LEWIS KINARD, CHAIR
TIMOTHY D. BELTON
AMY BRESNEN
ROBERT DENBY
CLAUDE DUCLOUX

HON. PHYLLIS GONZALEZ
RICK HAGEN
VINCENT JOHNSON
KAREN NICHOLSON

October 19, 2022

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

RE: Submission of Proposed Rule Recommendations – Rules 1.00, 1.09, 1.10, 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 Rules 1.00, relating to terminology, 1.09, relating to conflicts of interest regarding a former client, and 1.10, relating to imputation of conflicts of interest, of the Texas Disciplinary Rules of Professional Conduct. 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 2022 meeting, the Committee voted to recommend the proposed rules to the Board of Directors.

Included in this submission packet, you will find the proposed rules 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
Brad Johnson
Chris Ritter
Ross Fischer

Committee on Disciplinary Rules and Referenda
Overview of Proposed Rules

Texas Disciplinary Rules of Professional Conduct
Rule 1.00. Terminology

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda (Committee) related to proposed Rule 1.00 of the Texas Disciplinary Rules of Professional Conduct (TDRPC), relating to terminology. The Committee originally initiated the rule proposal process in July 2020 and initiated the rule proposal process again in March 2021.

Actions by the Committee – 2020 Proposal

- **Initiation** – The Committee voted to initiate the rule proposal process at its July 8, 2020, meeting.
- **Publication** – The proposed rule was published in the September 2020 issue of the *Texas Bar Journal* and the August 21, 2020, 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.
- **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 September 1 and September 10, 2020. An additional email notification was sent to Committee email subscribers on September 14, 2020.
- **Public Comments** – The Committee accepted public comments through October 6, 2020. The Committee received three written public comments on the proposed rule.
- **Public Hearing** – On September 17, 2020, the Committee held a public hearing by Zoom teleconference. No persons requested to address the Committee at the public hearing.[1]
- **Amendments to Proposal** – Due to amendments to the proposed rule after its publication and to solicit additional public feedback, on November 4, 2020, the Committee voted to table the subject of the rule proposal until its February 3, 2021, meeting to consider initiating the rule proposal process again and publishing an updated version of the proposed rule for public feedback.

Actions by the Committee – 2021 Proposal

- **Initiation** – The Committee voted to initiate the rule proposal process again at its March 3, 2021, meeting.

[1] On September 17, 2020, the Committee held public hearings on three proposed rules. An attorney addressed proposed Rule 1.00 during the public hearing on proposed Rule 1.18, TDRPC, regarding duties to prospective clients, which occurred immediately after the public hearing on proposed Rule 1.00. The attorney's comments addressed both proposed Rule 1.00 and proposed Rule 1.18.

- **Publication** – The proposed rule was published in the May 2021 issue of the *Texas Bar Journal* and the May 7, 2021, 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.
- **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 May 10 and May 27, 2021. An additional email notification was sent to Committee email subscribers on June 4, 2021.
- **Public Comments** – The Committee accepted public comments through July 13, 2021. The Committee received twenty written public comments on the proposed rule.
- **Public Hearing** – On June 10, 2021, the Committee held a public hearing by Zoom teleconference. Two individuals addressed the Committee at the public hearing.
- **Recommendation** – The Committee voted at its August 4, 2021, meeting to recommend the proposed rule to the Board of Directors with certain amendments. Notably, the final recommended version of proposed Rule 1.00 does not include "Client" as a defined term, which had been part of the version published for public comment in May 2021.
- **Re-Publication** – The proposed rule was re-published in the March 2022 issue of the *Texas Bar Journal* and the March 4, 2022, issue of the *Texas Register*, with three related proposed rules that the Committee had initiated in October and November 2021. 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.
- **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 7 and March 23, 2022. An additional email notification was sent to Committee email subscribers on April 1, 2022.
- **Public Comments** – The Committee announced that it would accept public comments through April 5, 2022, but it also considered all public comments that were submitted after that date. The Committee received nine written public comments on the proposed rule, which were submitted by six members of the public.[2]
- **Public Hearing** – On April 6, 2022, 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 4, 2022, meeting to recommend the proposed rule to the Board of Directors. The recommended proposed rule was identical to the version published in March 2022.

[2] One member of the public submitted different written comments on the proposed rule on three separate dates.

Overview

Proposed Rule 1.00, TDRPC, incorporates the current TDRPC Terminology as a rule, adds five new definitions, and clarifies a current definition. Additionally, the Committee has recommended interpretive comments to the proposed rule.[3]

Proposed Rule 1.00 adds the following defined terms:

- "Confirmed in writing"
- "Informed consent"
- "Represent," "Represents," or "Representation"
- "Screened"
- "Writing" or "Written"

"Confirmed in writing" is used in proposed Rule 1.18 (Duties to Prospective Client), which the State Bar Board of Directors approved at its September 24, 2021, meeting, and in proposed Rule 1.09 (Conflict of Interest: Former Client), which the Committee recommended to the Board on May 4, 2022.

"Informed consent" is used in various provisions in the TDRPC (*see, e.g.,* Rule 1.01(a)(1) and Paragraphs 4 and 5 of the Comment to Rule 1.01 (Competent and Diligent Representation); Paragraphs 2, 7, 8, and 9 of the Comment to Rule 1.06 (Conflict of Interest: General Rule)), as well as in proposed Rules 1.09 and 1.18.

"Represent," "Represents," and/or "Representation" are used regularly throughout the TDRPC.

"Screened" is used in Rule 1.10 (Successive Government and Private Employment) and Rule 1.11 (Adjudicatory Official or Law Clerk), as well as in proposed Rule 1.18. The term is also used in proposed Rule 1.10 (Imputation of Conflicts of Interest: General Rule), which the Committee recommended to the Board on May 4, 2022.[4]

"Writing" and/or "Written" are used regularly throughout the TDRPC (*see*, *e.g.*, Rules 1.04(c) and 1.04(d) and Paragraph 11 of the Comment to Rule 1.04 (Fees)) and in rule proposals the Committee has considered (*e.g.*, proposed Rule 1.17 (Sale of Law Practice), initiated February 3, 2021, but not recommended to the Board).

Additionally, proposed Rule 1.00 clarifies the current definition of "Fraud" or "Fraudulent" by adding the word "negligent" in one place as follows [new language underlined]: "'Fraud' or 'Fraudulent' denotes conduct having a purpose to deceive and not merely negligent misrepresentation or <u>negligent</u> failure to apprise another of relevant information." As explained in Paragraph 5 of the proposed Comment to proposed Rule 1.00:

---

[3] 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.

[4] Proposed Rules 1.09 and 1.10 together would replace one rule, namely current Rule 1.09. Current Rules 1.10-1.16 would remain in effect and would be renumbered as Rules 1.11-1.17.

> When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under applicable substantive or procedural law and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. Silence may be fraudulent if there is a duty to speak and intent to deceive. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Amendments in Response to Public Comments

In response to public feedback during the Committee's 2020 consideration of proposed Rule 1.00, the Committee added the following sentence to the definition of "Informed consent": "If a rule calling for informed consent requires specific disclosures (see, e.g., Rule 1.06(c)(2)), consent is not informed unless those disclosures have been made."

Additionally, in response to a public comment received in 2020, the Committee added the definition for "'Represent,' 'Represents,' or 'Representation.'"

The version of proposed Rule 1.00 that was published for public comment in May 2021 included the two aforementioned amendments to define "Informed consent" and "Represent," "Represents," or "Representation." Notably, the term "Client" was included in the version of proposed Rule 1.00 that was published in May 2021. However, based on public comments received, the Committee voted to delete the proposed definition from the version of Rule 1.00 that it voted to recommend to the Board in August 2021. (The TDRPC do not currently include a definition for the term "Client.")

In March 2022, the Committee voted to re-publish the proposed rule that the Committee had voted to recommend to the Board in August 2021. The Committee so voted because it also voted in March 2022 to publish three related proposed rules that could affect proposed Rule 1.00.

The Committee considered additional public comments on proposed Rule 1.00 that it received after re-publication. In May 2022, the Committee voted to recommend this version, identical to the version published in March 2022, to the Board.

Committee on Disciplinary Rules and Referenda
Overview of Proposed Rule

Texas Disciplinary Rules of Professional Conduct
Rule 1.09. Conflict of Interest: Former Client
Rule 1.10. Imputation of Conflicts of Interest: General Rule

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda (Committee) related to proposed Rules 1.09 and 1.10 of the Texas Disciplinary Rules of Professional Conduct (TDRPC). In conjunction, the two proposed rules address a conflict of interest related to a former client and the imputation of such a conflict of interest when lawyers move among law firms. The Committee initiated the rule proposal process for proposed Rule 1.09 in October 2021 and for proposed Rule 1.10 in November 2021.

Actions by the Committee

- **Initiation** – The Committee voted to initiate the rule proposal process for proposed Rule 1.09 at its October 6, 2021, meeting, and for Rule 1.10 at its November 3, 2021, meeting.
- **Publication** – The proposed rules were published in the March 2022 issue of the *Texas Bar Journal* and the March 4, 2022, issue of the *Texas Register*. The proposed rules were 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.
- **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 7 and March 23, 2022. An additional email notification was sent to Committee email subscribers on April 1, 2022.
- **Public Comments** – The Committee accepted public comments through April 5, 2022. The Committee received six written public comments on proposed Rule 1.09 and seven written public comments on proposed Rule 1.10.
- **Public Hearing** – On April 6, 2022, the Committee held a public hearing by Zoom teleconference. No persons requested to address the Committee on proposed Rule 1.09. One person addressed the Committee on proposed Rule 1.10 at the public hearing.
- **Recommendation** – The Committee voted at its May 4, 2022, meeting to recommend the proposed rules to the Board of Directors.

Overview

In conjunction, proposed Rules 1.09 and 1.10 clarify how the general conflict-of-interest rule would apply specifically to the movement of lawyers among law firms. Proposed Rules 1.09 and 1.10 are based on American Bar Association (ABA) Model Rules 1.9 (Duties to Former Clients) and 1.10 (Imputation of Conflicts of Interest: General Rule). The proposed change would

permit the use of screening to manage conflicts of interest regarding former clients and other conflicts of interest that arise under current Rule 1.06, TDRPC.

Absent the proposed rule changes, the use of screening is now limited to conflicts of interest occurring only in specific contexts. For example, current TDRPC rules apply the screening requirement to a limited class of individuals: Rule 1.06 (Conflict of Interest: General Rule), Comment 19, refers to screening of a paralegal, legal secretary, law clerk, or intern; Rule 1.10 (Successive Government and Private Employment) refers to screening of a former public officer or employee; and Rule 1.11 (Adjudicatory Official or Law Clerk) refers to screening of an adjudicatory official or law clerk to an adjudicatory official.[1]

The use of screening is contained in proposed Rule 1.18 (Duties to Prospective Client), which the Board voted to approve at its September 24, 2021, meeting. There, the proposed changes would permit the use of screening to manage conflicts of interest regarding prospective clients.

Following proposed Rule 1.09 (Conflict of Interest: Former Client) and proposed Rule 1.10 (Imputation of Conflicts of Interest: General Rule), current Rule 1.10 (Successive Government and Private Employment) and subsequent rules in Part I would be renumbered beginning with Rule 1.11 (Successive Government and Private Employment). Current Rule 1.09 would be deleted in its entirety.

The Committee has also recommended interpretive comments to proposed Rules 1.09 and 1.10.[2]

Amendments in Response to Public Comments

The Committee considered public feedback during the comment period ending on April 5, 2022, and at the public hearing on April 6, 2022. The Committee also considered written public comments received from April 6 to May 3, 2022. After further discussion at its May 4, 2022, meeting, there were no motions to amend the proposed rules. The Committee voted to recommend the proposed rules, as published, to the Board of Directors.

Additional Documents

Included on the pages that follow these Overviews of Proposed Rules are: 1) the final recommended versions of proposed Rules 1.00, 1.09, and 1.10 (Bates Numbers 000010 – 000023); 2) proposed Rules 1.00, 1.09, and 1.10 as published in the March 2022 *Texas Bar Journal* (Bates Number 000024 – 000038);[3] 3) the versions of proposed Rule 1.00 as published in the May 2021 and September 2020 issues of the *Texas Bar Journal* (Bates Numbers 000039 – 000043); 4) public comments received in response to the publications in the *Texas Bar Journal* in chronological order (Bates Numbers 000044 – 000166); 5) links to the video recordings of the Committee's public

[1] Current Rules 1.10 and 1.11 are proposed to be renumbered as Rules 1.11 and 1.12.

[2] 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.

[3] The Committee voted to publish four proposed rules in the March 2022 *Texas Bar Journal* for public comment. Although on June 1, 2022, the Committee voted not to recommend proposed Rule 3.09 to the Board, it is included in this document.

hearing on proposed Rules 1.00, 1.09, and 1.10, conducted by Zoom teleconference on April 6, 2022,[4] the Committee's public hearing on proposed Rule 1.00, conducted by Zoom teleconference on June 10, 2021, and the Committee's public hearing on proposed Rule 1.00, conducted by Zoom teleconference on September 17, 2020,[5] with the name of each speaker and time-stamp of each speaker's oral comments (Bates Number 000167); 6) the memoranda on proposed Rule 1.00 dated June 19, 2020, on proposed Rule 1.00 dated August 5, 2020, and on proposed Rules 1.09 and 1.10 dated October 1, 2021, from Committee Member Vincent R. Johnson (Bates Numbers 000168 – 000186).

[4] The Committee also heard public comments on proposed Rule 3.09, TDRPC, on April 6, 2022.

[5] The Committee also heard public comments on proposed Rule 1.18, TDRPC, and proposed Rule 13.05, TRDP, on September 17, 2020.

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct

Rule 1.00. Terminology
(Final Recommended Version)

Proposed Rule

Rule 1.00. Terminology

(a) "Adjudicatory Official" denotes a person who serves on a Tribunal.

(b) "Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.

(c) "Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(d) "Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

(e) "Consult" or "Consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(f) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (j) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(g) "Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

(h) "Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

(i) "Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or negligent failure to apprise another of relevant information.

(j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about material risks of and reasonably available alternatives to the proposed course of conduct. If a rule calling for informed consent requires specific disclosures (see, e.g., Rule 1.06(c)(2)), consent is not informed unless those disclosures have been made.

(k) "Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(l) "Law firm": see "Firm."

(m) "Partner" denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.

(n) "Person" includes a legal entity as well as an individual.

(o) "Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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

(q) "Represent," "Represents," or "Representation." A lawyer represents a person if the person is a client of the lawyer. If the relationship of client and lawyer terminates, the lawyer's representation of the client terminates.

(r) "Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

(s) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(t) "Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

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

(v) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment:

Confirmed in Writing

1. If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

2. Whether two or more lawyers constitute a firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

3. With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

4. Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

5. When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under applicable substantive or procedural law and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. Silence may be fraudulent if there is a duty to speak and intent to deceive. For

purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

6. Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person. The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

7. Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. In emergency circumstances, or situations where a full discussion of risks or alternatives would threaten the best interests of the client or other person, the usual standards for informed consent do not apply.

Screened

8. This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules that expressly permit screening.

9. The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake

such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

10. In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Rule 1.09. Conflict of Interest: Former Client
(Final Recommended Version)

Proposed Rule

Rule 1.09. Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.05 and 1.09(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment:

1. After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment 9. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.[1]

2. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is

[1] Current Rule 1.10 (Successive Government and Private Employment) is proposed to be renumbered as Rule 1.11. Comment 1 refers to Rule 1.11 after the proposed renumbering.

prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

3. Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

4. When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

5. Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.05 and 1.09(c). Thus, if a lawyer while with one

firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b)[2] for the restrictions on a firm once a lawyer has terminated association with the firm.

6. Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

7. Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.05 and 1.09(c).

8. Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

9. The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.00(j).[3] With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.[4]

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

> ~~(1) in which such other person questions the validity of the lawyer's services or work product for the former client;~~
>
> ~~(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or~~

---

[2] Comment 5 refers to proposed Rule 1.10 (Imputation of Conflicts of Interest: General Rule). It does not refer to current Rule 1.10 (Successive Government and Private Employment), which is proposed to be renumbered as Rule 1.11.

[3] On May 4, 2022, the Committee on Disciplinary Rules and Referenda voted to recommend proposed Rule 1.00 (Terminology) to the Board of Directors of the State Bar of Texas. Proposed Rule 1.00(j) defines "Informed consent."

[4] Comment 9 refers to proposed Rule 1.10 (Imputation of Conflicts of Interest: General Rule). It does not refer to current Rule 1.10 (Successive Government and Private Employment), which is proposed to be renumbered as Rule 1.11.

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

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

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

~~Comment:~~

~~1. Rule 1.09 addresses the circumstances in which a lawyer in private practice, and other lawyers who were, are or become members of or associated with a firm in which that lawyer practiced or practices, may represent a client against a former client of that lawyer or the lawyer's former firm. Whether a lawyer, or that lawyer's present or former firm, is prohibited from representing a client in a matter by reason of the lawyer's successive government and private employment is governed by Rule 1.10 rather than by this Rule.~~

~~2. Paragraph (a) concerns the situation where a lawyer once personally represented a client and now wishes to represent a second client against that former client. Whether such a personal attorney client relationship existed involves questions of both fact and law that are beyond the scope of these Rules. See Preamble: Scope. Among the relevant factors, however, would be how the former representation actually was conducted within the firm; the nature and scope of the former client's contacts with the firm (including any restrictions the client may have placed on the dissemination of confidential information within the firm); and the size of the firm.~~

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

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

~~4A. The third situation where representation adverse to a former client is prohibited is where the~~

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

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

5. Paragraph (b) extends paragraph (a)'s limitations on an individual lawyer's freedom to undertake a representation against that lawyer's former client to all other lawyers who are or become members of or associated with the firm in which that lawyer is practicing. Thus, for example, if a client severs the attorney client relationship with a lawyer who remains in a firm, the entitlement of that individual lawyer to undertake a representation against that former client is governed by paragraph (a); and all other lawyers who are or become members of or associated with that lawyer's firm are treated in the same manner by paragraph (b). Similarly, if a lawyer severs his or her association with a firm and that firm retains as a client a person whom the lawyer personally represented while with the firm, that lawyer's ability thereafter to undertake a representation against that client is governed by paragraph (a); and all other lawyers who are or become members of or associates with that lawyer's new firm are treated in the same manner by paragraph (b). See also paragraph 19 of the comment to Rule 1.06.

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

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

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

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

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

Rule 1.10 Imputation of Conflicts of Interest: General Rule (Final Recommended Version)

Proposed Rule

Rule 1.10: Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.06 or 1.09,[5] unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.09(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.05 and 1.09(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.06.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.[6]

---

[5] In proposed Rule 1.10, "Rule 1.09" refers to proposed Rule 1.09 above. It does not refer to current Rule 1.09.
[6] In proposed Rule 1.10, "Rule 1.11" refers to current Rule 1.10, which would be renumbered as Rule 1.11.

Comment:

Definition of "Firm"

1. For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.00(g).[7] Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.00, Comments 2-4.[8]

Principles of Imputed Disqualification

2. The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.09(b) and 1.10(a)(2) and 1.10(b).

3. The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

4. The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.00(s)[9] and 5.03.[10]

5. Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person where the matter is the

---

[7] Proposed Rule 1.00(g) defines "Firm" and/or "Law firm."
[8] This refers to proposed Rule 1.00.
[9] Proposed Rule 1.00(s) defines "Screened."
[10] Rule 5.03 (Responsibilities Regarding Nonlawyer Assistants) relates to a nonlawyer employed or retained by or associated with a lawyer.

same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.05 and 1.09(c).

6. Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.06.

7. Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Comments 8-10, Rule 1.00.[11] Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.
8. Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

9. The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

10. Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11,[12] not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

11. Where a lawyer is prohibited from engaging in certain transactions under Rule 1.08, paragraph (i) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[11] This refers to proposed Rule 1.00.
[12] Comment 11 refers to Rule 1.11 (Successive Government and Private Employment) after the proposed renumbering of current Rule 1.10 as Rule 1.11.

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

Texas Disciplinary Rules of Professional Conduct
Rule 1.00. Terminology
Rule 1.09. Conflict of Interest: Former Client
Rule 1.10. Imputation of Conflicts of Interest: General Rule
Rule 3.09. Special Responsibilities of a Prosecutor

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 rules. The committee will accept comments concerning the proposed rules through April 5, 2022. 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 rules by teleconference at 10 a.m. CDT on April 6, 2022. For teleconference participation information, please go to texasbar.com/cdrr/participate.

This draft includes two proposed rules, numbered 1.09 to 1.10. Together, those two proposed rules would replace one rule, namely current Rule 1.09. Current Rules 1.10-1.16 would remain in effect and would be renumbered as Rules 1.11-1.17. Cross-references contained in the Texas Disciplinary Rules of Professional Conduct would be updated accordingly.

Proposed Rules (Redline Version)

Rule 1.00. Terminology

(a) "Adjudicatory Official" denotes a person who serves on a Tribunal.

(b) "Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.

(c) "Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(d) "Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

(e) "Consult" or "Consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(f) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (j) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(g) "Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

(h) "Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

(i) "Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or negligent failure to apprise another of relevant information.

(j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about material risks of and reasonably available alternatives to the proposed course of conduct. If a rule calling for informed consent requires specific disclosures (see, e.g., Rule 1.06(c)(2)), consent is not informed unless those disclosures have been made.

(k) "Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(l) "Law firm": see "Firm."

(m) "Partner" denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.

(n) "Person" includes a legal entity as well as an individual.

(o) "Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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

(q) "Represent," "Represents," or "Representation." A lawyer represents a person if the person is a client of the lawyer. If the relationship of client and lawyer terminates, the lawyer's representation of the client terminates.

(r) "Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

(s) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(t) "Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

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

(v) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment:

Confirmed in Writing

1. If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

2. Whether two or more lawyers constitute a firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

3. With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

4. Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

5. When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under applicable substantive or procedural law and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. Silence may be fraudulent if there is a duty to speak and intent to deceive. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

6. Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person. The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less

information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

7. Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. In emergency circumstances, or situations where a full discussion of risks or alternatives would threaten the best interests of the client or other person, the usual standards for informed consent do not apply.

Screened

8. This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules that expressly permit screening.

9. The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

10. In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Rule 1.09. Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.05 and 1.09(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment:

1. After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment 9. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.[1]

2. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

3. Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however,

the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

4. When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

5. Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.05 and 1.09(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b)[2] for the restrictions on a firm once a lawyer has terminated association with the firm.

6. Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

7. Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.05 and 1.09(c).

8. Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

9. The provisions of this Rule are for the protection of former clients and can be waived[3] if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.00(j).[4] With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.[5]

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

~~(1) in which such other person questions the validity of the lawyer's services or work product for the former client;~~

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

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

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

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

~~**Comment:**~~

~~1. Rule 1.09 addresses the circumstances in which a lawyer in private practice, and other lawyers who were, are or become members of or associated with a firm in which that lawyer practiced or practices, may represent a client against a former client of that lawyer or the lawyer's former firm. Whether a lawyer, or that lawyer's present or~~

former firm, is prohibited from representing a client in a matter by reason of the lawyer's successive government and private employment is governed by Rule 1.10 rather than by this Rule.

2. Paragraph (a) concerns the situation where a lawyer once personally represented a client and now wishes to represent a second client against that former client. Whether such a personal attorney client relationship existed involves questions of both fact and law that are beyond the scope of these Rules. See Preamble: Scope. Among the relevant factors, however, would be how the former representation actually was conducted within the firm; the nature and scope of the former client's contacts with the firm (including any restrictions the client may have placed on the dissemination of confidential information within the firm); and the size of the firm.

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

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

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

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

5. Paragraph (b) extends paragraph (a)'s limitations on an individual lawyer's freedom to undertake a representation against that lawyer's former client to all other lawyers who are or become members of or associated with the firm in which that lawyer is practicing. Thus, for example, if a client severs the attorney client relationship with a lawyer who remains in a firm, the entitlement of that individual lawyer to undertake a representation against that former client is governed by paragraph (a); and all other lawyers who are or become members of or associated with that lawyer's firm are treated in the same manner by paragraph (b). Similarly, if a lawyer severs his or her association with a firm and that firm retains as a client a person whom the lawyer personally represented while with the firm, that lawyer's ability thereafter to undertake a representation against that client is governed by paragraph (a); and all other lawyers who are or become members of or associates with that lawyer's new firm are treated in the same manner by paragraph (b). See also paragraph 19 of the comment to Rule 1.06.

