May 23, 2023

Mr. Chad Baruch, Chair
State Bar of Texas Board of Directors
[redacted]

RE: Submission of Proposed Rule Recommendations – Rule 1.08, Texas Disciplinary Rules of Professional Conduct

Dear Mr. Baruch:

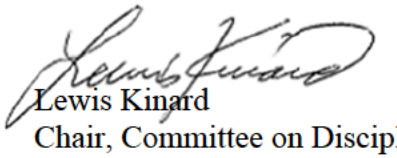
Pursuant to Section 81.0875 of the Texas Government Code, the Committee on Disciplinary Rules and Referenda initiated the rule proposal process for proposed Rule 1.08, Texas Disciplinary Rules of Professional Conduct, relating to Conflict of Interest: Prohibited Transactions. The Committee published the proposed rules in the *Texas Bar Journal* and the *Texas Register*. The Committee solicited public comments and held public hearings on the proposed rules. At its May 3, 2023, meeting, the Committee voted to recommend the proposed rule to the Board of Directors.

Included in this submission packet, you will find the proposed rule recommended by the Committee, as well as other supporting materials. Section 81.0877 of the Government Code provides that the Board is to vote on each proposed disciplinary rule recommended by the Committee not later than the 120th day after the date the rule is received from the Committee. The Board can vote for or against a proposed rule or return a proposed rule to the Committee for additional consideration.

As a reminder, if a majority of the Board approves a proposed rule, the Board shall petition the Supreme Court of Texas to order a referendum on the proposed rule as provided by Section 81.0878 of the Government Code.

As always, thank you for your attention to this matter and for your service to the State Bar. Should the Board require any other information, please do not hesitate to contact me.

Sincerely,



Lewis Kinard
Chair, Committee on Disciplinary Rules and Referenda

cc: Laura Gibson: [redacted]
Cindy V. Tisdale: [redacted]
Sylvia Borunda Firth: [redacted]
Trey Apffel
Ray Cantu
KaLyn Laney
Seana Willing
Chris Ritter
Ross Fischer

Committee on Disciplinary Rules and Referenda
Overview of Proposed Rule

Texas Disciplinary Rules of Professional Conduct
Rule 1.08. Conflict of Interest: Prohibited Transactions

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda (Committee) related to proposed Rule 1.08 of the Texas Disciplinary Rules of Professional Conduct (TDRPC), relating to Conflict of Interest: Prohibited Transactions. The Committee initiated the rule proposal process on November 3, 2022.

Actions by the Committee

- **Initiation** – The Committee voted to initiate the rule proposal process at its November 3, 2022, meeting.
- **Publication** – The proposed rule was published in the March 2023 issue of the *Texas Bar Journal* and the March 3, 2023, issue of the *Texas Register*. The proposed rule was concurrently posted on the Committee's website. Information about the public hearing and the submission of public comments was included in the publications and on the Committee's website. Although the Clean Version of proposed Rule 1.08, TDRPC, as published in the *Texas Bar Journal* and *Texas Register*, contained the accurate rule proposal language, the Redline Version erroneously did not include the complete strike-through language. On April 7, 2023, a corrected Redline Version was posted on the Committee's website and included in the materials for the April 12, 2023, public hearing and meeting.
- **Additional Outreach** – Email notifications regarding the proposed rule were sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices), Committee email subscribers, and other potentially interested parties on March 21, 2023, and April 4, 2023. An additional email notification was sent to Committee email subscribers on April 7, 2023.
- **Public Comments** – The Committee accepted public comments through April 13, 2023. The Committee received seven written public comments on the proposed rule.
- **Public Hearing** – On April 12, 2023, the Committee held a public hearing by Zoom teleconference. One individual addressed the Committee at the public hearing.
- **Recommendation** – The Committee voted at its May 3, 2023, meeting to recommend the proposed rule, as published, to the Board of Directors.

Overview

Proposed Rule 1.08(a), TDRPC, specifies the requirements with which a lawyer must comply before acquiring ownership or a business interest in property belonging to a client. Proposed 1.08(a) would replace current Rule 1.08(a). Rule 1.08(b)-(j) would not be amended and would remain in effect. Additionally, to clarify the duties enumerated by proposed Rule 1.08(a),

the Committee recommends the addition of new interpretive comments to the proposed rule, the deletion of certain comments, and the renumbering of the current comments.[1]

Rule 1.08 governs business dealings between a lawyer and a client and is intended to protect the client. Proposed Rule 1.08(a) strengthens that protection when a lawyer claims to acquire an ownership, possessory, security or other pecuniary interest adverse to a client. Proposed Rule 1.08(a) states, *inter alia*, that a lawyer must disclose and transmit the terms of a transaction to the client in writing, that either the client is represented by an independent lawyer in the transaction or the lawyer advises the client in writing to seek the advice of an independent lawyer, and that the client provides informed consent[2] in writing to the terms of the transaction and to the lawyer's role in it, including whether the lawyer is representing the client in the transaction.

Amendments in Response to Public Comments

The Committee considered public feedback during the comment period ending on April 13, 2023, and at the public hearing on April 12, 2023. After further discussion at its May 3, 2023, meeting, there were no motions to amend the proposed rule. The Committee voted to recommend the proposed rule, as published, to the Board of Directors.

Additional Documents

Included in the pages that follow this Overviews of Proposed Rule are: 1) proposed Rule 1.08(a) as published in the March 2023 *Texas Bar Journal* (Bates Number 000005 – 000006); 2) proposed Rule 1.08(a) as published in the March 3, 2023, issue of the *Texas Register* (Bates Numbers 000007 – 000009); 3) the corrected Redline Version of proposed Rule 1.08(a), as posted on the Committee's website and included in the materials for the April 12, 2023, public hearing and meeting (Bates Numbers 000010 – 000012); 4) public comments received in response to the publications (Bates Numbers 000013 – 000045); 5) the link to the video recording of the Committee's public hearing on proposed Rule 1.08 conducted by Zoom teleconference on April 12, 2023,[3] with the name of the speaker and time-stamp of the speaker's oral comments (Bates Number 000046); 6) a memorandum on proposed Rule 1.08 dated October 19, 2022, from Committee Member Claude Ducloux (Bates Numbers 000047 – 000049); and 7) a memorandum on proposed Rule 1.08 dated December 2, 2022, from Committee Member Vincent R. Johnson (Bates Numbers 000050 – 000051).

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[1] Interpretive comments are promulgated by the Supreme Court of Texas and are not subject to the rule proposal process set out in Subchapter E-1, Chapter 81, Texas Government Code.

[2] At its January 27, 2023, meeting, the Board of Directors of the State Bar of Texas voted to approve proposed Rule 1.00, TDRPC. Proposed Rule 1.00(j) defines "informed consent." At a future date, the Board will petition the Supreme Court of Texas to order a vote by Bar membership on proposed Rule 1.00 (as well as on other rule proposals approved by the Board).

[3] The Committee also heard public comments on proposed Rules 3.09, 5.01, 5.05, and 8.05, TDRPC, on April 12, 2023.

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

Rule 1.08. Conflict of Interest: Prohibited Transactions

The Committee on Disciplinary Rules and Referenda, or CDRR, was created by Government Code section 81.0872 and is responsible for overseeing the initial process for proposing a disciplinary rule. Pursuant to Government Code section 81.0876, the committee publishes the following proposed rule. The committee will accept comments concerning the proposed rule through April 13, 2023. Comments can be submitted at texasbar.com/CDRR or by email to cdrr@texasbar.com. The committee will hold a public hearing on the proposed rule by teleconference on April 12, 2023, at 10 a.m. CDT. For teleconference participation information, please go to texasbar.com/cdrr/participate.

Current sections 1.08(b)-(j) would not be amended and would remain in effect. The CDRR proposes additional comments to Rule 1.08 and proposes renumbering of the current comments.

Proposed Rule (Redline Version)

Rule 1.08. Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless:

(1) the terms of the transaction or acquisition are fair and reasonable to the client, and are fully disclosed and transmitted to the client in a writing that can be reasonably understood by the client;

(2) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(3) the client thereafter provides informed consent in writing to the terms of the transaction or acquisition, and to the lawyer's role in it, including whether the lawyer is representing the client in the transaction.

