
3) methods for creating and evaluating values and norms for the use of AI in legal technology, including tools to help ensure that results generated by AI tools are valid and unbiased
4) using information gathered in monitoring trends and legislation, provide a sample template allowing attorneys and law firms to evaluate and/or document their use of AI

Employment Law

Overview

Whether you are a Texas lawyer representing Texas employees or Texas employers, or a lawyer litigating on behalf of or against national employers operating in Texas, it is critical to be aware of the many ways in which AI is impacting the modern workplace. Use of AI within law firms for employment or HR purposes can also raise risks and obligations.

Widespread Use of AI in Employment Practices

AI tools are being extensively used by businesses for screening job applicants. AI is also employed in various aspects of human resource management, including recruitment, hiring, training, retention, and evaluating employee performance.

Potential Bias and Discrimination

Despite the potential to eliminate bias, current AI applications might inadvertently perpetuate existing biases, leading to unintentional discrimination. Examples include:

1) AI tools rejecting applicants with resume gaps, potentially discriminating against individuals with disabilities or those who took parental leave
2) overlooking older workers due to smaller digital footprints on social media and professional platforms

Legislative Responses to AI in Employment

There's an increasing trend in city and state legislatures to introduce AI-focused bills. Notable examples include:

1) California's draft AI regulation and legislative proposals to regulate AI's use in employment
2) New York City's Local Law 144 requiring bias audits for automated employment decision tools
3) proposals in other states like Illinois and Vermont focusing on regulating AI in employment decisions and employee monitoring
4) At the federal level, there are proposals like the Artificial Intelligence Research, Innovation, and Accountability Act of 2023 (AIRIA) and the Algorithmic Justice and Online Platform Transparency Act aimed at regulating discriminatory algorithms and allowing government intervention against AI-induced discrimination.

Potential Recommendations

This committee will continue to study what developments may occur in this area. Potential recommendations that the taskforce may later recommend include:

1) advising the Labor and Employment Section to list all legislation and regulations that practitioners in this area should be aware of
2) inasmuch as lawyers are employers as well, recommending that the State Bar publish a listing of legislation and regulations in this area

Family Law

Overview

Texas family law attorneys tend to be early adopters of technology. Family law is a fast-paced field with a high volume of cases, demanding a high level of professional efficiency.

Digital Evidence in Family Law

With over 85% of Americans using smartphones, digital media such as audio recordings, emails, texts, social media posts, and GPS data have become ubiquitous in family law cases. The handling of these extensive and voluminous personal records is a critical aspect of family law practice.

Misuse of Digital Data

Given the emotionally charged nature of family law and the inherent lack of trust between parties, there's a notable issue with the misuse of digital data.

AI’s Role in Enhancing Efficiency

AI has the potential to significantly enhance efficiency in family law, similar to past technological advancements like fax machines, scanners, email, and eFiling. However, AI differs in its autonomy, operating without skilled oversight and ethical constraints, and producing sophisticated results.

Use of AI by Self-Represented Litigants

A majority of Texas family law cases involve litigants without legal counsel. Many of these self-represented litigants turn to free online AI solutions to compensate for their lack of legal knowledge.

Legal Aid and AI

Legal aid associations are developing AI avatars to assist clients with inquiries and court preparation.

AI's Potential for Family Law Cases

Family law attorneys should consider utilizing AI to streamline document management, increase efficiency, and enhance communication with clients, while safeguarding courts against potential misuse and avoiding ethical entanglements.

There are many potential benefits of incorporation of AI systems for family law attorneys:

1) **Discovery**: AI document management systems can be used to streamline discovery by proposing and narrowing relevant discovery requests and objections. Voluminous documents can be sorted and scanned to identify responsive records and flag privileged communications that might otherwise escape detection. These systems can eliminate duplication, identify frivolous, repetitious, and bad faith responses, objections, and nonanswers, and then draft requests for sanctions or to compel.
2) **Document Management**: AI systems can independently evaluate records, categorizing them and organizing them by content. These systems can summarize the records as a whole or by category, no matter how voluminous, and then retrieve certain records based on natural language descriptors. Rule of Evidence 1006 summaries can be easily generated and readied for submission in court in lieu of offering separate and numerous exhibits.
3) **Contracts**: AI systems can draft, review, compare, and summarize contracts and drafts, to facilitate the creation of pre- and post-nuptial agreements, AID's, and other settlement agreements.
4) **Improved Communications**: Client hand-holding consumes a significant amount of time for lawyers and staff, particularly in solo and small firms. Online chatbots and virtual assistants can provide simple answers to common client questions, easing the administrative burden on staff, increasing efficiency, and eliminating wasted billable hours. Witness prep for depositions and trial can be bolstered or even replaced with AI training. This is particularly useful for self-represented litigants who have no other source of guidance. Legal Aid services are already implementing online training bots for clients and low income nonclients alike which may soon be made freely available to the general public.
5) **Trial Preparation**: By analyzing strengths and weaknesses of claims, AI systems can identify evidentiary gaps and recommend additional discovery requests, responses, and necessary witnesses. These systems can recommend and create demonstrative exhibits that appeal to certain judges or jurors. Trial briefs can be generated during contested hearings for submission during closing argument. Postjudgment motions can be generated from analysis of transcripts, for use as motions for new trial and polished appellate briefs.
6) **Tracing**: Successful tracing of separate property requires meticulous record keeping and clear presentation of complex concepts. AI can apply and compare various tracing methods and identify potential gaps that could be fatal to a tracing analysis. It can prepare timelines and summaries to bolster the presentation, possibly eliminating the need for expert testimony in some tracing cases.
7) **Social Media**: There is rarely a family law hearing that does not involve social media evidence. Unfortunately, there are many social media platforms, and search features are generally inadequate for sweeping and thorough inspection. AI can continually scan and monitor social

media for useful information about parties or witnesses, or posts indicating bias of potential jurors. This would be of great value in presenting motions to transfer venue under TRCP 257.

Potential Risks

While the potential benefits are numerous, so too are the risks of misuse and abuse. Family law lawyers must be able to anticipate, identify, and respond to these situations.

1) **Falsified Records**: Free AI websites can easily create fake, manipulated, forged, and pseudo documents and records that frequently escape detection. Government records (passports, driver's licenses, search warrants, protective orders, deportation orders) and personal records (medical, drug tests, utility bills, real estate documents, bank statements) can be obtained in seconds, for a minimal cost. Fake emails, texts, audio recordings, and social media posts may be indistinguishable to a nonexpert without application of AI detecting software.
2) **Medical Lay Opinions**: Parental observation and opinion of their child's medical, mental and emotional condition is commonly admitted in family law hearings. The basis for these opinions is explored on voir dire or during cross examination to test the credibility of the parent's testimony. Parents often report relying on input from the children's treating physicians. However, as AI chatbots replace personal interactions with medical professionals, opinions based on doctor's recommendations may be deemed unreliable. This is exacerbated by the recent trend of AI systems being quietly trained by unsophisticated workers to anthropomorphize communications—emoting to show seemingly real empathy and thus soothe frightened patients. Mimicry of empathy and humanity by AI can manipulate human emotion and sway outcomes in imperceptible ways.
3) **Editing of Digital Media**: "Deep fakes" are fictitious digital images and videos. They are created with simple, free apps currently available on both Apple and Android smart phones. With a few clicks or taps, AI can manipulate digital media and create seemingly authentic photos and videos that easily fool unwary recipients. AI detectors flag suspicious files, but they are not foolproof. Attorneys should routinely run all digital photos through AI detectors.
4) **Caller ID spoofing**: Spoofing is the falsification of information transmitted to a recipient phone's display that disguises the identity of the caller. The technique enables the user to impersonate others by changing the incoming phone number shown on the receiving phone. In this way, someone can fabricate abusive, repeated, or harassing calls and texts seemingly originating from one spouse, parent, paramour, child, law enforcement or CPS. The perpetrator can create a mountain of false evidence while hiding behind AI anonymity. AI systems can be instructed to inundate a recipient with nonstop harassing messages or calls, without leaving any digital footprint on the perpetrator's phone or computer. By evaluating years of messages and emails, the AI system can mimic the victim's speech and emoji patterns—a key element of admissibility. Further, AI spoofers can be used to fraudulently obtain or circumvent liability for life-long protective orders under Tex. Code Crim. Pro. 7b for stalking by digital harassment. And because these systems do not work through the service provider, third-party discovery from the phone company will appear to confirm that the calls or messages originated from the spoofed number, lending an air of credibility to the ruse.
5) **Voice Cloning**: Voice cloning apps and websites allow someone to convincingly spoof the voice of any other person with only a single audio sample of the target. Someone with dozens of voicemails and recorded conversations from years of marriage, or even a recorded deposition, can use these systems to create audio files that require an AI detector or forensic expert to detect.

6) **Data Analysis Manipulation**: AI systems can be used to subtly modify large data sets, corrupt legitimate data analysis, and generate false conclusions that appear legitimate and are only detectable by competing expert review. They can fabricate peer review and approval, circumventing the rigorous gatekeeping process that would otherwise be required for admissibility. This allows lay witnesses to present false opinions as verified scientific fact, or as the basis for a law-expert opinion.
7) **Dissemination of Misinformation**: As described above, AI can monitor and find useful social media evidence. However, it can also wield the power of social media to maliciously generate false information and evidence. AI can be unleashed to wage a social media disinformation campaign. It can flood various platforms in a reputation manipulation campaign targeting the judge, opposing counsel, parties, or witnesses. It can untraceably tamper with or poison a jury pool, spreading lies or false legal positions and authority. It can significantly damage the reputation of court participants, enabling the other side to provide negative reputation testimony to undermine the credibility of opposing witnesses. And these efforts could create sufficient taint to legitimately support a motion to recuse or venue transfer motion under TRCP 257.
8) **Facilitated Hacking**: Hackers use AI systems to breach secure cloud databases and obtain unauthorized access to sensitive personal information. Client's financial, medical, or personal communications, including attorney-client privileged emails, could be surreptitiously obtained. Moreover, hackers can target law firms seeking to break into their secure servers, obtaining access to all privileged records and client files. Lawyers should question the source of such information, so as not to run afoul of criminal prohibitions on use of stolen digital data, such as the Texas Penal Code 16.04. Additionally, these systems can hack dating apps and target unwary spouses for romantic entrapment using AI chatbot baiting.
9) **Voluminous Records**: One of the great benefits of AI is the handling of voluminous records: thousands of documents, millions of emails, or decades of bank statements and canceled checks. Through AI analysis, there is the possibility that all could be categorized and summarized, potentially one day without human oversight. However, there remain important questions about the validation of such tools and the ongoing role of human oversight. The committee will explore how to address risks presented by greater use of this technology.
10) **Local Rules and Court Practices**: AI systems can analyze a court participant's public life and social media presence, seeking leverage for inappropriate strong-arming and manipulation. In a similar way, the systems can be unleashed on a judge's personal and professional history, determining personal predilections, biases, and likely outcomes. The old saying, "A good lawyer knows the law. A great lawyer knows the judge," takes on new meaning when the knowledge includes a detailed and thorough psychological and historical evaluation of the judge.

Potential Recommendations

1) Increase Texas lawyers' awareness of the benefits and risks of AI by expanding the number of CLEs and articles regarding same.
2) Consider 1 hour of MCLE per year requirement to meet the technical competency and proficiency requirements of Texas Disciplinary Rules of Professional Conduct, Rule 1.01 Comment 8.
3) Examine and review TRCP 13 Effect of Signing Pleadings, Motions, and Other Papers: Sanctions to ensure that trial and appellate courts have adequate remedies regarding AI- generated misinformation or hallucinations.
4) Increase and support AI integration for low-income and pro bono legal service providers.

5) Annually review AI and its utilization and risk for Texas lawyers.
6) Continually review other State Bar and national legal organizations' reviews and recommendations regarding AI and the legal profession.
7) Periodically review state and federal laws regarding AI and advise Texas lawyers of any changes that would or could affect the practice of law.
8) Ensure that Texas judges are routinely provided with current information regarding the benefits and risks of AI.
9) Begin exploring with AI vendors a working relationship for potential use by Texas lawyers, similar to the State Bar's access to Fastcase.
10) Update predicate manuals to have enhanced materials and examples for offering or challenging digital evidence.

Healthcare

Overview

Complex Regulation of Medical AI

The U.S. Food and Drug Administration (FDA), U.S. Department of Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS), state medical boards and others have overlapping and complementary jurisdiction over AI in healthcare and life sciences. The use of AI in healthcare raises important opportunities for new treatments, improved medical decision making, and access to care and defragmentation of the healthcare system. At the same time, AI in healthcare poses unique risks and challenges to existing regulatory and legal rules such as the learned intermediary and the distinction between devices and practicing medicine. Lawyers in this space will face uncharted territory as the technology evolves.

Dependence on IT, the Internet, and Cloud Computing

Healthcare providers heavily rely on information technology, the Internet, and cloud computing, necessitating the protection of patient data privacy, especially when AI is involved.

HIPAA Compliance and Patient Data Protection

Healthcare providers are bound by the Health Insurance Portability and Accountability Act (HIPAA) to protect patient health information (PHI). They use Electronic Health Record (EHR) systems, such as EPIC and Cerner, where AI is likely utilized to assist healthcare providers and business associates.

Third-Party Software and AI Risks

Given the reliance on cloud computing, it's probable that third-party Software-as-a-Service (SaaS) providers use AI. Large cloud computing providers like Amazon offer AI-as-a-Service (AIaaS) to manage vast data volumes, which healthcare providers and business associates may use. However, the usage of AI by SaaS can pose risks to PHI if healthcare providers do not thoroughly review and negotiate online terms of service, click agreements, and privacy policies.

Complexity of AI in Healthcare

AI is involved in various healthcare aspects, including record keeping, diagnostic imaging, triage, prescription dispensing, billing, staffing, and patient satisfaction evaluation. The integration of AI in healthcare legal departments combines the complexities of healthcare, AI, and the law, necessitating tailored guidance.

Potential Recommendations

1) **Engagement with Healthcare IT Professionals**: The State Bar should interact with Chief Legal Officers (CLOs), Chief Information Officers (CIOs), Chief Privacy Officers (CPOs), Chief Information Security Officers (CISOs), and risk management professionals to understand their perspective on AI use in healthcare.
2) **Public Information and Awareness**: Provide accessible information to lawyers and the public about AI's current use in healthcare, its impact on patient care, and patient rights.
3) **Continuing Legal Education Programs**: Offer CLE programs for lawyers and judges to understand how healthcare providers, device manufacturers, covered entities, business associates, and subcontractors use AI. This understanding is crucial for the protection of safety and efficacy, patient care and rights, physical judgement, and PHI and to assist these entities effectively.

Legal Education

Overview

Importance of Understanding AI in Legal Education

Recognizing the significant influence that AI has on the ethical practice of law and case management in courts, it's essential for law school education to address how AI affects these areas. This understanding is crucial for preparing law students for their future roles as lawyers and judges.

AI as an Educational Tool

AI can be beneficial for law students to better comprehend the practice of law, which would ultimately benefit all lawyers and judges. However, there's a concern that an overreliance on AI could lead to a deficiency in the essential skills and knowledge required for legal and judicial careers.

Experiences with Generative AI in Law Schools

Early experiences with generative AI reflect some of the persistent concerns over its use by law students.

1) The University of Michigan Law School prohibited the use of ChatGPT on student application essays.
2) The University of California Berkeley School of Law adopted a formal policy on the use of AI by students but did not pass an outright ban.
3) In a study analyzing ChatGPT’s performance on the bar exam, Chicago-Kent College of Law professor Daniel Katz and Michigan State College of Law professor Michael Bommarito found that the AI got answers of the Multistate Bar Exam correct half of the time, compared to 68% for human test takers.
4) Law professors at the University of Minnesota Law School conducted a study which showed ChatGPT performing on average at the level of a C+ student, earning a low but passing grade in four courses. The same researchers authored a follow-up study, Lawyering in the Age of Artificial Intelligence, in November 2023. It found that while use of AI led to consistent and significant improvements in the speed of law students’ work on common legal tasks (enhancing it by as much as 32%), AI did not really improve the quality of the work.
5) Legal writing professors interviewed by the ABA Journal who used ChatGPT in writing classes concluded that the AI tool can model good sentence structure and paragraph structure and aid in summarizing facts.

The use of AI in law schools can present the opportunity for certain efficiencies and familiarize students with technology used in practice, but AI is no substitute for a student's own analysis.

Potential Recommendations

1) **Balancing AI Use with Traditional Learning**: A practical solution suggested is to modify legal education to encourage AI use among law students. At the same time, it is recommended that students be required to orally explain their research papers to ensure they retain critical thinking and understanding skills.
2) **Collaboration with Legal Education Institutions**: The State Bar should collaborate with law school deans and law professors to focus on using AI in practical law courses, thereby enhancing the practical aspects of legal education with AI technology.
3) **Mandatory Continuing Legal Education (MCLE) on AI**: The recommendation includes the State Bar mandating MCLE courses about the ethical and practical uses of AI for young lawyers, particularly in the first five years following their passing of the bar exam.
4) **AI Summit**: Consider recommending that the State Bar of Texas hold an "AI Summit," to which deans of the ten Texas law schools will be invited and encouraged to bolster technology law offerings to students, including but not limited to generative AI.
5) **Mandatory Court on AI for Recent Graduates**: Consider a requirement for recent law school graduates, along the lines of the mandatory Introduction to practice course currently in place, to complete a CLE course on the benefits and risks of generative AI.
6) **Ongoing Study**: Consider ongoing review and study of AI-related issues by the State Bar due to its rapid evolution and the advanced rate of adoption within the legal profession. Such ongoing study could include outreach to Texas law schools and providing guest speakers on the subject of generative AI.

The State Bar should encourage law schools to address AI topics in these Law School Courses:

TOPICS	LEGAL EDUCATION POINTS
1L Courses Which Should Include AI	Legal Research Writing Communication & Legal reasoning Foundation of the Legal profession Civil Procedure Legal Analysis & Persuasion
2L & 3L Courses Which Should Include AI	Administrative Law Basic Federal Income Taxation Business Associations Civil Procedure II Comparative Law Constitutional Criminal Procedure Conflict of Laws Estates and Trusts Evidence International Law Law Office Management Professional Responsibility Remedies

	Secured Transactions

Practical Uses

The legal community in Texas would benefit from a consideration of the possible practical uses of artificial intelligence.

Potential Recommendations

1) **Educational Outreach**: We recommend the development of a self-service presentation (slide deck) covering practical use cases and examples of responsible uses of AI. Bar members can review the presentation themselves, and we also recommend that it be presented at each bar section meeting at least once in 2024. To incentivize participation, we suggest offering CLE credits to attendees.
2) **Bar Magazine Articles**: To ensure that information reaches every member of the bar community, we propose the creation of concise one- or two-page articles that cover similar content to the presentation. These can be disseminated through the bar association's email newsletters or magazines, specifically tailored to cater to a less technical audience. The aim is to provide accessible and digestible insights into the world of AI and its relevance to legal practice.
3) **Paralegal Empowerment**: Recognizing the vital role paralegals play in the legal ecosystem, we recommend dedicating a one-page article in the Texas Bar Journal and Texas Paralegal Journal. This content should be tailored to address the unique perspectives and responsibilities of paralegals, making the integration of AI concepts relevant to their daily tasks.
4) **Community Building**: Fostering a sense of community and shared learning is crucial. We are considering recommending the creation of an AI affinity group that meets quarterly. This group would serve as a platform for members to share success stories, exchange insights, and collectively navigate the challenges posed by AI in the legal profession.
5) **Business Mentor Program**: To bridge the gap between tech-forward lawyers and those seeking guidance, we would like to explore designing a business mentor program for bar members. Experienced lawyers well-versed in technology can mentor another bar member, sharing ideas on how to incorporate tech into their practice. This could be designed in coordination with supporting retiring lawyers who want to transition their practice to the next generation of attorneys.
6) **Scholarship Fund for Upskilling**: Acknowledging the financial considerations of adopting AI tools, we propose the establishment of a scholarship fund. Bar members can apply for funds to purchase AI tools or reduce the cost of upskilling during this period of technology transition for the profession. Additionally, exploring potential bar discounts on AI tools would further support this initiative.
7) **List of Social Media Resources**: We recommend compiling a list of reputable groups and associated social media accounts on LinkedIn and Facebook so that bar members can continue to learn about AI in bite-size amounts over the course of the next few years.

Justice Gap

Overview

The “Justice Gap” refers to the tremendous unmet need for legal services among low-income persons. The Legal Services Corporation (LSC) 2022 Justice Gap Study revealed that 92% of the civil legal

problems of low-income Americans did not receive any or enough legal help. Nearly three-quarters (74%) of low-income households experienced at least one civil legal problem in the previous year. A third (33%) of low-income Americans had at least one problem they attributed to the COVID-19 Pandemic. (https://www.lsc.gov/initiatives/justice-gap-research)

How Might Legal AI Help?

Legal AI technology will impact the justice gap on two fronts. First, by making lawyers more productive and thus allowing them to serve more clients, more quickly. Second, via self-help legal tools, in the form of chatbots, designed to be used directly by consumers. (https://www.lawnext.com/2023/09/thoughts-on-promises-and-challenges-of-ai-in-legal-after-yesterdays-ai-summit-at-harvard-law-school.html)

What Are the Potential Challenges or Pitfalls?

Particularly with respect to consumer self-help legal tools, there will be huge challenges in ensuring that data used in legal AI systems is valid and that legal answers consumers receive can be trusted. The subcommittee will survey Texas legal aid providers regarding how they plan to use AI tools in the provision of client services and also directly to clients in form of chatbots (Texas Legal Services Center is beginning to test chatbot technology as a component of its virtual court kiosks, only for the purpose of helping people use the kiosks (https://www.tlsc.org/kiosks)).

Potential Recommendations

The Subcommittee may study and make recommendations regarding the following:

1) strategies for ensuring that direct-to-consumer legal AI tools provide valid information that is usable and effective in helping solve legal problems
2) how to ensure self-help legal AI tools are accessible to people who may have limited internet access or low proficiency in using computers and mobile devices, or who are non-English speakers
3) ideas for supporting Texas legal aid providers as they build out their own legal AI tools
4) how to address the potential for unequal access to AI technology; that is, that legal aid providers will be shut out of access to expensive AI tools which may be accessible only by big firms and corporations; encourage legal technology vendors to provide low-cost access to such tools
5) the potential for AI technology to help with dispute resolution and dispute avoidance
6) ideas for innovative legal services platforms based on AI

Areas for Additional Research

The taskforce identified areas where additional research would be helpful.

1) **The Use of AI by Texas Lawyers**: The taskforce proposes to poll members of the Texas Bar to gain insight into how quickly the use of AI is spreading in the legal profession, and what AI tools are being used.
2) **The Use of AI by the Judiciary**: The taskforce proposed to poll members of the judiciary to gain insight into how AI is being used by and in the courts.
3) **Practical Application of AI**: The taskforce proposes identifying examples of Texas lawyers and judges applying AI to their work.

4) **Responses to AI in Other States**: Taskforces or committees in several states are studying the implications of AI in the practice of law. The taskforce is monitoring these efforts and will consider the findings and recommendations that result from them.

Collaboration

As the taskforce identified issues that span the legal profession, it became apparent that these issues impact other interest groups such as the courts, law schools, and legal regulators, to name a few. The taskforce is planning to invite other stakeholders to an AI Summit in the spring of 2024 to continue the discussion on the impact of AI on the legal profession.

Conclusion

In conclusion, the Taskforce for Responsible AI in the Law has begun to navigate the complex intersection of AI and legal practice. This interim report marks an initial step in our journey, outlining key areas of focus and preliminary recommendations. As we proceed, our work remains grounded in a commitment to thorough investigation and careful consideration of AI's implications for the legal profession. Our ongoing efforts aim to responsibly integrate AI, balancing innovation with the profession's foundational values and ethical standards. The taskforce will continue to diligently explore these emerging challenges, ensuring our final recommendations are informed, measured, and aligned with the evolving needs of the legal community.

Appendix A

Glossary of Useful Terms

The following definitions and key terms are helpful in understanding the report of the taskforce:

1) **Algorithm**: a step-by-step procedure or set of rules designed to perform a specific task or solve a specific problem
2) **Artificial Intelligence** (AI): the simulation of human intelligence in machines, programmed to think and learn like humans
3) **Bias in AI**: the tendency of an AI model to make decisions that are systematically prejudiced due to underlying assumptions in the algorithm or biases in the training data
4) **Chatbot**: a computer program that simulates human conversation through text or voice interactions, often powered by AI
5) **ChatGPT**: a specific type of generative large language model developed by OpenAI, designed to create human-like text based on the input it receives that utilizes deep learning and has been applied in various fields including natural language understanding, content creation, and conversation simulation
6) **Data Training**: the process of feeding data into an AI model to teach it specific behaviors and patterns, allowing it to learn and make predictions or decisions
7) **Deep Learning**: a subset of machine learning that uses neural networks with three or more layers, allowing for more complex and abstract pattern recognition
8) **Ethical AI**: refers to the practice of using AI in a manner that aligns with accepted moral principles and values, especially in terms of fairness, transparency, and accountability
9) **Generative AI**: AI models that create new, original content such as text, images, or music, based on the data they have been trained on
10) **Large Language Model (LLM)**: a type of machine learning model designed to understand and generate human-like text, used in various applications including content creation and natural language understanding
11) **Machine Learning (ML)**: a subset of AI, where algorithms allow computers to learn and make decisions from data without being explicitly programmed
12) **Natural Language Processing (NLP)**: a branch of AI focused on the interaction between computers and humans using natural language, enabling machines to read, interpret, and respond to human language
13) **Neural Network**: a computational model inspired by the way human brain cells work, used in machine learning to process complex patterns and relationships in data
14) **OpenAI**: an artificial intelligence research lab consisting of the for-profit OpenAI LP and its parent company, the non-profit OpenAI Inc. OpenAI is dedicated to advancing digital intelligence and conducts research on various AI topics including machine learning, deep learning, and natural language processing
15) **Reinforcement Learning**: a type of machine learning where agents learn to make decisions by receiving rewards or penalties based on the actions they take
16) **Supervised Learning**: a type of machine learning where algorithms are trained on a labeled dataset, which means the algorithm has access to an answer key while learning
17) **Unsupervised Learning**: a type of machine learning where algorithms are trained without any labeled response data, learning to identify patterns and structures within the input data

Taskforce for Responsible AI in the Law

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STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT

PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

EXECUTIVE SUMMARY

Generative AI is a tool that has wide-ranging application for the practice of law and administrative functions of the legal practice for all licensees, regardless of firm size, and all practice areas. Like any technology, generative AI must be used in a manner that conforms to a lawyer's professional responsibility obligations, including those set forth in the Rules of Professional Conduct and the State Bar Act. A lawyer should understand the risks and benefits of the technology used in connection with providing legal services. How these obligations apply will depend on a host of factors, including the client, the matter, the practice area, the firm size, and the tools themselves, ranging from free and readily available to custom-built, proprietary formats.

Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services.

The following Practical Guidance is based on current professional responsibility obligations for lawyers and demonstrates how to behave consistently with such obligations. While this guidance is intended to address issues and concerns with the use of generative AI and products that use generative AI as a component of a larger product, it may apply to other technologies, including more established applications of AI. This Practical Guidance should be read as guiding principles rather than as "best practices."

PRACTICAL GUIDANCE

Applicable Authorities	Practical Guidance
Duty of Confidentiality Bus. & Prof. Code, § 6068, subd. (e) Rule 1.6 Rule 1.8.2	Generative AI products are able to utilize the information that is input, including prompts and uploaded documents or resources, to train the AI, and might also share the query with third parties or use it for other purposes. Even if the product does not utilize or share inputted information, it may lack reasonable or adequate security. A lawyer must not input any confidential information of the client into any generative AI solution that lacks adequate confidentiality and security protections. A lawyer must anonymize client information and avoid entering details that can be used to identify the client. A lawyer or law firm should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols. A lawyer should review the Terms of Use or other information to determine how the product utilizes inputs. A lawyer who intends to use confidential information in a generative AI product should ensure that the provider does not share inputted information with third parties or utilize the information for its own use in any manner, including to train or improve its product.
Duties of Competence and Diligence Rule 1.1 Rule 1.3	It is possible that generative AI outputs could include information that is false, inaccurate, or biased. A lawyer must ensure competent use of the technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law. Before using generative AI, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms of use and other policies governing the use and exploitation of client data by the product. Overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment by the lawyer. AI-generated outputs can be used as a starting point but must be carefully scrutinized. They should be critically analyzed for

Applicable Authorities	Practical Guidance
	accuracy and bias, supplemented, and improved, if necessary. A lawyer must critically review, validate, and correct both the input and the output of generative AI to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand, including as part of advocacy for the client. The duty of competence requires more than the mere detection and elimination of false AI-generated results. A lawyer's professional judgment cannot be delegated to generative AI and remains the lawyer's responsibility at all times. A lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing. For example, a lawyer may supplement any AI-generated research with human-performed research and supplement any AI-generated argument with critical, human-performed analysis and review of authorities.
Duty to Comply with the Law Bus. & Prof. Code, § 6068(a) Rule 8.4 Rule 1.2.1	A lawyer must comply with the law and cannot counsel a client to engage, or assist a client in conduct that the lawyer knows is a violation of any law, rule, or ruling of a tribunal when using generative AI tools. There are many relevant and applicable legal issues surrounding generative AI, including but not limited to compliance with AI-specific laws, privacy laws, cross-border data transfer laws, intellectual property laws, and cybersecurity concerns. A lawyer should analyze the relevant laws and regulations applicable to the attorney or the client.
Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers Rule 5.1 Rule 5.2 Rule 5.3	Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of generative AI and make reasonable efforts to ensure that the firm adopts measures that give reasonable assurance that the firm's lawyers and non lawyers' conduct complies with their professional obligations when using generative AI. This includes providing training on the ethical and practical aspects, and pitfalls, of any generative AI use. A subordinate lawyer must not use generative AI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer's professional responsibility and obligations.

Applicable Authorities	Practical Guidance
Communication Regarding Generative AI Use Rule 1.4 Rule 1.2	A lawyer should evaluate their communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with generative AI use, scope of the representation, and sophistication of the client. The lawyer should consider disclosure to their client that they intend to use generative AI in the representation, including how the technology will be used, and the benefits and risks of such use. A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of generative AI.
Charging for Work Produced by Generative AI and Generative AI Costs Rule 1.5 Bus. & Prof. Code, §§ 6147–6148	A lawyer may use generative AI to more efficiently create work product and may charge for actual time spent (e.g., crafting or refining generative AI inputs and prompts, or reviewing and editing generative AI outputs). A lawyer must not charge hourly fees for the time saved by using generative AI. Costs associated with generative AI may be charged to the clients in compliance with applicable law. A fee agreement should explain the basis for all fees and costs, including those associated with the use of generative AI.
Candor to the Tribunal; and Meritorious Claims and Contentions Rule 3.1 Rule 3.3	A lawyer must review all generative AI outputs, including, but not limited to, analysis and citations to authority for accuracy before submission to the court, and correct any errors or misleading statements made to the court. A lawyer should also check for any rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of generative AI.
Prohibition on Discrimination, Harassment, and Retaliation Rule 8.4.1	Some generative AI is trained on biased information, and a lawyer should be aware of possible biases and the risks they may create when using generative AI (e.g., to screen potential clients or employees). Lawyers should engage in continuous learning about AI biases and their implications in legal practice, and firms should establish policies and mechanisms to identify, report, and address potential AI biases.

Applicable Authorities	Practical Guidance
Professional Responsibilities Owed to Other Jurisdictions Rule 8.5	A lawyer should analyze the relevant laws and regulations of each jurisdiction in which a lawyer is licensed to ensure compliance with such rules.

FLORIDA BAR ETHICS OPINION
OPINION 24-1
January 19, 2024

Advisory ethics opinions are not binding.

Lawyers may use generative artificial intelligence ("AI") in the practice of law but must protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising. Lawyers must ensure that the confidentiality of client information is protected when using generative AI by researching the program's policies on data retention, data sharing, and self-learning. Lawyers remain responsible for their work product and professional judgment and must develop policies and practices to verify that the use of generative AI is consistent with the lawyer's ethical obligations. Use of generative AI does not permit a lawyer to engage in improper billing practices such as double-billing. Generative AI chatbots that communicate with clients or third parties must comply with restrictions on lawyer advertising and must include a disclaimer indicating that the chatbot is an AI program and not a lawyer or employee of the law firm. Lawyers should be mindful of the duty to maintain technological competence and educate themselves regarding the risks and benefits of new technology.

RPC: 4-1.1; 4-1.1 Comment; 4-1.5(a); 4-1.5(e); 4-1.5(f)(2); 4-1.5(h); 4-1.6; 4-1.6 Comment; 4-1.6(c)(1); 4-1.6(e); 4-1.18 Comment; 4-3.1; 4-3.3; 4-4.1; 4-4.4(b); Subchapter 4-7; 4-7.13; 4-7.13(b)(3); 4-7.13(b)(5); 4-5.3(a)

OPINIONS: 76-33 & 76-38, Consolidated; 88-6; 06-2; 07-2; 10-2; 12-3; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993); Iowa Ethics Opinion 11-01; New York State Bar Ethics Opinion 842

CASES: *Mata v. Avianca*, 22-cv-1461, 2023 WL 4114965, at 17 (S.D.N.Y. June 22, 2023); *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992); *The Florida Bar v. Carlon*, 820 So. 2d 891, 899 (Fla. 2002); *Att'y Grievance Comm'n of Maryland v. Manger*, 913 A.2d 1 (Md. 2006)

The Florida Bar Board of Governors has directed the Board Review Committee on Professional Ethics to issue an opinion regarding lawyers' use of generative artificial intelligence ("AI"). The release of ChatGPT-3 in November 2022 prompted wide-ranging debates regarding lawyers' use of generative AI in the practice of law. While it is impossible to determine the impact generative AI will have on the legal profession, this opinion is intended to provide guidance to Florida Bar members regarding some of the ethical implications of these new programs.

Generative AI are "deep-learning models" that compile data "to generate statistically probable outputs when prompted." IBM, What is generative AI?, (April 20, 2023), https://research.ibm.com/blog/what-is-generative-AI (last visited 11/09/2023). Generative AI can create original images, analyze documents, and draft briefs based on written prompts. Often, these programs rely on large language models. The datasets utilized by generative AI large language models can include billions of parameters making it virtually impossible to determine

how a program came to a specific result. Tsedel Neeley, 8 Questions About Using AI Responsibly, Answered, Harv. Bus. Rev. (May 9, 2023).

While generative AI may have the potential to dramatically improve the efficiency of a lawyer's practice, it can also pose a variety of ethical concerns. Among other pitfalls, lawyers are quickly learning that generative AI can "hallucinate" or create "inaccurate answers that sound convincing." Matt Reynolds, vLex releases new generative AI legal assistant, A.B.A. J. (Oct. 17, 2023), https://www.abajournal.com/web/article/vlex-releases-new-generative-ai-legal-assistant (last visited 11/09/2023). In one particular incident, a federal judge sanctioned two unwary lawyers and their law firm following their use of false citations created by generative AI. *Mata v. Avianca*, 22-cv-1461, 2023 WL 4114965, at 17 (S.D.N.Y. June 22, 2023).

Even so, the judge's opinion explicitly acknowledges that "[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance." Id. at 1.

Due to these concerns, lawyers using generative AI must take reasonable precautions to protect the confidentiality of client information, develop policies for the reasonable oversight of generative AI use, ensure fees and costs are reasonable, and comply with applicable ethics and advertising regulations.

Confidentiality

When using generative AI, a lawyer must protect the confidentiality of the client's information as required by Rule 4-1.6 of the Rules Regulating The Florida Bar. The ethical duty of confidentiality is broad in its scope and applies to all information learned during a client's representation, regardless of its source. Rule 4-1.6, Comment. Absent the client's informed consent or an exception permitting disclosure, a lawyer may not reveal the information. In practice, the most common exception is found in subdivision (c)(1), which permits disclosure to the extent reasonably necessary to "serve the client's interest unless it is information the client specifically requires not to be disclosed[.]" Rule 4-1.6(c)(1). Nonetheless, it is recommended that a lawyer obtain the affected client's informed consent prior to utilizing a third-party generative AI program if the utilization would involve the disclosure of any confidential information.

Rule 4-1.6(e) also requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the client's representation." Further, a lawyer's duty of competence requires "an understanding of the benefits and risks associated with the use of technology[.]" Rule 4-1.1, Comment.

When using a third-party generative AI program, lawyers must sufficiently understand the technology to satisfy their ethical obligations. For generative AI, this specifically includes knowledge of whether the program is "self-learning." A generative AI that is "self-learning" continues to develop its responses as it receives additional inputs and adds those inputs to its existing parameters. Neeley, supra n. 2. Use of a "self-learning" generative AI raises the possibility that a client's information may be stored within the program and revealed in response to future inquiries by third parties.

Existing ethics opinions relating to cloud computing, electronic storage disposal, remote paralegal services, and metadata have addressed the duties of confidentiality and competence to prior technological innovations and are particularly instructive. In its discussion of cloud computing resources, Florida Ethics Opinion 12-3 cites to New York State Bar Ethics Opinion 842 and Iowa Ethics Opinion 11-01 to conclude that a lawyer should:

- Ensure that the provider has an obligation to preserve the confidentiality and security of information, that the obligation is enforceable, and that the provider will notify the lawyer in the event of a breach or service of process requiring the production of client information;
- Investigate the provider's reputation, security measures, and policies, including any limitations on the provider's liability; and
- Determine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information.

While the opinions were developed to address cloud computing, these recommendations are equally applicable to a lawyer's use of third-party generative AI when dealing with confidential information.

Florida Ethics Opinion 10-2 discusses the maintenance and disposition of electronic devices that contain storage media and provides that a lawyer's duties extend from the lawyer's initial receipt of the device through the device's disposition, "including after it leaves the control of the lawyer." Opinion 10-2 goes on to reference a lawyer's duty of supervision and to express that this duty "extends not only to the lawyer's own employees but over entities outside the lawyer's firm with whom the lawyer contracts[.]" Id.

Florida Ethics Opinion 07-2 notes that a lawyer should only allow an overseas paralegal provider access to "information necessary to complete the work for the particular client" and "should provide no access to information about other clients of the firm." Additionally, while "[t]he requirement for informed consent from a client should be generally commensurate with the degree of risk involved[,]" including "whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services." Id. Again, this guidance seems equally applicable to a lawyer's use of generative AI.

Finally, Florida Ethics Opinion 06-2 provides that a lawyer should take reasonable steps to safeguard the confidentiality of electronic communications, including the metadata attached to those communications, and that the recipient should not attempt to obtain metadata information that they know or reasonably should know is not intended for the recipient. In the event that the recipient inadvertently receives metadata information, the recipient must "promptly notify the sender," as is required by Rule 4-4.4(b). Similarly, a lawyer using generative AI should take reasonable precautions to avoid the inadvertent disclosure of confidential information and should not attempt to access information previously provided to the generative AI by other lawyers.

It should be noted that confidentiality concerns may be mitigated by use of an inhouse generative AI rather than an outside generative AI where the data is hosted and stored by a third-party. If the use of a generative AI program does not involve the disclosure of confidential

information to a third-party, a lawyer is not required to obtain a client's informed consent pursuant to Rule 4-1.6.

Oversight of Generative AI

While Rule 4-5.3(a) defines a nonlawyer assistant as a "a person," many of the standards applicable to nonlawyer assistants provide useful guidance for a lawyer's use of generative AI.

First, just as a lawyer must make reasonable efforts to ensure that a law firm has policies to reasonably assure that the conduct of a nonlawyer assistant is compatible with the lawyer's own professional obligations, a lawyer must do the same for generative AI. Lawyers who rely on generative AI for research, drafting, communication, and client intake risk many of the same perils as those who have relied on inexperienced or overconfident nonlawyer assistants.

Second, a lawyer must review the work product of a generative AI in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals. Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.

Functionally, this means a lawyer must verify the accuracy and sufficiency of all research performed by generative AI. The failure to do so can lead to violations of the lawyer's duties of competence (Rule 4-1.1), avoidance of frivolous claims and contentions (Rule 4-3.1), candor to the tribunal (Rule 4-3.3), and truthfulness to others (Rule 4-4.1), in addition to sanctions that may be imposed by a tribunal against the lawyer and the lawyer's client.

Third, these duties apply to nonlawyers "both within and outside of the law firm." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021); see Fla. Ethics Op. 07-2. The fact that a generative AI is managed and operated by a third-party does not obviate the need to ensure that its actions are consistent with the lawyer's own professional and ethical obligations.

Further, a lawyer should carefully consider what functions may ethically be delegated to generative AI. Existing ethics opinions have identified tasks that a lawyer may or may not delegate to nonlawyer assistants and are instructive. First and foremost, a lawyer may not delegate to generative AI any act that could constitute the practice of law such as the negotiation of claims or any other function that requires a lawyer's personal judgment and participation.

Florida Ethics Opinion 88-6 notes that, while nonlawyers may conduct the initial interview with a prospective client, they must:

- Clearly identify their nonlawyer status to the prospective client;
- Limit questions to the purpose of obtaining factual information from the prospective client; and
- Not offer any legal advice concerning the prospective client's matter or the representation agreement and refer any legal questions back to the lawyer.

This guidance is especially useful as law firms increasingly utilize website chatbots for client intake. While generative AI may make these interactions seem more personable, it presents additional risks, including that a prospective client relationship or even a lawyer-client relationship has been created without the lawyer's knowledge.

The Comment to Rule 4-1.18 (Duties to Prospective Client) explains what constitutes a consultation:

> A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of subdivision (a).

Similarly, the existence of a lawyer-client relationship traditionally depends on the subjective reasonable belief of the client regardless of the lawyer's intent. *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992).

For these reasons, a lawyer should be wary of utilizing an overly welcoming generative AI chatbot that may provide legal advice, fail to immediately identify itself as a chatbot, or fail to include clear and reasonably understandable disclaimers limiting the lawyer's obligations.

Just as with nonlawyer staff, a lawyer should not instruct or encourage a client to rely solely on the "work product" of generative AI, such as due diligence reports, without the lawyer's own personal review of that work product.

Legal Fees and Costs

Rule 4-1.5(a) prohibits lawyers from charging, collecting, or agreeing to fees or costs that are illegal or clearly excessive while subdivision (b) provides a list of factors to consider when determining whether a fee or cost is reasonable. A lawyer must communicate the basis for fees and costs to a client and it is preferable that the lawyer do so in writing. Rule 4-1.5(e). Contingent fees and fees that are nonrefundable in any part must be explained in writing. Rule 4-1.5(e); Rule 4-1.5(f)(2).

Regarding costs, a lawyer may only ethically charge a client for the actual costs incurred on the individual client's behalf and must not duplicate charges that are already accounted for in

the lawyer's overhead. *See, The Florida Bar v. Carlon*, 820 So. 2d 891, 899 (Fla. 2002) (lawyer sanctioned for violations including a $500.00 flat administrative charge to each client's file); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (lawyer should only charge clients for costs that reasonably reflect the lawyer's actual costs); Rule 4-1.5(h) (lawyers accepting payment via a credit plan may only charge the actual cost imposed on the transaction by the credit plan).

Regarding fees, a lawyer may not ethically engage in any billing practices that duplicate charges or that falsely inflate the lawyer's billable hours. Though generative AI programs may make a lawyer's work more efficient, this increase in efficiency must not result in falsely inflated claims of time. In the alternative, lawyers may want to consider adopting contingent fee arrangements or flat billing rates for specific services so that the benefits of increased efficiency accrue to the lawyer and client alike.

While a lawyer may separately itemize activities like paralegal research performed by nonlawyer personnel, the lawyer should not do so if those charges are already accounted for in the lawyer's overhead. Fla. Ethics Op. 76-33 & 76-38, Consolidated. In the alternative, the lawyer may need to consider crediting the nonlawyer time against the lawyer's own fees. Id. Florida Ethics Opinion 07-2 discusses the outsourcing of paralegal services in contingent fee matters and explains:

> The law firm may charge a client the actual cost of the overseas provider [of paralegal services], unless the charge would normally be covered as overhead. However, in a contingent fee case, it would be improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third-party provider.

Additionally, a lawyer should have sufficient general knowledge to be capable of providing competent representation. *See, e.g., Att'y Grievance Comm'n of Maryland v. Manger*, 913 A.2d 1 (Md. 2006). "While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client." Id. at 5.

In the context of generative AI, these standards require a lawyer to inform a client, preferably in writing, of the lawyer's intent to charge a client the actual cost of using generative AI. In all instances, the lawyer must ensure that the charges are reasonable and are not duplicative. If a lawyer is unable to determine the actual cost associated with a particular client's matter, the lawyer may not ethically prorate the periodic charges of the generative AI and instead should account for those charges as overhead. Finally, while a lawyer may charge a client for the reasonable time spent for case-specific research and drafting when using generative AI, the lawyer should be careful not to charge for the time spent developing minimal competence in the use of generative AI.

Lawyer Advertising

The advertising rules in Subchapter 4-7 of the Rules Regulating The Florida Bar include prohibitions on misleading content and unduly manipulative or intrusive advertisements.

Rule 4-7.13 prohibits a lawyer from engaging in advertising that is deceptive or inherently misleading. More specifically, subdivision (b) includes prohibitions on:

> (3) comparisons of lawyers or statements, words, or phrases that characterize a lawyer's or law firm's skills, experience, reputation, or record, unless the characterization is objectively verifiable; [and]
>
> * * *
>
> (5) [use of] a voice or image that creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee of the advertising firm unless the advertisement contains a clear and conspicuous disclaimer that the person is not an employee or member of the law firm[.]

As noted above, a lawyer should be careful when using generative AI chatbot for advertising and intake purposes as the lawyer will be ultimately responsible in the event the chatbot provides misleading information to prospective clients or communicates in a manner that is inappropriately intrusive or coercive. To avoid confusion or deception, a lawyer must inform prospective clients that they are communicating with an AI program and not with a lawyer or law firm employee. Additionally, while many visitors to a lawyer's website voluntarily seek information regarding the lawyer's services, a lawyer should consider including screening questions that limit the chatbot's communications if a person is already represented by another lawyer.

Lawyers may advertise their use of generative AI but cannot claim their generative AI is superior to those used by other lawyers or law firms unless the lawyer's claims are objectively verifiable. Whether a particular claim is capable of objective verification is a factual question that must be made on a case-by-case basis.

Conclusion

In sum, a lawyer may ethically utilize generative AI technologies but only to the extent that the lawyer can reasonably guarantee compliance with the lawyer's ethical obligations. These obligations include the duties of confidentiality, avoidance of frivolous claims and contentions, candor to the tribunal, truthfulness in statements to others, avoidance of clearly excessive fees and costs, and compliance with restrictions on advertising for legal services. Lawyers should be cognizant that generative AI is still in its infancy and that these ethical concerns should not be treated as an exhaustive list. Rather, lawyers should continue to develop competency in their use of new technologies and the risks and benefits inherent in those technologies.

RULES, PROCEDURE, COMMENTS

All opinions of the Ethics Committee are predicated upon the North Carolina Rules of Professional Conduct. Any interested person or group may submit a written comment – including comments in support of or against the proposed opinion – or request to be heard concerning a proposed opinion. The Ethics Committee welcomes and encourages the submission of comments, and all comments are considered by the committee at the next quarterly meeting. Any comment or request should be directed to the Ethics Committee at ethicscomments@ncbar.gov no later than March 30, 2024.

Proposed 2024 Formal Ethics Opinion 1 Use of Artificial Intelligence in a Law Practice

January 18, 2024

Proposed opinion discusses a lawyer's professional responsibility when using artificial intelligence in a law practice.

Editor's Note: There is an increasingly vast number of helpful resources on understanding Artificial Intelligence and the technology's interaction with the legal profession. The resources referenced in this opinion are not exhaustive but are intended to serve as a starting point for a lawyer's understanding of the topic. Over time, this editor's note may be updated as additional resources are published that staff concludes would be beneficial to lawyers.

Background

"Artificial intelligence" (hereinafter, "AI") is a broad and evolving term encompassing myriad programs and processes with myriad capabilities. While a single definition of AI is not yet settled (and likely impossible), for the purposes of this opinion, the term "AI" refers to "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments." Nat'l Artificial Intelligence Initiative Act of 2020, Div. E, sec. 5002(3) (2021). Said in another, over-simplified way, AI is the use of computer science and extensive data sets to enable problem solving or decision-making, often through the implementation of sophisticated algorithms. AI encompasses, but is not limited to, both extractive and generative AI,1 natural language processing, large language models, and any number of machine learning processes.2 Examples of law-related AI programs range from online electronic legal research and case management software to e-discovery tools and programs that draft legal documents (e.g., a trial brief, will, etc.) based upon the lawyer's input of information that may or may not be client-specific.

Most lawyers have likely used some form of AI when practicing law, even if they didn't realize it (e.g., widely used online legal research subscription services utilize a type of extractive AI, or a program that "extracts" information relevant to the user's inquiry from a large set of existing data upon which the program has been trained). Within the year preceding the date of this opinion, generative AI programs that create products in response to a user's request based upon a large set of existing data upon which the program has been trained (e.g., Chat-GPT) have grown in capability and popularity, generating both positive and negative reactions regarding the integration of these technological breakthroughs in the legal profession.3 It is unquestioned that AI can be used in the practice of law to increase efficiency and consistency in the provision of

legal services. However, AI and its work product can be inaccurate or unreliable despite its appearance of reliability when used during the provision of legal services.4

Inquiry #1:

Considering the advantages and disadvantages of using AI in the provision of legal services, is a lawyer permitted to use AI in a law practice?

Opinion #1:

Yes, provided the lawyer uses any AI program, tool, or resource competently, securely to protect client confidentiality, and with proper supervision when relying upon or implementing the AI's work product in the provision of legal services.

On the spectrum of law practice resources, AI falls somewhere between programs, tools, and processes readily used in law practice today (e.g. case management systems, trust account management programs, electronic legal research, etc.) and nonlawyer support staff (e.g. paralegals, summer associates, IT professionals, etc.). Nothing in the Rules of Professional Conduct specifically addresses, let alone prohibits, a lawyer's use of AI in a law practice. However, should a lawyer choose to employ AI in a practice, the lawyer must do so competently, the lawyer must do so securely, and the lawyer must exercise independent judgment in supervising the use of such processes.

Rule 1.1 prohibits lawyers from "handl[ing] a legal matter that the lawyer knows or should know he or she is not competent to handle[,]" and goes on to note that "[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Comment 8 to Rule 1.1 recognizes the reality of advancements in technology impacting a lawyer's practice, and states that part of a lawyer's duty of competency is to "keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice[.]" Rule 1.6(c) requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Rule 5.3 requires a lawyer to "make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer[,]" and further requires that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer[.]" Rules 5.3(a) and (b). The requirements articulated in Rule 5.3 apply to nonlawyer assistants within a law firm as well as those outside of a law firm that are engaged to provide assistance in the lawyer's provision of legal services to clients, such as third-party software companies. *See* 2011 FEO 6 ("Although a lawyer may use nonlawyers outside of the firm to assist in rendering legal services to clients, Rule 5.3(a) requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer.").

A lawyer may use AI in a variety of manners in connection with a law practice, and it is a lawyer's responsibility to exercise independent professional judgment in determining how (or if) to use the product of an AI tool in furtherance of the representation of a client. From discovery and document review to legal research, drafting contracts, and aggregating/analyzing data trends, the possibilities for employing AI in a law practice are increasingly present and constantly

evolving. A lawyer's decision to use and rely upon AI to assist in the lawyer's representation of a client is generally hers alone and one to be determined depending upon a number of factors, including the impact of such services, the cost of such services, and the reliability of the processes.5 This opinion does not attempt to dictate when and how AI is appropriate for a law practice.

Should a lawyer decide to employ AI in the representation of a client, however, the lawyer is fully responsible for the use and impact of AI in the client's case. The lawyer must use the AI tool in a way that meets the competency standard set out in Rule 1.1. Like other software, the lawyer employing an AI tool must educate herself on the benefits and risks associated with the tool, as well as the impact of using the tool on the client's case. Educational efforts include, but are not limited to, reviewing current and relevant resources on AI broadly and on the specific program intended for use during the provision of legal services. A lawyer that inputs confidential client information into an AI tool must take steps to ensure the information remains secure and protected from unauthorized access or inadvertent disclosure per Rule 1.6(c). Additionally, a lawyer utilizing an outside third-party company's AI program or service must make reasonable efforts to ensure that the program or service used is compatible with the lawyer's responsibilities under the Rules of Professional Conduct pursuant to Rule 5.3. Whether the lawyer is reviewing the results of a legal research program, a keyword search of emails for production during discovery, proposed reconciliations of the lawyer's trust account prepared by a long-time assistant, or a risk analysis of potential borrowers for a lender-client produced by an AI process, the lawyer is individually responsible for reviewing, evaluating, and ultimately relying upon the work produced by someone—or something—other than the lawyer.

Inquiry #2:

May a lawyer provide or input a client's documents, data, or other information to a third-party company's AI program for assistance in the provision of legal services?

Opinion #2:

Yes, provided the lawyer has satisfied herself that the third-party company's AI program is sufficiently secure and complies with the lawyer's obligations to ensure any client information will not be inadvertently disclosed or accessed by unauthorized individuals pursuant to Rule 1.6(c).

At the outset, the Ethics Committee does not opine on whether the information shared with an AI tool violates the attorney-client privilege, as the issue is a legal question and outside the scope of the Rules of Professional Conduct. A lawyer should research and resolve any question on privilege prior to engaging with a third-party company's AI program for use in the provision of legal services to a client, particularly if client-specific information will be provided to the AI program.

This inquiry is akin to any lawyer providing confidential information to a third-party software program (practice management, cloud storage, etc.), on which the Ethics Committee has previously opined. As noted above, a lawyer has an obligation to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating the representation of the client." Rule 1.6(c). What constitutes "reasonable efforts" will vary depending on the circumstances related to the practice and representation, as well as a

variety of factors including the sensitivity of the information and the cost or benefit of employing additional security measures to protect the information. Rule 1.6, cmt. [19]. Ultimately, "[a] lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties" when using technology to handle, communicate, analyze, or otherwise interact with confidential client information. 2008 FEO 5; *see also* 2005 FEO 10; 2011 FEO 6.