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

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

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

~~(3), or (4), however, unless the protected information is actually used. Likewise, a lawyer is not subject to discipline under this Rule unless the new representation by the lawyer in reasonable probability would result in a violation of those provisions.~~

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

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

Rule 110. Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.06 or 1.09,[6] unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.09(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.05 and 1.09(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.06.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.[7]

Comment:

Definition of "Firm"

1. For purposes of the Rules of Professional Conduct, the term "Firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.00(g),[8] Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.00, Comments 2-4.[9]

Principles of Imputed Disqualification

2. The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.09(b) and 1.10(a)(2) and 1.10(b).

3. The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

4. The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.00(s)[10] and 5.03.

5. Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.05 and 1.09(c).

6. Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.06.

7. Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Comments 8-10, Rule 1.00.[11] Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

8. Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

9. The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

10. Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11,[12] not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

11. Where a lawyer is prohibited from engaging in certain transactions under Rule 1.08, paragraph (i) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Rule 3.09. Special Responsibilities of a Prosecutor
The prosecutor in a criminal case shall:

(a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

(f) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(g) The duty to disclose exculpatory and mitigating evidence as provided by this rule and constitutional and statutory authorities is a continuing duty. A prosecutor is not relieved of the duty to disclose because he or she no longer works in the jurisdiction in which the conviction was obtained or is no longer working as a prosecutor.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment:
Source and Scope of Obligations
1. A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate. This responsibility carries with it a

number of specific obligations. Among these is to see that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause. See paragraph (a). In addition a prosecutor should not initiate or exploit any violation of a suspect's right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pre-trial, trial, or post-trial rights from unrepresented persons. See paragraphs (b) and (c). In addition, a prosecutor is obliged to see that the defendant is accorded procedural justice, that the defendant's guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor. See paragraph (d). Finally, a prosecutor is obliged by this rule to take reasonable measures to see that persons employed or controlled by him refrain from making extrajudicial statements that are prejudicial to the accused. See paragraph (e) and Rule 3.07. See also Rule 3.03(a)(3), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.04.

2. Paragraph (a) does not apply to situations where the prosecutor is using a grand jury to determine whether any crime has been committed, nor does it prevent a prosecutor from presenting a matter to a grand jury even though he has some doubt as to what charge, if any, the grand jury may decide is appropriate, as long as he believes that the grand jury could reasonably conclude that some charge is proper. A prosecutor's obligations under that paragraph are satisfied by the return of a true bill by a grand jury, unless the prosecutor believes that material inculpatory information presented to the grand jury was false.

3. Paragraph (b) does not forbid the lawful questioning of any person who has knowingly, intelligently and voluntarily waived the rights to counsel and to silence, nor does it forbid such questioning of any unrepresented person who has not stated that he wishes to retain a lawyer and who is not entitled to appointed counsel. See also Rule 4.03.

4. Paragraph (c) does not apply to any person who has knowingly, intelligently and voluntarily waived the rights referred to therein in open court, nor does it apply to any person appearing pro se with the approval of the tribunal. Finally, that paragraph does not forbid a prosecutor from advising an unrepresented accused who has not stated he wishes to retain a lawyer and who is not entitled to appointed counsel and who has indicated in open court that he wishes to plead guilty to charges against him of his pre-trial, trial and post-trial rights, provided that the advice given is accurate; that it is undertaken with the knowledge and approval of the court; and that such a practice is not otherwise prohibited by law or applicable rules of practice or procedure.

5. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

6. Subparagraph (e) does not subject a prosecutor to discipline for failing to take measures to prevent investigators, law enforcement personnel or other persons assisting or associated with the prosecutor, but not in his employ or under his control, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.07. To the extent feasible, however, the prosecutor should make reasonable efforts to discourage such persons from making statements of that kind.

7. When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (f) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (f) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.02 and 4.03, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

8. Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

9. A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (f) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule. **TBJ**

Notes

1. Current Rule 1.10 (Successive Government and Private Employment) is proposed to be renumbered as Rule 1.11. Comment 1 refers to Rule 1.11 after the proposed renumbering.
2. Comment 5 refers to proposed Rule 1.10 (Imputation of Conflicts of Interest: General Rule). It does not refer to current Rule 1.10 (Successive Government and Private Employment), which is proposed to be renumbered as Rule 1.11.
3. The subject of advance waiver of a conflict of interest is not expressly addressed in the current Texas Rules, and the Committee on Disciplinary Rules and Referenda has not yet considered that topic.
4. Proposed Rule 1.00(j) defines "Informed consent."
5. Comment 9 refers to proposed Rule 1.10 (Imputation of Conflicts of Interest: General Rule). It does not refer to current Rule 1.10 (Successive Government and Private Employment), which is proposed to be renumbered as Rule 1.11.
6. In proposed Rule 1.10, "Rule 1.09" refers to proposed Rule 1.09. It does not refer to current Rule 1.09.
7. In proposed Rule 1.10, "Rule 1.11" refers to current Rule 1.10 (Successive Government and Private Employment), which would be renumbered as Rule 1.11.
8. Proposed Rule 1.00(g) defines "Firm" and "Law firm."
9. Comment 1 refers to proposed Rule 1.00 and interpretive comments.
10. Proposed Rule 1.00(s) defines "Screened."
11. Comment 7 refers to proposed Rule 1.00 and interpretive comments.
12. Comment 10 refers to Rule 1.11 after the proposed renumbering of current Rule 1.10 (Successive Government and Private Employment) as Rule 1.11.

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

Texas Disciplinary Rules of Professional Conduct
Rule 1.00. Terminology
Rule 1.09. Conflict of Interest: Former Client
Rule 1.10. Imputation of Conflicts of Interest: General Rule
Rule 3.09. Special Responsibilities of a Prosecutor

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 rules. The committee will accept comments concerning the proposed rules through April 5, 2022. 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 rules by teleconference at 10 a.m. CDT on April 6, 2022. For teleconference participation information, please go to texasbar.com/cdrr/participate.

This draft includes two proposed rules, numbered 1.09 to 1.10. Together, those two proposed rules would replace one rule, namely current Rule 1.09. Current Rules 1.10-1.16 would remain in effect and would be renumbered as Rules 1.11-1.17. Cross-references contained in the Texas Disciplinary Rules of Professional Conduct would be updated accordingly.

Proposed Rules (Clean Version)

Rule 1.00. Terminology

(a) "Adjudicatory Official" denotes a person who serves on a Tribunal.

(b) "Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.

(c) "Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(d) "Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

(e) "Consult" or "Consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(f) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (j) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(g) "Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

(h) "Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

(i) "Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or negligent failure to apprise another of relevant information.

(j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about material risks of and reasonably available alternatives to the proposed course of conduct. If a rule calling for informed consent requires specific disclosures (see, e.g., Rule 1.06(c)(2)), consent is not informed unless those disclosures have been made.

(k) "Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(l) "Law firm": see "Firm."

(m) "Partner" denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.

(n) "Person" includes a legal entity as well as an individual.

(o) "Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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

(q) "Represent," "Represents," or "Representation." A lawyer represents a person if the person is a client of the lawyer. If the relationship of client and lawyer terminates, the lawyer's representation of the client terminates.

(r) "Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

(s) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(t) "Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

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

(v) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment:

Confirmed in Writing

1. If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

2. Whether two or more lawyers constitute a firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

3. With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

4. Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

5. When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under applicable substantive or procedural law and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. Silence may be fraudulent if there is a duty to speak and intent to deceive. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

6. Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person. The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to

seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

7. Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. In emergency circumstances, or situations where a full discussion of risks or alternatives would threaten the best interests of the client or other person, the usual standards for informed consent do not apply.

Screened

8. This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules that expressly permit screening.

9. The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

10. In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Rule 1.09. Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.05 and 1.09(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment:

1. After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment 9. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.[1]

2. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. The

underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

3. Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

4. When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

5. Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.05 and 1.09(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b)[2] for the restrictions on a firm once a lawyer has terminated association with the firm.

6. Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

7. Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.05 and 1.09(c).

8. Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

9. The provisions of this Rule are for the protection of former clients and can be waived[3] if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.00(j).[4] With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.[5]

Rule 1.10. Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.06 or 1.09,[6] unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.09(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.05 and 1.09(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.06.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.[7]

Comment:

Definition of "Firm"

1. For purposes of the Rules of Professional Conduct, the term "Firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.00(g).[8] Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.00, Comments 2-4.[9]

Principles of Imputed Disqualification

2. The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.09(b) and 1.10(a)(2) and 1.10(b).

3. The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

4. The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.00(s)[10] and 5.03.

5. Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.05 and 1.09(c).

6. Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.06.

7. Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Comments 8-10, Rule 1.00.[11] Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

8. Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

9. The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the

screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

10. Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11,[12] not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

11. Where a lawyer is prohibited from engaging in certain transactions under Rule 1.08, paragraph (i) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Rule 3.09. Special Responsibilities of a Prosecutor
The prosecutor in a criminal case shall:

(a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

(f) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(g) The duty to disclose exculpatory and mitigating evidence as provided by this rule and constitutional and statutory authorities is a continuing duty. A prosecutor is not relieved of the duty to disclose because he or she no longer works in the jurisdiction in which the conviction was obtained or is no longer working as a prosecutor.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment:
Source and Scope of Obligations
1. A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate. This responsibility carries with it a number of specific obligations. Among these is to see that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause. See paragraph (a). In addition a prosecutor should not initiate or exploit any violation of a suspect's right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pre-trial, trial, or post-trial rights from unrepresented persons. See paragraphs (b) and (c). In addition, a prosecutor is obliged to see that the defendant is accorded procedural justice, that the defendant's guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor. See paragraph (d). Finally, a prosecutor is obliged by this rule to take reasonable measures to see that persons employed or controlled by him refrain from making extrajudicial statements that are prejudicial to the accused. See paragraph (e) and Rule 3.07. See also Rule 3.03(a)(3), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.04.

2. Paragraph (a) does not apply to situations where the prosecutor is using a grand jury to determine whether any crime has been committed, nor does it prevent a prosecutor from presenting a matter to a grand jury even though he has some doubt as to what charge, if any, the grand jury may decide is appropriate, as long as he believes that the grand jury could reasonably conclude that some charge is proper. A prosecutor's obligations under that paragraph are satisfied by the return of a true bill by a grand jury, unless the prosecutor believes that material inculpatory information presented to the grand jury was false.

3. Paragraph (b) does not forbid the lawful questioning of any

person who has knowingly, intelligently and voluntarily waived the rights to counsel and to silence, nor does it forbid such questioning of any unrepresented person who has not stated that he wishes to retain a lawyer and who is not entitled to appointed counsel. See also Rule 4.03.

4. Paragraph (c) does not apply to any person who has knowingly, intelligently and voluntarily waived the rights referred to therein in open court, nor does it apply to any person appearing pro se with the approval of the tribunal. Finally, that paragraph does not forbid a prosecutor from advising an unrepresented accused who has not stated he wishes to retain a lawyer and who is not entitled to appointed counsel and who has indicated in open court that he wishes to plead guilty to charges against him of his pre-trial, trial and post-trial rights, provided that the advice given is accurate; that it is undertaken with the knowledge and approval of the court; and that such a practice is not otherwise prohibited by law or applicable rules of practice or procedure.

5. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

6. Subparagraph (e) does not subject a prosecutor to discipline for failing to take measures to prevent investigators, law enforcement personnel or other persons assisting or associated with the prosecutor, but not in his employ or under his control, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.07. To the extent feasible, however, the prosecutor should make reasonable efforts to discourage such persons from making statements of that kind.

7. When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (f) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (f) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.02 and 4.03, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

8. Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

9. A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (f) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule. **TBJ**

Notes

1. Current Rule 1.10 (Successive Government and Private Employment) is proposed to be renumbered as Rule 1.11. Comment 1 refers to Rule 1.11 after the proposed renumbering.
2. Comment 5 refers to proposed Rule 1.10 (Imputation of Conflicts of Interest: General Rule). It does not refer to current Rule 1.10 (Successive Government and Private Employment), which is proposed to be renumbered as Rule 1.11.
3. The subject of advance waiver of a conflict of interest is not expressly addressed in the current Texas Rules, and the Committee on Disciplinary Rules and Referenda has not yet considered that topic.
4. Proposed Rule 1.00(j) defines "Informed consent."
5. Comment 9 refers to proposed Rule 1.10 (Imputation of Conflicts of Interest: General Rule). It does not refer to current Rule 1.10 (Successive Government and Private Employment), which is proposed to be renumbered as Rule 1.11.
6. In proposed Rule 1.10, "Rule 1.09" refers to proposed Rule 1.09. It does not refer to current Rule 1.09.
7. In proposed Rule 1.10, "Rule 1.11" refers to current Rule 1.10 (Successive Government and Private Employment), which would be renumbered as Rule 1.11.
8. Proposed Rule 1.00(g) defines "Firm" and "Law firm."
9. Comment 1 refers to proposed Rule 1.00 and interpretive comments.
10. Proposed Rule 1.00(s) defines "Screened."
11. Comment 7 refers to proposed Rule 1.00 and interpretive comments.
12. Comment 10 refers to Rule 1.11 after the proposed renumbering of current Rule 1.10 (Successive Government and Private Employment) as Rule 1.11.

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.00. Terminology

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 July 13, 2021. 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 at 10:30 a.m. CDT on June 10, 2021. For teleconference participation information, please go to texasbar.com/cdrr/participate.

Proposed Rule

Rule 1.00. Terminology

(a) "Adjudicatory Official" denotes a person who serves on a Tribunal.

(b) "Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.

(c) "Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(d) "Client." A person is a client when:

(1) the person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(i) the lawyer manifests to the person consent to do so; or

(ii) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

(e) "Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

(f) "Consult" or "Consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(g) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (k) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(h) "Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

(i) "Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

(j) "Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or negligent failure to apprise another of relevant information.

(k) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about material risks of and reasonably available alternatives to the proposed course of conduct. If a rule calling for informed consent requires specific disclosures (see, e.g., Rule 1.06(c)(2)), consent is not informed unless those disclosures have been made.

(l) "Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(m) "Law firm": see "Firm."

(n) "Partner" denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.

(o) "Person" includes a legal entity as well as an individual.

(p) "Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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

(r) "Represent," "Represents," or "Representation." A lawyer represents a person if the person is a client of the lawyer. See "Client." If the relationship of client and lawyer terminates, the lawyer's representation of the client terminates.

(s) "Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

(t) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(u) "Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

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

(w) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment:

Client

1. An attorney-client relationship is created only three ways: by judicial appointment, by express agreement, or by mistake. Two of the three ways of establishing a lawyer-client relationship—court appointment and express agreement—are relatively formal and easy to recognize. For an attorney-client relationship to arise by mistake, three things are necessary. First, the person must manifest an intent that the lawyer provide legal services. Second, the lawyer must fail to manifest lack of consent to do so. Third, the lawyer must know, or reasonably should know, that the person reasonably relies on the lawyer to provide legal services. By itself, a unilateral belief on the part of a person that the lawyer will provide legal services is insufficient to create a lawyer-client relationship.

Confirmed in Writing

2. If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

3. Whether two or more lawyers constitute a firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

4. With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

5. Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

6. When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under applicable substantive or procedural law and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. Silence may be fraudulent if there is a duty to speak and intent to deceive. For purposes of these Rules, it is not necessary that anyone has

suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

7. Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person. The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

8. Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. In emergency circumstances, or situations where a full discussion of risks or alternatives would threaten the best interests of the client or other person, the usual standards for informed consent do not apply.

Screened

9. This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules that expressly permit screening.

10. The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

11. In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening. **TBJ**

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.00. Terminology

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 October 6, 2020. 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 at 10:30 a.m. CDT on September 17, 2020. For teleconference participation information, please go to texasbar.com/cdrr/participate.

Proposed Rule (Redline Version)

Rule 1.00. Terminology

(a) "Adjudicatory Official" denotes a person who serves on a Tribunal.

(b) "Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.

(c) "Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(d) "Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

(e) "Consult" or "Consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(f) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (j) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(g) "Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

(h) "Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

(i) "Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

(j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about material risks of and reasonably available alternatives to the proposed course of conduct.

(k) "Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(l) "Law firm": see "Firm."

(m) "Partner" denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.

(n) "Person" includes a legal entity as well as an individual.

(o) "Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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

(q) "Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

(r) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(s) "Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

(t) "Tribunal" denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. "Tribunal" includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees,

arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

(u) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Proposed Rule (Clean Version)

Rule 1.00. Terminology

(a) "Adjudicatory Official" denotes a person who serves on a Tribunal.

(b) "Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.

(c) "Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(d) "Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

(e) "Consult" or "Consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(f) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (j) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(g) "Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

(h) "Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

(i) "Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

(j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about material risks of and reasonably available alternatives to the proposed course of conduct.

(k) "Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(l) "Law firm": see "Firm."

(m) "Partner" denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.

(n) "Person" includes a legal entity as well as an individual.

(o) "Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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

(q) "Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

(r) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(s) "Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

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

(u) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. **TBJ**

Committee on Disciplinary Rules and Referenda
Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.00. Terminology

Public Comments Received
September 1, 2020, through October 6, 2020

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comment in support of Proposed changes to Rules 1.00, 1.18
Date: Tuesday, September 1, 2020 9:50:45 AM

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

Contact

First Name	Nathan
Last Name	Block
Email	[redacted]
Member	Yes
Barcard	24005355

Feedback

Subject	Comment in support of Proposed changes to Rules 1.00, 1.18

Comments

I am very much in favor of adoption of the proposed changes to rules 1.00 and 1.18. They appear to codify what has always been the expectation of ethical practice and are entirely appropriate.

From: Kent Canada
To: cdrr
Subject: Comment to Proposed Rules -- 1.00 and 1.18
Date: Tuesday, September 1, 2020 10:03:13 AM

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

How could a "screen" possibly work in today's electronic world?

These proposed changes are a bad idea.

Kent Canada

--
Kent Canada
Attorney at Law
1900 Preston Road #267 - PMB 238
Plano, Texas 75093

[redacted]
800-425-5059 telecopy

Twitter: LegalReason

From: [redacted]
To: cdrr
Subject: CDRR Comment: Rule 1.00
Date: Wednesday, September 2, 2020 9:31:39 AM

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

Contact

First Name	robert
Last Name	schuwerk
Email	[redacted]
Member	Yes
Barcard	17855300

Feedback

Subject	Rule 1.00

Comments

I assume that the underlying text being edited is the Preamble section of our current rules. My comments are: (i) should the definition of "prospective client" currently contained in proposed Rule 1.18 be moved up here?; (ii) should we take a shot at defining "client," "represent" and "personally represent"? Many years ago, the drafting committee that assembled the TDRPC punted on defining those terms but it might be worth taking another run at doing that.

To: Texas State Bar CDRR
From: Roy Leatherberry (TSB# 00789441)
Re: Proposed Amendments to Rule 1.00 and New Rule 1.18
Date: October 6, 2020

I am writing the Committee to encourage the Committee to decline to press forward with the proposals regarding these rules.

ABA Model Rule 1.18 was initially proposed as part of the Ethics 2000 Commission of the ABA with the intent of incorporating the Restatement of the Law Governing Lawyers. However, as is often the case, the "Restatement" was not a restatement of law at all but, rather, the expression of a desire as to what the law ought to be.

Beginning in 2005 various states began adopting the Rule in one form or another.

Texas did not.

Multiple referendums have occurred in Texas and the consistent opinion of the Texas legal community is that this rule is not only not necessary, it is not desirable.

In a 2010 article[1], Kenno L. Peterson summarized what had occurred through that date and provided a nice chart comparing the ABA rule to the rule as proposed at that time (which was numbered 1.17). There were numerous differences that had been incorporated, which recognize the problems associated with the ABA Model Rule. Mr. Peterson stated:

> Both proposed Rule 1.17 and ABA Rule 1.18 recognize that, while it is important to protect a prospective client's interests, the protections afforded to a prospective client generally should not be as extensive as the protections afforded to an actual client to whom a lawyer owes the full range of fiduciary duties. But these rules, as well as other related rules, approach this balancing act in fairly divergent ways.

One of the additions to the proposed rule was the inclusion of a "good faith" requirement on the part of the prospective client.

> As explained in comment 3 to the proposed rule, "[t]he requirement in paragraph (a) that a lawyer's services be sought 'in good faith' is intended to preclude the tactical disclosure of confidential information to a lawyer so as to prevent the individual lawyer or the lawyer's firm from representing an adverse party."

Another point of deviation between the Model rule and the proposed rule was noted:

> In addition, proposed Rule 1.17(c), like other proposed rules, does not follow the ABA in referring to a "disqualified" lawyer. The concepts of discipline and disqualification, while related, are not the same. In that regard, paragraph 13 of the

[1] 23 App. Advoc. 268.

> preamble to the proposed rules provides that "these Rules are not designed to be standards for procedural decisions, such as disqualification." And paragraph 20 of the preamble to the ABA rules provides similarly that "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation." To avoid any unintended blurring of the standards of disqualification and discipline, the proposed rules simply do not refer to disqualified lawyers or disqualification.

The rules proposed in 2020, tracking more closely the Model rule, do not seem to have considered the work that had been undertaken prior to the 2010 proposals.

Nevertheless, during the 2011 Referendum, as recognized in the March 2011 edition of the Texas Bar Journal, the proposed amendments "went down in flames."[2] More than 77% of the votes were *against* this rule.[3]

It is not clear why, under the circumstances, why anyone thinks that this rule should rise from those flames, especially in a format that was not even acceptable to the committee members and the Supreme Court in 2010, prior to the referendum.

This ABA Model Rule is and has always been an attempt to impose, on the legal community, *policy* concerns by an obvious *minority* in a manner that rejects the entirety of the common law in Texas.

In *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*,[4] the Texas Supreme Court observed: "It is by now axiomatic that legislative enactments generally establish public policy."[5]

The Legislature has *not* however, expressed any public policy suggesting an extension of a lawyer's duty to a non-client beyond that as already exists and which is well-reflected in the Formal Ethics opinions.

It is, and always has been the policy in Texas that the duty of an attorney is to the *client* and not some third party.[6] Texas Rule of Evidence 503(a)(1), of course, defines "client" as "a person … who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer."[7]

This is reflected in Opinion 651 by the Professional Ethics Committee for the State Bar of Texas in 2015.[8] The hypothetical presented involves a lawyer who invites the prospective client to send information and, despite warnings that the information would not be treated as confidential, the

---

[2] 74 Tex. B.J. 192 (2010).
[3] 74 Tex. B.J. 195 (2010).
[4] *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494 (Tex. 2015).
[5] *Id.* at 504.
[6] *See e.g.*, *Barcelo v. Elliot*, 923 S.W.2d 575, 577 (Tex. 1996).
[7] There seems to be a split of authority as to whether there is a presumption, including a conclusive presumption, as to whether confidential information was imparted. Compare *In re Gerry*, 173 S.W.3d 901 (Tex. App.—Tyler 2005, no pet.) and *In re Z.N.H.*, 280 S.W.3d 481 (Tex. App.—Eastland 2009, no pet.).
[8] 79 Tex. B.J. 44 (2016)

prospective client transmits such confidential information. Receipt of the information results in a determination that taking on of that prospective client would conflict with representation of a current client.

The Ethics opinion is that the individual submitting the information is *not* a client, although there may be a duty of confidentiality imposed that "may" create a conflict of interest with a current client.

The Ethics opinion then explicitly recognizes that *existing* Rules are sufficient to address the situation.

Under those rules, because the lawyer had previously provided notification to the prospective client that any communication would *not* be treated as confidential. Thus the committee concluded:

> [T]he law firm and its lawyers will not have an obligation to protect or refrain from using information received.

The rules currently proposed, however, would likely result in a very different conclusion which, thus, is not a conclusion that reflects *current* law but is, instead, reflective of a *policy* choice that has been rejected time and time again by the Texas legal community.

In drafting these comments I have done extensive multi-state research (both cases[9] and Ethics opinions[10]) into the situations involving this rule and it is clear that in those states where the Model Rule has been adopted, the rule is being used as a sword to prevent a party from having the representation that the party desires.

Thus, my major concern is that the rule will be interpreted in such a way as to deprive the *existing* client of the right to choose the attorney it desires. Attorneys are not fungible and the right to counsel of one's choice rests with the individual. It is, indeed, the constitutional right of an individual to have the attorney of its choice unless there are very strong reasons to not permit such.