***

Comment:

Transactions between Client and Lawyer

Business Transactions between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.04, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that in many cases the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.00(j).[1]

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.06. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.06 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement

for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

***

[No Proposed Changes to Current Comments 4-8, Which Are Proposed to Be Renumbered as Comments 5-9.]

Proposed Rule (Clean Version)

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(a) A lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless:

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***

Comment:

Transactions between Client and Lawyer

Business Transactions between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.04, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

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[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.06. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.06 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

***

[No Proposed Changes to Current Comments 4-8, Which Are Proposed to Be Renumbered as Comments 5-9.] TBJ

NOTES

1. The Committee on Disciplinary Rules and Referenda recommended proposed Rule 1.00, TDRPC, to the State Bar of Texas Boa d of Directors for review and consideration. The boa d approved the proposed rule and shall petition the Texas Supreme Court to o der a vote by State Bar members.

ted by an ineligible applicant; the application is not submitted in the manner and form required by the Application Kit; the application is submitted after the deadline established in the Application Kit; or the application does not meet other requirements as stated in the RFA and the Application Kit.

How to Obtain Application Kit: The OAG will post the Application Kit on the OAG's website at https://www.texasattorneygeneral.gov/divisions/grants. Updates and other helpful reminders about the application process will also be posted at this location. Potential applicants are encouraged to refer to the site regularly.

Deadlines and Filing Instructions for the Grant Application:

Create an On-Line Account: Creating an on-line account in the Grant Offering and Application Lifecycle System (GOALS) is required to apply for a grant. *If an on-line account is not created, the Applicant will be unable to apply for funding.* To create an on-line account, the Applicant must email the point of contact information to Grants@oag.texas.gov with the following information:

--First Name

--Last Name

--Email Address *(It is highly recommended to use a generic organization email address if available)*

--Organization Legal Name

Application Deadline: The Applicant must submit its application, including all required attachments, to the OAG by the deadline and the manner and form established in the Application Kit.

Filing Instructions: Strict compliance with the submission instructions, as provided in the Application Kit, is required. The OAG will **not** consider an Application if it is not submitted by the due date. The OAG will **not** consider an Application if it is not in the manner and form as stated in the Application Kit.

Minimum and Maximum Amounts of Funding Available: Minimum and maximum amounts of funding are subject to change as stated in the Application Kit. The minimum amount of funding for all programs is $20,000 per fiscal year. The maximum amount for a program is $49,500 per fiscal year.

Start Date and Length of Grant Contract Period: The grant contract period (term) is up to two years from September 1, 2023 through August 31, 2025, subject to and contingent on funding and/or approval by the OAG.

No Match Requirements: There are no match requirements.

Award Criteria: The OAG will make funding decisions that support the efficient and effective use of public funds. Scoring components will include, but are not limited to, information provided by the applicant on the proposed project activities and budget. Funding decisions will be determined using a competitive allocation method.

Grant Purpose Area: All grant projects must address one or more of the purpose areas as stated in the Application Kit.

Prohibitions on Use of Grant Funds: OAG grant funds may not be used to support or pay the costs of lobbying; indirect costs; fees to administer a subcontract; any portion of the salary or any other compensation for an elected government official; the purchase of food and beverages except as allowed under Texas State Travel Guidelines; the purchase or lease of vehicles; the purchase of promotional items or recreational activities; costs of travel that are unrelated to the direct delivery of services that support the OAG grant-funded program; the costs for consultants or vendors who participate directly in writing a grant application; or for any unallowable costs set forth in applicable state or federal law, rules, regulations, guidelines, policies, procedures or cost principles. Grant funds may not be used to purchase any other products or services the OAG identifies as inappropriate or unallowable within this RFA or the Application Kit.

OAG Contact Person: If additional information is needed, contact the Grants Administration Division at Grants@oag.texas.gov, or (512) 936-0792.

TRD-202300842
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: February 22, 2023

♦ ♦ ♦

State Bar of Texas

Committee on Disciplinary Rules and Referenda Proposed Rule Changes, Rules 1.08, 5.01, 5.05, 8.05, Texas Disciplinary Rules of Professional Conduct

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

Rule 1.08. Conflict of Interest: Prohibited Transactions

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Current sections 1.08(b)-(j) would not be amended and would remain in effect. The CDRR proposes additional comments to Rule 1.08 and proposes renumbering of the current comments.

Proposed Rule (Redline Version)

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(a) A lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless:

(1) ~~the transaction and terms on which the lawyer acquires the interest~~ the terms of the transaction or acquisition are fair and reasonable to the client, and are fully disclosed and transmitted to the client in a ~~manner which~~ writing that can be reasonably understood by the client;

(2) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek ~~the~~ that advice ~~of independent counsel in the transaction~~; and

(3) the client ~~consents in writing thereto~~ thereafter provides informed consent in writing to the terms of the transaction or acquisition, and to the lawyer's role in it, including whether the lawyer is representing the client in the transaction.

***

Comment:

Transactions between Client and Lawyer

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

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

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

Business Transactions between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.04, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that in many cases the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.00(j).[1]

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial

interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.06. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.06 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

***

[No Proposed Changes to Current Comments 4-8, Which Are Proposed to Be Renumbered as Comments 5-9.]

Proposed Rule (Clean Version)

Rule 1.08. Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless:

(1) the terms of the transaction or acquisition are fair and reasonable to the client, and are fully disclosed and transmitted to the client in a writing that can be reasonably understood by the client;

(2) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(3) the client thereafter provides informed consent in writing to the terms of the transaction or acquisition, and to the lawyer's role in it, including whether the lawyer is representing the client in the transaction.

***

Comment:

Transactions between Client and Lawyer
Business Transactions between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.04, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that in many cases the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.00(j).[1]

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.06. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.06 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

***

[No Proposed Changes to Current Comments 4-8, Which Are Proposed to Be Renumbered as Comments 5-9.] TBJ

NOTES

1. The Committee on Disciplinary Rules and Referenda recommended proposed Rule 1.00, TDRPC, to the State Bar of Texas Boa d of Directors for review and consideration. The boa d approved the proposed rule and shall petition the Texas Supreme Court to o der a vote by State Bar members.

Committee on Disciplinary Rules and Referenda
Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.08. Conflict of Interest: Prohibited Transactions

Public Comments Received
Through April 13, 2023

From: [redacted]
To: cdrr
Subject: Moss Comments on the Proposed Revisions to TDRPC 1.08, 5.01, 5.05 and 8.05
Date: Thursday, March 16, 2023 1:04:55 PM
Attachments: Moss Comments on proposed TDRPC 1.08.1.docx
Moss Comments on Proposed TDRPC 5.05.1.docx
Moss Comments on Proposed TDRPC 5.01.1.docx
Moss Comments on proposed TDRPC 8.05.1.docx

Dear Rules and Referendum Committee:

I appreciate your hard work in bringing forward these important and necessary changes to the TDRPC, and the opportunity to submit comments.

I have attached, separately, my comments on the four rules. I have very few suggestions about the Rules themselves. Most of my observations and suggestions concern the proposed Comments.

In reading my suggestions, I hope you will not view them as mere pedantic quibbling with the language of the proposed comments, most of which are taken verbatim from the Model Rules. That many of the Comments that I complain about are from the Model Rules does not, I think, make them sacrosanct. Several are flawed. The Model Rules drafters were fallible, and I think that we (you) can do better.

I fear that revising the Comments at this point may entail some delay and complications, and that this may inhibit the Committee's willingness to revisit and revise Comments. In any event, I hope the Comments can be revised by you or the Court without too much difficulty.

Thank you for your attention and consideration.