The Ethics Committee in 2011 FEO 6 recognized that employing a third-party company's services/technology with regards to confidential client information requires a lawyer to exercise reasonable care when selecting a vendor. The opinion states:

[W]hile the duty of confidentiality applies to lawyers who choose to use technology to communicate, this obligation does not require that a lawyer use only infallibly secure methods of communication. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality....A lawyer must fulfill the duties to protect confidential client information and to safeguard client files by applying the same diligence and competency to manage the risks of [technology] that the lawyer is required to apply when representing clients.

2011 FEO 6 (internal citations omitted). In exercising reasonable care, the opinion discusses a sample of considerations for evaluating whether a particular third-party company's services are compatible with the lawyer's professional responsibility, including:

• The experience, reputation, and stability of the company;
• Whether the terms of service include an agreement on how the company will handle confidential client information, including security measures employed by the company to safeguard information provided by the lawyer; and
• Whether the terms of service clarify how information provided to the company will be retrieved by the lawyer or otherwise safely destroyed if not retrieved should the company go out of business, change ownership, or if services are terminated.

2011 FEO 6; *see* Rule 5.3. A proposed ethics opinion from the Florida Bar on a lawyer's use of AI adds that lawyers should "[d]etermine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information" when determining whether a third-party company's technological services are compatible with the lawyer's duty of confidentiality. *See* Florida Bar Proposed Advisory Opinion 24-1 (published Nov. 13, 2023).

Furthermore, this duty of reasonable care continues beyond initial selection of a service, program, or tool and extends throughout the lawyer's use of the service. A lawyer should continuously educate herself on the selected technology and developments thereto—both individually and by "consult[ing] periodically with professionals competent in the area of online security"—and make necessary adjustments (including abandonment, if necessary) when discoveries are made that call into question services previously thought to be secure. 2011 FEO 6.

The aforementioned considerations—including the consideration regarding ownership of information articulated by the Florida Bar opinion—are equally applicable to a lawyer's selection and use of a third-party company's AI service/program. Just as with any third-party service, a lawyer has a duty under Rule 5.3 to make reasonable efforts to ensure the third-party AI program or service is compatible with the lawyer's professional responsibility, particularly with regards to the lawyer's duty of confidentiality pursuant to Rule 1.6. Importantly, some current AI programs are publicly available to all consumers/users, and the nature of these AI programs are to retain and train itself based on the information provided by any user of its program. Lawyers should educate themselves on the nature of any publicly available AI program intended to be used in the provision of legal services, with particular focus on whether the AI program will retain and subsequently use the information provided by the user. Generally, and as of the date of this opinion, lawyers should avoid inputting client-specific information into publicly available AI resources.

Inquiry #3:

If a firm were to have an AI software tool initially developed by a third-party but then used the AI tool in-house using law firm owned servers and related infrastructure, does that change the data security requirement analysis in Opinion #2?

Opinion #3:

No. Lawyer remains responsible for keeping the information secure pursuant to Rule 1.6(c) regardless of the program's location. While an in-house program may seem more secure because the program is maintained and run using local servers, those servers may be more vulnerable to attack because a lawyer acting independently may not be able to match the security features typically employed by larger companies whose reputations are built in part on security and customer service. A lawyer who plans to independently store client information should consult an information technology/cybersecurity expert about steps needed to adequately protect the information stored on local servers.

Relatedly, AI programs developed for use in-house or by a particular law practice may also be derivatives of a single, publicly available AI program; as such, some of these customized programs may continue to send information inputted into the firm-specific program back to the central program for additional use or training. Again, prior to using such a program, a lawyer must educate herself on the nuances and operation of the program to ensure client information will remain protected in accordance with the lawyer's professional responsibility. The list of considerations found in Opinion #2 offers a starting point for questions to explore when identifying, evaluating, and selecting a vendor.

Inquiry #4:

If a lawyer signs a pleading based on information generated from AI, is there variation from traditional or existing ethical obligations and expectations placed on lawyers signing pleadings absent AI involvement?

Opinion #4:

No. A lawyer may not abrogate her responsibilities under the Rules of Professional Conduct by relying upon AI. Per Rule 3.1, a lawyer is prohibited from bringing or defending "a proceeding,

or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous[.]" A lawyer's signature on a pleading also certifies the lawyer's good faith belief as to the factual and legal assertions therein. *See* N.C. R. Civ. Pro. 11 ("The signature of an attorney...constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."). If the lawyer employs AI in her practice and adopts the tool's product as her own, the lawyer is professionally responsible for the use of the tool's product. *See* Opinion #1.

Inquiry #5:

If a lawyer uses AI to assist in the representation of a client, is the lawyer under any obligation to inform the client that the lawyer has used AI in furtherance of the representation or legal services provided?

Opinion #5:

The answer to this question depends on the type of technology used, the intended product from the technology, and the level of reliance placed upon the technology/technology's product. Ultimately, the attorney/firm will need to evaluate each case and each client individually. Rule 1.4(b) requires an attorney to explain a matter to her client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Generally, a lawyer need not inform her client that she is using an AI tool to complete ordinary tasks, such as conducting legal research or generic case/practice management. However, if a lawyer delegates substantive tasks in furtherance of the representation to an AI tool, the lawyer's use of the tool is akin to outsourcing legal work to a nonlawyer, for which the client's advanced informed consent is required. See 2007 FEO 12. Additionally, if the decision to use or not use an AI tool in the case requires the client's input with regard to fees, the lawyer must inform and seek input from the client.

Inquiry #6:

Lawyer has an estate planning practice and bills at the rate of $300 per hour. Lawyer has integrated an AI program into the provision of legal services, resulting in increased efficiency and work output. For example, Lawyer previously spent approximately three hours drafting standard estate planning documents for a client; with the use of AI, Lawyer now spends only one hour preparing those same documents for a client. May Lawyer bill the client for the three hours of work that the prepared estate documents represent?

Opinion #6:

No, Lawyer may not bill a client for three hours of work when only one hour of work was actually experienced. A lawyer's billing practices must be accurate, honest, and not clearly excessive. Rules 7.1, 8.4(c), and 1.5(a); *see also* 2022 FEO 4. If the use of AI in Lawyer's practice results in greater efficiencies in providing legal services, Lawyer may enjoy the benefit of those new efficiencies by completing more work for more clients; Lawyer may not inaccurately bill a client based upon the "time-value represented" by the end product should Lawyer not have used AI when providing legal services.

Rather than billing on an hourly basis, Lawyer may consider billing clients a flat fee for the drafting of documents—even when using AI to assist in drafting—provided the flat fee charged is not clearly excessive and the client consents to the billing structure. *See* 2022 FEO 4.

Relatedly, Lawyer may also bill a client for actual expenses incurred when employing AI in the furtherance of a client's legal services, provided the expenses charged are accurate, not clearly excessive, and the client consents to the charge, preferably in writing. *See* Rule 1.5(b). Lawyer may not bill a general "administrative fee" for the use of AI during the representation of a client; rather, any cost charged to a client based on Lawyer's use of AI must be specifically identified and directly related to the legal services provided to the client during the representation. For example, if Lawyer has generally incorporated AI into her law practice for the purpose of case management or drafting assistance upon which Lawyer may or may not rely when providing legal services to all clients, Lawyer may not bill clients a generic administrative fee to offset the costs Lawyer experiences related to her use of AI. However, if Lawyer employs AI on a limited basis for a single client to assist in the provision of legal services, Lawyer may charge those expenses to the client provided the expenses are accurate, not clearly excessive, and the client consents to the expense and charge, preferably in writing.

Endnotes

1. For a better understanding of the differences between extractive and generative AI, *see* Jake Nelson, *Combining Extractive and Generative AI for New Possibilities, LexisNexis* (June 6, 2023), lexisnexis.com/community/insights/legal/b/thought-leadership/posts/combining-extractive-and-generative-ai-for-new-possibilities (last visited January 10, 2024).

2. For an overview of the state of AI as of the date of this opinion, *see What is Artificial Intelligence (AI)?*, IBM, ibm.com/topics/artificial-intelligence (last visited January 10, 2024). For information on how AI relates to the legal profession, *see AI Terms for Legal Professionals: Understanding What Powers Legal Tech*, LexisNexis (March 20, 2023), lexisnexis.com/community/insights/legal/b/thought-leadership/posts/ai-terms-for-legal-professionals-understanding-what-powers-legal-tech (last visited January 10, 2024).

3. John Villasenor, *How AI Will Revolutionize the Practice of Law*, Brookings Institution (March 20, 2023), brookings.edu/articles/how-ai-will-revolutionize-the-practice-of-law/ (last visited January 10, 2024); Steve Lohr, *AI is Coming for Lawyers Again*, New York Times (April 10, 2023), nytimes.com/2023/04/10/technology/ai-is-coming-for-lawyers-again.html (last visited January 10, 2024).

4. Larry Neumeister, *Lawyers Blame ChatGPT for Tricking Them Into Citing Bogus Case Law*, AP News (June 8, 2023), apnews.com/article/artificial-intelligence-chatgpt-courts-e15023d7e6fdf4f099aa 122437dbb59b (last visited January 10, 2024).

5. In certain circumstances a lawyer may need to consult a client about employing AI in the provision of legal services to that client, see Opinion #5, below.

The Ethics Committee welcomes feedback on the proposed opinion; feedback should be sent to ethicscomments@ncbar.gov.

NOTICE TO THE BAR

LEGAL PRACTICE: PRELIMINARY GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE BY NEW JERSEY LAWYERS

Artificial intelligence (AI) includes a variety of rapidly evolving technologies with significant capabilities as well as significant risks. In furtherance of its responsibility to uphold the highest level of professionalism among lawyers, the New Jersey Supreme Court seeks to balance the benefits of innovation while safeguarding against the potential harms of misuse. To that end, the Court here provides preliminary guidelines on the use of AI to support lawyers who practice in New Jersey and the clients who depend on those lawyers.

Supreme Court Committee on AI and the Courts

The Supreme Court Committee on Artificial Intelligence and the Courts, which includes private and public lawyers, as well as judges, Judiciary leaders, technologists, and experts in academia and media, recommended these initial guidelines to support lawyers in continuing to comply with the existing Rules of Professional Conduct (RPCs) and the Rules of Court.

The attached preliminary guidelines are intended to inform and assist lawyers in navigating their ethical responsibilities in light of the current and anticipated effects of AI -- in particular generative AI -- on legal practice.

Questions and Suggestions

Lawyers with specific questions about their own prospective conduct related to the use of AI should continue to seek direction from the Attorney Ethics Hotline at (609) 815-2924 or in writing to Court-Use-of-AI.mbx@njcourts.gov. As always, the identity of lawyers who pose such specific questions will remain confidential. However, the issues raised by such inquiries may inform the development of future, more detailed guidance regarding the ethical use of AI in the practice of law.

While these interim guidelines are effective immediately, the Supreme Court also invites comments and questions on the use of AI in legal practice, including suggestions of potential use cases for lawyers and the courts.

Questions regarding this notice should be directed to the Office of the Administrative Director of the Courts at (609) 376-3000. Written inquiries and any comments on the preliminary guidelines should be submitted via email to Comments.Mailbox@njcourts.gov.

Stuart Rabner
Chief Justice

Glenn A. Grant, J.A.D.
Acting Administrative Director

Dated: January 24, 2024

PRELIMINARY GUIDELINES ON NEW JERSEY LAWYERS' USE OF ARTIFICIAL INTELLIGENCE

Artificial intelligence (AI) refers to a machine-based system that can make predictions, recommendations, or decisions. AI systems use machine and human-based inputs to perceive environments, abstract such perceptions into models through automated analysis, and use model inference to formulate options. While various forms of AI have been widely used for years, the advent of generative artificial intelligence (Gen AI) -- a subset of AI in which machine-based systems create text or images based on predictive models derived from training with large datasets -- has elevated interest in and use of AI in legal and other professions. These preliminary guidelines refer generally to AI with the understanding that certain provisions relate primarily to generative AI. The ongoing integration of AI into other technologies suggests that its use soon will be unavoidable, including for lawyers. While AI potentially has many benefits, it also presents ethical concerns. For instance, AI can "hallucinate" and generate convincing, but false, information. These circumstances necessitate interim guidance on the ethical use of AI, with the understanding that more detailed guidelines can be developed as we learn more about its capacities, limits, and risks.

Artificial Intelligence Does Not Change Lawyers' Duties

Lawyers in some jurisdictions improperly relied on Gen AI to generate content, which in some cases resulted in the submission to courts of briefs containing references to fake case law (which those lawyers did not check before or after submission). At the other end of the spectrum, reputable resources including LexisNexis and Westlaw promise to improve the quality of legal practice through the integration of AI to provide faster, more reliable legal research and writing assistance. Larger law firms are continuing to develop in-house AI systems while vendors are marketing AI-facilitated contract review and administrative support to smaller firms and solo practitioners. In this complex and evolving landscape, lawyers must decide whether and to what extent AI can be used so as to maintain compliance with ethical standards without falling behind their colleagues.

The core ethical responsibilities of lawyers, as outlined in the Rules of Professional Conduct (RPCs) are unchanged by the integration of AI in legal practice, as was true with the introduction of computers and the internet. AI

tools must be employed with the same commitment to diligence, confidentiality, honesty, and client advocacy as traditional methods of legal practice. While AI does not change the fundamental duties of legal professionals, lawyers must be aware of new applications and potential challenges in the discharge of such responsibilities. As with any disruptive technology, a lack of careful engagement with AI could lead to ethical violations, underscoring the need for lawyers to adapt their practices mindfully and ethically in this evolving landscape. This notice highlights particular RPCs that may be implicated by the use of AI, with the understanding that such references are not intended to be exhaustive.

Accuracy and Truthfulness

A lawyer has a duty to be accurate and truthful. RPC 3.1 provides that a lawyer may not "assert or controvert an issue . . . unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous . . . ." RPC 4.1(a)(1) prohibits a lawyer from making a false statement of material fact or law. And RPC 8.4(c) states that it is misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Because AI can generate false information, a lawyer has an ethical duty to check and verify all information generated by AI to ensure that it is accurate. Failure to do so may result in violations of the RPCs.

Honesty, Candor, and Communication

RPC 3.3 requires a lawyer to uphold candor to the tribunal, including by not knowingly making "a false statement of material fact or law . . . ." or offering "evidence that the lawyer knows to be false . . . ." RPC 3.3(a)(1); RPC 3.3(a)(4). A lawyer who uses AI in the preparation of legal pleadings, arguments, or evidence remains responsible to ensure the validity of those submissions. While the RPCs do not require a lawyer to disclose the use of AI, such use does not provide an excuse for the submission of false, fake, or misleading content. The RPCs prohibit a lawyer from using AI to manipulate or create evidence and prohibit a lawyer from allowing a client to use AI to manipulate or create evidence. See, e.g., RPC 1.2(d); RPC 1.4(d); RPC 3.4(b).

RPC 1.2 provides that a lawyer must "abide by a client's decisions concerning the scope and objectives of representation . . . and as required by

RPC 1.4 shall consult with the client about the means to pursue them." RPC 1.4(b), in turn, provides that a lawyer must promptly comply with a client's reasonable requests for information, and RPC 1.4(c) provides that a lawyer must provide sufficient explanation for a client to make informed decisions regarding the representation. Those RPCs do not impose an affirmative obligation on lawyers to tell clients every time that they use AI. However, if a client asks if the lawyer is using AI, or if the client cannot make an informed decision about the representation without knowing that the lawyer is using AI, then the lawyer has an obligation to inform the client of the lawyer's use of AI. As to client interactions, a lawyer can use AI to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions . . . ." consistent with RPC 1.4, but the lawyer must continue to oversee such communications to ensure accuracy.

Confidentiality

RPC 1.6 provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." To uphold this core duty, a lawyer must not only avoid intentional disclosure of confidential information but must also "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of a client." RPC 1.6(f). Today, the market is replete with an array of AI tools, including some specifically designed for lawyers, as well as others in development for use by law firms. A lawyer is responsible to ensure the security of an AI system before entering any non-public client information.

Prevention of Misconduct, Including Discrimination

A lawyer must not engage in misconduct, including "conduct involving dishonesty, fraud, deceit or misrepresentation;" "conduct that is prejudicial to the administration of justice;" and "conduct involving discrimination . . . ." RPC 8.4(c); 8.4(d); 8.4(g). Those duties are addressed in part by the ongoing requirements to ensure accuracy (and avoid falsification) of communications with clients and the court.

Oversight

Law firms and lawyers are responsible for overseeing other lawyers and nonlawyer staff, as well as law students and interns, as they may be held responsible for ethical violations by those individuals. See, e.g., RPC 5.1 (Responsibilities of Partners, Supervisory Lawyers, and Law Firms); RPC 5.2 (Responsibilities of a Subordinate Lawyer); RPC 5.3 (Responsibilities Regarding Nonlawyer Assistance). This requirement extends to ensuring the ethical use of AI by other lawyers and nonlawyer staff.

Conclusion

These preliminary guidelines are intended to assist lawyers in complying with the existing RPCs, which remain unchanged by the availability and use of AI. The references to specific RPCs are intended for illustration and not as an exhaustive list. For instance, the use of AI likely will affect lawyer billing practices and advertising. See, e.g., RPC 1.5 (Fees); RPC 7.2 (Advertising). Those and other specific applications can be addressed in future guidelines if and as needed.

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
FEBRUARY 6, 2023

RESOLUTION

RESOLVED, That the American Bar Association urges organizations that design, develop, deploy, and use artificial intelligence ("AI") systems and capabilities to follow these guidelines:

1) Developers, integrators, suppliers, and operators **("**Developers**")** of AI systems and capabilities should ensure that their products, services, systems, and capabilities are subject to human authority, oversight, and control;

2) Responsible individuals and organizations should be accountable for the consequences caused by their use of AI products, services, systems, and capabilities, including any legally cognizable injury or harm caused by their actions or use of AI systems or capabilities, unless they have taken reasonable measures to mitigate against that harm or injury; and

3) Developers should ensure the transparency and traceability of their AI products, services, systems, and capabilities, while protecting associated intellectual property, by documenting key decisions made with regard to the design and risk of the data sets, procedures, and outcomes underlying their AI products, services, systems and capabilities.

FURTHER RESOLVED, That the American Bar Association urges Congress, federal executive agencies, and State legislatures and regulators, to follow these guidelines in legislation and standards pertaining to AI.

REPORT

I. LEGAL ISSUES WITH AI

Artificial Intelligence ("AI") systems and capabilities create significant new opportunities for technological innovation and efficiencies to benefit our society, but they also raise new legal and ethical questions. AI enables computers and other automated systems to perform tasks that have historically required human cognition, such as drawing conclusions and making predictions.[1] AI systems operate at much faster speeds than humans.[2]

With AI and machine learning (ML)[3] already changing the way in which society addresses economic and national security challenges and opportunities, these technologies must be developed and used in a trustworthy and responsible manner. As private sector organizations and governments move rapidly to design, develop, deploy, and use AI systems and capabilities,[4] now is a critical time for the American Bar Association (ABA) to articulate principles that are essential to ensuring that AI is developed and deployed in accordance with the law and well-accepted legal standards.[5]

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[1] AI is not a single piece of hardware or software, but rather a constellation of technologies that give a computer system the ability to solve problems and to perform tasks that would otherwise require human intelligence. National Security Commission on Artificial Intelligence (NSCAI), *Final Report*, Artificial Intelligence in Context, pages 31-40, https://www.nscai.gov/ [hereinafter "NSCAI Final Report"].
National Artificial Intelligence Research and Development Strategic Plan: 2019 Update (Nov. 12, 2020), https://catalog.data.gov/dataset/the-national-artificial-intelligence-research-and-development-strategic-plan-2019-update.

According to the National Institute of Standards and Technology (NIST), AI is:

> (1) A branch of computer science devoted to developing data processing systems that performs functions normally associated with human intelligence, such as reasoning, learning, and self-improvement.
> (2) The capability of a device to perform functions that are normally associated with human intelligence such as reasoning, learning, and self-improvement.

NIST *U.S. Leadership in AI: A Plan for Federal Engagement in Developing Technical Standards and Related Tools* (Aug. 2019), https://www.nist.gov/system/files/documents/2019/08/10/ai_standards_fedengagement_plan_9aug2019.pdf.

[2] U.S. Government Accountability Office (GAO), *Artificial Intelligence: Status of Developing and Acquiring Capabilities for Weapons Systems*, GAO-22-104765 (Feb. 2022), https://www.gao.gov/assets/gao-22-104765.pdf. [hereinafter "GAO AI Report."]

[3] *Championing ethical and responsible machine learning through open-source best practices*, THE FOUNDATION FOR BEST PRACTICES IN MACHINE LEARNING, v. 1.0.0 (May 21, 2021), https://www.nist.gov/system/files/documents/2021/08/18/ai-rmf-rfi-0010-attachment3.pdf.

[4] NSCAI Final Report at 28, *supra* note 1. ("We now know the uses of AI in all aspects of life will grow and the pace of innovation will accelerate.")

[5] This Resolution does not purport to alter lawyers' obligations under applicable rules of professional conduct. Lawyers may wish to consider the issues raised in Daniel W. Linna Jr. and Wendy J. Muchma, Ethical Obligations to Protect Client Data when Building Artificial Intelligence Tools: Wigmore Meets AI (Oct. 2, 2020),

Fundamental concepts such as accountability, transparency, and traceability play an important role in ensuring the trustworthiness of AI systems. These concepts also play key roles in our legal system.[6] This Resolution presents guidance on how the legal system and its participants, including attorneys, regulators, and stakeholders, such as developers, integrators, suppliers, and operators **("**developers**")** of AI systems and capabilities, should assess these fundamental issues with AI. It states that in the context of AI, individual and enterprise accountability and human authority, oversight, and control are required and it is not appropriate to shift legal responsibility to a computer or an "algorithm" rather than to responsible people and other legal entities.

This Resolution will ensure that courts and participants in the legal process have the capacity to evaluate and resolve legal questions and disputes by specifying the essential information that must be included in the design, development, deployment, and use of AI to ensure transparency and traceability.

By focusing on these principles related to AI, this Resolution will help to ensure that accountability, transparency, and traceability are built into AI products, services, systems, and capabilities "by design" from the beginning of the development process. Following the proposed guidelines will enhance AI by maximizing the benefits from the use of AI in a trustworthy and responsible manner and help to minimize the risks.

Further, the Resolution urges Congress, federal executive agencies, and State legislatures and regulators to follow the guidelines in legislation and standards pertaining to AI.

II. OVERVIEW OF AI

AI holds great potential to bring innovation and efficiency across a number of industry sectors. New AI-enabled systems are benefitting many parts of society and the economy, from commerce and healthcare to transportation and cybersecurity. Consider just a few examples of recent AI innovations:

- Artificial intelligence is being deployed as a dialog agent for customer service. Several of these efforts have passed the Turing test – the eponymous idea developed by early computer pioneer Alan Turing which posited that the true test

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https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/27/1/ethical-obligations-protect-client-data-when-building-artificial-intelligence-tools-wigmore-meets-ai/.
Risks to protect client confidentiality are present in the latest AI-augmented capabilities such as ChatGPT, and are heightened if counsel is unaware of the ways such capabilities involve human reviewers:

> "Ethical concerns arise because the conversations that happen within ChatGPT are not merely an exchange between a user and a computer program—humans are reviewing these ChatGPT conversations."

Foster J. Sayers, *ChatGPT and Ethics: Can Generative AI Break Privilege and Waive Confidentiality*, NYLJ (January 31, 2023), p. 3.

[6] Other important legal issues with AI have been identified, such as intellectual property infringement, algorithmic bias, access to justice, fairness in decision-making, discrimination, unfairness, and privacy and data protection/ cybersecurity. These issues may be appropriate for future ABA resolutions.

of computer intelligence will be met when individuals cannot tell the difference between a computer and a human interaction;

- Self-driving cars are under wide development by virtually every major manufacturer in the world (as well as most of the larger tech companies). While they are still in the testing stage, there is every reason to anticipate that geo-fenced cars will be on the market within 5-10 years;

- The AI product named Watson defeated the human champion in a game of Jeopardy and one named Alpha Go defeated the world Go champion;

- A system known as Deep Patient is now being deployed, successfully, as a diagnostic assistant to clinicians in a hospital setting, helping them make improved diagnoses in difficult cases. It is capable of predicting the onset of certain psychological diseases like schizophrenia in situations where the symptoms are not apparent to human clinicians;

- An artwork created by AI recently sold for over $400,000 at auction;

- More than two years ago a TV station in China began using an AI-powered announcer as the news anchor;

- Recent tests of autonomous self-directed weapons systems have successfully demonstrated that military systems can identify and target adversaries without human intervention; and

- New AI programs that go by the generic name of Deep Fakes can create fake video that can be virtually indistinguishable from reality.

Recently, governments and other organizations have been working on proposed AI governance frameworks and principles with the goal of mitigating the risks that can result through implementation of AI systems and capabilities. For example, NIST has developed an AI Risk Management Framework to provide guidance regarding the trustworthiness of AI systems.[7] Specifically, the framework is intended to help incorporate trustworthiness considerations into the design, development, use, and evaluation of AI systems, and it highlights accountability and transparency as two key guiding principles."[8]

The White House Office of Science and Technology Policy (OSTP) has acknowledged the "extraordinary promise of AI" as well as its pitfalls, and the need to "advance development, adoption, and oversight of AI in a manner that aligns with our democratic

[7] NIST *AI Risk Management Framework,* (AI RMF 1.0) NIST AI 100-1 (Jan. 2023), https://www.nist.gov/itl/ai-risk-management-framework [hereinafter "NIST AI Risk Management Framework"].
[8] *Id.* at 13.

values."[9] In recognition of the importance of ensuring that the American public has appropriate protections in the age of AI, OSTP released its Blueprint for an AI Bill of Rights "for building and deploying automated systems that are aligned with democratic values and protect civil rights, civil liberties, and privacy." [10] OSTP explained:

> Our country should clarify the rights and freedoms we expect data-driven technologies to respect. What exactly those are will require discussion, but here are some possibilities: your right to know when and how AI is influencing a decision that affects your civil rights and civil liberties; your freedom from being subjected to AI that hasn't been carefully audited to ensure that it's accurate, unbiased, and has been trained on sufficiently representative data sets; your freedom from pervasive or discriminatory surveillance and monitoring in your home, community, and workplace; and your right to meaningful recourse if the use of an algorithm harms you.[11]

III. ACCOUNTABILITY AND HUMAN OVERSIGHT, AUTHORITY, AND CONTROL

The ABA urges organizations that design, develop, deploy, and use AI systems and capabilities to follow these guidelines:

- Developers, integrators, suppliers, and operators ("developers") of AI systems and capabilities should ensure that their products, services, systems, and capabilities are subject to human authority, oversight, and control.

- Responsible individuals and enterprises should be accountable for the consequences caused by their use of AI products, services, systems, and capabilities, including any legally cognizable injury or harm caused by their use, unless they have taken reasonable measures to mitigate against that harm or injury.

Accountability and human authority, oversight and control are closely interrelated legal concepts. In the context of AI, they present key concerns, given that AI is increasingly being used in a variety of contexts to make decisions that can significantly impact

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[9] L. Parker and R. Richardson, *OSTP's Continuing Work on AI Technology and Uses That Can Benefit Us All*, OSTP Blog (Feb. 3, 2022), https://www.whitehouse.gov/ostp/news-updates/2022/02/03/ostps-continuing-work-on-ai-technology-and-uses-that-can-benefit-us-all/.

[10] White House Office of Science and Technology Policy (OSTP), *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People* (October 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf. The Blueprint focuses on five principles for automated decision-making systems: (1) Safe and effective systems; (2) Algorithmic discrimination protections; (3) Data privacy; (4) Notice and explanation; and (5) Human alternatives, consideration and fallback.

[11] E. Lander & A. Nelson, *ICYMI: WIRED (Opinion): Americans Need a Bill of Rights For An AI-Powered World*, OTSP Blog (Oct. 22, 2022), https://www.whitehouse.gov/ostp/news-updates/2021/10/22/icymi-wired-opinion-americans-need-a-bill-of-rights-for-an-ai-powered-world/.
See, Ben Winters, AI Bill of Rights Provides Actionable Instructions for Companies, Agencies, and Legislators, EPIC (Oct. 11, 2022), https://epic.org/ai-bill-of-rights-leaves-actionable-instructions-for-companies-agencies-and-legislators/.

people's lives, including evaluating applicants for jobs, determining who receives access to loans, assessing criminal defendants' likelihood of being a repeat offender in connection with bail proceedings, screening rental applicants, and determining how self-driving cars should navigate through complex traffic and driving situations.

The Defense Advanced Research Projects Agency (DARPA) recently announced that it is starting a program to evaluate the use of AI to make complex decisions in modern military operations. DARPA explained that this In the Moment (ITM) program "aims to evaluate and build trusted algorithmic decision-makers for mission-critical Department of Defense (DoD) operations."[12]

Various organizations have recognized the importance of accountability with AI systems. In its AI Risk Management Framework (AI RMF 1.0), NIST stated that:

> Organizations need to establish and maintain the appropriate accountability mechanisms, roles and responsibilities, culture, and incentive structures for risk management to be effective. …
>
> Trustworthy AI depends upon accountability. Accountability presupposes transparency. *Transparency* reflects the extent to which information about an AI system and its outputs is available to individuals interacting with such a system – regardless of whether they are even aware that they are doing so. …
>
> When consequences are severe, such as when life and liberty are at stake, AI developers and deployers should consider proportionally and proactively adjusting their transparency and accountability practices.[13]

The Organization for Economic Cooperation and Development (OECD) Principles for AI includes Principle 1.5 on Accountability, which provides:

> Organizations and individuals developing, deploying or operating AI systems should be held accountable for their proper functioning in line with the OECD's values-based principles for AI.[14]

Australia has issued a voluntary framework of eight AI Ethics Principles which includes accountability, stating:

> People responsible for the different phases of the AI system lifecycle should be identifiable and accountable for the outcomes of the AI systems, and human oversight of AI systems should be enabled.[15]

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[12] *Developing Algorithms That Make Decisions Aligned With Human Expert*, DARPA Notice (March 3, 2022), https://www.darpa.mil/news-events/2022-03-03.
[13] NIST AI Risk Management Framework, at 9, 15, and 16, *supra* note 7,
[14] OECD AI Principles, https://oecd.ai/en/dashboards/ai-principles/P7. [hereinafter "OECD AI Principles."]
[15] *Australia's AI Ethics Principles, Principles at a Glance*,

In addition, large technology companies have also recognized the importance of accountability with regard to their AI products. For example, one of Microsoft's Six Principles for Responsible AI is accountability: "people should be accountable for AI systems."[16] Similarly, Google includes accountability in its Objectives for AI Applications, and states that AI should "be accountable to people. We will design AI systems that provide appropriate opportunities for feedback, relevant explanations, and appeal. Our AI technologies will be subject to appropriate human direction and control."[17]

Human accountability is of particular importance given that with ML, a subset of AI, computers are able to learn from data sets without being given explicit instructions from humans. Instead, the computer model learns from experience and trains itself to find patterns and make predictions.[18] There has been widespread recognition of the critical role that humans should play in overseeing and implementing AI systems that are making such important decisions. For example, the term "human-centered artificial intelligence" has been used to describe the view that AI systems "must be designed with awareness that they are part of a larger system consisting of human stake-holders, such as users, operators, clients, and other people in close proximity."[19]

Accountability is important given the increasing concern about understanding AI decision-making and ensuring fairness in AI models, including with regard to the potential discriminatory impact of certain AI systems. For example, Amazon started a program to automate hiring by using an algorithm to review resumes. However, the program had to be discontinued after it was discovered that it discriminated against women in certain technical positions, such as software engineer, because the software analyzed the credentials of its existing employee base, which was predominantly male.[20] In addition, researchers found a gender and skin-type bias with commercial facial analysis programs, with an error rate of 0.8 percent for light-skinned men, versus 34.7 for dark-skinned women.[21]

There have been recent efforts to prohibit AI systems from violating anti-discrimination and privacy laws. For example, the Equal Employment Opportunity Commission (EEOC) launched an initiative to ensure that AI used in hiring and other employment

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https://www.industry.gov.au/data-and-publications/australias-artificial-intelligence-ethics-framework/australias-ai-ethics-principles.

[16] Microsoft *Responsible AI principles in practice*, https://www.microsoft.com/en-us/ai/responsible-ai?activetab=pivot1%3aprimaryr6, [hereinafter "Microsoft *Responsible AI Principles*"].

[17] Google *AI Principles*, https://ai.google/principles/.

[18] S. Brown, *Machine Learning Explained*, MIT Management: Ideas Made to Matter (April 21, 2021), https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained.

[19] M. Riedl, *Human-Centered Artificial Intelligence and Machine Learning*, arXiv:1901.11184[cs.AI].

[20] J. Dastin, *Amazon Scraps Secret AI Recruiting Tool That Shows Bias Against Women*, Reuters (Oct. 10, 2018), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G.

[21] L. Hardesty, *Study Finds Gender and Skin-Type Bias in Commercial Artificial Intelligence Systems*, MIT NEWS (Feb. 11, 2018), https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-021.

decisions does not violate anti-discrimination laws.[22] New York City passed a new law to take effect in 2023 that prohibits the use of AI machine learning products in hiring and promotion decisions unless the tools have first been audited for bias.[23] In 2018, California passed the California Consumer Privacy Act (CCPA), a consumer protection law intended to protect the privacy of California residents. In 2020, it passed the California Privacy Rights Act (CPRA), amending the CCPA to add measures including the right to limit use and disclosure of sensitive personal information and the right to obtain information about how companies use automated decision-making technology.[24] In addition, questions have also been raised about the protection of privacy because of the processing of personal data in AI systems.[25]

Existing laws and regulations can be used to prevent potential violations of anti-discrimination and privacy laws by AI systems. For example, Federal Trade Commission (FTC) Commissioner Rebecca Kelly Slaughter explained her view that the FTC's existing tools, including section 5 of the FTC Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and the Children's Online Privacy Protection Act, can and should be used to protect consumers against algorithmic harms.[26]

In light of the need to ensure compliance with laws and regulations being used to prevent harms from AI systems, it is essential that the humans and enterprises with responsibility for these AI systems be held accountable for the consequences of the uses of these systems.

Under our legal system, in order to be held accountable, an entity must have a specific legal status that allows it to be sued, such as being an individual human or a corporation. On the other hand, property, such as robots or algorithms, does not have a comparable legal status.[27] Thus, it is important that legally recognizable entities such as humans and corporations be accountable for the consequences of AI systems, including any legally cognizable injury or harm that their actions or those of the AI systems or

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[22] EEOC Artificial Intelligence and Algorithmic Fairness Initiative (2021), https://www.eeoc.gov/ai; EEOC *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees,* https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence.

[23] N. Lee and S. Lai, *Why New York City Is Cracking Down on AI in Hiring*, BROOKINGS TECHTANK (Dec. 20, 2021), https://www.brookings.edu/blog/techtank/2021/12/20/why-new-york-city-is-cracking-down-on-ai-in-hiring/.

[24] B. Justice, *CPRA Countdown: It's Time to Brush Up on California's Latest Data Privacy Law*, NATIONAL LAW REVIEW (Dec. 18, 2021), https://www.natlawreview.com/article/cpra-countdown-it-s-time-to-brush-california-s-latest-data-privacy-law.

[25] C. Tucker, *Privacy, Algorithms and Artificial Intelligence*, in *The Economics of Artificial Intelligence: An Agenda*, NATIONAL BUREAU OF ECONOMIC RESEARCH (2019), https://www.nber.org/books-and-chapters/economics-artificial-intelligence-agenda/privacy-algorithms-and-artificial-intelligence.

[26] R. Slaughter, *Algorithms and Economic Justice*, ISP DIGITAL FUTURE WHITEPAPER & YALE JOURNAL OF LAW & TECHNOLOGY SPECIAL PUBLICATION (Aug. 2021)

[27] Michalski, Roger (2018), *How to Sue a Robot*, UTAH LAW REVIEW: Vol. 2018: No. 5, Article 3, https://dc.law.utah.edu/ulr/vol2018/iss5/3.

capabilities cause to others, unless they have taken reasonable measures to mitigate against that harm or injury.[28]

IV. TRANSPARENCY AND TRACEABILITY

The ABA urges organizations that design, develop, deploy, and use artificial intelligence ("AI") products, services, systems and capabilities to follow this guideline:

- Developers should ensure the transparency and traceability of their AI products, services, systems, and capabilities, while protecting associated intellectual property, by documenting key decisions made with regard to the design and risk of the data sets, procedures, and outcomes underlying their AI products, services, systems, and capabilities.

A. Transparency

In the context of AI, transparency is about responsible disclosure to ensure that people understand when they are engaging with an AI system, product, or service and enable those impacted to understand the outcome and be able to challenge it if appropriate.[29] NIST stated that "explainable AI" is one of several properties that characterize trust in AI systems.[30]

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[28] In developing rules of liability, the supplier/component part doctrine would apply. Under that doctrine, the manufacturer of a non-defective component is not liable for harm caused by a defect in a larger system sold by a manufacturer into which the component was integrated.

[29] OEDC adopted Transparency and Explainability Principle 1.3 that states:

AI Actors should commit to transparency and responsible disclosure regarding AI systems. To this end, they should provide meaningful information, appropriate to the context, and consistent with the state of art:

- to foster a general understanding of AI systems,
- to make stakeholders aware of their interactions with AI systems, including in the workplace,
- to enable those affected by an AI system to understand the outcome, and,
- to enable those adversely affected by an AI system to challenge its outcome based on plain and easy-to-understand information on the factors, and the logic that served as the basis for the prediction, recommendation or decision.

OECD AI Principles, *supra* note 12.

[30] NIST *Artificial Intelligence*, https://www.nist.gov/artificial-intelligence; NIST *Four Principles of Explainable Artificial Intelligence*, NIST Interagency/Internal Report (NISTIR) - 8312, https://doi.org/10.6028/NIST.IR.8312.

Four principles of explainable AI – for judging how well AI decisions can be explained:

- *Explanation* – AI systems should deliver accompanying evidence or reasons for all their outputs.
- *Meaningful* – Systems should provide explanations that are meaningful or understandable to individual users.
- *Explanation Accuracy* – The explanation correctly reflects the system's process for generating the output.
- *Knowledge Limits* – The system only operates under conditions for which it was designed or when the system reaches a sufficient confidence in its output. (The idea is that if a system has insufficient confidence in its decision, it should not supply a decision to the user.)

See, https://www.nist.gov/artificial-intelligence/ai-fundamental-research-explainability.

Lack of transparency with AI can negatively affect individuals who are denied jobs, refused loans, refused entry or are deported, imprisoned, put on no-fly lists or denied benefits. They are often not informed of the reasons other than the decision was processed using computer software. Human rights principles that may be impacted are rights to a fair trial and due process, effective remedies, social rights and access to public services, and rights to free elections. [31]

OECD has explained that the term transparency carries multiple meanings:

> In the context of this Principle [1.3], the focus is first on disclosing when AI is being used (in a prediction, recommendation or decision, or that the user is interacting directly with an AI-powered agent, such as a chatbot). Disclosure should be made with proportion to the importance of the interaction. The growing ubiquity of AI applications may influence the desirability, effectiveness or feasibility of disclosure in some cases.
>
> Transparency further means enabling people to understand how an AI system is developed, trained, operates, and deployed in the relevant application domain, so that consumers, for example, can make more informed choices. Transparency also refers to the ability to provide meaningful information and clarity about what information is provided and why. Thus transparency does not in general extend to the disclosure of the source or other proprietary code or sharing of proprietary datasets, all of which may be too technically complex to be feasible or useful to understanding an outcome. Source code and datasets may also be subject to intellectual property, including trade secrets.
>
> An additional aspect of transparency concerns facilitating public, multi-stakeholder discourse and the establishment of dedicated entities, as necessary, to foster general awareness and understanding of AI systems and increase acceptance and trust.

Numerous organizations around the world have developed AI principles. A researcher who reviewed them reported that "[f]eatured in 73/84 sources, transparency is the most prevalent principle in the current literature."[32] Varied terminology is used to express this concept of transparency, comprising efforts to increase explainability, interpretability, intelligibility or other acts of communication and disclosure.

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[31] Rowena Rodrigues, *Legal and human rights issues of AI: Gaps, challenges and vulnerabilities*, JOURNAL OF RESPONSIBLE TECHNOLOGY, Vol. 4, Dec. 2020, 100005, https://doi.org/10.1016/j.jrt.2020.100005.

[32] Anna Jobin, *et. al., Artificial Intelligence: the global landscape of ethics guidelines*, HEALTH ETHICS & POLICY LAB, ETH Zurich, 8092 Zurich, Switzerland (2019), https://www.researchgate.net/profile/Anna-Jobin/publication/334082218_Artificial_Intelligence_the_global_landscape_of_ethics_guidelines/links/5d19ec7d299bf1547c8d2be8/Artificial-Intelligence-the-global-landscape-of-ethics-guidelines.pdf?origin=publication_detail.

European Union member state reports on AI can be found at https://futurium.ec.europa.eu/en/european-ai-alliance/pages/official-documents-and-reports.

Intelligibility can uncover potential sources of unfairness, help users decide how much trust to place in a system, and generally lead to more usable products. It also can improve the robustness of AI systems by making it easier for data scientists and developers to identify and fix bugs.[33]

The FTC published guidance regarding the commercial use of AI technology, acknowledging that while AI has significant positive potential, it also presents negative risks, such as unfair or discriminatory outcomes or the entrenchment of existing disparities.[34] The FTC urged companies to:

- Be transparent with consumers;
- Explain how algorithms make decisions;
- Ensure that decisions are fair, robust, and empirically sound; and
- Hold themselves accountable for compliance, ethics, fairness and non-discrimination.

B. Traceability

It is important to ensure that the complex processes in data science — from data processing through modeling to deployment in production — can be documented in a way that is understood easily.[35] Traceability is considered a key requirement for trustworthy AI. It would allow companies to better understand the entire reasoning process, and builds trust with AI implementations.[36]

According to NIST, "[t]rustworthy AI refers to AI capabilities that exhibit characteristics such as resilience, security, and privacy so that relevant people can adopt them without fear."[37] An AI capability must be traceable, meaning that it is developed and deployed such that relevant personnel possess an appropriate understanding of the technology, development processes, and operational methods applicable to AI capabilities, including

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[33] Microsoft *Responsible AI principles, supra* note 14. Microsoft Research Collection: *Research Supporting Responsible AI* (April 13, 2020), https://www.microsoft.com/en-us/research/blog/research-collection-research-supporting-responsible-ai/.

[34] FTC *Using Artificial Intelligence and Algorithms* (April 8, 2020), https://www.ftc.gov/business-guidance/blog/2020/04/using-artificial-intelligence-algorithms; FTC, *Aiming for truth, fairness, and equity in your company's use of AI* (April 19, 2021), https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai.

[35] Andreas Gödde, *Traceability for Trustworthy AI: A Review of Models and Tools*, SAS, https://www.mdpi.com/2504-2289/5/2/20/htm.
https://blogs.sas.com/content/hiddeninsights/2018/03/12/interpretability-traceability-clarity-ai-mandate/.
See, Association for Computing Machinery, *Outlining Traceability: A Principle for Operationalizing Accountability in Computing Systems,* FAccT '21: Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency (March 2021), pages 758–771, https://dl.acm.org/doi/10.1145/3442188.3445937.

[36] Sanjay Srivastava, *The path to explainable AI*, CIO (May 21, 2018), https://www.cio.com/article/221668/the-path-to-explainable-ai.html.

[37] NIST, Draft –Taxonomy of AI Risk (Oct. 2021), https://www.nist.gov/system/files/documents/2021/10/15/taxonomy_AI_risks.pdf*; see* GAO AI Report, *supra* note 2.

with transparent and auditable methodologies, data sources and design procedures and documentation.[38]

C. Documenting key decisions made with regard to the design and risk of the data sets, procedures, and outcomes.

As AI algorithms become more complex, the need for greater transparency grows. Experts are developing software tools that will address the "black box" problem[39] – not knowing how algorithms arrive at their final output – by analyzing complex AI systems and documenting how the system processes information, answers questions, and provides results.[40]

Traceability is related to the need to maintain a complete account of the provenance of data, processes, and artifacts involved in the production of an AI model – and it should encompass all elements of an AI system, product or service, namely the data, the system, and the business model. It requires documentation of the data sets, procedures, and outcomes for the AI system or capability.[41]

Practical Considerations – In establishing traceability for AI products, services, systems, and capabilities, developers should create contemporaneous records that document key decisions made with regard to the design and risk of the AI data sets. This means using automated tools when appropriate and available, or otherwise using documentation techniques (online or manual) appropriate for the software development lifecycle and for

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[38] The Department of Defense (DoD) adopted *5 Principles of Artificial Intelligence Ethics* that commits the Department to this principle of traceability. U.S. Department of Defense, *5 Principles of Artificial Intelligence Ethics*, https://www.defense.gov/News/News-Stories/Article/Article/2094085/dod-adopts-5-principles-of-artificial-intelligence-ethics/. *See AI Principles: Recommendations on the Ethical Use of Artificial Intelligence* by the Department of Defense, Defense Innovation Board, *available at* https://media.defense.gov/2019/Oct/31/2002204458/-1/-1/0/DIB_AI_PRINCIPLES_PRIMARY_DOCUMENT.PDF.
Similarly, the *Principles of Artificial Intelligence Ethics for the Intelligence Community*[38] provide:

> *Transparent and Accountable* – We will provide appropriate transparency to the public and our customers regarding our AI methods, applications, and uses within the bounds of security, technology, and releasability by law and policy, and consistent with the Principles of Intelligence Transparency for the IC. We will develop and employ mechanisms to identify responsibilities and provide accountability for the use of AI and its outcomes.

[39] Cliff Kuang, *Can A.I. Be Taught to Explain Itself*? THE NEW YORK TIMES MAGAZINE (Nov. 21, 2017), https://www.nytimes.com/2017/11/21/magazine/can-ai-be-taught-to-explain-itself.html
[40] Neil Savage, *Breaking into the black box of artificial intelligence: Scientists are finding ways to explain the inner workings of complex machine-learning models*, NATURE (Mar. 29, 2022), https://www.nature.com/articles/d41586-022-00858-1.
[41] The assessment for traceability includes:

- *Procedures*: Methods used for designing and developing the algorithmic system: how the algorithm was trained, which input data was gathered and selected, and how this occurred.
- *Data*: Methods used to test and validate the algorithmic system: information about the data used to test and validate.
- *Outcomes*: The outcomes of the algorithms or the subsequent decisions taken on the basis of these outcomes, as well as other potential decisions that would result from different cases (*e.g.,* for other subgroups of users).

conducting AI risk assessments. Computer scientists are developing data models and tools to fully document data, procedures and outcomes for AI systems. They enable some form of automated repetition of the construction of the artifacts.[42]

Examples of the types of key decisions to be documented throughout the AI lifecycle include:

- *Business* – business-oriented requirements, expected uses and outcomes, key performance features (including when AI is used or relied upon in decision making). Human control over the selection of inputs and generation of outputs in order to reduce the risks of unintended adverse consequences.
- *Data* – types, quantities, and sources of data to be used in training the AI systems and capabilities; modeling, analysis, evaluation.[43]
- *AI risk assessment* – risks assessed, unintended bias, or hazardous use.
- *Cybersecurity risks* – risks of unauthorized access to, and compromise of the integrity of, the AI algorithms, software, training data, and/or model.
- *Design and development* – key design trade-offs, risks mitigated by the design. Review of algorithm(s), software code and the AI model.
- *Testing* – involvement of humans with detailed understanding of AI processes and industry domain issues. Testing of implementing software, model with data sets, and adjustments and correction of errors. Problems observed in generating desired outputs. Performance deficiencies, malfunctions, unintended outputs, and discovered risks observed.
- *Deployment*
- *Developers should respond promptly* to avert or mitigate AI risks that are identified at any point in the AI system/product life cycle.

In the event of a gap between actual and desired performance with an AI system, capability, product, or service, recurring errors or failures with specific processes and undesirable events reoccurring, traceability will enable root cause analysis, a process for understanding 'what happened' and solving a problem through looking back and drilling down to find out 'why it happened' in the first place. Then, looking to rectify the issue(s) so that it does not happen again, or reduce the likelihood that it will happen again.[44]

The many benefits of root cause analysis include reducing risk and preventing recurring failures, improving performance, as well as the potential for cost reduction. It provides a logical approach to problem solving using data that already exist and a learning process

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[42] *Traceability for Trustworthy AI: A Review of Models and Tools*, https://www.mdpi.com/2504-2289/5/2/20/htm.

[43] The key is to fully understand the data's behavior. Best practices include documenting assumptions around completeness of the data, addressing data biases, and reviewing new rules identified by the machine before implementing. If AI is being used to identify anomalies, companies can put checks and balances in place to manually test and determine if the results make sense.

[44] Chartered Institute of Internal Auditors, *Root Cause Analysis* (Sept. 22, 2020), https://www.iia.org.uk/resources/delivering-internal-audit/root-cause-analysis?downloadPdf=true.

for better understanding of relationships, causes and effect, and solutions. The process should lead to more robust AI systems and capabilities.

V. EXISTING ABA POLICY

The ABA House of Delegates passed two Resolutions that address AI. This Resolution builds on and is consistent with those existing ABA policies.

- ABA urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ("AI") in the practice of law, including (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI. 19A112.

- ABA urges federal, state, local, territorial and tribal governments to:
  - Ensure due process and refrain from using pretrial risk assessment tools unless the data supporting the risk assessment is transparent, publicly disclosed, and validated; and
  - Recognize that an individual's criminal history and other criteria may reflect structurally biased application of laws, policies or practices, as well as conscious or unconscious bias. 22M700.

VI. CONCLUSION

This Resolution addresses important legal issues concerning AI by focusing on the principles of accountability, transparency and traceability. It states that in the context of AI, human and enterprise accountability and human authority, oversight, and control are required and it is not appropriate to shift legal responsibility to a computer or an "algorithm" rather than to responsible people and other legal entities.

It will ensure that courts and participants in the legal process have the capacity to evaluate and resolve legal questions and disputes by specifying the essential information that must be included in the design, development, deployment, and use of AI to ensure transparency and traceability. Passage of this Resolution will enhance AI by maximizing the benefits from the use of AI in a trustworthy and responsible manner and help to minimize the risks.

Respectfully Submitted,

Claudia Rast and Maureen Kelly, Co-Chairs
Cybersecurity Legal Task Force

February 2023

APPENDIX

LAWS, COURT DECISIONS, AND LEADING REPORTS

An exhaustive analysis of federal, state, and international laws applicable to AI is outside the scope of this Report. Below are some of the highlights:

National Conference of State Legislatures (NCLS) ***State AI Legislation***
https://www.ncsl.org/research/telecommunications-and-information-technology/2020-legislation-related-to-artificial-intelligence.aspx

General AI bills or resolutions were introduced in at least 17 states in 2021-22, and were enacted in Alabama, Colorado, Illinois, Mississippi, Vermont, and Washington.

General Data Protection Regulation (GDPR) Article 22 – AI Requirements[45]

GDPR imposes legal requirements on whoever uses an AI system for profiling and/or automated decision-making (regardless of the *means* by which personal data are processed), even if they acquired the system from a third party. These requirements include Fairness; Transparency, including meaningful information about the logic involved in the AI system; and the right to human intervention, enabling the individual to challenge the automated decision.

Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) (25 November 2022), approved by the Council on December 6, 2022.

2021/0106(COD), https://data.consilium.europa.eu/doc/document/ST-14954-2022-INIT/en/pdf.

The Regulation introduces new obligations for vendors of AI systems, and includes requirements for high-risk AI systems and users.

European Parliament, The impact of the General Data Protection Regulation (GDPR) on artificial intelligence, PE 641.530 (June 2020),
https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641530/EPRS_STU(2020)641530_EN.pdf.

Holbrook v. Prodomax Automation Ltd.**,** 2021 U.S. Dist. LEXIS 178325 (Sept. 20, 2021) U.S. Dist. Ct., W.D. Mich.

[45] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) (OJ L 119 04.05.2016, p. 1, CELEX: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0679).

Man Whose Wife Was Killed by Factory Robot Settles Mid-Trial, BLOOMBERG (Nov. 9, 2021), https://news.bloomberglaw.com/product-liability-and-toxics-law/man-whose-wife-was-killed-by-factory-robot-settles-mid-trial.
Eric L. Alexander, *Unintended Consequences for Software Liability*? REED SMITH (Nov. 26, 2021), https://www.lexology.com/library/detail.aspx?g=54e4a579-500d-4db0-adc2-065bc9b06263.

Leading Reports

White House Office of Science and Technology Policy (OSTP), *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People* (October 2022)
https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.

The Blueprint focuses on principles for automated decision-making systems: (1) Safe and effective systems; (2) Algorithmic discrimination protections; (3) Data privacy; (4) Notice and explanation; and (5) Human alternatives, consideration and fallback.

National Security Commission on Artificial Intelligence (NSCAI), *Final Report*
https://www.nscai.gov/.

Presents the strategy for the U.S. to win in the AI era by responsibly using AI for national security and defense, defending against AI threats, and promoting AI innovation. *Blueprints for Action* provide plans to implement the recommendations.

House Committee on Transportation and Infrastructure

Boeing 737 MAX Investigation, https://transportation.house.gov/committee-activity/boeing-737-max-investigation.
Final Committee Report on the Design, Development, and Certification of the Boeing 737 MAX (Sept. 2020).

NIST AI Risk Management Framework: Second Draft (August 2022)
https://www.nist.gov/system/files/documents/2022/08/18/AI_RMF_2nd_draft.pdf.

Intended for voluntary use “in addressing risks in the design, development, use, and evaluation of AI products, services, and systems.”

Artificial Intelligence and the Courts: Materials for Judges, American Association for the Advancement of Science (AAAS) (Sep. 2022)
https://www.aaas.org/ai2/projects/law/judicialpapers.

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With the support of NIST, this AAAS project is developing resources to support judges as they address an increasing number of cases involving AI.

Stanford HAI, *Artificial Intelligence Index Report 2021*, Stanford Human-Centered Artificial Intelligence
https://aiindex.stanford.edu/wp-content/uploads/2021/11/2021-AI-Index-Report_Master.pdf.

Presents unbiased, globally sourced data that will enable policy-makers, researchers, executives, and the public to develop intuitions about AI.