---

[9] *Sturdivant v. Sturdivant*, 241 S.W.3d 740 (Ark. 2006); *ADP, Inc. v. PMJ Enterprises, LLC*., 2007 WL 836658 ((D.N.J. Mar. 14, 2007); *Phase II Chin, LLC v. Forum Shops, LLC*, 2009 WL 10709796, D.Nev. (Feb. 19, 2009); *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, Cal.App. 2 Dist., Apr. 07, 2010, as modified (May 06, 2010), review denied (Jun 23, 2010); *O Builders & Assoc. v. Yuna Corp.*, 19A3d 966 (N.J. 2011); *State ex rel. Thompson v. Dueker*, 346 S.W.3d 390 (Mo.App. E.D. 2011); *In re Marriage of Perry*, 293 P.3d 170 (Mont. 2013); *In re Carpenter*, 863 N.W.2d 223 (N.D. 2015); *Keuffer v. O.F. Mossberg & Sons, Inc.*, 373 P.3d 14 (Mont. 2016); *Xiao Hong Liu v. VMC East Coast LLC*, No. 16 CV 5184 (AMD)(RML), 2017 WL 4564744 (E.D.N.Y. Oct. 11, 2017); *Mt. Hebron District Missionary Baptist Association of AL, Inc. v. Sentinel Insurance Company, Limited*, 2017 WL 3928269, M.D.Ala. (Sep. 07, 2017); *Kidd v. Kidd*, 219 So.3d 1021 (Fla.App. 5 Dist 2017); *Lopez v. Flores*, 223 So.3d 1033 (Fla.App. 3 Dist 2017); *Skybell Tech., Inc. v. Ring Inc.*, No. SACV 18-00014 JVS (JDEx), 2018 WL 6016156 (C.D. Cal. Sept. 18, 2018); *Dahleh v. Mustafa*, 2018 WL 1167675, (N.D.Ill. Mar. 05, 2018); *In re Onejet, Inc*., 614 B.R. 522 (Bkrtcy.W.D.Pa. 2020); *Zalewski v. Shelroc Homes, LLC*, 856 F.Supp.2d 426 (N.D.N.Y 2020); *Ocean Thermal Energy Corp. v. Coe*, 2020 WL 5237276, C.D.Cal. (July 29, 2020).

[10] Formal Opinion 2006-2 (The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics); Iowa State Barr Association Opinion 07-02 (2007); Wisconsin Formal Ethics Opinion EF-10-03 (2010); Formal Opinion 2013-1 (The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics); ABA Formal Opinion 492 (June 9, 2020)

As explained by the U.S. Supreme Court in *Whole Woman's Health v. Hellerstedt*,[11] even if there were a legitimate state interest in a particular policy, a rule that has "the effect of placing a substantial obstacle in the path" of the consumer of the constitutionally protected service "cannot be considered a permissible means of serving its legitimate ends."

But, given that two decades has passed since the Model Rule was proposed, and given the overwhelming rejection of the rule by the legal community in Texas in 2011, it is clear that no legitimate state interest in passing this rule exists. If it did, then we would already have it.

In short, in light of the rule having already been rejected by the legal community in Texas, and in the absence of a clearly public policy rationale articulated by the legislature, there is simply no sound basis for proposing this rule at all.

Thank you for your attention to these comments.

[11] *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2309 (2016)

Committee on Disciplinary Rules and Referenda
Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.00. Terminology

Public Comments Received
May 10, 2021, through June 9, 2021

From: [redacted]
To: cdrr
Subject: CDRR Comment: Why?
Date: Monday, May 10, 2021 10:28:54 AM

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

Contact

First Name	Rush
Last Name	Wells
Email	[redacted]
Member	Yes
Barcard	21158500

Feedback

Subject	Why?

Comments

Why not just attach the proposed langusge eithimn the email??

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comment on Rule 1
Date: Monday, May 10, 2021 10:46:36 AM

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

Contact

First Name	Bruce
Last Name	Bain
Email	[redacted]
Member	Yes
Barcard	01546700

Feedback

Subject	Comment on Rule 1

Comments

D 3. Are you guy serious? You are absolutely creating a problem. Why do you feel compelled to change things all the time? Do you not have anything to do in real life?

From: Steve Waldman
To: cdrr
Subject: Proposed Rule 1.00 of the Texas Disciplinary Rules of Professional Conduct
Date: Monday, May 10, 2021 10:53:38 AM
Attachments: image005.png
image006.png

Regarding proposed Rule 1.00(d), which states as follows:

(d) "Client." A person is a client when:

(1) the person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(i) the lawyer manifests to the person consent to do so; or

(ii) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

The use of the word "manifest," in (i) and (ii), being undefined, may permit an attorney-client relationship to be formed without any express communication by the attorney or the putative client. Further, the "reasonably" standard in (ii) may a person to become the "client" of a lawyer without any action or knowledge on the part of the lawyer, or any actual reliance by the person.

The rule would be more appropriately written as follows:

(d) "Client." A person is a client when:

(1) the person communicates to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(i) the lawyer communicates to the person consent to do so; or

(ii) the lawyer fails to communicate lack of consent to do so, and the lawyer has actual knowledge that the person relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

Respectfully,

Steve Waldman

Steve Waldman
Attorney at Law
[redacted]
P: (713) 830-7085 | F: (713) 973-1188 | vCard
8584 Katy Freeway Suite 100, Houston, TX 77024
Terry Bryant PLLC | https://www.terrybryant.com

BOARD CERTIFIED
Texas Board of Legal Specialization
PERSONAL INJURY TRIAL LAW

NEW REFERRAL?

TERRYBryant
ACCIDENT & INJURY LAW

CONFIDENTIALITY NOTICE This email and any attachments are confidential and may be protected by legal privilege. No confidentiality or privilege is waived or lost by any mis-transmission. If you are not the intended recipient, be aware that any disclosure, copying, distribution, or use of this email or any attachment is prohibited. If you are not the intended recipient of this message, please immediately destroy this message and kindly notify the sender by email or at 1-713-973-8888. Thank you for your anticipated cooperation.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Attorney-Client Relationship
Date: Monday, May 10, 2021 10:54:22 AM

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

Contact

First Name	Darren
Last Name	Anderson
Email	[redacted]
Member	Yes
Barcard	00792331

Feedback

Subject	Attorney-Client Relationship

Comments

An attorney client relationship being created by "mistake" is the most ludicrous thing I have ever heard. The myriad of situations that may inadvertently create an attorney-client relationship is never ending and very subjective. This simply creates a mine field particularly, for the firms and general solo practice attorneys. And is simply not necessary for the integrity of the profession!!!

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comment on Rule 1.00
Date: Monday, May 10, 2021 11:31:13 AM

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

Contact

First Name	Stephen
Last Name	Niermann
Email	[redacted]
Member	Yes
Barcard	15027300

Feedback

Subject	Comment on Rule 1.00

Comments

I think the Rule is good, but we need to add something: There is a growing problem where a lawyer makes an "informal inquiry" for a "potential client" or "relative", in pending litigation. This problem crops up in scenarios, where the lawyer has not been retained and wants to minimize the cost of his involvement. When the next step is entry of default judgment, setting a hearing, or enforcement of unanswered discovery, the honest attorney does not know whether he is supposed to give notice directly to the pro se litigant or if he has a duty to notify the lawyer making to informal inquiry. This is not only confusing to me, but potentially to the judge, clerk and both clients. I think the rule should be amended to add: "No attorney shall make inquiry in pending litigation for another litigant unless and until the attorney has been hired. Any attorney making informal inquiry shall confirm in writing that the attorney has been hired by the litigant, as soon as practicable after being retained. Opposing counsel shall not be required to rely on any representations or instructions unless opposing counsel has received a notice of appearance.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Disagree with the concept that an attorney client relationship can be created by mistake
Date: Monday, May 10, 2021 11:38:28 AM

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

Contact

First Name	mary
Last Name	taylor
Email	[redacted]
Member	Yes
Barcard	19713650

Feedback

Subject	Disagree with the concept that an attorney client relationship can be created by mistake

Comments

The attorney client relationship is based on a contract. If no meeting of the minds exists there is no contract. Let's not create another standard for lawyers and allow them to unwittingly become subject to liability as well as the ACP.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rule 1.00, TDRPC - Terminology
Date: Monday, May 10, 2021 12:01:57 PM

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

Contact

First Name	Julie
Last Name	Camacho
Email	[redacted]
Member	Yes
Barcard	24032904

Feedback

Subject	Proposed Rule 1.00, TDRPC - Terminology

Comments

1.00 (1)(d)(1)(ii) could be construed to create an attorney client relationship based on an email contact form. If a firm gets hundreds of contacts, and many appear to be spam, they cannot be expected to decline representation of every person that contacts them through their website Contact form. It also would be a problem in the event an email directed to a firm attorney goes to Spam and is never actually viewed by the attorney. It seems too broad.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rule 1.00 Terminology (subsection (d))
Date: Monday, May 10, 2021 4:14:53 PM

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

Contact

First Name	Andrew
Last Name	Bolton
Email	[redacted]
Member	Yes
Barcard	00785706

Feedback

Subject	Proposed Rule 1.00 Terminology (subsection (d))

Comments

A person should only become a client when that person "manifests to a lawyer the person's PRESENT intent to have the lawyer provide CURRENT legal services for the person; and either . . . ." ------ Can you not envision a situation wherein a lawyer is holding her drink at a dinner party and a friend says, "Jane, I believe that my neighbor has sued me, will you help me out on that?" and the lawyer replying "Joe, just let me know when he serves you with the petition?" I do not want THAT exchange to constitute the initiation of a lawyer-client relationship! This exchange is more of an "invitation to negotiate" such a relationship in the future. We should have CURRENT intent included here.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rule 1.00
Date: Tuesday, May 11, 2021 9:49:03 AM

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

Contact

First Name	Jani
Last Name	Maselli Wood
Email	[redacted]
Member	Yes
Barcard	00791195

Feedback

Subject	Proposed Rule 1.00

Comments

I have some concern over the new definition of "client." Specifically ,this new definition of client: (ii) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services. I worked as a public defender for many years. I started out as a lawyer for Inmate Legal Services. And as an appellate attorney for most of my 27 years or so - I get lots of correspondence form inmates. Anytime there is a published case where I have won, the letters come by the dozens. And the refrain is sadly, "My case is just like the case you won. Will you file something for me?" I try to respond to all letters letting people know that I cannot represent them. But frequently, that message is ignored or misunderstood and I get repeated letters. This new definition of client - especially with the comment - "the lawyer must fail to manifest lack of consent to do so. Third, the lawyer must know, or reasonably should know, that the person reasonably relies on the lawyer to provide legal services" is especially problematic. What is the time frame for telling someone who has written me a letter that I do not represent them? Am I required to search them out because of a transfer within TDCJ? What are my duties when they tell me to call a family member about my representation? (This happens regularly). I try to respond to all mail from people including those I do not represent. But now it appears my duty becomes more urgent for nonclients because of this definition. Thank you for considering my comment.

From: James Adams
To: cdrr
Subject: Comment re: stupid proposed Texas DR Rule 1.00 Terminology
Date: Tuesday, May 11, 2021 1:35:26 PM

DISCUSSION RE: (d) "Client." A person is a client when: (1) the person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (i) the lawyer manifests to the person consent to do so; or (ii) the lawyer **fails to manifest lack of consent to do so**, and the **lawyer knows or reasonably should know** that the person reasonably relies on the lawyer to provide the services; o

https://www.texasbar.com/Content/NavigationMenu/CDRR/Documents1/TDRPC_Terminology_Publication.pdf

When I was county attorney for some 34 years, people would show up at court claiming to have a lawyer and wondering where the lawyer was.

I would ask if the person paid the lawyer any money and if the answer was No, then I told them that they most likely had no lawyer, but to be safe, would call and the lawyer's secretary would usually confirm that the lawyer did not represent the person. No money, No lawyer. A simple rule everyone can understand and go by.

The old rule prevented hundreds of DR violation complaints over the decades and gave lawyers some breathing room. It also provided a bright line rule everyone could rely on without extra paperwork that had to be preserved for every person the lawyer ever talked to.

People usually don't have much exposure to lawyers and have to learn how it all works.

I had a guy show up once who claimed that he had the money ready for a real estate purchase. So when it came down to the closing date, he showed up with a mass-mailed form solicitation letter stating that he was pre-approved for a $30,000 loan. Do I have to tell you that he did not have the money as he thought?

Many decades ago, a story that was repeated as true, but I cannot verify it, which involved a man who was charged with murder. His defense was that he killed the man on advise of counsel.

Apparently, he found a lawyer at a bar who is reported to have said something to the effect that, If any SOB did that, I would kill him.

When examined in the trial, the lawyer did some fast talking, and the person was convicted of murder.

If this rule goes through, as I figure it will since state agencies tend to view themselves as accountable to no one, lawyers will go through a rough learning curve of this unjust rule.

The citizens will not be served very well when this rule makes talking to a lawyer will get even harder to do.

How can anyone know that they need a lawyer if lawyers require money up front just to talk? Why are you trying to increase the paperwork lawyers will have to keep up with? Is the disciplinary counsel sitting around with not enough to do and thought this might be a good way to occupy some time, maybe even get a bigger portion of the budget?

Lawyers can't pay bills with good looks, and getting called up on a DR violation like this one will simply makes practicing law more expensive and riskier.

As to the *clients* who seek out free advice from lawyers in barrooms, should they have a reasonable expectation of getting more value than they pay for?

Likewise, the definitions of informed consent and confirmed in writing should be rejected.

Yours truly,

J. Collier Adams, Jr.
SBN 00863400
Morton, Texas

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed changes to rule 1 definitions
Date: Tuesday, May 11, 2021 5:53:57 PM

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

Contact

First Name	Dennis
Last Name	Kan
Email	[redacted]
Member	Yes
Barcard	24092609

Feedback

Subject	Proposed changes to rule 1 definitions

Comments

The definition of client as proposed is absurd. No other fiduciary duty in society is formed unilaterally. The language "layer knew or reasonably should have know," is a useless standard. The burden this places on attorneys to gather additional information about prospective clients or individuals requesting representation is onerous. Consent to an attorney client relation is not truly consent if it can be forced upon an attorney. There is no other situation in society where lack of assent is construed as consent. Imagine if we used the proposed standard for attorney client relation in the dating context. That would never be acceptable. It should not be in the legal context. Lack of explicit rejection cannot be construed as consent. This sets an absurd precedent and should not be permitted. It exists in no other situation. Reject this proposal.

From:	Paul Koning
To:	cdrr
Cc:	Paul Koning
Subject:	Comments regarding proposed Rule 1.00(d) - Terminology -- "Client"
Date:	Monday, May 17, 2021 1:48:47 PM
Attachments:	Comments re Terminology.pdf

Attached please find a letter commenting on the proposed addition of a definition of the term "Client." Please do not hesitate to contact me with any questions. Thanks

Paul Koning

Paul Koning
Koning Rubarts LLP
1700 Pacific Ave., Suite 4500
Dallas, Texas 75201
214.751.7901 (direct)

KONING RUBARTS LLP

vCard | Bio | email

This electronic message contains information from the law firm of Koning Rubarts LLP. The contents may be privileged and confidential and are intended for the use of the intended addressee(s) only. If you are not an intended addressee, note that any disclosure, copying, distribution, or use of the contents of this message is prohibited. If you have received this e-mail in error, please contact me at [redacted].

KONING RUBARTS LLP

1700 Pacific Avenue • Suite 4500 • Dallas, Texas 75201 • O 214.751.7900 • F 214.751.7888 • www.koningrubarts.com

Paul M. Koning
214.751.7901
[redacted]

May 17, 2021

Committee on Disciplinary Rules and Referenda
M. Lewis Kinard, Chair

Re: Comments regarding proposed amendment to Texas Disciplinary Rules of Professional Conduct (Rule 1.00(d): Terminology - "Client")

Dear Mr. Kinard and Committee Members:

I write to comment on the proposed amendment of the Terminology section of the Texas Disciplinary Rules of Professional Conduct (the "Rules"), specifically the proposed addition of a definition for "Client." The proposed definition would appear as newly numbered Rule 1.00(d):

> (d) "Client." A person is a client when:
>
> > (1) the person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
> >
> > > (i) the lawyer manifests to the person consent to do so; or
> > >
> > > (ii) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
> >
> > (2) a tribunal with power to do so appoints the lawyer to provide the services.

I urge the Committee to delete the definition of "Client" from the proposed amendment. No other jurisdiction has adopted such a definition. And there are many good reasons not to do so. The formation, scope and continued existence of the lawyer-client relationship is far too nuanced to be reduced to a simple shorthand definition. Moreover, the proposed definition is not a complete statement of relevant Texas law and is, therefore, confusing and potentially misleading. Above all, there is simply no need to add a definition of "Client" to the Rules.

Defining "Client" is unnecessary and threatens to supplant the common law of Texas.

Neither the ABA Model Rules nor the disciplinary rules of any other United States jurisdiction contain a substantive definition of "Client."[1] It is my understanding that the drafters of the original Texas Rules (1990) debated whether to include such a definition—but intentionally decided not to do so. *See* R. Schuwerk, L. Hardwick, 48 Tex. Prac., Tex. Lawyer & Jud. Ethics § 5:6 (2021 ed.). The fact that no other jurisdiction has adopted a substantive definition of "Client" is telling. It can only be read as an acknowledgment that the formation of the lawyer-client relationship is a highly fact-intensive question that is not suitable for "one size fits all" treatment in a definition section of the disciplinary rules.

It appears that the Committee adopted the proposed definition from Section 14 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS. The Restatement is an excellent resource, but it is only an aspirational attempt to summarize the majority law in the United States. More importantly, it does not purport to be a summary of Texas law. Although Section 14 has been cited by intermediate Texas courts, it has not been adopted by the Texas Supreme Court. Simply put, it is not Texas law.

There is, on the other hand, ample Texas case law that defines the formation of a lawyer-client relationship. In general, a lawyer-client relationship may be based on express or implied contract, "[b]ut whether the agreement is express or implied, there must be evidence both parties intended to create an attorney-client relationship—one party's subjective belief is insufficient to raise a question of fact to defeat summary judgment." *Belliveau v. Barco, Inc.*, 987 F.3d 122, 133 (5th Cir. 2021). If the existence of a lawyer-client relationship is disputed, the question can be resolved only by objective evidence of what the parties said and did. *Kiger v. Balestri*, 376 S.W.3d 287, 291 (Tex. App.—Dallas 2012, pet. denied).

Whether a person is a client of lawyer is often a disputed and dispositive question of fact in professional liability cases. If the intent of the proposed definition is to incorporate a common law definition of the attorney-client relationship into the Rules, I would respectfully suggest that the proposed definition varies in important ways from the accepted standards in Texas. If, on the other hand, the committee's purpose is to create a new standard, the definition is bound to lead to confusion. Although the disciplinary rules state that they are not to be used as standards in civil litigation, they are frequently cited for exactly that purpose. Including a definition of "Client" in

[1] Alaska is the only jurisdiction that includes a definition of "Client" in its disciplinary rules. Alaska takes a very different approach. Alaska Rule 9.1(b) provides that "Client" "denotes a person, a public officer or agency, or a corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer."

the Rules that differs from existing common law jurisprudence will lead to uncertainty and unpredictable results.

A lawyer's limited duty to disclaim representation should not be conflated with the existence of an attorney-client relationship.

The proposed definition is particularly troubling because it conflates the formation of a lawyer-client relationship—a question of contract—with the duty to disclaim representation of non-clients in some circumstances—a question of negligence. "The general rule is that in absence of evidence that the attorney knew that the parties had assumed that he was representing them in a matter, the attorney had no affirmative duty to inform the person that he was not their attorney." *Parker v. Carnahan*, 772 S.W.2d 151, 157 (Tex. App.—Texarkana 1989, writ denied). "On the other hand, an attorney can be held negligent where he fails to advise a party that he is not representing them on a case where the circumstances lead the party to believe that the attorney is representing him." *Id*. When the facts require a disclaimer of representation, a failure to disclaim does not necessarily create a lawyer-contract relationship, with concomitant fiduciary responsibilities. It merely creates potential tort liability for injury suffered by the non-client's reasonable reliance on the belief that the lawyer was providing representation. *See id.* ("While we believe that the evidence negates the showing of an attorney-client relationship between the attorneys and Martha Parker, we find there is a fact issue on whether the attorneys were negligent in failing to advise Martha Parker that they were not representing her interests."); *see also Bergthold v. Winstead Sechrest & Minick, P.C.*, 2-07-325-CV, 2009 WL 226026, at *5 (Tex. App.—Fort Worth Jan. 29, 2009, no pet.) ("*Even in the absence of an attorney-client relationship*, an attorney may be liable for negligently failing to advise a party that he is not representing the party") (emphasis added).

By including the concept of the duty to disclaim in the definition of "Client", the proposed definition ignores this very important distinction and suggests that a failure to honor the duty to disclaim necessarily creates a lawyer-client relationship, which relationship would include other obligations such as a fiduciary duty. This is not Texas law.

The definition would create confusion for entities and their constituents. The Restatement itself recognizes that determining the existence of an attorney/client relationship is often very difficult when a lawyer represents a small entity with "extensive common ownership and management," such as a limited partnership. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. f. Factors to consider in determining whether an entity lawyer also represents an individual partner include:

> whether the lawyer affirmatively assumed the duty of individual representation, whether the partner had independent representation, whether the lawyer

> previously represented the partner on a personal basis, and whether the evidence demonstrates the partner's reliance on or expectations of the lawyer's separate representation.

MacFarlane v. Nelson, 03-04-00488-CV, 2005 WL 2240949, at *4 (Tex. App.—Austin Sept. 15, 2005, pet. denied). A simplified definition thus threatens to expand the disciplinary exposure of lawyers for entities, including in-house lawyers, who are often accused of personally representing the individual constituents with whom they communicate.

The proposed definition of "Client" is not limited to a particular matter. Another flaw in the proposed definition is that it does not confine the existence of the lawyer-client relationship to the specific matter that is the subject of the parties' agreement. The proposed definition refers to the status of "Client" as a generic or broad concept when that is not necessarily the case. A lawyer's duties, including the lawyer's fiduciary duties, extend only to the scope of the particular matter that is the subject of the parties' agreement. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 159 (Tex. 2004) ("a lawyer's fiduciary duties to a client, although extremely important, 'extend[ ] only to dealings within the scope of the underlying relationship of the parties.'"). Similarly, a lawyer-client relationship generally terminates upon the completion of the purpose of the employment, absent agreement to the contrary. *Stephenson v. LeBoeuf*, 16 S.W.3d 829, 836 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). The definition does not address these important limitations on the scope of the lawyer-client relationship, risking confusion as to the scope and extent of a person's status as "Client."

If it ain't broke . . .

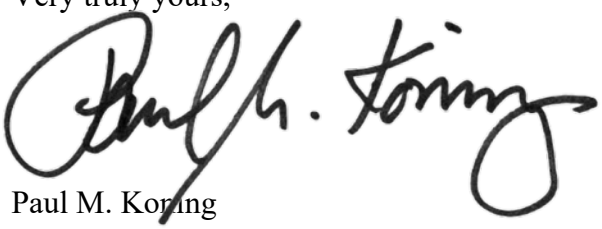
Texas is not required to follow the rest of the United States. But there is no reason why Texas should want to become an outlier on *this* issue. I have handled many grievances brought by alleged non-clients, and in no case has the complainant or respondent been hampered in asserting a claim or response because of the absence of a definition of "Client" in the Rules. To the extent a lawyer contests the existence of an attorney-client relationship, it is easy enough to state the relevant facts and cite applicable law. There is no need to insert an entirely new definition with unfamiliar terminology and concepts, particularly one that is not completely aligned with well-established Texas law.

In short, there is no good reason to add this definition and many reasons not to do so. Above all, adopting this definition will not bring the Rules in line with national standards. It will do just the opposite. I respectfully encourage the Committee to withdraw the definition of "Client" from proposed Rule 1.00.

KONING RUBARTS LLP

Thank you for considering these comments. I am available to discuss further at your convenience.

Very truly yours,



Paul M. Koning

The foregoing comments represent my personal views and not the views of Koning Rubarts, LLP, or the Professional Ethics Committee.