Prof. Fred C. Moss (Emeritus)
Dallas

One does not ask of one who suffers: What is your country and what is your religion? One merely says: You suffer, that is enough for me. -Louis Pasteur, chemist and bacteriologist (27 Dec 1822-1895)

Moss comments on proposed revision of TDRPC 1.08

1. Section (a) and subsections (1), (2), and (3) all carefully differentiate between a "transaction" and an "acquisition," and make it clear that this Rule applies to both kinds of dealings with a client. However, some comments fail to continue this distinction. Comments [2], [3] and [4] refer only to "transactions." While it is true that an acquisition is a form of transaction, referring only to "transactions" may cause one to conclude that those comments are not also applicable to "acquisitions." I doubt that is the intent of these Comments. (Comment [1] clearly applies to "business, property or financial transactions," so it covers acquisitions and transactions.] To be clear that Comments [2]-[4] apply to acquisitions as well as transactions, the words, "or acquisition" should be added after every mention of a "transaction" in those comments. (3 times in [2], 4 times in [3], and 3 times in [4].) I realize that the ABA Comments to Model Rule 1.8 refer only to "transactions," and that my suggestion will make the Comments somewhat cumbersome, but I feel it is important to make the Comments conform to the language of the Rule.

2. Regarding Comment [4], the first sentence up to the comma is very unnecessary as it merely states the (painfully) obvious. It is like saying, if a minor is accompanied by a parent, the requirement that minors be told they need to be accompanied by a parent does not apply. (As my grandson would say, "Well, Duh!") Again, and realizing that you have lifted the ABA's language verbatim, I suggest starting Comment [4] with, "The paragraph (a)(1) requirement . . . ," (but see the next comment).

3. Comment [4] seems to require a written disclosure "… by the lawyer involved in the transaction [or acquisition] *or by the client's independent counsel*." I don't think it was intended to impose this duty on the independent counsel. While this, again, is a direct lift from the ABA's Comment, this ambiguity should be eliminated and it might be a clearer restatement of (a)(2) if the sentence were reworded something like:

   > 'The requirement of a written full disclosure under paragraph (a)(1) is satisfied if the client is represented in the transaction or acquisition by independent counsel of the client's choosing.'

4. Not long ago, Texas contingent fee lawyers (read: P.I. plaintiffs' attorneys) would include in their fee agreements an assignment to the lawyer of a contingent interest in the client's *cause of action*. This led to much mischief and eventually was declared unethical in Texas Ethics Opinion 610 (Aug. 2011). Now, Texas contingent fee lawyers have replaced the assignment of an interest in the cause of action with a contractual lien on the proceeds of the action equal to the contingent fee.

   The question is whether Comment [1] (again, taken directly from the ABA's Comment) makes it clear enough that imposing a contractual lien on the proceeds of the action is not covered by Rule 1.08(a). Is a contingent fee agreement with a lien an "ordinary fee arrangement?" If acquiring such a lien is deemed a business transaction with a client, 99% of all P.I. lawyers in Texas will be violating 1.08. Can it be made clearer in the Comment that it is not? Perhaps the Comment should state:

It does not apply to ordinary fee arrangements between client and lawyer, such as [including?] contingent fee contracts that impose a lien upon the proceeds of the matter. Such agreements are governed by Rule 1.04, although the requirement of this Rule must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rule 1.08
Date: Tuesday, March 21, 2023 3:02:39 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	David
Last Name	Aronofsky
Email	[redacted]
Member	Yes
Barcard	01355500

Feedback

Subject	Proposed Rule 1.08

Comments

I suggest adding a comment sentence stating that independent counsel for purposes of this Rule may not be, or be provided by, an attorney in the same law firm as, or otherwise having a financial relationship with, the attorney proposing to enter into a transaction with the attorney's client.

From: Tim Ackermann
To: cdrr
Subject: Re: Public Hearing Reminder - Proposed Disciplinary Rule Changes
Date: Tuesday, April 4, 2023 11:06:08 AM

Hello,
I'm curious why the posted notices for the proposed rule changes say they include a redline, when some have nothing of the sort.
The notice for 1.08, for instance, merely shows the new (a), as an entirely new section. It does not show what is proposed for deletion, much less a meaningful redline. And the old/new comparison (below) reveals that it would have been simple to do this, and useful in that one could see what change is actually proposed.
Sincerely,
Tim Ackermann
The Ackermann Law Firm

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E: [redacted]
P: 817.305.0690
F: 214.453.0810
W: ackermannlaw.com
O: 1701 W. Northwest Hwy. Ste. 100
Grapevine TX 76051

On Tue, Apr 4, 2023 at 10:04 AM State Bar of Texas - CDRR <cdrr@texasbar.com> wrote:

State Bar of Texas

Public Hearing Reminder

April 12 Public Hearing on Proposed Rules 1.08 (Conflict of Interest: Prohibited Transactions), 3.09 (Special Responsibilities of a Prosecutor), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), 8.05 (Jurisdiction), TDRPC

The Committee on Disciplinary Rules and Referenda published Proposed Rule 3.09 (Special Responsibilities of a Prosecutor) of the Texas Disciplinary Rules of Professional Conduct in the January issue of the Texas Bar Journal and the January 13 issue of the Texas Register. The Committee on Disciplinary Rules and Referenda published Proposed Rules 1.08 (Conflict of Interest: Prohibited Transactions), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), and 8.05 (Jurisdiction) of the Texas Disciplinary Rules of Professional Conduct in the March issue of the Texas Bar Journal and the March 3 issue of the Texas Register.

The Committee will hold a public hearing on Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05 by teleconference at 10 a.m. CDT on April 12, 2023. For teleconference participation information, please go to texasbar.com/cdrr/participate, where an agenda with a Zoom link will be posted before the meeting. If you plan to address the Committee at the public hearing, it is requested that you email cdrr@texasbar.com in advance of the hearing stating on which rule(s) you will comment.

The Committee will continue to accept comments concerning Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05 through April 13, 2023. Comments can be submitted here, or by email to cdrr@texasbar.com.

Additional Information

The Committee is responsible for overseeing the initial process for proposing a change or addition to the disciplinary rules (Gov't Code § 81.0873). For more information, go to texasbar.com/cdrr.

To subscribe to email updates, including notices of public hearings and published rules for comment, click here.

Committee on Disciplinary Rules and Referenda

From: [redacted]
To: cdrr
Subject: Moss Comments on the Proposed Revisions to TDRPC 1.08, 5.01, 5.05 and 8.05
Date: Thursday, March 16, 2023 1:04:55 PM
Attachments: Moss Comments on proposed TDRPC 1.08.1.docx
Moss Comments on Proposed TDRPC 5.05.1.docx
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In reading my suggestions, I hope you will not view them as mere pedantic quibbling with the language of the proposed comments, most of which are taken verbatim from the Model Rules. That many of the Comments that I complain about are from the Model Rules does not, I think, make them sacrosanct. Several are flawed. The Model Rules drafters were fallible, and I think that we (you) can do better.

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Thank you for your attention and consideration.

Prof. Fred C. Moss (Emeritus)
Dallas

One does not ask of one who suffers: What is your country and what is your religion? One merely says: You suffer, that is enough for me. -Louis Pasteur, chemist and bacteriologist (27 Dec 1822-1895)

From: Peter Lomtevas
To: cdrr
Subject: Re: Seeking Comments on Proposed Rules 1.08, 3.09, 5.01, 5.05, 8.05, TDRPC
Date: Tuesday, March 21, 2023 11:26:47 AM

To The CDRR,

As For Rule 3.09 Special Responsibilities of a Prosecutor

In (f): What puzzles me is that the rule must specify in writing that a prosecutor cannot fake a case. Was faking a case the norm before this rule? Is this newly included paragraph a reaction to all the innocent people imprisoned falsely?

In General: Why are missing any specified sanctions and punishments of prosecutors who fake cases? We have these rules, so what if a prosecutor breaks any?

In the Comments Section: What puzzles me is that in a government that must be open and in cases where proceedings are public, what "privileged" information can a prosecutor have that is not subject to disclosure? Who makes that call among prosecutors that something possibly exculpatory can be deemed "privileged?"