Industry IoT Consortium, *Industrial IoT Artificial Intelligence Framework* (Feb. 22, 2022)
https://www.iiconsortium.org/pdf/Industrial-AI-Framework-Final-2022-02-21.pdf.

Provides guidance in the development, training, documentation, communication, integration, deployment, and operation of AI-enabled industrial IoT systems.

OECD AI Principles (May 2019)
https://oecd.ai/en/ai-principles.

Promotes the use of innovative and trustworthy AI and respects human rights and democratic values.

European Commission, European AI Alliance
https://futurium.ec.europa.eu/en/european-ai-alliance/pages/official-documents-and-reports.

Council of Europe, Karen Yeung, Responsibility and AI, DGI(2019)05
https://rm.coe.int/responsability-and-ai-en/168097d9c5.

A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework.

Katherine B. Forrest, When Machines Can Be Judge, Jury, And Executioner: Justice In The Age Of Artificial Intelligence (2021)

GENERAL INFORMATION FORM

Submitting Entity: Cybersecurity Legal Task Force

Submitted By: Claudia Rast and Maureen Kelly, Co-chairs

1. Summary of Resolution(s).

This Resolution presents guidance on how the legal system and its participants, including attorneys, regulators, and stakeholders – developers, integrators, suppliers, and operators **("**developers**")** of AI systems and capabilities – should assess three fundamental issues with AI: accountability, transparency and traceability.

The Resolution will ensure that courts and participants in the legal process have the capacity to evaluate and resolve legal questions and disputes by specifying the essential information that must be included in the design, development, deployment, and use of AI to ensure transparency and traceability.

2. Indicate which of the ABA's four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution meets Goal 4 – Advance the Rule of Law. The Resolution is designed to help mitigate the risks that can result through implementation of AI systems and capabilities and enhance the use of AI in a trustworthy and responsible manner.

3. Approval by Submitting and Co-sponsoring Entities.

The Cyberspace Legal Task Force voted to sponsor this Resolution on December 2, 2022.
The Antitrust Law Section voted to co-sponsor this Resolution on December 2, 2022.
The Tort, Trial & Insurance Practice (TIPS) Section voted to co-sponsor this Resolution on November 16, 2022.
The Science & Technology Law Section voted to co-sponsor this Resolution on December 20, 2022.
The Standing Committee on Law and National Security voted to co-sponsor this Resolution on November 19, 2022.

4. Has this or a similar resolution been submitted to the House or Board previously? No.

5. What existing Association policies are relevant to this resolution and how would

they be affected by its adoption?

The ABA House of Delegates has passed resolutions that address issues with AI. This Resolution builds on and is consistent with those ABA policies.

- ABA urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ("AI") in the practice of law, including (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI. 19A112.

- ABA urges federal, state, local, territorial and tribal governments to:
  - Ensure due process and refrain from using pretrial risk assessment tools unless the data supporting the risk assessment is transparent, publicly disclosed, and validated to demonstrate the absence of conscious or unconscious racial, ethnic, or other demographic, geographic, or socioeconomic bias; and
  - Recognize that an individual's criminal history and other criteria may reflect structurally biased application of laws, policies or practices, as well as conscious or unconscious bias. 22M700.

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

This is not a late report. As private sector organizations and governments move rapidly to design, develop, deploy, and use AI systems and capabilities, now is a critical time for lawyers to articulate principles that are essential to ensuring that AI is developed and implemented in accordance with the law and well-accepted legal standards.

7. Status of Legislation. (If applicable)

S. 1605, FY 2022 National Defense Authorization Act – enacted
Legislation to strengthen the U.S. government's artificial intelligence (AI) readiness, support long-term investments in AI ethics and safety research, and increase governmental AI transparency, were passed as part of the FY 2022 *National Defense Authorization Act (NDAA)*.

Artificial Intelligence Capabilities and Transparency (AICT) Act.
The A/CT Act would implement recommendations of the National Security Commission on Artificial Intelligence's (NSCAI) final report. Congress established the NSCAI through the FY 2019 *National Defense Authorization Act (NDAA)* in order to consider the methods and means necessary to advance the development and improve the government's use of AI and related technology.

S. 2551 — Artificial Intelligence Training for the Acquisition Workforce Act or the AI Training Act
This bill requires the Office of Management and Budget (OMB) to establish or otherwise provide an AI training program for the acquisition workforce of executive agencies (*e.g.*, those responsible for program management or logistics) to ensure that the workforce has knowledge of the capabilities and risks associated with AI.

U.S. States

General AI bills or resolutions were introduced in at least 17 states in 2021-22, and were enacted in Alabama, Colorado, Illinois, Mississippi, Vermont, and Washington.

National Conference of State Legislatures (NCLS), *State AI Legislation,* https://www.ncsl.org/research/telecommunications-and-information-technology/2020-legislation-related-to-artificial-intelligence.aspx.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

This Resolution will be disseminated to members of Congress and State legislators in coordination and cooperation with the ABA Governmental Affairs Office, as well as executives of large and small companies that design, develop, deploy, and use AI systems, capabilities, products, and services.

It will alert them to the ABA's newly-adopted policy and encourage them to take action consistent with the ABA policy. We also encourage its use in Amicus Curiae briefs by the ABA.

9. Cost to the Association. (Both direct and indirect costs).
None.

10. Disclosure of Interest. (If applicable)
Not Applicable.

11. Referrals.

Sections:
Business Law
Civil Rights & Social Justice
Criminal Justice
Environment, Energy & Resources
Intellectual Property
International Law
Litigation
Public Contract Law
Science & Technology Law

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State and Local Government Law
Tort, Trial & Insurance Practice

Standing Committees:
Cybersecurity Legal Task Force
Professional Responsibility

Divisions:
Young Lawyers
Senior Lawyers
Law Practice

12. Contact Name and Address Information. (Prior to the meeting)

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Livingston PLLC, Washington, D.C.
lucythomson1@mindspring.com, (703) 798-1001

Roland Trope
Trope Law, New York, New York
rltrope@tropelaw.com, (917) 370-3705

13. Contact Name and Address Information. (Who will present the report to the House?)

Lucy L. Thomson, Delegate, District of Columbia Bar
Livingston PLLC, Washington, D.C.
lucythomson1@mindspring.com, (703) 798-1001

EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution presents guidance on how the legal system and its participants, including attorneys, regulators, and stakeholders, such as developers, integrators, suppliers, and operators **(“**developers**”)** of AI systems and capabilities, should assess fundamental issues with AI by addressing the principles of accountability, transparency and traceability.

2. Summary of the Issues that the Resolution Addresses

This Resolution states that in the context of AI individual and enterprise accountability and human authority, oversight, and control is required and it is not appropriate to shift legal responsibility to a computer or an “algorithm” rather than to responsible people and other legal entities.

By focusing in the context of AI on the key issues accountability, transparency and traceability, passage of this Resolution will help mitigate the risks that can result through implementation of AI systems and capabilities and enhance the use of AI in a trustworthy and responsible manner.

3. Please Explain How the Proposed Policy Position Will Address the Issue

This Resolution presents guidance on how the legal system and its participants, including attorneys, regulators, and stakeholders, including developers, integrators, suppliers, and operators **(“**developers**”)** of AI systems and capabilities, should assess fundamental issues with AI by addressing the principles of accountability, transparency and traceability. It states that in the context of AI individual and enterprise accountability and human authority, oversight, and control is required and it is not appropriate to shift legal responsibility to a computer or an “algorithm” rather than to responsible people and other legal entities.

Further, this Resolution would ensure that courts and participants in the legal process will have the capacity to evaluate and resolve legal questions and disputes by specifying the essential information that must be included in the development, deployment and use of AI to ensure transparency and traceability.

4. Summary of Minority Views

None.

State AI Task Force Information

Share:

The Center for Innovation and Center for Bar Leadership are working to gather information about all State Bar Associations AI Task Forces. If you have additional information for your state please connect with us so we can add your work to the list.

State: California

- Name of Task Force: The State's Bar Committee on Professional Responsibility and Conduct
- Website: N/A
- Deliverables: N/A
- Contact Information:
  - Executive Director: Leah Wilson; leaht.wilson@calbar.ca.gov (415) 538-2257

State: Florida

- Name of Task Force: Special Committee on AI Tools & Resources
- Website

- Deliverables: N/A
- Resources
  - Proposed advisory opinion on Lawyers' and Law Firms' Use of Generative Artificial Intelligence – The Florida Bar
  - Professional Ethics of the Florida Bar - Proposed Advisory Opinion 24-1
- Contact Information:
  - Staff Liaison: Christine Bilbrey; cbilbrey@floridabar.org; (850) 561-5579

- Co-Chair: Gordon Glover; gordon@gloverlawfirm.com; (352) 484-0075

- Co-Chair: Duffy Myrtetus; edmyrtetus@eckertseamans.com; (804) 788-7749

State: Illinois

- Name of Task Force: Illinois State Bar Association AI Committee

- Website: N/A

- Deliverables:

  - Report to President Shawn Kasserman (September 27, 2023)

- Contact Information:
    - Chair: George Bellas; george@bellas-wachowski.com

State: Kentucky

- Name of Task Force: Kentucky AI Task Force
- Website: N/A
- Deliverables: N/A
- Contact Information:
    - Staff Liaison: John Meyers; jmeyers@kybar.org
    - Chair: Chief Justice John Minton

State: Minnesota

- Name of Task Force: AI/UPL Working Group
- Website: N/A
- Deliverables: N/A
- Contact Information:
  - Staff Liaison: Nancy Mischel; nmischel@mnbars.org; (612) 278-6331
  - Chair: Damien Riehl

State: New York

- Name of Task Force: New York State Bar Association Task Force To Address Emerging Policy Challenges Related to Artificial Intelligence
- Website
- Deliverables: N/A
- Resources
    - World-Renowned Experts Among Prominent Panelists Who Will Be Discussing the Evolutionary Impact of Artificial Intelligence at the 2024 Presidential Summit

- Contact Information:
    - Chair: Vivian Wesson; vdw1013@gmail.com

State: Texas

- Name of Task Force: Taskforce for the Responsible AI in the Law (TRAIL)
- Website: N/A
- Deliverables:
    - Taskforce for Responsible AI in the Law Interim Report to the State Bar of Texas Board of Directors

- Contact Information:
  - Chair: John Browning

International

- AI Task Force Exec Cte Call Agenda (April 1 2024)
- ABA draft letter to Senator Schumer (March 23, 2024)
- G7 Bars Statement on GenAI (March 21, 2024)

MEMO TO MEMBERS, CDRR
FROM: Claude Ducloux
RE: Flat Fees, Retainers, and Use of Trust Accounts
DATE: September 19, 2023

Rule Proposals to Clarify the Acceptance of Flat Fees

Purpose: to resolve and clarify three fee related issues for Texas Lawyers:

1. There is substantial disagreement in Texas about flat fees and whether such fees may be immediately deposited into the lawyer's operating account, or must instead by deposited into the lawyer's trust account, and only transferred to the lawyer upon performing all or appropriately related "stages" of the legal services.
2. To clarify that flat fees ARE legal, and may be deposited into operating accounts with the clients waiver and consent.
3. Similarly, lawyers often consider prepaid fees intended to be held in trust prior to being earned to be "retainers." Modern definitions of retainers mean fees earned upon payment based upon the promised availability of the lawyer during a given period of time. A true retainer is NOT part of payment for future services, and thus need not be held in trust.

I have drafted for your review, rule additions and proposed comments to address and clarify:

- Flat fees are permitted, but may not be "non-refundable," (except for true retainers) as the client must be protected if the lawyers failed to complete the tasks or is terminated prior to the completion of the tasks.
- Retainers are properly defined.
- Flat fees may be directly deposited into the lawyers operating accounts upon the disclosure of the rule to the client, and the clients waiver of depositing the flat fee in trust.

I have, for reference, included two other states' more modern rules (Minnesota and California) addressing the ability to charge flat fees, defining retainers, and the prohibition against non-refundability. Adopting similar provisions and clarifications in Texas would be extremely helpful to lawyers, and resolve vagueness and ambiguities of current Texas rules.

Our proposal is:

First, to confirm that a lawyer may charge a flat fee, and that it can be paid totally in advance, And under new proposed section 1.04 (j) to once and for all define "retainer" to avoid future confusion.

Next, to direct lawyers, via amendments to TX Rule 1.14, how that Flat fee should be handled and deposited, based upon the agreements of the lawyer and client outlined in these new rules.

Proposed NEW subsection (i) to Rule 1.04 (Fees) (Flat Fees permitted)

(i) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.

Proposed NEW subsection (j) to Rule 1.04 (Fees) (Retainer defined)

(j) A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.

Now let's turn to how flat fee agreement should be documented:

Intent: requiring the lawyer to disclose that fees generally should be deposited to trust, and allowing the parties to waive that requirement. Disclosure must be made in writing, and if the flat fee exceeds $1000, the client must agree in writing. In either event, the lawyer shall disclose that the fee is subject to appropriate refund if the legal services are not performed. Thus: No non-refundable fees allowed.

Proposed NEW subsection (c) to Rule 1.14 (Fees) (Handling Flat Fees)

(c) Notwithstanding paragraph (b), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:

(1) the lawyer or law firm discloses to the client in writing (i) that the client has a right under paragraph (b) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and

(2) if the flat fee exceeds $1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (c)(1) are set forth in a writing signed by the client.

[Existing subparagraph (c) would re-numbered (d)]

Proposed New Comment 4:

[4] Absent written disclosure and the client's agreement in a writing signed by the client as provided in paragraph (c), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account. Paragraph (c) does not apply to advance payment for costs and expenses. Paragraph (c) does not alter the lawyer's obligations under paragraph (d) or the lawyer's burden to establish that the fee has been earned.

[Existing comments [4] and [5] would be renumbered [5] and [6].]

References

Existing Texas DRPC 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 another 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.

Related Comment in Texas Rules:

. . .

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.

Compare Texas Rule to Newer rules in other jurisdictions:

Contracting for, and Use of Trust Account for Flat Fees

California Rules 1.5 (d) and (e)

(d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.

(e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.

Relevant Comments to the above Rule subsections:

Payment of Fees in Advance of Services

…

[2] Rule 1.15(a) and (b) govern whether a lawyer must deposit in a trust account a fee paid in advance.

[3] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. (See rule 1.16(e)(2).)

California Rules 1.15 (a) and (b)

(Rule Approved by the Supreme Court, Effective January 1, 2023)

(a) All funds received or held by a lawyer or law firm for the benefit of a client, or other person to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction.

(b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:

(1) the lawyer or law firm discloses to the client in writing (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and

(2) if the flat fee exceeds $1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing signed by the client.

Comments (related to above rule):

[3] Absent written disclosure and the client's agreement in a writing signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer's obligations under paragraph (d) or the lawyer's burden to establish that the fee has been earned.

MINNESOTA RULE 1.5(b) - incorporates retainer, flat fees, and non-refundability

. . .

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. Except as provided below, fee payments received by a lawyer before legal services have been rendered are presumed to be unearned and shall be held in a trust account pursuant to Rule 1.15.

(1) A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a written fee agreement signed by the client, a flat fee shall be considered to be the lawyer's property upon payment of the fee, subject to refund as described in Rule 1.5(b)(3). Such a written fee agreement shall notify the client:

(i) of the nature and scope of the services to be provided;

(ii) of the total amount of the fee and the terms of payment;

(iii) that the fee will not be held in a trust account until earned;

(iv) that the client has the right to terminate the client-lawyer relationship; and

(v) that the client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided.

(2) *[Minnesota's definition of "retainer" -C.D.]*A lawyer may charge a fee to ensure the lawyer's availability to the client during a specified period or on a specified matter in addition to and apart from any compensation for legal services performed. Such an availability fee shall be reasonable in amount and communicated in a writing signed by the client. The writing shall clearly state that the fee is for availability only and that fees for legal services will be charged separately. An availability fee may be considered to be the lawyer's property upon payment of the fee, subject to refund in whole or in part should the lawyer not be available as promised.

(3) *[Prohibition against non-refundable fees]* Fee agreements may not describe any fee as nonrefundable or earned upon receipt but may describe the advance fee payment as the lawyer's property subject to refund. Whenever a client has paid a flat fee or an availability fee pursuant to Rule 1.5(b)(1) or (2) and the

lawyer-client relationship is terminated before the fee is fully earned, the lawyer shall refund to the client the unearned portion of the fee. If a client disputes the amount of the fee that has been earned, the lawyer shall take reasonable and prompt action to resolve the dispute.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON PROFESSIONAL REGULATION

REPORT TO THE HOUSE OF DELEGATES

REVISED RESOLUTION

RESOLVED, That the American Bar Association amends ABA Model Rule of Professional Conduct 1.16 and its Comments [1], [2], and [7] as follows (insertions underlined, deletions struck through):

Rule 1.16: Declining or Terminating Representation

(a) A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; ~~or~~

(3) the lawyer is discharged; or

(4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(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 is criminal or fraudulent;~~

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

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

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services 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) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. 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 payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] Paragraph (a) imposes an obligation on a lawyer to inquire into and assess the facts and circumstances of the representation before accepting it. The obligation imposed by Paragraph (a) continues throughout the representation. A change in the facts and circumstances relating to the representation may trigger a lawyer's need to make further inquiry and assessment. For example, a client traditionally uses a lawyer to acquire local real estate through the use of domestic limited liability companies, with financing from a local bank. The same client then asks the lawyer to create a multi-tier corporate structure, formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's

funding through the lawyer's trust account. Another example is when, during the course of a representation, a new party is named or a new entity becomes involved. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.1, 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules 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 make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Under paragraph (a)(4), the lawyer's inquiry into and assessment of the facts and circumstances will be informed by the risk that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. This analysis means that the required level of a lawyer's inquiry and assessment will vary for each client or prospective client, depending on the nature of the risk posed by each situation. Factors to be considered in determining the level of risk may include: (i) the identity of the client, such as whether the client is a natural person or an entity and, if an entity, the beneficial owners of that entity, (ii) the lawyer's experience and familiarity with the client, (iii) the nature of the requested legal services, (iv) the relevant jurisdictions involved in the representation (for example, whether a jurisdiction is considered at high risk for money laundering or terrorist financing), and (v) the identities of those depositing into or receiving funds from the lawyer's client trust account, or any other accounts in which client funds are held. For further guidance assessing risk, see, e.g., as amended or updated, Financial Action Task Force Guidance for a Risk-Based Approach for Legal Professionals, the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, A Lawyer's Guide to Detecting and Preventing Money Laundering (a collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe), the Organization for Economic Cooperation and Development (OECD) Due Diligence Guidance for Responsible Business Conduct, and the U.S. Department of Treasury Specially Designated Nationals and Blocked Persons List.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request 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. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. 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 appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some 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~~. 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. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses 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.

Assisting the Client upon Withdrawal

[9] 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. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

REVISED REPORT

Introduction

The Standing Committee on Ethics and Professional Responsibility (the "Ethics Committee") and the Standing Committee on Professional Regulation (the "Regulation Committee") propose amendments to the Black Letter and Comments to ABA Model Rule of Professional Conduct 1.16, Declining or Terminating Representation.

This Resolution constitutes another piece of the ABA's longstanding and ongoing efforts to help lawyers detect and prevent becoming involved in a client's unlawful activities and corruption, as described in this Report. In February 2023, the ABA House of Delegates adopted Resolution 704 proposed by the Working Group on Beneficial Ownership. Resolution 704 updates ABA policy on entities providing the federal government with information about the identity of the entity's beneficial owners. Resolution 704, like this Resolution, represents a compromise among those with diverse and strongly held views. This Resolution presents a balanced approach to ensuring that lawyers conduct inquiry and assessment ~~client due diligence~~ - appropriate to the circumstances - to detect and prevent involvement in unlawful activities and corruption.

The proposed amendments to the Black Letter clearly state for lawyers their ~~client due diligence~~ obligations to inquire about and assess the facts and circumstances when considering whether to undertake a representation and their ongoing obligations throughout the representation. The amendments further state that the lawyer must decline the representation or withdraw when the prospective client or client seeks to use or persists in using the lawyers' services to commit or further a crime or fraud after the lawyer has advised of the limitations on the lawyer's services.

These are not new obligations. Lawyers already perform these inquiries and assessments ~~client due diligence~~ every day to meet their ethical requirements. For example, they do so to identify and address conflicts of interests. They also do so to ensure they represent clients competently (Rule 1.1); to develop sufficient knowledge of the facts and the law to understand the client's objectives and to identify means to meet the client's lawful interests (Rule 1.2(a)); and, if necessary, to persuade the client not to pursue conduct that could lead to criminal liability or liability for fraud (Rule 1.2(d)).[1] Implicit duties – like unwritten rules – do not serve lawyers or the public well. Therefore, the Committees present these amendments to the Black Letter of Model Rule 1.16 from which both lawyers and the public will benefit.

In addition to the proposed changes to the Black Letter of Rule 1.16, proposed new language in Comment [1] elaborates on the duty to inquire about and assess the facts

[1] *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 463 (2013) & 491 (2020).

and circumstances of the representation. The Comment makes clear that the duty is one that continues throughout the course of the representation.[2]

New language proposed in Comment [2] explains that under new Black Letter paragraph (a)(4) of Rule 1.16, the scope of the lawyer's inquiry and assessment ~~client due diligence~~ is informed by the risk that the prospective client or current client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. The use of a risk-based inquiry and assessment of the facts and circumstances of each representation set forth in Comment [2] ensures that the scope and depth of the inquiry and assessment a lawyer must make will be based on the unique facts and circumstances presented by each client or prospective client. There is no "one-size-fits-all" ~~client due diligence~~ obligation. Proposed amendments to Comment [2] provide examples for lawyers to consider in assessing the level of risk posed to determine whether lawyers must decline the representation or withdraw from an ongoing representation.

While the impetus for these proposed amendments was lawyers' unwitting involvement in or failure to pay appropriate attention to signs or warnings of danger ("red flags") relating to a client's use of a lawyer's services to facilitate possible money laundering and terrorist financing activities, it is clear that lawyers' ~~client due diligence~~ existing obligations to inquire and assess apply broadly to all lawyers. The proposed amendments will help lawyers avoid entanglement in criminal, fraudulent, or other unlawful behavior by a client, including tax fraud, mortgage fraud, concealment from disclosure of assets in dissolution or bankruptcy proceedings, human trafficking and other human rights violations, violations of U.S. foreign policy sanctions and export controls, and U.S. national security violations.

In developing this Resolution, the Standing Committees on Ethics and Professional Responsibility and Professional Regulation circulated widely for comment, inside and outside the ABA, three Discussion Drafts of possible amendments to the Model Rules of Professional Conduct addressing ~~lawyers' client due diligence~~ these obligations. The Committees held four public roundtables to obtain testimony regarding the Discussion Drafts.[3] The Committees are grateful to all who commented. Their comments and testimony informed the substance of this Resolution and Report.[4]

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[2] GEOFFREY C. HAZARD JR., W. WILLIAM HODES & PETER R. JARVIS, LAW OF LAWYERING § 21.02 (4th ed. 2021) ("Rule 1.16 often plays a role *during* representation of a client as well. By focusing attention on situations in which the lawyer either may or must withdraw, it serves as a reminder to lawyers and clients alike that they must continually communicate with each other and monitor their relationship, to minimize the likelihood that such withdrawals will occur.").

[3] These meetings were held in February and August 2022 and February 2023.

[4] Comments received and recordings of the public roundtables are available on the Center for Professional Responsibility website for public viewing at: www.americanbar.org/groups/professional_responsibility/discussion-draft-of-possible-amendments-to-model-rules-of-profes/ (last visited Apr. 28, 2023).

Background

Concerns Underlying This Resolution

As noted, the impetus for this Resolution related to lawyers' unwitting involvement in money laundering and terrorist financing or their failure to pay appropriate attention to "red flags" relating to the proposed course of action by a client or prospective client. Money laundering occurs when criminals obscure the proceeds of unlawful activity (dirty money) using "laundering" transactions so that the money appears to be the "clean" proceeds of legal activity. Terrorist financing is just that, providing funds to those involved in terrorism.[5] The proceeds of money laundering are used to facilitate terrorism and other illegal activities, including human trafficking, drug trafficking, and violations of U.S. government sanctions.

Lawyers' services can be used for money laundering and other criminal and fraudulent activity. One common way to do so is by asking a lawyer to hold money in a client trust account pending completion of the purchase of real estate or equipment, or to fund another transaction. After a period of time, the client asks the lawyer to return the funds because the "transaction" has fallen apart. By holding money in a law firm trust account then disbursing the money back to the client when the transaction does not close, the money has been laundered through the lawyer's client trust account. Of course, more sophisticated means exist by which individuals seek to use lawyers' services to launder money, either with or without the lawyer's knowledge. It is illegal and unethical for lawyers to knowingly launder money, finance terrorism, or knowingly assist another in doing so. It is also unethical for a lawyer to ignore facts indicating a likelihood that the client intends to use the lawyer's services to assist the client in engaging in illegal or fraudulent conduct.

Domestic and international laws and regulations are designed to prevent, detect, and prosecute money laundering. Anti-money laundering and counter terrorism financing laws and regulations applicable to lawyers are a complex subject.[6] Generally, the issues can be divided into three overarching topics: (1) client due diligence; (2) disclosure of entity beneficial ownership information; and (3) suspicious activity reporting.

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[5] The U.S. Department of Treasury's 2018 National Money-Laundering Risk Assessment estimated that $300 billion is laundered every year in the U.S. alone, with that amount growing and methodologies of money-launderers ever evolving and becoming more sophisticated according to the Department's 2022 National Money-Laundering Risk Assessment. *See* U.S. DEPARTMENT OF THE TREASURY NATIONAL MONEY LAUNDERING RISK ASSESSMENT (2018), https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf and U.S. DEPARTMENT OF THE TREASURY NATIONAL MONEY LAUNDERING RISK ASSESSMENT (Feb. 2022), https://home.treasury.gov/system/files/136/2022-National-Money-Laundering-Risk-Assessment.pdf.

[6] Additional resources may be found at ABA TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, https://www.americanbar.org/groups/criminal_justice/gatekeeper/ (last visited Apr. 19, 2023); ABA GATEKEEPER REGULATIONS ON ATTORNEYS, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/ (last visited Apr. 19, 2023).

In the U.S., the primary anti-money laundering laws are the Bank Secrecy Act ("BSA") and the Money Laundering Control Act. The U.S. Department of Treasury created the Financial Crimes Enforcement Network ("FinCEN") to implement, administer, and enforce compliance with the BSA. Most recently, Congress enacted the Corporate Transparency Act ("CTA") to enhance the identification and disclosure of certain beneficial ownership information. The CTA is part of the Anti-Money Laundering Act of 2020, which is part of the National Defense Authorization Act for Fiscal Year 2021.[7]

Outside the U.S., the Financial Action Task Force ("FATF") is a powerful inter-governmental entity that coordinates efforts to prevent money laundering or terrorism financing among and between its member countries. The U.S. is a charter member of the FATF. The FATF exerts tremendous pressure on member countries, even though it has no "official" legislative or enforcement power. A primary way in which it does so is through its Mutual Evaluation Reports of countries' compliance with the FATF Recommendations.[8] The most recent Mutual Evaluation Report of the U.S. was in 2016, and the FATF found the US. noncompliant in four areas, including the lack of sufficient client due diligence by the legal profession and lack of enforceable obligations in that regard.[9]

The Organization for Economic Cooperation and Development ("OECD") is another international organization that has been active in this arena. The OECD is not a standard-setting entity like the FATF. While a primary focus of the OECD is fighting international tax evasion, it is supportive of the FATF's critiques of the legal and other professions on the subjects of money laundering and other white-collar crime.

These groups, along with U.S. and international governments, continue to focus in very public ways on lawyers as facilitators of money laundering, terrorism financing, and other related illegal and fraudulent conduct. They point to the 2016 FATF Report's recommendations, and events like the Paradise Papers, the Panama Papers, and the more recent Pandora Papers and FinCEN Files, as necessitating further and enforceable action by the legal profession.[10]

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[7] The full name of the NDAA is the WILLIAM M. (MAC) THORNBERRY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2021, Pub. L. No. 116-283 (H.R. 6395), *available at* https://www.congress.gov/116/plaws/publ283/PLAW-116publ283.pdf. 116th Cong. 2d Sess. Congress' override of the President's veto was taken in Record Vote No. 292 (Jan. 1, 2021). The CTA consists of §§ 6401-6403 of the NDAA. Section 6402 of the NDAA sets forth Congress' findings and objectives in passing the CTA and § 6403 contains its substantive provisions, primarily adding § 5336 to Title 31 of the United States Code.

[8] *See* THE FATF RECOMMENDATIONS, https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html (last visited Apr. 28, 2023).

[9] FATF UNITED STATES' MEASURES TO COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2016), https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-united-states-2016.html.

[10] *See, e.g.,* PARADISE PAPERS: SECRETS OF THE GLOBAL ELITE, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/paradise-papers/ (last visited Apr. 28, 2023); THE PANAMA PAPERS: EXPOSING THE ROGUE OFFSHORE FINANCE INDUSTRY, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/panama-papers/ (last visited Apr. 28, 2023); PANDORA PAPERS, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/pandora-papers/ (last visited Apr. 28, 2023); and FINCEN FILES,

The ABA has long supported state-based judicial regulation of lawyers and the practice of law and opposed federal legislative or executive branch efforts to regulate the practice of law at the federal level.[11] National and international concerns about lawyers unwitting involvement in client crimes like money laundering and terrorism finance greatly raise the risk of federal legislative and regulatory action.

The U.S. Congress has demonstrated its willingness to act in this regard. For example, initial versions of the Corporate Transparency Act ("CTA") would have required lawyers to disclose beneficial ownership information relating to their clients to the federal government, in contravention of their ethical obligations under ABA Model Rule 1.6. Additionally, various Members of Congress have sought enactment of the ENABLERS Act, which would have regulated many lawyers and law firms as "financial institutions" under the BSA.[12] Such regulation could require those lawyers and law firms to report to the federal government information protected by the attorney-client privilege or Model Rule 1.6 by requiring them to comply with some or all of the BSA's requirements for financial institutions, such as submitting Suspicious Activity Reports (SARs) on clients' financial transactions and establishing due diligence policies.[13]

To date, the ABA has successfully advocated against such incursion on the regulatory authority of state supreme courts. In response to concerns raised by the ABA and others, the sponsors of the final version of the CTA that became law omitted the language from previous versions of the bill that would have directly regulated lawyers. Therefore, the final version of the CTA passed by Congress in early 2021 only requires

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INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/fincen-files/ (last visited Apr.19, 2023).

[11] *See, e.g.*, COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY 2 (1992) [hereinafter MCKAY REPORT], *available at* http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html; AM. BAR ASS'N COMM'N ON MULTIJURISDICTIONAL PRACTICE REPORT TO THE HOUSE OF DELEGATES Report 201A (2002), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/201a.pdf; and JUDICIAL OVERSIGHT OF THE LEGAL PROFESSION, https://www.americanbar.org/advocacy/governmental_legislative_work/letters_testimony/independence/ (last visited Apr. 19, 2023).

[12] The original ENABLERS Act legislation, introduced on October 8, 2021, by Rep. Tom Malinowski (D-NJ) as H.R. 5525, is available at https://www.congress.gov/bill/117th-congress/house-bill/5525/text?s=1&r=1. A revised version of the ENABLERS Act, sponsored by Rep. Maxine Waters (D-CA) and included in the House-passed version of the FY 2023 National Defense Authorization Act (H.R. 7900) as Section 5401, is available at https://amendments-rules.house.gov/amendments/GATEKEEPERS_NDAA_xml%20v3220711190941114.pdf. A third version of the ENABLERS Act, sponsored by Sen. Sheldon Whitehouse (D-RI) and offered as an amendment to the Senate version of the FY 2023 National Defense Authorization Act (H.R. 7900 and S. 4543) as SA 6377, is available at https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/whitehouse-enablers-act-amendment-to-ndaa-september2022.pdf.

[13] *See* ABA URGES SENATORS TO OPPOSE ENABLERS ACT AMENDMENT TO DEFENSE AUTHORIZATION BILL, ABA WASHINGTON LETTER (Oct. 31, 2022), *available at* https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/oct22-wl/enablers-1022wl/.

"reporting companies"—not their lawyers or law firms—to report the companies' beneficial ownership information to the government.[14] Similarly, in response to objections by the ABA[15], numerous state and local bar associations, and many small business groups, Congress declined to include the ENABLERS Act in the final version of the FY 2023 National Defense Authorization Act (P.L. 117-263, H.R. 7776) or the FY 2023 Consolidated Appropriations Act (P.L. 117-328, H.R. 2617) that were signed into law in December 2022.

ABA Responses in the Context of the Model Rules of Professional Conduct

2013 Ethics Opinion

In 2013, the Ethics Committee issued ABA Formal Ethics Opinion 463 focusing on efforts to require U.S. lawyers to perform "gatekeeping" duties to protect the domestic and international financing system from criminal activity arising out of worldwide money-laundering and terrorism financing activities. Opinion 463 explained that "[i]t would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. . . . [16] An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold."[17]

2020 Ethics Opinion

In 2020, the Ethics Committee issued Formal Ethics Opinion 491 in response to ongoing concerns regarding lawyers' ~~client due diligence~~ obligations to inquire and assess. As explained in the Formal Opinion, a lawyer's duty to inquire into and assess the facts and circumstances of each representation is not new and is applicable before the representation begins and throughout the course of the representation. This obligation already is implicit in the following Rules:

- Rule 1.1 and the duty to provide competent representation. Comment [5] explains, "Competent handling of a particular matter requires inquiry into and analysis of the factual and legal elements of the problem."

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[14] *See* Corporate Transparency Act (CTA), available at H.R.6395 - 116th Congress (2019-2020): William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 | Congress.gov | Library of Congress (contained in Title LXIV of the National Defense Authorization Act for FY 2021, P.L. 116-283) (Jan. 1, 2021). Division F of the FY 2021 National Defense Authorization Act is the Anti-Money Laundering Act of 2020, which includes the CTA.

[15] *See* ABA letter to Senate leaders opposing the ENABLERS Act amendment to the FY 2023 National Defense Authorization Act and urging them not to include it in the final version of the legislation. Letter to Majority Leader Schumer, et al. re: Opposition to ENABLERS Act Amendment to the FY 2023 National Defense Authorization Act (H.R. 7900 and S. 4543) (Oct. 5, 2022), *available at* https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-letter-to-senate-leaders-opposing-enablers-act-amendment-to-ndaa-october52022.pdf.

[16] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 463 (2013).

[17] *Id.*

- Rule 1.2(d) and the prohibition against knowingly assisting a client in a crime or fraud.
- Rule 1.3 and the duty to be diligent which "requires that a lawyer ascertain the relevant facts and law in a timely and appropriately thorough manner."
- Rule 1.4 and the duty to communicate which requires "consultation with the client regarding 'any relevant limitation on the lawyer's conduct' arising from the client's expectation of assistance that is not permitted by the Rules of Professional Conduct or other law."
- Rule 1.13 which requires "further inquiry to clarify any ambiguity about who has authority and what the organization's priorities are."
- Rule 1.16(a) and the duty to withdraw when the representation will result in a violation of the law or the Rules.
- Rule 8.4(b) and (c) in the prohibition against committing a criminal act or engaging in dishonesty, fraud, deceit, or misrepresentation.

The Proposed Amendments to Model Rule 1.16 and Its Comments

After careful consideration over several years of concerns raised by ABA members and outside groups that the ABA Model Rules of Professional Conduct lacked sufficient clarity on lawyers' ~~client due diligence~~ obligations to inquire about and assess the facts and circumstances relating to a matter, the Committees concluded that Model Rule of Professional Conduct 1.16 should be amended to make explicit that which is already implicit.

Amendments to Paragraph (a)

The proposed amendments to the Black Letter of Rule 1.16(a) include a statement addressing the nature and scope of lawyers' inquiry and assessment ~~client due diligence~~ obligations when the lawyer is deciding whether to accept a representation, deciding whether to terminate the representation, and considering the matter throughout the course of a representation. The following statement is added to the beginning of Rule 1.16(a):

> A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation.

In addition to the proposed change to the Black Letter of Rule 1.16(a), new language in Comment [1] provides guidance on the duty to inquire about and assess the facts and circumstances of the representation. The addition to Comment [1] reads:

> Paragraph (a) imposes an obligation on a lawyer to inquire into and assess the facts and circumstances of the representation before accepting it. The obligation imposed by Paragraph (a) continues throughout the representation. For example, a client traditionally uses a lawyer to acquire

> local real estate through the use of domestic limited liability companies, with financing from a local bank. The same client then asks the lawyer to create a multi-tier corporate structure, formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's funding through the lawyer's trust account. Another example is when, during the course of a representation, a new party is named or a new entity becomes involved.

This additional language in Comment [1], that the obligation continues throughout the representation, helps lawyers understand that if changes in the facts and circumstances occur during a representation, lawyers must inquire and evaluate whether they can continue the representation. A new cross-reference to Model Rule 1.1 (Competence) also is added.

Creating a new provision for mandatory withdrawal in paragraph (a)(4)

Current Model Rule 1.16(a)(1) requires a lawyer to decline or withdraw from a representation if "the representation will result in violation of the Rules of Professional Conduct or other law."

Current Comment [2] explains: "A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules 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 make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation." Model Rule 1.4(a)(5), regarding communications obligations, explains that lawyers must consult with the client about any relevant limitation on the lawyer's conduct. Rule 1.2(d) tells lawyers that one of those limitations on what a lawyer may do is counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent.

But these statements appear in three different Rules and their respective Comments. As a result, lawyers must hunt for this guidance – that when a client suggests a course of conduct that is criminal, fraudulent, or otherwise illegal or violates the Rules, a lawyer must consult with the client about the limits of the lawyer's representation and that the lawyer is prohibited from engaging or assisting a client in a crime or fraud. After the conversation, if the client is not deterred from the suggested conduct, the lawyer must decline the representation or withdraw if already in the matter.

The Committees believe that lawyers deserve clear direction regarding inquiry about and assessing the facts and circumstances ~~conducting client due diligence~~, and have clear advice on what to do when concerns or questions arise about the scope, goals, and objectives of the representation. Therefore, the Committees recommend clarifying the Black Letter of Rule 1.16(a) to provide that the lawyer must decline or withdraw from the representation if:

(4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

Expanding the guidance provided in Comment [2]

New language proposed for Comment [2] explains that the lawyer's obligation to inquire and assess ~~client due diligence requirement~~ is informed by the risk that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. The use of a risk-based inquiry and assessment of the facts and circumstances of each representation set forth in Comment [2] ensures that the scope and depth of the inquiry and assessment a lawyer must perform will be based on the unique facts and circumstances presented by each client or prospective client. There is no "one-size-fits-all" ~~client due diligence~~ obligation, and this risk-based approach is the least burdensome for lawyers. The proposed amendments take a balanced approach to the issue.

To assist lawyers, new language in Comment [2] provides examples for lawyers to consider in assessing the level of risk posed to determine whether they must decline the representation or withdraw from an ongoing representation. This risk-based approach differs from a rules-based approach that requires compliance with every element of detailed laws, rules, or regulations irrespective of the underlying quantum or degree of risk. As noted in ABA Formal Ethics Opinion 463, implementing risk-based control measures helps a lawyer avoid being caught up in a client's illegal activities, while decreasing the burden on lawyers whose practice does not expose them to the problems sought to be addressed.

In addition to these exemplary factors, new language in Comment [2] provides lawyers with a range of additional resources to guide their inquiry and assessment. For example, the new language references the 2010 ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, which provides excellent practice examples that help lawyers using the risk-based approach better identify situations that should be considered "red flags" and provides "practice pointers" to offer further insight.

The U.S. Department of Treasury's Specially Designated Nationals and Blocked Persons List is another sample resource to assist lawyers in conducting their inquiry and assessment ~~due diligence~~, which is comprised of "individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists

individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific."[18]

~~**Deleting permissive withdrawal under (b)(2) and applicable guidance in Comment [7]**~~

~~The recommended amendments to Model Rule 1.16(a) and the creation of Model Rule 1.16(a)(4) on mandatory withdrawal make the provisions on permissive withdrawal under Rule 1.16(b)(2) unnecessary for two reasons. Therefore, the Committees recommend deleting Model Rule of Professional Conduct 1.16(b)(2) and its corresponding guidance in Comment [7].~~

~~Current Model Rule 1.16(b)(2) provides that a lawyer may withdraw from the representation if the client "persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." With the addition of the now explicit duty to conduct a risk based inquiry and assessment, the lawyer who reasonably believes that a client seeks to use or is using the lawyer's services to commit or further a crime or fraud will have the facts necessary to decide whether withdrawal is mandatory under new paragraph (a)(4). Therefore, paragraph (b)(2) is no longer necessary.~~

~~Additionally, deleting the permissive withdrawal under current Rule 1.16(b)(2) does not remove the option for a lawyer to withdraw from a representation. This is true because Model Rule 1.16(b)(4) allows a lawyer to withdraw when the client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement" or because Model Rule 1.16(b)(7) allows the lawyer to withdraw "when other good cause for withdrawal exists." Both exceptions can be used by lawyers who withdraw from the representation when the client "persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." Therefore, paragraph (b)(2) is no longer necessary.~~

Conclusion

The proposed changes to Model Rule 1.16 will benefit lawyers and the public by making explicit the nature and scope of lawyers' existing ~~client due diligence~~ obligations to inquire about and assess the facts and circumstances regarding a matter in the enforceable Black Letter of the Rule. Doing so will help lawyers avoid unwittingly becoming involved in clients' criminal and fraudulent conduct and will help them better identify and respond to "red flags." In doing so, this Resolution also will demonstrate to the U.S. Government, entities like the FATF, and the public that the profession takes seriously its obligations to ~~perform client due diligence to~~ avoid becoming involved in a client's criminal and fraudulent conduct, including money laundering, terrorist financing,

[18] *See* OFFICE OF FOREIGN ASSETS CONTROL, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST (SDN) HUMAN READABLE LISTS (last updated Apr. 27, 2023), https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists.

human trafficking and human rights violations, tax related crimes, sanctions evasion, and other illicit activity.

The ABA Standing Committees on Ethics and Professional Responsibility and Professional Regulation respectfully request that the House of Delegates approve this Resolution to amend the Black Letter of Model Rule 1.16 and its Comments.

Respectfully submitted,

Lynda C. Shely, Chair
ABA Standing Committee on Ethics
and Professional Responsibility

Justice Daniel J. Crothers, Chair
ABA Standing Committee on
Professional Regulation

August 2023

AMERICAN BAR ASSOCIATION
Center for Professional Responsibility

To: ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Individuals, and Entities

From: Lynda C. Shely, Chair
ABA Standing Committee on Ethics and Professional Responsibility

Justice Daniel J. Crothers, Chair
ABA Standing Committee on Professional Regulation

Re: For Comment: Discussion Draft of Possible Amendments to Model Rules of Professional Conduct Concerning Lawyers' Client Due Diligence Obligations

Date: December 15, 2021

Introduction

The American Bar Association's policies, advocacy, and educational efforts have long supported a balanced and necessary domestic and international effort to combat money laundering and counter financing of terrorism.[1] The ABA has advanced and, when appropriate, proposed new or amended policies to create robust anti-money laundering and counter terrorism financing mechanisms that are consistent with lawyers' ethical responsibilities to their clients and that maintain primary state-based judicial regulation of the legal profession in the U.S.[2]

[1] In 2002, the ABA Board of Governors created the ABA Task Force on Gatekeeper Regulation and the Profession (ABA Task Force) to study money laundering and terrorism financing risks in the legal profession and related subjects, and to help coordinate the ABA's response to these challenges. The Task Force was sunsetted at the 2021 ABA Annual Meeting.

[2] For example, the Task Force developed two policies adopted by the ABA House of Delegates in 2003 and 2008 expressing support for reasonable and balanced, risk-based measures to combat money laundering and terrorism financing while opposing any law or regulation that would undermine the authority of state supreme courts to regulate the legal profession, the confidential client-lawyer relationship (including Model Rule of Professional Conduct 1.6), and the attorney-client privilege. *See* ABA TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, RESOLUTION & REPORT 104 (Feb. 2003), *available at* https://www.americanbar.org/content/dam/aba/directories/policy/2003_my_104.authcheckdam.pdf; ABA RECOMMENDATION 300 (Aug. 11-12, 2008), *available at* https://www.americanbar.org/content/dam/aba/directories/policy/annual-2008/2008_am_300.pdf. *See also* ABA VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2010), *available at* https://www.americanbar.org/content/dam/aba/directories/policy/annual-2010/2010_am_116.pdf.

Anti-money laundering and counter terrorism financing regulations applicable to lawyers is a complex subject.[3] The primary issues surrounding this subject generally can be divided into three overarching topics: (1) client due diligence; (2) disclosure of beneficial ownership information; and (3) suspicious activity reporting. The requests for comment on this Discussion Draft by the Standing Committee on Ethics and Professional Responsibility and Standing Committee on Professional Regulation are focusing on the lawyers' client due diligence obligations under the ABA Model Rules of Professional Conduct (Model Rules).

Below we provide further information regarding proposed amendments to several Model Rule Comments and ask specific questions about those proposals. Written comments should be submitted to Natalia Vera, ABA Center for Professional Responsibility Senior Paralegal at natalia.vera@americanbar.org by February 15, 2022. Written comments may be posted online.

The Committees will hold a public roundtable on February 11, 2022, in Seattle in conjunction with the ABA Midyear Meeting. That roundtable will take place from 1:30 p.m. to 3:30 p.m. Pacific Standard Time at the Grand Hyatt Seattle, 721 Pine Street (room location forthcoming in January 2022).

Background on Anti-Money Laundering & Terrorism Finance Regulation

Money laundering occurs when criminals hide the proceeds of unlawful activity (dirty money) using "laundering" transactions so that the money appears to be the "clean" proceeds of legal activity. Money laundering often occurs with the knowing and unknowing assistance of others. Terrorism financing is just that, providing funds to those involved in terrorism. Money laundering is often used to facilitate financing of terrorism. The U.S. Department of Treasury's 2018 National Money-Laundering Risk Assessment estimates that $300 billion is laundered every year in the U.S. alone.

Lawyers' services can be used by criminals for money laundering, with or without the knowledge of those lawyers. One common way criminals use lawyers to launder money is by asking a lawyer to hold money in a client trust account pending completion of the purchase of real estate, equipment, or another transaction. After a period of time, the client asks the lawyer to return the funds because the "transaction" has fallen apart. Upon return of the money to the client, the money has been laundered through the lawyer's client trust account. Of course, more sophisticated means exist by which individuals seek to use lawyers' services to launder money. It is equally illegal and unethical for lawyers to knowingly launder money, finance terrorism, or knowingly assist another in doing so.

Domestic and international laws and regulations are designed to prevent, detect, and prosecute money laundering. For decades, U.S. and international governments, and international anti-money

[3] Additional resources may be found at ABA TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, https://www.americanbar.org/groups/criminal_justice/gatekeeper/ (last visited Dec. 14, 2021); ABA GATEKEEPER REGULATIONS ON ATTORNEYS, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/ (last visited Dec. 14, 2021).

laundering (AML) and counter terrorism financing organizations, have focused on lawyers as enablers of money laundering and terrorism financing. They include lawyers among those identified as "gatekeepers" because lawyers are a Designated Non-Financial Business and Profession (along with accountants, casinos, real estate agents, and dealers in precious metals and stones).[4] The "gatekeepers" control, to some extent, access to the world's monetary systems.

In the U.S., the primary AML laws are the Bank Secrecy Act and the Money Laundering Control Act. The Money Laundering Control Act made money laundering a federal crime. The Bank Secrecy Act requires U.S. financial institutions to help U.S. government agencies detect and prevent money laundering. This occurs in several ways, including requiring financial institutions to report and keep records of certain cash transactions, and to report other suspicious activity often involved in money laundering, tax evasion, or other crimes. The U.S. Department of Treasury created the Financial Crimes Enforcement Network (FinCEN) to implement, administer, and enforce compliance with the Bank Secrecy Act.

The USA PATRIOT Act also made financing of terrorism a federal crime, amended the Bank Secrecy Act, and authorized the Treasury Department to issue rules governing financial institutions' AML regimes. Most recently, Congress enacted the Corporate Transparency Act to enhance the identification and disclosure of certain beneficial ownership information.

Many of the federal AML legislation and regulations have, at some point, sought to cover lawyers. However, subjecting lawyers to the client due diligence requirements (current or future) of these federal regulations would conflict with a lawyers' obligations under Model Rule 1.6, the attorney-client privilege, and the ABA's longstanding policy supporting state-based regulation of the legal profession. The ABA has thus far successfully advocated to ensure the legal profession is not, generally, subject to such federal legislation, rules, and regulations.

Outside the U.S., the Financial Action Task Force (FATF) is a powerful international entity that coordinates efforts to prevent money laundering or terrorism financing among and between its member countries. The U.S. is a charter member of the FATF. After the September 11, 2001, terrorist attacks the FATF expanded its mandate to counter terrorism financing activities. The FATF is a highly influential intergovernmental body because of the tremendous peer pressure it exerts, even though it has no "official" legislative or enforcement power. The Organization for Economic Cooperation and Development is another international entity focusing efforts on preventing global corruption, money laundering, and terrorism financing. It pairs its work in this area with the FATF.

At the heart of FATF's effort to combat money laundering and financing of terrorism is a set of forty recommendations.[5] The Forty Recommendations are the global standards for combating money laundering and the financing of terrorism. To help implement the Forty Recommendations, the FATF developed a methodology called the Risk Based Approach (RBA) for detecting and

[4] *See* FINANCIAL ACTION TASK FORCE DESIGNATED CATEGORIES OF OFFENCES, https://www.fatf-gafi.org/glossary/d-i/ (last visited Dec. 14, 2021).
[5] *See* THE FATF RECOMMENDATIONS, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION (Oct. 2021), https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html.

preventing money laundering and financing of terrorism. The RBA concept quite simply focuses the most attention and resources on activities that pose the greatest risks of money laundering and terrorism financing.

The FATF's 2008 Guidance for the Legal Profession, updated in 2019,[6] provides factors lawyers should consider when developing a risk-based system to help avoid money laundering and terrorism financing risks, including client due diligence. In 2010, the ABA adopted its Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering to help lawyers better understand the RBA and the 2008 Guidance.[7] The ABA Voluntary Good Practices Guidance (ABA Good Practices Guidance) provides lawyers with practice pointers for implementing an RBA and includes a suggested protocol for client intake.

In 2013, the ABA Standing Committee on Ethics and Professional Regulation (Ethics Committee) issued ABA Formal Ethics Opinion 463 addressing efforts to require U.S. lawyers to perform "gatekeeping" duties to protect the international financing system from criminal activity arising out of worldwide money-laundering and terrorism financing activities. Addressing client due diligence activities in the context of the Model Rules of Professional Conduct, Opinion 463 provided guidance reinforcing a lawyer's "duty to investigate in appropriate circumstances." Opinion 463 explained that "[i]t would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. . . . [P]ursuant to a lawyer's ethical obligation to act competently, a duty to inquire further may also arise. An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold."

In 2016, the FATF issued a Mutual Evaluation Report assessing U.S. compliance with the FATF Recommendations.[8] The FATF found the U.S. noncompliant in four areas and recommended that Designated Non-Financial Businesses and Professions, including lawyers, be subject to requirements of the Bank Secrecy Act and the USA PATRIOT Act. Coverage under those Acts would have required lawyers to perform "customer" due diligence and report suspicious activity by their clients. While acknowledging that the ABA Good Practices Guidance and Formal Ethics Opinion 463 demonstrated an understanding of money laundering and terrorism financing risks, the FATF Report questioned the efficacy of both due to the lack of enforceable obligations for failure to comply with the ABA Good Practices Guidance.

In 2020, the Ethics Committee issued Formal Ethics Opinion 491 in response to continued concerns regarding lawyers' client due diligence obligations. Opinion 491 interpreted ABA Model Rule of Professional Conduct 1.2(d). The Opinion reiterated that "knowledge" under Rule 1.2(d) may be inferred from the circumstances. The Ethics Committee also explained that Rule 1.2(d) (stating that a lawyer "shall not engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent") and Model Rule 1.1 (requiring that a lawyer "provide competent

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[6] *See* FATF GUIDANCE FOR A RISK-BASED APPROACH GUIDANCE FOR LEGAL PROFESSIONALS (2019), https://www.fatf-gafi.org/publications/fatfrecommendations/documents/rba-legal-professionals.html.
[7] *Supra* note 2.
[8] *See* FATF UNITED STATES' MEASURES TO COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2016), https://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-united-states-2016.html.

representation to a client") together require that a lawyer "who has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity … Failure to make a reasonable inquiry is willful blindness punishable under the actual knowledge standard of the Rule."

The Ethics Committee noted in Opinion 491 that "even where Rule 1.2(d) does not require further inquiry, other Rules may. These Rules include the duty of competence under Rule 1.1, the duty of diligence under Rule 1.3, the duty of communication under Rule 1.4, the duty to protect the best interests of an organizational client under Rule 1.13, the duties of honesty and integrity under Rules 8.4(b) and (c), and the duty to withdraw under Rule 1.16(a)."

Despite the ABA Good Practices Guidance, the Ethics Opinions, and the current text of the black letter and Comments to the Model Rules, the FATF, U.S. Government (including the Department of Treasury), and others continue to urge that the legal profession create an enforceable client due diligence obligation in the Model Rules. They point to the 2016 FATF Report's recommendations, and events like the Paradise Papers, the Panama Papers, the 60 Minutes-Global Witness exposé, and the Pandora Papers, as necessitating further action by the legal profession. They argue the failure of the profession to act will result in increased federal legislative and regulatory action. To address these concerns about enforceable lawyer client due diligence obligations, the Ethics and ABA Standing Committee on Professional Regulation (Regulation Committee) developed possible amendments to the Model Rules.

Possible Amendments to the Model Rules of Professional Conduct

ABA Formal Ethics Opinions 463 and 491 concluded the Model Rules, as currently written, create an enforceable duty to inquire of a client when risk factors are present like those discussed in the Voluntary Good Practices. Based on the Opinions, the Ethics and Regulation Committees determined the black letter of the Model Rules of Professional Conduct did not need amending. Instead, the Committees focused on explaining the existing duties subject to disciplinary enforcement by proposing additional guidance in the Comments to Model Rules 1.0, 1.1, and 1.2.