.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comment regarding proposed amendment to Rule 1.00(d): "Client"
Date: Monday, May 17, 2021 3:54:05 PM

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

Contact

First Name	Kelli
Last Name	Hinson
Email	[redacted]
Member	Yes
Barcard	00793956

Feedback

Subject	Comment regarding proposed amendment to Rule 1.00(d): "Client"

Comments

Dear Committee Members -- I urge the Committee not to include the proposed definition of "Client" in the Terminology section of the Texas Disciplinary Rules of Professional Conduct. This definition is not consistent with Texas law and would constitute a marked departure from prior Texas precedent. Most concerning, the proposed definition conflates the negligence-based duty from Parker v. Carnahan, 772 S.W.2d 151, 157 (Tex. App.--Texarkana 1989, writ denied), with the actual creation of an attorney-client relationship. Such a result is contrary to Texas law holding that, in order to create an attorney-client relationship, there must be evidence that both parties intended to create such a relationship. See, e.g., Belliveau v. Barco, Inc., 987 F.3d 122, 133 (5th Cir. 2021). There is ample case law in Texas regarding the creation of attorney-client relationships and what it means to be a "client" under Texas law. The proposed definition is unnecessary and, because it would put the disciplinary rules at odds with current Texas law, it would create unnecessary confusion as to the applicable standard for civil liability. Thank you for your consideration. Kelli Hinson

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Change to Rules- definition of "Client"
Date: Monday, May 17, 2021 5:56:32 PM

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

Contact

First Name	Steven
Last Name	Harr
Email	[redacted]
Member	Yes
Barcard	09035600

Feedback

Subject	Proposed Change to Rules- definition of "Client"

Comments

I write to comment on the proposed rule change of including a definition of "client". I oppose including the definition in its entirety. First, no other jurisdiction has adopted such a definition. There must be reasons even beyond the comments you will receive. Certainly the fact that 50 other state / DC bars have not adopted such a definition is compelling. Second, it's a land mine. You are creating a malpractice risk by by putting the burden on lawyers to "manifest" a lack of consent. That language is wildly open to interpretation. Finally, the establishment of the attorney client relationship is far to nuanced to be boiled down to a simple statement such as this. Please delete this amendment. If you don't all the other good work you have done will be lost as we will have to vote against the changes due to this problem. Thank you

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comments on proposed amendments to Rule 100(d)
Date: Tuesday, May 18, 2021 8:37:52 AM

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

Contact

First Name	Sim
Last Name	Israeloff
Email	[redacted]
Member	Yes
Barcard	10435380

Feedback

Subject	Comments on proposed amendments to Rule 100(d)

Comments

I am board certified in civil trial law and have over 38 years' experience in commercial litigation and attorney malpractice. I also serve as the Firm Counsel to my law firm. I write to express disapproval of the proposed amendment to the definition of "Client" from the proposed amendments. I have wrestled with this issue in practice and with my firm and do not believe this definition captures the often fact-intensive inquiry into when an attorney-client relationship has been created. The proposed rule would potentially trap attorneys into an attorney-client relationship because they "failed to manifest a lack of consent." An attorney - client relationship should not ordinarily be created by the LACK of objection by the attorney, there is no involuntary servitude as to attorneys. This rule would allow would-be clients to FORCE an attorney to be their lawyer unless the attorney remembers this rule and manifests a lack of consent. This has it backwards, and risks trapping attorneys in "gotcha" situations without their actual consent. Case law touches on this subject, and numerous cases define when the lawyer is deemed to be an attorney for a particular putative client. The proposed rule is overly simplistic and puts a burden on attorneys to negate that they have been hired just because someone has told them they intend that the lawyer represent them. Among other examples, inmates who regularly write attorneys asking for their help and expressing unilateral, unsolicited, and unwanted expectations as to attorneys who they have never met, could use this new rule to trap attorneys into representing them. I urge that the new rule NOT be adopted. Thank you.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rule 1.00, TDRPC - Terminology
Date: Tuesday, May 18, 2021 1:23:42 PM

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

Contact

First Name	James
Last Name	Graham
Email	[redacted]
Member	Yes
Barcard	24102973

Feedback

Subject	Proposed Rule 1.00, TDRPC - Terminology

Comments

The rule changes as proposed appear to open up numerous avenues by which an attorney could be grieved or otherwise roped into a representation as a result of providing an answer to a seemingly innocuous question by any person. Wouldn't this put lawyers in the position of having to choose between engaging in a casual conversation or asking anyone they speak with on a potentially legal subject to provide contact information so the attorney can affirmatively assert in writing that the act of answering a question did not create any attorney-client relationship and the person is not a client? This language appears to be potentially lethal to lawyers who would potentially be subject to claims that they represent people they had no intention of representing. Further, it could open up a way for unscrupulous persons to make claims against lawyers for failure to provide representation, when the lawyer had no idea someone the lawyer spoke with in passing would claim the conversation established an attorney-client relationship.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rule 1.00(d)(1)(ii)
Date: Thursday, May 27, 2021 10:26:42 AM

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

Contact

First Name	Bryan
Last Name	Vezey
Email	[redacted]
Member	Yes
Barcard	00788583

Feedback

Subject	Proposed Rule 1.00(d)(1)(ii)

Comments

Please consider an exception to this paragraph, or a clarifying statement in the official comments, to the effect that a lawyer need not manifest lack of consent when the purported client has only communicated to the lawyer with unilateral e-mails and the lawyer has not responded at all. I get one-line e-mails all the time saying "Do you do breach of contract?" or something like that, 99.9% of which are simply spam. If they get past my spam filter, I add them to my junk sender list and I never see anything from them again. Strangers should not be able to impose response obligations on lawyers by a method overwhelmingly used by spam bots and hackers. As I finish typing this, I see that I have to click a box below to show that I'm not a robot, so my point should not be controversial.

From: John Wheat Gibson, Sr.
To: cdrr
Subject: Proposed terminology
Date: Thursday, May 27, 2021 4:36:35 PM

Dear Committee:

With all due respect, I don't see how the proposed rule 11.00 improves our understanding of anything. "Adjudicatory Official" denotes a person who serves on a Tribunal. What is the definition of a "Tribunal," and why the capital "t?"

"Belief or Believes" denotes that the person involved actually supposed the fact in question to be true," How is "supposed" a clarification of "believed?"

Etc. Petitio principii. Case law may define subjective terms usefully, but more subjective terms cannot.

Respectfully submitted,

John Wheat Gibson, P.C.
By John Wheat Gibson
Texas Bar No. 07868500
2201 Main Street, Suite 520
Dallas, Texas 75201
(214)748-6944
[redacted]

From: Bryan Neil Linch
To: cdrr
Subject: Comment on Proposed Rule 1.00, TDRPC
Date: Friday, May 28, 2021 3:33:25 PM
Attachments: image001.png
image003.png

My comment relates to the second prong of the proposed definition of "Client" – specifically 1.00(d)(2) "a tribunal with power to do so appoints the lawyer to provide the services."

Discussion of potential problem:

This ***seems*** like a fairly straight-forward and bright-line rule; however, in practice there are complications. Some Courts are quite efficient at informing the appointed attorney about the appointment; however, some are not. I have been appointed in cases but not informed of the appointment until many weeks (even over a month) has gone by. During that period of time, I might be considered an attorney with a client under the proposed rule without knowing it. Not only could things occur during that time period that would put me in a conflict, but I may already have been in a conflict at the time of appointment and not yet had the ability to present the conflict of interest to the Court and ask for the appointment to be rescinded.

As an example, I may have been contacted by a potential heir and discussed matters with the heir such that the attorney-client privilege applied, then appointed by the Court to represent unknown heirs. Upon notification of the appointment, I would immediately inform the Court of the conflict of interest and request the Order be rescinded. Under the proposed rule, I would be deemed to have represented the "client" for whom I was appointed; therefore, I would have violated several Rules.

Sticking with the same type of case, another possibility is that I am appointed by Court Order to represent unknown heirs, but do not yet know it. Then, I am contacted by a potential heir. I may engage in communications with the potential heir to explore engagement (which are protected by attorney-client privilege regardless whether I am ultimately engaged) and only determine after the fact that I had previously been appointed.

Also, it is possible that I represented another party to the action – a fact the appointing Court has no reason to know. Whether that representation would or would not arise to a conflict should be up to the appointed attorney.

Potential solution:

A possible solution for this situation would be for the court appointment to trigger an attorney-client relationship only upon Notice to the attorney followed by a reasonable period to research potential conflicts and respond.

Thank you,
Bryan

Bryan n eil l inch , JD, c Pa
Attorney at Law
19901 Southwest Fwy Ste 136
Sugar l and TX 77479-6538
Tel: (281) 344-3220
Fax: (281) 344-3106
e mail: [redacted]

Board Certified Specialist in Estate Planning & Probate Law by the Texas Board of Legal Specialization.

Confidentiality Notice: The information contained in this electronic e-mail and any accompanying attachment(s) is intended only for the use of the intended recipient and is non-public in nature and may be confidential and/or privileged. if any reader of this communication is not the intended recipient, unauthorized use, disclosure, dissemination or copying is strictly prohibited, and may be unlawful. if you have received this communication in error, please immediately notify the sender by return e-mail, and delete the original message and all copies from your system and promptly destroy any copies made of this electronic message. Thank you.

Circular 230 Disclosure: a ny advice contained in this email (including any attachments unless expressly stated otherwise) is not intended or written to be used, and cannot be used, for purposes of avoiding tax penalties that may be imposed on any taxpayer.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed change to Rule 1.00
Date: Wednesday, June 9, 2021 4:07:29 PM

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

Contact

First Name	Lindsey
Last Name	Drake
Email	[redacted]
Member	Yes
Barcard	24090644

Feedback

Subject	Proposed change to Rule 1.00

Comments

I have a strong objection to the inclusion of (d)(1)(ii). I get messages to my personal Facebook account, Twitter account, and Instagram accounts from strangers asking for legal advice that end up in Spam or Message Request, which I don't always see. How am I supposed to manifest a lack of consent when I haven't seen the message? The same is true for Yelp and other directory listing services. I didn't ask to be on Yelp or AVVO and yet this change to the rule holds me responsible for responding to every single message that might come at me from anywhere even if I don't know I've received the message. What about when someone approaches me at a social gathering, do I have to follow up questions at cocktail hour with written disclaimers and manifest my lack of consent over appetizers? I don't have time to send non-representation letters to every caller who leaves a message with my receptionist service that manifests my lack of consent to represent the person. I try, as a courtesy, to respond at least with an email, but it is not always possible and not everyone gets the message even when I send it. With this terminology change, I could be subject to defending a disciplinary action for failing to inform someone who left a message or spoke to me in any fashion that I am not their lawyer, even if they've never paid me a dime or signed a letter of engagement.

Committee on Disciplinary Rules and Referenda
Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.00. Terminology

Public Comments Received
March 8, 2022, through May 2, 2022

From: Israeloff, Sim
To: cdrr
Subject: Comments on Proposed Rules
Date: Tuesday, March 8, 2022 9:41:55 AM
Attachments: image001.png

Good morning,

This e mail contains comments to the proposed rules amendments recently published by the committee.

By way of background, I was admitted to the bar in 1983. I serve as firm counsel to the firm of Cowles & Thompson, P.C. in Dallas. My practice includes defense of professional liability claims against lawyers. My real-world experience leads me to make the following comments and requested revisions to the proposed rules. These are my personal comments.

Rule 1.00(q) is proposed to read as follows:

> (q) "Represent," "Represents," or "Representation." A lawyer represents a person if the person is a
> client of the lawyer. If the relationship of client and lawyer terminates, the lawyer's representation of the
> client terminates.

This formulation leaves out the critical question of for what legal matters a lawyer represents a person. A lawyer or law firm frequently represents a client in discrete legal matters, typically opening a separate file for each new matter handled, but that does not mean they represent the client in all legal matters or for all purposes. In many cases a lawyer is prevented by conflicts or other reasons from taking on a new matter for an existing client. A good practice is for the lawyer to confirm in writing to the client that the lawyer or firm cannot represent the client in that new matter, i.e., send a "declination letter." The new rule fails to clarify that a lawyer represents a client only on those legal matters for which they agree to represent the prospective or existing client.

This is more than a hypothetical problem. I recently defended a law firm from a lawsuit in which they had previously represented a client on several distinct legal matters like drafting a will and negotiating a contract, but when the client asked the firm about a potential new matter – bringing a med mal lawsuit against a nursing home – the firm

determined that it could not take the case. It confirmed in writing that it would not represent the client in that matter and referred the client to another lawyer. The client later sued the law firm claiming in part that because the firm represented him as his lawyer in those prior matters, it was his lawyer for all purposes including the med mal case that it had declined in writing. On that basis and in the absence of a specific rule stating otherwise, the court denied motions seeking to establish that the law firm was not acting as lawyers for the plaintiff in the med mal action.

Given the need for clarity in this area, I would request that the rule be amended as follows:

> (q) "Represent," "Represents," or "Representation." A lawyer represents a person in a particular legal matter if the person is a client of the lawyer with respect to that legal matter. If a lawyer confirms in writing that it is declining to serve as lawyer with regard to a particular legal matter, no representation is created as to that matter. If the relationship of client and lawyer terminates as to a particular legal matter, the lawyer's representation of the client in that matter terminates.

Thank you for your work, and for reviewing this comment.

Best,

Sim Israeloff
Sim Israeloff

COWLES THOMPSON
ATTORNEYS | COUNSELORS

901 Main St., Suite 3900, Dallas, TX 75202
214.672.2131 (t) | [redacted]
214.672.2331 (f) | www.cowlesthompson.com

BOARD CERTIFIED
Texas Board of Legal Specialization
Civil Trial Law

From: Ryan Reneau
To: cdrr
Subject: Participation in Tomorrow"s Meeting
Date: Tuesday, April 5, 2022 10:18:22 AM
Attachments: image001.png

I intend to participate in tomorrow's meeting regarding the Rule 1.00 change. My comments will follow this afternoon.

Can you please provide me the instructions to join the teleconference?

S. Ryan Reneau
- JD LLM CPA CFA -

The content of this email is limited to the matters specifically addressed herein and is not intended to address other potential tax consequences or the potential application of tax penalties to this or any other matter.

The information transmitted, including any attachments, is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited, and all liability arising therefrom is disclaimed. If you received this in error, please contact the sender and delete the material from any computer.

From:	Ryan Reneau
To:	cdrr
Subject:	Rule 1.00 Change - Comments Attached
Date:	Tuesday, April 5, 2022 4:01:43 PM
Attachments:	image001.png Rule Change Comments 4-5-2022 - Final Submission.pdf

Please find my written comments regarding the Rule 1.00 change attached for your consideration. Thank you.

S. Ryan Reneau
- JD LLM CPA CFA -
Reneau Law Firm PC

The content of this email is limited to the matters specifically addressed herein and is not intended to address other potential tax consequences or the potential application of tax penalties to this or any other matter.

The information transmitted, including any attachments, is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited, and all liability arising therefrom is disclaimed. If you received this in error, please contact the sender and delete the material from any computer.

S. Ryan Reneau
2809 Southmore Blvd, Houston, TX 77004
t: 830-832-4455 e: [redacted]

April 5, 2022

Committee on Disciplinary Rules and Referenda
Attn: Mr. Lewis Kinard, Chair
1414 Colorado Street
Austin, Texas 78701

Re: Proposed Rule Change to Rule 1.00 Terminology

Dear Chair Kinard:

The proposed rule change published by the Committee on Disciplinary Rules and Referenda (the "Committee") in the March 2022 edition of the Texas Bar Journal to Rule 1.00 inserting the word "negligent" and proposed Comment 5 should be rejected. The proposals are substantively flawed and must be substantially revised.

Comments to the Committee

1. **Supreme Court of Texas Case Law Conflicts with the Committee's Changes**

Last year the Supreme Court of Texas made clear that attorney immunity applied in the transaction context.[1] The Supreme Court previously stated there is no fraud exception to attorney immunity.[2] As a result, an attorney may never face any monetary repercussions for her participation, knowing or otherwise, in a fraudulent scheme. The Supreme Court has identified the attorney disciplinary process as the sole direct remedy remaining for harmed non-clients.

In *Haynes & Boone*, an attorney assisted a client in the preparation of a "Confidential Business Profile" to solicit buyers for the client's business. The profile stated the business developed, protected, and defended its intellectual property and that it bore significant value, a material misrepresentation. The drafting attorney learned through investigation the prior year that the business sued its patent lawyers for malpractice due to questionable enforceability of the patents. The Court noted evidence contradicted the attorney's assertion he had no knowledge of the lawsuits, worthlessness of the patents, or their unenforceability. The buyer subsequently sued the seller and attorney based on negligence, fraud, and misrepresentation when it became aware of the patent issues.

The trial court granted the attorney's summary judgment motion relying on attorney immunity. The appellate court reversed the trial court, limiting the application of attorney immunity to the

[1] *Haynes & Boone LLP v. NFTD, LLC*, 631 S.W.3d 65 (Tex. 2021); *Landry's, Inc. v. Animal Legal Defense Fund*, 631 S.W.3d 40 (Tex. 2021).
[2] *Cantey Hanger v. Byrd*, 467 S.W.3d 477 (Tex. 2015).

litigation context. The Supreme Court clarified that attorney immunity applies in the transaction context, reversed the appellate court, and remanded the matter back to trial court for consideration of the motion based on the clarified standard.

The Supreme Court addressed the attorney immunity standard at length, including its limitations and policy considerations relevant to its decision. Importantly, the Supreme Court explicitly stated the following regarding the transaction context and safeguards against attorney wrongful conduct:

> As we have observed, the litigation context offers "other mechanisms," besides a suit against the attorney, to discourage and remedy an opposing attorney's wrongful conduct, "such as sanctions, contempt, and attorney [**34] disciplinary proceedings." *Cantey Hanger*, 467 S.W.3d at 482. **Although the first two of these mechanisms are only available in the litigation context, the third is available to any non-client who complains of an attorney's wrongful conduct**.[3]

The Committee's proposed changes appear to eliminate the third safeguard and would render the Supreme Court's logic flawed. If the Rules fail to establish a minimum threshold of responsibility, then there are no safeguards against attorneys who recklessly disregard the truth and facilitate fraudulent transactions.

Proposed Comment 5 states, "[w]hen used in these Rules, the terms 'fraud' or 'fraudulent' refer to conduct that is characterized as such under applicable substantive or procedural law and has a purpose to deceive." The Committee should clarify that attorney immunity should not be considered when interpreting this provision since this may be argued to be an applicable substantive or procedural law. Allowing such a defense would shield attorney misbehavior and render the Supreme Court's statement false that non-clients may complain through disciplinary proceedings. The Committee should further clarify what standard applies to attorneys to determine when they should be sanctioned for their participation in fraudulent transactions if the standard is not negligence.

2. Texas Ethics Opinion 691 Conflicts with the Committee's Proposed Changes

The proposed rule change and comment conflict with Texas Ethics Opinion Rule 692 and the application of Rule 3.03 related to the trial context. The Rules should be logically and internally consistent. Accordingly, the Committee should consider the apparent conflict between the opinion and their proposed changes.

The question before the Professional Ethics Committee (PEC) in the Opinion 692 was:

> Does a lawyer have a duty under the Texas Disciplinary Rules of Professional Conduct to correct false statements made by his client in response to questioning by opposing party's counsel during deposition?

[3] *Haynes & Boone LLP v. NFTD, LLC*, 631 S.W.3d 65, 79 (Tex. 2021) (emphasis added).

The PEC discussed the applicable standards. Important to the proposed rule, they acknowledged silence may not constitute assisting a criminal or fraudulent act under the circumstances they analyzed; however, they recognized that does not mean a lawyer should do nothing. In contrast, the Committee's rule change and comment would allow a lawyer to utter "oops", shrug his shoulders, and move on to the next case.

The opinion concluded a lawyer should urge their client to correct false statements, explain the potential civil and criminal ramifications of false testimony, and may withdraw from client representation if the client refuses to correct the false statements. Further, the PEC stated a lawyer may not use the false testimony to advance the client's case in any way.

In the transaction context, the Committee's comments should make clear that once a lawyer becomes aware of false statements by his client that he may not use those false statements in any way. It should also specify when a lawyer must either correct the transactions documents or withdraw.

For example, the Committee should address when a lawyer learns of a fraudulent representation in the language drafted (e.g., a purchase sale agreement with representations and warranties by the client). How the lawyer should act if the lawyer (i) learns the statements are false or (ii) learns of facts that would lead a reasonable lawyer to inquire farther? What if the first draft has been circulated and marked up by the parties, the lawyer learns of facts that lead him to reasonably question the client's truthfulness, and then the client directs the attorney to finalize and publish the document to the other side? An attorney may interpret the Committee's changes to relieve him of any duty to affirmatively notify the counter party; however, we could certainly agree publication of the final documents constitutes the use of the false statement to the advance the client's case.

If the Committee intends to condone lawyers repeating lies over and over if they first uttered them by mistake (i.e., negligently), then the Committee should have the fortitude to educate the public in plain terms. The public expects more from lawyers than silence when a lawyer knows his client is lying and more than "oops" from the State Bar when the lawyer is caught red-handed. The Committee should revise the proposed rule and comment to narrow the grey area of interpretation instead of expand it.

3. ABA Opinion 491 Conflicts with the Committee's Proposed Rule and Comment

The American Bar Association specifically addressed a lawyer's duties under the Model Code related to fraud and non-litigation contexts in Opinion 491. The opinion is well written, and in the interest of brevity, it is attached hereto. Upon review, the Committee should clarify that lack of specific knowledge is no excuse for an attorney's failure to inquire when fraud or misrepresentation may be readily inferred from the circumstance known to the attorney, willful blindness to a client's actions, or conscious disregard of available facts. Further, the Committee should specify that the minimum level of diligence required for an attorney to be satisfied that the client is seeking a legitimate and proper goal and intends to employ legal means to attain it.

Again, the Committee should be wary of creating an environment where "oops" is an acceptable answer when an attorney is confronted by a grievance based on their participation in a fraudulent scheme and profits in the form of legal fees.[4]

4. The Committee Failed to Produce Any Evidence It Studied the Issue as Required

The Committee failed to study the issue as required by Tex. Gov. Code section 81.0876(a)(1).

On March 9, 2022, I requested written documentation evidencing the Committee studied this issue. The Committee produced 79 pages of documents on April 1, 2022, in response. There appears to be no substantive discussion of this change within those pages.

On March 11, 2022, Chair Kinard stated the change reflects "the current state of the definition in Texas, so the added word is not a *change* as much as a way to avoid confusion." No State Bar document could be located online nor was one produced by the Committee evidencing this assertion.

If the Committee withheld documents, those should be produced immediately. If not, then it should terminate this attempt to modify the rules until such study has been conducted

5. The Committee Published an Incorrect Redline of the Proposed Rule

Mr. Kinard confirmed on March 11, 2022, the Committee published an incorrect redline of its proposed changes. The Committee should publish a corrected version prior to advancing the proposed rule change and reset the period for public comment.

In conclusion, the Committee should actually study this issue as mandated by law, propose clarifying rules and comments, and hold attorneys accountable for profits reaped at the expense of the public when they assist clients in fraud and misrepresentation. The proposed rule change and comment should be rejected.

For further discussion, please do not hesitate to contact me by phone at 830-832-4455 or by email at [redacted].[5]

Regards,

S. Ryan Reneau

[4] Good policy would dictate the party in the best position to defend itself against harm should be responsible for doing so. Here, an attorney is generally in a better position than the victim of fraud or misrepresentation to defend herself. The Committee should carefully consider why an attorney should retain their fees (i.e., profit) when the victim is left empty handed. At the very least, the Committee should affirm the principal that attorneys should disgorge themselves of any fees taken during their participation, knowing or negligent or otherwise, in their client's fraud or misrepresentation, even if they are not responsible for additional collateral damage under the law or Rules.

[5] These comments are filed exclusively on my own behalf and should not be construed to be the opinion or statement of my employer.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 491 **April 29, 2020**

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

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

I. Introduction

In the wake of media reports,[2] disciplinary proceedings,[3] criminal prosecutions,[4] and reports on international counter-terrorism enforcement and efforts to combat money-laundering, the legal profession has become increasingly alert to the risk that a client or prospective client[5] might try to retain a lawyer for a transaction or other non-litigation matter that could be

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

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

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

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

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

legitimate but which further inquiry would reveal to be criminal or fraudulent.[6] For example, a client might seek legal assistance for a series of purchases and sales of properties that will be used to launder money. Or a client might propose an all-cash deal in large amounts and ask that the proceeds be deposited in a bank located in a jurisdiction where transactions of this kind are commonly used to conceal terrorist financing or other illegal activities.[7] On the other hand, further inquiry may dispel the lawyer's concerns.

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

As set forth in Section II of this opinion, a lawyer who has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity under Rule 1.2(d). Failure to make a reasonable inquiry is willful blindness punishable under the actual knowledge standard of the Rule. Whether the facts known to the lawyer require further inquiry will depend on the circumstances. As discussed in Section III, even where Rule 1.2(d) does not require further inquiry, other Rules may. These Rules include the duty of competence under Rule 1.1, the duty of diligence under Rule 1.3, the duty of communication under Rule 1.4, the duty to protect the best interests of an organizational client under Rule 1.13, the duties of honesty and integrity under Rules 8.4(b) and (c), and the duty to withdraw under Rule 1.16(a). Further inquiry under these Rules serves important ends. It ensures that the lawyer is in a position to provide the informed advice and assistance to which the client is entitled, that the representation will not result in professional misconduct, and that the representation will not involve counseling or assisting a crime or fraud. Section IV addresses a lawyer's obligations in responding to a client who either agrees or does not agree to provide information necessary to satisfy the duty to inquire. Finally, Section V examines hypothetical scenarios in which the duty to inquire would be triggered, as well as instances in which it would not.