As for Rule 1.08 - Conflicts of Interest

Comments: I completely disagree with the underlying assumption contained within this comment that lawyers are tricky, evil geniuses and businessmen who want to enter into business with a lawyer are idiots. The reality is the opposite: the businessman is crafty, and the lawyer is perfectly naive given the weak legal education (focused on federal law) he has received in law school compounded by the weak preparation afforded by bar review (focused on state law). Businessmen learn by daily experience while lawyers study the test.

Hence, the various statement made as to how clients are at risk without careful and independent guidance is a mind fake that places at risk the attorney who may want to leave private practice because of all the risk that entails.

As for Rule 5.01 - Responsibilities of a Supervisory Lawyer

I do not care what amendments take place that pertain to large attorney organizations. I only care about the solo practitioner and all the pitfalls in the rules that face him.

However, lawyers make awful leaders, and imposing upon them a duty to spot misconduct can be overwhelming.

Rule 5.05 - As For Unauthorized Practice of Law

I oppose state-level licensure of lawyers. This rule, whether in its old form or its new form, supports the isolation and protection of groups of lawyers and judges who are without public review and scrutiny. These groups become comfortable with each other and can rip off innocent citizens who believe there is justice in those courts.

This isolation from view mutates into appellate court complacency characterized by affirming every order entered by the trial court. Municipalities can be made immune from suit by a judge who is elevated, paid and promoted by the municipality. Lawyers stay quiet so they can win cases before such a judge. Judges can use any political fad in their orders, and no one can question them.

In recent years, political fads are now baked into statutes that judge cannot question. So, a parent who loses a child because of domestic violence has no recourse: has no defense, has no appeal. How about the child? We have unexplained school shootings around this nation. Are groups of lawyers and judges implementing federal family legislation at the root of these? An outsider cannot come without a year-long delay because of licensure?

I also oppose the law examiner's board review of lawyers seeking admission from state to state. Even the most trouble-free attorney must have all his complaints and arbitration re-litigated before each subsequent review board. In one state, client suits against the lawyer must be picked through. In other states, a lawyer's suits against clients must be picked through. Full faith and credit of one state's adjudications of a lawyer's misconduct mean nothing. This must stop.

I support a universal law license that is in force throughout the nation in any court. No state's laws are unique especially those preempted by federal legislation. The question is what has not been preempted by federal legislation? Which attorney cannot learn quickly a state's variations in the law and properly represent the public.

I do not subscribe to the idea that law licensure protects the hapless client from a bad lawyer. I submit that the lawyer needs better protection from the bad client. But that is a topic for a different discussion because we do not a code of conduct for clients.

<u>As for Rule 8.05 - Jurisdiction</u>

Lawyers understand they have lost very many of the civil rights over the years. We cannot speak freely. We have to watch how we assemble in protests. I was a litigant in a contract dispute with an auto dealer where the imbecile judge yelled out, "You're a lawyer! This case cries out for a number," meaning I had no case and I had to settle while the dealer faked his case with no contractual terms giving rise to the suit. A well placed judicial complaint cause a judicial recusal, and a different judge decided the case on its merits.

Now comes multiple jeopardy again the lawyer. I am admitted in four states and like a game of dominoes, if a client fakes a charge against me that one state sustains, I lose all four state licenses. Violence including rape make for sensational disbarments.

The language of your proposal, as the language in all your previous proposals, tightens the noose around the neck of the lawyer. The word,"may" is now replaced with "is subject to." What was a possibility is now a definite. Attorney discipline is becoming a turkey shoot.

The impact upon the public is devastating. Lawyers who leave practice cause a drop in supply which elevates counsel fees for the remaining population. If the idiot client made the complaint, then that client cut the branch upon which he sat. Disciplinary committees of non-practicing lawyers end up incorrectly deciding the lawyer's discipline, and another lawyer leaves practice.

There is also the loss of subject matter expert attorneys who leave. One area well publicized as enduring the most attorney discipline complaints is family law. Non-family practitioners discipline family law lawyers, and when those leave practice, clients have even fewer family lawyers from whom to hire.

This highly concentrated batch of practitioners does not operate in the client's best interests, but rather in their own best interests. Cases are decided with discipline in mind (heavy stipping), and the outcomes rarely match the facts and the law. A judge only needs to say "boo" at the lawyer, and the stipulation of settlement comes right away selling out the lawyer's client.

Comment: This statement is vague: *as well as lawyers not admitted to practice in this state who provide or offer any legal services in this jurisdiction*. What is a "legal service?" Is it advice online? Is it what?

Comment: This is not true - *lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction*. Lawyer discipline has nothing to do with protecting clients; it has everything to do with protecting groupings of local judges and their local lawyers from exposure. Clients are not stupid and lawyers are not geniuses.

Comment: *The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters*. This is also ridiculous. A law license, like a driver license, does not make a lawyer an agent of the state. Lawyers are supposed to be independent of the state, and operate on both sides of a controversy. Here, the state has taken up a superior role as if the state is command headquarters and the lawyer is a soldier on the front. Personal service of process cannot be to the state because lawyers are not agents of the state; instead service of civil process must remain "personal" and not artificial.

Ultimately, the crossed off portions of the Comment section provided better protections for lawyers. I do not understand why the state has taken up arms against lawyers, but that is something we should be asking the voters in this state.

Peter

www.lomtevas.com

On Tuesday, March 21, 2023 at 10:03:29 AM CDT, State Bar of Texas - CDRR <cdrr@texasbar.com> wrote:

State Bar of Texas

Proposed Rules Published

Public Comments Sought

Proposed Rules 1.08 (Conflict of Interest: Prohibited

Transactions), 3.09 (Special Responsibilities of a Prosecutor), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), 8.05 (Jurisdiction), TDRPC

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From: John McIntyre
To: cdrr
Subject: Re: Seeking Comments on Proposed Rules 1.08, 3.09, 5.01, 5.05, 8.05, TDRPC
Date: Tuesday, March 21, 2023 11:27:08 AM

OVERBROAD , VIOLATE FREEDOM OF SPEECH, AND FREEDOM OF CONTRACT ! DUPLICITY TOO!

On Tuesday, March 21, 2023 at 10:02:49 AM CDT, State Bar of Texas - CDRR <cdrr@texasbar.com> wrote:

State Bar of Texas

Proposed Rules Published

Public Comments Sought

Proposed Rules 1.08 (Conflict of Interest: Prohibited Transactions), 3.09 (Special Responsibilities of a Prosecutor), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), 8.05 (Jurisdiction), TDRPC

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The Committee will accept comments concerning Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05, TDRPC, through April 13, 2023. Comments can be submitted here, or by email to cdrr@texasbar.com.

The Committee will hold a public hearing on Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05 by teleconference at 10:00 a.m. CDT on April 12, 2023. For teleconference participation information, please go to texasbar.com/cdrr/participate. If you plan to address the Committee at the public

hearing, it is requested that you email cdrr@texasbar.com in advance of the hearing stating on which rule(s) you will comment.

Additional Information

The Committee is responsible for overseeing the initial process for proposing a change or addition to the disciplinary rules (Gov't Code § 81.0873). For more information, go to texasbar.com/cdrr.

To subscribe to email updates, including notices of public hearings and published rules for comment, click here.

Committee on Disciplinary Rules and Referenda

State Bar of Texas | 1414 Colorado | Austin, Texas 78701 | 800.204.2222

From: Louis Leichter
To: cdrr
Subject: RE: Public Hearing Reminder - Proposed Disciplinary Rule Changes
Date: Tuesday, April 4, 2023 10:29:40 AM
Attachments: image001.png

Good luck

Very truly yours,

Louis Leichter, Principal/Attorney
[redacted]

LEICHTER
LAW FIRM PC

AUSTIN | 1602 E 7th St., Austin, TX 78702 | Phone: (512) 495-9995 | Fax: (512) 482-0164

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***Meetings with lawyers are by appointment only at these locations.**
www.LeichterLaw.com » *Video conferencing: 3000452@lifesizecloud.com*

From: State Bar of Texas - CDRR <cdrr@texasbar.com>
Sent: Tuesday, April 4, 2023 10:04 AM
To: Louis Leichter [redacted]
Subject: Public Hearing Reminder - Proposed Disciplinary Rule Changes

State Bar of Texas

Public Hearing Reminder

April 12 Public Hearing on Proposed Rules 1.08 (Conflict of Interest: Prohibited Transactions), 3.09 (Special Responsibilities of a Prosecutor), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), 8.05 (Jurisdiction), TDRPC

The Committee on Disciplinary Rules and Referenda published Proposed Rule 3.09 (Special Responsibilities of a Prosecutor) of the Texas Disciplinary Rules of Professional Conduct in the January issue of the Texas Bar Journal and the January 13 issue of the Texas Register. The Committee on Disciplinary Rules and Referenda published Proposed Rules 1.08 (Conflict of Interest: Prohibited Transactions), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), and 8.05 (Jurisdiction) of the Texas Disciplinary Rules of Professional Conduct in the March issue of the Texas Bar Journal and the March 3 issue of the Texas Register.