In addition to comments on the discussion draft generally, the Ethics and Professional Regulation Committees seek input on the specific questions referenced below.

Amendments to Comments of Model Rule 1.0

The Ethics and Regulation Committees propose adding a new Comment to Model Rule 1.0. The Comment will provide enhanced guidance regarding the statement in the black letter of Rule 1.0(f) that a person's knowledge may be inferred from the circumstances:

[11] A lawyer's knowledge may be derived from the lawyer's direct observation, credible information provided by others, reasonable factual inferences, or other circumstances. For purposes of these Rules, a lawyer who ignores or consciously avoids obvious relevant facts may be found to have knowledge of those facts.

Specific Questions to Supplement General Comments:

1. Are both "ignores" and "consciously avoids" necessary in the explanation or is "consciously avoids" sufficient? Please explain why or why not.

2. Does the suggested new Comment benefit by the inclusion of the modifier "obvious" before "relevant facts"? Please explain why or why not. Other Model Rule Comments have used the word "obvious." For example, Comment [3] to Model Rule 1.13 states, in part, "As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious." Comment [8] to Model Rule 4.2 explains, "As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious." Finally Comment [8] to Rule 3.3 reads: "The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood."

Amendments to Comments of Model Rule 1.1

Based on Formal Ethics Opinion 491, the Committees suggest additional guidance in the Comments of Model Rule 1.1 would be helpful. The Committees seek comments on whether the following language should be added to what is now Comment [5]:

The duty of competence requires that a lawyer make a reasonable inquiry into the facts and decline or terminate the representation when the lawyer has reason to believe that the client seeks the lawyer's services in criminal or fraudulent activity. A lawyer may not knowingly assist in criminal or fraudulent activity and should discourage a client from engaging in such activity, but the lawyer may offer to assist in achieving the client's lawful objectives by lawful means. In some circumstances, competent representation may require verifying, or inquiring into, facts provided by the client. Ignoring or consciously avoiding obvious relevant facts, or failure to inquire when warranted, may violate the duty of competence. See Rules 1.0(f) and 1.2(d), Comment [10].

Specific Question to Supplement General Comments:

1. Does this suggested new Comment language provide adequate guidance, and if not please explain what else would be helpful.

Amendments to Committee of Model Rule 1.2

The Committees suggest modifying the Comments to Model Rule 1.2 as follows by adding the following:

Rule 1.2(d) prohibits a lawyer from assisting a client in conduct the lawyer knows is criminal or fraudulent. Rule 1.16(a) creates a duty to decline or withdraw from representation if the representation will result in violation of the rules of professional conduct or other law.

When a lawyer has reason to believe that the client seeks the lawyer's assistance in criminal or fraudulent activity, the lawyer should conduct a reasonable inquiry to avoid assisting in that activity by the client. See Rule 1.1, Comment [5]. A lawyer's duty to undertake a reasonable inquiry may exist at the formation of, or arise during, the course of the representation.
To determine whether further inquiry is warranted regarding whether a client is seeking the lawyer's assistance in criminal or fraudulent activity, including money-laundering or terrorist financing, relevant considerations include: (i) the identity of the client, (ii) the lawyer's familiarity with the client, (iii) the nature of the requested legal services, and (iv) the relevant jurisdictions involved in the representation (when a jurisdiction is classified by credible sources as high risk for criminal or fraudulent activity). For further information, see ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing.

Specific Questions to Supplement General Comments:

1. Does this proposed Comment to Model Rule 1.2 provide adequate guidance, and if not please explain what else would be helpful.

2. Having read each of the suggested Comment amendments in this discussion draft, do you agree no changes to the black letter Model Rules are necessary? Please explain why or why not.

Formal Opinion 491 April 29, 2020

Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings

Model Rule 1.2(d) prohibits a lawyer from advising or assisting a client in conduct the lawyer "knows" is criminal or fraudulent. That knowledge may be inferred from the circumstances, including a lawyer's willful blindness to or conscious avoidance of facts. Accordingly, where facts known to the lawyer establish a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer has a duty to inquire further to avoid advising or assisting such activity. Even if information learned in the course of a preliminary interview or during a representation is insufficient to establish "knowledge" under Rule 1.2(d), other rules may require the lawyer to inquire further in order to help the client avoid crime or fraud, to avoid professional misconduct, and to advance the client's legitimate interests. These include the duties of competence, diligence, communication, and honesty under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the representation or withdraw under Rule 1.16. A lawyer's reasonable evaluation after inquiry and based on information reasonably available at the time does not violate the rules. This opinion does not address the application of these rules in the representation of a client or prospective client who requests legal services in connection with litigation. [1]

I. Introduction

In the wake of media reports,[2] disciplinary proceedings,[3] criminal prosecutions,[4] and reports on international counter-terrorism enforcement and efforts to combat money-laundering, the legal profession has become increasingly alert to the risk that a client or prospective client[5] might try to retain a lawyer for a transaction or other non-litigation matter that could be legitimate but which further inquiry would reveal to be criminal or fraudulent.[6] For example, a client might seek legal assistance for a series of purchases and sales of properties that will be used to launder money. Or a client might propose an all-cash deal in large amounts and ask that the proceeds be deposited in a bank located in a jurisdiction where transactions of this kind are commonly used to conceal terrorist financing or other illegal activities.[7] On the other hand, further inquiry may dispel the lawyer's concerns.

This opinion addresses a lawyer's obligation to inquire when faced with a client who may be seeking to use the lawyer's services in a transaction to commit a crime or fraud. Ascertaining whether a client seeks to use the lawyer's services for prohibited ends can be delicate. Clients are generally entitled to be believed rather than doubted, and in some contexts investigations can be both costly and time-consuming. At the same time, clients benefit greatly from having informed assistance of counsel. A lawyer's obligation to inquire when faced with circumstances addressed in this opinion is well-grounded in authority interpreting Rule 1.2(d) and in the rules on competence, diligence, communication, honesty, and withdrawal.

As set forth in Section II of this opinion, a lawyer who has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity under Rule 1.2(d). Failure to make a reasonable inquiry is willful blindness punishable under the actual knowledge standard of the Rule. Whether the facts known to the lawyer require further inquiry will depend on the circumstances. As discussed in Section III, even where Rule 1.2(d) does not require further inquiry, other Rules may.

These Rules include the duty of competence under Rule 1.1, the duty of diligence under Rule 1.3, the duty of communication under Rule 1.4, the duty to protect the best interests of an organizational client under Rule 1.13, the duties of honesty and integrity under Rules 8.4(b) and (c), and the duty to withdraw under Rule 1.16(a). Further inquiry under these Rules serves important ends. It ensures that the lawyer is in a position to provide the informed advice and assistance to which the client is entitled, that the representation will not result in professional misconduct, and that the representation will not involve counseling or assisting a crime or fraud. Section IV addresses a lawyer's obligations in responding to a client who either agrees or does not agree to provide information necessary to satisfy the duty to inquire. Finally, Section V examines hypothetical scenarios in which the duty to inquire would be triggered, as well as instances in which it would not.

II. The Duty to Inquire Under Rule 1.2(d)

Rule 1.2(d) states that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." A duty to inquire to avoid knowingly counseling or assisting a crime or fraud may arise under this Rule in two ways. First, Rule 1.0(f) states that to "know[]" means to have "actual knowledge of the fact in question." When facts already known to the lawyer are so strong as to constitute "actual knowledge" of criminal or fraudulent activity, the lawyer must "consult with the client regarding the limitations on the lawyer's conduct."[8] This consultation will ordinarily include inquiry into whether there is some misapprehension regarding the relevant facts. If there is no misunderstanding and the client persists, the lawyer must withdraw.[9]

In *In re Blatt*,[10] for example, the New Jersey Supreme Court disciplined a lawyer for participation in a real estate transaction where "*[o]n their face* the [transaction] documents suggest[ed] impropriety if not outright illegality."[11] Addressing the lawyer's duties, the court wrote:

A lawyer may not follow the directions of a client without first satisfying himself that the latter is seeking a legitimate and proper goal and intends to employ legal means to attain it. . . . The propriety of any proposed course of action must be initially considered by the attorney, and it may be thereafter pursued only if the lawyer is completely satisfied that it involves no ethical compromise. . . . [The lawyer's] duty, upon being requested to draft the aforementioned agreements, was to learn all the details of the proposed transaction. Only then, upon being satisfied that he had indeed learned all the facts, and that his client's proposed course of conduct was proper, would he have been at liberty to pursue the matter further.[12]

Additionally, if facts before the lawyer indicate a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, a lawyer's conscious, deliberate failure to inquire amounts to knowing assistance of criminal or fraudulent conduct. Rule 1.0(f) refers to "actual knowledge" and provides that "[a] person's knowledge may be inferred from circumstances." Substantial authority confirms that a lawyer may not ignore the obvious.[13]

The obligation to inquire is well established in ethics opinions. Nearly forty years ago, prior to the adoption of the Model Rules, *ABA Informal Opinion 1470* (1981) declared that "a lawyer should not undertake representation in disregard of facts *suggesting* that the representation might aid the client in perpetrating a fraud or otherwise committing a crime . . . . A lawyer cannot escape responsibility by avoiding inquiry. A lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct . . . ."[14]

Relying on *ABA Informal Opinion 1470*, the Legal Ethics Committee of the Indiana State Bar

Association concluded in 2001 that "[a] lawyer should not undertake representation without making further inquiry if the facts presented by a prospective client suggest that the representation might aid the client in perpetrating a fraud or otherwise committing a crime."[15] The opinion reasoned that an attorney asked to create a "new" sole power of attorney for a prospective client on behalf of her wealthy grandfather in matters concerning his estate has a duty to inquire further. The opinion emphasized the possibility that the granddaughter could fraudulently use the power of attorney to benefit herself rather than serve the interests of her grandfather, whom the attorney had not consulted, the possibility that the grandfather wouldnot wish to grant sole power of attorney to his granddaughter, and the possibility that the grandfather might lack the capacity to consent to such an arrangement (made likely by the fact that the lawyer's paralegal observed the grandfather's deteriorated condition). Thus, although it is possible that the granddaughter's representation of the facts was accurate and therefore consistent with Rule 1.2(d), "the fact that a proposed client in drafting a power of attorney was the agent and not a frail principal should have suggested to [the lawyer] the possibility that the client's real objective might be fraud. [The lawyer] then *had an ethical responsibility to find out whether the proposal was above-board* before performing the services. By failing to make further inquiry, [the lawyer] violated Rule 1.2."[16]

Similarly, New York City Ethics Opinion 2018-4 concluded that lawyers must inquire when "retained to assist an individual client in a transaction that appears to the lawyer to be suspicious."[17] The opinion explains that "[i]n general, assisting in a suspicious transaction is not competent where a reasonable lawyer prompted by serious doubts would have refrained from providing assistance or would have investigated to allay suspicions before rendering or continuing to render legal assistance. . . . What constitutes a suspicion sufficient to trigger inquiry will depend on the circumstances."[18] Failure to inquire may constitute "conscious avoidance" when, for example, "the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction."[19]

Courts imposing discipline are generally in accord. When a lawyer deliberately or consciously avoids knowledge that a client is or may be using the lawyer's services to further a crime or fraud, discipline is imposed.[20] Some courts have applied the even broader standard set out in Comment [13] to Rule 1.2, which requires a lawyer to consult with the client when the lawyer "comes to know or *reasonably should know* that [the] client expects assistance not permitted by the Rules of Professional Conduct . . . ." (Emphasis added.) For example, in *In re Dobson*,[21] the South Carolina Supreme Court identified facts showing that the lawyer "knew" or *"should have known*" that he was furthering a client's illegal scheme, and added, "[w]e also find that respondent *deliberately evaded* knowledge of facts which tended to implicate him in a fraudulent scheme. This Court will not countenance the conscious avoidance of one's ethical duties as an attorney."[22]

Criminal cases treat deliberate ignorance or willful blindness as equivalent to actual knowledge.[23] As the Supreme Court recently summarized:

The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. . . . [The Model Penal Code defines] "knowledge of the existence of a particular fact" to include a situation in which "a person is aware of a *high probability* of [the fact's] existence, unless he actually believes that it does not exist." Our Court has used the Code's definition as a guide . . . [a]nd every Court of Appeals—with the

possible exception of the District of Columbia Circuit—has fully embraced willful blindness, applying the doctrine to a wide range of criminal statutes.[24]

A lawyer may accordingly face criminal charges or civil liability, in addition to bar discipline, for deliberately or consciously avoiding knowledge that a client is or may be using the lawyer's services to further a crime or fraud.[25] To prevent these outcomes, a lawyer must inquire further when the facts before the lawyer create a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity.[26]

III. The Duty To Inquire Under Other Rules

Rule 1.2(d) is not the only source of a lawyer's duty to inquire. A lawyer may be obliged to inquire further in order to meet duties of competence, diligence, communication, honesty, and withdrawal under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. The kinds of facts and circumstances that would trigger a duty to inquire under these rules include, for example, (i) the identity of the client, (ii) the lawyer's familiarity with the client, (iii) the nature of the matter (particularly whether such matters are frequently associated with criminal or fraudulent activity), (iv) the relevant jurisdictions (especially whether any jurisdiction is classified as high risk by credible sources), (v) the likelihood and gravity of harm associated with the proposed activity, (vi) the nature and depth of the lawyer's expertise in the relevant field of practice, (vii) other facts going to the reasonableness of reposing trust in the client,[27] and (viii) any other factors traditionally associated with providing competent representation in the field.

First, Rule 8.4(b) makes it professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.” Rule 8.4(c) makes it professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Providing legal services could violate Rules 8.4(b) and (c) where the relevant law on criminal or fraudulent conduct defines the lawyer's state of mind as culpable even without proof of actual knowledge.[28] In such a situation, the lawyer must conduct further investigation to protect the client, advance the client's legitimate interests, and prevent the crime or fraud.

Second, and more broadly, the lawyer's duty of competence, diligence, and communication under Rules 1.1, 1.3, and 1.4 may require the lawyer, prior to advising or assisting in a course of action, to develop sufficient knowledge of the facts and the law to understand the client's objectives, identify means to meet the client's lawful interests, to probe further, and, if necessary, persuade the client not to pursue conduct that could lead to criminal liability or liability for fraud. Comment [5] of Rule 1.1 states that “[c]ompetent handling of a particular matter requires inquiry into and analysis of the factual and legal elements of the problem.”[29] The duty of diligence under Rule 1.3 requires that a lawyer ascertain the relevant facts and law in a timely and appropriately thorough manner.[30] Rule 1.4(a)(5), which requires consultation with the client regarding “any relevant limitation on the lawyer's conduct” arising from the client's expectation of assistance that is not permitted by the Rules of Professional Conduct or other law, may require investigation of the relevant facts and law. Rule 1.4(b) requires the lawyer to give the client explanations sufficient to enable the client to make informed decisions about the representation.

Rule 1.13 imposes a duty to inquire in entity representations. Rule 1.13(a) provides that a lawyer “employed or retained by the organization represents the organization acting through its duly authorized constituents.” Determining the interests of the organization will often require further inquiry to clarify any ambiguity about who has authority and what the organization's priorities are. Under Rule 1.13(b), once the lawyer learns of action, omission, or planned activity on the part of an “officer,

employee, or other person associated with the organization . . . that is a violation of a legal obligation to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interests of the organization." Even if the underlying facts regarding the violation or potential violation are already well established and require no additional inquiry, determining what is "reasonably necessary" and in the "best interest of the organization" will commonly involve additional communication and investigation.[31]

Recent ABA guidance and opinions support this approach. Concern that individuals might use the services of U.S. lawyers for money-laundering and terrorist financing prompted the ABA House of Delegates to adopt in 2010 the *ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* ("Good Practices Guidance"). The Good Practices Guidance advocates a "risk-based approach" to avoid assisting in money laundering or terrorist financing, according to guidelines developed by the Financial Action Task Force on Money Laundering ("FATF").[32] Recommended measures include "examining the nature of the legal work involved, and where the [client's] business is taking place. [33]

ABA Formal Opinion 463 addresses efforts to require U.S. lawyers to perform "gatekeeping" duties to protect the international financing system from criminal activity arising out of worldwide money-laundering and terrorist financing activities. Observing that "the Rules do not mandate that a lawyer perform a 'gatekeeper' role," especially in regards to "mandatory reporting" to public authorities "of suspicion about a client," Opinion 463 nevertheless identifies the Good Practices Guidance as a resource "consistent with the Model Rules" and with Informal Opinion 1470.[34] It also reinforces the duty to investigate in appropriate circumstances. Specifically, Opinion 463 states that "[i]t would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. . . . *[P]ursuant to a lawyer's ethical obligation to act competently, a duty to inquire further may also arise*. An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are *essential prerequisites* for accepting a new matter or continuing a representation as new facts unfold." [35]

A lawyer's reasonable judgment under the circumstances presented, especially the information known and reasonably available to the lawyer at the time, does not violate the rules. Nor should a lawyer be subject to discipline because a course of action, objectively reasonable at the time it was chosen, turned out to be wrong with hindsight.[36]

IV. Other Obligations Incident to the Duty to Inquire

If the client refuses to provide information or asks the lawyer not to evaluate the legality of a transaction the lawyer should explain to the client that the lawyer cannot undertake the representation unless an appropriate inquiry is made. If the client does not agree to provide information, then the lawyer must decline the representation or withdraw.[37] If the client agrees, but then temporizes and fails to provide the requested information, or provides incomplete information, the lawyer must remonstrate with the client. If that fails to rectify the information deficit, the lawyer must withdraw. Indeed, proceeding in a transaction without the requested information may, depending on the circumstances, be evidence of the lawyer's willful blindness under Rule 1.2(d).[38] If the client agrees, provides additional information, and the lawyer concludes that the requested services would amount to assisting in a crime or fraud, the lawyer must either discuss the matter further with the client, decline the representation, or seek to withdraw under Rule 1.16(a).[39]

In general, a lawyer should not assume that a client will be unresponsive to remonstration. However, if the client insists on proceeding with the proposed course of action despite the lawyer's remonstration, the lawyer must decline the representation or withdraw.[40] The lawyer may have discretion to disclose information relating to the representation under Model Rule 1.6(b)(1)-(3).[41]

If the lawyer needs information from sources other than the prospective client and can obtain that information without disclosing information protected by Rules 1.6 and 1.18, the information should be sought. If the lawyer needs to disclose protected information in order to analyze the transaction, the lawyer must seek the client's informed consent in advance. [42] If the client will not consent or the lawyer believes that seeking consent will lead to criminal or fraudulent activity, the lawyer must decline the representation or withdraw.[43]

If an inquiry would result in expenses that the client refuses to pay, the lawyer may choose to conduct the inquiry without payment or to decline or discontinue the representation.

Overall, as long as the lawyer conducts a reasonable inquiry, it is ordinarily proper to credit an otherwise trustworthy client where information gathered from other sources fails to resolve the issue, even if some doubt remains.[44] This conclusion may be reasonable in a variety of circumstances. For example, the lawyer may have represented the client in many other matters. The lawyer may know the client personally, professionally, or socially. The business arrangements and other individuals or parties involved in the transaction may be familiar to the lawyer.

Finally, Rule 1.2(c) permits a lawyer to “limit the scope of [a] representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Permitted scope limitations include, for example, that the client has limited but lawful objectives for the representation, or that certain available means to accomplish the client's objectives are too costly for the client or repugnant to the lawyer.[45] Any limitation, however, must “accord with the Rules of Professional Conduct and other law,” including the lawyer's duty to provide competent representation.[46] In the circumstances addressed by this opinion, a lawyer may not agree to exclude inquiry into the legality of the transaction.

V. Hypotheticals

The following hypotheticals are intended to clarify when circumstances might require further inquiry because of risk factors known to the lawyer. Some are drawn from the Good Practices Guidance, an important resource for transactional lawyers detailing how to conduct proper due diligence as well as how to identify and address risk factors in the most common scenarios in which a lawyer's assistance might be sought in criminal or fraudulent transactions.[47]

Further inquiry would be required in the first two examples because the combination of risk factors known to the lawyer creates a high probability that the client is engaged in criminal or fraudulent activity.

#1: A prospective client has significant business connections and interests abroad. The client has received substantial payments from sources other than his employer. The client holds these funds outside the US and wants to bring them into the US through a transaction that minimizes US tax liability. The client says: (i) he is “employed” outside the US but will not say how; (ii) the money is in a “foreign bank” in the name of a foreign corporation but the client will not identify the bank or the corporation; (iii) he has not disclosed the payments to his employer or any governmental authority or to

anyone else; and (iv) he has not included the amounts in his US income tax returns.[48]

#2: A prospective client tells a lawyer he is an agent for a minister or other government official from a "high risk" jurisdiction[49] who wishes to remain anonymous and would like to purchase an expensive property in the United States. The property would be owned through corporations that have undisclosed beneficial owners. The prospective client says that large amounts of money will be involved in the purchase but is vague about the source of the funds, or the funds appear to come from "questionable" sources.[50]

If, on the same facts as #2, the client assures the lawyer that information will be provided but does not follow through, the lawyer must either withdraw or again discuss with the client the need for the information to continue in the representation, seek an explanation for the delay, and withdraw if the explanation the client offers is unsatisfactory. If the information provided is incomplete — e.g., information that leaves the identity of the actual funding sources opaque — the lawyer must follow the same course: withdraw or again discuss with the client the need for the information to continue in the representation, seek an explanation for the delay, and withdraw if the explanation offered is unsatisfactory.[51]

In examples #3 through #5 below, the duty to inquire depends on contextual factors, most significantly, the lawyer's familiarity with the client and the jurisdiction.

#3: A general practitioner in rural North Dakota receives a call from a long-term client asking her to form a limited liability company for the purpose of buying a ranch.[52]

#4: The general practitioner in rural North Dakota receives a call from a new and unknown prospective client saying that the client just won several million dollars in Las Vegas and needs the lawyer to form a limited liability company to buy a ranch.[53]

#5: A prospective client in New York City asks a general practitioner in a mid-size town in rural Georgia to provide legal services for the acquisition of several farms in rural Georgia. The prospective client tells the lawyer that he has made a lot of money in hedge funds and now wants to diversify his investments by purchasing these farms but says he doesn't want his purchases to cause a wave of land speculation and artificially inflate local prices. He wants to wire money into the law firm's trust account over time for the purchases. He asks the lawyer to create a series of LLCs to make strategic (and apparently unrelated) acquisitions.[54]

VI. Conclusion

Model Rule 1.2(d) prohibits a lawyer from advising or assisting a client in a transaction or other non-litigation matter the lawyer "knows" is criminal or fraudulent. That knowledge may be inferred from the circumstances, including a lawyer's willful blindness or conscious disregard of available facts. Accordingly, where there is a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer must inquire further to avoid advising or assisting such activity. Even if information learned in the course of a preliminary interview or during a representation is insufficient to establish "knowledge" under Rule 1.2(d), other rules may require further inquiry to help the client avoid crime or fraud, to advance the client's legitimate interests, and to avoid professional misconduct. These include the duties of competence, diligence, communication, and honesty under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the

representation or withdraw under Rule 1.16. A lawyer's reasonable evaluation after that inquiry based on information reasonably available at the time does not violate the rules.

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2019. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] *See* Debra Cassens Weiss, *Group Goes Undercover at 13 Law Firms to Show How U.S. Laws Facilitate Anonymous Investment,* A.B.A. J. (Feb. 1, 2016), https://www.abajournal.com/news/article/group_goes_undercover_at_13_law_firms_to_show_how_us_laws_facilitate; *see also* Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. Times (Feb. 7, 2015), https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html.

[3] *In re* Albrecht, 42 P.3d 887, 898–900 (Or. 2002) (disbarment for assisting client in money laundering).

[4] *See, e.g.*, United States v. Farrell, 921 F.3d 116 (4th Cir. 2019) (affirming conviction for money laundering); United States v. Blair, 661 F.3d 755 (4th Cir. 2011) (same); Laura Ende, *Escrow, Money Laundering Cases Draw Attention to the Perils of Handling Client Money*, State Bar of Cal. (Feb. 2017), http://www.calbarjournal.com/February2017/TopHeadlines/TH1.aspx (lawyer sentenced “to five years in prison after being convicted of felonies related to a money laundering scheme”).

[5] “Client” refers hereinafter to “client and prospective client” unless otherwise indicated.

[6] Hereinafter, “transaction” refers both to transactions and other non-litigation matters unless otherwise indicated. This opinion does not address the application of rules triggering a duty to inquire where a client requests legal services in connection with litigation. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981), discusses how a lawyer *not* involved in the past misconduct of a client should handle the circumstance of a proposed transaction arising from or relating to the past misconduct.

[7] *See* Am. Bar Ass'n Task Force on Gatekeeper Regulation and the Profession, Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing 15–16 (2010) [hereinafter Good Practices Guidance] (describing institutions, such as the United Nations, the World Bank, the International Monetary Fund, and the U.S. Department of State, believed to be “credible sources” for information regarding risks in different jurisdictions); *id.* at 24 (noting the “higher risk situation” when a client offers to pay in cash).

[8] Model Rules of Prof'l Conduct R. 1.2 cmt. [13] [hereinafter Model Rules].

[9] *See* Model Rules R. 1.16(a)(1); Section IV, *infra*. Rule 1.2(d) nevertheless permits a lawyer to “discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

[10] 324 A.2d 15 (N.J. 1974).

[11] *Id.* at 18 (emphasis added).

[12] *Id.* at 18–19; *see also In re* Evans, 759 N.E.2d 1064 (Ind. 2001) (mem.) (three-year suspension for filing fraudulent federal tax returns knowingly misrepresenting sale proceeds from real estate transaction); *In re* Harlow, *2004 WL 5215045*, at *2 (Mass. State Bar Disciplinary Bd. 2004) (suspending lawyer for violation of 1.2(d) for assisting client in knowing manipulation of state licensing agency's escrow account requirements); State *ex rel.* Counsel for Discipline of Nebraska Supreme Court v. Mills, 671 N.W.2d 765 (Neb. 2003) (two-year suspension for participating in illegal scheme to avoid estate taxes by knowingly

backdating and preparing false documents); *accord* N.C. State Bar, Formal Op. 12, *2001 WL 1949450* (2001).

[13] In the words of Charles Wolfram, "as in the criminal law, a lawyer's studied ignorance of a readily ascertainable fact by consciously avoiding it is the functional equivalent of knowledge of the fact. . . . As a lawyer, one may not avoid the bright light of a clear fact by averting one's eyes or turning one's back." Charles W. Wolfram, Modern Legal Ethics 696 (1986); *see also* Ellen J. Bennett & Helen W. Gunnarsson, Annotated Model Rules of Professional Conduct 47 (9th ed. 2019) ("[a] lawyer's assistance in unlawful conduct is not excused by a failure to inquire into the client's objectives"); *id.* (gathering cases).

[14] ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981) (emphasis added) (interpreting the analogous ABA Model Code provision 7-102(A)(7), which provides that a lawyer must not "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent").

[15] Ind. State Bar Ass'n Comm. on Legal Ethics, Op. 2, at 4 (2001).

[16] *Id.* at 4 (emphasis added). The Opinion reaches the same conclusion if the grandfather is considered to be the true client. *Id.* at 6–7. *Accord* N.C. State Bar Ass'n, Formal Op. 7 (2003).

[17] N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4, at 2 (2018); *see also* Conn. Bar Ass'n Standing Comm. on Prof'l Ethics, Informal Op. 91-22 (1991).

[18] N.Y.C Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4, at 3 (2018).

[19] *Id.* Hypotheticals in Section V of this opinion, *infra*, identify circumstances that should prompt further inquiry.

[20] *See In re* Bloom, 745 P.2d 61 (Cal. 1987) (affirming disbarment of lawyer who assisted client in sale and transport of explosives to Libya; categorically rejecting lawyer's defense that he believed in good faith that transaction was authorized by national security officials); *In re* Albrecht, 42 P.3d 887, 898–99 (Or. 2002) ("suspicious nature" of transactions, combined with other facts, support inference that lawyer must have known his participation in scheme constituted money laundering; upholding disbarment for knowingly assisting crime or fraud and rejecting defense that lawyer was "an unwitting dupe to a talented con man"); *see also* Ellen Bennett & Helen Gunnarsson, Annotated Model Rules of Professional Conduct 47 (9th ed.) ("[a] lawyer's assistance in unlawful conduct is not excused by a failure to inquire into the client's objectives"). *But see* Iowa Supreme Court Att'y Disciplinary Bd. v. Ouderkirk, 845 N.W. 2d 31, 45–48 (Iowa 2014) (declining to infer knowledge of client's fraud despite what disciplinary counsel argued were "highly suspicious" circumstances where sophisticated, longstanding client who typically relied on the lawyer exclusively to prepare final paperwork deceived the lawyer about a fraudulent transfer to avoid creditors).

[21] 427 S.E.2d 166 (S.C. 1993).

[22] *Id.* at 427 (emphasis added); *see also* Florida Bar v. Brown, 790 So.2d 1081, 1088 (Fla. 2001) (suspension for soliciting illegal campaign contributions from employees and others for political candidates viewed as favorable to business interests of major client of firm; lawyer "should have known" conduct was criminal or fraudulent under Florida version of Rule 1.2(d) which expressly incorporates this standard); *In re* Siegel, 471 N.Y.S. 2d 591, 592 (N.Y. App. Div. 1984) (attorney "knew *or should have known* that at the very least, his conduct was a breach of trust, if not illegal") (emphasis added). Other jurisdictions have rejected a negligence standard for Rule 1.2(d). *See In re* Tocco, 984 P.2d 539, 543 (Ariz. 1999) (en banc) (declining to read a should have known standard into Arizona Rule 1.2(d); "While actual knowledge can be proven by circumstantial evidence, a mere showing that the attorney reasonably *should have known* her conduct was in violation of the rules, without more, is insufficient."); *accord* Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Jones, 606 N.W.2d 5, 7–8 (Iowa 2000).

The Committee acknowledges the tension between the "actual knowledge" standard of Model Rule 1.2(d), on the one hand, and those authorities applying a reasonably should know standard. This opinion concludes only that the standard of actual knowledge set out in the text of Model Rules 1.2(d) and 1.0(f) is met by appropriate evidence of willful blindness. When the Model Rules intend a lower threshold of scienter, such as "reasonably should know," the text generally makes this explicit. *See, e.g.*, Model Rules R. 2.3(b), 2.4(b), 4.3.

[23] United States v. Ramsey, 785 F.2d 184, 189 (7th Cir. 1986) ("[A]ctual knowledge and deliberate avoidance of knowledge are the same thing.").

[24] Global-Tech Appliances, Inc. v. SEB USA, 563 U.S. 754, 767 (2011) (emphasis added) (citations omitted) (applying willful blindness standard to statute prohibiting knowing inducement of patent infringement).

[25] *See* United States v. Cavin, 39 F.3d 1299, 1310 (5th Cir. 1994) (upholding deliberate ignorance jury instruction in prosecution of a lawyer); United States v. Scott, 37 F.3d 1564, 1578 (10th Cir. 1994) (affirming use of deliberate ignorance instruction against an attorney convicted of conspiracy to defraud the IRS); Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 590 (9th Cir. 1983) (upholding deliberate ignorance finding against law firm in antitrust suit because firm was aware of high probability that client made illegal payments and failed to investigate); United States v. Benjamin, 328 F.2d 854, 862 (2d Cir. 1964) (a lawyer may be held liable in a securities fraud suit if the lawyer has "deliberately closed his eyes to the facts he had a duty to see"); Harrell v. Crystal, 611 N.E. 2d 908, 914 (Ohio Ct. App. 1992) (affirming finding of liability in malpractice action for lawyer's failure to investigate sham tax shelters); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2003-104 (2003) (where facts suggested property transfer to client from relative was to conceal assets from creditors, lawyer handling sale of property to a third party "must evaluate whether the transfer of realty to your client was 'fraudulent'" under state law); *cf.* Restatement (Third) of the Law Governing Lawyers § 94, Reporter's Note, cmt. g. at 17 (Am. Law Inst. 2000) ("the preferable rule is that proof of a lawyer's conscious disregard of facts is relevant evidence which, together with other evidence bearing on the question, may warrant a finding of actual knowledge").

[26] As the authorities and analysis in this Section make clear, the duty to inquire under Model Rule 1.2(d) is tied to the circumstances and the lawyer's state of knowledge. It is *not* a freestanding, blanket obligation to scrutinize every client for illicit ends irrespective of the nature of the specific matter and the attorney-client relationship. *See* United States v. Sarantos, 455 F.2d 877, 881 (2d Cir. 1972) ("Construing 'knowingly' in a criminal statute to include willful blindness . . . is no radical concept in the law," but the standard does not mean that an attorney has a general duty to "investigate 'the truth of his client's assertions' or risk going to jail"; upholding criminal conviction of lawyer who actively aided in immigration related marriage fraud); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2001-26 ("*Generally*, a lawyer has no obligation to inquire or otherwise uncover facts that are not necessary to enable the lawyer to fulfill his or her obligations with respect to the representation"; warning nevertheless that Rule 1.2(d) applies to filing of worker's compensation claims and leaving attorney to determine relevance of client's fatal condition to client's specific claim) (emphasis added). However, the Committee rejects the view that the actual knowledge standard of Rule 1.2(d) relieves the lawyer of a duty to inquire further where the lawyer is aware of facts creating a high probability that the representation would further a crime or fraud. *Cf.* Restatement (Third) of the Law Governing Lawyers § 94 cmt. g. at 11 ("Under the actual knowledge standard . . . a lawyer is not required to make a particular kind of investigation in order to ascertain more clearly what the facts are, although it will often be prudent for the lawyer to do so."); *id.* § 51 cmt. h., ill. 6 at 366; George M. Cohen, *The State of Lawyer Knowledge Under the Model Rules of Professional Conduct*, 3 Am. U. Bus. L. Rev. 115, 116 (2014) (discussing association of willful blindness with recklessness, without citing to *Global-Tech Appliances*, and analyzing assumption that "the actual knowledge standard aims to exclude a duty to inquire").

[27] For facts that can undermine the reasonableness of reposing trust, see the discussion of "risk categories" provided by the Good Practices Guidance, supra note 7, at 15–36.

[28] *See In re* Berman, 769 P.2d 984, 989 (Cal. 1989) (en banc) (holding, in disciplinary proceeding for aiding a money

laundering scheme, that attorney's "*belief* that the financial statements contained false information reflects sufficient indicia of fraudulent intent to constitute moral turpitude"). The same conduct would require the lawyer's withdrawal under Rule 1.16(a)(1).

[29] *See also* Iowa Supreme Court Att'y Disciplinary Bd. v. Wright, 840 N.W.2d 295, 301 (Iowa 2013) (failure to conduct even preliminary research on overseas internet scam violates Rule 1.1); *In re* Winkel, 577 N.W.2d 9 (Wis. 1998) (failure to obtain information on trust funds of clients' business prior to surrendering clients' assets to bank). *See also* Restatement (Third) of the Law Governing Lawyers § 52 cmt. c at 377 ("[A] lawyer must perform tasks reasonably appropriate to the representation, including, where appropriate, inquiry into the facts.").

[30] *See In re* Konnor, 694 N.W. 2d 376 (Wis. 2005) (failure to investigate concern that rents owed to estate were being misappropriated).

[31] *See* Model Rules R. 1.13 cmts. [3] & [4]. Rule 1.13(b) was added after a series of high profile financial accounting scandals in the early 2000s. Am. Bar Ass'n Task Force on Corporate Responsibility (2003), *reprinted in* 59 Bus. Law. 145, 166–70 (2003). Other law may also create a duty to inquire. The Sarbanes-Oxley Act of 2002 creates a duty for the "chief legal officer" to conduct an "appropriate" investigation in response to another lawyer's report of "evidence of a material violation" by the company. 17 C.F.R. § 205.3(b)(2) (2012); *see also In re* Kern, 816 S.E. 2d 574 (S.C. 2018) (discussing obligations of securities lawyers); U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations § 9-28.720 (quality of internal investigation can affect eligibility for "cooperation credit"); Cohen, *supra* note 26, at 129–30 (discussing obligations of securities lawyers).

[32] *See* Good Practices Guidance, supra note 7, at 2. A "risk-based approach" is generally "intended to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified . . . [H]igher risk areas should be subject to enhanced procedures, such as enhanced client due diligence ("CDD") . . . ." *Id.* at 8. The report continues: "This paper [identifies] the risk categories and offer[s] voluntary good practices designed to assist lawyers in detecting money laundering while satisfying their professional obligations." *Id.*

[33] ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 463, at 2 (2013) (summarizing Good Practices Guidance).

[34] *Id.*

[35] *Id.* at 2–3 (emphasis added); *see also id.* at 2 n.10 ("The Good Practices Guidance encourages all lawyers to perform basic CDD by (1) identifying and verifying the identity of each client; (2) identifying and verifying the identity of any 'beneficial owner' of the client, defined as the natural person(s) with ultimate control of a client, when such an analysis is warranted from a risk-based standpoint; and (3) obtaining enough information to understand a client's circumstances, business, and objectives.").

[36] In numerous contexts of evaluating attorney conduct, courts and regulators have warned against hindsight bias. *See* Woodruff v. Tomlin, 616 F.2d 924, 930 (6th Cir. 1980) ("[E]very losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight."); *In re* Claussen, 14 P.3d 586, 593–94 (Or. 2000) (en banc) (declining to discipline lawyer who aided client in converting insurance policy to cash while client's bankruptcy petition was pending; lawyer did not know client would abscond with money and cannot be judged by a standard of "clairvoyance" that reflects the knowledge of "hindsight"); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 (2018) ("Under the knowledge standard of Rule 1.2(d), a lawyer is not deemed to 'know' facts, or the significance of facts, that become evident only with the benefit of hindsight."); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2005-05 (2005) (in handling of "'thrust upon' concurrent client conflicts a lawyer who does balance the relevant considerations in good faith should not be subject to discipline for getting it wrong in hindsight"); Pa. Bar Ass'n

Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2001-100 (2001) (the propriety of accepting stock as payment of legal fees for a start-up "should be made based on the information available at the time of the transaction and not with the benefit of hindsight").

[37] As discussed below, under Rule 1.2(c) a lawyer cannot assent to an unreasonable limitation on the representation even if the client seeks or insists upon such a limitation and offers consent.

[38] *See also* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 5 ("[A] client's refusal to authorize and assist in an inquiry into the lawfulness of the client's proposed conduct will ordinarily constitute an additional, and very significant, 'red flag.'").

[39] Model Rules R. 1.2 cmt. [13] ("If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law . . . the lawyer must consult with the client regarding the limitations on the lawyer's conduct.").

[40] *See also* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 6 ("If it becomes clear during a lawyer's representation that the client has failed to take necessary corrective action, and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, Rule 1.16(b)(1) mandates that the lawyer withdraw from representation."). For a discussion of the obligation to withdraw upon learning that a lawyer's services have been used to further a fraud, see ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992).

[41] N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 6.

[42] Model Rules R . 1.0(e) ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.").

[43] Model Rules R . 1.16(c)(2).

[44] *See* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 5.

[45] *See* Model Rules R. 1.2 cmt. [6] ("A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.")

[46] *See id.* cmt. [7] ("an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation"); *id.* cmt. [8] ("All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law.").

[47] The analysis of the hypotheticals that follows draws on the Good Practices Guidance but should not be read to support the conclusion that any isolated risk factor identified in the Good Practices Guidance necessarily creates a duty to inquire in all matters in which it may be present. The question is whether a reasonable lawyer under the specific circumstances would be obliged to conduct further inquiry. The Committee further cautions that circumstances that render a specific jurisdiction or other factor "high risk" can change. On the one hand, if new circumstances presenting a greater risk arise the lawyer should take appropriate action, and may need to seek advice on what, if any, action is required. On the other hand, new circumstances may support acceptance or continuation of the representation by showing that, upon inquiry, the high-risk designation is inaccurate or inapplicable to the matter.

[48] This hypothetical is drawn from ABA Comm. on Ethics & Prof'l Responsibility, Informal Opinion 1470, which concludes that a lawyer must conduct further inquiry.

[49] For information about "high risk" jurisdictions, see Good Practices Guidance, *supra* note 7, at 15–16.

[50] This hypothetical is based on *In re* Jankoff, 81 N.Y.S.3d 733, 734 (N.Y. App. Div. 2018) (public censure imposed on stipulated facts), and *In re* Koplik, 90 N.Y.S.3d 187 (N.Y. App. Div. 2019) (same).

[51] *See supra*, Section IV.

[52] This hypothetical is drawn from Good Practices Guidance, *supra* note 7, at 8, and should not require further inquiry regarding the legitimacy of the transaction assuming prior matters have not involved abuse of the attorney-client relationship on the part of the client. It is likely, of course, that some inquiry into other details will be necessary to handle the transaction competently.

[53] This hypothetical is drawn from Good Practices Guidance, *supra* note 7, at 8, and requires further inquiry.

[54] This hypothetical is drawn from American Law Institute, Anti-Money Laundering Rules and Other Ethics Issues 450-51 (2017) and requires further inquiry.

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Client Due Diligence, Money Laundering, and Terrorist Financing

The Model Rules of Professional Conduct and the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing ("Good Practices Guidance") are consistent in their ethical principles, including loyalty and confidentiality. The Good Practices Guidance provides information to help lawyers recognize and evaluate situations where providing legal services may assist in money laundering and terrorist financing. By implementing the risk-based control measures detailed in the Good Practices Guidance where appropriate, lawyers can avoid aiding illegal activities in a manner consistent with the Model Rules. [1]

In an effort to combat money laundering and terrorist financing, intergovernmental standards-setting organizations and government agencies have suggested that lawyers should be "gatekeepers" to the financial system.[2] The underlying theory behind the "lawyer-as-gatekeeper" idea is that the lawyer has the capacity to monitor and to control, or at least to influence, the conduct of his or her clients and prospective clients in order to deter wrongdoing.[3] Many have taken issue with this theory[4] and with the word "gatekeeper." The Rules do not mandate that a lawyer perform a "gatekeeper" role in this context.[5] More importantly, mandatory reporting of suspicion about a client is in conflict with Rules 1.6 and 1.18, and reporting without informing the client is in conflict with Rule 1.4(a)(5). In this opinion we examine the contours of a lawyer's ethical obligations under the Model Rules of Professional Conduct with regard to efforts to deter and combat money laundering.

In August 2010 the ABA's policymaking House of Delegates adopted the *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* ("Good Practices Guidance"),[6] along with a resolution stating that the Association "acknowledges and supports the United States Government's efforts to combat money laundering and terrorist financing." The approved Good Practices Guidance states that it is not intended to be, nor should it be construed as, a statement of the standard of care governing the activities of lawyers in implementing a risk-based approach to combat money laundering and terrorist financing, but rather is intended to serve as a resource that lawyers can use in developing their own voluntary approaches.[7]

Good Practices Guidance policy supports a "risk-based" approach in accord with guidelines developed by the Financial Action Task Force on Money Laundering ("FATF") created by the U.S. and other leading industrialized nations.[8] This approach differs from a rules-based approach that requires compliance with every element of detailed laws, rules, or regulations irrespective of the underlying quantum or degree of risk. The Good Practices Guidance urges lawyers to assess money-laundering and terrorist financing risks by examining the nature of the legal work involved, and where the business is taking place.[9]

The Model Rules neither require a lawyer to fulfill a gatekeeper role, nor do they permit a lawyer to engage in the reporting that such a role could entail. It would be prudent for lawyers to undertake Client Due Diligence ("CDD")[10] in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. This admonition is consistent with Informal Opinion 1470 (1981), where we stated that "[a] lawyer cannot escape responsibility by avoiding inquiry. A lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct and without relying on past client crime or fraud to achieve results the client now wants."[11] Further in that opinion we stated that,

pursuant to a lawyer's ethical obligation to act competently,[12] a duty to inquire further may also arise.[13]

An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold. Rule 1.2(d) prohibits a lawyer from *knowingly* counseling or assisting a client to commit a crime or fraud. A lawyer also is subject to federal laws prohibiting conduct that aids, abets, or commits a violation of U.S. anti-money laundering laws (*e.g.*, 18 U.S.C. Sections 1956 and 1957) or counter-terrorist financing laws.[14] Thus, for example, lawyers should be mindful of legal restrictions applicable to all persons in the U.S. to avoid providing certain legal services to, and receiving money from, individuals or entities publicly identified by the U.S. Department of the Treasury on its Specially Designated Nationals List ("SDN List").[15] In certain circumstances, checking a client's identity internally within the firm against the SDN List can avoid the risk of unlawful conduct by the lawyer.

The level of appropriate CDD varies depending on the risk profile of the client, the country or geographic area of origin, or the legal services involved.[16] For example, the fact that clients are deemed to be "Politically Exposed Persons," (*e.g.*, domestic or foreign senior government, judicial, or military officials) may justify enhanced due diligence on the part of the lawyer because of the potential for corruption. Clients or legal matters associated with countries that are subject to sanctions or embargoes issued by the United Nations, or those identified by credible sources as having significant levels of corruption or other criminal activity or that provide funds or support to terrorist organizations, may require greater examination. Furthermore, clients who ask that the lawyer handle actual receipt and transmission of funds or those who request accelerated real estate transfers for no apparent reason may also require an extra level of scrutiny.

Once a representation has commenced, a lawyer may terminate it in a number of circumstances in which the lawyer does not *know* for certain the client's plans or whether the client is engaged in criminal or fraudulent activities, but the lawyer has reason to believe that the client is engaging, or plans to engage, in such improper activities. Rule 1.16(b)(2) (Declining or Terminating Representation) states that a lawyer may withdraw from representing a client if "the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is criminal or fraudulent." (Emphasis added).[17]

The Committee believes that the advice derived from the Good Practices Guidance is consistent, and not in conflict, with the ethical obligations of lawyers under the Model Rules. Indeed, the Good Practices Guidance states that "when faced with a situation where the lawyer is compelled to decline or terminate the relationship, the lawyer should comply with the requirements of the applicable rules of professional conduct." [18] Accordingly, lawyers should be conversant with the risk-based measures and controls for clients and legal matters with an identified risk profile and use them for guidance as they develop their own client intake and ongoing client monitoring processes. When in a lawyer's professional judgment aspects of the contemplated representation raise suspicions about its propriety, that lawyer's familiarity with risk-based measures and controls will assist in avoiding unwitting assistance to unlawful activities. Indeed, the usefulness of the Good Practices Guidance is an example of the declaration in the Model Rules that "[t]he Rules do not … exhaust the moral and ethical considerations that should inform a lawyer…."[19]

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates

through February 2013. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] Kevin L. Shepherd, *The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance for U.S. Lawyers*, 2010 J. Prof. Law 83, 88 (lawyers are considered "gatekeepers" because they have the ability to furnish access to the various functions that might help criminals move or conceal funds).

[3] *See* Press Center, *Treasury Deputy Secretary Stuart Eizenstat House Committee on Banking and Financial Services*, U.S. Department of the Treasury (Mar. 9, 2000), http://www.treasury.gov/press-center/press-releases/Pages/ls445.aspx (stating that "[w]e are aggressively pursuing programs aimed at the lawyers, accountants and auditors who function as 'gatekeepers' to the financial system. While legal rules properly insulate professional consultations from overly broad scrutiny and create a zone of safety within which professionals can advise their clients, those rules should not create a cover for criminal conduct.").

[4] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2013 BCCA 147 (2013), *available at* http://www.canlii.org/en/bc/bcca/doc/2013/2013bcca147/2013bcca147.html (striking down Canadian legislation as violating the solicitor-client privilege and interfering with the independence of the Bar).

[5] *But see* Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 Rutgers L. Rev. 9 (2003).

[6] Resolution & Report 116, *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, American Bar Association (2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/116.authcheckdam.pdf. *See generally* Shepherd, *supra* note 2.

[7] Resolution & Report 116, *supra* note 6, at 7.

[8] *Federation of Law Societies of Canada v. Canada*, *supra* note 4.

[9] *See* Michael A. Lindenberger, *Into the Breach: Voluntary Compliance on Money Laundering Gets a Boost from the ABA and Treasury*, ABA Journal (Oct. 2011), *available at* http://www.abajournal.com/magazine/article/into_the_breach_voluntary_compliance_on_money_laundering_gets_a_boost/ (quoting the ABA President to encourage lawyers to be more vigilant about combating money laundering by following the Good Practices Guidance so that gatekeeper legislation regulating the legal profession will be unnecessary).

[10] The Good Practices Guidance encourages all lawyers to perform basic CDD by (1) identifying and verifying the identity of each client; (2) identifying and verifying the identity of any "beneficial owner" of the client, defined as the natural person(s) with ultimate control of a client, when such an analysis is warranted from a risk-based standpoint; and (3) obtaining enough information to understand a client's circumstances, business, and objectives. Resolution & Report 116, *supra* note 6, at 9-11.

[11] ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981) [hereinafter ABA Informal Op. 1470]. *See also* Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on The Model Rules of Professional Conduct §1.6:403, 199-200 (2d ed. 1990 & Supp. 1998). *Cf.* Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 Cath. U. L. Rev. 191, 200 (1978) (warning lawyers against "assum[ing] the worst regarding the client's desires").

[12] *See* Model Code of Prof'l Responsibility DR 6-101 (1979) (now Rule 1.1).

[13] ABA Informal Op. 1470, *supra* note 11.

[14] These laws include, for example, the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism

(USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001).

[15] *Specially Designated Nationals List*, U.S. Department of the Treasury, http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx (last visited May 20, 2013).

[16] *Supra* note 10.

[17] Moreover, Model Rule 1.16(b)(4) allows a lawyer to withdraw when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

[18] Resolution & Report 116, *supra* note 6, at 38.

[19] Model Rules of Prof'l Conduct, Scope, cmt. 16. *See also* Model Rules of Prof'l Conduct R. 2.1 (explaining that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 335 (1974) (stating that in the context of writing opinions for transactions involving sales of unregistered securities, a lawyer should not "accept as true that which he does not reasonably believe to be true.").

General Information

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AMERICAN BAR ASSOCIATION
Center for Professional Responsibility

To: **ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Individuals, and Entities**

From: **David Majchrzak, Chair**
Center for Professional Responsibility Working Group on ABA Model Rule of Professional Conduct 5.5

Re: **Issues Paper For Comment: Regulatory Issues Associated With Possible Amendments to ABA Model Rule of Professional Conduct 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law)**

Date: **January 16, 2024**

Introduction

The ABA has long advanced and, when appropriate, proposed amendments to its Model Rules of Professional Conduct (MRPC) and other professional regulatory policies to ensure that they align with the changing nature of law practice and the delivery of legal services. Since the last largescale review of ABA MRPC 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), technology, globalized legal practice, and client expectations regarding the delivery of legal services have continued to evolve. In light of these developments, as described further below, questions have arisen as to whether Model Rule 5.5 remains fit for purpose, or whether reality of 21st century legal practice and delivery of legal services merits changes to the current manner in which multijurisdictional practice is permitted.

These questions originate from various quarters, including the ABA Center for Professional Responsibility, as well as from outside organizations, most prominently from the Association of Professional Responsibility Lawyers (APRL). APRL is a professional organization comprised of lawyers who represent other lawyers, law professors, judges, and others who work in the area of, or are concerned with, regulation of lawyers and the legal profession. What follows is the history of MRPC 5.5, a description of the work leading up to this Issues Paper, and specific questions on which both I and the Center for Professional Responsibility working group seek your input to assist us in determining whether and how to amend MRPC 5.5. Your responses to the questions posed in this issues paper are critical to our work. Because the goal is an active exchange of ideas, when crafting your response please provide your reasoning in addition to expressing agreement or disagreement. On behalf of the working group and the Center, thank you for taking the time to respond.

Written comments should be submitted to Natalia Vera, ABA Center for Professional Responsibility Senior Paralegal at natalia.vera@americanbar.org by March 1, 2024. Written comments may be posted by the Center for Professional Responsibility on its website.

History of MRPC 5.5

MRPC 5.5 provides that lawyers shall not practice law in a jurisdiction where to do so would be in violation of that jurisdiction's rules. Originally appearing in the ABA Model Code of Professional Responsibility, the ABA has reiterated this policy position over time, in the 1983 Model Rules of Professional Conduct in MRPC 5.5(a), and later in amendments to the Model Rules that created certain instances where lawyers could practice in a jurisdiction where they were not licensed without engaging in the unauthorized practice of law (UPL).[1]

For example, in July 2000, ABA President Martha Barnett appointed the Commission on Multijurisdictional Practice (MJP Commission) to "research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law."[2] The MJP Commission was directed to "analyze the impact of those rules on the practices of in-house counsel, transactional lawyers, litigators and arbitrators and on lawyers and law firms maintaining offices and practicing in multiple state and federal jurisdictions" and "make policy recommendations to govern the multijurisdictional practice of law."[3]

The MJP Commission was created as the profession "struggled with the application of UPL laws to licensed lawyers . . . in light of the changing nature of clients' legal needs and the changing nature of law practice."[4] Its members understood that "the law and the transactions in which lawyers assist clients have increased in complexity, requiring a growing number of lawyers to concentrate in particular areas of practice rather than being generalists in state law."[5] Also, "modern transportation and communications technology have enabled clients to travel easily and transact business throughout the country, and even internationally. Because of this globalization of business and finance, clients sometimes now need lawyers to assist them in transactions in multiple jurisdictions (state and national) or to advise them about multiple jurisdictions' laws."[6]

The MJP Commission's central focus became offering recommendations to create uniformity and clarity for multijurisdictional practice in those circumstances when the level or extent of risk of harm to the public was low. Its final report explained:

> The guiding principle that informs the Commission's recommendations is simple to state: we searched for the proper balance between the interests of a state in protecting its residents and justice system, on the one hand; and the interests of clients in a national and international economy in the ability to employ or retain counsel of choice efficiently and economically.[7]

In August 2002, the MJP Commission recommended, and the ABA House of Delegates adopted, revised MRPC 5.5(a) to provide that a lawyer "shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction … ." Revised paragraph (b)

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[1] As adopted in 1983, Rule 5.5 read: A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
[2] Final report
[3] *Ibid.*
[4] Interim report
[5] *Ibid.*
[6] *Ibid.*
[7] Final report

prohibited a lawyer, not admitted by the jurisdiction, from establishing an office or other systematic and continuous presence in the jurisdiction or holding out to the public that the lawyer was licensed by the jurisdiction, except as otherwise authorized by rule or other law.