---

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

[7] *See* AM. BAR ASS'N TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING 15–16 (2010) [hereinafter GOOD PRACTICES GUIDANCE] (describing institutions, such as the United Nations, the World Bank, the International Monetary Fund, and the U.S. Department of State, believed to be "credible sources" for information regarding risks in different jurisdictions); *id.* at 24 (noting the "higher risk situation" when a client offers to pay in cash).

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

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

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

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

Additionally, if facts before the lawyer indicate a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, a lawyer's conscious, deliberate failure to inquire amounts to knowing assistance of criminal or fraudulent conduct. Rule 1.0(f) refers to "actual knowledge" and provides that "[a] person's knowledge may be inferred

---

[8] MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. [13] [hereinafter MODEL RULES].
[9] *See* MODEL RULES R. 1.16(a)(1); Section IV, *infra*. Rule 1.2(d) nevertheless permits a lawyer to "discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."
[10] 324 A.2d 15 (N.J. 1974).
[11] *Id.* at 18 (emphasis added).
[12] *Id.* at 18–19; *see also In re* Evans, 759 N.E.2d 1064 (Ind. 2001) (mem.) (three-year suspension for filing fraudulent federal tax returns knowingly misrepresenting sale proceeds from real estate transaction); *In re* Harlow, 2004 WL 5215045, at *2 (Mass. State Bar Disciplinary Bd. 2004) (suspending lawyer for violation of 1.2(d) for assisting client in knowing manipulation of state licensing agency's escrow account requirements); State *ex rel.* Counsel for Discipline of Nebraska Supreme Court v. Mills, 671 N.W.2d 765 (Neb. 2003) (two-year suspension for participating in illegal scheme to avoid estate taxes by knowingly backdating and preparing false documents); *accord* N.C. State Bar, Formal Op. 12, 2001 WL 1949450 (2001).

from circumstances." Substantial authority confirms that a lawyer may not ignore the obvious.[13]

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

Relying on ABA Informal Opinion 1470, the Legal Ethics Committee of the Indiana State Bar Association concluded in 2001 that "[a] lawyer should not undertake representation without making further inquiry if the facts presented by a prospective client suggest that the representation might aid the client in perpetrating a fraud or otherwise committing a crime."[15] The opinion reasoned that an attorney asked to create a "new" sole power of attorney for a prospective client on behalf of her wealthy grandfather in matters concerning his estate has a duty to inquire further. The opinion emphasized the possibility that the granddaughter could fraudulently use the power of attorney to benefit herself rather than serve the interests of her grandfather, whom the attorney had not consulted, the possibility that the grandfather would not wish to grant sole power of attorney to his granddaughter, and the possibility that the grandfather might lack the capacity to consent to such an arrangement (made likely by the fact that the lawyer's paralegal observed the grandfather's deteriorated condition). Thus, although it is possible that the granddaughter's representation of the facts was accurate and therefore consistent with Rule 1.2(d), "the fact that a proposed client in drafting a power of attorney was the agent and not a frail principal should have suggested to [the lawyer] the possibility that the client's real objective might be fraud. [The lawyer] then *had an ethical responsibility to find out whether the proposal was above-board* before performing the services. By failing to make further inquiry, [the lawyer] violated Rule 1.2."[16]

Similarly, New York City Ethics Opinion 2018-4 concluded that lawyers must inquire when "retained to assist an individual client in a transaction that appears to the lawyer to be suspicious."[17] The opinion explains that "[i]n general, assisting in a suspicious transaction is not competent where a reasonable lawyer prompted by serious doubts would have refrained

---

[13] In the words of Charles Wolfram, "as in the criminal law, a lawyer's studied ignorance of a readily ascertainable fact by consciously avoiding it is the functional equivalent of knowledge of the fact. . . . As a lawyer, one may not avoid the bright light of a clear fact by averting one's eyes or turning one's back." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 696 (1986); *see also* ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 47 (9th ed. 2019) ("[a] lawyer's assistance in unlawful conduct is not excused by a failure to inquire into the client's objectives"); *id*. (gathering cases).

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

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

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

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

from providing assistance or would have investigated to allay suspicions before rendering or continuing to render legal assistance. . . . What constitutes a suspicion sufficient to trigger inquiry will depend on the circumstances."[18] Failure to inquire may constitute "conscious avoidance" when, for example, "the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction."[19]

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

---

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

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

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

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

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

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

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

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. . . . [The Model Penal Code defines] "knowledge of the existence of a particular fact" to include a situation in which "a person is aware of a *high probability* of [the fact's] existence, unless he actually believes that it does not exist." Our Court has used the Code's definition as a guide . . . [a]nd every Court of Appeals—with the possible exception of the District of Columbia Circuit—has fully embraced willful blindness, applying the doctrine to a wide range of criminal statutes.[24]

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

---

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

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

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

[26] As the authorities and analysis in this Section make clear, the duty to inquire under Model Rule 1.2(d) is tied to the circumstances and the lawyer's state of knowledge. It is *not* a freestanding, blanket obligation to scrutinize every client for illicit ends irrespective of the nature of the specific matter and the attorney-client relationship. *See* United States v. Sarantos, 455 F.2d 877, 881 (2d Cir. 1972) ("Construing 'knowingly' in a criminal statute to include willful blindness . . . is no radical concept in the law," but the standard does not mean that an attorney has a general duty to "investigate 'the truth of his client's assertions' or risk going to jail"; upholding criminal conviction of lawyer who actively aided in immigration related marriage fraud); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2001-26 ("*Generally*, a lawyer has no obligation to inquire or otherwise uncover facts that are not necessary to enable the lawyer to fulfill his or her obligations with respect to the representation"; warning nevertheless that Rule 1.2(d) applies to filing of worker's compensation claims and leaving attorney to determine relevance of client's fatal condition to client's specific claim) (emphasis added). However, the

III. The Duty To Inquire Under Other Rules

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

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

Second, and more broadly, the lawyer's duty of competence, diligence, and communication under Rules 1.1, 1.3, and 1.4 may require the lawyer, prior to advising or assisting in a course of action, to develop sufficient knowledge of the facts and the law to understand the client's objectives, identify means to meet the client's lawful interests, to probe further, and, if necessary, persuade the client not to pursue conduct that could lead to criminal liability or liability for fraud. Comment [5] of Rule 1.1 states that "[c]ompetent handling of a particular matter requires inquiry into and analysis of the factual and legal elements of the problem."[29]

Committee rejects the view that the actual knowledge standard of Rule 1.2(d) relieves the lawyer of a duty to inquire further where the lawyer is aware of facts creating a high probability that the representation would further a crime or fraud. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. g. at 11 ("Under the actual knowledge standard . . . a lawyer is not required to make a particular kind of investigation in order to ascertain more clearly what the facts are, although it will often be prudent for the lawyer to do so."); *id.* § 51 cmt. h., ill. 6 at 366; George M. Cohen, *The State of Lawyer Knowledge Under the Model Rules of Professional Conduct*, 3 AM. U. BUS. L. REV. 115, 116 (2014) (discussing association of willful blindness with recklessness, without citing to *Global-Tech Appliances*, and analyzing assumption that "the actual knowledge standard aims to exclude a duty to inquire").

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

[28] *See In re* Berman, 769 P.2d 984, 989 (Cal. 1989) (en banc) (holding, in disciplinary proceeding for aiding a money laundering scheme, that attorney's "*belief* that the financial statements contained false information reflects sufficient indicia of fraudulent intent to constitute moral turpitude"). The same conduct would require the lawyer's withdrawal under Rule 1.16(a)(1).

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

The duty of diligence under Rule 1.3 requires that a lawyer ascertain the relevant facts and law in a timely and appropriately thorough manner.[30] Rule 1.4(a)(5), which requires consultation with the client regarding "any relevant limitation on the lawyer's conduct" arising from the client's expectation of assistance that is not permitted by the Rules of Professional Conduct or other law, may require investigation of the relevant facts and law. Rule 1.4(b) requires the lawyer to give the client explanations sufficient to enable the client to make informed decisions about the representation.

Rule 1.13 imposes a duty to inquire in entity representations. Rule 1.13(a) provides that a lawyer "employed or retained by the organization represents the organization acting through its duly authorized constituents." Determining the interests of the organization will often require further inquiry to clarify any ambiguity about who has authority and what the organization's priorities are. Under Rule 1.13(b), once the lawyer learns of action, omission, or planned activity on the part of an "officer, employee, or other person associated with the organization . . . that is a violation of a legal obligation to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interests of the organization." Even if the underlying facts regarding the violation or potential violation are already well established and require no additional inquiry, determining what is "reasonably necessary" and in the "best interest of the organization" will commonly involve additional communication and investigation.[31]

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

---

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

[31] *See* MODEL RULES R. 1.13 cmts. [3] & [4]. Rule 1.13(b) was added after a series of high profile financial accounting scandals in the early 2000s. AM. BAR ASS'N TASK FORCE ON CORPORATE RESPONSIBILITY (2003), *reprinted in* 59 BUS. LAW. 145, 166–70 (2003). Other law may also create a duty to inquire. The Sarbanes-Oxley Act of 2002 creates a duty for the "chief legal officer" to conduct an "appropriate" investigation in response to another lawyer's report of "evidence of a material violation" by the company. 17 C.F.R. § 205.3(b)(2) (2012); *see also In re* Kern, 816 S.E. 2d 574 (S.C. 2018) (discussing obligations of securities lawyers); U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS § 9-28.720 (quality of internal investigation can affect eligibility for "cooperation credit"); Cohen, *supra* note 26, at 129–30 (discussing obligations of securities lawyers).

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

include "examining the nature of the legal work involved, and where the [client's] business is taking place."[33]

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

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

IV. Other Obligations Incident to the Duty to Inquire

If the client refuses to provide information or asks the lawyer not to evaluate the legality of a transaction the lawyer should explain to the client that the lawyer cannot undertake the representation unless an appropriate inquiry is made. If the client does not agree to provide

---

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

[34] *Id.*

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

[36] In numerous contexts of evaluating attorney conduct, courts and regulators have warned against hindsight bias. *See* Woodruff v. Tomlin, 616 F.2d 924, 930 (6th Cir. 1980) ("[E]very losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight."); *In re* Claussen, 14 P.3d 586, 593–94 (Or. 2000) (en banc) (declining to discipline lawyer who aided client in converting insurance policy to cash while client's bankruptcy petition was pending; lawyer did not know client would abscond with money and cannot be judged by a standard of "clairvoyance" that reflects the knowledge of "hindsight"); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 (2018) ("Under the knowledge standard of Rule 1.2(d), a lawyer is not deemed to 'know' facts, or the significance of facts, that become evident only with the benefit of hindsight."); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2005-05 (2005) (in handling of "'thrust upon' concurrent client conflicts a lawyer who does balance the relevant considerations in good faith should not be subject to discipline for getting it wrong in hindsight"); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2001-100 (2001) (the propriety of accepting stock as payment of legal fees for a start-up "should be made based on the information available at the time of the transaction and not with the benefit of hindsight").

information, then the lawyer must decline the representation or withdraw.[37] If the client agrees, but then temporizes and fails to provide the requested information, or provides incomplete information, the lawyer must remonstrate with the client. If that fails to rectify the information deficit, the lawyer must withdraw. Indeed, proceeding in a transaction without the requested information may, depending on the circumstances, be evidence of the lawyer's willful blindness under Rule 1.2(d).[38] If the client agrees, provides additional information, and the lawyer concludes that the requested services would amount to assisting in a crime or fraud, the lawyer must either discuss the matter further with the client, decline the representation, or seek to withdraw under Rule 1.16(a).[39]

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

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

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

Overall, as long as the lawyer conducts a reasonable inquiry, it is ordinarily proper to credit an otherwise trustworthy client where information gathered from other sources fails to resolve the issue, even if some doubt remains.[44] This conclusion may be reasonable in a variety of

---

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

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

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

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

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

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

[43] MODEL RULES R. 1.16(c)(2).

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

circumstances. For example, the lawyer may have represented the client in many other matters. The lawyer may know the client personally, professionally, or socially. The business arrangements and other individuals or parties involved in the transaction may be familiar to the lawyer.

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

V. Hypotheticals

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

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

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

---

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

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

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

his employer or any governmental authority or to anyone else; and (iv) he has not included the amounts in his US income tax returns.[48]

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

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

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

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

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

#5: A prospective client in New York City asks a general practitioner in a mid-size town in rural Georgia to provide legal services for the acquisition of several farms in rural Georgia. The prospective client tells the lawyer that he has made a lot of money in hedge funds and now wants to diversify his investments by purchasing these farms but says he doesn't want his purchases to cause a wave of land speculation and artificially inflate local prices. He wants

---

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

[49] For information about "high risk" jurisdictions, see GOOD PRACTICES GUIDANCE, *supra* note 7, at 15–16.

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

[51] *See supra*, Section IV.

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

[53] This hypothetical is drawn from GOOD PRACTICES GUIDANCE, *supra* note 7, at 8, and requires further inquiry.

to wire money into the law firm's trust account over time for the purchases. He asks the lawyer to create a series of LLCs to make strategic (and apparently unrelated) acquisitions.[54]

VI. Conclusion

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

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328
CHAIR: Barbara S. Gillers, New York, NY ■ Lonnie T. Brown, Athens, GA ■ Robert Hirshon, Ann Arbor, MI ■ Hon. Goodwin Liu, San Francisco, CA ■ Thomas B. Mason, Washington, D.C. ■ Michael H. Rubin, Baton Rouge, LA ■ Lynda Shely, Scottsdale, AZ ■ Norman W. Spaulding, Stanford, CA ■ Elizabeth Clark Tarbert, Tallahassee, FL ■ Lisa D. Taylor, Parsippany, NJ

CENTER FOR PROFESSIONAL RESPONSIBILITY

©2020 by the American Bar Association. All rights reserved.

[54] This hypothetical is drawn from AMERICAN LAW INSTITUTE, ANTI-MONEY LAUNDERING RULES AND OTHER ETHICS ISSUES 450-51 (2017) and requires further inquiry.

From: Ryan Reneau
To: cdrr
Subject: Rule 1.00 - Follow Up Materials
Date: Wednesday, April 6, 2022 11:33:09 AM
Attachments: image001.png
SEC Alert.pdf
Destino v TK Petition.PDF
Law Firms' Accounts Pose Money-Laundering Risk - WSJ.pdf

To the Committee:

Thank you for allowing me the opportunity to participate this morning. Attached are the SEC and WSJ materials I referenced when speaking. Additionally, attached in response to Mr. Belton's request is the petition in a case that implicates the proposed rule and comment changes related to the definition of "fraud."

Please do not hesitate to reach out if you have any further questions.

Regards,

S. Ryan Reneau
- JD LLM CPA CFA -

The content of this email is limited to the matters specifically addressed herein and is not intended to address other potential tax consequences or the potential application of tax penalties to this or any other matter.

The information transmitted, including any attachments, is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited, and all liability arising therefrom is disclaimed. If you received this in error, please contact the sender and delete the material from any computer.

Updated Investor Alert: Be on the Lookout for Advance Fee Fraud

Sept. 22, 2016

The SEC's Office of Investor Education and Advocacy is issuing this Investor Alert to help educate investors about advance fee fraud.

Every year, the SEC receives thousands of complaints describing a scam called an "advance fee fraud." Advance fee fraud gets its name from the fact that an investor is asked to pay a fee up front – in advance of receiving any proceeds, money, stock, or warrants – in order for the deal to go through. The bogus fee may be described as a deposit, underwriting fee, processing fee, administrative fee, commission, regulatory fee or tax, or even an incidental expense that fraudsters may guarantee to repay later. Sometimes, advance fee frauds brazenly target investors who have already lost money in investment schemes. Fraudsters also often direct investors to wire advance fees to escrow agents or lawyers to give investors comfort and to lend an air of legitimacy to their schemes.

The variety of advance fee fraud schemes is limited only by the imagination of the fraudsters who offer them. They may involve the sale of products or services, the offering of investments, lottery winnings, found money, or many other opportunities. Frequently, fraudsters will offer common financial instruments such as bank guarantees, old government or corporate bonds, medium or long term notes, stand-by letters of credit, blocked funds programs, "fresh cut" or "seasoned" paper, and proofs of funds. Clever con artists will offer to find financing arrangements for their clients who pay a "finder's fee" in advance. They require their clients to sign contracts in which they agree to pay the fee when they are introduced to the financing source. Victims often learn that they are ineligible for financing only after they have paid the "finder" according to the contract.

SEC Advance Fee Fraud Case

The SEC won a judgment against Brett A. Cooper and his companies, who conned investors out of more than $2 million through various frauds, including prime bank schemes guaranteeing astronomical returns to investors in purported prime bank transactions and overseas debt instruments. The defendants

were found to have lured investors into fictitious “Prime Bank” or “High-Yield” investment contracts with the promise of extraordinary returns on their investments in a matter of weeks, with little or no risk. The purported investments involved the purchase of bank instruments, including “standby letters of credit” and “bank guarantees” from major international banks, however none of the investors received any returns on the money they invested and none of it was used to acquire any bank instruments. In addition, Cooper and one of his companies participated in an advance ”finder’s fee” scheme, in which an investor was charged a “fee” purportedly to get a bank or brokerage firm to accept a “Brazilian bond” for listing and eventual sale. That service was fictitious, and the defendants pocketed the advance fees and created falsified communications from a purported broker justifying the fees.

Sometimes, fraudsters posing as legitimate U.S. brokers or firms offer to help investors recover their stock market losses by exchanging worthless stock, typically a microcap stock (the low-priced and thinly traded stocks issued by the smallest companies), for an established blue chip stock or by purchasing the stock outright. But investors must first pay an upfront “security deposit” or post an “insurance” or “performance bond.” Never do business with a broker without checking them out first using the search engine on Investor.gov.

Advance fee fraud schemes may try to fool investors with official-sounding websites and e-mail addresses. These addresses may contain “.gov” and end in “.us” or “.org.” U.S. government agency websites or e-mail addresses end in “.gov,” “.mil,” or “fed.us.” Be wary of a website or correspondence claiming to be from a U.S. government agency if the website or e-mail address does not end in “.gov,” “.mil,” or “fed.us.” Even if the sender’s email address appears to end in “.gov,” “.mil,” or “fed.us,” an impersonator may have sent the email message. Other schemes may involve direct mail solicitations.

U.S. Department of Justice (DOJ) Mass Mailing Cases

The Department of Justice also prosecutes advance fee and similar frauds, and has recently focused its efforts on international mass mailing fraud schemes. Victims receive a steady stream of mailings in which they are promised lottery winnings, gifts, and/or unique items with important mystical characteristics, in return for a relatively small fee. The mailers appear to be personalized to the victim, but, in reality, are received by hundreds of thousands of other individuals. DOJ recently shut down an international “psychic” mail fraud scheme in which two purported psychics allegedly defrauded more than one million Americans out of more than $180 million by sending mass mailings claiming that the psychics had specific, personalized visions or psychic readings revealing the opportunity for the recipient to receive great wealth,

including claims of winning lottery millions. The mailings urged victims to purchase products and services in order to ensure that the foreseen good fortune would come to pass. In reality, the solicitations were identical, mass produced form letters sent to tens of thousands of recipients monthly.

In another mass mailing advance fee fraud, DOJ filed an action against an individual and two Dutch companies that allegedly engaged in multiple mail fraud schemes targeting elderly and vulnerable U.S. victims. The defendants allegedly sent direct mail solicitations that falsely claimed that the recipients had won, or would soon win, cash or valuable prizes or otherwise come into great fortune. Recipients responded to the solicitations by completing a form and submitting a payment from $15 to $55 via mail. DOJ estimates the scheme raised more than $18 million annually in the U.S.

For more information on DOJ's efforts on advance fee fraud, see www.justice.gov/.

Be Skeptical and Ask Questions

One of the best ways to avoid investment fraud is to ask questions. Be skeptical if you are approached by somebody touting an investment opportunity. Ask that person whether he or she is licensed and whether the offering they are promoting is registered with the SEC or with a state. Check out their answers with an unbiased source, such as the SEC or your state securities regulator. You should also search the Internet for complaints about the investment or the people offering the investment.

Investors are encouraged to review the SEC publication "Ask Questions" and other SEC publications located at Investor.gov before making any investment. Some questions investors may consider asking include:

- Does it sound too good to be true? If it sounds too good to be true, it (probably) is.
- Is the investment offering registered with the SEC and my state securities agency? Where can I get more information about this investment? Can I get the latest reports filed by the company with the SEC: a prospectus or offering circular, or the latest annual report and financial statements? Check the SEC's EDGAR database to find out.
- Is the person making the offer registered with our state securities regulator? Have they ever been disciplined by the SEC, a state regulator, or other organization (FINRA or one of the stock exchanges)? Research the background of the individuals and firms offering and selling you these investments, including their registration/license status and disciplinary history using Investor.gov or your state securities regulator.

- Do I understand what I am agreeing to? Make sure you fully understand any investment or business agreement that you enter into, or have the terms reviewed by a competent attorney.
- Can I locate the business or person with whom I am dealing? Be wary of businesses that operate out of post office boxes or mail drops and do not have a street address. Also, be suspicious when dealing with persons who do not have a direct telephone line and who are never in when you call, but always return your call later.

If you are thinking about investing and have any questions, do not hesitate to call the SEC's Office of Investor Education and Advocacy at 1-800-732-0330 or ask a question using this online form.

Other Resources

- Investor.gov: the SEC's educational website for retail investors.
- MyMoney.gov: the U.S. government's website dedicated to teaching the basics about managing your money.
- The Department of Justice Consumer Protection Branch website.
- Protect Your Money: Check Out Brokers and Investment Advisers
- **Saving and Investing Basics:** For general information about saving and investing, please see Saving and Investing: a Roadmap to Your Financial Security through Saving and Investing. This publication is also available in Spanish.
- **Ask Questions:** For a list of questions you should ask when considering an investment, see Ask Questions: Questions You Should Ask about Your Investments. This publication is also available in Spanish.
- DOJ Consumer Protection Branch “Prevent Mass Mailing Fraud” Flyer: https://www.justice.gov/opa/file/895271/download
- FTC “Mail Fraud Scams” Flyer: https://www.justice.gov/opa/file/895266/download
- DOJ website: “Mass Mailing Fraud Prevention Initiative”: https://www.justice.gov/civil/consumer-protection-branch/mass-mailing-fraud

The Office of Investor Education and Advocacy has provided this information as a service to investors. It is neither a legal interpretation nor a statement of SEC policy. If you have questions concerning the meaning or application of a particular law or rule, please consult with an attorney who specializes in securities law.

2/1/2021 1:14 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 50226021
By: Rhonda Momon
Filed: 2/1/2021 1:14 PM

2021-06046 / Court: 127

CAUSE NO. _____

DESTINO ENERGY LLC AND DESTINO OCCIDENTAL LLC,	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	
	§	
V.	§	**OF HARRIS COUNTY, TEXAS**
	§	
THOMPSON & KNIGHT, LLP and ANDREW P. FLINT	§	**_____ JUDICIAL DISTRICT**
Defendants.	§	

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs, Destino Energy LLC and Destino Occidental LLC ("Destino"), file this Original Petition and complain of Defendants, Thompson Knight, LLP and Andrew P. Flint, and would respectfully show as follows:

I
SUMMARY

1. "No man can serve two masters; For either he will hate the one, and love the other; or else he will hold to the one, and despise the other." MATTHEW 6:24 (King James ed.). Thompson Knight[1] failed to uphold this simple and self-evident biblical maximum. Destino was hoodwinked into depositing $320,000 with Thompson Knight, as an escrow agent, to secure financing for an oil and gas deal with Thompson Knight's other client, LRH.[2] LRH represented to Destino that it had "over 1 billion dollars" in committed funds, from multiple funding sources. But that was a lie that Thompson Knight knew about and supported. Based on those lies, and Thompson Knight's concealment of material facts, Destino made the deposit with Thompson Knight. Thereafter, Thompson Knight depleted the deposit by transferring the funds to itself or

[1] At all material times, Thompson Knight acted through its partner, Defendant Andrew P. Flint. The term "Thompson Knight" will refer collectively to the firm Thompson Knight LLP and Flint unless stated otherwise.