The Committee will hold a public hearing on Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05 by teleconference at 10 a.m. CDT on April 12, 2023. For teleconference participation information, please go to texasbar.com/cdrr/participate, where an agenda with a Zoom link will be posted before the meeting. If you plan to address the Committee at the public hearing, it is requested that you email cdrr@texasbar.com in advance of the hearing stating on which rule(s) you will comment.

The Committee will continue to accept comments concerning Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05 through April 13, 2023. Comments can be submitted here, or by email to cdrr@texasbar.com.

Additional Information

The Committee is responsible for overseeing the initial process for proposing a change or addition to the disciplinary rules (Gov't Code § 81.0873). For more information, go to texasbar.com/cdrr.

To subscribe to email updates, including notices of public hearings and published rules for comment, click here.

Committee on Disciplinary Rules and Referenda

State Bar of Texas | 1414 Colorado | Austin, Texas 78701 | 800.204.2222

From: Seana Willing
To: cdrr
Cc: Andrea Low
Subject: Re: Written Comments from CDC on Proposed Rule Changes
Date: Tuesday, April 11, 2023 4:40:48 PM
Attachments: CDC Comments (041123).docx
Administering Justice Maryland Interprets Rule 3.8(d).pdf

Andrea, I received feedback from our Ethics Helpline Attorneys as well as from CDC Regional Counsel regarding some of the proposed rule changes. We hope these written comments will prove helpful for the committee.

I will see you tomorrow at the Public Hearing; however, I do not intend to address the committee or make any public comments at the hearing. If asked, I can try to answer questions but we hope the memo speaks for itself.

Thank you!

Seana

STATE BAR OF TEXAS

Office of Chief Disciplinary Counsel

Date: April 11, 2023

To: Andrea Lowe, Rules Attorney

From: Seana Willing, Chief Disciplinary Counsel

Re: CDC Comments on Proposed Rules

Andrea,

Please accept these comments from the Office of Chief Disciplinary Counsel regarding some of the proposed rule changes being considered at the Public Hearing on April 12, 2023. The comments and recommendations are the result of consultation with CDC Regional Counsel and the Bar's Ethics Attorneys, who are happy to provide additional information is needed.

Regarding proposed TDRPC Rule 1.08:

We understand that the CDRR is substantively following the ABA Model Rule in its revisions of 1.08(a) and that the proposed comments are the same verbatim.

We would point out that the use of the words "or" and "adverse" in the first paragraph of the proposed rule may be problematic. For example, a fee agreement that includes stock in a start-up company to pay for the lawyer's services requires compliance with Rule 1.08(a) under Comment 1; however, is such an arrangement *adverse* to a client who has no other means to afford legal services? If it is not an adverse acquisition of stock, why does Comment 1 say it has to follow the rule?

Suggestion: Instead of saying "adverse to a client" substitute "prohibited by Rule 1.06." It is stronger than Comment 3 since not all conflicts can be waived under 1.06.

With regard to Comment 1 to Rule 1.08, which specifically states that the rule does not apply to "ordinary fee agreements," we would raise a concern with regard to *renegotiated* fee

agreements during the course of representation. Despite the conclusion in Ethics Opinion 679, the case law is clear about the presumption of unfairness to the client under these circumstances leading to the need for an additional requirement of fairness to the client if they negotiate a *new* fee agreement during the course of the representation. In such a situation, the attorney would still be able to rebut the presumption of unfairness.

We would like to see the Comment to 1.08 clarified to address that the rule *does* apply to renegotiated fee agreements; it should only exclude the original fee agreement which is negotiated before the creation of the attorney-client relationship.

Finally, Comment 1 talks about a lawyer being able to loan a client money. Depending on the fact pattern, such a loan may violate Rules 1.08 (d), (h) and, or 7.03(f). Comment 1 does not reference these rules.

Regarding proposed TDRPC Rule 3.09:

Our concern is that the added obligations to notify defendants or defense attorneys of the new information will be difficult to enforce when considering paragraph (g): "*A prosecutor who concludes in good faith that information is not subject to disclosure under paragraph (f) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.*" It would be helpful to include a requirement that the prosecutor document in the State's file that s/he has knowledge of the new information and the reason(s) why the prosecutor determined that the information is not subject to disclosure. Having to create and maintain such a written record may prevent situations where prosecutors have allegedly ignored new information that does not support their theory of the case.

We also have a concern to the extent that the proposed changes require the CDC and grievance committee panels to make the determination that the new and credible information creates a likelihood that the convicted defendant did not commit the offense. We would prefer that we not have to make that determination in a disciplinary case.

We have also attached an article, *Attorney Grievance Commission of Maryland v. Cassilly,* which demonstrates the need for the CDRR's proposed rule changes.

Regarding proposed TDRPC Rule 5.01:

We support this rule change but suggest moving paragraphs (a) and (b) to comments since it is not clear whether and to what extent it would be a rule violation if an attorney did not comply with these provisions. Instead, these provisions could be factors to use to prove a violation of paragraph (c), which provides a clearer violation.

Nevertheless, we support the language providing the following preventative measure: "…*shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to these Rules.*" This is a subtle but important difference from the rule as it currently reads.

Additionally, we suggest the use of "Texas Disciplinary Rules of Professional Conduct" in Comments 1 and 8, as opposed to a generic reference.

Regarding proposed TDRPC Rule 5.05:

Including information and guidance regarding the remote practice of law is a welcome and overdue clarification to Rule 5.05 and will provide guidance to many attorneys calling for assistance on the Ethics Helpline. However, the comments provided by the UPLC regarding the proposed changes to Rule 5.05 also deserve serious consideration.

Regarding proposed TDRPC Rule 8.05:

As we pointed out earlier, Section 81.071 of the Texas Government Code controls jurisdiction in disciplinary proceedings and actions. According to statute, "[e]ach attorney admitted to practice in this state and each attorney specially admitted by a court of this state for a particular proceeding is subject to the disciplinary and disability jurisdiction of the supreme court and the Commission for Lawyer Discipline, a committee of the state bar." Although clarification of Rule 8.05 is welcome since the Ethics Helpline Attorneys receive many calls from attorneys licensed outside of Texas who are interested in providing or offering legal services in Texas, it remains unclear to us whether the Court, by rule, can alter whether or to what extent attorneys who are not admitted to practice in this state would fall under the jurisdiction of the Court and the CFLD.

Additionally, it is unclear what this sentence in Comment 2 means: "A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.05 appoints an *official* to be designated by this *court* to receive service of process in this jurisdiction." These terms could use clarification.

Suggestion: Define or explain "an official." Use "a tribunal" instead of "this court" so that it applies to evidentiary hearings.

Thank you for your consideration of this request. Please let us know if we can provide any additional information to the Committee.