At the same time and based on the MJP Commission's recommendation, the ABA adopted amendments to MRPC 5.5 allowing for specific exceptions to the broad statement of prohibition in MRPC 5.5(a).[8] The amendments to MRPC 5.5 creating new paragraph (c) allowed a lawyer admitted in another United States jurisdiction to provide legal services on a temporary basis in a jurisdiction in which the lawyer was not admitted when the lawyer is not disbarred or suspended from practice in any jurisdiction and when the exceptions noted in (c) "served the interests of clients and the public" and did not "create an unreasonable regulatory risk."[9] Those exceptions were:

- When the lawyer was associated with another lawyer who was licensed by the jurisdiction;
- When the lawyer was providing services reasonably related to a pending or potential matter for which that lawyer would in the future or already had secured pro hac vice admission;
- When the lawyer was providing services reasonably related to a pending or potential ADR proceeding;
- When the lawyer's service arose out of or were reasonably related to the lawyer's practice in the lawyer's licensing jurisdiction;

In addition to new paragraph (c), the ABA adopted new paragraph (d)(1) providing that a lawyer, admitted in another U.S. jurisdiction, and not disbarred or suspended in any jurisdiction, could provide legal services that did not require pro hac vice admission through a systematic and continuous presence to the lawyer's employer or its organizational affiliates. New paragraph (d)(2) provided that a lawyer, admitted in another U.S. jurisdiction, and not disbarred or suspended in any jurisdiction, could provide legal services through on a systematic and continuous presence when authorized by federal or other law.[10]

As part of its final report, the MJP Commission also recommended strengthening MRPC 8.5, addressing disciplinary authority and choice of law. As amended, MRPC 8.5 provides that a jurisdiction may discipline any lawyer who provides or offers to provide legal services in that jurisdiction regardless of whether the lawyer is licensed by that jurisdiction.[11] Rounding out its work, the MJP Commission recommended amendments to Rule 22 the ABA Model Rules for Lawyer Disciplinary Enforcement (Reciprocal Discipline and Reciprocal Disability Inactive Status), amendments to the Model Rules on Pro Hac Vice Admission and the Licensing and Practice of Foreign Legal Consultants, and the creation of the Model Rule on Temporary Practice by Foreign Lawyers and the Model Rule on Admission on Motion.[12]

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[8] A Legislative History p. 655.
[9] *Ibid.*
[10] *Id.* at p. 651.
[11] MRPC 8.5(a). This aligns with MRLDE 6A. That Rule states that "… any lawyer not admitted in this jurisdiction who practices law or renders or offers to render any legal services in this jurisdiction, is subject to the disciplinary jurisdiction of this court and the board." The MJP Report for 8.5 states: "The proposal is consistent with existing ABA policy, as embodied in Rule 6 of the ABA Model Rules for Lawyer Disciplinary Enforcement."
[12] MJP Commission website:
https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission-on-multijurisdictional-practice/?login

The ABA continued to monitor and study developments impacting the multijurisdictional practice of law in the years following adoption and implementation of the MJP Commission recommendations. In 2009, then ABA President Carolyn Lamm created the ABA Commission on Ethics 20/20 (Ethics 20/20 Commission) to review the Model Rules in the context of advances in technology and global legal practice developments. The Ethics 20/20 Commission proposed, and the House of Delegates adopted, the Commission's first set of recommendations in 2012. Then, in 2013, the Ethics 20/20 Commission recommended, and the House of Delegates adopted, amendments to MRPC 5.5(d)(1) to allow lawyers admitted by foreign jurisdictions to have a U.S. office and to provide legal services to the lawyer's employer regarding the law of a foreign country.[13] The amendments further provide that the foreign lawyer may advise on U.S. law when based on the advice of a U.S. licensed lawyer. The House also adopted, at the Ethics 20/20 Commission's recommendation, new paragraph (e) to MRPC 5.5, defining a "foreign lawyer" for purposes of the amendments to (d).

The Association of Professional Responsibility Lawyers Proposal

In April 2022, the Association of Professional Responsibility Lawyers (APRL) forwarded to ABA President Reggie Turner a white paper and proposal to amend MRPC 5.5 to expand opportunities for lawyers to practice across jurisdictional borders.[14] In its transmission, APRL explained, "lawyers in the United States have continued to expand their practices beyond state and national borders" and "APRL believes that a broader rule is critical to the future of the profession."

Focusing on "the client's right to choose counsel" the APRL proposal was based on the idea that "protecting clients from incompetent lawyering does not require artificial boundaries that prevent clients from choosing competent counsel of their choice even if the lawyer they choose is licensed elsewhere." APRL rejected the idea that a state-based license always assures that every state-licensed lawyer is competent to represent every client with any kind of legal problem in that jurisdiction. The report argued that the practice has changed for many lawyers allowing them to focus narrowly and practice one or two areas of the law. The result has been lawyers developing deep expertise that extends beyond one state's laws. APRL notes that this "outcome has arisen because of the marketplace, not any ethical restrictions on practice."

The APRL proposal to revise MRPC 5.5 provides that a lawyer admitted and authorized to practice law in any United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services—including on a systematic and continuing basis—in a jurisdiction in which the lawyer was not licensed, subject to the following conditions:

- the lawyer may not hold out to the public or otherwise represent that the lawyer is admitted to practice law in a jurisdiction in which the lawyer is not licensed;
- the lawyer must disclose where the lawyer is admitted to practice law;
- the lawyer must comply with the jurisdiction's rules of professional conduct, including but not limited to MRPC 1.1 (Competence), and with the admission requirements of courts of this jurisdiction;
- the lawyer will be subject to MRPC 8.5 regarding the disciplinary authority and choice of law rules of this jurisdiction; and

[13] History, p. 660.
[14] See Appendix A for the APRL proposal for a revised MRPC 5.5.

- the lawyer may not assist another person in the unauthorized practice of law in this, or any other, jurisdiction.

The APRL proposal also retains the language in MRPC 5.5 permitting a lawyer admitted and authorized to practice law in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, to provide, in this jurisdiction, legal services that are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and do not arise under the law of any U.S. jurisdiction, unless the services are provided after consultation with a lawyer authorized to practice law in this jurisdiction.

President Turner forwarded the APRL proposal to the ABA Standing Committee on Ethics and Professional Responsibility.

Standing Committee on Ethics and Professional Responsibility Draft

Before APRL published its report and proposal, the Standing Committee on Ethics and Professional Responsibility ("Ethics Committee") had also started looking at whether and how MRPC 5.5 might be amended.[15]

The Ethics Committee's March 2022 draft permitted a lawyer admitted and authorized to practice law[16] by any United States jurisdiction, and not disbarred or suspended from practice by any jurisdiction, to provide legal services in any jurisdiction,[17] if that lawyer:

- discloses, in writing, to the client or prospective client who will be receiving legal services in this jurisdiction, the jurisdiction(s) where the lawyer holds an active license to practice law and that the lawyer is not actively licensed to practice law by this jurisdiction;[18] and
- complies with the pro hac vice admission or other regulatory requirements of this jurisdiction.[19]

But a lawyer would not be required to make such a disclosure if the services being provided while the lawyer is located in the jurisdiction are services limited to: the law of the jurisdiction in which the lawyer is admitted; authorized by federal law or rule; or federal law or tribal law.

The Ethics Committee's March 2022 draft also permitted, in paragraph (c), a lawyer admitted and actively licensed to practice law in a foreign jurisdiction or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction to "provide legal services in this jurisdiction to the lawyer's employer or its organizational affiliates, unless they are services for which the forum requires pro hac vice admission, in which case such services may be provided following pro hac vice admission."

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[15] See Appendix B for the Ethics Committee's proposal dated March 2022.
[16] The March 2022 draft from the Ethics Committee requires that the lawyer seeking to engage in cross border practice is both "admitted" by a jurisdiction and "authorized to practice by any jurisdiction." Therefore, a lawyer admitted, but not authorized to practice because the lawyer is, for example, retired, suspended, or disbarred, would not be permitted to engage in cross-border practice.
[17] March 2022 draft, paragraph (a).
[18] March 2022 draft, paragraph (b)(1).
[19] March 2022 draft, paragraph (b)(2).

New paragraph (c)—borrowing language from current MRPC 5.5(d)(1)—also explained, "If services provided by a foreign lawyer require advice on the law of this or another United State jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is actively licensed or otherwise authorized to practice law by that jurisdiction." Additionally, that same paragraph—borrowing language from current MRPC 5.5(e)(1)—provided that, "The foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority."

The Ethics Committee asked entities within the Center for Professional Responsibility to review and comment on the initial discussion draft because the Committee recognized that multijurisdictional practice implicated enforcement and other systemic issues for the regulation of lawyers under the U.S. system of state-based judicial regulation. These issues include lawyer discipline, IOLTA account oversight and regulation, client protection fund payments, operations and procedures, and professional liability insurance.

Concerns Raised by CPR Entities

While CPR entities did not express disagreement with the concepts behind the discussion draft, their collective comments identified multiple issues requiring further internal discussion. To address these concerns Paula Frederick, Chair of the Center for Professional Responsibility Coordinating Council, formed a working group on MRPC 5.5.[20] The working group was composed of representatives from all the Center entities, APRL, and the National Organization of Bar Counsel (NOBC).

While discussing the systemic issues noted above, the working group members noted that many of these issues exist today with the multijurisdictional practice permitted by current MRPC 5.5. What follows is a recitation of the issues the working group discussed, concerns raised, and areas where input is sought.

The Competence Paradox

Working group members discussed APRL's assertion that there exists today a competency paradox:

> The seemingly arbitrary nature of the geographical limitations imposed by the current regulatory structure is heightened by an understanding of the paradox associated with how few restrictions exist on a lawyer's ability to practice by subject matter. Once admitted in a U.S. jurisdiction, a lawyer is permitted to practice in any area of law of the lawyer's choosing or in multiple areas of law.

Once admitted in a U.S. jurisdiction, a lawyer is permitted to practice in any area of law of the lawyer's choosing or in multiple areas of law because MRPC 1.1:

> assumes that the lawyers can educate themselves about the subject matter and competently handle the case … The 'Competency Fallacy of Rule 5.5,' however,

[20] After reviewing the APRL submission and collecting comments from CPR entities on its March 2022 draft, the Ethics Committee refined and circulated what it titled Draft 1.0 of possible amendments to Model Rule 5.5. This was circulated to representatives appointed to the working group. See Appendix C.

> dictates that a lawyer licensed in 'State A', who has devoted their entire career to personal injury work for example, would not be competent to represent the car-accident victim described above (without the association of local counsel) because the lawyer is presumed to be incapable of knowing or coming to understand 'the law of State B.' Instead, if that State A-licensed lawyer wanted to be able to regularly represent clients with personal injury cases in State B, the lawyer would have to obtain a second license to practice law, a license issued by State B.

The working group also noted that 39 states, the District of Columbia, and the Virgin Islands require applicants to pass the Uniform Bar Exam for admission, and the minimum score for passing the multi-state bar exam diverges by only 12 points in these jurisdictions.

Question: Given that 39 states, D.C., and the Virgin Islands require applicants to pass the Uniform Bar Exam for admission, and that the minimum score for passing the multi-state bar exam diverges by only 12 points in these jurisdictions, should we assume that lawyers who take and pass that exam are competent to practice anywhere? If yes, why? If not, please explain.

Question: Does the fact that admission on motion is available in all but seven states, and many jurisdictions allow for other exceptions to cross-border practice, including those modeled on the ABA Model Rule for Registration of In-House Counsel, the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster, the ABA Model Rule on Practice Pending Admission, and the ABA's support for and urging of state and territorial bar admission authorities to enact an "admission by endorsement" for military spouse attorneys affect your analysis?

Lawyer Discipline

The working group discussed a variety of disciplinary enforcement and concomitant resource related issues raised by the Ethics Committee's March 2022 discussion draft and the APRL proposal, keeping at the fore that the purpose of lawyer discipline is to protect the public.

For example, as noted at footnote 11 above, Rule 6 of the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE) provides that any lawyer "not admitted in this jurisdiction who practices law or renders or offers to render any legal services in this jurisdiction, is subject to the disciplinary jurisdiction of this court and the board." But the Working Group noted that not all jurisdictions have analogous provisions in their disciplinary procedural rules. In addition, Rule 9 of the MRLDE provides that it is grounds for discipline in a jurisdiction where a lawyer is admitted for a lawyer to "engage in conduct violating applicable rules of professional conduct of another jurisdiction."

The Commentary to MRLDE 6 states, with regard to lawyers specially admitted[21] to practice in a jurisdiction, that: "It is inappropriate for the jurisdiction in which the lawyers is specially admitted to rely exclusively upon the lawyer's home jurisdiction to enforce ethical standards. The witnesses and other evidence of misconduct are likely to be located in the adopted jurisdiction. Moreover, the jurisdiction in which the misconduct occurred will be far more interested in pursuing the matter. Finally, misconduct should, in the first instance, be judged by the ethical standards of the jurisdiction where it occurred."

[21] Rule 6 refers to lawyers "specially admitted by a court of this jurisdiction for a particular proceeding."

Consistent with Rule 6 of the MRLDE, MRPC 8.5 provides:

> (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

In light of the above, some on the working group posited that liberalizing MRPC 5.5 in the manner proposed in the March 2022 discussion draft or APRL proposal could exacerbate the already existing number of instances where there are difficulties for disciplinary entities to determine which jurisdiction has the authority to proceed with a complaint of misconduct by a lawyer providing legal services in a jurisdiction in which the lawyer is not licensed or authorized to practice.

Question: Given the above, do you agree that there currently are barriers for regulators to determine which jurisdiction should proceed with a complaint of misconduct by a lawyer providing legal services in a jurisdiction in which the lawyer is not licensed or authorized to practice? If yes, please explain why, and if applicable, please cite your jurisdiction's rules that are at issue. If not, please also explain why not.

Question: Will amending MRPC 5.5 in the manner proposed by the March 2022 discussion draft or APRL proposal create any new barriers for determining which jurisdiction should first investigate a complaint of lawyer misconduct? If yes, please explain why, including whether amendments to Rule 6 of the MRLDE or MRPC 8.5 would be necessary to address this issue. If not, please explain why.

Question: If both disciplinary entities have jurisdiction, does it make sense for them to investigate and prosecute concurrently, and if so, in what circumstances? Please explain your reasoning.

If two jurisdictions are concurrently investigating and prosecuting, should the MRLDE be amended to include a model for determining when parallel investigation and prosecution is appropriate? Please explain why.

Some members of the working group expressed concerns about whether the proposed changes to MRPC 5.5 would impact the enforcement of disciplinary subpoenas when the lawyer resides or works from an office in a different jurisdiction that that investigating or prosecuting the lawyer. MRLDE 14 states, in relevant part:

> **Subpoena Pursuant to Law of Another Jurisdiction**. Whenever a subpoena is sought in this state pursuant to the law of another jurisdiction for use in lawyer discipline or disability proceedings, and where the issuance of the subpoena has been duly approved under the law of the other jurisdiction, the chair of the board, upon petition for good cause, may issue a subpoena as provided in this section to compel the attendance of witnesses and production of documents in the county where the witness resides or is employed or elsewhere as agreed by the witness. Service, enforcement, or challenges to this subpoena shall be as provided in these rules.

Question: In the context of the March 2022 discussion draft and the APRL proposal, does MRLDE Rule 14(G) continue to set forth an effective framework for enforcement of reciprocal subpoenas? If not, how should MRLDE 14 be amended to address this issue?

Another issue that the working group discussed in the context of possibly expanding the authority to engage in multijurisdictional practice related to the ability of regulators to share information. In almost all jurisdictions the investigation of complaints of misconduct is confidential. Upon the filing and service of formal charges, disciplinary matters become public in almost all jurisdictions.

MRLDE 16B (Access to Disciplinary Information) states:

B. Confidentiality. Prior to the filing and service of formal charges in a discipline matter, the proceeding is confidential within the agency, except that the pendency, subject matter, and status of an investigation may be disclosed by disciplinary counsel if:
(1) the respondent has waived confidentiality;
(2) the proceeding is based upon allegations that include either the conviction of a crime or reciprocal discipline;
(3) the proceeding is based upon allegations that have become generally known to the public; or
(4) there is a need to notify another person or organization, including the client protection fund, in order to protect the public, the administration of justice, or the legal profession.

While paragraph (4) would permit some information sharing with another disciplinary entity, the extent of the information that may be shared may not be sufficient. Some jurisdictions may feel constrained by their confidentiality rules from alerting regulators in other jurisdictions where the lawyer is admitted or authorized to practice, which could, in turn, be contrary to the goal of public protection.

Question: During the course of an otherwise confidential investigation, should lawyer disciplinary entities be free to share any information they deem relevant with other regulators in a jurisdiction where a lawyer is admitted or authorized to practice? If yes, please indicate whether concomitant amendments should be made to MRLDE 16. If not, please explain why you disagree, and describe any limitations on any sharing of such information you believe appropriate.

Finally, the working group discussed creating a mechanism to ensure that disciplinary entities know the identity and contact information for lawyers who, under the March 2022 discussion draft or APRL proposal, though not be admitted, would be permissibly practicing in their jurisdictions. The working group discussed whether the creation of some type of national database or a registration-like process akin to the Model Rule for Registration of In-House Counsel made sense.[22] Questions related to a possible registration regime include whether it would apply to lawyers engaging in temporary practice in a jurisdiction where they are not admitted or authorized—something that is not currently required for temporary practice—or only when the lawyer is engaged in systematic or continuous practice. If so, at what point would temporary practice become systematic and continuous?

[22] Link to In House Counsel Registration Rule.

Question: Does creation of a registration regime make sense? If not, please explain why? If yes, should such registration regime apply only to systematic and continuous practice or also to temporary practice, and why?

Client Protection Funds

The legal profession is the only profession that collectively undertakes to reimburse victims of misappropriation by fellow lawyers. The profession does this through Client Protection Funds established in each jurisdiction. In 1981, the ABA adopted Model Rules for Lawyers' Funds for Client Protection (MRCPF). Most jurisdictions have adopted a version of the MRCPF for the operation of their client protection fund. As explained in the preface to the MRCPF:

> [I]t is a fact that some lawyers misappropriate money from their clients. Typically, those lawyers lack the financial wherewithal to make restitution to their victims. The organized bar throughout the United States has responded by creating Client Protection Funds to provide necessary reimbursement.

Traditionally, client protection funds have been state-based and many such programs are underfunded. As a result, many funds limit the allowable reimbursement amount for victims of a lawyer's misconduct.

Although MRCPR 1.A. explains that a fund will reimburse losses caused by the dishonest conduct of lawyers "licensed or otherwise authorized to practice law in the courts of this jurisdiction," MRCPF 1. B. does not state that a lawyer licensed in another jurisdiction but providing services in this jurisdiction on a temporary basis under current MRPC 5.5(c) is a lawyer for purposes of the MRCPF.[23] Additionally, MRCPF 10. E. allows a fund to consider whether it—or another fund—should reimburse the claimant. Rule 10.E. reads:

> In determining whether it would be more appropriate for this Fund or another Fund to pay a claim, the Board should consider the following factors:
>
> (1) the Fund(s) into which the lawyer is required to pay an annual assessment or into which an appropriation is made on behalf of the lawyer by the bar association;
>
> (2) the domicile of the lawyer;
>
> (3) the domicile of the client;
>
> (4) the residence(s) of the lawyer;
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> (5) the number of years the lawyer has been licensed in each jurisdiction;
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> (6) the location of the lawyer's principal office and other offices;
>
> (7) the location where the attorney-client relationship arose;
>
> (8) the primary location where the legal services were rendered;
>
> (9) whether at the time the legal services were rendered, the lawyer was engaged in the unauthorized practice of law as defined by the jurisdiction in which the legal services were rendered; and
>
> (10) any other significant contacts.

[23] MRCPF 1. B reads: For purposes of these Rules, "lawyer" shall include a person: (1) licensed to practice law in this jurisdiction, regardless of where the lawyer's conduct occurs; (2) admitted as in-house counsel; (3) admitted pro hac vice; (4) admitted as a foreign legal consultant; (5) admitted only in a non-United States jurisdiction but who is authorized to practice law in this jurisdiction; or (6) recently suspended or disbarred whom clients reasonably believed to be licensed to practice law when the dishonest conduct occurred.

The working group discussed that, in practice, most funds will reimburse for the dishonest acts of a lawyer who is licensed by the jurisdiction in which the fund operates ***and*** when there is some nexus between the harm and the jurisdiction. Both must be true. The working group was told that client protection funds are much less likely to reimburse harmed clients if the lawyer is not licensed by the jurisdiction or if the lawyer is licensed by the jurisdiction, but the legal services are provided outside the licensing jurisdiction. The working group was told that, under the current multijurisdictional practice of law, there are some jurisdictions where consumers of legal services are not being compensated through existing CPF because of limitations in funds, limitations in current rules, and/or discretion provided by those rules when the relevant lawyer or consumer are from different jurisdictions.

It appears to the working group that in the current multijurisdictional manner in which law is currently practiced, there are consumers of legal services who are not being compensated through existing CPF because of limitations in current rules.

Question: Do you agree that this is an issue? Please explain your reasoning.

The working group discussed changes that could be made to the current MRCPF and jurisdictional CPF rules to address today's cross-border practice concerns as well as concerns that could be raised by allowing for increased cross-border practice. As a result, they are interested in knowing:

Question: Do you believe that MRCPF 1 should be amended to include lawyers providing legal services on a temporary basis in a jurisdiction in which the lawyer is not licensed?

Question: Should a lawyer providing legal services on a temporary basis in a jurisdiction be required to contribute to the client protection fund operating in the jurisdiction in which the lawyer is providing temporary services? Some jurisdictions pro hac vice rules require such a contribution.[24]

Interest on Lawyers Trust Accounts (IOLTA)

MRPC 1.15 requires lawyers to hold client property in connection with a representation separately from the lawyer's property. Funds are to be maintained in a separate account—commonly referred to as an Interest on Lawyers Trust Account ("IOLTA") account. An IOLTA is a pooled, interest- or dividend-bearing business checking account into which lawyers deposit client funds that are held for brief periods of time. The interest from the account is paid to the Lawyers Trust Fund for the state in which the account is located. Lawyers Trust Funds are a critical source ($175+ million nationally)[25] for the operation of no-cost and low-cost civil legal services provided to moderate and income insecure persons.

MRPC 1.15(a) provides that the lawyer shall hold client funds in a "separate account maintained in the state whether the lawyer's office is situated, or elsewhere with the consent of the client or third person." Not all jurisdictions have adopted MRPC 1.15(a) verbatim. The majority provide that the funds must be held in the jurisdiction in which the lawyer's office is situated; a

[24] See, e.g., New Jersey Rule 1:21-2(a)(1); Alabama Client Security Fund Rule VIII, E.; Tennessee Lawyers' Fund for Client Protection Rule 1.05(c) and 2.01(a).
[25] ABA Commission on Lawyers' Trust Funds overview available at https://www.americanbar.org/groups/interest_lawyers_trust_accounts/overview

minority mandate that the funds be held in a jurisdiction in which the legal services are provided.[26] Additionally, ABA Model Rules for Client Trust Account Records explains that "only a lawyer admitted to practice law in this jurisdiction . . . shall be an authorized signatory or authorize transfers from a client trust account."[27]

Jurisdictions differ as to whether IOLTA accounts are randomly audited, whether there is overdraft notification from the bank to the jurisdiction's disciplinary authority, and whether there is payee notification that settlement funds have been deposited into the lawyer's IOLTA account.

Question: Do you agree that MRPC 1.15, Rule 2 of the Model Rules for Client Trust Account Records, and jurisdictional variations raises issues for the lawyer providing legal services on a temporary basis under MRPC 5.5(c) in a jurisdiction in which the lawyer is not licensed? Please explain your reasoning.

Question: Does MRPC 8.5(b), Choice of Law, provide adequate guidance for the lawyer facing these issues? If yes, how? And, if no, how would you amend any of the above-cited Rules to address this concern?

Lawyers Professional Liability Insurance

Members of the working group discussed how lawyers' professional liability insurance would be affected by amendments to MRPC 5.5 that allow broader opportunities for multijurisdictional practice, akin to that proposed by APRL and the March 2022 discussion draft. Some noted that allowing increased cross border practice in these ways may embolden lawyers to "dabble" in jurisdictions and in subject matters in which they are not familiar. A portion of the working group expressed concerns that many malpractice claims have at their root a lawyer who was either dabbling in a subject matter in which the lawyer was not familiar or with a particular procedural issue they had mishandled.

Question: Would liberalization of MRPC 5.5 as suggested by APRL or the March 2022 discussion draft necessitate insurers developing new application questions, risk assessment, and liability insurance pricing beyond those that already exist for permissible temporary practice in jurisdictions where a lawyer is not licensed?

Other Issues of Note

Jurisdictions differ in how they regulate continuing legal education for lawyers they license. Some of the working group believed this issue should also be considered when evaluating whether and how to allow for greater cross-border practice. For example, currently, only four U.S. states and the District of Columbia do not require a licensed lawyer to attend CLE.[28] The jurisdiction with the least number of hours required per year mandates only three hours of CLE annually. The jurisdiction requiring the most CLE hours mandates 20 hours annually.[29]

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[26] A common jurisdiction split raised is the split between Ohio and its neighbor Pennsylvania. While Ohio's rules require an account held in the state in which the lawyer is licensed, Pennsylvania requires an account where the services are rendered.

[27] Check this.

[28] https://www.americanbar.org/events-cle/mcle

[29] https://www.americanbar.org/events-cle/mcle

Question: Should a lawyer providing legal services temporarily in a jurisdiction in which the lawyer is not licensed be subject to the CLE requirements of that jurisdiction? Please explain your reasoning.

Additionally, some jurisdictions have adopted statewide, enforceable professionalism standards or standards regarding mandatory or voluntary fee dispute resolution. Others have not.

Question: Should the lawyer providing legal services on a temporary basis in a jurisdiction that has adopted enforceable professionalism standards or standards regarding mandatory or voluntary fee dispute resolution be subject to the rule of the jurisdiction in which those services are provided? Please explain your reasoning.

Appendix A

APRL ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

600 W. Van Buren Street
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Chicago, IL 60607
www.aprl.net

Phone: (312) 782-4396
Fax (312) 782-4725

April 18, 2022

By email: rturner@clarkhill.com
Reginald M. Turner, Esq.
President, American Bar Association

Re: APRL's Proposal for a Revised Model Rule 5.5

Dear President Turner:

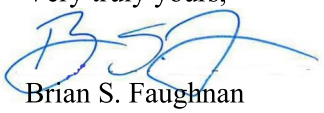
On behalf of APRL, an association of over 400 lawyers and law professors advising and representing lawyers in ethics matters, I enclose APRL's proposal for a replacement Model Rule 5.5 to better reflect the way lawyers practice in the 21st Century. Our proposal advocates that a lawyer admitted in any United States jurisdiction should be able to practice law and represent willing clients without regard to the geographic location of the lawyer or the client, without regard to the forum where the services are to be provided, and without regard to which jurisdiction's rules apply at a given moment in time. At the same time, our new Model Rule 5.5 would still preserve judicial authority in each state to regulate who appears in state courts, emphasizes that lawyers must be competent under Rule 1.1 no matter where they are practicing or what kind of legal services they are providing, and ensures that lawyers will be subject to the disciplinary jurisdiction of not only their state of licensure but wherever they practice.

Several years ago, one of my predecessors as President of APRL, George Clark, established a committee focused on the Future of Lawyering. The Future of Lawyering Committee is chaired by two other past presidents of our organization, Jan Jacobowitz and Art Lachman. After several years of hard work and discussions, the first action item from that group is a proposal to replace current ABA Model Rule 5.5 with a new version. That group has also created a very detailed report that discusses the history of the existing rule, how it is rooted in troubling presumptions, and how it is anachronistic in relation to the modern practice of law. In addition to the revised proposed rule itself, I also enclose a copy of that Report of the Future of Lawyering Subcommittee of the Association of Professional Responsibility Lawyers.

In March, APRL's Board voted to adopt the proposed revised rule as APRL's own proposal and authorized the report prepared by a Subcommittee of our Future of Lawyering Committee to be publicly disseminated. We hope to garner support not only within the ABA for this proposal, but also in any states independently willing to consider changes to their own versions of RPC 5.5. I would ask that you help disseminate these materials to the appropriate channels within the ABA.

I thank you for your time, your consideration, and your service to our profession.

Very truly yours,



Brian S. Faughnan
APRL 2021-2022 President
Lewis Thomason, P.C.

APRL MODEL RULE 5.5

RULE 5.5: Multijurisdictional Practice of Law

(a) A lawyer admitted and authorized to practice law in any United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction, subject to the other provisions of this rule.

(b) Only a lawyer who is admitted to practice in this jurisdiction may hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer who provides legal services in this jurisdiction shall:

(1) Disclose where the lawyer is admitted to practice law;

(2) Comply with this jurisdiction's rules of professional conduct, including but not limited to Rule 1.1 (Competence), and with the admission requirements of courts of this jurisdiction;

(3) Be subject to Rule 8.5 regarding the disciplinary authority and choice of law rules of this jurisdiction; and

(4) Not assist another person in the unauthorized practice of law in this, or any other, jurisdiction.

(d) A lawyer admitted and authorized to practice law in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates;

(2) are not services for which the forum requires pro hac vice admission; and

(3) do not arise under the law of any U.S. jurisdiction, unless the services are provided after consultation with a lawyer authorized to practice law in this jurisdiction.

New Comments

1. This rule acknowledges that the practice of law now routinely transcends geographic jurisdictional boundaries. The question of what it means for a lawyer to practice law "in" a jurisdiction has been clouded by advances in technology that facilitate lawyers' ability to communicate, work, and appear in other jurisdictions. For example, historically a lawyer's physical presence in a jurisdiction was the predominate factor in determining where the lawyer practiced law. In modern law practices, lawyers routinely send e-mails, place phone calls, and participate in video calls with clients and other parties in other jurisdictions, rendering the lawyer's physical location irrelevant to the lawyer's capacity to provide legal

services. Similarly, the advent of on-line research, including access to local rules and ordinances, has enhanced lawyers' ability to master competency without regard to artificial geographic limitations. Hence, this rule recognizes the realities of current law practice and expanding access to lawyers while still being mindful of the need for public protection.

2. The definition of the practice of law may be established by statute or common law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to individuals admitted and authorized to practice law in at least one United States jurisdiction, protects the public against rendition of legal services by unqualified and unaccountable persons. Under the circumstances specified in section 5.5(d) of this rule, lawyers licensed in a foreign jurisdiction may also practice law without undue risk of harm to the public.

3. A lawyer is "admitted" in a jurisdiction when they have been formally licensed to appear in the courts of that jurisdiction without limitation. A lawyer may be "authorized" to practice in a jurisdiction if they are admitted to practice in any U.S. jurisdiction or, where court rules so require, the lawyer has been admitted to appear by a pro hac vice procedure, or other similar mechanism. A lawyer may be admitted to practice but not authorized to do so, because, for example, the lawyer is on inactive status. Under this rule, a lawyer must be both admitted and authorized to practice in at least one United States jurisdiction.

4. The distinction of being admitted in a particular jurisdiction relates to the privilege of regularly appearing in the courts of this jurisdiction and communicating that privilege to the public. Thus, while lawyers admitted in other jurisdictions may practice in this jurisdiction as provided in this rule, only lawyers admitted in this jurisdiction may represent that they are fully authorized to appear regularly in the courts of this jurisdiction.

5. Paragraph (c)(1) requires that all lawyers, including lawyers admitted in this jurisdiction, disclose the jurisdiction(s) in which they are admitted. Such disclosure is necessary to inform consumers of legal services and other parties where the lawyer's license originates and to facilitate disciplinary enforcement. This Rule anticipates that the primary form of disclosure will be in written communications, such as lawyers' signature blocks on correspondence and in lawyer advertising, including websites. A lawyer who communicates orally with another person and knows, or reasonably should know, that the other person has a misunderstanding about the lawyer's licensure, has an affirmative duty to correct the person's impression. *See* Rule 4.3.

6. A lawyer may establish an office for the practice of law in this jurisdiction with proper disclosure of the jurisdiction(s) in which the lawyer is admitted.

7. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 – 7.3.

8. All lawyers are required to be competent in the practice of law. *See* Rule 1.1. The lawyer's duty of competence applies regardless of practice area or the jurisdiction in which a matter is located.

9. All lawyers are subject to the disciplinary authority of the jurisdictions in which they practice. *See* Rule 8.5(a). The frequency with which disciplinary authorities have exercised their authority to prosecute and discipline lawyers not licensed in their jurisdiction has increased in the past decade, suggesting that geographic boundaries are not an impediment to holding lawyers accountable for ethical misconduct. Hence, allowing lawyers to practice in multiple jurisdictions does not undermine public protection.

10. A lawyer does not engage in the unauthorized practice of law by employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3. A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

11. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority. In the absence of such requirements, this Rule permits lawyers to appear before administrative agencies in jurisdictions in which they are not admitted, subject to the other provisions of this Rule.

12. In situations in which pro hac vice admission is required, this Rule permits a lawyer to engage in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law under this rule but for which pro hac vice admission has not yet been obtained. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents.

13. Paragraph (d) applies to a foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the foreign lawyer to provide personal legal services to the employer's officers or employees or legal services to the general public. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the foreign jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under this Rule needs to first consult with a lawyer admitted and authorized to practice in at least one U.S. jurisdiction.

REPORT OF THE FUTURE OF LAWYERING SUBCOMITTEE OF THE ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS REGARDING PROPOSED REVISED MODEL RULE 5.5[1]

Introduction

The Association of Professional Responsibility Lawyers Committee on the Future of Lawyering proposes a revised Model Rule 5.5 that offers a 21st century approach to the practice of law. Since the adoption of the current Model Rule 5.5 in 2002, lawyers in the United States have continued to expand their practices beyond state and national borders. The existing rule no longer adequately addresses the day-to-day questions lawyers have about multi-jurisdictional practice and it preserves outdated notions of how lawyers serve their clients. APRL believes that a broader rule is critical to the future of the profession.

APRL's proposed revision of Model Rule 5.5 reflects the concept that a lawyer admitted in any U.S. jurisdiction should be able to engage in the practice of law and represent willing clients without regard to the geographic location of the lawyer or the client, the forum the services are provided in, or which jurisdiction's rules apply at a given moment in time. The proposed revision recognizes that ethics rules will continue to govern the conduct of lawyers and require competence in the delivery of legal services provided; acknowledges that courts and other tribunals have the inherent power to control who appears before them; and embraces the fact that technology has fundamentally changed the ease with which clients and lawyers work together over vast distances.

The proposed revised Model Rule 5.5 offers up a regulatory model that would be similar, though not identical to the way that driver's licensing works in our nation. Although each jurisdiction implements its own scheme for granting drivers' licenses, those licenses are, of necessity, recognized in every U.S. jurisdiction. Drivers are expected to inform themselves of the laws in jurisdictions to which they travel.

APRL's proposal does not ignore state licensure. To the contrary, APRL's proposal would enhance public protection by requiring that all lawyers, in every jurisdiction,

[1] The members of the subcommittee involved in the drafting of the proposed rule and of this report are: Kendra Basner (San Francisco, CA), Eric Cooperstein (Minneapolis, MN), Craig Dobson (New York, NY), Brian S. Faughnan (Memphis, TN), Jan Jacobowitz (Miami, FL), Arthur Lachman (Lake Forest Park, WA), David Majchrzak (San Diego, CA), Sari Montgomery (Chicago, IL), Lynda Shely (Scottsdale, AZ), and Hope Todd (Washington, D.C.).

disclose the jurisdictions in which they are licensed. APRL's proposal preserves the authority of judicial branches to regulate who appears before them, reminds lawyers of their ethical obligation under Rule 1.1 to be competent in all the services they provide, and ensures that lawyers will be held responsible for any misdeed committee in the relevant jurisdictions.

The proposal which APRL now urges acknowledges that clients must continue to be protected from the incompetent practice of law. However, the proposal also elevates the client's right to choose counsel to a co-equal status in the context of the regulation of multijurisdictional practice and acknowledges that protecting clients from incompetent lawyering does not require artificial boundaries that prevent clients from choosing competent counsel of their choice even if the lawyer they choose is licensed elsewhere.

The report provides APRL's reasoning and support for its proposal, including some significant historical context for Rule 5.5. The report addresses the realities of today's practice to highlight the unnecessary restriction on the ability of lawyers to practice in multiple jurisdictions and considers the recent experience of lawyers and their clients during the global pandemic.

The report also expands the principles that APRL believes should be at the heart of a regulatory structure that addresses multijurisdictional practice in a manner that benefits both clients and their lawyers. The report also discusses why certain existing "solutions" to these problems are insufficient, unjust, or both. Finally, the report includes historical context and insight into the origin of today's approach and the systemic problems that are exacerbated by its continuing existence.

Technology and the Evolution of the Practice of Law

If it was not already clear before the onset and consequences of the Covid-19 Global Pandemic ("2020 Pandemic") that technology has changed the modern practice of law, the conclusion is now undeniable. In the face of stay-at-home and other quarantine orders, technology has allowed lawyers to remotely meet with clients, negotiate deals, mediate, and appear in court via Zoom and other video conferencing technology.[2] Today's

[2]Jan L. Jacobowitz, Chaos or Continuity? The Legal Profession: From Antiquity to the Digital Age, the Pandemic, and Beyond, 23 Vanderbilt Journal of Entertainment and Technology Law 279 (2021);

technology readily allows a lawyer to practice law from almost anywhere assuming available access to a wireless network. However, Model Rule 5.5 and its various state iterations prohibit the unauthorized practice of law—even with the use of remarkable technology during a global Pandemic. As discussed below, both the historical underpinnings of Rule 5.5 and the contemporary practice of law compel a review and revision to what should be considered the unauthorized practice of law and the rules that prohibit it.

It is important to note that not only is there a lack of evidence that lawyers are harming the public by working across state lines (assuming that they are licensed and in good standing in at least one state), but also that there is no evidence clients prioritize the location of their lawyer when deciding who to retain. In fact, Clio's 2020 Legal Trends Report indicates that:

> - ...Many consumers (37%) prefer to meet virtually with a lawyer for a consultation or first meeting, and 50% would rather conduct follow-up meetings through video conference. 56% of consumers would prefer videoconferencing over a phone call.
> - ...The majority of consumers (65%) prefer to pay using electronic forms of payment, such as credit cards, debit cards, or online payment systems such as Clio Payments, PayPal, or Apple Pay over cash or check.
> - ...The majority of consumers (69%) prefer working with a lawyer who can share documents electronically through a web page, app, or online portal. [3]

Thus, not only can lawyers and clients conduct the business of law remotely, regardless of physical location, but many even find it preferable. Just as the rules have evolved regarding competence, confidentiality, and technology so too should Rule 5.5 be revised to permit lawyers and clients to work together remotely without fear of

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https://news.bloomberglaw.com/us-law-week/pandemic-pressures-restriction-on-where-lawyers-can-practice.

[3] 2020 Legal Trends Report (Clio) available at https://www.clio.com/resources/legal-trends/2020-report/.

disciplinary or statutory action against the lawyer for violations of Rule 5.5 or UPL regulations.

Geographical Limitation and The Public's Access to Legal Services

There is no legitimate dispute that there is an access to justice crisis in the United States. This access to justice crisis – in all U.S. jurisdictions - exists under the current regulatory framework restricting the unauthorized practice of law. The "access to justice" gap includes many under-served clients who are willing to pay legal fees for a lawyer's representation, but do not ever hire a lawyer. Admittedly, there are multiple reasons why clients with some means to pay may not hire a lawyer. One of those reasons is an actual physical access problem -- the unavailability of lawyers in the clients' geographic area. Legal services "deserts" exist in many states where there are too few lawyers, or none at all, in a geographic area. Rural consumers have less access to lawyers than urban and suburban consumers.[4] Geographic restrictions on admission further compound the problem.

In some rural areas lawyers are retiring, but new lawyers are not moving to those areas to replace them. Other locations do not have locally admitted lawyers, thus causing consumers in these legal services deserts to have to travel long distances to meet with a lawyer.

The lack of truly local lawyers can be remedied to some degree by harnessing technology to make representation by lawyers from other parts of the same state easier, but it is only the profession's current ethical rules that make using lawyers geographically nearby but, in another state or jurisdiction as a broader remedy untenable.

Unfortunately, even in jurisdictions that have written their UPL rules and laws to be in line with ABA Model Rule 5.5, lawyers in another state or jurisdiction cannot provide legal services on a regular basis in a jurisdiction where they are not admitted. The current state regulatory restrictions on practicing law reinforce some of the reasons these geographic legal deserts continue to exist.

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[4] *See* Conference of State Court Administrators, *Courts Need to Enhance Access to Justice in Rural America*, p. 1-3 (2018).

Lawyers who may be only a few miles away from clients in need cannot provide the services if the lawyers are not admitted to practice law where the clients live. Those same available lawyers may be under-employed or unemployed, yet an arbitrary state boundary prohibits them from providing services.

Additionally, those unemployed and under-employed lawyers may not be able to afford to pay a second state's admission fees, repeatedly satisfy CLE requirements, and so forth. Yet those lawyers may be competent and would otherwise be available at a reasonable fee but for current ethical and regulatory restrictions. Forcing unemployed lawyers who are competent and licensed in at least one state to take an additional bar examination, pay additional bar dues, and be challenged again about their character and fitness for the ability to serve underserved legal communities in another jurisdiction is illogical.

An unyielding, purely geographic, border inhibits the ability for competent and willing lawyers to provide legal services to consumers who need access to those services. The current state admission framework inhibits clients' ability to receive legal services and further inhibits clients' choice of counsel. If there were more flexibility for "border" lawyers to provide legal services for clients who are geographically close, whatever the applicable state law may be, the cost of legal services would be reduced, availability and access would be increased, and lawyers could be more gainfully employed.

U.S. jurisdictions continue to struggle to bridge the access to justice gap by failing to adequately amend rules concerning the "practice of law" and who may provide legal services because much of the focus is on including more and more categories of nonlawyers.[5] This is not the only solution, and it blatantly ignores an obvious path forward.

Jurisdictions continue to have lawyers who are unemployed and under-employed[6] all while legal services "deserts" exist in places where paying clients would be willing to

[5] *See, e.g., Washington LLLTs and legal navigators, AZ CLDPs and LPS, California Document Preparers, Minnesota Nonlawyers, NM nonlawyers, NY advocates, Utah Sandbox Participants.* National Center for State Courts, Non-Lawyer Legal Assistant Roles Efficacy, Design, and Implementation (2015) at 2 (A study by the National Center for State Courts (NCSC) in 2013, "Estimating the Cost of Civil Litigation" reports that the average cost for typical civil court case types puts the courts beyond the financial means of many litigants).

[6] 2020 Legal Trends Report (Clio), *supra*.

hire a lawyer who is presently unavailable to them. The current outdated state regulatory framework further reinforces the access to legal services problem in the U.S and it does so despite a wealth of experience demonstrating that modern technology can allow lawyers to provide many legal services seamlessly and competently to clients from just about any location.

Competency and the Paradox of the Licensed Lawyer

The seemingly arbitrary nature of the geographical limitations imposed by the current regulatory structure is heightened by an understanding of the paradox associated with how few restrictions exist on a lawyer's ability to practice by subject matter. Once admitted in a U.S. jurisdiction, a lawyer is permitted to practice in any area of law of the lawyer's choosing or in multiple areas of law.

Indeed, historically, lawyers might take any case that crossed their office threshold, be it a family law matter one day, a criminal matter the next, or HIPAA compliance for a third-party provider of information systems the day after that. Over the past several decades, the profession has observed a trend away from the concept of lawyers as generalists and toward lawyers narrowing their practice to only one or two areas, in which they develop deep expertise. But that outcome has arisen because of the marketplace, not any ethical restrictions on practice.

A lawyer's voluntary devotion to one area of practice, however, in no way restricts the scope of the lawyer's license in their state. An attorney with 20 years of experience, but only involving family law, who learns of a neighbor's, relative's, or former client's severe car accident may agree to represent that person. Similarly, a lawyer who, following admission to the bar, works in a non-legal setting for twenty years, faces no licensing restrictions in taking on that same personal injury case as long as they have an active law license. Moreover, a newly minted lawyer immediately after passing the bar could take on a family law case, a car-accident lawsuit, and a contract negotiation with a hospital for a physician. The lawyers in these scenarios might not be the best lawyers for the job, but the Rules of Professional Conduct assume that the lawyers can educate themselves about the subject matter and competently handle the case. *See* Rule 1.1, cmt. [2].

The "Competency Fallacy of Rule 5.5," however, dictates that a lawyer licensed in "State A", who has devoted their entire career to personal injury work for example, would not be competent to represent the car-accident victim described above (without the association of local counsel)[7] because the lawyer is presumed to be incapable of knowing or coming to understand "the law of State B." Instead, if that State A-licensed lawyer wanted to be able to regularly represent clients with personal injury cases in State B, the lawyer would have to obtain a second license to practice law, a license issued by State B. Those who accept the current systemic issues often rely upon arguments that lawyers who wish to be able to practice across state lines more freely can simply obtain such additional licenses through reciprocity. This option to pursue additional licenses through reciprocity is not an adequate solution, and for many jurisdictions, is simply not true.

Those who tout the virtues of reciprocity not only ignore that 11 states do not offer reciprocity or provisional/reduced admission requirements at all, but they usually gloss over the burdens that this default imposes upon lawyers in the jurisdictions where it is a possibility. First, many jurisdictions impose a "time in practice" requirement such that a lawyer seeking to become licensed in a new jurisdiction without having to sit for the bar examination must have either practiced law for a set number of years, often five or more, or must have been engaged in active law practice for some percentage (often 60% or more) of the most recent time-period or both.

For example, to seek admission by reciprocity in Tennessee, a lawyer must have been licensed in another jurisdiction for at least 5 years and must have been engaged in the active practice of law for 5 of the 7 years preceding the date of the application. See Tenn. Sup. Ct. R. 7, § 5.01(a)(3). On the other hand, there are some jurisdictions that allow reciprocity if the lawyer received a minimum passing score on the Multistate Bar Examination so long as the lawyer applies within a certain amount of time after passing that test.

Second, for those jurisdictions that conditionally allow reciprocity, the application and admissions process for reciprocity has built in expenses – both upfront and recurring

[7] Of course, even with local counsel, the lawyer will likely also have to seek pro hac vice admission to appear in the State B court in connection with the litigation. Furthering the paradox, most rules for pro hac vice admission do not include anything that would require the lawyer seeking admission to demonstrate substantive competence with respect to the issues being litigated or even as to litigation generally.

-- in the form of application fees, the fee charged by the National Conference of Bar Examiners for conducting a background investigation (discussed below), additional annual registration or bar fees, and, in some jurisdictions, additional imposed taxes in the form of professional privilege taxes and the like.

Third, the addition of another state of licensure can also lead to the imposition of even more required hours of continuing legal education if both the lawyer's original jurisdiction and the new jurisdiction impose mandatory hours requirements and if the states' approaches to calculating hours or certifying courses are not identical.

Fourth, even for lawyers that have practiced for long enough to be eligible for admission by reciprocity, the process can take an excessive time, especially when considering that the person awaiting a ruling on their application is someone who has most likely already passed a bar examination (unless they are among the small minority of lawyers (pre-pandemic) to have obtained licensure in a diploma-privilege state) and also has already been vetted through a state's character and fitness evaluation process.

The process can take months and may even last for a year or longer. The timing of the process is prolonged because it is not one of a rubber stamping of decisions made in the home licensing jurisdiction; nor is it one in which the exploration into the applicant's background is reasonably limited to life events occurring after the issuance of the original law license.

Instead, an applicant must authorize a brand-new background investigation by either the National Conference of Bar Examiners or other state authorized investigatory body. The state entity from which reciprocity is sought then waits for the results of that new investigation and has the power to dig into any aspects of the applicant's background that it feels raises substantial questions about the applicant's character and fitness.

Thus, someone who is already a licensed lawyer in one state can find themself facing opposition to their admission in another jurisdiction on character and fitness grounds involving past conduct that did not prevent their admission to their home jurisdiction. These situations seem discordant enough when the grounds being examined truly involve only "conduct." But the unfairness is made even starker when situations arise involving concerns about physical or mental health conditions rather than actual incidents of past misconduct. Such a situation, indirectly presented in subsequent federal court litigation, resulted in one federal district judge (now a member of the D.C. Circuit Court of Appeals),

authoring a scathing opinion taking Kentucky's regulatory process to task. *See Jane Doe v. Supreme Court of Ky.*, No. 03:19-cv-00236-JRW, (W.D. Ky. Aug. 28, 2020).

The collective burdens this general approach imposes have been the subject of scrutiny with application to military spouse attorneys, a very small subset of the population with very successful lobbying efforts at seeking regulatory reforms. Roughly 30 states have enacted rule revisions or other accommodations in response to such efforts. You can find an up-to-date listing of such revisions at https://www.msjdn.org/rule-change/.

While much of the focus of lobbying efforts made on behalf of military spouse attorneys focused on the sympathetic nature of their circumstances and the practical realities associated with being required to move frequently – sometimes even faster than the wheels of the regulatory system can turn to fully process a reciprocity application – there is fundamentally little reason to believe that a lawyer falling within this small subset is more ethical or more competent than another lawyer simply because they are married to someone in active military service.

Returning to Tennessee as an example, after lobbying efforts and a rules revision petition filed by a prominent military spouse attorneys' group, an exception was adopted in Tennessee that permits someone who is not licensed in Tennessee, but who is married to an active member of the U.S. armed forces, to obtain a temporary license in Tennessee without having to submit to a new NCBE character and fitness investigation as long as they are "the spouse of an active duty servicemember of the United States Uniformed Services," are "physically residing in Tennessee or Fort Campbell, Kentucky due to the servicemember's military orders," and can demonstrate several other basic requirements. *See* Tenn. Sup. Ct. R. 7, § 10.06(a).

Although the overall sample size is small when compared to the bar as a whole, the apparent dearth of any known cases of discipline for incompetent handling of matters by military spouse attorneys in the 30 jurisdictions where barriers to licensure have been dropped cannot be overlooked as an indicator that the "Competency Fallacy of Rule 5.5" cries out for re-evaluation. While allowing these lawyers more freedom to represent clients has not resulted in any noticeable increase in discipline, state bars have been actively imposing discipline against lawyers solely for engaging in "unauthorized practice

of law" in circumstances where the existence of any harm to consumers of legal services is questionable.

Client Trust and Choice of Counsel

APRL's proposed revisions to Model Rule 5.5 do not reject the need for client protection but elevates the client's right to choose counsel to a co-equal status in the context of the regulation of multijurisdictional practice. Providing client protection does not require artificial boundaries that prevent clients from choosing competent counsel of their choice even if the lawyer they choose is licensed elsewhere.

A client's right to choose, discharge, or replace their lawyer is a core ethical principal that permeates the Rules of Professional Conduct and is underscored in case law throughout the country. The law of law firm breakups and lawyer departures clarifies that neither a law firm nor any of its lawyers have a possessory interest in clients. The Supreme Court of Indiana has articulated in concise fashion the broadly recognized concept that clients are not "chattel" but independent actors with agency: "Although the firm may refer to clients of the firm as 'the firm's clients,' clients are not the 'possession' of anyone, but, to the contrary, control who will represent them." *Kelly v. Smith*, 611 N.E.2d 118, 122 (Ind. 1993).

The concept that an individual has a right to legal counsel is traditionally centered around the concept that "choice" necessarily suggests alternatives from which to choose. When the client is prepared to pay for legal representation, it would make sense that the client should be empowered to choose whoever the client wishes. This largely unchallenged freedom of choice continues past the initial selection of a lawyer. "[T]he right to change attorneys, with or without cause, has been characterized as 'universal.'" *Echlin v. Super. Ct. of San Mateo County*, 90 P.2d 63, 65 (Cal. 1939).

One scenario that highlights this issue is when a lawyer who has been working on a matter departs the firm where they have been employed. In such instances, the client has three choices, to remain a client with the firm, to remain a client with the departing lawyer, or whether to select new counsel altogether. *See, e.g.*, ABA Formal Ethics Op. 489; Rules Regulating the Florida Bar, rule 4-5.8; Virginia State Bar Professional Guidelines, rule 5.8 (both requiring that clients be notified of these three options).

It is because of a client's choice of counsel that restrictive covenants precluding lawyers who depart a firm from competing in the same marketplace have generally been found to be unenforceable outside of conditions on retirements, such as permitted by Model Code of Professional Responsibility DR 2-108(A) and Model Rule 5.6. Such restrictions not only discourage mobility within the marketplace but also deny clients the ability to choose between the firm and the withdrawing lawyer who previously represented them.

Under common law, the client's right to choose who should serve as their lawyer has been regarded as necessary to ensure that the proper dynamics exist for this unique fiduciary relationship. More than 90 years ago, the City Court of New York remarked, "It is unquestioned that a client has the right to terminate the relationship of attorney and client at any time, with or without cause. That right is afforded him by the law because of the peculiar nature and character of the relationship, which in its very essence is one of trust and confidence. It is a right for the benefit of the client and is intended to save him from representation by an attorney whose services he no longer desires." *Gordon v. Mankoff,* 261 N.Y.S. 888, 889-90 (1931).

Further, under the Sixth Amendment, there is a presumption that a criminal defendant may retain counsel of choice. For example, the Supreme Court concluded that the denial of a defendant's request for a continuance to consult with a lawyer violated due process rights. "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified. …A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." *Chandler v. Fretag*, 348 U.S. 3, 9, 10 (1954). This is consistent with the Supreme Court's earlier statement that "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama,* 287 U.S. 45, 53 (1932).

A client's preference for counsel is even honored when looking at the termination of the relationship between a lawyer and a client. Clients may end a lawyer's representation at any time and for any reason. Conversely, lawyers may terminate the relationship only based on one or more of the enumerated situations set forth in Model

Rule 1.16(a) and (b)—and may only do so upon following the procedures set forth in (c) and (d).

Indeed, it is not unheard of for a court to deny a lawyer's application to withdraw from representing a client, even when the appropriate conditions are present. This issue is often litigated when a client terminates a lawyer's engagement before the occurrence of an event that a fee is contingent upon. The terminated lawyer often argues that the client's decision is unfair, particularly if the lawyer believes there was no just cause for the termination. But fairness to lawyers is subordinate to clients' right to choose and change their legal representatives. *See, e.g., Fracasse v. Brent*, 494 P.2d 9, 13 (Cal.1972). The Supreme Court of California has remarked:

> The interest of the client in the successful prosecution or defense of the action is superior to that of the attorney, and he has the right to employ such attorney as will in his opinion best subserve his interest. The relation between them is such that the client is justified in seeking to dissolve that relation whenever he ceases to have absolute confidence in either the integrity or the judgment or the capacity of the attorney. . . . The fact that the attorney has rendered valuable services under his employment, or that the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action, does not deprive the client of this right. (*Id.*.)