[2] This refers collectively to LRH Energy Capital LLC or its affiliates, including LRH Energy NFB Funds HOLDCO LLC, LRH N&F Holdings LLC, LRH Energy Z Fund 1 LP, LRH Loan 2 LLC, or LRH Siegel SPV 1 LLC.

LRH, without Destino's knowledge or consent, to cover purported fees and expenses for services that were never incurred on a fabricated deal that would never close. Thompson Knight not only placed the interests of itself and its other clients ahead of Destino, but it actively assisted in defrauding Destino to further those interests. This is a lawsuit to recover for the injuries that Destino incurred because of Thompson Knight's malfeasance.

II
DISCOVERY CONTROL PLAN

2. Based upon this Petition, this case should be controlled by a discovery control plan Level 3 pursuant to the Texas Rules of Civil Procedure, Rule 190.4. Plaintiffs request the Court to enter a Scheduling Order reflecting a Level 3 discovery plan.

III
RULE 47 STATEMENT OF RELIEF

3. In accordance with Texas Rule of Civil Procedure 47, Plaintiffs seek monetary relief in excess of $32,000,000. This is not an expedited action.

IV
PARTIES

4. Plaintiff, Destino Energy LLC, is a Texas Limited Liability Company with principal office in Harris County, Texas.

5. Plaintiff, Destino Occidental LLC, is a Texas Limited Liability Company with principal office in Harris County, Texas.

6. Defendant, Thompson & Knight, LLP is Texas Limited Liability Partnership formed for the practice of law with principal office in Harris County, Texas, and may be served with citation by serving its managing partner, Mark M. Sloan, at One Arts Plaza, 1722 Routh Street Suite 1500, Dallas, Texas 75201, or wherever he may be found.

7. Defendant, Andrew P. Flint is an individual attorney residing in and doing business in Harris County, Texas, and may be served with citation at his principal place of business, Thompson & Knight, LLP, 811 Main Street, Suite 2500 Houston, Texas 77002, or wherever he may be found.

V
JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over the controversy because the claims asserted in this Petition arose, in whole or in part, in Texas and the amount in controversy exceeds the minimum jurisdictional limits of this Court.

9. This Court has personal jurisdiction over each Defendant because the acts and omissions complained of herein occurred in Texas, each Defendant does and/or did do business in the State of Texas, has committed a tort, in whole or in part in Texas, is a resident and citizen of Texas, and/or has minimum contacts with the State of Texas during the period of time complained of herein.

10. Venue is properly laid in Harris County, Texas because Defendants reside in and/or have a principal place of business in Harris County, Texas. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(2), (3).

VI
FACTUAL BACKGROUND

11. LRH describes itself as offering "oil and gas production teams a great finance package for asset acquisition with over 1 billion dollars" in committed funds, from multiple funding sources. In 2019, Destino submitted a request to LRH for senior secured financing to finance the purchase of the "Wilmington" property for continued operation and proposed drill plan, additional OPEX working capital and reimbursement of closing costs for credit facility. Upon approval of the request by LRH, Destino agreed to the terms of the commitment letter dated

November 1, 2019 ("Commitment Letter") based on the reliance on LRH's representations that it had committed capital capable of lending $90 million within forty-five days.

12. In accordance with the Commitment Letter, Destino deposited $320,000.00 in "up front fees" into a trust account with Thompson Knight, who agreed to act as an escrow agent for both parties. Additionally, over the next forty-five days, Destino incurred over $227,000 in expenses. Approximately $64,000 was paid from Thompson Knight to vendors based on mutual agreement. However, Thompson Knight transferred approximately $256,000 to itself or LRH and its affiliates without Destino's knowledge or consent. In addition, Destino entered third-party contracts to facilitate the deal, again in reliance of LRH's affirmative representations that it had committed capital to fund the transaction. Among other things, Destino entered an Agreement and Plan of Merger with the seller to acquire oil and gas assets.

13. When the funds were completely depleted, LRH advised Destino, on or about December 30, 2019, that it would not be funding the loan due to lack of funds from its "committed" partners. In other words, LRH's representations to Destino that it had committed partners available to fund were false.

14. Thompson Knight acted through its partner, Andrew P. Flint. Accountings received from Flint confirm that $150,000 of the fee was transferred to LRH and its affiliate, BetaZi, purportedly for services rendered in the form of "Predictive Analytics" and "Financial Advisory." But LRH and BetaZi never rendered services to Destino. No predictive analytics or financial advisory report was provided. Thompson Knight's transfer under the facade of the term sheet was fraudulent and done without Destino's knowledge or consent. Thompson Knight paid itself more than $76,000 as a fee for services that it allegedly performed, even though it knew the transaction would never close. Again, Destino did not receive any benefit for those services, even if they were actually performed, and Destino did not consent to that transfer of funds.

Thompson Knight also allegedly paid separate counsel $25,000 to set up a legal entity in Delaware, a task that should have cost less than $2,000 to accomplish.

15. Thompson Knight knew that LRH's representations were false but it nonetheless aided LRH in the fraudulent investment scheme to hoodwink Destino into paying LRH and Thompson Knight more than $350,000. Based on information and belief, LRH has been involved in at least two other deals where LRH has required an upfront fee of $320,000 to be paid by the borrower to Thompson Knight for "safe keeping" but LRH and Thompson Knight depleted the fee by incurring bogus services on deals that never closed because LRH had no committed funding. As counsel for LRH, Thompson Knight has intimate knowledge about its client's inability to follow through with its promises. Nonetheless, Thompson Knight continues to aid LRH in fraudulent transactions like this one.

VII
STATEMENT OF CLAIMS AND THEORIES OF LIABILITY

16. Therefore, it has become necessary to bring this suit to collect a legal and equitable debt of money damages owing to Plaintiffs due to the Defendants' conduct. Specifically, Plaintiffs bring claims against Defendants for breach of fiduciary duty, fraud by nondisclosure, constructive fraud, conspiracy and aiding and abetting fraud.

A. Breach of Fiduciary Duty

17. Defendants are liable to Destino for breach of fiduciary duty. Thompson Knight was an escrow agent for the transaction and therefore owed Destino fiduciary duties as a matter of law. *See Capcor at KirbyMain, L.L.C. v. Moody Nat'l Kirby Hous. S, L.L.C.*, 509 S.W.3d 379, 385 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Those duties include "(1) the duty of loyalty; (2) the duty to make full disclosure; and (3) the duty to exercise a high degree of care to conserve the money and pay it only to those persons entitled to receive it." *Trevino v. Brookhill*

Capital Res., Inc., 782 S.W.2d 279, 281 (Tex. App.—Houston [1st Dist.] 1989, writ denied). An escrow agent "not only owes a fiduciary duty to all parties involved in a contract, but must also act with utmost good faith and avoid self-dealing that places its interest in conflict with its obligations to the beneficiaries." *Gonzales v. Am. Title Co. of Hous.*, 104 S.W.3d 588, 598 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

18. Defendants breached their fiduciary duties by violating their duties of loyalty and honesty, and by engaging in self-dealing, as outlined above. Specifically, Thompson Knight knew that LRH could not fund the deal and that its representations to Destino were false. Nonetheless, Thompson Knight concealed that fact from Destino in order to induce Destino to pay the upfront fee of $320,000 for Thompson Knight and LRH to deplete by performing illegitimate or fictitious services on a deal they knew would never close. These breaches of fiduciary duty proximately caused injury to Destino and/or a benefit to Thompson Knight in the amount that Destino paid to enter into the transaction. Additionally, these breaches of fiduciary duty proximately caused other related damages to Destino, as outlined below.

B. Fraud by Non-Disclosure and Constructive Fraud

19. Defendants are liable for fraud by non-disclosure. Thompson Knight concealed from or failed to disclose to Destino certain facts; namely, LRH did not have investors in a fund to extend credit to close the deal. Thompson Knight had a duty to disclose those facts and others to Destino because of their fiduciary relationship. The fact that LRH did not have investors to complete the deal was material to Destino because the belief that LRH had investors – based on LRH's representations to Destino – is what induced Destino to pay the transaction fees. Thompson Knight knew that Destino was ignorant of the facts or did not have an equal opportunity to discover the truth but remained deliberately silent when it had a duty to speak. Thompson Knight intended that Destino rely on the omission and concealment, and Destino did

rely on the omission and concealment by ultimately paying the fees that it would not have otherwise paid. Thus, the nondisclosure and concealment by Thompson Knight caused injury to Destino and an improper benefit to Thompson Knight.

20. Defendants are liable for constructive fraud. "[C]onstructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interest." *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964). Here, Thompson Knight engaged in constructive fraud by breaching its fiduciary duties of loyalty and candor, and engaging in self-dealing by concealing material information from Destino to induce it into the transaction with LRH in order to charge bogus fees for illegitimate or fictitious work on a transaction that Thompson Knight knew would never close.

C. Civil Conspiracy

21. Defendants are liable for civil conspiracy. Defendants were members of a combination of two or more persons, along with LRH. The object of the combination was to accomplish an unlawful purpose or a lawful purpose by unlawful means; specifically, defrauding Plaintiffs in the manner described herein. The members had a meeting of the minds on the object or course of action; to fraudulently induce Plaintiffs into enter the transaction and pay $357,000 to initiate a fairytale deal that Defendants and LRH knew would never close, and then fraudulently transfer those funds to Thompson Knight or LRH and its affiliates for illegitimate or superfluous work allegedly performed. One or more of the members committed an unlawful, overt act in furtherance of the object or course of action; LRH made fraudulent representations to Plaintiffs about the ability to fund the deal. Plaintiff suffered injuries as a result of the wrongful acts committed by Defendants and its co-conspirators as outlined herein.

D. Aiding and Abetting (Assisting and Encouraging)

22. Defendants are liable for aiding and abetting fraud by assisting and encouraging. Defendants gave assistance or encouragement to LRH in the fraud it committed against Plaintiffs. More specifically, Defendants had knowledge that LRH's conduct constituted torts, and Defendants had the intent to assist LRH in committing the torts. Defendants assisted or encouraged LRH in committing the torts by acting as an escrow agent for the phony deal that Thompson Knight knew would never come to fruition and transferring fees to itself and LRH or its affiliates, without Destino's knowledge or consent. Those acts were a substantial factor in allowing LRH to commit the underlying fraud. The aiding and abetting caused Plaintiffs damages in the amount described herein.

VIII
DAMAGES

23. Regarding the cause of action and conduct alleged above, Plaintiffs have sustained pecuniary losses that were proximately caused by Defendants' conduct. Plaintiffs hereby seek the maximum allowable of actual damages that are within the jurisdictional limits of this Court. Plaintiffs seek monetary relief in excess of $32,000,000.

A. Direct Damages

24. Plaintiffs seek actual damages in the amount of $554,500. These out-of-pocket damages include the $357,500 in "up front fees" that Plaintiffs would not have paid and $227,000 in expenses that Plaintiffs would not have incurred but for the fraud and breach of fiduciary duty committed by Defendants.

B. Consequential Damages

25. Plaintiffs also seek unliquidated consequential damages estimated at approximately $31,000,000. This is the amount that Destino may become liable for under the

contracts that Destino entered with third parties to facilitate the transactions, including the seller of oil and gas assets. The fraud and breach of fiduciary duty committed by Defendants, and the fraud committed by LRH to which Defendants aided and abetted and conspired to commit, was a substantial factor in bringing about these damages, which otherwise would not have occurred because Plaintiffs would not have otherwise entered into these third-party contracts to which they now may be liable. Moreover, a person of ordinary intelligence would have foreseen that the damages might result from such conduct.

C. Exemplary Damages

26. Due to Defendants' intentional breach of fiduciary duty, intentional fraud by non-disclosure, and conspiracy to commit fraud, Plaintiffs are entitled to exemplary damages which they seek herein, to the maximum extent of the law. As stated below, exemplary damage caps do not apply in this case.

D. Fee Forfeiture

27. Due to Defendants' intentional breach of fiduciary duty and fraud, Plaintiffs are entitled to disgorge all fees and expenses paid to Defendants and request that those fees or expenses be placed into a constructive trust. In addition, the Court may order all profits obtained by a fiduciary to be disgorged as a result of the breach of fiduciary duty when the fiduciary competes with the beneficiary and benefits in some way. Thus, Plaintiffs seek to disgorge any attorneys' fees or expenses paid to Defendants by LRH or its affiliates related to the transactions made the basis of this lawsuit. The law does not allow Defendants to profit from their intentional breach of fiduciary duty and aiding and abetting fraud to the detriment of Plaintiffs.

IX
EXCEPTION TO DAMAGE CAPS

28. Texas Civil Practice and Remedies Code § 41.008(c) provides that exemplary damage caps do not apply to a cause of action against a defendant which is based on conduct which violates certain sections of the Texas Penal Code and was committed knowingly and intentionally. TEX. CIV. PRAC. & REM. CODE § 41.008(c). In this case, Defendants violated Section 32.43 of the Texas Penal Code by engaging in commercial bribery. This section prohibits a fiduciary – such as an attorney – from intentionally or knowingly accepting, or agreeing to accept any benefit from another person on agreement or understanding that the benefit will influence the conduct of the fiduciary in relation to the affairs of his beneficiary – such as a client. TEX. PENAL CODE § 32.43(b). Applied here, Defendants violated this statute by agreeing and knowingly accepting a benefit from LRH or its affiliates (attorney's fees) on the agreement or understanding that the benefit would influence their conduct in relation to the affairs of their beneficiary, Destino. Accordingly, exemplary damages are not capped in this case. *See* TEX. CIV. PRAC. & REM. CODE § 41.008(c)(9).

X
RESPONDEAT SUPERIOR

29. At all times material hereto all of the specific acts complained of herein are attributable to the conduct of the individual attorneys associated with their respective law firm, Thompson Knight, as a partner, agent, servant, representative and/or employee. Thus, the liability and responsibility of Thompson Knight is vicarious and joint and several, and, further, Plaintiffs plead the legal theory of *respondeat superior* as between the individual lawyers named herein and Thompson Knight.

XI
JURY DEMAND

30. Plaintiffs desire to have a jury decide this case and makes this formal request pursuant to Texas Rule of Civil Procedure 216. This request is filed more than thirty days before this case has been scheduled for trial and all fees have been paid.

XII
NOTICE OF INTENT TO USE PRODUCED DOCUMENTS

31. Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, each party is hereby given notice of Plaintiffs' intent to use any and all documents produced by any and all parties at any pretrial hearing, deposition, proceeding, the trial of this matter, or any combination.

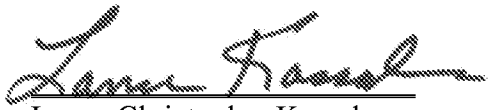
XIII
PRAYER

WHEREFORE, Plaintiffs pray that after trial herein, that judgment be entered against Defendants jointly and severally as prayed for, that costs of court be taxed against Defendants, that Plaintiffs be given prejudgment as well as post judgment interest, and for such other and further relief, at law and in equity to which Plaintiffs may show themselves to be justly entitled, to which the Court believes Plaintiffs to be deserving, and for which Plaintiffs will ever pray.

Dated: February 1, 2021.

Respectfully submitted,

THE KASSAB LAW FIRM



Lance Christopher Kassab
Texas State Bar No. 00794070
lance@kassab.law
David Eric Kassab
Texas State Bar No. 24071351
david@kassab.law

Nicholas R. Pierce
Texas State Bar No. 24098263
nicholas@kassab.law
1214 Elgin Street
Houston, Texas 77004
Telephone: 713-522-7400
Facsimile: 713-522-7410
Electronic Service: eserve@kassab.law

ATTORNEYS FOR PLAINTIFFS

You Can Help: Ukraine crisis

1 million refugees have been displaced by the crisis in Ukraine. Rush an emergency gift.

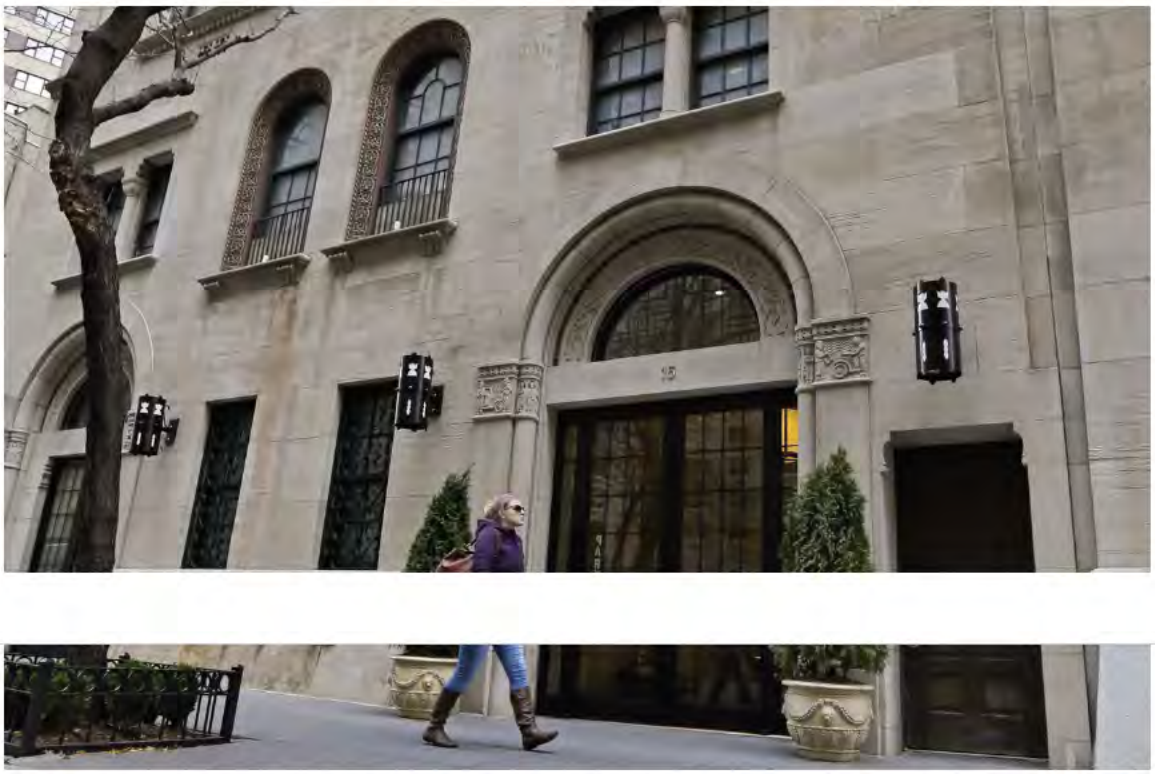
rescue org

Ope

U.S.

Law Firms' Accounts Pose Money-Laundering Risk

Hundreds of millions of dollars allegedly siphoned from Malaysian state fund 1MDB passed through firms' pooled accounts prosecutors say



The Park Laurel building in New York. The Justice Department says one condo in it was bought and sold with misappropriated funds that passed through law firms' pooled accounts for client money.

PHOTO: PETER FOLEY FOR THE WALL STREET JOURNAL

By Rachel Louise Ensign Follow *and* Serena Ng Follow

Updated Dec. 26, 2016 10:27 am ET

SHARE

SAVE PRINT TEXT 47

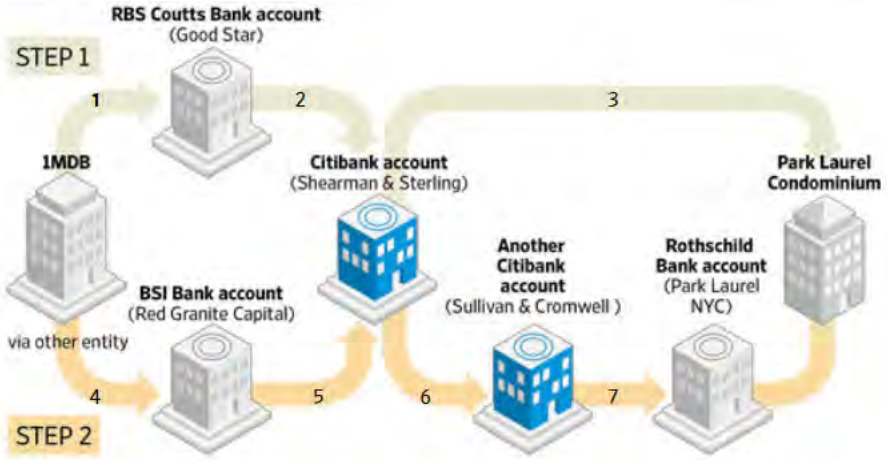
Tens of billions of dollars every year move through opaque law-firm bank accounts that create a gap in U.S. money-laundering defenses, according to a Wall Street Journal analysis.

These accounts were used by suspects in a multibillion-dollar scandal involving a Malaysian state investment fund known as 1MDB, according to a Justice Department description of events. They also played a part in a Florida Ponzi scheme, in a case related to an official of Equatorial Guinea and in a dozen other U.S. money-laundering cases over the past decade, case records show.

Law firms lump together client money they are holding for short periods, such as while real-estate sales are pending, into pooled bank accounts, and the law firms face no requirement to disclose whose cash is in the accounts. Banks say they generally see only a law firm's name.

Money often stays in the accounts for only a few days or weeks. At the request of law firms' clients, funds can be sent from the accounts to other parties, with scant transparency.

While banks and other firms that move money across borders face heavy pressure to alert regulators to suspicious activity, U.S. law firms protect the confidentiality of their pooled accounts in the name of attorney-client privilege.



< Back Next >

1. SEPTEMBER 2009

$700 million from 1MDB passes to an RBS Coutts bank account in Switzerland controlled by Good Star, a firm controlled by Malaysian financier Jho Low.

The result is "a way of getting money into the U.S. system without going through the anti-money-laundering safeguards," said Elise Bean, former chief counsel to a Senate investigating subcommittee that analyzed vulnerabilities in the banking system. It's "a pretty darn big loophole."

The Financial Action Task Force, a global group that sets international standards for anti-money-laundering procedures, has called the law-firm accounts a vulnerability. In a December report assessing American efforts to fight financial crime, the group criticized the U.S.'s limited oversight of lawyers, who are not required to flag suspicious financial activity.

American Bar Association President Linda A. Klein said the ABA supports the legal profession's efforts to prevent misconduct involving client money. "Additional financial reporting requirements would be unnecessary and burdensome," she said, because there are few examples of client trust accounts being misused.

Riza Aziz
PHOTO: GREGORY PACE/REX

Ms. Klein said the ABA has supported guidance to alert lawyers to suspicious situations and will continue supporting reasonable efforts to fight money laundering "in ways that minimize the impact on the attorney-client privilege" and clients' right to effective counsel.

Most pooled accounts aren't the law firms' idea. Many state courts or legislatures mandate that lawyers combine small sums of client money and funds held only briefly, as a way to generate interest to fund legal aid to the poor. Most such accounts are called IOLTAs, for Interest On Lawyer Trust Accounts. Law firms hold certain other client money in individual clients' names.

The pooled accounts typically contain money held for real-estate purchases, pending lawsuit settlements and prepaid legal services, but they can contain client money that a firm is holding for virtually any purpose, said Nabil Foster, a partner at Hinshaw & Culbertson LLP in Chicago.

Hundreds of millions of dollars allegedly siphoned out of 1Malaysia Development Bhd., the Malaysian state fund known as 1MDB, passed through law-firm pooled accounts in the U.S., federal prosecutors said in lawsuits filed in July. Investigators

MOST POPULAR NEWS

1. Russian Prosecutors Warn Western Companies of Arrests, Asset Seizures
2. Russian Missiles Strike Ukrainian Base Near Polish Border
3. Ukraine and Russia Resume Talks as Moscow's Bombing Campaign Grinds On
4. After Walt Disney, Robert Iger Heads to the Metaverse
5. Iran Claims Missile Attack on Iraq That Sent U.S. Troops Rushing for Shelter

MOST POPULAR OPINION

1. Opinion: Send NATO Troops to Western Ukraine
2. Opinion: Is the Dollar in Danger?
3. Opinion: Russia's War Gets Closer to NATO
4. Opinion: The State Flat-Tax Movement Grows
5. Opinion: Biden's War on Oil Hits Consumers

RECOMMENDED VIDEOS

SHUTTERSTOCK/ZUMA PRESS

Follow The Wall Street Journal's coverage of 1MDB

October 2009.

in several countries say billions of dollars are missing from the Malaysian fund.

The Justice Department, in civil suits seeking forfeiture of assets allegedly bought with stolen 1MDB money, said law firms holding the money in their pooled accounts authorized transfers that were used to pay for luxury U.S. real estate, jewelry, and yacht and jet rentals.