January 20, 2023 **FEATURE**

Administering Justice: Maryland Interprets Rule 3.8(d)

By Andrew V. Jezic and Erin A. Risch

Share:

Under ABA Model Rule 3.8(d), does a prosecutor's duty to disclose exculpatory evidence continues post-conviction?

iStock / Getty Images Plus

In 1983, the American Bar Association (ABA) adopted Model Rule of Professional Conduct 3.8(d), addressing the special responsibilities of a prosecutor to disclose certain evidence and information favorable to the defense. The interpretation and application of Rule 3.8(d) have been the subject of debate and dissonance. In a case of first impression, the Court of Appeals of Maryland recently considered the scope of its version of ABA Model Rule 3.8(d): Rule 19-303.8(d) of the Maryland Attorneys' Rules of Professional Conduct (hereinafter Rule 3.8(d))[1] and held that a prosecutor's duty to disclose exculpatory evidence continues post-conviction. In *Attorney Grievance Commission of Maryland v. Cassilly*, the court disbarred a former elected state's attorney for failing to disclose exculpatory evidence that came to light

more than 15 years after the defendant's conviction, for destroying the evidence, and for making misrepresentations about the evidence to the trial court.[2] Prior to the Court of Appeals' opinion in *Cassilly*, no state supreme court or federal court had addressed whether a prosecutor's ethical duty to disclose information favorable to the defense applies to information that the prosecutor only learns of after the defendant's last direct appeal has been exhausted.

The Pertinent Facts

Beginning in 1981, Joseph I. Cassilly, first as an assistant state's attorney and later as the elected state's attorney for Harford County, Maryland,[3] prosecuted John N. Huffington for the murders of Diane Becker and her boyfriend, Joseph Hudson Jr. Following a jury trial, Huffington was convicted and sentenced to death.[4] The appellate court reversed the judgments of conviction and remanded the case for a new trial.[5] At the second trial, the state called Federal Bureau of Investigation (FBI) Agent Michael P. Malone to testify as an expert in microscopic hair analysis. Malone testified that hair samples recovered from the crime scene "were indistinguishable from Mr. Huffington's head hairs; you could not tell them apart."[6] Huffington was again convicted and sentenced to death.[7]

Between the second conviction in 1983 and 1998, Huffington sought a variety of post-conviction relief.[8] In 1991 Huffington was granted a new sentencing hearing and sentenced to life imprisonment. In 1998 the U.S. Court of Appeals for the Fourth Circuit affirmed the federal district court's denial of Huffington's application for a writ of habeas corpus.[9] At that point, Huffington had exhausted his standard post-conviction remedies.

In 1997, the Department of Justice (DOJ) Office of the Inspector General issued a report entitled "The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases" (hereinafter 1997 Report), which criticized the work of 13 FBI Laboratory examiners, including Malone. The 1997 Report included allegations by William Tobin, another FBI examiner, that Malone had testified falsely in an unrelated case and presented potentially exculpatory evidence as incriminating.[10] The 1997 Report stated:

> Based on our investigation, we conclude that Malone, in his 1985 testimony before the Investigating Committee, falsely testified that he had himself performed the tensile test and that he testified outside his expertise and inaccurately concerning the test results. The OIG questioned Malone about Tobin's allegations and, to his credit, Malone agreed with many points that Tobin had raised. Malone maintained, however, that he was justified in giving certain testimony because he was offering his own personal opinions rather than expert opinions. This is not a persuasive rationale for the presentation of inaccurate testimony by a Laboratory examiner.[11]

In 1997, DOJ established a task force to analyze disclosure issues arising from the 1997 Report. DOJ sent Cassilly a copy of the 1997 Report and requested that he contact the task force. Huffington's counsel also received a copy of the report. Cassilly contacted the task force and advised that he had originally requested that the FBI laboratory retest the evidence in Huffington's case but he "reconsidered and decided to wait to see what the defense [would] do since it has received a copy of the report."[12]

As a result of the 1997 Report, the FBI hired forensic scientists to conduct independent reviews of cases in which the work of the criticized examiners was material to a conviction. Steve Robertson, a hair and fiber analyst, was assigned to review Malone's work in Huffington's case. On September 16, 1999, Robertson issued his "Independent Case Review Report" criticizing Malone's work in Huffington's case. Among other things, Robertson stated that he was unable to determine whether Malone performed the appropriate tests in a scientifically acceptable manner and that Malone's examination results as set forth in the laboratory report were not supported or adequately documented in the bench notes. Robertson found that Malone's testimony at Huffington's trial was consistent with the laboratory report but inconsistent with his bench notes and that Malone testified that he personally performed certain tests that were most likely performed by laboratory technicians.

In October 1999, DOJ sent the Robertson Report to Cassilly and requested that he review the report to determine whether it should be disclosed to Huffington or his counsel. Cassilly did not provide the Robertson Report to Huffington. At the disciplinary hearing, Cassilly testified that he kept the 1997 Report and the Robertson Report for five years and then discarded them.[13]

In 2003, Huffington filed a "Petition to Preserve Forensic Evidence and Conduct DNA Analysis," seeking to test the hairs that Malone found to be microscopically similar to Huffington's. At the time, Huffington and his counsel were unaware of the Robertson Report. Cassilly filed an opposition to the petition and requested permission from the court to destroy the forensic evidence in Huffington's case. The court denied Cassilly's request to destroy the evidence and granted Huffington's request to preserve the evidence and conduct DNA testing on the hairs. Huffington subsequently dismissed his petition because his expert could not determine which hairs Malone matched to Huffington's.[14]

In 2010, Huffington filed a "Petition for Writ of Actual Innocence," asserting that the evidence used to convict him, namely Malone's hair and fiber analysis and the comparative bullet lead analysis, was unreliable. Huffington relied on scientific reports and the 1997 Report's findings regarding Malone's false testimony in an unrelated matter. In 2010, Huffington and his counsel were still unaware of the Robertson Report.[15] In his response to the petition, Cassilly stated:

> No evidence has been presented that the conclusion that examiner Malone rendered in court is not correct. References that Malone was found deficient in another case may be impeaching but it does not prove that his observations in this case are incorrect.[16]

At a hearing on Huffington's petition, Cassilly falsely told the trial court that he had received a letter from the FBI indicating that Malone's testimony in Huffington's case was appropriate.[17] At the disciplinary hearing, Cassilly argued that he was recalling "the gist" of a report that he had not seen for 11 years and that his characterization of the report was a fair interpretation of a "confusing, check-the-box unexplained document."[18]

In November 2011, a reporter from the *Washington Post* received a copy of the Robertson Report in response to a Freedom of Information Act request and provided it to Huffington's counsel. Huffington supplemented his "Petition for Writ of Actual Innocence" with the Robertson Report. In the meantime, the trial court directed Cassilly to determine if the FBI could perform DNA testing on the hair samples. On March 27, 2013, the FBI issued a DNA report concluding that Huffington was excluded as the source of the hairs at issue. The court granted Huffington's petition and ordered a new trial for both murder charges. Although the DNA test results rendered the arguments regarding Malone's testimony moot, in its written opinion granting the petition, the court noted that Malone's testimony was a key piece of evidence used to connect Huffington to Becker's murder.[19]

In 2014, Cassilly received a letter from DOJ stating that Malone's testimony in Huffington's case exceeded the limits of science and was invalid. Cassilly did not provide a copy of the letter to Huffington or his counsel.[20]

Huffington's third trial was scheduled for April 2017. Even though the 2014 DOJ letter was responsive to Huffington's discovery requests and material required to be disclosed pursuant to the Maryland Rules of Criminal Procedure,[21] Cassilly did not produce the 2014 letter. Cassilly also continued to misrepresent the contents of the Robertson Report and the 2014 DOJ letter to the trial court. In the disciplinary case, Cassilly argued that his failure to produce the 2014 DOJ letter was not a discovery violation because he did not intend to call Malone as a witness at the 2017 trial.

In November 2017, Huffington entered *Alford* pleas to two counts of first-degree murder and other related counts. The plea agreement provided that Huffington would receive two concurrent life sentences suspended with all but time served (11,752 days).[22]

Battle of the Experts

In 2018 Huffington filed a complaint with the Attorney Grievance Commission of Maryland asserting that Cassilly had repeatedly and intentionally withheld exculpatory evidence in his case. In 2020 the Attorney Grievance Commission, acting through Bar Counsel, filed a "Petition for Disciplinary or Remedial Action" against Cassilly, charging him with violating various rules of professional conduct, including Rule 3.8(d), in connection with his prosecution of Huffington.