Even where a client's right to choose is not absolute, for example, where a lawyer has a conflict of interest that cannot be waived, courts still articulate that the right to choose counsel should be of paramount importance. Particularly when addressing challenges by third parties—often in the context of asserted conflicts—courts have consistently concluded that a client's choice of counsel should be infringed upon only in cases where injustice will result. [8]

[8] *See, e.g., Blumenfeld v. Borenstein*, 247 Ga. 406, 408 (1981) (reversing disqualification based solely on marital status, holding, "The mere fact that the public may perceive some conduct as improper is, without some actual impropriety, insufficient justification for interference with a client's right to counsel of choice."); *United States v. Urbana*, 770 F. Supp. 1552, 1556 (S.D.Fla. 1991) (courts disqualify an accused's lawyer of choice only as a measure of last resort). *Macheca Transport Co. v. Philadelphia Indem. Co.*, 463 F.3d 827, 833 (8th Cir. 2006) (the extreme measure of disqualifying counsel of choice should be used only when absolutely necessary); *In re BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003) (the right to counsel of choice may only be overridden for compelling reasons); *Optyl Eyewear Fashion Intern. Corp. v. Style Companies, Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985) (because of potential for abuse, disqualification motions should be subject to particularly strict judicial scrutiny); *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 794 (2d Cir. 1983) (movant must meet a heavy burden to remove opposing counsel).

Yet when it comes to the multi-jurisdictional practice of law, the principal of client choice of counsel is strikingly absent. No matter that the prospective client has known the lawyer personally for many years, is related to the lawyer, has a prior professional relationship with the lawyer, is familiar with the lawyer's expertise in a narrow area of the law, or was referred to the lawyer by a trusted associate. If the lawyer is not licensed in the state in which the client resides or where a matter occurs, the client's choice receives no deference under Rule 5.5. Client choice of a lawyer is paramount, except when it contravenes an outdated regulatory scheme based on state boundaries

The Long and Problematic History of Placing Geographic Restrictions on the Right to Practice Law

Historical context proves useful when attempting to understand the current framework and to justify amending it to reflect the contemporary practice of law. In fact, "[t]he state-based licensing process originated more than two centuries ago when the need for legal services was locally based and often involved the need for representation in court."[9] It is worthwhile to journey back to this time to understand both the historical reasoning and its inapplicability to today's legal profession.

The authority to admit lawyers to practice in a jurisdiction derives from the role of the judiciary in the American legal system:

> From the colonial period until today, American courts have claimed the English common law tradition of inherent power—a power not derived from statute—to regulate the lawyers practicing before them, especially with respect to admission to practice. Thus, the courts must license lawyers before lawyers will be given audience, courts set the terms upon which legal practice is pursued, and courts enforce the rules they have themselves established.[10]

From Colonial Times to 1921

[9] Report of the ABA Commission on Multijurisdictional Practice, at 7 (August 2002) ("2002 MJP Report")."

[10] 1 Geoffrey Hazard, Jr., William Hodes & Peter Jarvis, THE LAW OF LAWYERING §1.07, at 1-26 (4th ed. 2021).

In colonial America, local judges generally determined admission in colonial courts, usually based on service in an apprenticeship for a number of years. An alternative approach was to permit lawyers admitted to the English bar to practice anywhere in the colonies.[11] After the American Revolution, states imposed varying admission requirements, with bar examinations, where they existed, generally a mere formality that could be bypassed by choosing a different area of study, such as clerking under a practitioner or judge.[12]

"[C]ontrol of the American legal profession remained highly localized and dispersed through the first hundred years or so following the Revolution."[13] Thus, "during the Jacksonian era, Bar admission requirements became increasingly less strict because of the perceived elitism of admission practices as contrary to democratic ideals."[14] As a result, almost any *man* who desired to practice law could gain admittance.[15] Where examinations were required, they were often oral and minimal, and have been characterized as "laughable" and almost a "farce" or a "joke."[16] "By 1860, of the thirty-nine states, only nine had any specific requirements for admission to their Bar."[17]

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[11] Daniel Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives,* 45 CASE W. RES. L. REV. 1191, 1193-94 (1995).

[12] *Id.* at 1194-95.

[13] James Jones, Anthony Davis, Simon Chester & Caroline Hart, *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?,* 30 GEORGETOWN J. LEGAL ETHICS 125, 129 (2017).

[14] Hansen, *supra,* at 1195; Carol Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process,* 36 HOFSTRA L. REV. 1193, 1199 (2008). *See also* Jones, et al., *supra,* at 129 ("early efforts by the old established bars of the original colonies to keep the legal profession small and elite through rigorous admissions standards following the American Revolution largely collapsed, in no small part because of the diverse legal needs of a vast and rapidly expanding country of individual entrepreneurs"), citing Lawrence Friedman, A HISTORY OF AMERICAN LAW 315–18 (2d ed. 1985).

[15] Hansen, *supra,* at 1195-96; Langford, *supra,* at 1199. *See also* Matthew Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions,* 39 CAL W. L. REV. 1, 7 (2002) ("Although good moral character remained requisite for admission to the practice of law in many states, Bar membership was effectively open at the end of the Civil War to any and all male citizens who could produce a personal reference.").

[16] Hansen, *supra,* at 1196, 1200; Lawrence Friedman, A HISTORY OF AMERICAN LAW 317, 652 (2d ed. 1985). An often-told anecdote from the pre-Civil War period is of Abraham Lincoln examining an Illinois bar applicant while the future president was taking a bath. Hansen, *supra,* at 1196 (quoting Joel Seligman, *Why the Bar Exam Should be Abolished,* JURIS DR., at 48 (Aug.-Sept. 1978).

[17] Ritter, *supra*, at 7.

"The radical democratization of Bar admissions prompted widespread calls for its reform in the later nineteenth century."[18] The post-Civil War years saw the beginning of the standardized law school curriculum in this country, as Christopher Columbus Langdell's theory of legal education, based on the case method of Socratic instruction and focused on increased standards and more uniformity (which would effectively limit competition in the profession), became accepted.[19]

In addition, "[e]xpanding post-war industrialization increased concern over the character certification and competency of lawyers to deal with the extensive legalization of the social economy."[20] "The ancestor to the modern written bar examination developed between 1870 and 1890 and gained substantial ground and acceptance in the 1890s… [B]y the 1920s, there was a written bar examination in most states."[21] Further, "[b]etween 1880 and 1920, states adopted additional entry procedures, such as publication of applicants' names, probationary admissions, recommendations by the local Bar, court-directed inquiries, and investigation by character committees."[22]

1921 ABA Root Report

What has become the traditional route to bar admission now includes "graduating from an accredited law school, passing the admitting state's bar examination, and satisfying the state's bar examiners that the applicant possesses the requisite character to

[18] Deborah Rhode, *Moral Character as a Professional Credential,* 94 YALE L.J. 491, 498 (1985)

[19] Hansen, *supra,* at 1198-99.

[20] Langford, *supra,* at 1204.

[21] Hansen, *supra,* at 1200 (noting that "the written bar exam principally developed as a replacement for oral bar exams, and not as a check on law schools," and citing George Stevens, *Diploma Privilege, Bar Examination or Open Admission,* 46 B. EXAMINER 15, 25-26 (1977), for the proposition that "the bar exam was intended to standardize admissions requirements and was considered egalitarian in the sense that its mission was to equalize the disparate admissions requirements in various regions around the country").

[22] Rhode, *supra,* at 499.

practice law."[23] This uniform route to lawyer admission in virtually every state has its roots in the ABA Root Committee Report, issued 100 years ago, in 1921.[24]

The Root Report established the ABA's position that three years of law school education should be required for licensed lawyers (with two years of college as a prerequisite for law school entry), but that such a requirement alone was not sufficient. "[G]raduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness."[25] The diploma privilege was eventually eliminated and replaced by required exams by all of the states with the exception of Wisconsin as of 2020.[26]

The Root Report urged states to impose these legal education and bar examination requirements based on two primary considerations: "efficiency" and "character." "The part played by lawyers in the formulation of law and in the establishment and maintenance of personal and property rights requires a high degree of efficiency for the proper service of the public."[27]

As to "character" considerations specifically, the Report noted that "it is plain that the private and public responsibilities of the profession demand a high standard of morality and implicit obedience to correct standards of professional ethics."[28] Thus, "character screening effectively arrived in the early twentieth century."[29] By 1927, a large

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[23] 2002 MJP Report, at 7.

[24] Elihu Root, et al., *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association,* 44 REP. ANNUAL MTG. A.B.A. 679 (1921) ("Root Report").

[25] *Id.* at 687-88

[26] *See* Hansen, *supra,* at 1192 & n.7. Objections to the diploma privilege in the 20th Century included "(1) a fear that law school education lacked uniformity in the length of time given over to study; (2) a belief that the diploma privilege was anti-democratic because it tended to favor state law schools over private schools, which were often not granted the privilege; (3) a belief that the diploma privilege discriminated against state residents who studied at out-of-state institutions; (4) a belief that the bar examination produced a higher standard of practice; and (5) a fear that the diploma privilege allowed law schools to circumvent the state's control of the bar." Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It,* 2000 WISC. L. REV. 645, 647. The third and fifth of these objections implicate federalism concerns that form the basis of current UPL regulation in state statutes and the ethics rules.

[27] *Id.* at 680.

[28] *Id.*

[29] Keith Swisher, *The Troubling Rise of the Legal Profession's Good Moral Character,* 82 ST. JOHN'S L. REV. 1037, 1041 (2008). Other articles exploring the history of character and fitness requirements in detail

majority of the states had "strengthen[ed] character inquiries through mandatory interviews, character questionnaires, committee oversight, or related measures."[30]

The Report urged immediate action by the organized bar, the ABA, and state and local bar associations "to prevent the admission of the unfit and to eject the unworthy," and to "purify the stream at its source by causing a proper system of training to be established and to be required."[31] It is probably an understatement to say that when enforcement of character requirements began in earnest in the middle part of the 20th Century, "both its motivations and outcomes were extremely problematic."[32] In 1971 and again in 1991, the ABA and the National Conference of Bar Examiners reaffirmed the basic conclusions and recommendations of the Root Report.[33]

Statutory Developments and Enshrinement of UPL Restrictions in the Ethics Rules

Although the original 1908 ABA Canons on Professional Ethics did not contain a provision regarding the Unauthorized Practice of Law (UPL), professional bar associations began to organize against UPL about a decade before the issuance of the Root Report. In 1914, "the New York County Lawyers Association launched the first unauthorized practice campaign by forming an unauthorized practice committee to curtail competition from title and trust companies," and the ABA followed suit by forming

include Deborah Rhode, *Moral Character as a Professional Credential,* 94 YALE L.J. 491, 498-503 (1985); Roger Roots, *When Lawyers Were Serial Killers: Nineteenth Century Visions of Good Moral Character,* 22 N. ILL. U. L. REV. 19 (2001); Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions,* 39 CAL. W. L. REV. 1, 4-13 (2002); and Carol Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process,* 36 HOFSTRA L. REV. 1193, 1196-1208 (2008).

[30] Swisher, *supra,* at 1041 (quoting Rhode, *supra,* 94 YALE L.J. at 499).

[31] Root Report, at 681.

[32] Swisher, *supra,* at 1040. As well documented in Professor Rhode's seminal 1995 article and expanded upon by Professor Swisher in his 2008 piece, scrutiny based on "character" excluded from admission "unworthy groups" based on gender and ethnicity considerations, as well as other perceived "problem" applicants. *Id.* at 1041-42. By the late 1950s, the U.S. Supreme Court had imposed constitutional constraints on these standards, requiring a rational connection to fitness to practice. *Id.* at 1042 (citing cases).

[33] Hansen, *supra,* at 1201 & nn.62, 63 (citing the 2nd and 3rd editions of the NCBE's Bar Examiner's Handbook).

its own committee on unauthorized practice by 1930.[34] "Beginning in the 1920s, bar associations attempted to gain greater control over the practice of law by spearheading efforts to 'integrate' the bar through court rules (pursuant to inherent powers) or statutes that required every lawyer to belong to the state bar."[35] And beginning in the 1930s, most state legislatures adopted statutes outlawing (and sometimes criminalizing) UPL,[36] with state supreme courts asserting their authority (often stated as "exclusive" authority vis-à-vis the legislature) to define and regulate UPL and the practice of law.[37]

UPL was first mentioned in an ABA ethics code in a September 30, 1937, amendment to the ABA Canons. New Canon 47, titled "Aiding the Unauthorized Practice of Law," provided that "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."

Three decades later, the restriction on assisting UPL was enshrined in the ABA Model Code of Professional Responsibility but also paired with a new prohibition. Canon 3 of the 1969 ABA Model Code of Professional Responsibility was titled "A Lawyer Should Assist In Preventing the Unauthorized Practice of Law." DR 3-101 of the Model Code,

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[34] Derek Denckla, *Nonlawyers & the Unauthorized Practice of Law: An Overview of the Legal & Ethical Parameters,* 67 FORDHAM L. REV. 2581, 2583-84 (1999).

[35] *Id.* at 2582. "Invoking 'inherent powers,' the highest state courts have claimed the jurisdiction—sometimes exclusive—to regulate every aspect of the practice of law, through such activities as specifying conditions for admission, disciplining or disbarring those lawyers who fail to exercise good conduct, and promulgating lawyers' codes of conduct." *Id.; see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §1, cmt. *c* (2000) ("The highest courts in most states have ruled as a matter of state constitutional law that their power to regulate lawyers is inherent in the judicial function. Thus, the grant of judicial power in a state constitution devolves upon the courts the concomitant regulatory power."). The historical development of, and the role of the organized bar in, the "inherent power" doctrine in the context of state UPL regulation is extensively discussed in Laurel Rigertas, *Lobbying & Litigating Against "Legal Bootleggers"—The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century,* 46 CAL. W. L. REV. 65 (2009); and in Laurel Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law,* 37 QUINNIPIAC L. REV. 97 (2018).

[36] The language of these statutes appears to focus on the unauthorized practice of law by nonlawyers, but "most jurisdictions regarded even out-of-state *lawyers* as engaged in UPL, unless they had met local licensing requirements. Thus, lawyers were prohibited from practicing law in violation of local regulations, which meant that in courtroom litigation, at least, and perhaps in arbitration as well, out-of-state lawyers were required to seek admission *pro hac vice*. . . . Furthermore, whether out-of-state lawyers could participate in interstate transactional work in the 'wrong' jurisdiction, or even advise clients about the situation was uncertain, and many lawyers were willing to test the limits of a state's tolerance." 2 Hazard, Hodes & Jarvis, *supra,* §49.02, at 49-5.

[37] *See* Denckla, *supra,* at 2585.

titled "Aiding Unauthorized Practice of Law," provided that "(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law" and "(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." The focus of the Ethical Considerations in Canon 3 was on practice by so-called non-lawyer "layman," but EC 3-9 explained the restriction on multijurisdictional practice:

> Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

In a footnote supporting the first proposition in this EC (that regulation of the practice of law is accomplished principally by the respective states), the ABA Code cited the U.S. Supreme Court decision in *United Mine Workers v. Illinois State Bar Ass'n,* 389 U.S. 217, 222 (1967): "That the States have broad power to regulate the practice of law is, of course, beyond question." Quoting ABA Ethics Op. 316 (1967), the footnote also noted that "It is a matter of law, not of ethics, as to where an individual may practice law. Each state has its own rules." In recognizing the potential practical difficulties with imposing these restrictions, another footnote also quoted ABA Ethics Op. 316 for the proposition that

> Much of clients' business crosses state lines. People are mobile, moving from state to state. Many metropolitan areas cross state lines. It is common today to have a single economic and social community involving more than

> one state. The business of a single client may involve legal problems in several states."[38]

The Ethical Consideration noted these practical difficulties without providing guidance on how to resolve them.

This uncertainty continued with the enactment of the Model Rules. "When Model Rule 5.5 was originally promulgated in 1983, . . . it carried forward from the Model Code of Professional Responsibility, without elaboration, both aspects of the traditional prohibition on the unauthorized practice of law."[39] The rule simply provided that "A lawyer shall not (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." There was a single comment:

> 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. Paragraph (b) 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 their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

As of the adoption of the Model Rules in the early 1980s, the state-based framework for regulation of lawyer admission and practice by the 50 individual states and

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[38] An additional footnote quoted from a New Jersey Supreme Court case, *In re Estate of Waring,* 47 N.J. 367, 376, 221 A.2d 193, 197 (1966): "[W]e reaffirmed the general principle that legal services to New Jersey residents with respect to New Jersey matters may ordinarily be furnished only by New Jersey counsel; but we pointed out that there may be multistate transactions where strict adherence to this thesis would not be in the public interest and that, under the circumstances, it would have been not only more costly to the client but also 'grossly impractical and inefficient' to have had the settlement negotiations conducted by separate lawyers from different states."

[39] 2 Hazard, Hodes & Jarvis, *supra,* §49.02, at 49-4.

the District of Columbia was a *fait accompli,* altogether consistent with traditional and historical federalism principles, and seemingly immutable.[40] Any and all constitutional and other challenges to the individual states' authority to regulate the practice of law within their borders, as well as federal courts' authority to condition admission based on admission in the state in which they sit, have been decisively and universally rejected by the courts.[41]

Birbrower: The California Supreme Court Grabs Lawyers' Attention

Despite the long history of the restrictions set forth above, the application of UPL restrictions to licensed lawyers who practice law across state lines where they are not licensed, referred to as interstate UPL, did not receive much attention in the profession until 1998 when the Supreme Court of California issued its landmark decision in the case *Birbrower, Montalbano, Condo & Frank v. Superior Court of Santa Clara County*.[42] In sum, the Court held that New York-licensed lawyers from the New York law firm of Birbrower, Montalbano, Condo & Frank had engaged in UPL because the firm's lawyers

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[40] For example, the 2002 MJP Report, at page 7, noted: "Lawyers in the United States are not licensed to practice law on a national basis, but are licensed by a state judiciary to practice law within the particular state. In general, state admissions processes are intended to protect the public by ensuring that those who are licensed to practice law in the state have the requisite knowledge of that state's laws and the general fitness and character to practice law." And §3 of the Restatement of the Law Governing Lawyers, adopted in 2000, accepts as essentially unchangeable based on historical experience the concept of judicial authority of each state to regulate law practice within state boundaries. *See* RESTATEMENT, *supra,* §3 & cmt. *b* ("[J]urisdictional limitations on practice applicable to lawyers are primarily a function of state lines. . . . Occasionally, proposals are put forward for removal of state-line limitations on practice, as by means of a national bar-admission process. However, local interest in maintaining regulatory control of lawyers practicing locally is strong and historically has prevented adoption of such proposals.").

[41] *E.g., Schoenefeld v. Schneiderman,* 821 F.3d 273 (2d Cir. 2016) (upholding against constitutional challenge under the Privilege and Immunities Clause a state requirement for nonresident bar members to maintain a physical office in the state), *cert. denied,* 137 S. Ct. 1580 (2017); *National Association for the Advancement of Multijurisdictional Practice (NAAMJP) v. Howell,* 851 F.3d 12 (D.C. Cir.) (joining "the chorus of judicial opinions" rejecting constitutional challenges of the NAAMJP and lawyer Joseph Giannini to local rules of practice limiting who may appear in particular state and federal courts), *cert. denied,* 138 S. Ct. 420 (2017); *NAAMJP v. Lynch,* 826 F.3d 191 (4th Cir.) (rejecting NAAMJP's constitutional challenge to conditions placed on admission to the Maryland federal district court bar), *cert. denied,* 137 S. Ct. 459 (2016); *Giannini v. Real,* 911 F.2d 354 (9th Cir.) (upholding constitutionality of California bar examination and local federal rules conditioning admission), *cert. denied,* 498 U.S. 1012 (1990); *Lawyers United Inc. v. U.S.,* 2020 WL 3498693 (D.D.C. June 29, 2020) (rejecting constitutional challenges to federal bar admission rules in D.C., California, and Florida), *aff'd,* 839 Fed. Appx. 570 (March 15, 2021).

[42] 949 P.2d 1 (1998), *cert. denied,* 525 U.S. 920 ("*Birbrower*")

handled a matter in California for a California client in preparation for a California arbitration based on a contract governed by California law. The Court further held that because the firm violated California's UPL statute it could not enforce its fee agreement and collect the substantial fees it had earned for the California legal services it had provided.[43]

Birbrower generated a great deal of controversy and concern among lawyers and law firms throughout the country. It particularly created uncertainty for lawyers who regularly practiced across state lines as to what amount of legal work and activity would constitute the unlawful practice of law. (Those interested in a more thorough discussion of *Birbrower* can find a deeper dive into its facts and ramifications at Appendix A.)

Although the California Court of Appeal case that quickly followed on the heels of *Birbrower*, *Estate of Condon v. McHenry* 65 Cal.App.4th 1138, 76 Cal. Rptr. 2d 922 (1998) ("*Condon*"), attempted to clarify some of these concerns by emphasizing that purpose of the UPL rules to protect the state's people and entities should be paramount in any analysis, the holding in Condon that a Colorado lawyer did not commit UPL by representing a Colorado client concerning a California matter was not widely noticed.

While there are courts that have deviated from *Birbrower*, *Birbrower's* influence continues to impact interstate UPL. For example, in the 2016 case *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016), a Colorado-admitted lawyer agreed to represent his in-laws in a post-judgment debt collection matter in Minnesota. The Colorado lawyer was not licensed in Minnesota and never set foot in the state, but he unsuccessfully tried to negotiate a settlement of the Minnesota matter by telephone and email.

In defending himself against disciplinary charges, the Colorado lawyer argued that a lawyer practices law *in* a jurisdiction in one of three ways: (1) by being physically present in the jurisdiction; (2) by establishing an office or other systematic and continuous presence in the jurisdiction; or (3) by entering an appearance in a matter through the filing of documents with a tribunal. *Id.* at 665. Citing *Birbrower*, the court determined that physical presence in the state was not the only way to practice law in Minnesota and that through multiple e-mails sent over several months, the lawyer advised Minnesota

[43] *Id.* at 11.

clients on Minnesota law in connection with a Minnesota legal dispute and attempted to negotiate a resolution of that dispute with a Minnesota attorney demonstrating an ongoing attorney-client relationship with his Minnesota clients and that his contacts with Minnesota were not fortuitous or attenuated. *Id*. at 666. Thus, the court held that the out-of-state lawyer committed the unauthorized practice of law in Minnesota by violating Minn. R. Prof. Conduct 5.5(a) resulting in the lawyer being disciplined.

In response to *Birbrower* and after issuance of the 2002 MJP Report, the ABA eventually adopted a revision to the Model Rules to authorize temporary practice in jurisdictions other than a lawyer's licensed jurisdiction.

The 2002 MJP Report and the Most Recent Revisions to ABA Model Rule 5.5

The 2002 MJP report, which preceded and largely served as an advocacy piece for changes to ABA Model Rule 5.5 adopted by the House of Delegates the same year, summarized the purported policy basis for multijurisdictional UPL restrictions in state statutes and the lawyer ethics rules:

> In general, a lawyer may not represent clients before a state tribunal or otherwise practice law within a particular state unless the lawyer is licensed by the state or is otherwise authorized to do so. Jurisdictional restrictions promote a variety of state regulatory interests. Most obviously, by limiting law practice in the state to those whom the state judiciary, through its admissions process, has deemed to be qualified to practice law in the state, they promote the state interest in ensuring that those who represent clients in the state are competent to do so. Jurisdictional restrictions also promote the state interest in ensuring that lawyers practicing law within the state do so ethically and professionally. Lawyers licensed by the state are thought to be more conversant than out-of-state lawyers with state disciplinary provisions as well as with unwritten but understood expectations about how members of the local bar should behave, and lawyers in the state may be disciplined more easily and effectively than out-of-state lawyers when they engage in professional improprieties. By strengthening lawyers' ties to the particular communities in which they maintain their offices, jurisdictional restrictions may also help maintain an active and vibrant local bar, which in many communities serves a crucial public role, because lawyers serve voluntarily on court committees, in public office, and on boards of not-for-profit institutions in the community. 2002 MJP Report, at 9.

The 2002 MJP Report noted that "no state categorically excludes out-of-state lawyers and there is general agreement that, as a practical matter, lawyers cannot serve clients effectively unless accommodations are made for multijurisdictional law practice, at least on a temporary or occasional basis." *Id.* at 10. For litigation matters, the Report noted that *pro hac vice* admission rules existed in every state but was not available for some aspects of litigation matters, such as pre-litigation work and ADR. *Id.* at 10, 12. Transactional lawyers "also commonly provide services in states in which they are not licensed," and on behalf of clients in their state of admission, often "travel outside the state in order to conduct negotiations, gather information, provide advice, or perform other tasks relating to the representation." *Id.* at 12. Thus, the Report noted that lawyers, as of the end of the 20th Century,

> have general understandings about how jurisdictional restrictions apply to their work in states where they are not licensed. These understandings are shaped less by the wording of the UPL provisions or by decisional law, which is sparse, than by conventional wisdom or by what the U.S. Supreme Court has called "the lore of the profession." On one hand, lawyers understand that they may not open a permanent office in a state where they are not licensed and also that they may not appear in the court of a state where they are not licensed without judicial authorization. On the other hand, lawyers recognize that they may give advice in their own states concerning the law of other jurisdictions, that they may represent out-of-state clients in connection with transactions and litigation that take place where the lawyer is licensed, and that they may travel to other jurisdictions in connection with legal work on behalf of clients who reside in and have matters in the state where the lawyer is licensed.

Id. at 13. And these understandings were "to some extent, reinforced by the sporadic enforcement of state UPL laws," with regulatory actions "rarely brought against lawyers who assist clients on a temporary basis in connection with multi-state or interstate matters." *Id.*

Consistent with the recommendations of the 2002 MJP Report, the ABA adopted temporary practice rules contained in Model Rule 5.5(c). It permits four exceptions to UPL that allow lawyers to "provide legal services on a temporary basis" in a jurisdiction where they are not admitted: (1) when they associate with local counsel who actively

participates in the matter; (2) when they are assisting or participating in an actual or potential proceeding before a tribunal, generally by obtaining pro hac vice admission; (3) when they are participating in an arbitration, mediation or other alternative resolution; and (4) where the legal services in the second state "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." Model Rule 5.5(c) (1-4).

Model Rule 5.5(d) further allows lawyers admitted in another US jurisdiction or in a foreign jurisdiction, or a person lawfully practicing as in-house counsel under the laws of a foreign jurisdiction to provide legal services through an office or other systematic or continuous presence in a jurisdiction where the lawyer is not licensed if certain criteria are met. Model Rule 5.5(d-e). Model rule 5.5(a-b), however, essentially continued, other than otherwise as excepted under the above sub-sections, to prohibit interstate multijurisdictional practice.

These revisions to the ABA Model Rules met widespread approval in terms of being adopted by a majority of U.S. jurisdictions, but not all jurisdictions have done so, and issues persist. Some of those issues revolve around lawyers' need to evaluate the approaches of jurisdictions that have not embraced the Model Rule approach to temporary practice, while other issues stem from problems involving the lack of "fit" between modern law practice and either regulating activity based only on geographic boundaries or based upon notions that any lawyer practices "the law of a jurisdiction."

Competence as an Ongoing Regulatory Justification

Defenders of the current version of Rule 5.5 often assert that restrictions on multi-jurisdictional practice are necessary to ensure the competence of lawyers who represent clients in their jurisdiction. In addition to the previously discussed competence paradox involved in the privileges of licensed lawyers under the current regulatory structure, the modern landscape of how lawyers become licensed to practice law across the United States undermines this rationale.

As discussed above, jurisdiction to regulate the practice of law has been largely a matter of geographic boundaries up to this point,[44] with some exceptions.[45] Notably, authorization to practice law within the state of licensure is comprehensive; the license does not limit a lawyer to work involving the law of the licensing jurisdiction. Although jurisdictional licensing based exclusively on a lawyer's location has provided the benefit of clarity both in terms of the authorization and freedom to practice regardless of what laws or jurisdictions the lawyer's work might touch; lawyers can now effectively practice nationwide in many respects without ever leaving their licensing jurisdictions. Moreover, the jurisdictional regulatory scheme limits lawyers' ability to physically relocate while serving clients only in those jurisdictions in which the lawyers are admitted to practice.

Licensing Lawyers in 2021

Admission by Bar Examination

As discussed above, the competency argument for multi-jurisdictional practice restrictions assumes that admission to practice in one jurisdiction does not establish competence to practice in any other jurisdiction. The underlying premise in that proposition is that some special training or testing is required to demonstrate competence in a particular jurisdiction.

Presently, 41 U.S. jurisdictions have adopted the Uniform Bar Examination (including Michigan, which announced in October 2021 that it would adopt the UBE, to be administered starting in 2023). The candidates for admission in those jurisdictions take identical bar examinations, although the minimum threshold for passing scores varies among jurisdictions:[46]

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[44] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §3(1) (2000), "A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client…at any place within the admitting jurisdiction." *Id.* COMMENT (e): "Admission in a state permits a lawyer to maintain an office and otherwise practice law anywhere within its borders."

[45] Federally authorized practice, for example, allows one to practice law nationwide. See *Sperry v. Florida*, 373 U.S. 379 (1963). Federal law sets the maximum qualifications required to practice before all but one federal agency at being a member of the bar of a state. See 5 USC §500(b). Some federal courts also allow for application to admission based upon a bar license in any jurisdiction along with admission to a federal court in that jurisdiction. See, e.g., L.R.Civ.P. 83.1 (WDNY).

[46] *See* https://www.ncbex.org/exams/ube/score-portability/minimum-scores/ (last visited Jan. 8, 2022).

260	Alabama, Minnesota, Missouri, New Mexico, North Dakota
264	Indiana, Oklahoma
266	Connecticut, District of Columbia, Illinois, Iowa, Kansas, Kentucky, Maryland, Montana, New Jersey, New York, South Carolina, Virgin Islands
270	Arkansas, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wyoming
272	Idaho, Pennsylvania
273	Arizona
276	Colorado
280	Alaska

Twenty-four of the UBE jurisdictions have no additional or substitute exam component tailored to that particular jurisdiction.[47] Of the 16 jurisdictions that have a state-specific component, nine require attending a course or tutorial in the jurisdiction's law (all the courses but one, New Mexico's, are online, and only New York requires both an online course and an online test). When an applicant from another jurisdiction transfers in a passing UBE score, such applicants may also be required by these nine states to complete the state-focused course or tutorial. Seven jurisdictions (including New York) require an applicant to complete an online multiple-choice test. All seven states require anyone seeking admission, either by bar exam or transfer of score from another jurisdiction, to complete the test.

[47] https://reports.ncbex.org/comp-guide/charts/chart-5/#1610472174303-4aeee78b-6a74 (last visited Jan. 8, 2022).

Admission on Motion

Virtually all of the jurisdictions permitting admission by motion impose the same jurisdiction-specific exam and course requirements for those applicants. Otherwise, the states permitting admission by motion treat the lawyer's experience in their home jurisdiction as sufficient to demonstrate competence to be licensed in the new jurisdiction.

Conclusion

Geographic limitations on a lawyer's provision of services long accepted by the legal profession in the name of client protection often deprive clients of ever having an opportunity to exercise a truly full and free "choice" of counsel. These geographic restrictions exist even if lawyer and client are both willing to enter into the engagement, oftentimes already having an existing professional relationship. Geographic limitations also make no accommodation for the idea that the relationship may benefit from both the level of trust that the client has in the lawyer as the "first choice" as well as any existing knowledge the lawyer has about the client, including relevant goals, priorities, tendencies, and communication style.

Instead of such a rigid approach, APRL's proposed Model Rule 5.5 allows clients to consciously choose the lawyer they want to represent them as long as the lawyer has disclosed to the client the facts as to where they are licensed. It does not abandon client protection in empowering client choice. It also ensures that lawyers who ultimately do provide incompetent legal services, or who otherwise run afoul of their ethical obligations, will be capable of being held responsible for their misconduct or shortcomings in any (or all) of the relevant jurisdictions.

APRL's proposal to revise Model Rule 5.5 is also consistent with the trend that has come from several jurisdictions who have issued guidance during the 2020 Pandemic to lawyers who found themselves practicing across state lines less by choice and more by necessity.[48] Not all of the guidance issued in these jurisdictions has been focused entirely

[48] D.C. Opinion 24-20: Teleworking from Home and the COVID-19 Pandemic (March 23, 2020) (interpreting the "incidental and temporary practice" exception of DC's Rule 49(c)(13)); *see also* N.J. Committee on the Unauthorized Practice of Law Op. 59, Advisory Committee on Prof. Ethics Op. 742 (Oct. 6, 2021); Pennsylvania State Bar Op. 300 (April 2020); Utah State Bar Ethics Advisory Committee Opinion

upon, or limited to situations where, lawyers were forced for public health reasons to live somewhere other than where they were licensed, but, if history is a guide, absent further improvements in the rule itself, then the progress that has been made will likely not come to fruition. APRL's proposed Model Rule 5.5 embeds the concepts of client choice, transparency, and accountability in a way that we believe will long outlive those who currently practice law under the existing regulatory system.

No. 19-03 (May 14, 2019); The Fla. Bar re: Advisory Opinion – Out-of-State Attorney Working Remotely From Florida Home, SC20-1220 (Fla. May 20, 2021).

Appendix B

RULE 5.5: AUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer admitted and authorized to practice law by any United States jurisdiction, and not disbarred or suspended from practice by any jurisdiction, may provide legal services in this jurisdiction, subject to the other provisions of this rule.

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

(b) A lawyer admitted and actively licensed to practice law by another United States jurisdiction may provide legal services in this jurisdiction if the lawyer:

(1) discloses, in writing, to the client or prospective client who will be receiving legal services in this jurisdiction where the lawyer is licensed to practice law and that the lawyer is not actively licensed to practice law by this jurisdiction; and

(2) complies with the pro hac vice admission or other regulatory requirements of this jurisdiction.

A lawyer is not required to comply with (b)(1) if the services being provided while the lawyer is located in this jurisdiction are services authorized by federal law or rule; limited to federal law or tribal law; or limited to the law of the jurisdiction in which the lawyer is admitted

(c) A lawyer admitted and actively licensed to practice law in a foreign jurisdiction or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services in this jurisdiction to the lawyer's employer or its organizational affiliates, unless they are services for which the forum requires pro hac vice admission, in which case such services may be provided following pro hac vice admission. If services provided by a foreign lawyer require advice on the law of this or another United State jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is authorized to practice law by that jurisdiction. The foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority

Comments

[1] To practice law in this jurisdiction, a lawyer must be "actively" licensed to practice law by at least one United States jurisdiction or, for legal services addressed in paragraph (c), by a foreign jurisdiction. "Actively" licensed means both that the lawyer has been admitted to practice law by at least one jurisdiction and that the lawyer is currently and affirmatively authorized to practice law by that jurisdiction.

[2] Paragraph (a) applies to the authorized practice of law and the unauthorized practice of law by a lawyer, whether through the lawyer's own action or by the lawyer assisting another person in activities constituting unauthorized practice by this jurisdiction.

[3] The definition of the practice of law is established by law and varies from one jurisdiction to another. Practicing law "in a jurisdiction" does not necessarily relate to a lawyer's physical presence there. Rather, for purposes of this Rule, the practice of law "in" a jurisdiction entails either performing legal services in a matter pending before a tribunal of the jurisdiction or providing legal services regarding a subject matter governed solely or primarily by the law of the jurisdiction. For purposes of this Rule, "primarily" shall mean the law of that jurisdiction is applicable more than the law of any other single jurisdiction.

[4] The practice of law in this jurisdiction by a lawyer licensed only by one or more other jurisdictions may be either temporary or systematic and continuous. If such a lawyer maintains a systematic and continuous presence in this jurisdiction, that lawyer may be required to comply with other regulatory requirements of this jurisdiction governing the practice of law. Temporary practice ordinarily involves advising a client on the law of this jurisdiction as part of the lawyer's representation of that client in the lawyer's licensing jurisdiction or the occasional pro hac vice admission by a tribunal in this jurisdiction in compliance with the rules of the tribunal and the regulations of this jurisdiction governing the authorized practice of law. A systematic and continuous presence in this jurisdiction, on the other hand, denotes more than mere occasional or attenuated contacts with this jurisdiction and exists when lawyers or law firms hold themselves out as having a professional presence in or ties to this jurisdiction, regularly solicit or direct advertising towards clients in the jurisdiction, or establish an ongoing office or business presence in this jurisdiction.

[5] If a lawyer is practicing law in this jurisdiction, the lawyer is subject to this jurisdiction's disciplinary authority regardless of whether the lawyer has been admitted to practice by this jurisdiction, in addition to being subject to the disciplinary authority of the lawyer's jurisdiction or jurisdictions of admission. See Rule 8.5.

[6] A lawyer who is not admitted to practice by this jurisdiction may not hold out to the public or otherwise state that the lawyer is admitted to practice by this jurisdiction. *See Rule 7.1.*

[7] Nothing in this rule supersedes or abrogates the admission rules of any local court or tribunal or the admission-to-practice rules of this jurisdiction requiring pro hac vice admission for a particular action or proceeding. If a tribunal requires pro hac vice admission to appear before that tribunal, then lawyers admitted only by other jurisdictions must comply with that requirement.

[8] The disclosure provision of paragraph (b)(1) enables clients to make informed decisions regarding the selection of a lawyer in such circumstances. Such a lawyer has an obligation to ensure that the lawyer is competent to provide legal services involving the law of this jurisdiction. See Rule 1.1. In order to comply with the duty of competence, such a lawyer may, for example, elect to associate with local counsel in order to assist in the representation.

[9] The paragraph (b)(1) disclosure obligation is not applicable if a lawyer actively licensed to practice law by another United States jurisdiction is providing services the lawyer is authorized to provide by federal law, tribal law, or the law of another United States jurisdiction. For example, if a lawyer's services are strictly limited to federal law or if a legal matter involves only the law of the jurisdiction where the lawyer is actively licensed, then the lawyer is not required to disclose the lawyer's jurisdictions of licensure. "Authorized by federal law" may include specific authorization to represent clients before a tribunal or administrative agency or it may mean the lawyer limits the practice to advising and representing clients solely on federal law matters that do not involve appearances before a tribunal or federal agency.

[10] A lawyer licensed only in another jurisdiction who is employed as in-house counsel and provides legal services to the lawyer's employer in this jurisdiction must inform the employer and any of its individual constituents to whom the lawyer provides services about the lawyer's licensure status, i.e. provide notice that the

lawyer is not actively licensed to practice law by this jurisdiction, as well as specify where the lawyer is licensed to practice law.

Appendix C

RULE 5.5: AUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer admitted [and/or authorized to practice law] by any United States jurisdiction, and not disbarred or suspended from practice by any jurisdiction, may provide legal services in this jurisdiction, subject to the other provisions of this rule.

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

(b) A lawyer admitted and actively licensed to practice law by another United States jurisdiction may provide legal services in this jurisdiction if the lawyer:

(1) discloses, in writing, to the client or prospective client who will be receiving legal services in this jurisdiction, the jurisdiction(s) where the lawyer holds an active license to practice law and that the lawyer is not actively licensed to practice law by this jurisdiction; and

(2) complies with the pro hac vice admission or other regulatory requirements of this jurisdiction.

A lawyer is not required to comply with (b)(1) if the services being provided while the lawyer is located in this jurisdiction are services limited to the law of the jurisdiction in which the lawyer is admitted; authorized by federal law or rule; or limited to federal law or tribal law.

(c) A lawyer admitted to practice law in a foreign jurisdiction who is not suspended or disbarred, or the equivalent thereof, by any jurisdiction, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services in this jurisdiction to the lawyer's employer or its organizational affiliates, unless they are services for which the forum requires pro hac vice admission, in which case such services may be provided following pro hac vice admission. If services provided by a foreign lawyer require advice on the law of this or another United State jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is actively licensed or otherwise authorized to practice law by that jurisdiction. The foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the

equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority

Comments

[1] To practice law in this jurisdiction, a U.S. lawyer must be "actively" licensed to practice law by at least one United States jurisdiction and not disbarred or suspended by an jurisdiction. "Actively" licensed means both that the lawyer has been admitted to practice law by at least one jurisdiction and is currently and affirmatively authorized to practice law by that jurisdiction.

[2] Foreign lawyers providing legal services in this jurisdiction pursuant to paragraph (c) must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority, or are otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction. The latter qualification is because some foreign jurisdictions do not permit otherwise qualified in-house counsel to be members of or admitted to the bar. Lawyers in such foreign jurisdictions who are employed as in-house counsel may be required to relinquish any bar membership or admission while so employed or they may never have obtained such admission or membership status. In addition, to qualify to deliver legal services pursuant to this Rule, the admitted foreign lawyer must not be suspended or disbarred, or the equivalent thereof, by any jurisdiction.

[3] Paragraph (a) applies to the authorized practice of law and the unauthorized practice of law by a lawyer, whether through the lawyer's own action or by the lawyer assisting another person in activities constituting unauthorized practice by this jurisdiction.

[4] The definition of the practice of law is established by law and varies from one jurisdiction to another. Practicing law "in a jurisdiction" does not necessarily relate to a lawyer's physical presence there. Rather, for purposes of this Rule, the practice of law "in" a jurisdiction entails either performing legal services in a matter pending before a tribunal of the jurisdiction or providing legal services regarding a subject matter governed solely or primarily by the law of the jurisdiction. For purposes of this Rule, "primarily" shall mean the law of that jurisdiction is applicable more than the law of any other single jurisdiction.

[5] The practice of law in this jurisdiction by a lawyer licensed only by one or more other jurisdictions, and who is not disbarred or suspended, or the equivalent thereof, in any jurisdiction, may be either temporary or systematic and continuous. If such a lawyer maintains a systematic and continuous presence in this jurisdiction or a temporary presence, that lawyer may be required to comply with other regulatory requirements of this jurisdiction governing the practice of law. Temporary practice ordinarily involves advising a client on the law of this jurisdiction as part of the lawyer's representation of that client in the lawyer's licensing jurisdiction or the occasional pro hac vice admission by a tribunal in this jurisdiction in compliance with the rules of the tribunal and the regulations of this jurisdiction governing the authorized practice of law. A systematic and continuous presence in this jurisdiction, on the other hand, denotes more than mere occasional or attenuated contacts with this jurisdiction. It exists when lawyers or law firms hold themselves out as having a professional presence in or ties to this jurisdiction, regularly solicit or direct advertising towards clients in the jurisdiction, or establish an ongoing office or business presence in this jurisdiction.

[6] If a lawyer is practicing law in this jurisdiction, the lawyer is subject to this jurisdiction's disciplinary authority regardless of whether the lawyer has been admitted to practice by this jurisdiction, in addition to being subject to the disciplinary authority of the lawyer's jurisdiction or jurisdictions of admission. See Rule 8.5 and Rule 6 of the ABA Model Rules for Lawyer Disciplinary Enforcement.

[7] A lawyer who is not admitted to practice by this jurisdiction may not hold out to the public or otherwise state that the lawyer is admitted to practice by this jurisdiction. *See Rule 7.1*.

[8] Nothing in this rule supersedes or abrogates the admission rules of any local court or tribunal or the admission-to-practice rules of this jurisdiction requiring pro hac vice admission for a particular action or proceeding. If a tribunal requires pro hac vice admission to appear before that tribunal, then lawyers admitted only by other jurisdictions must comply with that requirement.

[9] The disclosure provision of paragraph (b)(1) enables clients to make informed decisions regarding the selection of a lawyer in such circumstances. Such a lawyer has an obligation to ensure that the lawyer is competent to provide legal services involving the law of this jurisdiction. See Rule 1.1. In order to comply with the duty of competence, such a lawyer may, for example, elect to associate with local counsel in order to assist in the representation.

[10] The paragraph (b)(1) disclosure obligation is not applicable if a lawyer actively licensed to practice law by another United States jurisdiction is providing services the lawyer is authorized to provide by federal law, tribal law, or the law of another United States jurisdiction. For example, if a lawyer's services are strictly limited to federal law or if a legal matter involves only the law of the jurisdiction where the lawyer is actively licensed, then the lawyer is not required to disclose the lawyer's jurisdictions of licensure. "Authorized by federal law" may include specific authorization to represent clients before a tribunal or administrative agency or it may mean the lawyer limits the practice to advising and representing clients solely on federal law matters that do not involve appearances before a tribunal or federal agency.

[11] Paragraph (b)(1) also applies to a lawyer licensed only in another jurisdiction who is employed as in-house counsel.

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

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.

TEXAS RULES OF DISCIPLINARY PROCEDURE

(Including Amendments Effective December 18, 2023)

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TEXAS RULES OF DISCIPLINARY PROCEDURE

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

1.01. Citation: These rules are to be called the Texas Rules of Disciplinary Procedure and shall be cited as such.

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.

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.

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.

1.05. Texas Disciplinary Rules of Professional Conduct: Nothing in these rules is to be construed, explicitly or implicitly, to amend or repeal in any way the Texas Disciplinary Rules of Professional Conduct.

1.06. Definitions:

A. "Address" means the registered mailing address or preferred email address provided to the State Bar by the Respondent pursuant to Article III of the State Bar Rules.

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 a Grievance received by the Office of the Chief Disciplinary Counsel that:

1. either on its face or upon screening or preliminary investigation, alleges Professional Misconduct or attorney Disability, or both, cognizable under these rules or the Texas Disciplinary Rules of Professional Conduct; and

2. is submitted by any of the following:

a. a family member of a ward in a guardianship proceeding that is the subject of the Grievance;

b. a family member of a decedent in a probate matter that is the subject of the Grievance;

c. a trustee of a trust or an executor of an estate if the matter that is the subject of the Grievance relates to the trust or estate;

d. the judge, prosecuting attorney, defense attorney, court staff member, or juror in the legal matter that is the subject of the Grievance;

e. a trustee in a bankruptcy that is the subject of the Grievance; or

f. any other person who has a cognizable individual interest in or connection to the legal matter or facts alleged in the Grievance.

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, the proceeding before an Investigatory Panel, presentation of a Complaint before a Summary Disposition Panel, and the proceeding before an Evidentiary Panel.

M. "Discretionary Referral" means a Grievance received by the Office of Chief Disciplinary Counsel that has been determined upon initial classification to involve minor misconduct and is appropriate for referral to the State Bar's Client Attorney Assistance Program.

N. "District" means disciplinary district.

O. "Evidentiary Hearing" means an adjudicatory proceeding before a panel of a grievance committee.

P. "Evidentiary Panel" means a panel of the District Grievance Committee performing an adjudicatory function other than that of a Summary Disposition Panel or an Investigatory Panel with regard to a Disciplinary Proceeding pending before the District Grievance Committee of which the Evidentiary Panel is a subcommittee.

Q. "Evidentiary Petition" means a pleading that satisfies the requirements of Rule 2.17.

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. "Injury" in Part XV of these Rules is harm to a client, the public, the legal system, or the profession which results from a Respondent's misconduct. The level of injury can

range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.

T. "Inquiry" means a Grievance received by the Office of the Chief Disciplinary Counsel that, even if true, does not allege Professional Misconduct or Disability or is not submitted by a person listed in paragraph G.

U. "Intent" in Part XV of these Rules is the conscious objective or purpose to accomplish a particular result. A person's intent may be inferred from circumstances.

V. "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.

W. "Investigatory Panel" means a panel of the Committee that conducts a nonadversarial proceeding during the investigation of the Complaint by the Chief Disciplinary Counsel.

X. "Knowledge" in Part XV of these Rules is the conscious awareness of the nature of attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. A person's knowledge may be inferred from circumstances.

Y. "Negligence" in Part XV of these Rules, is the failure to exercise the care that a reasonably prudent and competent lawyer would exercise in like circumstances.

Z. "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.

AA. "Penal Institution" has the meaning assigned by Article 62.001, Code of Criminal Procedure.

BB. "Potential injury" in Part XV of these Rules is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the Respondent's misconduct, and which, but for some intervening factor or event, would probably have resulted from the Respondent's misconduct.

CC. "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 jurisdiction, including before any federal court or federal agency, 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.

DD. "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.

EE. "Respondent" means any attorney who is the subject of a Grievance, Complaint, Disciplinary Proceeding, or Disciplinary Action.

FF. "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:

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.

GG. "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.

HH. "State Bar" means the State Bar of Texas.

II. "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.

JJ. "Wrongfully Imprisoned Person" has the meaning assigned by Section 501.101, Government Code.

PART II. THE DISTRICT GRIEVANCE COMMITTEES

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.

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.

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.

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.

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."

2.06. Assignment of Committee Members: Each member of a Committee shall act through panels assigned by the chair of the Committee for investigatory hearings, summary disposition dockets, and evidentiary hearings. Promptly after assignment, notice must be provided to the Respondent 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.

2.07. Duties of Committees: Committees shall act through panels, as assigned by the Committee chairs, to conduct investigatory hearings, 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 to an Evidentiary Panel pertaining to the same disciplinary matter that the member considered at either an investigatory hearing or summary disposition docket. Any tie vote is a vote in favor of the position of the Respondent.

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.

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.

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.

2.10. Classification of Grievances: The Chief Disciplinary Counsel shall within thirty days examine each Grievance received to determine whether it constitutes an Inquiry, a Complaint, or a Discretionary Referral.

A. If the Grievance is determined to constitute an Inquiry, the Chief Disciplinary Counsel shall notify the Complainant 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.

B. 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. The Respondent may, within thirty days after the receipt of notice to respond, appeal to the Board of Disciplinary Appeals the Chief Disciplinary Counsel's determination that the Grievance constitutes a Complaint. If the Respondent perfects an appeal, the pendency of the appeal automatically stays the Respondent's deadline to respond to the Complaint and the deadlines pertaining to the investigation and determination of Just Cause. If the Board of

Disciplinary Appeals reverses the Chief Disciplinary Counsel's determination, the Grievance must be dismissed immediately as an Inquiry. If the Board of Disciplinary Appeals affirms the Chief Disciplinary Counsel's determination, the Respondent must respond to the allegations in the Complaint within thirty days after the Respondent receives notice of the affirmance.

C. If the Grievance is determined to be a Discretionary Referral, the Chief Disciplinary Counsel will notify the Complainant and the Respondent of the referral to the State Bar's Client Attorney Assistance Program (CAAP). No later than sixty days after the Grievance is referred, CAAP will notify the Chief Disciplinary Counsel of the outcome of the referral. The Chief Disciplinary Counsel must, within fifteen days of notification from CAAP, determine whether the Grievance should be dismissed as an Inquiry or proceed as a Complaint. The Chief Disciplinary Counsel and CAAP may share confidential information for all Grievances classified as Discretionary Referrals.

2.11. Venue: Venue of District Grievance Committee proceedings shall be in accordance with the following:

A. Investigatory Panel Proceedings. Proceedings of an Investigatory 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. 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.

C. Evidentiary Panel Proceedings. Proceedings of an Evidentiary Panel shall be conducted by a Panel for the county where Respondent's principal place of practice is maintained; 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.

2.12. Investigation and Determination of Just Cause:

A. The Chief Disciplinary Counsel will investigate a Complaint to determine whether Just Cause exists.

1. *General Rule:* The Chief Disciplinary Counsel must make a Just Cause determination within 60 days of the date that the Respondent's response to the Complaint is due.

2. *Exceptions:* The Just Cause determination date is extended to 60 days after the latest of:

   a. the date of compliance specified in any investigatory subpoena issued by the Chief Disciplinary Counsel;

   b. the date of any enforcement order issued by a district court under (E); or

   c. the date that an investigatory hearing is completed.

B. During the investigation, the Chief Disciplinary Counsel, with the Committee chair's approval, may issue a subpoena that relates directly to a specific allegation of attorney misconduct for the production of documents, electronically stored information, or tangible things or to compel the attendance of a witness, including the Respondent, at an investigatory hearing.

C. A subpoena must notify the recipient of the time, date, and place of appearance or production and must contain a description of materials to be produced. A subpoena must be served on a witness personally or in accordance with Rule 21a, Texas Rules of Civil Procedure. Proof of service may be by certification of the server or by return receipt. A witness, other than the Respondent, who is commanded to appear at an investigatory hearing is entitled to the same fee and expense reimbursement as a witness commanded to appear in district court.

D. Before the time specified for compliance, a person commanded to appear or make production must present any objection to the chair of the Investigatory Panel, if an investigatory hearing has been set, or to the Committee chair, if an investigatory hearing has not been set. Objections must be made in good faith. If the chair overrules an objection in whole or in part, and the objecting party fails to comply with the chair's ruling, the Chief Disciplinary Counsel may seek to enforce the subpoena in district court under (E).

E. The Chief Disciplinary Counsel may seek enforcement of a subpoena in the district court of the county in which appearance or production is required. The person commanded to appear or make production may raise any good faith objection to the subpoena. If the district court finds that the person's noncompliance with or objection to a subpoena is in bad faith, then after notice and a hearing, the court may order the person to pay the Chief Disciplinary Counsel's reasonable and necessary costs and attorney fees. The district court's order is not appealable. The Chief Disciplinary Counsel must not consider a Respondent's good faith objection to an investigatory subpoena as grounds for Just Cause.

F. An investigatory hearing on a Complaint will be set before an Investigatory Panel and is a nonadversarial proceeding that may be conducted by teleconference. The chair of the Investigatory Panel may administer oaths and may set forth procedures for eliciting evidence, including witness testimony. Witness examination may be conducted by the Chief Disciplinary Counsel, the Respondent, or the Panel. An investigatory hearing is strictly confidential and any record may be released only for use in a disciplinary matter.

G. An investigatory hearing may result in a Sanction negotiated with the Respondent or in the Chief Disciplinary Counsel's dismissing the Complaint or finding Just Cause. The terms of a negotiated Sanction must be in a written judgment with findings of fact and conclusions of law. The judgment must be entered into the record by the chair of the Investigatory Panel and signed by the Chief Disciplinary Counsel and the Respondent.

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, which may be conducted by teleconference. 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 will proceed in accordance with Rule 2.14 and Rule 2.15. 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.