Other transfers moved money from a pooled account to Las Vegas casinos and to personal bank accounts of individuals linked to the global 1MDB scandal, according to the lawsuits.

In one set of transactions, the Justice Department lawsuits said, Malaysian financier Jho Low, whom investigators consider a central figure in the alleged 1MDB fraud, wired $148 million from a Swiss bank account to law firm Shearman & Sterling LLP's pooled account at Citibank in New York in

Advertisement - Scroll to Continue

Four months later, four bank checks totaling about $22 million were issued from the law-firm account to pay for a condo in the Park Laurel adjacent to Manhattan's Central Park, the suits said. The buyer was listed as a British Virgin Islands firm called Park Laurel (NYC) Ltd.

That company sold the condo a couple of years later to an entity called Park Laurel Acquisition LLC. The lawsuits said that entity was controlled by Riza Aziz, the stepson of Malaysian Prime Minister Najib Razak.

Zho Low
PHOTO: TAYLOR HILL/GETTY IMAGES

About $34 million for this second purchase of the condo was transferred to the Shearman & Sterling pooled account, according to the lawsuits. They said the money came from a Singapore account held by a British Virgin Islands firm that Mr. Aziz controlled.

Next, a wire from the Shearman & Sterling pooled account sent a similar amount of money to an attorney trust account of another law firm, Sullivan & Cromwell LLP.

The Sullivan & Cromwell account, also held at Citibank, then wired $34 million to a bank account at Switzerland-based Rothschild Bank AG to pay Mr. Low, said the suits.

The Justice Department suits asserted that the cash for both purchases of the condo was stolen from 1MDB. The suits said companies controlled by Mr. Low and Mr. Aziz sent a total of $489 million into Shearman & Sterling's pooled account from overseas.

The asset-seizure suits are civil actions filed against properties themselves, and don't include any individuals as defendants.

Messrs. Low and Aziz both have denied any wrongdoing in the 1MDB matter.

Neither Citibank nor the U.S. law firms are accused of any wrongdoing. A spokeswoman for Shearman & Sterling said it was in compliance with legal and ethical standards and had no reason to believe funds might have been stolen. Citibank and Sullivan & Cromwell had no comment.

The predominant type of pooled client account traces back more than three decades to a cutback in federal spending on civil legal aid, said Randall Berg, a Florida public-interest attorney who helped set up pooled-account systems in several states to generate interest to pay for civil legal aid. Today, 46 states and the District of Columbia require law firms to use such accounts.

A rough estimate of how much money runs through them is possible from the amount of interest they generate, which was $78 million in 2015, according to an ABA information repository. In five large states that track data on the accounts, banks paid an average interest rate of 0.21% on them. Those figures suggest that nationally, law firms' pooled accounts held an average balance of at least $36 billion over the course of the year.

Since money often stays in them for only days or weeks, however, the amount flowing through in a year could be much higher. The figures suggest that if money sat in the accounts for an average of three months, roughly $146 billion would pass through in a year, and if money turned over every month, the total passing through would exceed $400 billion.

The accounts appear to be swelling. In the five large states that

How a Malaysian Scandal Spread Across the World

See how billions allegedly siphoned from 1MDB were spent across the world » (https://www.wsj.com/graphics/1mdb-how-a-malaysian-scandal-spread-across-the-world/)

(https://www.facebook.com/sharer/sharer.php?u=https%3A%2F%2Fwww.wsj.com%2Fgraphics%2F1mdb-how-a-malaysian-scandal-spread-across-the-world%2F%3Fmod%3Dwsj_share_facebook%20a%20Malaysi

More on Financial Regulation

track balances—California, New York, Texas, Florida and New Jersey—the law firms' pooled accounts collectively held roughly $20 billion last year, which was up 32% from 2012. The growth is partly due to higher sales of real estate, including luxury properties, some lawyers say.

The confidentiality of bank accounts in general became a bigger issue after the Sept. 11, 2001, terrorist attacks, when the government increased surveillance of the financial system. The legal industry fought hard to avoid being swept up in the extension of tough anti-money-laundering rules beyond bankers to other professions.

Stephen Saltzburg, a George Washington University law-school professor and member of the ABA policy-making body, called the prospect of rules requiring lawyers to turn in clients "the single most alarming threat to attorney-client privilege anyone has seen in a long time." He led the passage of an ABA resolution against them.

This year, the ABA successfully pushed for pooled trust accounts to be exempt from new federal rules requiring financial institutions to know the beneficial owners of accounts that are in the names of legal entities such as shell companies. People can effectively get around those requirements by sending money to their lawyers' accounts for short periods, said Richard Gordon, a Case Western Reserve University law professor and former anti-money-laundering specialist at the International Monetary Fund.

American lawyers do face rules requiring them to keep records of client funds and forbidding them to knowingly aid illegal conduct. Investigators can ask law firms to turn over pooled-account records in connection with a case. The ABA has voluntary guidelines for lawyers to spot and prevent money laundering.

Lawyers in the U.S. don't have to investigate client conduct unless they believe a client may be engaging in illegal activity while using the lawyer's services, unlike requirements in other developed countries. In situations where a U.S. lawyer learns a client is engaging in nefarious activity, state rules vary on whether the lawyer would be required to report it to the government, said Hal Lieberman, a New York legal-ethics attorney.

Other attorneys said if the lawyers couldn't persuade such a client to adhere to the law or end the possibly illegal activity, they should stop representing the client or risk being seen as facilitating the illegal activity.

Banks have occasionally faced sanctions for failing to detect money laundering carried out via pooled law-firm accounts. In 2009, investigators uncovered a $1.2 billion Ponzi scheme run by a South Florida attorney, Scott Rothstein, who had done transactions through his law firm's pooled accounts at the U.S. unit of Canada's Toronto-Dominion Bank and at Gibraltar Private Bank & Trust, a small Florida bank. Mr. Rothstein pleaded guilty to federal crimes including conspiracy to commit money laundering.

TD Bank and Gibraltar were fined a total of $56.5 million for failing to have sufficient controls in place to detect and report the scheme, along with other lapses. Both banks declined to comment.

In another case, for years banks and regulators were suspicious of accounts opened by Teodoro Nguema Obiang Mangue, vice president of Equatorial Guinea and son of the African country's president. According to a U.S. Senate report, Mr. Obiang, often with the help of a lawyer, moved more than $100 million into the U.S. and deposited some of it in bank accounts used to pay for parking tickets, furnishings and other expenses. Investigators said they believed some of the funds were the proceeds of foreign corruption.

Some banks shut accounts linked to Mr. Obiang following internal reviews, but he continued sending money to his lawyer's client trust account at Bank of America Corp., which had already closed Mr. Obiang's accounts. In 2008, Senate investigators contacted Bank of America with concerns about the law-firm account, and it too was shut down, according to the Senate report.

Investigators at Bank of America had suspicions about the account but "made a judgment call" to keep it open because they believed the lawyer was using it to represent a client, a senior bank compliance officer told federal lawmakers in 2010, though he said the bank's compliance procedures had since improved. Bank of America declined to comment.

The Justice Department in 2011 filed civil forfeiture complaints to seize U.S. assets Mr. Obiang purchased. They reached a settlement in 2014 to end the case. A representative of Mr. Obiang said he had no comment.

Write to Rachel Louise Ensign at rachel.ensign@wsj.com and Serena Ng at serena.ng@wsj.com

Corrections & Amplifications:
A Justice Department lawsuit's account of events involving 1Malaysia Development Bhd. said 1MDB money that moved

to a BSI bank account in 2012 passed via an intermediate entity. An earlier version of an illustration with this article omitted a reference to the intermediate entity. The illustration has been updated. (Dec. 28, 2016)

Appeared in the December 27, 2016, print edition as 'Money Laundering Loophole: Law Firms'.

SHOW CONVERSAT ON (47

ADVERTISEMENT

Dianomi

Stocks Fall as Steve Jobs' Prediction Coming True
Altimetry

Where to Invest $10,000 Right Now
The Motley Fool

How Savvy Investors Pay for Healthcare in Retirement
Fisher Investments

Streamline Your Tech Solutions and Evolve Your Client Experience
Orion Advisor Technology

6 Credit Cards You Should Not Ignore If You Have Excellent Credit

Schwab's Outlook for Stock Sectors
Charles Schwab

SPONSORED OFFERS

WAYFAIR:
Extra 15% off + free shipping at Wayfair

TURBOTAX:
Save up to an additional $20 with TurboTax March 2022

H&R BLOCK TAX:
Save up to $40 with H&R Block compared to TurboTax

TARGET:
Up to 60% off - Target Promo Code

SAMSUNG:
30% off smartphones + free shipping - Samsung promo code

AT&T:
Get an extra $50 Reward Card with AT&T Promo Code

Copyright ©2022 Dow Jones & Company, Inc. All Rights Reserved.

WSJ Membership
WSJ+ Membership Benefits
Subscription Options
Why Subscribe?
Corporate Subscriptions
Professor Journal
Student Journal
WSJ High School Program
Public Library Program
WSJ Live

Customer Service
Customer Center
Contact Us

Tools & Features
Newsletters & Alerts
Guides
Topics
My News
RSS Feeds
Video Center
Watchlist
Podcasts
Visual Stories

Ads
Advertise
Commercial Real Estate Ads
Place a Classified Ad
Sell Your Business
Sell Your Home
Recruitment & Career Ads
Coupons
Digital Self Service

More
About Us
Commercial Partnersh
Content Partnerships
Corrections
Jobs at WSJ
News Archive
Register for Free
Reprints & Licensing
Buy Issues
WSJ Shop

WSJ Membership Benefits
Customer Center
Legal Policies

Sign Out

Copyright ©2022 Dow Jones & Company, Inc. All Rights Reserved.

From: Ryan Reneau
To: cdrr
Subject: Lack of CDC Fraud Training
Date: Monday, May 2, 2022 4:40:25 PM
Attachments: image001.png

Ladies and Gentlemen of the Committee:

As you revise the rules related to fraud and their application, please keep in mind the response below from the Open Records Center regarding the training of the Office of the Chief Disciplinary Counsel staff for the period of January 1, 2020, through December 31, 2021.

Regards,

S. Ryan Reneau
- JD LLM CPA CFA -

The content of this email is limited to the matters specifically addressed herein and is not intended to address other potential tax consequences or the potential application of tax penalties to this or any other matter.

The information transmitted, including any attachments, is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited, and all liability arising therefrom is disclaimed. If you received this in error, please contact the sender and delete the material from any computer.

From: TEXASBAR Support <texasbar@govqa.us>
Date: Thursday, April 28, 2022 at 4:30 PM
To: Ryan Reneau <ryan@reneau.io>
Subject: [Records Center] Public Information Request :: R000652-041122

--- Please respond above this line ---

RE: PUBLIC RECORDS REQUEST of April 11, 2022, Reference # R000652-041122

Dear Steven Reneau,

The State Bar of Texas received a public information request from you on April 11, 2022. Your request mentioned:

"Please provide a copy of any training courses or classes, internal or external, attended by the staff of the Office of the Chief Disciplinary Counsel related to investigating fraud, misrepresentation, or failure to apprise another of relevant information. Additionally, please

provide the number of staff and level who attended each course or class."

The State Bar of Texas has reviewed its files and has determined there are no responsive documents to your request.

We anticipate this satisfies your request. Please respond in writing to clarify if this response does not satisfy your request or you have additional information to assist us in locating responsive records. For more information about State Bar records, how to make a request, and the public information process, see www.texasbar.com/publicinformation.

Sincerely,

State Bar of Texas Open Records Center

To monitor the progress or update this request please log into the Public Records Center

From: Ryan Reneau
To: cdrr
Subject: Lack of Guidance Regarding Fraud Definition
Date: Thursday, May 5, 2022 1:18:16 PM
Attachments: image001.png

Ladies and Gentlemen of the Committee,

Please find the reply below from the Open Records Center of the State Bar regarding guidance related to the definition of fraud for the Committee records.

I would also like to document for the record my objection to the lack of substantive replies to my comments. While it is unclear to me at this time whether the Administrative Procedures Act applies and requires substantive replies, it is none-the-less best practice of administrative rule-making to address the public comments and the issues raised. Particularly, the Committee did not respond or address the latest Supreme Court decisions regarding negligent misrepresentation and attorney immunity that state the grievance process is a guardrail against attorney misdeeds and the Committee's proposed language that abdicates the State Bar's responsibility by turning back to the Courts in a circular reasoning loop created.

Regards,

S. Ryan Reneau
- JD LLM CPA CFA -

The content of this email is limited to the matters specifically addressed herein and is not intended to address other potential tax consequences or the potential application of tax penalties to this or any other matter.

The information transmitted, including any attachments, is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited, and all liability arising therefrom is disclaimed. If you received this in error, please contact the sender and delete the material from any computer.

From: TEXASBAR Support <texasbar@govqa.us>
Date: Thursday, May 5, 2022 at 12:48 PM
To: Ryan Reneau <ryan@reneau.io>
Subject: [Records Center] Public Information Request :: R000646-040722

--- Please respond above this line ---

RE: PUBLIC RECORDS REQUEST of April 07, 2022., Reference # R000646-040722

Dear Steven Reneau,

The State Bar of Texas received a public information request from you on April 07, 2022. Your request mentioned:

"Texas Disciplinary Rules of Professional Conduct Rule 1.00 states: "Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information. Please provide the State Bar's written guidance regarding the application of this provision to lawyer's conduct, specifically negligent actions.

It is expected the Office of the Chief Disciplinary Counsel will have memorandums, policy statements, internal manuals, and non-confidential decisions regarding public sanctions related to negligent actions.

It is also expected the Professional Ethics Committee will have memorandums, research documents, internal communications, and opinions related to negligent actions."

The only information responsive to the request is the public sanction information described in the estimate.

Sincerely,

State Bar of Texas Open Records Center

To monitor the progress or update this request please log into the Public Records Center

Committee on Disciplinary Rules and Referenda
Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.09. Conflict of Interest: Former Client

Public Comments Received
March 11, 2022

From: [redacted]
To: cdrr
Subject: CDRR Comment: Rule 1.09
Date: Friday, March 11, 2022 2:30:35 PM

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

Contact

First Name	Kanon
Last Name	Lillemon
Email	[redacted]
Member	Yes
Barcard	24032668

Feedback

Subject	Rule 1.09

Comments

I am only concerned with the following pattern: Lawyer 1 leaves large firm A which has 10,000 active clients at any given time. Lawyer 1 only works on 50 at a time. Note that A is not likely to divulge an entire client list to 1 who is leaving. 1 takes employment adverse to A. At a court appearance lawyer 2 tells the court that 1 is conflicted because 1 worked at A when the party retained firm A. At this point the court should ask for some proof of actual conflict. If 1 has seen protected information, there is no fear of further revelation by 2 showing 1 or the court the proof. However, lawyers at A have learned there is no repurcussion for making claims without evidence. The courts will often turn to the accused atorney and ask did you gain knowledge of this party? And 1 will have to address their absence of knowledge. I swear I did not represent or obtain any protected information. This is not a client I was assigned. That can resolve the issue. But judges can be leary of the greater consequences. I recommend keeping the term personal representation in the rule. Simply stated: an attorney who personally represented a client or gained protected information about a client whether singly or through a firm may not thereafter represent a client adverse to the previous client's position in the same or substantially similar matter. Or A person leaving a firm is not conflicted from representing an adverse party against a party represented by the former firm unless the firm can clearly show that the lawyer worked on the file, or gained protected knowledge within the file. I also suggest that making this assertion without evidence should be grounds for an ethics violation if the attorney making it has no reason to believe that the attorney who is accused has protected materials or worked directly on the file.

Committee on Disciplinary Rules and Referenda
Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.10. Imputation of Conflicts of Interest: General Rule

Public Comments Received
March 8, 2022, through April 6, 2022

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed amendment to TDRPC 1.10
Date: Tuesday, March 8, 2022 1:20:19 AM

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

Contact

First Name	Philip
Last Name	Kingston
Email	[redacted]
Member	Yes
Barcard	24010159

Feedback

Subject	Proposed amendment to TDRPC 1.10

Comments

I question whether the proposed rule will sufficiently assure the client whose confidential information is in danger of being used against it. What screening could really be effective if a lawyer who moves to a firm that later takes a matter adverse to the client still retains actual knowledge of the client's still-confidential information? Even if the new matter is unrelated to previous ones for which the moving lawyer was exposed to the confidential information, the safeguards proposed by the amendment would not prevent giving the impression that the bar makes different rules for itself than it seeks to apply to other fiduciaries. The client will be left only with the cumbersome and expensive disqualification process, which frankly, might be made more uncertain under this amendment.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rule 1.10
Date: Sunday, March 13, 2022 10:03:09 PM

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

Contact

First Name	George
Last Name	Shires
Email	[redacted]
Member	Yes
Barcard	24068016

Feedback

Subject	Proposed Rule 1.10

Comments

Wouldn't proposed Rule 1.10(a) also change existing Rule 1.06(f)? I did not see where there were any redline changes to Rule 1.06(f), which could create some confusion as to which Rule would control in an imputed conflict situation.

From:	Christopher A. Hernandez
To:	cdrr
Cc:	Kelli Childress
Subject:	Comments Concerning the Proposed Rules
Date:	Tuesday, March 29, 2022 3:20:56 PM
Attachments:	image001.jpg Comt Conc Propd Rules.pdf

To Whom it May Concern:

Attached are our comments concerning the proposed rules.

Sincerely,

Card Logo

Christopher A. Hernandez
Deputy Public Defender
El Paso County Public Defender's Office
500 E. San Antonio, Suite 501
El Paso, Texas 79901
Office (915) 546-8185, ext: 5165
Fax (915) 546-8186

Office of the El Paso County
PUBLIC DEFENDER
Justice for One is Freedom for All

Via: cdrr@texasbar.com
Committee on Disciplinary Rules and Referenda
State Bar of Texas
Texas Law Center
1414 Colorado Street
Austin, Texas 78701

Re: Comments Concerning the Proposed Rules

Honorable Members of the Committee on Disciplinary Rules and Referenda:

Thank you for the important updates you are working on to better the practice of law in Texas. As a Public Defender, I appreciate how the proposed changes to Rules 1.00, 1.09, 1.10 and 3.09 will not only serve to better protect the rights of the most vulnerable Texans, but also to clarify roles and ease administration of Public Defenders' Offices throughout the state. I offer a few comments to Rules 1.10, 1.11, and 3.09 below.

I. The creation of the new Rule 1.10 renders the new Rule 1.11 unnecessary

I support the adoption of the newly proposed Rule 1.10, which replicates ABA Rule 1.10. However, the new Rule 1.11 (current Rule 1.10) deviates from the ABA model rules in a manner that provides no measurable benefit, and in fact operates to restrict Public Defenders' Offices in a manner that will negatively impact the criminal justice system, especially in larger counties.

Of particular concern in the new Rule 1.11, is the "body politic rule" found in TEX. DISCIPLINARY R. PROF'L. CONDUCT R. 1.10(i) & n. 10, which prohibits government law firms, such as mine, from screening imputed conflicts when hiring attorneys from other government law firms within the same body politic. For example, if I hire an attorney from our County Attorney's Office, our entire office will be required to withdraw from any case the County Attorney's Office handled during the subject attorney's employment with the County Attorney. This is a limitation that will not be placed upon private law firms after the adoption of the newly proposed Rule 1.10.

I suggest that this committee, upon adoption of the new Rule 1.10, simply eliminate the new Rule 1.11 in its entirety. This will have the effect of treating all law firms the same. The new Rule 1.11

no longer serves any function, other than continuing to prevent indigent defense offices from hiring the most qualified candidates.

II. Rule 3.09's Proposed Additions

The proposed additions to Rule 3.09 are a logical extension of Rules 3.03 (Candor Toward the Tribunal) and 3.04 (Fairness in Adjudicatory Proceedings). The adoption of the proposed additions to Rule 3.09 provides current and former prosecutors with important guidance. I would, however, recommend an important clarification.

A. Removal of the term "material"

The Disciplinary Rules of Professional Conduct should be as free from interpretive discrepancies as possible. The use of the term "material" creates the potential for a subjective application of Rule 3.09. The Court of Criminal Appeals in *Watkins*, after a very lengthy discussion, ultimately concluded for the purpose of TEX. CODE CRIM. PROC. art. 39.14 that "material" meant "having some logical connection to a fact of consequence." *Watkins v. State*, 619 S.W.3d 265, 291 (Tex. Crim. App. 2021). Arguably, even the definition by the *Watkins* Court is subject to a significant range of interpretation. Including the term "material" in the proposed additions to Rule 3.09 without defining it could have the result of diluting the important accomplishment intended by the proposed changes, by leaving open a subjective analysis of what is "material," or, if relying on the *Watkins* definition, what is a "logical connection" or whether something is a "fact of consequence." As *Watkins* illustrates, using words with such high potential for broad differences in interpretation, leads to confusion, withholding information, complaints of unfairness, and lengthy litigation.

The omission of the word "material" would be of no consequence to the intended application of the proposed additions. The rule without the word "material" still requires both that the new evidence be 1) be credible, and 2) create a reasonable likelihood that the person did not commit the offense for which they were convicted. These two benchmarks are strong enough to prevent the over-application of this rule, while still correcting wrongful convictions.

B. Reporting knowledge of exculpatory information to an "appropriate authority" by prosecutors and former prosecutors

I am aware that the issue of the proposed addition's application to former prosecutors has been an issue facing the committee for many months. I, like many other Chief Public Defenders across Texas, employ many former prosecutors, and I am a former prosecutor myself. I very much appreciate the high level of ethics required of a prosecutor's important position.

I would suggest that this committee explicitly state to whom exculpatory information should be forwarded. Adding language such as, the "current elected prosecutor in the jurisdiction of that matter" to 3.09(f)(1), rather than simply "appropriate authority," would make the former prosecutor's duty clear. *State ex rel. Edison v. Edwards*, 793 S.W.2d 1, n. 5 (Tex. Crim. App. 1990) (The authority of assistant district attorneys stems from their appointment by the elected district attorney.); *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 931 (Tex. Crim. App. 1994) ("An assistant prosecuting attorney is hired by the district attorney, serves under his direction and at his discretion, and exercises no independent prosecutorial power.") This will allow the elected prosecuting authority - who has the obligation to see that justice is done – to fulfill his or her obligations under Rule 3.09. It will also eliminate the subjective decision making that might lead one to only inform, for example, the former prosecutor who handled the matter and may now be retired, or the former elected official who may now be out of office, or the former defense attorney who may no longer be practicing in the area. Again, the elimination of room for interpretation is essential to equal application of the disciplinary rules.

Thank you for your efforts in these matters. And thank you for allowing and considering commentary.

Sincerely,

Kelli Childress
Chief Public Defender
El Paso County, Texas

From: Christopher Hernandez
To: cdrr
Subject: Comments Concerning the Proposed Rules
Date: Saturday, April 2, 2022 9:55:14 PM

Members of the Committee on Disciplinary Rules and Referenda:

I generally support the proposed rule changes, but I feel there are two important changes that need to be made. I have been a criminal defense attorney my entire career; I feel that the proposed changes to Rule 3.09 do not adequately address confidential information. Further, adopting the newly proposed Rule 1.10, while keeping the current 1.10, and renumbering it creates disparate treatment between government and non-government attorneys. Also, the proposed handling of the proposed and current Rules 1.10 does not fully address the Court of Criminal Appeals' treatment of attorney disqualification.

Protecting the Attorney-Client Relationship

The proposed changes to Rule 3.09 are an excellent clarification to how a prosecutor executes their duties on Rules 3.03 & 3.04. However, not specifying whether these provisions are subject to the confidentiality provisions of Rule 1.05 creates the possibility that a former prosecutor might be forced to inform on their client, if the client admits to committing a crime that another was convicted of committing.

This is more than just theoretical; this situation famously happened in Alton Logan's case when Andrew Wilson confessed to his attorneys that he committed the crime Logan was convicted of committing. *See* https://www.cbsnews.com/news/26-year-secret-kept-innocent-man-in-prison/. In that situation, Wilson's attorneys did not disclose Wilson's admission until after Wilson's death, per his authorization to release the information.