In support of the Rule 3.8(d) charge, Bar Counsel argued that (1) the Robertson Report was exculpatory or "tended to negate the guilt of the accused"; (2) Rule 3.8(d) applies post-conviction; and (3) Rule 3.8(d) does not have a "materiality" requirement as defined in *Brady v. Maryland* and its progeny.[23] Bar Counsel and Cassilly designated experts who testified at the evidentiary hearing.[24] The experts offered competing opinions as to whether the Robertson Report was exculpatory and whether Rule 3.8(d) required Cassilly to disclose the report.

Bar Counsel's expert testified that the Robertson Report constituted exculpatory and impeachment evidence that Cassilly was required to disclose under Rule 3.8(d). He testified that the requirement of a prosecutor to disclose information that tends to negate the guilt of the accused is a "very low standard" and is far lower than the *Brady* materiality requirement. He asserted that the Robertson Report tended to negate Huffington's guilt by detracting from a key piece of forensic evidence used by the state to place Huffington at the scene of the crime.[25]

Cassilly's expert testified that the Robertson Report did not constitute exculpatory evidence that needed to be disclosed under Rule 3.8(d) and that the analysis of what is exculpatory is different depending on whether the obligation to disclose arises pretrial or posttrial. He asserted that the Robertson Report simply criticized Malone's documentation and did not say that Malone's conclusions were wrong. Therefore, Cassilly was not obligated to disclose the information that came out about Malone after Huffington was convicted.[26]

The Court's Holding

In October 2021, the Court of Appeals of Maryland issued its opinion disbarring Cassilly for violating Rule 3.3(a)(1) (Candor Towards the Tribunal),[27] Rule 3.4(a) (Fairness to Opposing Party and Attorney),[28] Rule 3.8(d) (Special Responsibilities of a Prosecutor),[29] Rule 8.1(b) (Bar Admission and Disciplinary Matters),[30] and Rule 8.4(a), (c), and (d) (Misconduct).[31] The court found that Cassilly made repeated misrepresentations to the trial court regarding the Robertson Report and the 2014 DOJ letter. The court also found that Cassilly improperly disposed of the Robertson Report and then sought to destroy the evidence that was the subject of the report.[32]

With respect to Cassilly's disclosure obligations, the Court of Appeals of Maryland considered, for the first time, the application and scope of Rule 3.8(d). In finding that Cassilly violated the rule when he failed to provide the Robertson Report to Huffington and his counsel, the court determined that the Robertson Report was exculpatory and tended to negate Huffington's guilt because it detracted from a key piece of forensic evidence used by the state to place Huffington at the scene of the crime.[33] Cassilly asserted that the Robertson Report was not exculpatory because it was an ambiguous and confusing "check-the-box unexplained document."[34] The court rejected Cassilly's argument holding that the Robertson Report contained information that "in no uncertain terms undermined the validity of Malone's testimony and the accuracy of his conclusions in Huffington's case."[35]

Based on the plain language of Rule 3.8(d), the court also concluded that the duty to disclose applies pretrial, during trial, and post-conviction. The court expressly found that even though there were no pending proceedings at the time he received the Robertson Report, Cassilly was required to disclose the report to the defense. The court further held that Cassilly had a heightened duty to disclose the exculpatory report in 2003 when Huffington filed his petition to conduct DNA testing and preserve the forensic evidence in the case, and in 2010 when he filed his "Petition for Writ of Actual Innocence."

In reaching its conclusion, the court reviewed the history of ABA Model Rule 3.8 and Maryland's equivalent and stated:

> What can be gleaned from our rulemaking history is that the plain language of Rule 3.8(d) containing the requirement that a prosecutor "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense" applies to a prosecutor's obligation to make disclosures postconviction. From our perspective, it would not be consistent with the plain language of Rule 3.8(d), Comment [1] to the Rule, the Supreme Court's holding in [*Imbler v. Pachtman*, 424 U.S. 409 (1976)], or our case law concerning *Brady* to construe Rule 3.8(d) to apply only to pretrial or trial disclosures.[36]

In the court's view, the amendments to the ABA Model Rule in 2008 setting forth post-conviction obligations for prosecutors in subsections (g) and (h) expressly stated what was already inherent in subsection (d). The court also referred the matter to the Maryland Standing Committee on Rules of Practice and Procedure to consider similar amendments.[37]

Unresolved Issues

Although the Court's holding in *Cassilly* confirms that Rule 3.8(d) is broader than *Brady* because it applies post-conviction, the court did not reach the issue of whether Rule 3.8(d)

requires materiality—a determination that the result would have been different if the suppressed evidence had been disclosed.

Bar Counsel argued that the *Brady* materiality standard should not apply when determining whether a prosecutor withheld evidence in violation of Rule 3.8(d). While the *Brady* materiality analysis is necessary to determine whether a defendant's constitutional rights were violated such that the defendant is entitled to a new trial, no such "after-the-fact, look-back analysis" is required when considering whether a prosecutor failed to disclose exculpatory evidence in violation of Rule 3.8(d).

The court, without extensive discussion, determined that the Robertson Report was material because Malone's testimony constituted key forensic evidence linking Huffington to the crime and was emphasized to the jury by the state.[38] Therefore, the court concluded that it did not need to determine whether Rule 3.8(d) requires a prosecutor to disclose evidence that tends to negate guilt when the evidence is not necessarily "material" under *Brady*. In his concurring opinion, Judge Robert N. McDonald, now retired, reiterated that the court did not reach the conclusion that the scope of Rule 3.8(d) exceeds the prosecutor's discovery obligations under *Brady* and its progeny.

States remain split over whether Rule 3.8 requires a prosecutor to disclose evidence that is not necessarily "material" under *Brady*. Jurisdictions opposing a more expansive reading of Rule 3.8, such as Colorado, Louisiana, North Carolina, Ohio, Oklahoma, Tennessee, and Wisconsin, raise concerns that such an interpretation "would impose inconsistent obligations upon prosecutors"[39] and lead to a situation in which a prosecutor meets his or her obligations under the constitution but is still found in violation of an ethical rule.[40] States such as Arizona, New York, North Dakota, Texas, Utah, Virginia, and Washington, D.C., along with cities such as New York, that have adopted a more expansive reading of the rule have found that the plain language definition of Rule 3.8(d) indicates a very low bar, if any, regarding materiality.[41] Specifically, that "information" (not necessarily "evidence") that "tends to" negate guilt cannot be read any other way than to indicate a standard far less exacting than materiality under *Brady* and its progeny.

Given the state of the law, prosecutors are advised to think broadly about their obligation to seek justice and err on the side of disclosure.

Endnotes

1. Md. Att'ys' Rules of Pro. Conduct r. 19-303.8(d) (2016) is identical to Model Rules of Pro. Conduct r. 3.8(d) (Am. Bar Ass'n 1983). Effective July 1, 2016, the Maryland Lawyers' Rules of Professional Conduct (MLRPC) were renamed the Maryland Attorneys' Rules of Professional Conduct (MARPC) and relocated to Title 19 of the Maryland Rules without substantive

changes. The full text can be found at https://www.courts.state.md.us/attygrievance/rules. Hereinafter in the text, citations to individual MARPC rules will be abbreviated to match their ABA counterparts (e.g., Maryland Attorneys' Rule of Professional Conduct 19-303.8(d) will be abbreviated as Rule 3.8(d)).

2. 262 A.3d 272 (Md. 2021).

3. Cassilly served as the elected state's attorney from 1983 to 2019.

4. *Cassilly*, 262 A.3d at 279–81.

5. *Id.*; *see also* Huffington v. State, 452 A.2d 1211, 1218 (Md. 1982) (admission of inadmissible testimonial evidence in rebuttal constituted reversible error).

6. *Cassilly*, 262 A.3d at 279–81.

7. *Id.*

8 *Id* In 1988, David O Stewart, Esq , began representing Huffington, and from that point until the conclusion of the case in 2017, Huffington was represented by Stewart and his law firm, Ropes & Gray, LLC.

9. *Id.*

10. *Id.* at 281.