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 after an investigatory hearing, resolved through a negotiated judgment entered by an Investigatory Panel, or 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 after an investigatory hearing, resolved through a negotiated judgment entered by an Investigatory Panel, or 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 after an investigatory hearing, resolved through a negotiated judgment entered by an Investigatory Panel, or dismissed by the 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.

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.

2.16. Confidentiality:

A. All members and staff of the Office of Chief Disciplinary Counsel, Board of Disciplinary Appeals, Committees, and Commission shall maintain as confidential all Disciplinary Proceedings and associated records, except that:

1. the pendency, subject matter, status of an investigation, and final disposition, if any, may be disclosed by the Office of Chief Disciplinary Counsel or Board of Disciplinary Appeals if the Respondent has waived confidentiality, the Disciplinary Proceeding is based on conviction of a serious crime, or disclosure is ordered by a court of competent jurisdiction;

2. a negotiated judgment entered by an Investigatory Panel for any Sanction other than a private reprimand may be disclosed;

3. if the Evidentiary Panel finds that professional misconduct occurred and imposes any Sanction other than a private reprimand;

a. the Evidentiary Panel's final judgment is a public record from the date the judgment is signed; and

b. once all appeals, if any, have been exhausted and the judgment is final, the Office of Chief Disciplinary Counsel shall, upon request, disclose all documents, statements, and other information relating to the Disciplinary Proceeding that came to the attention of the Evidentiary Panel during the Disciplinary Proceeding;

4. the record in any appeal to the Board of Disciplinary Appeals from an Evidentiary Panel's final judgment, other than an appeal from a judgment of private reprimand, is a public record; and

5. 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.

B. The deliberations and voting of an Investigatory Panel or Evidentiary Panel are strictly confidential and not subject to discovery. No person is competent to testify as to such deliberations and voting.

C. Rule 6.08 governs the provision of confidential information to authorized agencies investigating qualifications for admission to practice, attorney discipline enforcement agencies, law enforcement agencies, the State Bar's Client Security Fund, the State Bar's Lawyer Assistance Program, the Supreme Court's Unauthorized Practice of Law Committee and its subcommittees, and the Commission on Judicial Conduct.

D. 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.

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 or an Investigatory Panel that heard the Complaint and must have at least three members but 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.

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.

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: the Commission or the Respondent may compel the attendance of witnesses, including the Respondent, and the production of documents electronically stored information, or tangible things by subpoena. A subpoena must notify the witness of the time, date, and place of appearance or production; contain a description of the materials to be produced; be signed by the Evidentiary Panel chair; and be served personally or in accordance with Rule 21a, Texas Rules of Civil Procedure. Proof of service may be by certification of the server or by return receipt. Any contest between the Commission and the Respondent about the materiality of the testimony or production sought will be determined by the Evidentiary Panel chair, and is subject to review. The Commission or the Respondent may seek enforcement of a subpoena in the district court of the county in which the attendance or production is required. A witness, other than the Respondent, who is commanded to appear at an Evidentiary Panel hearing is entitled to the same fee and expense reimbursement as a witness commanded to appear in 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:

1. 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.

2. The Evidentiary Panel may:

a. dismiss the Disciplinary Proceeding and refer it to the voluntary mediation and dispute resolution procedure;

b. 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

c. find that Professional Misconduct occurred and impose Sanctions.

3. The Evidentiary Panel must impose a public sanction listed in Rule 1.06(FF)(1)-(7) against the Respondent if the Evidentiary Panel finds that the Respondent knowingly made a false declaration on an application for a place on the ballot as a candidate for the following judicial offices:

a. chief justice or justice of the supreme court;

b. presiding judge or judge of the court of criminal appeals;

c. chief justice or justice of a court of appeals;

d. district judge, including a criminal district judge; or

e. judge of a statutory county court.

2.18. 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 the 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.

2.19. 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 the Chief Disciplinary Counsel.

2.20. 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 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.

2.21. 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.

2.22. 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.

2.23. 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.

2.24. 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.

2.25. 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.

2.26. 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.

2.27. 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.

Comment: Consistent with section 81.086 of the Texas Government Code, these rules permit the Office of Chief Disciplinary Counsel to allow or require anyone involved in an investigatory hearing, a summary disposition setting, or an evidentiary hearing—including but not limited to a party, attorney, witness, court reporter, or grievance panel member—to participate remotely, such as by teleconferencing, videoconferencing, or other means. A panel may consider as evidence sworn statements or sworn testimony given remotely. The term "teleconference" in these rules includes videoconference or other remote means.

PART III. TRIAL IN DISTRICT COURT

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, not more than sixty days after receipt of Respondent's election to proceed in district court, notify the Presiding Judge of the administrative judicial region covering the county of appropriate venue of the Respondent's election by transmitting a copy of the Disciplinary Petition in the name of the Commission to the Presiding Judge. 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. A request for assignment of an active district judge to preside in the case.

D. Allegations necessary to establish proper venue.

E. 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.

F. 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.

G. A demand for judgment that the Respondent be disciplined as warranted by the facts and for any other appropriate relief.

H. Any other matter that is required or may be permitted by law or by these rules.

3.02. Assignment of Judge:

A. Assignment Generally: Upon receipt of a Disciplinary Petition, the Presiding Judge shall assign an active district judge whose district does not include the county of appropriate venue to preside in the case. An assignment of a judge from another region shall be under Chapter 74, Government Code. The Presiding Judge shall transmit a copy of the Presiding Judge's assignment order to the Chief Disciplinary Counsel. Should the judge so assigned be unable to fulfill the assignment, he or she shall immediately notify the Presiding Judge, and the Presiding Judge shall assign a replacement judge whose district does not include the county of appropriate venue. A judge assigned under this Rule shall be subject to recusal or disqualification as provided by the Texas Rules of Civil Procedure and the laws of this state. The motion seeking recusal or motion to disqualify must be filed by either party within the time provided by Rule 18a, Texas Rules of Civil Procedure. In the event of recusal or disqualification, the Presiding Judge shall assign a replacement judge whose district does not include the county of appropriate venue. If an active district judge assigned to a disciplinary case becomes a retired, senior, or former judge, he or she may be assigned by the Presiding Judge to continue to preside in the case, provided the judge has been placed on a visiting judge list. If the Presiding Judge decides not to assign the retired, senior, or former judge to continue to preside in the case, the Presiding Judge shall assign an active district judge whose district does not include the county of appropriate venue. A visiting judge may only be assigned if he or she was originally assigned to preside in the case while an active judge. Any judge

assigned under this Rule is not subject to objection under Chapter 74, Government Code.

B. Transfer of Case: If the county of alleged venue is successfully challenged, the case shall be transferred to the county of proper venue. If the case is transferred to a county in the assigned judge's district, the judge must recuse himself or herself, unless the parties waive the recusal on the record. In the event of recusal, the Presiding Judge of the administrative judicial region shall assign a replacement judge whose district does not include the county of appropriate venue. If the case is transferred to a county outside the administrative judicial region of the Presiding Judge who made the assignment, the Presiding Judge of the administrative judicial region where the case is transferred shall oversee assignment for the case and the previously assigned judge shall continue to preside in the case unless he or she makes a good cause objection to continued assignment, in which case the Presiding Judge shall assign a replacement judge whose district does not include the county of appropriate venue.

3.03. Filing, Service and Venue: After the trial judge has been assigned, the Chief Disciplinary Counsel shall promptly file the Disciplinary Petition and a copy of the Presiding Judge's assignment order with the district clerk of the county of alleged venue. The Respondent shall then be served as in civil cases generally with a copy of the Disciplinary Petition and a copy of the Presiding Judge's assignment 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.

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.

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.

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.

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.

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.

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.

3.10. 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 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.

3.11. 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.

3.12. 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.

3.13. No Supersedeas: 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.

3.14. 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.

3.15. 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

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.

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.

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.

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."

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.

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 after an investigatory hearing, resolved through a negotiated judgment entered by an Investigatory Panel, or dismissed by the 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.

O. 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.

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.

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.

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

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.

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. The investigation may include the issuance of subpoenas, an investigatory hearing, and the entry of a negotiated judgment by an Investigatory Panel.

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 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.

5.03. Accountability: On disciplinary and disability matters, the Chief Disciplinary Counsel is accountable only to the Commission.

PART VI. PUBLIC INFORMATION AND ACCESS

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.

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.

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.

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.

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.

6.06. Court and Board of Disciplinary Appeals Opinions:

A. Court Opinions: In any case arising out of a Complaint, an opinion of a court of appeals issued on or after May 1, 1992 has precedential value regardless of its designation.

B. Board of Disciplinary Appeals Opinions: Board of Disciplinary Appeals opinions are open to the public and must be made available to public reporting services,

print or electronic, for publishing. These opinions are persuasive, not precedential, in disciplinary proceedings tried in district court.

Comment to 2009 change: Rule 6.06 is divided into two subdivisions. The language in subdivision A is amended to remove an outdated reference to the official reporter system and to be consistent with Texas Rule of Appellate Procedure (TRAP) 47 amendments intended to prospectively discontinue designating opinions as either "published" or "unpublished." The erroneously designated opinions addressed in subdivision A have precedential value from May 1, 1992 on because that is the effective date of the prior version of the rule, which mandated publication of "[a]ll cases involving the Professional Misconduct or Disability of an attorney appealed to the Courts of Appeal [sic] or to the Supreme Court of Texas." New subdivision B addresses Board of Disciplinary Appeals (BODA) opinions and includes a distribution provision similar to TRAP 47.3. This change provides for the publication of BODA opinions issued in any type of case, whether pursuant to BODA's original or appellate jurisdiction.

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.

6.08. Access to Confidential Information: No officer or Director of the State Bar or any appointed adviser to the Commission shall have access to any confidential information relating to any Disciplinary Proceeding, Disciplinary Action, or Disability suspension. The Office of Chief Disciplinary Counsel may provide this information to authorized agencies investigating qualifications for admission to practice, attorney discipline enforcement agencies, law enforcement agencies, the State Bar's Client Security Fund, the State Bar's Lawyer Assistance Program, the Supreme Court's Unauthorized Practice of Law Committee and its subcommittees and the Commission on Judicial Conduct.

PART VII. BOARD OF DISCIPLINARY APPEALS

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.

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.

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.

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."

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.

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.

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 [proceeding] in which recusal or disqualification would be required of a judge similarly situated.

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 Grievance constitutes either:

1. an Inquiry as opposed to a Complaint; or

2. a Complaint as opposed to an Inquiry.

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.

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.

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.

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 constitutes either an Inquiry or a Complaint, or transferring cases, are conclusive, and may not be appealed to the Supreme Court.

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 or the Open Records Act.

Comment: These rules permit the Board of Disciplinary Appeals, upon decision of its chair, to allow or require anyone involved in a matter before the Board—including but not limited to a party, attorney, witness, court reporter, or Board member—to participate remotely, such as by teleconferencing, videoconferencing, or other means. The Board may consider as evidence sworn statements or sworn testimony given remotely.

PART VIII. COMPULSORY DISCIPLINE

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.

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.

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.

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 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.

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.

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.

8.07. Early Termination: An early termination of criminal probation shall have no effect on any judgment entered pursuant to Part VIII.

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

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, including by any federal court or federal agency, 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. For purposes of this Part, "discipline" by a federal court or federal agency means a public reprimand, suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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.

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.

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

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.

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.

10.03. Effect of Filing: The filing of a motion for resignation in lieu of discipline does not, without the consent of the Chief Disciplinary Counsel, serve to delay or abate any then pending Grievance, Complaint, Disciplinary Proceeding, Disciplinary Action or disciplinary investigation.

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.

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

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.

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.

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 employers, 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.

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.

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.

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.

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.

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.

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.

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

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.

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.

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 finding of Disability, the

District Disability Committee shall certify the finding to the Board of Disciplinary Appeals.

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.

12.05. Effect on Limitations: Any statute of limitations applying to a disciplinary matter is tolled during the period of any Disability suspension.

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 1. nor 2. 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.

2. 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.

8. Psychological evaluation, counseling, and treatment.

9. The abstinence from alcohol or drugs.

10. Payment of costs (including Reasonable Attorneys' Fees and all direct expenses) associated with the proceedings.

11. Substance abuse evaluation, counseling, and treatment.

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 Bar 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.

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

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.

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.

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.

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.

Comment: Chapter 456, Estates Code, authorizes the personal representative of a deceased attorney to designate an attorney—including him- or herself, if the personal representative is an attorney—to disburse and close the deceased attorney's trust or escrow accounts for client funds. *See* TEX. EST. CODE § 456.002. Before appointing an attorney to wind up a deceased attorney's practice under this rule, the court should determine whether the deceased attorney's personal representative has designated an attorney under Chapter 456 to close the deceased attorney's trust and escrow accounts.

13.04. Voluntary Appointment of Custodian Attorney for Cessation of Practice: In lieu of the procedures set forth in Rules 13.02 and 13.03, an attorney ceasing practice or planning for the cessation of practice ("appointing attorney" for purposes of this Rule) may voluntarily designate a Texas attorney licensed and in good standing to act as custodian ("custodian attorney" for purposes of this Rule) to assist in the final resolution and closure of the attorney's practice. The terms of the appointing documents, which shall be signed and acknowledged by the appointing attorney and custodian attorney, may include any of the following duties assumed:

A. Examine the client matters, including files and records of the appointing 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 appointing attorney of

the cessation 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 attorney shall observe the attorney-client relationship and privilege as if the custodian were the attorney of the client and may make only such disclosures as are necessary to carry out the purposes of this Rule. Except for intentional misconduct or gross negligence, no person acting as custodian attorney under this Rule shall incur any liability by reason of the actions taken pursuant to this Rule.

The privileges and limitations of liability contained herein shall not apply to any legal representation taken over by the custodian attorney.

Comment: Performing the duties of a custodian under this Rule does not create a client-lawyer relationship. If a lawyer serving as custodian assumes representation of a client, the lawyer's role as custodian terminates, and the lawyer's actions are subject to the Texas Disciplinary Rules of Professional Conduct regarding the client-lawyer relationship.

PART XIV. INTERIM SUSPENSION

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 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.

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.

B. Any other conduct by an attorney that, if continued, will probably cause harm to clients or prospective clients.

PART XV. GUIDELINES FOR IMPOSING SANCTIONS

15.01. Purpose and Nature of Sanctions

A. Purpose of Lawyer Discipline Proceedings.
The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.

B. Purpose of These Guidelines.
These Guidelines are designed for use in Disciplinary Actions and Disciplinary Proceedings under Parts II and III of the Texas Rules of Disciplinary Procedure. The Guidelines set forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning Sanctions in particular cases of lawyer misconduct. They are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of Sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; and (3) consistency in the imposition of disciplinary Sanctions for the same or similar rule violations among the various district grievance committees and district courts that consider these matters. The Guidelines do not limit the authority of a district grievance committee or of a district judge to make a finding or issue a decision.

15.02. General Factors to be Considered in Imposing Sanctions

In imposing a sanction after a finding of Professional Misconduct, the disciplinary tribunal should consider the following factors:

(a) the duty violated;
(b) the Respondent's level of culpability;
(c) the potential or actual injury caused by the Respondent's misconduct; and
(d) the existence of aggravating or mitigating factors.

15.03. Imposition of Sanctions

In any Disciplinary Proceeding or Disciplinary Action where Professional Misconduct is found have occurred, the district grievance committee or district court may, in its discretion, conduct a separate hearing and receive evidence as to the appropriate Sanctions to be imposed.

15.04. Violations of Duties Owed to Clients

A. Lack of Diligence

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Rule 15.02, the following sanctions are generally appropriate in cases involving neglect, frequent failure to carry out completely the obligations owed to a client, failure to communicate, failure to provide competent representation, or failure to abide by client decisions:

1. Disbarment is generally appropriate when:

(a) a Respondent abandons the practice and causes serious or potentially serious injury to a client; or

(b) a Respondent knowingly fails to perform services for a client, fails to adequately communicate with a client, fails to provide competent representation, or fails to abide by client decisions and causes serious or potentially serious injury to a client; or

(c) a Respondent engages in a pattern of neglect with respect to client matters, inadequate client communications, lack of competent representation, or failure to abide by client decisions and causes serious or potentially serious injury to a client.

2. Suspension is generally appropriate when:

(a) a Respondent knowingly fails to perform services for a client, fails to adequately communicate with a client, fails to provide competent representation, or fails to abide by client decisions and causes injury or potential injury to a client, or

(b) a Respondent engages in a pattern of neglect with respect to client matters, inadequate client communications, lack of competent representation, or failure

to abide by client decisions and causes injury or potential injury to a client.

3. Public reprimand is generally appropriate when a Respondent does not act with reasonable diligence in representing a client, communicating with a client, providing competent representation, or abiding by client decisions and causes injury or potential injury to a client.

4. Private reprimand is generally appropriate when a Respondent does not act with reasonable diligence in representing a client, communicating with a client, providing competent representation or abiding by client decisions and causes little or no actual or potential injury to a client.

B. Failure to Preserve the Client's Property

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Rule 15.02, the following sanctions are generally appropriate in cases involving the failure to preserve client property, including the failure to surrender papers and property or to refund any advance payment of fee that has not been earned on the termination of representation:

1. Disbarment is generally appropriate when a Respondent knowingly converts client property and causes injury or potential injury to a client.

2. Suspension is generally appropriate when a Respondent knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

3. Public reprimand is generally appropriate when a Respondent is negligent in dealing with client property and causes injury or potential injury to a client.

4. Private reprimand is generally appropriate when a Respondent is negligent in dealing with client property and causes little or no actual or potential injury to a client.

C. Failure to Preserve the Client's Confidences

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Rule 15.02, the following sanctions are generally appropriate in cases involving improper disclosure of information relating to the representation of a client:

1. Disbarment is generally appropriate when a Respondent, with the intent to benefit the Respondent or another, knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

2. Suspension is generally appropriate when a Respondent knowingly reveals

information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

3. Public reprimand is generally appropriate when a Respondent negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

4. Private reprimand is generally appropriate when a Respondent negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes little or no actual or potential injury to a client.

D. Failure to Avoid Conflicts of Interest

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Rule 15.02, the following sanctions are generally appropriate in cases involving conflicts of interest:

1. Disbarment is generally appropriate when a Respondent, without the informed consent of client(s):

   (a) engages in representation of a client knowing that the Respondent's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or

   (b) simultaneously represents clients that the Respondent knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or

   (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the Respondent or another, and causes serious or potentially serious injury to a client.

2. Suspension is generally appropriate when a Respondent knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

3. Public reprimand is generally appropriate when a Respondent is negligent in determining whether the representation of a client may be materially affected by the Respondent's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

4. Private reprimand is generally appropriate when a Respondent engages in an

isolated instance of negligence in determining whether the representation of a client may be materially affected by the Respondent's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

E. Lack of Candor

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Rule 15.02, the following sanctions are generally appropriate in cases where the lawyer engages in dishonesty, fraud, deceit, or misrepresentation directed toward a client:

1. Disbarment is generally appropriate when a Respondent knowingly deceives a client with the intent to benefit the Respondent or another, and causes serious injury or potential serious injury to a client.

2. Suspension is generally appropriate when a Respondent knowingly deceives a client, and causes injury or potential injury to the client.

3. Public reprimand is generally appropriate when a Respondent is negligent in determining the accuracy or completeness of information provided to a client, and causes injury or potential injury to the client.

4. Private reprimand is generally appropriate when a Respondent engages in an isolated instance of negligence in determining the accuracy or completeness of information provided to a client, and causes little or no actual or potential injury to the client.

15.05. Violations of Duties Owed to the Legal System

A. False Statements, Fraud, and Misrepresentation

Absent aggravating or mitigating circumstances, and upon application of the actors set out in Rule 15.02, the following sanctions are generally appropriate in cases involving conduct that impedes the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court or another:

1. Disbarment is generally appropriate when a Respondent, with the intent to deceive the court or another, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

2. Suspension is generally appropriate when a Respondent knows that false statements or documents are being submitted to the court or another or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party, or causes

an adverse or potentially adverse effect on the legal proceeding.

3. Public reprimand is generally appropriate when a Respondent is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party, or causes an adverse or potentially adverse effect on the legal proceeding.

4. Private reprimand is generally appropriate when a Respondent engages in an isolated instance of negligence in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

B. Abuse of the Legal Process

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Rule 15.02, the following sanctions are generally appropriate in cases involving failure to bring a meritorious claim, failure to minimize the burdens and delays of litigation, lack of fairness in adjudicatory proceedings, improper extrajudicial statements, improper means involving third persons, or improper discriminatory activities:

1. Disbarment is generally appropriate when a Respondent knowingly engages in an abuse of the legal process with the intent to obtain a benefit for the Respondent or another, and causes serious injury or potentially serious injury to a client or other party or causes serious or potentially serious interference with a legal proceeding.

2. Suspension is generally appropriate when a Respondent knows that he or she is abusing the legal process, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

3. Public reprimand is generally appropriate when a Respondent negligently engages in conduct involving an abuse of the legal process, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

4. Private reprimand is generally appropriate when a Respondent engages in an isolated instance of negligence that involves an abuse of the legal process, and causes little or no actual or potential injury to a client or other party, or causes little or no actual or potential interference with a legal proceeding.

C. Improper Communications with Individuals in the Legal System

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Rule 15.02, the following Sanctions are generally appropriate in cases involving attempts to influence a judge, juror, prospective juror or other official by means prohibited by law or rules of practice or procedure, or improper communications with one represented by counsel or unrepresented individuals:

1. Disbarment is generally appropriate when a Respondent:

   (a) intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or

   (b) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or

   (c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal proceeding.

2. Suspension is generally appropriate when a Respondent engages in communication with an individual in the legal system when the Respondent knows or should know that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

3. Public reprimand is generally appropriate when a Respondent is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.

4. Private reprimand is generally appropriate when a Respondent engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding.

15.06. Violations of Duties Owed to the Public

A. Failure to Maintain Personal Integrity

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Rule 15.02, the following Sanctions are generally appropriate in cases involving (1) barratry or the commission of any other criminal act that reflects adversely on the Respondent's honesty, trustworthiness, or fitness as a lawyer in other respects; or (2) the failure to maintain personal integrity in other respects, including stating or implying an ability to influence improperly a government agency or official or by improperly assisting a judge or judicial official in conduct that violates rules of judicial conduct or other law:

1. Disbarment is generally appropriate when:

   (a) a Respondent engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

   (b) a Respondent knowingly engages in any other conduct involving the failure to maintain personal integrity and causes serious injury of potential injury to others or the legal system.

2. Suspension is generally appropriate when:

   (a) a Respondent knowingly engages in criminal conduct that does not contain the elements listed in Guideline 15.06(A)(1) and that seriously adversely reflects on the Respondent's fitness to practice law; or

   (b) knowingly engages in conducting involving the failure to maintain personal integrity and causes injury or potential injury to others or the legal system.

3. Public reprimand is generally appropriate when a Respondent negligently engages in any other conduct involving the failure to maintain personal integrity and causes injury or potential injury to others or the legal system.

4. Private reprimand is generally appropriate when a Respondent negligently engages in any other conduct involving the failure to maintain personal integrity and causes little or no actual or potential injury to others or the legal system.

B. Failure to Maintain the Public Trust

Absent aggravating or mitigating circumstances, and upon application of the factors set

out in Rule 15.02, the following sanctions are generally appropriate in cases involving public officials who engage in conduct that impedes the administration of justice:

1. Disbarment is generally appropriate when a Respondent in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.

2. Suspension is generally appropriate when a Respondent in an official or governmental position knowingly fails to follow applicable procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

3. Public reprimand is generally appropriate when a Respondent in an official or governmental position negligently fails to follow applicable procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

4. Private reprimand is generally appropriate when a Respondent in an official or governmental position engages in an isolated instance of negligence in not following applicable procedures or rules, and causes little or no actual or potential injury to a party or to the integrity of the legal process.

15.07. Violations of Other Duties as a Professional

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Rule 15.02, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services; improper solicitation of professional employment from a prospective client; unconscionable, illegal, or improper fees; unauthorized practice of law; improper withdrawal from representation; failure to supervise; improper restrictions on the right to practice; appointments by a tribunal; failure to report professional misconduct; failure to respond to a disciplinary agency; improper conduct involving bar admission or reinstatement proceedings; statements regarding judicial and legal officials or a lawyer as a judicial candidate; or improper conduct in the role as advisor or evaluator.

1. Disbarment is generally appropriate when a Respondent knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the Respondent or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

2. Suspension is generally appropriate when a Respondent knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

3. Public reprimand is generally appropriate when a Respondent negligently engages

in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

4. Private reprimand is generally appropriate when a Respondent engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

15.08. Prior Discipline Orders

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Rule 15.02, the following sanctions are generally appropriate in cases involving prior discipline.

1. Disbarment is generally appropriate when a Respondent:

   (a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

   (b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

2. Suspension is generally appropriate when a Respondent has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

3. Public reprimand is generally appropriate when a Respondent:

   (a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

   (b) has received a private reprimand for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

4. A private reprimand is generally not an appropriate sanction when a Respondent violates the terms of a prior disciplinary order or when a Respondent has engaged in the same or similar misconduct in the past.

5. A private reprimand should not be utilized when a Respondent:

   (a) has received a private reprimand within the preceding five-year period for

a violation of the same disciplinary rule; or

(b) has engaged in misconduct involving theft, misapplication of fiduciary property, or the failure to return, after demand, a clearly unearned fee; or

(c) has engaged in misconduct involving the failure of a prosecutor to 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 mitigate the offense.

6. A private reprimand is not an available sanction in a Disciplinary Action.

15.09. Aggravation and Mitigation

A. Generally

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

B. Aggravation

1. Definition. Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.

2. Factors which may be considered in aggravation.

Aggravating factors include:

(a) prior disciplinary record, including private reprimands;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple violations;

(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority or uncooperative conduct during proceedings;

(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(g) refusal to acknowledge wrongful nature of conduct;

(h) vulnerability of victim;

(i) substantial experience in the practice of law;

(j) indifference to making restitution;

(k) illegal conduct, including that involving the use of controlled substances;

(l) unsuccessful participation in the Grievance Referral Program.

C. Mitigation

1. Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

2. Factors which may be considered in mitigation.

Mitigating factors include:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

(e) full and free disclosure to disciplinary authority or cooperative conduct during proceedings;

(f) inexperience in the practice of law;

(g) character or reputation;

(h) physical disability suffered by the Respondent at the time of the misconduct that caused or contributed to the misconduct;

(i) mental disability or chemical dependency including alcoholism or drug abuse when:

(1) there is medical evidence that the Respondent is affected by a chemical dependency or mental disability;

(2) the chemical dependency or mental disability caused the misconduct;

(3) the Respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely;

(j) delay in disciplinary proceedings;

(k) imposition of other penalties or sanctions;

(l) remorse;

(m) remoteness of prior sanctions.

D. Factors which are neither aggravating nor mitigating.

The following factors should not be considered as either aggravating or mitigating:

(a) forced or compelled restitution;

(b) agreeing to the client's demand for certain improper behavior or result;

(c) withdrawal of complaint against the Respondent;

(d) complainant's recommendation as to sanctions;

(e) failure of injured client to complain.

PART XVI. GRIEVANCE REFERRAL PROGRAM

16.01. Grievance Referral Program. The Grievance Referral Program is established as a diversion program designed to address professionalism issues in minor misconduct cases and component of the attorney discipline system.

16.02. Eligibility. The following criteria are to be considered for participation in the program:

A. Respondent has not been disciplined within the prior three years.

B. Respondent has not been disciplined for similar conduct within the prior five years.

C. Misconduct does not involve misappropriation of funds or breach of fiduciary duties.

D. Misconduct does not involve dishonesty, fraud, or misrepresentation.

E. Misconduct did not result in substantial harm or prejudice to client or complainant.

F. Respondent maintained cooperative attitude toward the proceedings.

G. Participation is likely to benefit the Respondent and further the goal of protection of the public.

H. Misconduct does not constitute a crime that would subject the Respondent to compulsory discipline under Part VIII of these Rules.

16.03. Procedure.

A. The Commission may refer an eligible Respondent to the program in any disciplinary matter that has reached the Just Cause stage of the process. An eligible Respondent may also be referred to the program after an investigatory hearing pursuant to Rule 2.12.

B. The Respondent must agree to meet with the program administrator for an assessment of the professionalism issues that contributed to the misconduct.

C. The Respondent must agree in writing to waive any applicable time limits and to complete specific terms and conditions, including restitution if appropriate, by a date certain and to pay for any costs associated with the terms and conditions.

D. If the Respondent agrees to participate and completes the terms in a timely manner, the underlying grievance will be dismissed.

E. If the Respondent does not fully complete the terms of the agreement in a timely manner, the underlying grievance will continue in the ordinary disciplinary process.

F. Generally, a Respondent is eligible to participate in the program one time.

16.04. Reporting.

The program administrator will provide periodic reports to the Commission on the progress of the program, including the number of cases resolved.

PART XVII. MISCELLANEOUS PROVISIONS

17.01. Enforcement of Judgments: The following judgments have the force of a final judgment of a district court: judgments entered by an Investigatory Panel, 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.

17.02. 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.

17.03. 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.

17.04. 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.

17.05. 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.

17.06. Limitations, General Rule and Exceptions:

A. *General Rule*: No attorney may be disciplined for Professional Misconduct that occurred more than four years before the date on which a Grievance alleging the Professional Misconduct is received by the Chief Disciplinary Counsel.

B. *Exception: Compulsory Discipline:* The general rule does not apply to a Disciplinary Action seeking compulsory discipline under Part VIII.

C. *Exception: Alleged Violation of the Disclosure Rule:* A prosecutor may be disciplined for a violation of Rule 3.09(d), Texas Disciplinary Rules of Professional Conduct, that occurred in a prosecution that resulted in the wrongful imprisonment of a person if the Grievance alleging the violation is received by the Chief Disciplinary Counsel within four years after the date on which the Wrongfully Imprisoned Person was released from a Penal Institution.

D. *Effect of Fraud or Concealment*: Where fraud or concealment is involved, the time periods stated in this rule do not begin to run until the Complainant discovered, or in the exercise of reasonable diligence should have discovered, the Professional Misconduct.

17.07. 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.

17.08. 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 or the Chief Disciplinary Counsel and Investigatory Panel subject to the provisions of Rule 6.08.

17.09. 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.

17.10. 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.

APPENDIX A TO THE TEXAS RULES OF DISCIPLINARY PROCEDURE

Competent and Diligent Representation 1.01	Guideline 15.04A
Scope and Objectives of Representation 1.02 (a)(b) 1.02 (c)(d)(e)(f) 1.02 (g)	 Guideline 15.04A Guideline 15.05A Guideline 15.07
Communication 1.03	Guideline 15.04A
Fees 1.04	Guideline 15.07; 15.04E
Confidentiality of Information 1.05	Guideline 15.04C
Conflict of Interest: General Rule 1.06	Guideline 15.04D
Conflict of Interest: Intermediary 1.07	Guideline 15.04D
Conflict of Interest: Prohibited Transactions 1.08	Guideline 15.04D
Conflict of Interest: Former Client 1.09	Guideline 15.04D; 15.04C
Successive Government and Private Employment 1.10	Guideline 15.04D
Adjudicatory Official or Law Clerk 1.11	Guideline 15.04D
Organization as a Client 1.12	Guideline 15.04D
Conflicts: Public Interest Activities 1.13	Guideline 15.04D
Safekeeping Property 1.14	Guideline 15.04B
Declining or Termination Representation 1.15 1.15(d)	 Guideline 15.07 Guideline 15.04B
Clients with Diminished Capacity 1.16	Guideline 15.04A; 15.04C; 15.07
Advisor 2.01	Guideline 15.07
Evaluation for Use by Third Person 2.02	Guideline 15.07
Meritorious Claims and Contentions 3.01	Guideline 15.05B

Minimizing the Burdens and Delays of Litigation 3.02	Guideline 15.05B
Candor Toward the Tribunal 3.03	Guideline 15.05A
Fairness in the Adjudicatory Proceedings 3.04	Guideline 15.05B; 15.05A
Maintaining Impartiality of Tribunal 3.05	Guideline 15.05C
Maintaining Integrity of Jury System 3.06	Guideline 15.05C
Trial Publicity 3.07	Guideline 15.05B
Lawyer as Witness 3.08	Guideline 15.04D
Special Responsibilities of a Prosecutor 3.09	Guideline 15.05B; 15.06B
Advocate in Nonadjudicative Proceedings 3.10	Guideline 15.05B; 15.05C
Truthfulness in Statement to Others 4.01	Guideline 15.05A
Communication with One Represented by Counsel 4.02	Guideline 15.05C
Dealing with Unrepresented Person 4.03	Guideline 15.05C
Respect for Rights of Third Persons 4.04	Guideline 15.05B
Responsibilities of a Partner or Supervisory Lawyer 5.01	Guideline 15.07
Responsibilities of a Supervised Lawyer 5.02	Guideline 15.07
Responsibilities Regarding Nonlawyer Assistants 5.03	Guideline 15.07
Professional Independence of a Lawyer 5.04	Guideline 15.07; 15.04D
Unauthorized Practice of Law 5.05	Guideline 15.07
Restrictions on Right to Practice 5.06	Guideline 15.07
Prohibited Discriminatory Activities 5.08	Guideline 15.05B

Accepting Appointments by a Tribunal 6.01	Guideline 15.07
Communications Concerning a Lawyer's Services 7.01	Guideline 15.07
Advertisements 7.02	Guideline 15.07
Solicitation and Other Prohibited Communications 7.03	Guideline 15.07
Filing Requirements for Advertisements and Solicitation Communications 7.04	Guideline 15.07
Communications Exempt from Filing Requirements 7.05	Guideline 15.07
Prohibited Employment 7.06	Guideline 15.07
Bar Admission, Reinstatement, and Disciplinary Matters 8.01	Guideline 15.07
Judicial and Legal Officials 8.02	Guideline 15.07
Reporting Professional Misconduct 8.03	Guideline 15.07
Misconduct 8.04 8.04(a)(2)(5)(6)(9) 8.04(a)(3) 8.04(a)(4) 8.04(a)(7)(10)(11) 8.04(a)(8)(12)	Guideline 15.04 – 15.08 15.06A 15.04E; 15.05A 15.05A 15.08 15.07
Jurisdiction 8.05	Guideline: None
Severability 9.01	Guideline: None

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Part III. TRIAL IN DISTRICT COURT

Part IV. THE COMMISSION FOR LAWYER DISCIPLINE

Part V. CHIEF DISCIPLINARY COUNSEL

Part VI. PUBLIC INFORMATION AND ACCESS

Part VII. BOARD OF DISCIPLINARY APPEALS

Part VIII. COMPULSORY DISCIPLINE

Part IX. RECIPROCAL DISCIPLINE

Part X. RESIGNATION IN LIEU OF DISCIPLINE

Part XI. REINSTATEMENT AFTER DISBARMENT OR RESIGNATION

Part XVII. MISCELLANEOUS PROVISIONS

APPENDIX A TO THE TEXAS RULES OF DISCIPLINARY PROCEDURE

From: [redacted]
To: cdrr
Subject: CDRR Comment: Opportunity in honoring The Texas Lawyer"s Creed for future of Texas
Date: Tuesday, August 29, 2023 5:00:38 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Steve
Last Name	Swanson
Email	[redacted]
Member	No

Feedback

Subject	Opportunity in honoring The Texas Lawyer's Creed for future of Texas

Comments

Second time - not sure first time went through. Being encouraged by Chief Justice Nathan Hecht and guided by ombudsman Stephanie Lowe, this is to advocate for The Texas Lawyer's Creed and to help the Bar take steps to help lawyers honor the Creed. Our Texas school lawyers honoring their Creed and helping lead and guide Texas in the lawful governance of education, as noted in the Creed, is essential to serve the needs of and protect the lives of students and to make effective use of community resources - the future of Texas. Suggestion: The Committee on Disciplinary Rules and Referenda plans for and implements the plan for Texas lawyers honoring the Texas Lawyer's Creed. Plan for and implementing the plan for honoring the Creed includes: • Lawyers educating clients, other lawyers, and the public regarding the spirit and letter of the Creed and • The Bar obtaining and sharing the public's opinion about lawyer's honoring their Creed to help reinforce lawyers improving their compliance with the Creed. Honoring the Creed to diminish the need for an Attorney Discipline System as promised in the Creed. Look forward to hearing from you and your thoughts. Steve .

From: [redacted]
To: cdrr
Subject: CDRR Comment: Opportunity in honoring The Texas Lawyer"s Creed for future of Texas
Date: Tuesday, September 12, 2023 12:07:38 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Steve
Last Name	Swanson
Email	[redacted]
Member	No

Feedback

Subject	Opportunity in honoring The Texas Lawyer's Creed for future of Texas

Comments

Watched the Last CDRR meeting - September. Thank you for putting the suggestion focused on the Texas Lawyer's Creed on the agenda for the October meeting. Here to help. Please let me know.
Steve

From: [redacted]
To: cdrr
Subject: Opportunity in honoring The Texas Lawyer"s Creed for future of Texas
Date: Tuesday, September 12, 2023 12:14:10 PM

HI
I watched the last CDRR meeting - September.

Thank you for putting the suggestion focused on the Texas Lawyer's Creed on the agenda for the October meeting.

Here to help.

Please let me know.
Steve

Steve Swanson
[redacted]
Improvetexasschools.org

From: [redacted]
To: cdrr
Subject: Opportunity in honoring The Texas Lawyer"s Creed for future of Texas
Date: Saturday, September 30, 2023 6:57:48 AM
Attachments: texaslawyerscreed with signatures HIlights.pdf

Thank you for putting the suggestion focused on the Texas Lawyer's Creed on the agenda for the October meeting.

Attached is a highlighted copy of the Creed, with signatures, we have been referencing.

Thank you again.
.
Steve

Steve Swanson
[redacted]
Improvetexasschools.org

ORDER OF THE SUPREME COURT OF TEXAS AND THE COURT OF CRIMINAL APPEALS

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 reenforcement 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 Supreme Court of Texas

Thomas R. Phillips, Chief Justice

Franklin S. Spears, Justice

C. L. Ray, Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd A. Doggett, Justice

The Court of Criminal Appeals

Michael J. McCormick, Presiding Judge

W. C. Davis, Judge

Sam Houston Clinton, Judge

Marvin O. Teague, Judge

Chuck Miller, Judge

Charles F. (Chuck) Campbell, Judge

Bill White, Judge

M. P. Duncan, III, Judge

David A. Berchelmann, Jr., Judge

THE TEXAS LAWYER'S CREED-- A MANDATE FOR PROFESSIONALISM

PROMULGATED BY
THE SUPREME COURT OF TEXAS
AND
THE COURT OF CRIMINAL APPEALS

PRINTED AND DISTRIBUTED
COURTESY OF
TEXAS BAR FOUNDATION
AND
TEXAS CENTER FOR LEGAL ETHICS
AND PROFESSIONALISM

THE SUPREME COURT OF TEXAS
AND
THE COURT OF CRIMINAL APPEALS

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 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 commited 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.

From: [redacted]
To: cdrr
Subject: RE: Opportunity in honoring The Texas Lawyer"s Creed for future of Texas
Date: Wednesday, October 4, 2023 11:28:41 AM

Hi
Thanks to everyone – including new subcommittee on the Creed.
Here to help.
Steve

Steve Swanson
[redacted]
Improvetexasschools.org

From: [redacted]
Sent: Saturday, September 30, 2023 6:57 AM
To: 'CDRR@texasbar.com' <CDRR@texasbar.com>
Subject: Opportunity in honoring The Texas Lawyer's Creed for future of Texas

Thank you for putting the suggestion focused on the Texas Lawyer's Creed on the agenda for the October meeting.

Attached is a highlighted copy of the Creed, with signatures, we have been referencing.

Thank you again.
.
Steve

Steve Swanson
[redacted]
Improvetexasschools.org

From: [redacted]
To: cdrr
Subject: CDRR Comment: Opportunity During CDRR Presentations
Date: Wednesday, November 1, 2023 4:52:32 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Steve
Last Name	Swanson
Email	[redacted]
Member	No

Feedback

Subject	Opportunity During CDRR Presentations

Comments

Thank you for continuing your focus on the Creed. Hearing today, during the CDRR's 11/1/2023 meeting, about the various presentations you make, this is to share the following suggestion for your presentations. Should the following topics not already be included in your presentations, this is to encourage taking the opportunity to include the following: • Lawyers are to educate clients, the public, and other lawyers regarding lawyers: o Endeavoring to achieve client's lawful objectives in legal transactions and in litigation as quickly and economically as possible. o Advising clients that they will not pursue: Conduct which is intended primarily to harass or drain the financial resources of the opposing party and Tactics which are intended primarily for delay and o Advising clients regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes, • Lawyers must always be mindful that the practice of law is a profession. As members of a learned art lawyers pursue a common calling in the spirit of public service. Lawyers have a proud tradition. Throughout the history of our nation, the members of our citizenry have looked to the ranks of the lawyer's profession for leadership and guidance and • Other topics from the Creed. Thank you again, Steve

From: [redacted]
To: cdrr
Subject: Opportunity During CDRR Presentations
Date: Wednesday, November 1, 2023 4:55:00 PM

Thank you for continuing your focus on the Creed.

Hearing today, during the CDRR's 11/1/2023 meeting, about the various presentations you make, this is to share the following suggestion for your presentations.

Should the following topics not already be included in your presentations, this is to encourage taking the opportunity to include the following:

- Lawyers are to educate clients, the public, and other lawyers regarding lawyers:
    - Endeavoring to achieve client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
    - Advising clients that they will not pursue:
        - Conduct which is intended primarily to harass or drain the financial resources of the opposing party and
        - Tactics which are intended primarily for delay and
    - Advising clients regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes,

- Lawyers must always be mindful that the practice of law is a profession. As members of a learned art lawyers pursue a common calling in the spirit of public service. Lawyers have a proud tradition. Throughout the history of our nation, the members of our citizenry have looked to the ranks of the lawyer's profession for leadership and guidance and

- Other topics from the Creed.

Thank you again,
Steve

Steve Swanson
[redacted]
Improvetexasschools.org

From: [redacted]
To: cdrr
Subject: CDRR Comment: Why Texas Lawyers and The Lawyer's Creed are Critical for the Future of Texas
Date: Friday, November 3, 2023 3:15:13 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Steve
Last Name	Swanson
Email	[redacted]
Member	No

Feedback

Subject	Why Texas Lawyers and The Lawyer's Creed are Critical for the Future of Texas

Comments

Also sent by email To Members of the CDRR Encouraged by Mr. Kinard's comments at the beginning of the last CDRR meeting, Chief Justice Nathan Hecht, guidance from Stephanie Lowe, Ombudsman, Attorney Discipline System (noted in previous comments to the CDRR), and the CDRR's continuing focus on the Creed, this is to provide additional comments and information. Below is a video and comments describing why Texas lawyers and honoring The Texas Lawyer's Creed are critical in serving the needs of Texas students, their future – the future of Texas. Lawyers are important: 1. Having skills, time spent, and commitment to become a lawyer. 2. "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." (From The Texas Lawyer's Creed) 3. They have the capability to serve the public by helping; a. Those who govern education know about, learn, and implement Texas' own laws for governing education for serving the needs of students and b. The public become educated in the Creed. Video - Why lawyers are needed includes: A. Laws not implemented. Those who govern Texas education need help from lawyers to know about and implement existing Texas law for suicide and violence prevention in schools. B. New legislation not needed. Texas legislators and their staff who write, introduce, and pass Bills for education need help from lawyers to know existing law and prevent writing and passing redundant Bills/legislation. C. Senator not knowing about the Creed. The public, including the Chair of the Texas Senate Committee on Education and our students, need help from lawyers to become educated regarding the Texas Lawyers Creed. (See I. 4. of the Creed) VIDEO - SEE EMAIL for LINK Additional research and videos are available to describe the importance of lawyers' public service in helping govern public education and educating the public regarding the Creed. Thank you again. Sincerely Steve Swanson Steve Swanson [redacted] Improvetexasschools.org

From: [redacted]
To: cdrr
Subject: To The Texas Bar"s CDRR - Why Texas Lawyers and The Lawyer"s Creed are Critical for the Future of Texas
Date: Friday, November 3, 2023 3:05:02 PM
Attachments: image001.emz
image002.png

To Members of the CDRR

Encouraged by Mr. Kinard's comments at the beginning of the last CDRR meeting, Chief Justice Nathan Hecht, guidance from Stephanie Lowe, Ombudsman, Attorney Discipline System (noted in previous comments to the CDRR), and the CDRR's continuing focus on the Creed, this email is to provide additional comments and information.

Below is a video and comments describing why Texas lawyers and honoring The Texas Lawyer's Creed are critical in serving the needs of Texas students, their future – the future of Texas.

Lawyers are important:

1. Having skills, time spent, and commitment to become a lawyer.

2. "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."
   (From The Texas Lawyer's Creed)

3. They have the capability to serve the public by helping;
   a. Those who govern education know about, learn, and implement Texas' own laws for governing education for serving the needs of students and
   b. The public become educated in the Creed.

Video - Why lawyers are needed includes:

A. **Laws not implemented.**
   Those who govern Texas education need help from lawyers to know about and implement existing Texas law for suicide and violence prevention in schools.

B. **New legislation not needed.**
   Texas legislators and their staff who write, introduce, and pass Bills for education need help from lawyers to know existing law and prevent writing and passing redundant Bills/legislation.

C. **Senator not knowing about the Creed.**
   The public, including the Chair of the Texas Senate Committee on Education and our students, need help from lawyers to become educated regarding the Texas Lawyers Creed. *(See I. 4. of the Creed)*

Video

Additional research and videos are available to describe the importance of lawyers' public service in helping govern public education and educating the public regarding the Creed.

Thank you again.

Sincerely
Steve Swanson

Steve Swanson
[redacted]
Improvetexasschools.org

From: [redacted]
To: cdrr
Subject: CDRR Comment: Suggestion – CDRR Leadership in Educating Others Regarding The Texas Lawyer's Creed
Date: Sunday, November 5, 2023 11:44:11 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Steve
Last Name	Swanson
Email	[redacted]
Member	No

Feedback

Subject	Suggestion – CDRR Leadership in Educating Others Regarding The Texas Lawyer's Creed

Comments

See email also To Members of the CDRR Encouraged by Mr. Kinard to continue emailing comments and suggestions and by Justice Hecht and Ms. Lowe, and guided by the Creed, this email is to share the following suggestion. CDRR Leadership in Educating Lawyers and The Public. (See Creed highlights below) "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." "I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed." A. With the Creed providing for: a. Compliance with the Creed to minimize use of "rules already in existence "and b. "Compliance…depends…upon reinforcement by peer pressure and public opinion…" Members of the CDRR provide leadership and guidance through preparation for and educating: a. Lawyers they know, and b. People they know, including family, students, clients, and others – the public, "Regarding the spirit and letter of this Creed." See the attached highlighted Creed of specifics suggested for clients and the public to know. B. With the Creed providing that "compliance… depends…upon … public opinion…", the members of the CDRR provide leadership and guidance through: a. Surveying the public about the public's knowledge of the Creed and the public's opinion about lawyers complying with the Creed and b. Publishing the survey for lawyers and the public to see. Thank you again. Please email me your thoughts and questions. Sincerely, Steve Swanson See email for copy of Creed Highlights follow: The Supreme Court of Texas and the Court of Criminal Appeals hereby promulgate and adopt "The Texas Lawyer's Creed - A Mandate for Professionalism" In Chambers, this 7th day of November, 1989. 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. … being part of the solution… 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. 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. … 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…. 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 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…. 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. 11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

From: [redacted]
To: cdrr
Subject: Suggestion - CDRR Leadership in Educating Others Regarding The Texas Lawyer"s Creed
Date: Sunday, November 5, 2023 11:37:12 AM
Attachments: image001.emz
image002.png
image007.emz
image008.png

To Members of the CDRR

Encouraged by Mr. Kinard to continue emailing comments and suggestions and by Justice Hecht and Ms. Lowe, and guided by the Creed, this email is to share the following suggestion.

CDRR Leadership in Educating Lawyers and The Public.
(See Creed highlights below)

"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."

"I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed."

A. With the Creed providing for:
   a. Compliance with the Creed to minimize use of *"rules already in existence* "and
   b. "*Compliance…depends…upon reinforcement by peer pressure and public opinion…*"

Members of the CDRR provide leadership and guidance through preparation for and educating:
   a. Lawyers they know, and
   b. People they know, including family, students, clients, and others – the public,

"Regarding the spirit and letter of this Creed."
See the attached highlighted Creed of specifics suggested for clients and the public to know.

B. With the Creed providing that "*compliance…depends…upon … public opinion***…", the members of the CDRR provide leadership and guidance through**:
   a. Surveying the public about the public's knowledge of the Creed and the public's opinion about lawyers complying with the Creed and
   b. Publishing the survey for lawyers and the public to see.

Thank you again.
Please email me your thoughts and questions.

Sincerely,
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… being part of the solution…

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.

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.

... 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....

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 shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

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2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
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Steve Swanson
[redacted]
Improvetexasschools.org

From: [redacted]
To: cdrr
Subject: Another Suggestion - Rule for CDRR Leadership in Educating Others Regarding The Texas Lawyer"s Creed
Date: Sunday, November 19, 2023 8:25:23 PM
Attachments: image003.emz
image005.emz
image001.png
image002.png

To Members of the CDRR

Thank you again for your focus on the Texas Lawyer's Creed !

Honoring the Creed for the Future of Texas
Experience and research reveal honoring the Lawyer's Creed is critical to lawfully governing public education for our students' and taxpayers' sake – the Future of Texas.
Videos and documentation available.

Suggestion – Rule for CDRR Leadership in Texas Lawyers Honoring the Texas Lawyer's Creed
Following up on our previous 11/5/2023 email and after reviewing the last CDRR meeting, this is to suggest your consideration of a rule for CDRR leadership in honoring the Creed.

How about a rule that states:

1. To honor the Texas Lawyer's Creed, once a year, and during each presentation by CDRR members to lawyers, the CDRR will educate, more than provide a handout, the public and lawyers regarding the spirit and letter of the Texas Lawyer's Creed.

   Honoring the Creed's statement – *I* (Texas lawyer) *am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.*

2. Presentations on the Creed will highlight the following from *the Creed* and will provide examples of following the highlights.

   - **Creed History** – *The Supreme Court of Texas and the Court of Criminal Appeals hereby promulgate and adopt* ***"The Texas Lawyer's Creed - A Mandate for Professionalism"*** *In Chambers, this 7th day of November, 1989.*
   - **Texas Lawyer's Leadership –** *We* (Texas lawyers) *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.*
   - **Spirit of Public Service –** *As members of a learned art we* (Texas lawyers) *pursue a common calling in the spirit of public service.*
   - **Restore Public Confidence in Lawyers' Profession –** *Let us* (Texas lawyers) *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.*
   - **Conduct** – *The conduct of a lawyer should be characterized at all times by honesty, candor, and fairness. … a lawyer must be ever mindful of the profession's broader duty to the legal system.*
   - **Respect** – *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.*
   - **Following Creed Depends Upon Reinforcement By Peer Pressure and Public Opinion** – *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.*
   - **Creed is Right** – *I* (Texas lawyer) *am committed to this creed for no other reason than it is right.*
   - **Independence –** *…A lawyer owes to the administration of justice personal dignity, integrity, and independence….*
   - **Obligated to Educate Others –** *I*(Texas lawyer) *am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.*
   - **Duty to Judicial System –** *I* (Texas lawyer) *will always be conscious of my duty to the judicial system.*
   - **Not Influenced by Self-Interest** … 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.
   - I (Texas lawyer) will
     - **Advise Client of Creed** – advise my client of the contents of this creed when undertaking representation.
     - **Be Quick and Economical** – endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
     - **Provide Independent Advice –** 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….
     - **Not Harass Opposing Party –** advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
     - **Not Use Tactics to Delay –** advise my client that we will not pursue tactics which are intended primarily for delay.
     - **Use Alternative Methods –** advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

3. Every 6 months the CDRR will:
   a. Survey the public to obtain their opinion of lawyers honoring the Texas Lawyer's Creed including:
      i. Do they know the Creed exists? - yes or no
      ii. Do they know a lawyer who educates the public regarding the Creed? - yes or no
      iii. Are they confident in the lawyer's profession? - yes or no and
   b. Publish the survey results for lawyers and the public to see in Bar Associations, schools, universities, and public buildings.

Please let me know your thoughts and questions.
Thank you again.

Sincerely,
Steve

Steve Swanson
[redacted]

Improvetexasschools.org

From: [redacted]
Sent: Sunday, November 5, 2023 11:36 AM
To: 'CDRR@texasbar.com' <CDRR@texasbar.com>
Subject: Suggestion – CDRR Leadership in Educating Others Regarding The Texas Lawyer's Creed

To Members of the CDRR

Encouraged by Mr. Kinard to continue emailing comments and suggestions and by Justice Hecht and Ms. Lowe, and guided by the Creed, this email is to share the following suggestion.

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Steve Swanson
[redacted]
Improvetexasschools.org

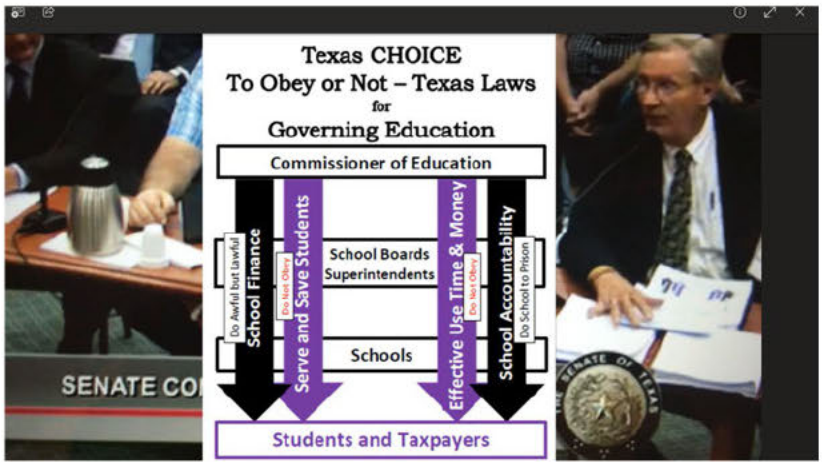
Videos on WHY – HOW TO IMPROVE Governing Texas Education

For Texas Students' Sake

Help Our Education Lawyers
Honor Their Creed

THE TEXAS LAWYER'S CREED
A MANDATE FOR PROFESSIONALISM
PROMULGATED BY
SUPREME COURT OF TEXAS
AND
THE COURT OF CRIMINAL APPEALS

WHY and HOW 5 Minute Video LINK



WHY and HOW 2 Minute Video LINK

WHY

TX House Hearing on ISD Grievance Process

4 Minute Video LINK

WHY

TX House Hearing on ISD Grievance Process

3 Minute Video LINK

WHY – Funding DISASSOCIATED from Cost of Education

4 Minute Video LINK

Texas
EDUCATION LAWYERS' Opportunities

Representing
The Texas Legislative Counsil, Texas Education Agency (TEA), School Districts, Students, Parents, Teachers, and Taxpayers

--

Improving
Governing Public Education
For Students' Sake

With WHY Seek Opportunities

Texas Education Lawyers' Opportunities Serving the Public

Continuously Improving School Districts' and State of Texas' (*TEA*'s) Governance of Public Education for the Students' Sake

Opportunity – Lawyers Honoring The Texas Lawyer's Creed

Including:

- I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
- Compliance… depends … upon… peer pressure and public opinion…
- We must always be mindful that the practice of law is a profession.
- As members of a learned art we (lawyers) pursue a common calling in the spirit of public service.
- 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…
- Lawyer must be ever mindful of the profession's broader duty to the legal system.
- The lawyers who use abusive tactics instead of being part of the solution have become part of the problem.
- I will advise my client of the contents of this creed when undertaking representation.
- I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.
- I am committed to this Creed for no other reason than it is right.
- I am entrusted by the people of Texas to preserve and improve our legal system.
- I am passionately proud of my profession. Therefore, "My word is my bond."
- A lawyer shall not … be influenced by mere self-interest.
- 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.
- 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.
- I will advise my client that we will not pursue tactics which are intended primarily for delay.

Opportunity – Texas Legislative Council (TLC) Lawyers Serving Texas Legislature and Public

Seize Opportunities in Texas Law (Gov. Code 323 – TEC 7.051) and Council Website

Preventing Redundant Bills/Legislation, Researching State Agencies, Inform Senate About the Commissioner of Education's Performance

Including:

MATTERS AFFECTING THE GENERAL WELFARE OF THE STATE.

- A nonpartisan legislative agency *(TLC)* that serves as a source of impartial research and information. (WEB) -- *(Research TEA fulfilling lawful responsibilities)*
- Staff assist legislators on matters affecting the general welfare of the state. (WEB)
- Study and investigate the functions and problems of state departments, agencies, and officers (LAW) *(Study/investigate TEA fulfilling lawful responsibilities)*

TLC Studies the capabilities and performance of appointees to inform the Senate during the appointment of the Commissioner of Education.

The governor, **with the advice** and **consent of the senate**, **shall appoint the commissioner of education**. (Texas Education Code Section 7.051)

- The council may gather and analyze information relating to public education (LAW)
- State agencies in ea. branch of government shall cooperate with the council (LAW)
- The council is entitled to collect data from any state agency (LAW)
- The council or a council committee authorized by the council to hold hearings may hold public or executive hearings to make investigations and surveys**.** (LAW)

LEGISLATION

- Assist the legislature in drafting proposed legislation (LAW) *(Prevent writing bills that are not needed, are redundant, because law already exists)*

PROVIDE LEGAL ADIVCE

- Provide legal advice and other legal services to the legislature. (LAW)

Opportunity – Lawyers Serving The Texas Education Agency – Commissioner of Education

Seize Opportunities in Texas Law (TEC 7.055, 11.254, 11.252)

Including:

- The commissioner is the educational leader of the state.
- The commissioner shall oversee the provision of training and technical support to all districts…in respect to planning and site-based decision-making… for school board trustees, superintendents, principals, teachers, parents, and other members of school committees.

- The agency shall conduct an annual statewide survey of the types of district- and campus-level decision-making and planning structures that exist, the extent of involvement of various stakeholders in district- and campus-level planning and decision-making, and the perceptions of those persons of the quality and effectiveness of decisions related to their impact on student performance.
- …plan must include provisions for…suicide prevention … conflict resolution…; violence prevention…; and dyslexia treatment …

Opportunity – Lawyers Serving Texas School Boards

Seize Opportunities in Texas Law (TEC Chapter 11, ISD Policy BQ)

Including:

- The school districts…created in accordance with the laws of this state have the primary responsibility for implementing the state's system of public education and ensuring student performance …
- The board shall:
  - ❖ seek to establish working relationships with other public entities
    - ➢ to make effective use of community resources and
    - ➢ to serve the needs of public school students in the community;
  - ❖ oversee the management of the district. Including management responsibilities of the Texas Education Agency and commissioner of education:
    - ➢ The commissioner shall oversee the provision of training and technical support to all districts…in respect to planning and site-based decision-making… for school board trustees, superintendent, *others in district*.
    - ➢ The agency shall conduct an annual statewide survey
  - ❖ Ensure that the superintendent implements and monitors plans, procedures, programs, and systems…….
    - ➢ plan must include provisions for…suicide prevention … conflict resolution…; violence prevention…; and dyslexia treatment …
  - ❖ Ensure that administrative procedures are developed in the areas of planning, budgeting, curriculum, staffing patterns, staff development, and school organization; adequately reflect the District's planning process; and include implementation guidelines, time frames, and necessary resources.
  - ❖ Ensure that data are gathered and criteria are developed to undertake the required biennial evaluation to ensure that policies, procedures, and staff development activities related to planning and decision-making are effectively structured to positively impact student performance.

- **Ensure involvement of stakeholders in planning and decision-making**
  Shall adopt a policy to establish a district- and campus-level planning and decision-making process that will involve
  - the professional staff of the district,
  - parents, and
  - community members

  in establishing and reviewing the district's and campuses' educational plans, goals, performance objectives, and major classroom instructional programs. The board shall establish a procedure under which meetings are held regularly by district- and campus-level planning and decision-making committees that include
  - representative professional staff, including, if practicable, at least one representative with the primary responsibility for educating students with disabilities,
  - parents of students enrolled in the district,
  - business representatives, and
  - community members.

  The committees shall include a business representative without regard to whether the representative resides in the district or whether the business the person represents is located in the district.

Opportunity – Lawyers Serving Texas School District Superintendents Seize Opportunities in Texas Law (TEC Chapter 11, 19 TAC 242.15, ISD Policy BQ)

- Provide leadership in defining superintendent and board of trustees roles, mutual expectations, and effective superintendent-board of trustees working relationships;

- Shall report periodically to the Board on the status of the planning process, including a review of the related administrative procedures, any revisions to improve the process, and progress on implementation of identified strategies

- School district shall have a district improvement plan that is developed, evaluated, and revised annually, in accordance with district policy, **by the superintendent with the assistance of the district-level committee**. The district improvement plan must include provisions for:

  (1) a comprehensive needs assessment addressing district student performance on …. appropriate measures of performance, …, including students in special education programs

  (2) measurable district performance objectives for all appropriate achievement indicators for all student populations, including students in

special education programs … and other measures of student performance that may be identified through the comprehensive needs assessment;

(3) strategies for improvement of student performance that include:

(A) instructional methods for addressing the needs of student groups not achieving their full potential;

(B) evidence-based practices that address the needs of students for special programs, including:

(i) **suicide prevention** programs,

(ii) **conflict resolution** programs;

(iii) **violence prevention** programs; and

(iv) **dyslexia treatment** programs;

(C) dropout reduction;

(D) integration of technology in instructional and administrative programs;

(E) positive behavior interventions and support, including interventions and support that integrate best practices on grief-informed and trauma-informed care;

(F) staff development for professional staff of the district;

(G) career education to assist students in developing the knowledge, skills, and competencies necessary for a broad range of career opportunities;

(H) accelerated education; and

(5) **resources needed to implement identified strategies**;

(6) **staff responsible** for ensuring the accomplishment of each strategy;

(7) **timelines for ongoing monitoring** of the implementation of each improvement strategy;

(8) **formative evaluation criteria** for determining periodically whether strategies are resulting in intended improvement of student performance;

(9) the policy…addressing sexual abuse and other maltreatment of children; and

(10) the **trauma-informed care policy**

Opportunity – Lawyer's Leadership and Guidance Serving Students

For suicide and violence prevention in schools, serving needs of students, and making effective use of community resources in serving needs of students.

Seize Opportunities Serving:

- The Rights of
  - Students,
  - Parents,
  - Teachers,
  - Community members and
  - Taxpayers and
- The Responsibilities of
  - The Texas Legislative Council,
  - The Texas Education Agency and commissioner of education,
  - School Boards and
  - Superintendents

Rights and responsibilities provided in Texas Law, the Texas Administrative Code, and school district policies in respect to planning and decision-making, including **suicide and violence prevention in schools, serving needs of students,** and **making effective use of community resources in serving needs of students** and

Lawyers Honoring the Texas Lawyer's Creed
For the Student's Sake – for Texas' Sake – Beyond a VOTE or a TEST SCORE

Lawyer's honoring the Creed, in the spirit of public service, leading and guiding those who govern education in their lawful responsibilities in governing education for each student's sake, including **suicide and violence prevention** in schools, is not just, is more than, and is beyond a VOTE and a TEST SCORE.

WHY Seek Opportunities Follows

A 20-minute Video on WHY

Is available on improvetexasschools.org

Why
Should The State of Texas
(Texas Education Agency)
Learn and Continuously Improve CI
Governing Public Education
For Students' Sake

Governing Public Education
Is

Not Just, More Than, **and** ***Beyond***
A Test Score or A VOTE

Why

Contents

1. HONOR Lives of Students, Teachers, and Veterans
2. HONOR The Texas Lawyer's Creed

3. START Implementing Education Law

STOP Writing Redundant Legislation - Bills

- For Preventing Suicide in Schools,
- For Preventing Human Trafficking in Schools,
- For Serving Special Education Students,
- For Childhood Well-Being,
- For Teacher Empowerment – Not Burnout,
- For Saving Austin ISD Johnston HS from Dying,
- For Not *"Playing With"* Money,
- To Start Funding Being Associated with Cost
- Because Texas IS "FALLING WOEFULLY SHORT"

Meeting the Needs
of
Students and Families

4. Start MEASURING WHAT MATTERS

State Senators and *TEA*

GETTING DONE

Their Lawful Responsibilities for PREVENTING Suicide in Schools
and
Texas Falling Woefully Short

HONOR

Lives of Students, Teachers, and Veterans

Students and Teachers Noted During

Texas Senate Special Committee to Protect ALL Texans

Hearing 6/22/2022

Senator Lois Kolkhorst

Experience is a stern master,
And we learn from pain. We learn from tragedy.

And hopefully we learn from this committee's findings.

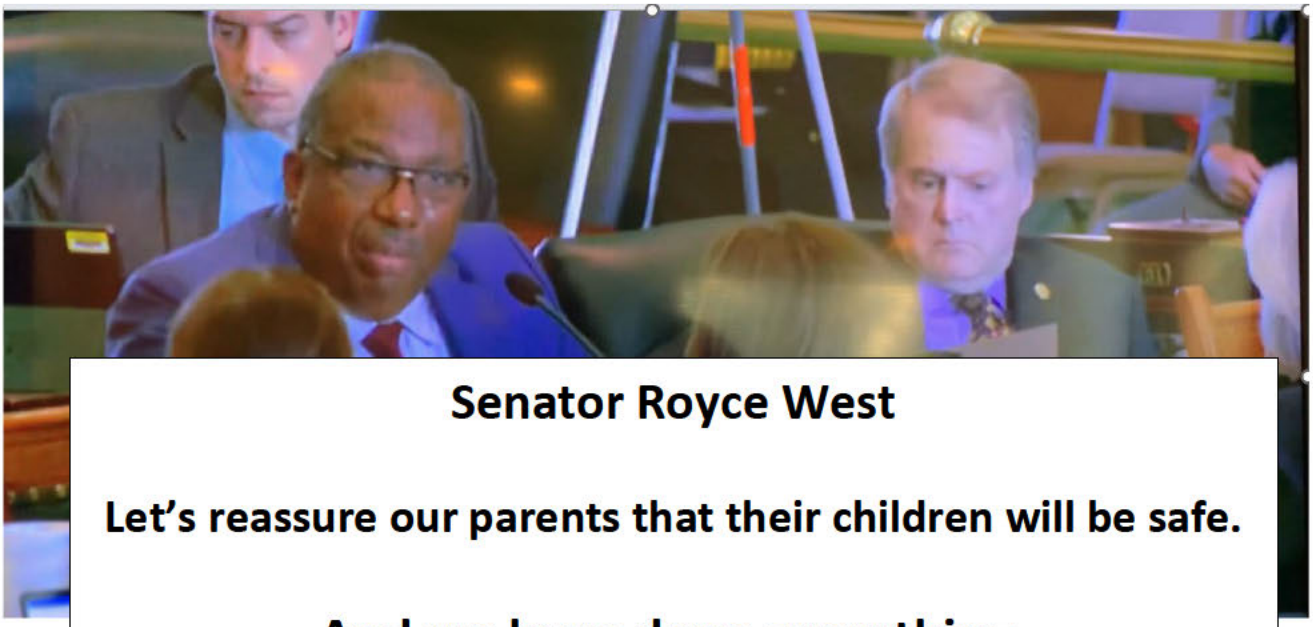
LEAVING NO – NO STONE UNTURNED

We owe it to those nineteen (19) children,
Senator Gutierrez,
And the two (2) teachers,
At Robb Elementary

We honor their lives today
by seeking truth, facts, and knowledge

Senator Brandon Creighton

We have to be willing to FOLLOW THE MONEY.
And we have to be willing to FOLLOW UP.



Senator Royce West

Let's reassure our parents that their children will be safe.

And we have done everything.
We've LEFT NO STONE UNTURNED

Honor

Those Who Sacrifice, Have Sacrificed,

Paid the Price
Many Giving All

For

"We the People... to Form a more perfect Union, Establish Justice"

US Constitution

For

"Liberty and Justice for ALL"

US Pledge of Allegiance

Why

Because State Senator Larry Taylor Asks the Question

What is The Texas Lawyer's Creed?

Senate Committee on Education

Hearing 4/8/2021 on SB 1776

Start Honoring
The Texas Lawyer's Creed

Includes Lawyers

EDUCATING the PUBLIC (Senators Included)

Regarding the spirit and letter of the CREED

START

Implementing Education Law 

and

STOP

Writing Redundant Legislation - Bills

During Texas House Public Education Committee Hearing 4/13/2021

Texas Legislators Turn Stones Revealing:

- **Existing Education Laws** 

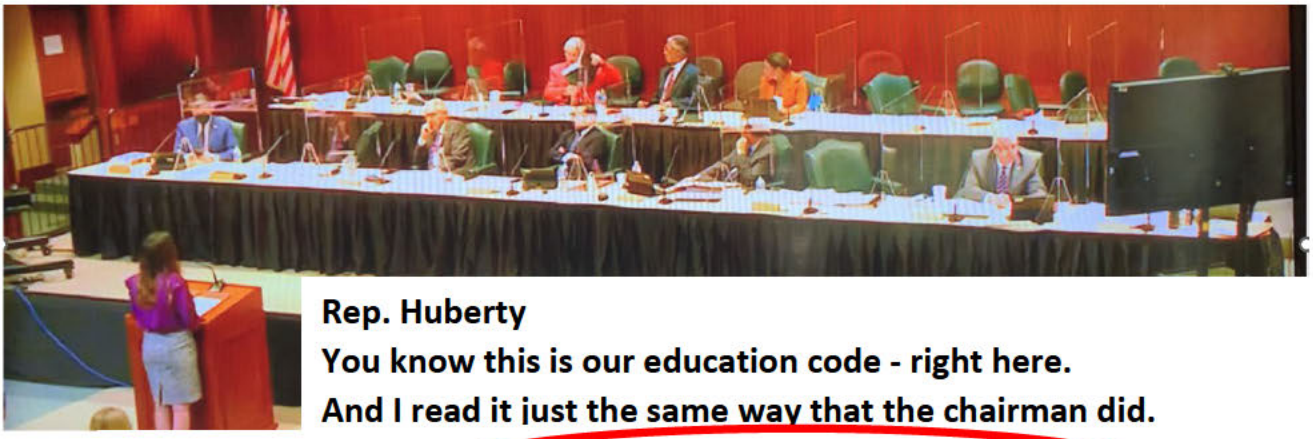
  - **For preventing suicide in schools and**
  - **For preventing human trafficking of children**

Are Not Implemented

- **Need to STOP Writing REDUNDANT Bills**

and the distress that they and their students have experienced --- rates of clinical depression, anxiety, and suicidal ideation.

available counseling options for students affected by trauma or grief, I was wondering what is the difference in what this Bill has?



Rep. Huberty
You know this is our education code - right here.
And I read it just the same way that the chairman did.

I read this and said - I don't know why we need this bill.
Because you don't.

Rep Morales Shaw
Thank you for bringing up those points Rep Huberty and Chairman Dutton

I thought about the exact same thing when I read it,
I'm like wait a minute, this kind of sounds redundant

I agree with you Rep Huberty
I don't think we should make laws that are redundant or repetitive

If I could just ask you to consider a couple of things.
In January some schools reached out to my office –

and said, you know, we have a big problem with children getting attracted or drawn into human trafficking situations and we need your help.

And then come to find out that Zaffirini had already passed a bill last session or two sessions ago, and so then we started digging into, well if there's a bill, why isn't it being implemented, right.

There was a bill that had been passed, great language, great preventative measures, but nothing was happening.

It was just a bill that was passed.
That's one example of how I think this is a similar

npr

Jan. 11, 2018

Department Of Education Finds Texas

Violated Special Education Law

Also Violated Texas Law – Chapter 11

Statesman

June 17, 2019

"Kids Count" report ranked Texas 41

Report:

Texas among the worst states for childhood well-being

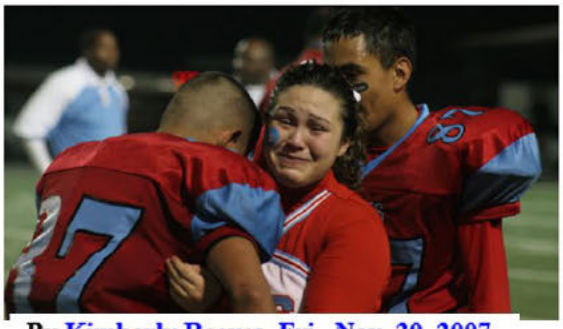
In Austin – *Texas' Capitol City and* *Home of* ***TEA***

The Slow Dying of Johnston High

Austin ISD High School

Pride of the Eastside

struggles to survive



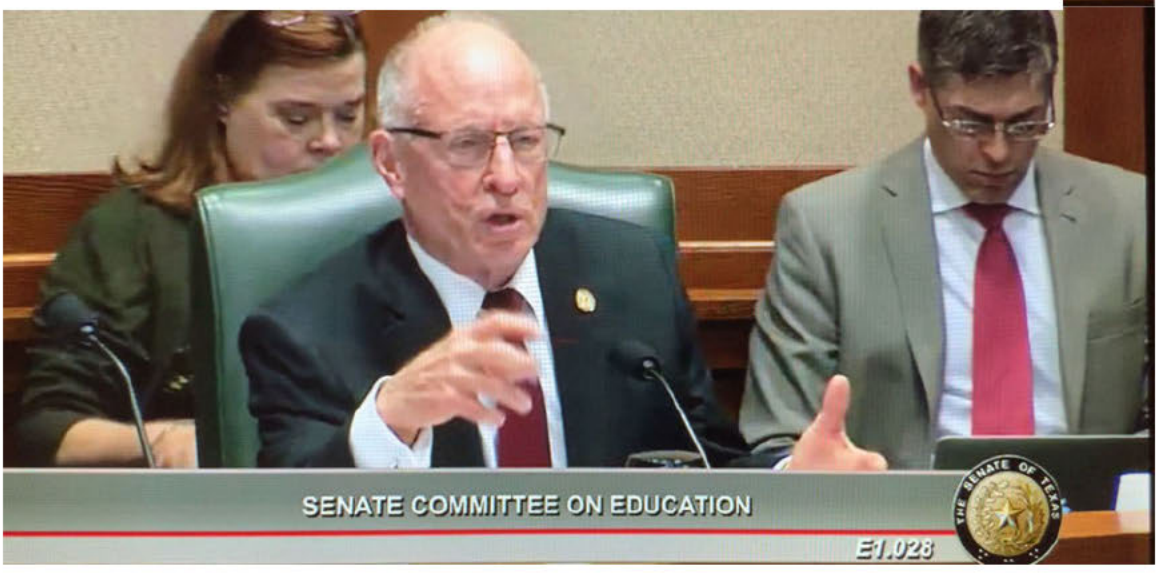
By Kimberly Reeves, Fri., Nov. 30, 2007

Texas State Senators State

- Texas is **Playing with** Money $
  Out in the Ether
  Senator Kirk Watson
- Texas' Funding $ is **Disassociated** from the Cost $
  Senator Bob Hall

During Texas Senate Committee on Education Hearing
4/25/2019

Playing with money – Out in the ether



Funding disassociated from needs of students

Start MEASURING Effective Use
Of Money $
For the Students' Sake

As Already Provided for in Texas Law 

Not Just, More Than,* and *Beyond
A Test Score or A VOTE

WHY START

Implementing Texas Education Law

Empowering Teachers

Because Texas Teachers Leaving Profession

PALESTINE HERALD-PRESS

Report: Rising number of Texas teachers want to leave the profession

Ali Linan CNHI Texas statehouse reporter Sep 9, 2022

WHY

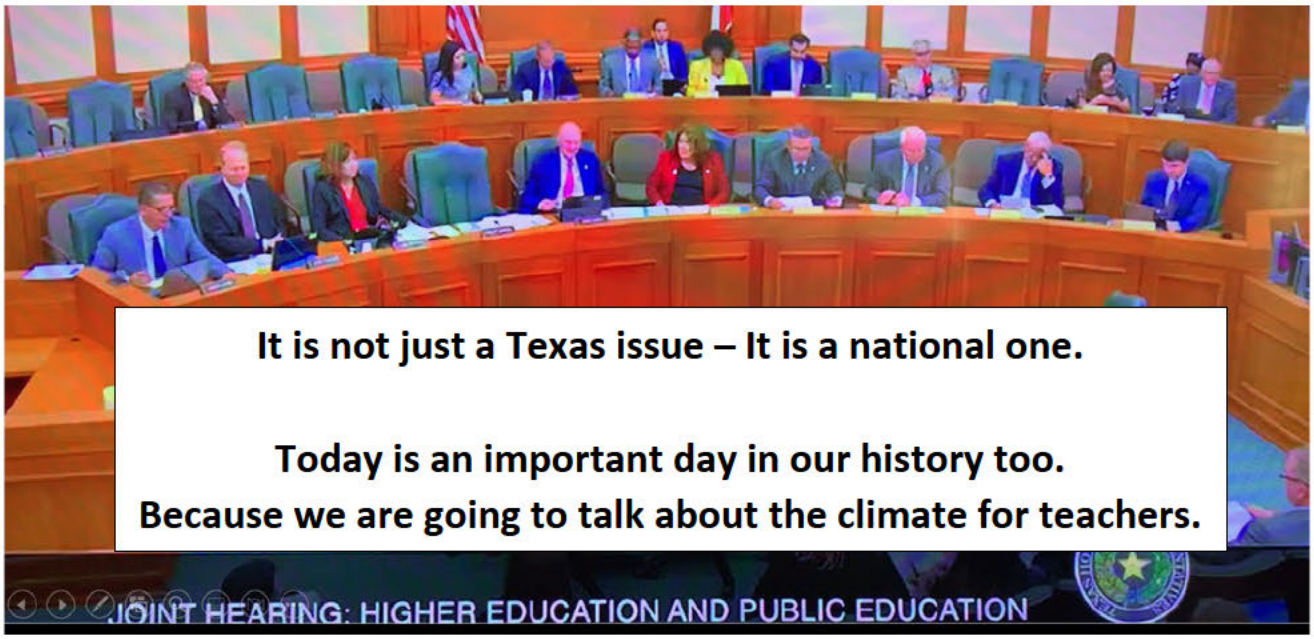
Are Texas Teachers Leaving Profession

Reasons Stated During

Texas House

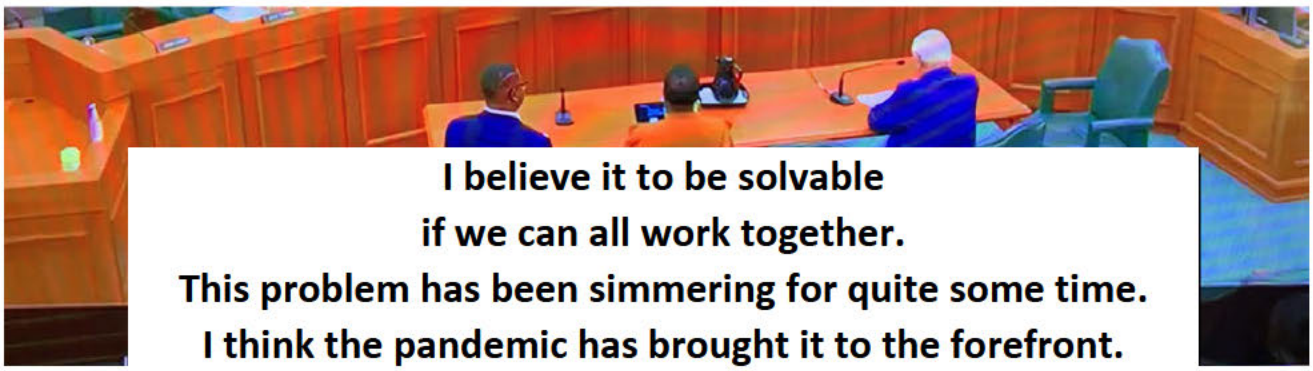
Public Education and Higher Education Joint Committee

Hearing 9/20/2022



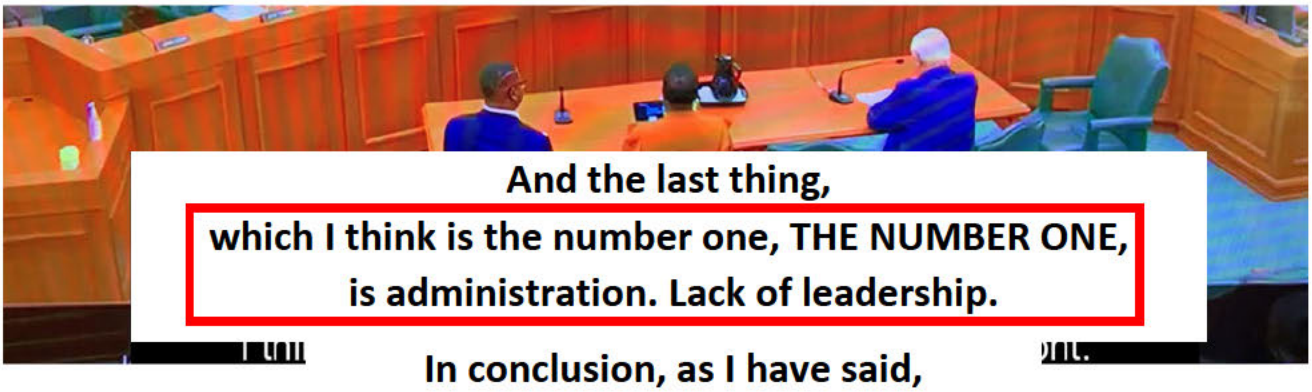
I don't know of anything that would be more serious, in terms of how Texas is going to look in the future, than solving the problems that teachers are facing.

My name is Seale Brand.
I have 41 years of experience in education. 11 years in teaching. 10 years as an elementary principal. 20 years as a high school principal and 6 years on the Orange Grove school board.
Let me begin by saying that this is a topic that is a major – major problem in our state, not only our state, but also the United States.



I believe it to be solvable
if we can all work together.
This problem has been simmering for quite some time.
I think the pandemic has brought it to the forefront.
The three major reasons that these people
were giving me, as I talked to them, as they emailed me.
First reason is the state testing.
Have any of you been around a school during testing week?
FOLKS – those teachers shouldn't be treated that way.
THEY SHOULDN'T BE TREATED THAT WAY.

The second reason that teachers had shared with me,
is teachers pay.
And of course, every year, nobody is questioning that.



And the last thing,

which I think is the number one, THE NUMBER ONE,
is administration. Lack of leadership.

In conclusion, as I have said,
there are many factors that contribute to
the teacher shortages.

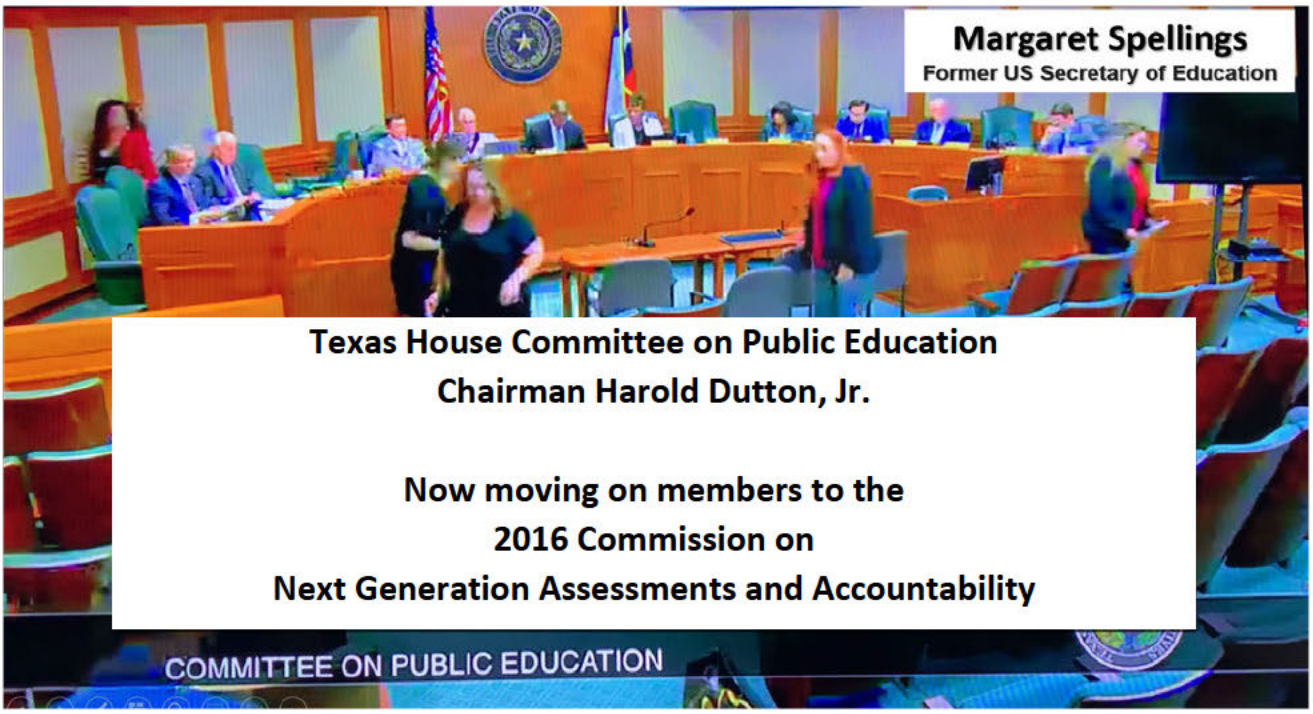
But the three main ones are
weak administration, testing, and teacher pay.

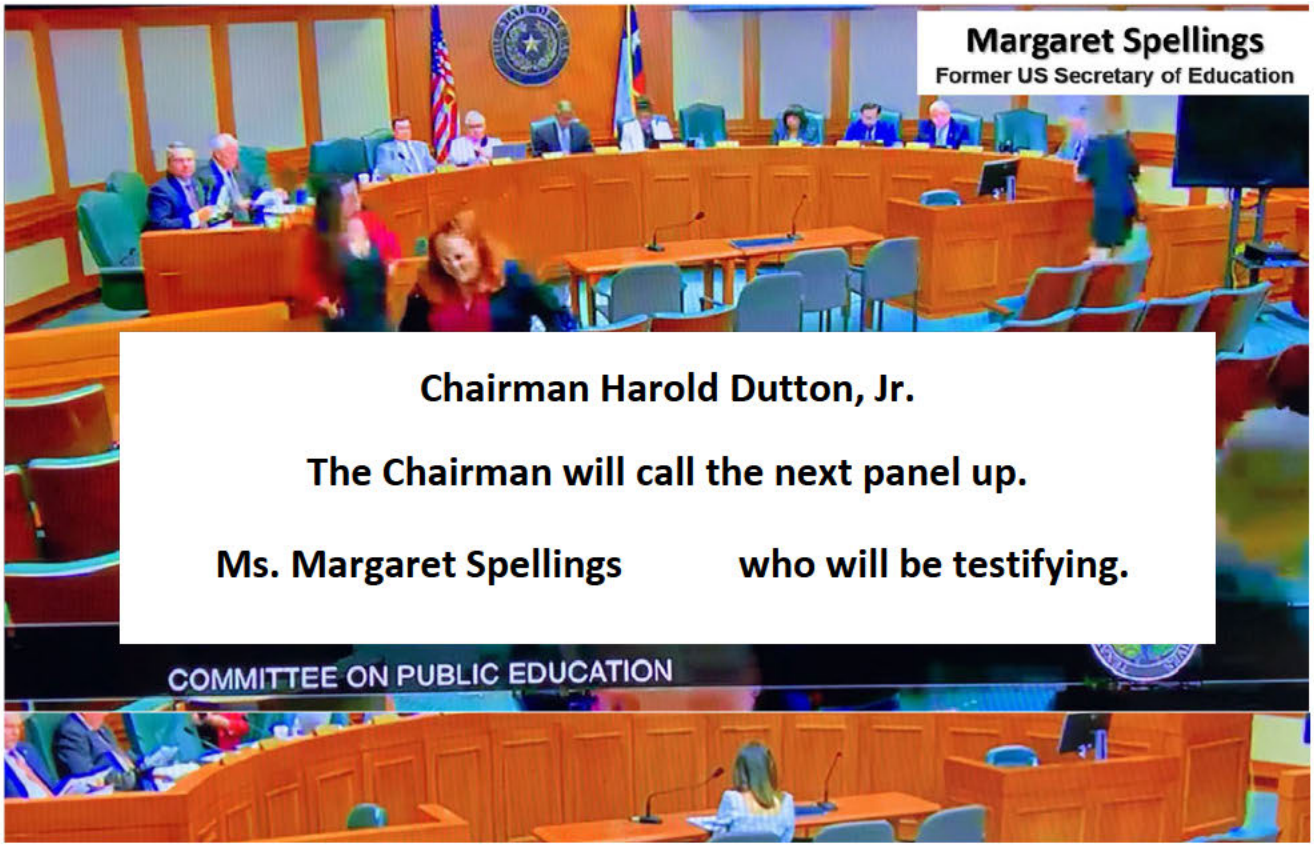
WHY START
Implementing Texas Education Law
For Students' Sake

Because Today Texas is "Falling Woefully Short Meeting the Needs of:

- Student, Families and
- Ultimately, needs of Texas and its growing economy."

Stated During
Texas House Public Education Committee
Hearing on Accountability – 8/9/2022





Ms. Margaret Spellings (Audio Only)

Like you, I believe, our state's number one asset is our people.

Today, we are falling woefully short of meeting the needs of students and families and ultimately the needs of our state and its growing economy.

Start
MEASURING WHAT MATTERS
To GET IT DONE

Ms. Margaret Spellings (Audio Only)

Thank you, Mr. Chairman, and members.
As I like to say, we need to care enough to find out
how All students are doing.

With this information,
we, as state policy makers,
can and must set priorities, allocate resources,
and convey needs and challenges to parents and taxpayers.

For those who want to
MEASURE WHAT MATTERS, whatever that means,
to aggregate data so we can have a clearer picture

To better apply resources and solutions and
understand the needs of every child, and
every unique population of students.

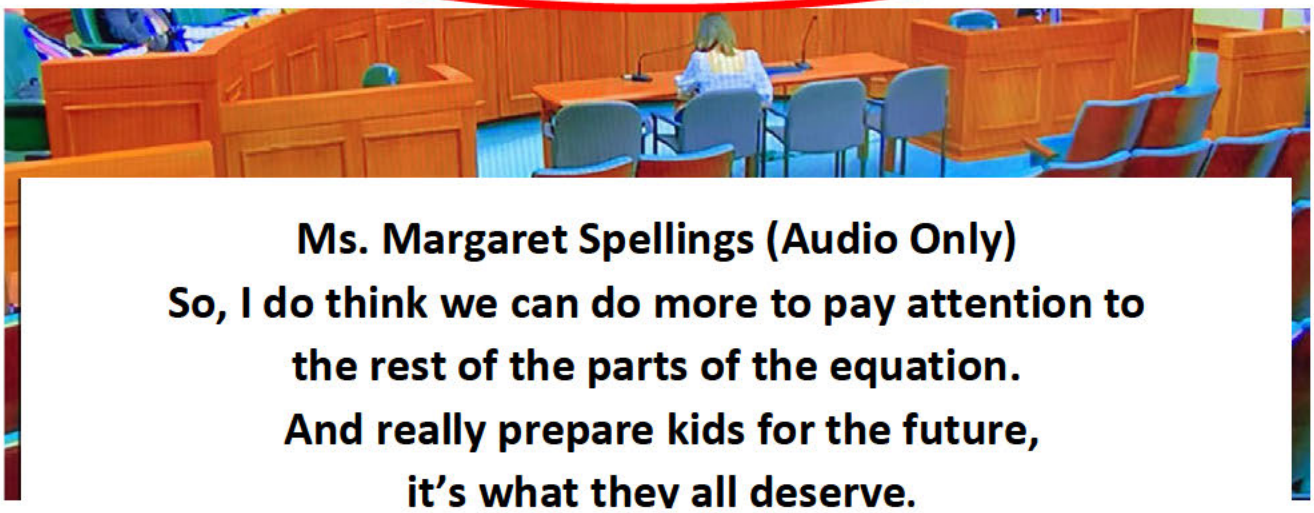
When Texas held true to a philosophy that embraces
WHAT GETS MEASURED GETS DONE
coupled with resources for reforms that work,
we moved the needle for students.

Ms. Margaret Spellings (Audio Only)
If ever there was a time
to stay true to the principle of caring enough to find out
ALL we can through strong assessment and accountability
systems, -- this is it.

Help explain to parents and taxpayers and educators,
that returning to the ostrich approach
of not knowing where we are, where our challenges are,
does not help students in Texas move forward.

Representative James Talarico

For all my critiques of assessment and accountability in Texas –
WHAT GETS MEASURED GETS DONE
and I see the logic of that



Ms. Margaret Spellings (Audio Only)
So, I do think we can do more to pay attention to
the rest of the parts of the equation.
And really prepare kids for the future,
it's what they all deserve.

It MATTERS
That Each Texas State Senator

Has Responsibility for
The State of Texas'
(Texas Education Agency's)
Performance

EDUCATION CODE
CHAPTER 7. STATE ORGANIZATION

Sec. 7.051. SELECTION OF THE COMMISSIONER.

The governor, with the advice and

consent

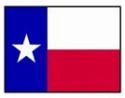
of the **senate**,

shall appoint

the commissioner of education

TEA - LEADERSHIP

Why



To Start Helping Texas State Senators and TEA

GET DONE

Lawful Responsibilities In 

Continuously Improving 

Governing Education

PREVENTING

Suicide in Schools

and

Texas Falling Woefully Short

Thank You

For taking the time and next step to learn and help measure what matters governing Public education for the Students' Sake

Contributors

- **Dr. Nolan Estes**
  Retired Educator
  - Former Associate U.S. Commissioner of Education
  - Former Dallas ISD Superintendent
  - Professor Emeritus UT Austin College of Education
- **Doug Rogers**
  Retired Educator
  - Former Executive Direct, Association of Texas Professional Educators (ATPE)
  - Former Government Relations Manager, Texas Association of School Boards
  - Former Principal and Teacher
- **Steve Swanson**
  Retired Business Executive and Engineer P.E. (Inactive)
  30-Yr. Volunteer in Texas Public Education
  - Austin area schools, Texas ISDs,
  - Texas Legislature, Texas Education Agency
  - UT Austin Superintendency Program

Please give us a call or text – [redacted]

From: Steve Swanson
To: Andrea Low
Cc: Lewis Kinard
Subject: Re: CDRR - Subcommittee for the Texas Lawyer"s Creed - ?
Date: Thursday, December 7, 2023 12:29:31 PM

Gratefully
Thank you

Steve Swanson
[redacted]
Sent from my iPhone

On Dec 7, 2023, at 10:12 AM, Andrea Low <Andrea.Low@texasbar.com> wrote:

Dear Mr. Swanson:

Thank you for your email. Chair Kinard has asked me to respond on his behalf.

Please note that the CDRR may include the Texas Lawyer's Creed in its meeting agenda at any time, although it did not place it on the agenda for the January 2024 meeting. The CDRR limited the agenda for January, as it likely will for a few months, due to the expected number of engagements for CDRR members related to the Rules Vote in April 2024. The CDRR has not terminated its consideration of the Creed.

Sincerely,

Haksoon Andrea Low
Disciplinary Rules and Referenda Attorney
Committee on Disciplinary Rules and Referenda
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711-2487
(512) 427-1323 – office
(737) 465-3851 – mobile
<image001.png>

From: [redacted]
Sent: Wednesday, December 6, 2023 3:52 PM
To: cdrr <cdrr@TEXASBAR.COM>
Subject: CDRR - Subcommittee for the Texas Lawyer's Creed - ?

To Chairman Kinard

Watching the meeting today, I noticed the Lawyer's Creed is not on the agenda for January.
Thought, based upon the November meeting comments, it would be.

Would like to help.
Please let me know how.

Sincerely
Steve

Steve Swanson
[redacted]
Improvetexasschools.org

From: [redacted]
To: Andrea Low
Cc: "Lewis Kinard"
Subject: RE: CDRR - Subcommittee for the Texas Lawyer"s Creed
Date: Wednesday, January 10, 2024 2:52:33 PM
Attachments: image001.png
image002.png

Ms. Low – thank you !

Steve Swanson
[redacted]
Improvetexasschools.org

From: Andrea Low <Andrea.Low@TEXASBAR.COM>
Sent: Wednesday, January 10, 2024 2:50 PM
To: Steve Swanson [redacted]
Cc: Lewis Kinard [redacted]
Subject: RE: CDRR - Subcommittee for the Texas Lawyer's Creed

Dear Mr. Swanson:

I was informed that some of the links on the CDRR website were not working. We have checked and corrected all of the links to the Rule Drafting Guidelines on each page of the CDRR website. Please do not use the link that was emailed earlier.

I have also attached a PDF. Please let me know if you cannot access the document on the website.

Thank you for your continued participation in the work of the Committee.

Sincerely,

Haksoon Andrea Low
Disciplinary Rules and Referenda Attorney
Committee on Disciplinary Rules and Referenda
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711-2487
(512) 427-1323 – office
(737) 465-3851 – mobile

From: Lewis Kinard [redacted]
Sent: Wednesday, January 10, 2024 11:12 AM
To: [redacted]; Andrea Low <Andrea.Low@TEXASBAR.COM>
Subject: RE: CDRR - Subcommittee for the Texas Lawyer's Creed

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As you probably know from reading the committee's Rule Drafting Guidelines (https://www.texasbar.com/Content/NavigationMenu/CDRR/Documents1/Rule_Drafting_Guidelines.pdf), disciplinary rules need to be in "must" or "must not" language, which presents a challenge for the committee with regard to Justice Cook's language in the creed, which at times overlaps existing rules and at others states principles of professionalism, which are not suited for disciplinary action.

That said, we have not decided as a committee to drop the matter permanently. I think it won't come back up before the referendum, however.

Thanks again for your interest and participation,

Lewis Kinard
EVP, General Counsel, Assistant Corporate Secretary,
Chief Ethics & Compliance Officer
American Heart Association
7272 Greenville Ave., Dallas TX 75231
O 214.706.1246

From: [redacted]
Sent: Wednesday, January 10, 2024 11:04 AM
To: 'Andrea Low' <Andrea.Low@TEXASBAR.COM>; Lewis Kinard [redacted]
Subject: CDRR - Subcommittee for the Texas Lawyer's Creed

Good morning

Noting the Creed was not mentioned today during the CDRR meeting,
we are interested in what the current timeline for your work on the Creed might be.

Thanks again for your help.
Steve

Steve Swanson
[redacted]
Improvetexasschools.org

From: Andrea Low <Andrea.Low@TEXASBAR.COM>
Sent: Thursday, December 7, 2023 10:03 AM
To: [redacted]
Cc: Lewis Kinard [redacted]
Subject: RE: CDRR - Subcommittee for the Texas Lawyer's Creed - ?

Dear Mr. Swanson:

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Would like to help.
Please let me know how.

Sincerely
Steve

Steve Swanson
[redacted]
Improvetexasschools.org

From: [redacted]
To: "Lewis Kinard"; Andrea Low
Subject: RE: CDRR - Subcommittee for the Texas Lawyer"s Creed
Date: Thursday, January 11, 2024 12:31:19 PM
Attachments: image004.png
image005.png
image007.png

Thank you!
Please keep us posted.

This is the cover to one of our reports.
Pleases let me know if you would like the full report
Thanks again
Steve

The Purpose of This Report is to Share

Texas Education Lawyers'

Opportunities

Protecting Students in Schools

Before Law Enforcement is Needed

Learning From Uvalde

Hearing 6/22/2022

Senators Say, "Leave no stone unturned."

Opportunities for Students' Sake

- Lawyers Honor The Texas Lawyer's Creed
- Lawyers guide those who govern education in fulfilling lawful responsibilities in TEC, for the students' sake. Each student grows up.
- Learn from Uvalde's Loss – Texas House Report
  A child's unmet needs reveal an urgent need to govern lawfully, for the children's sake.

The Texas Lawyer's Creed
A Mandate for Professionalism


Texas Education Code TEC

Contact Steve Swanson – [redacted]
12/21/2023

Steve Swanson
[redacted]
Improvetexasschools.org

From: Lewis Kinard [redacted]
Sent: Thursday, January 11, 2024 10:15 AM
To: [redacted]; 'Andrea Low' <Andrea.Low@TEXASBAR.COM>
Subject: RE: CDRR - Subcommittee for the Texas Lawyer's Creed

Thank you. We will keep these for future reference.

Lewis Kinard
EVP, General Counsel, Assistant Corporate Secretary,
Chief Ethics & Compliance Officer
American Heart Association
7272 Greenville Ave., Dallas TX 75231
O 214.706.1246

From: [redacted]
Sent: Wednesday, January 10, 2024 5:41 PM
To: Lewis Kinard [redacted]; 'Andrea Low' <Andrea.Low@TEXASBAR.COM>
Subject: RE: CDRR - Subcommittee for the Texas Lawyer's Creed

Mr. Kinard – Gratefully, thank you.

Thank you for your response to my email and for sharing the focus on rules being "must" or "must not" language.

Also, for your consideration of the following.
Please let us know your thoughts.

Below:

- **Why** lawyers and the Creed are important for Texas' future.
- **Ideas** for the CDRR's and its members' action and rules to honor the Creed

WHY

Aa a 30-year volunteer advocate in Texas public education, have come to understand the importance of

- our lawyers and
- the Texas Lawyer's Creed

for the future of children and the State of Texas

Please see Improvetexassachools.org and the video on the first page.
We have additional research and reports to help understand the importance of our lawyers and the Creed.

IDEAS

Based upon the Creed stating:

- "**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. "

And

- "I (lawyer) am **obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.**

The CDRR, and its members, bring the Lawyer's Creed alive for Texas' sake - our children's sake.

HOW

- **CDRR members individually, on their own, honor the Creed by educating:**
  - other CDRR members,
  - other lawyers they know ,
  - those they present to during their regular CDRR work, and
  - the public

  regarding the spirit and letter of the Creed.

- **CDRR creates "must" language rules:**
  - **Referring to the following language from the Creed**
    - "obligated
      to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed."
    - "Compliance…
      depends upon reinforcement by peer pressure and public opinion"

  - **Noting the importance of the law profession as stated in the Creed**

    Creed states:
    - "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."

  - **Example rules**
    1. The CDRR, being Texas lawyers **complying** with Texas lawyers' **obligation** in the Texas Lawyer's Creed "**to educate .. clients, the public, and other lawyers regarding the spirit and letter of** the Texas Lawyer's **Creed, must** educate other lawyers and the public regarding the spirit and letter of the Texas Lawyer's Creed. And, to improve the process of educating clients, the public and other lawyers, **must** create processes and metrics and implement the processes using the metrics, to measure the effectiveness of and then make changes to improve the process used to educate clients, the public and other lawyers regarding the spirit and letter of the Creed.

    2. The CDRR, being Texas lawyers **complying** with the Texas lawyer's Creed which states **compliance with the rules depends**…**upon reinforcement by…public opinion**, **must** obtain and publish in public

media the public's opinion of Texas lawyers honoring the spirit and letter of the Texas Lawyer's Creed.

a. Example of obtaining public opinion
   i. Survey the public asking:
      1. Have you heard of the Texas Lawyer's Creed? – yes or no
      2. Has a lawyer ever educated you in the spirit and letter of the Creed: -- yes or no
         a. If so – was it good, fair or not good
      3. Will you contact a lawyer to ask to be educated in the Creed? – yes or no
   ii. Create a Report
      1. Using surveys, create a report to share with the public the public's opinion of lawyers honoring the Texas Lawyer's Creed
   iii. Send report to Texas Supreme Court and Texas Bar
   iv. Publish report in news media and on Texas Bar website

Thank you again
Look forward to hearing your thoughts
Steve

Steve Swanson
[redacted]
Improvetexasschools.org

From: Lewis Kinard [redacted]
Sent: Wednesday, January 10, 2024 11:12 AM
To: [redacted]; 'Andrea Low' <Andrea.Low@TEXASBAR.COM>
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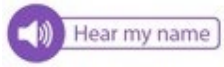

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[redacted]
Improvetexasschools.org

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Sent: Thursday, December 7, 2023 10:03 AM
To: [redacted]
Cc: Lewis Kinard [redacted]
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Haksoon Andrea Low
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Committee on Disciplinary Rules and Referenda
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Austin, Texas 78711-2487

(512) 427-1323 – office
(737) 465-3851 – mobile

From: [redacted]
Sent: Wednesday, December 6, 2023 3:52 PM
To: cdrr <cdrr@TEXASBAR.COM>
Subject: CDRR - Subcommittee for the Texas Lawyer's Creed - ?

To Chairman Kinard

Watching the meeting today, I noticed the Lawyer's Creed is not on the agenda for January. Thought, based upon the November meeting comments, it would be.

Would like to help.
Please let me know how.

Sincerely
Steve

Steve Swanson
[redacted]
Improvetexasschools.org

From: [redacted]
To: cdrr
Subject: 2nd - CDRR - Rules for Texas lawyers" vital role in preserving society - Rule following opportunity
Date: Wednesday, April 3, 2024 1:48:31 PM

Good morning CDRR members

Thank you again for your work and focus on helping our legal profession !

Today (4-3-2024), it was encouraging to hear about CDRR's work to prepare for and obtain votes for change to the Texas Disciplinary Rules of Professional Conduct (Rules) and to hear your request for ideas on the Rules.

The following is offered for your consideration.

Re: Hope for our Texas lawyers, as guardians of the law, playing a vital role in the preservation of society, for our children's and students' sake, the future of Texas.

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Preamble: A Lawyer's Responsibilities 1.

To CDRR members,

With hope for our lawyers, as guardians of the law, playing a vital role in lawfully governing Texas education and complying with Texas Disciplinary Rules of Professional Conduct (Rules) for our student's and taxpayers' sake, this is written to encourage your personal leadership.

Leadership through your action to encourage our lawyers to comply with the Rules, as required in the Rules Preamble:8. Which states, "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."

Recent research, and past experience and research, reveal the need for and importance of our lawyers complying with the Rules, as well as honoring The Texas Lawyer's Creed, see highlights below, in order:

- To prevent lawyer's reliance upon clients, and others, needing to use the Texas Rules of Disciplinary Procedure (Procedure) for lawyers to comply with the Rules, and
- For Texas to lawfully govern education for our children's and students' sake.

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Examples of actions you could take to "insist that every lawyer both comply with its minimum

disciplinary standards and aid in securing their observance by other lawyers" and honor The Texas Lawyer's Creed include documented presentations, letters, notices, and other forms of communication to:

- Lawyers to:
  - Insist that every lawyer both comply with the Rules and honor the Creed, and aid in securing their observance by other lawyers, and
  - Ask the lawyers for their written confirmation that they will comply with the Rules and honor the Creed and provide you with documentation of the actions they took to comply with Rules Preamble 8 for insisting other lawyers comply the Rules,
- The public to:
  - Communicate a lawyer's professional ethical responsibilities in the Rules and Creed, see Highlights – Rules and Creed below,
  - Share the names of the lawyers that have stated in writing their commitment to comply with the Rules and the Creed, and
  - Share the names of the law schools that have been verified as teaching law students how to comply with the Rules and honor the Creed, and
- Law schools to:
  - Insist that every law student is taught how to comply with the Rules and honor the Creed and to aid in securing their observance by other lawyers.

Highlights – Texas Disciplinary Rules of Professional Conduct

- Lawyers, as guardians of the law, play a vital role in the preservation of society.
- Obligation of lawyers is to maintain the highest standards of ethical conduct.
- Lawyers 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.
- 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.
- Lawyers provide a client with an informed understanding of the client's legal obligations.
- In all professional functions, a lawyer should be competent.

Highlights – The Texas Lawyer's Creed

0. Lawyer is obligated to educate clients, **the public**, and other lawyers regarding the spirit and letter of this Creed.
1. Members of our citizenry have looked to lawyers for leadership and guidance.
2. As members of a learned art we pursue a common calling in the spirit of public service.
3. 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,** …

4. Restore **public** confidence in lawyers' profession. Lawyers being part of the solution.
5. Lawyer will advise client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.
6. Lawyer shall not … be influenced by mere self-interest.
7. Lawyers' duty to provide objective and independent advice.

Thank you for your consideration
Sincerely,
Steve Swanson
[redacted]
Improvetexasschools.org