11. Off. of the Inspector Gen., U.S. Dep't of Just., The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases (1997), https://irp.fas.org/agency/doj/oig/fbilab1/fbil1toc.htm, quoted in *Cassilly*, 262 A.3d at 281.

12. *Cassilly*, 262 A.3d at 282.

13. *Id.* at 283.

14. *Id.* at 284.

15. *Id.*

16. *Id.* at 285.

17. *Id.*

18. *Id.* at 298.

19. *Id.* at 284.

20. *Id.* at 286–87.

21. *See* Md. Rules r. 4-263(d)(5), (6), (8).

22. *Cassilly*, 262 A.3d at 289.

23. Brady v. Maryland, 373 U.S. 83 (1963).

24. *Cassilly*, 262 A.3d at 305.

25. *Id.* at 317–18.

26. *Id.* at 302.

27. Md. Att'ys' Rules of Pro. Conduct, *supra* note 1, r. 19-303.3(a)(1) ("An attorney shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the attorney.").

28. *Id.* r. 19-303.4(a) ("An attorney shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. An attorney shall not counsel or assist another person to do any such act.").

29. *Id.* r. 19-303.8(d) ("The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.").

30. *Id.* r. 19-308.1(b) ("An applicant for admission or reinstatement to the bar, or an attorney in connection with a bar admission application or in connection with a disciplinary matter, shall not: . . . (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 19-301.6 (1.6).").

31. *Id.* r. 19-308.4 ("It is professional misconduct for an attorney to: (a) violate or attempt to violate the Maryland Attorneys' Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice.").

32. Att'y Grievance Comm'n of Md. v. Cassilly, 262 A.3d 272, 304 (Md. 2021).

33. *Id.* at 304–20.

34. *Id.* at 301.

35. *Id.* at 300.

36. *Id.* at 316.

37. *Id.* at 315–16. On September 30, 2022, the court adopted revisions to Rule 3.8 incorporating subsections (g) and (h) of the ABA Model Rule.

38. *Id.* at 319.

39. *In re* Att'y C, 47 P.3d 1167, 1170 (Colo. 2002).

40. *See id.*; *see also In re* Seastrunk, 236 So. 3d 509 (La. 2017); N.C. Rules of Pro. Conduct r. 3.8(d) (2012); Disciplinary Couns. v. Kellogg-Martin, 923 N.E.2d 125 (Ohio 2010); State *ex rel.* Okla. Bar Ass'n v. Ward, 353 P.3d 509 (Okla. 2015); *In re* Formal Ethics Op. 2017-F-163, 582 S.W.3d 200 (Tenn. 2019); *In re* Riek, 834 N.W.2d 384, 390 (Wis. 2013).

41. State Bar of Ariz. Rules of Pro. Conduct Comm., Op. 94-07 (1994); People v. Waters, 941 N.Y.S.2d 482 (Sup. Ct. 2012); N.Y.C. Bar Ass'n Comm'n on Pro Ethics Formal Op. 2016–3 (2016); *In re* Feland, 820 N.W.2d 672 (N.D. 2012); Schultz v. Comm'n for Law. Discipline, No. 55649, 2015 WL 9855916 (Tex. Bd. of Disciplinary App. Dec. 17, 2015); *In re* Larsen, 379 P.3d 1209 (Utah 2016); Va. State Bar Comm. on Legal Ethics, Op. 1862 (2012); *In re* Kline, 113 A.3d 202 (D.C. 2015); *see also* Mass. Rules of Pro. Conduct r. 3.8(d) & cmt. 3A (2016).

ENTITY:

GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION

TOPIC:

ETHICS

Authors

By Andrew V. Jezic and Erin A. Risch

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Video of Public Hearing on Proposed Rule 1.08 of the Texas Disciplinary Rules of Professional Conduct

Held on April 12, 2023, by the Committee on Disciplinary Rules and Referenda

Video of Public Hearing on April 12, 2023

https://texasbar-wo4m90g.vids.io/videos/d39fd8b21c10e9c55a/cdrr-meeting-april-12-2023

Comment on proposed Rule 1.08:

Jerry R. Hall at 46:12

MEMO TO: **CDRR Members**
FROM: **Claude Ducloux, Vincent R. Johnson, and Amy Bresnen**
DATE: **October 19, 2022**

RE: Proposed Change to TDRPC 1.08 (a)

Dear Members: Rule 1.08 governs business dealings between an attorney and a client. It is intended to protect the client. This proposal strengthens and clarifies exactly what must be done before an Attorney claims that he/she has acquired some sort of ownership or business interest in property belonging to the Client. As I mentioned in our Monthly meeting, in my CLE research I discovered that other states have a rule which is unmistakably clearer and more definite, and protects the client with specific requirements. I strongly believe we should consider making these clarifications. -C.D.

Our subcommittee has considered my initial proposal and Prof Johnson has improved my proposal admirably, and I think we're ready to discuss it at our next meeting.

Here is a methodical review:
Current Rule 1.08(a)

Proposed Change to TDRPC 1.08(a) and Proposed Comments

Current Rule 1.08. Conflict of Interest: Prohibited Transactions

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

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

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

(3) the client consents in writing thereto.

. . . .

Subcommittee's Proposed New Rule 1.8 (a)

(a) A lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless:

(1) the terms of the transaction or acquisition are fair and reasonable to the client, and are fully disclosed and transmitted to the client in a writing that can be reasonably understood by the client;

(2) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(3) the client thereafter provides informed consent[1] in writing to the terms of the transaction or acquisition, and to the lawyer's role in it, including whether the lawyer is representing the client in the transaction.

[1] VJ says: We have agreed to define "informed consent" in the terminology section. Those two words should be kept together. (CED's original draft just said "consent" – rather than "informed consent.")

Proposed Comments to New Rule 1.08(a)

[1] A lawyer has an "other pecuniary interest adverse to a client" within the meaning of this rule when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action. However, this rule does not apply to an attorney's lien given to secure payment of a contingent fee.

[2] For purposes of this rule, factors that can be considered in determining whether a reviewing lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition; and (ii) has a close legal,

[1] VJ says: We have agreed to define "informed consent" in the terminology section. Those two words should be kept together.

business, financial, professional or personal relationship with the lawyer seeking the client's consent.

[3] Fairness and reasonableness under paragraph (a)(1) are measured at the time of the transaction or acquisition based on the facts that then exist.

[4] In some circumstances, this rule may apply to a transaction entered into with a former client. A factor in that analysis includes whether the subject of the transaction relates to or results from the attorney's previous representation, whether the transaction relates to confidential information known to the attorney, and whether a continuing special trust resulting therefrom continue to exist.

[5] This rule does not apply to the agreement by which the lawyer is retained by the client, unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by Rule 1.04 (Fees). This rule also does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by Rules 1.04 and 1.14 (Safekeeping Property).

Current Texas Comments relating to 1.08(a):

Transactions between Client and Lawyer

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

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

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

December 2, 2022

TO: Subcommittee on TDRPC 1.08(a)

FROM: Vincent R. Johnson

RE: Proposed Re-write of Comments 1 to 5 for Proposed Rule 8.01(a)

The proposed comments for proposed Rule 1.08(a) are set forth in the e-mail from Haksoon Andrea Low dated December 1, 2022. I have reviewed those comments in comparison to the comments to Model Rule 8.1 and have concluded that our proposed comments are inferior, particularly with respect to concrete examples. I therefore suggest that proposed comments 1 to 5 be changed to read as follows. (This language is the text of the comments 1 to 4 of Model Rule 1.8. Minor changes have been marked with comment bubbles:

New Proposed Comments (12/2/22)

Business Transactions between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.04 (Fees) although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that in many cases the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and

Commented [JV1]: Text deleted. Texas does not have a rule parallel to MR 5.7.

Commented [JV2]: Rule cross-reference corrected.

Commented [JV3]: The word "in many cases" have been added since such advice is not required if the client is already independently represented.

should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Commented [JV4]: Double-check cross-reference.

Commented [JV5]: Change cross-reference to 1.06.

Commented [JV6]: Change cross-reference to 1.06.