The attorney-client privilege is broader in the criminal context than in the civil. Tex. R. Evd. R. 503(b)(2) gives criminal clients the "privilege to prevent a lawyer or lawyer's representative from disclosing any other fact that came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship." "Thus, the aspirational purpose of the privilege is the promotion of communication between attorney and client unrestrained by fear that these confidences may later be revealed." *Sanford v. State*, 21 S.W.3d 337, 342 (Tex. App.—El Paso 2000, no pet.) (citing *Strong v. State*, 773 S.W.2d 543, 547 (Tex. Crim. App. 1989)). Even under the best of circumstances gaining the complete trust of people facing the most stressful, humiliating, and consequential times of their life is extremely difficult. The mere possibility that their confidences could be subject to forced disclosure will only serve to harm the attorney-client relationship in these already difficult situations. Therefore, I recommend the committee add a comment to Rule 3.09 that states "A lawyer cannot be disciplined under this rule for failing to disclose information that is confidential under Rule 1.05. This rule does not authorize a lawyer to disclose information that is confidential under Rule 1.05. To disclose information pursuant to this rule that is confidential under Rule 1.05 there must be an applicable exception to Rule 1.05 in paragraphs (c) (e) or (f) of Rule 1.05."

This will not undermine the effect of the proposed changes to Rule 3.09 since Rule 1.05(c)(4) authorizes disclosure because the new evidence would be subject to disclosure pursuant to Tex. Code Crim. Proc. art. 39.14, the proposed changes' logical connection to Rules 3.03 & 3.04 and Rule 1.05(f)'s mandatory disclosure requirements under Rules 3.03 & 3.04, and that "[t]he work product privilege does not operate as a blanket privilege covering all decisions made by the DA's Office." *In re State ex rel. Skurka*, 512 S.W.3d 444, 455 (Tex. App.—Corpus Christi 2016, no pet.) (citing *In re Crudup*, 179 S.W.3d 47, 50 (Tex. App.–San Antonio 2005, orig. proceeding), mand. granted on other grounds sub nom. *In re Bexar Cnty. Crim. Dist. Attorney's Office*, 224 S.W.3d 182, 188 (Tex.2007) (orig. proceeding)).

Creating Equal Treatment for all Attorneys & Conformity

Between the Rules and the Applicable Case Law

I support the adoption of the newly proposed Rule 1.10 as it facilitates attorneys' and firms' ability to choose their own path forward unencumbered by prior representations having only theoretical impacts on current clients. However, adding the newly proposed Rule 1.10 and moving the following rules down in numbering will not operate as intended. The current Rule 1.10 which is proposed to be renumbered 1.11 contains language markedly different from the ABA Model Rules that the newly proposed Rule 1.10 is based upon. As you can see, they have different titles and address different concerns.

Rule 1.11: Special Conflicts of Interest for Former & Current Government Officers & Employees	Current Rule 1.10 1.10 Successive Government and Private Employment
Share: Client-Lawyer Relationship (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government: (1) is subject to Rule 1.9(c); and (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule. (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government	(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. (b) No lawyer in a firm with which a lawyer subject to paragraph (a) is associated may knowingly undertake or continue representation in such a matter unless: (1) The lawyer subject to paragraph (a) is screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is given with reasonable promptness to the appropriate government agency. (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows or should know is confidential government information about a person or other legal entity acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person or legal entity. (d) After learning that a lawyer in the firm is subject to paragraph (c) with respect to a particular matter, a firm may undertake or continue representation in that matter only if

information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by that disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

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

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

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

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

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

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

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

Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

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

(h) As used in this Rule, Private Client includes not only a private party but also a governmental agency if the lawyer is not a public officer or employee of that agency.

(i) A lawyer who serves as a public officer or employee of one body politic after having served as a public officer of another body politic shall comply with paragraphs (a) and (c) as if the second body politic were a private client and with paragraph (e) as if the first body politic were a private client.

Of special importance is paragraph (i) and comment 10 to the current Rule 1.10. “As used in paragraph (i), one body politic refers to one unit or level of government such as the federal government, a state government, a county, a city or a precinct. The term does not refer to different agencies within the same body politic or unit of government.” Tex. Disciplinary R. Prof’l. Conduct R. 1.10 n.10. This “body politic rule” limits the screening that can be done by prohibiting screening if the attorney is remaining within the same body politic. This will create disparate treatment placing limits on screening for attorneys who engage in public employment while removing those limitations for attorneys who do not do so.

To allow attorneys who served as Assistant County Attorneys, Public Defenders, Prosecutor *Pro Tem*, or in county Domestic Relations Offices to move departments within the same county or into public employment in the case of a Prosecutor *Pro Tem* allows these attorneys the same freedom of movement as all other attorneys.

Additionally, the disqualification rules are different in Texas state criminal cases than in civil ones or even federal criminal cases. *In re Meza*, 611 S.W.3d 383, 386 (Tex. Crim. App. 2020). A defendant has a constitutional right to the council of their choice thus in order to disqualify defense counsel the state must show a “due process violation.” *Id*. Also, because a prosecutor’s duties are constitutionally created and protected, they “may be disqualified only for a violation of the defendant's due-process rights.” *Landers v. State*, 256 S.W.3d 295, 304 - 310 (Tex. Crim. App. 2008). In summation, the “Court has taken the position that a disciplinary rule cannot by itself furnish a sufficient basis for disqualification.” *In re Meza*, 611 at 393. However, the court has not excepted any attorneys from the Disciplinary Rules of Professional Conduct. *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 6 (Tex. Crim. App. 1990).

To create equal treatment amongst all legal employment and bring the Disciplinary Rules of Professional Conduct into conformity with Texas Court of Criminal Appeals’ precedent, I suggest that the committee replace the current Rule 1.10 with the newly proposed Rule 1.10. Having the newly proposed Rule 1.10 apply to all attorneys will allow constant screening no matter the current or prior employment of the attorney. This along with the proposed changes to Rule 1.09 will cause the Disciplinary Rules of Professional Conduct to mirror the Texas Court of Criminal Appeals’ precedent on disqualification.

- Christopher Hernandez

From: Christopher Hernandez
To: cdrr
Subject: Clarify of a Response I Made in Public Comment
Date: Wednesday, April 6, 2022 3:41:13 PM

Members of the Committee on Disciplinary Rules and Referenda:

I need to clarify a response I made to the committee in public comment this morning. In response to Mr. Hagen's question about whether replacing the current Rule 1.10 with the proposed Rule 1.10 would cause the rules to become in line with the Court of Criminal Appeals' precedent on disqualification I gave a partially correct answer.

When I stated that the replacement would cause the rules to become in line with the Court of Criminal Appeals' precedent on disqualification this is only correct for imputed conflicts arising from an attorney's prior employment. Relacing the rules would not address conflicts arising from the attorney's current firm's past or present representation of another client, since proposed Rule 1.10(a) only permits screening for prior employment and based upon person interest.

After reviving the Attorney General's letter date April 5, 2022, specifically the issues raised in *Cofr*, the issue of imputed conflicts arising from the same firm's past or present representation of a client combined with constitutional protections and duties appears to be much broader than just Court of Criminal Appeals' precedent on disqualification. *See* 2nd Supplement at 000069 – 000070. I would be happy to discuss this issue in the criminal context with the committee or any of its members if they have questions. Please feel free to email me at [redacted] or call me at (915) 275-3052.

- Christopher Hernandez

Committee on Disciplinary Rules and Referenda
Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.00. Terminology
Rule 1.09. Conflict of Interest: Former Client
Rule 1.10. Imputation of Conflicts of Interest: General Rule

Public Comments Received
(Regarding Multiple Proposed Rules)
March 8, 2022, through April 6, 2022

From: Zandra Anderson
To: cdrr
Subject: Proposed Rule Changes
Date: Tuesday, March 8, 2022 11:56:17 AM

Hon. Committee on Rule Changes:

The writing of these rules, whether changes or not, reflect a disconnect regarding the best way to communicate with anyone, whether a lawyer or a juror with a sixth grade education. Simplicity. The ethical rules have consistently raised far more questions than they have answered. The proposed changes are no exception. Consider doing something novel--revamping all the rules into something that communicates the "do's and don'ts" of the practice of law. All too often lawyers like to hide behind stilted and convoluted language as almost a badge of honor because others can't follow what is being said. The last thing the practice needs is a mire in communicating the standards to which an attorney is held or the pontificating of lawyers mincing words.

The practice has changed over the years. Technology has changed. There are real issues that lawyers have to deal with and it makes sense that less is more, and the simpler the better. The true sign of brilliance is the communicator who can speak with anyone and be understood. These rules are not easily understood, nor do the communicate in a real way what is expected of an attorney.

Thank you for your consideration.

Zandra Anderson
Texas Dog Lawyer
7941 Katy Freeway, No. 412
Houston, Texas 77024-1924
713 222 7600
www.TexasDogLawyer.com

From: [redacted]
To: cdrr
Subject: CDRR Comment: Conflict Rules
Date: Friday, March 11, 2022 6:34:31 PM

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

Contact

First Name	Charla
Last Name	Bradshaw
Email	[redacted]
Member	Yes
Barcard	00787124

Feedback

Subject	Conflict Rules

Comments

All of these rules should pass. As a Managing Shareholder of the one of the largest family law firms in the Southwest, this rule is vital for attorneys to have the ability to change firms should they so choose. For large family law firms it is vitally impossible for an attorney at another large family law firm to change firms. Thank you Proposed Rules Published Public Comments Sought Proposed Rules 1.00 (Terminology) 1.09 (Conflict of Interest: Former Client), 1.10 (Imputation of Conflicts of Interest: General Rule), and 3.09 (Special Responsibilities of a Prosecutor), TDRPC The Committee on Disciplinary Rules and Referenda has published Proposed Rules 1.00 (Terminology), 1.09 (Conflict of Interest: Former Client), 1.10 (Imputation of Conflicts of Interest: General Rule), and 3.09 (Special Responsibilities of a Prosecutor) of the Texas Disciplinary Rules of Professional Conduc

From: Moss, Fred
To: cdrr
Subject: Comments on Proposed changes to TDRPC 1.00, 1.09, 1.10, and 3.05
Date: Wednesday, March 23, 2022 1:44:15 PM
Attachments: TDRPC Change Comments.3-22-22.docx

Dear Committee members,

Please accept my comments and suggestions in the attached memo.

I hope to be with you for the April 6 teleconference.

Thank you for your kind consideration.

Prof. Fred C. Moss

"Patriotism corrupts history." (Goethe)

Comments of Prof. Fred Moss on the
Proposed Changes to the
Texas Disciplinary Rules of Professional Conduct
3/23/2022

Thank you for this opportunity to comment on the proposed changes to TDRPC 1.00, 1.09, 1.10, and 3.09. First, I see that, with a few nips and tucks, most of the changes to the first three rules are taken almost verbatim from the ABA Model Rules. I applaud this. The more state legal ethics rules are uniform the better, given that so many American lawyers now practice trans-nationally. Such lawyers should not be subject to differing and sometimes conflicting ethics rules. I'm sure that the ABA's Model Rules are the consensus rules in this country, and Texas should follow them where possible.

As for particular rules, I have these comments and suggestions:

1. Rule 1.00 Terminology
    a. You have added comments. Good. You have also added headings to each set of comments. You appear to have forgotten, however, to add a heading before comments 2-4 where the caption "Firm or Law Firm" should be inserted.
    b. Comment 1. The first sentence simply and unnecessarily (I'd argue) repeats the text of 1.00(f). It can be deleted or paraphrased.
    c. Comment 1. The second sentence implies that it references when a lawyer does not have <u>written</u> informed consent. To be clearer, it could read, "If a lawyer has obtained a client's informed consent <u>that is not in writing [as defined in this Rule (or) see Rule 1.00(v)]</u>, that lawyer may act in reliance . . . ."
    d. Comment 3. The comment should have a sentence added to the end stating, roughly, "Whether a law department represents affiliated or subsidiary entities can depend upon the specific facts." This adds the caution given in comment 2.
    e. I strongly recommend that the Terminology rule define "generally known." This term appears in Rules 1.05(b)(3) and 1.09(c)(1). It could have several meanings, including information that is buried in a government file that is accessible by the public. This is not what "generally known" means, however.

       The Texas Ethics Committee considered the meaning of "generally known" in Opinion 595 (February 2010). The Committee stated (with my revision to make it applicable generally): *"Information that is a matter of public record may not be information that is 'generally known.' A matter may be of public record simply by being included in a government record, such as a document filed with a court ~~clerk~~, whether or not there is any general public awareness of the matter. Information that 'has become generally known'' is information that is actually known to some members of the general public and is not merely available to be*

known if members of the general public choose to look where the information is to be found. Whether information is 'generally known' within the meaning of [these] Rule[s] ~~1.05(b)(3)~~ is a question of fact."
(See also Texas Ethics Op. 693 (2/22).)

The Model Rules do not define this term despite its being used in MR 1.9. However, ABA Formal Op. 479 (2017) defined the term as follows (with my slight alteration): Information is generally known "*if it is widely recognized by members of the public in the relevant geographic area or it is widely recognized in [an] ~~the former client's~~ industry, profession, or trade*." The comment to this new definition could include this helpful language from Op. 479: *"The fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known."*

In my opinion, adopting either definition of the term (or a combination of them) plus a comment, would be more acceptable than leaving it undefined. Here is my attempt at a definition:

(g) "Generally known" is information that is actually known to some members of the general public or is widely recognized in an industry, profession, or trade, and is not merely available to be known if one were to look where the information is to be found.

The accompanying comment could add:
Information that is a matter of public record may not be information that is 'generally known." The fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known.

2. Rule 1.09 Conflict of Interest: Former Client
    a. Comment 6. I realize the Model Rule's corresponding comment includes comment 6's final sentence, but stating that the burden of proving the conflict rests upon the firm that seeks disqualification is totally out of place in ethics rules. I also realize that the ethics rules are often applied by courts in ruling on motions to disqualify, but an ethics rule cannot dictate a burden of proof in a court proceeding. I can't think of any ethics context in which this sentence could properly be applied. This sentence is inappropriate and should be deleted.

b. Comment 8. If a definition of "generally known" is added to Rule 1.00, a cross-reference to it should be added here. Also, if "generally known" is defined, a cross-reference should be added to comment 8 of Rule 1.05.

c. [Aside: Comment 9 omits the sentence in the MR 1.9's corresponding comment that cross-references MR 1.7, comment 22's discussion of advance waivers. Given the wide use of advance waivers by Texas lawyers (and elsewhere), it is a shame and a serious deficiency that there is nothing in the TDRPC that discusses the appropriateness of advance waivers. I suggest that, eventually, comment [22] to MR 1.7 be added to the comments to TDRPC 1.06.]

3. Rule 1.10 Imputation of Conflicts of Interest: General Rule
   a. First, I agree with the two major changes wrought by Rule 1.10: allowing screening to prevent a firm from being prevented from opposing a firm member's former client on the same or substantially related matter, and allowing a firm to represent a client that a lawyer in the firm would be prevented from representing due to a "personal" conflict. I was an opponent of screening for many years, but now practicality and reality have overcome my principled opposition. It is allowed for former government lawyers and judicial employees and is widely allowed in other states where the practice of law has not gone to hell in a handbasket, as predicted. I've never heard of any state that allows it having misgivings and withdrawn the permission. And, the practice of law today bears little resemblance to the horse-and-buggy vision of the practice on which many of rules, the no screening rule included, are predicated. Lawyers today have branch offices all over the state, the nation, and the world. It simply makes no sense to disqualify all the lawyers in a firm – worldwide – because of one firm member's representation of a former client is the same or a substantially related matter. The Hong Kong partner probably has never met the New York partner, and they may practice in entirely different fields of law. Finally, this brings Texas into the mainstream of our nation's ethics rules. Uniformity here is good.

   b. I agree with omitting ABA 1.10 (a)(2)(iii) requiring continuing "certification" that the screen is being implemented effectively. This is a bit of "overkill."

   c. Comment 4. The comment (following the corresponding ABA comment) states that non-lawyer members of the firm who have disqualifying information from a previous employment were they lawyers "ordinarily must be screened." The "ordinarily" is confusing and troublesome. It implies that there may be extraordinary situations where a former law clerk-now lawyer or a paralegal who gained confidential information belonging to an opposing party while at another firm does not have to be screened to avoid "tainting" the entire firm. I can't

think of any such extraordinary circumstance, and I think Texas courts have been quite clear the there is no "ordinarily" about it; they must be screened. I suggest deleting "ordinarily." If not, then maybe add an example of an "extraordinary" situation not requiring screening?

d. Comment 7. The last sentence warns lawyer that courts may consider factors not used in the ethics rules in determining whether to disqualify a lawyer in litigation. I realize this is taken directly from the ABA's comment, but, again, I think it is inappropriate for ethics rules' comments to wander into commenting on court determinations. While it does no harm in being there, I suggest that what is intended here and what should be added in its stead is to note what is true: The fact a lawyer or firm has been disqualified by a court does not alone mean that the lawyer or firm has acted unethically, because courts consider other factors in making their decisions.

e. Comment 10. It states that a government lawyer's former private client conflicts are not imputed to associated government lawyers, citing Rule 1.11(d) (now 1.10(d)) as its authority. I think this is a typo. Rule 1.11(d) says no such thing. (d) explicitly and specifically applies to the situation in (c), where a private practice lawyer has "government information" about a person or entity gained while with the government, and says the lawyer can't represent a party adverse to the person or entity the lawyer has "government information" about. (d) says this "tainted" former government lawyer can be screened by the firm. It does not deal with the opposite situation that comment 10 addresses, where a former private practice lawyer joins the government. In fact, Rule 1.10 (1.11) doesn't say anything about the imputation of personal taint in this situation. Perhaps 1.10(e) (1.11(e)) was intended to be referred to. It says the former private lawyer can't represent the government adverse to a former private client unless no one can be authorized to act in the lawyer's stead. This is the situation covered by comment 10. Comment 10 infers from the fact that 1.11(e) makes no mention of needing to screen the former government lawyer that there is no imputation of the former private lawyer's "taint" to the other government lawyers in the "tainted" lawyer's office. Perhaps this is a correct inference (unfortunately). In short, if I'm correct, comment 10 should be amended to reference 1.11(e), not (d).

[Aside: I see no reason why public lawyers can't be required to be screened from cases involving former private clients, just like private lawyers. Are they more virtuous than private lawyers – perhaps because they are on a salary and don't "eat what they kill?" But, I guess this is a matter for discussion at another time.]

4. Rule 3.09 Special Responsibilities of a Prosecutor

    a. I think your committee has improved upon the corresponding ABA rule. Congratulations; well done.

    b. I suggest that 3.09(b) has missed several important preconditions that must be met before a prosecutor can conduct or assist in a custodial interrogation of an accused.

        i. While the accused must be warned of her rights, it is also necessary that the accused waive those rights before the prosecutor may interrogate or assisting the police to do so. This is mentioned in comment 3, but oddly, not in the rule. Thus, I recommend that this language (or the like) be added to the end of 3.09(b): *refrain from conducting or assisting in a custodial interrogation of an accused unless . . . and has been given reasonable opportunity to obtain counsel, and has knowingly, intelligently and voluntarily waived those rights.*

        ii. I also think that "allow" should be added to the subsection: "*(b) refrain from conducting[, ~~or~~] assisting[, <u>or] allowing</u> a custodial interrogation . . . . .*" A prosecutor should not be allowed to avoid her ethical duties simply by being absent from the interrogation room where she knows the required warnings and waivers won't be given and obtained, and escape ethical sanctions since she did not "conduct or assist" in the interrogation. As a minister of justice, the prosecutor has to ensure the warnings and waivers are given and gotten where that assurance can reasonably be obtained.

        iii. Finally, 3.09(b) leaves out the requirement that the full Miranda warnings be given; that is, that the accused be informed of the right to remain silent and that anything the accused says can be used against him. This is a universal constitutional requirement. Again, this is addressed in comment 3, but not in the rule where it should be. See below.

        In sum, I suggest that 3.09(b) be substantially rewritten to incorporate my three suggestions, perhaps reading as follows:

    The prosecutor in a criminal case shall:
    . . . .
    (b) refrain from conducting, assisting, or allowing a custodial interrogation of an accused unless the prosecutor has made reasonable effort to be assured that the

accused has been advised of the right to remain silent, that whatever the accused says can be used against the accused in court, the right to counsel before answering any questions, the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel, and has knowingly, intelligently and voluntarily waive these rights.

As an alternative, (b) could simply require the prosecutor to be reasonably assured that the accused has voluntarily, intelligently and knowingly waived all of his pretrial constitutional rights before conducting, assisting, or allowing the custodial interrogation. Prosecutors must know (or can be presumed to know) what these rights are.

Again, thank you for this opportunity to comment on these very important improvements to our ethics rules, and thank you for your consideration of my comments. I wish you (and our profession) the best of luck in getting these changes approved in the referendum.

Prof. (Emeritus) Fred C. Moss
[redacted]

From: Tanika Patterson
To: cdrr
Subject: Misconduct
Date: Wednesday, March 23, 2022 12:11:19 PM

Greetings,

I would like to attend the meeting to discuss how attorneys are able to practice in Texas if they have done something illegal in another state. I would also like to discuss how are attorneys able to practice in Texas if they have failed several character fitness test in other states. I honestly thought that attorneys should protect the best interest of the public instead of harming them.

From: Douglas Norman
To: cdrr
Subject: April 6, 2022 Meeting
Date: Thursday, March 24, 2022 9:52:58 AM

I would like to participate in this meeting.

Sent from Mail for Windows

From: Amy Wills
To: cdrr
Subject: Comment submission - Proposed Rules 1.00, 1.09, 1.10, 3.09
Date: Tuesday, April 5, 2022 4:52:49 PM
Attachments: image001.png
SBOT Proposed Rules_OAG comment.pdf

Good afternoon,

Please see the attached comment provided by the Office of the Attorney General.

To ensure that the comment was received, please respond with a confirmation of receipt.

Thanks so much!

Sincerely,

Amy Wills
Assistant Attorney General
General Counsel Division
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
[redacted]

BOARD CERTIFIED
Texas Board of Legal Specialization
ADMINISTRATIVE LAW

This message may be confidential and/or privileged under Government Code sections 552.101, 552.103, 552.107, and 552.111 and should not be disclosed without the express authorization of the Attorney General.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 5, 2022

State Bar of Texas
Texas Law Center
1414 Colorado Street
Austin, Texas 78701
Attn: Committee on Disciplinary Rules

Re: Comment on proposed disciplinary rules

Dear Committee Members,

The Office of the Texas Attorney General, Criminal Justice Division (hereinafter referred to as "OAG"), submits these comments—some minor, some substantive—in response to the proposed Texas Disciplinary Rules of Professional Conduct, Rules 1.00, 1.10, and 3.09.

RULE 1.00. TERMINOLOGY

(1) Represent.

The definition of "Represent," "Represents," or "Representation" is circular and vague. The material term "client" is not defined. There is no comment to help clarify its purpose, meaning, or application. The prior proposed rule is better.

(2) Order of Words.

In addition, the definition of "confirmed in writing" should precede the definition of "Consult."

RULE 1.10. IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(1) Jurisprudential Mandate for Attorney General to Represent Conflicting Interests.

As is commonly acknowledged by academics and courts alike, the practice of law in an attorney general's office creates many conflicts of interest not found in other law firms. First and foremost, the OAG represents the interests of Texas. But, pursuant to the Texas Constitution and various statutes, it also represents each of the state agencies. When one agency has different legal interests than another, a conflict of interest, as defined in Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct, can exist. Nevertheless, the Texas Supreme Court has recognized that the OAG *must* represent both agencies. *See Pub. Util. Comm'n of Texas v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988). *See also State v. Brabson*, 966 S.W.2d 49, 498 (Tex. Crim. App. 1998) (Womack, J., concurring), *en banc*. As recognized in *Cofer*, many states allow this dual representation. *Cofer*, 754 S.W.2d at 126. *This office requests that this jurisprudential mandate be recognized in the Comments to Rule 1.10.*

The Rules of Professional Conduct in different states treat this potential conflict in different ways. For example, the District of Columbia, Maine, and Utah exclude government agencies from the definition of "firm" for purposes of imputation. *See* D.C. R. Prof. Conduct 1.10 [Comment 1] ("the term 'firm' . . . does not include a government agency or other government entity); M.R. Prof. Conduct Rule 1.10 (d) ("For purposes of Rule 1.10 only, 'firm' does not include government agencies."); M.R. Prof. Conduct, Preamble [Comment 18] ("Also, lawyers under the supervision of [the attorney general] may be authorized to represent several government agencies in legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority."); Utah R. Prof. Cond. 1.10 (f) ("An office of government lawyers who serve as counsel to a governmental entity such as the office of the Utah Attorney General, the United States Attorney, or a district, county, or city attorney does not constitute a "firm" for purposes of Rule 1.10 conflict imputation." *This office requests that Texas adopt a similar paragraph in Proposed Rule 1.10 that would protect the lawyers in this office from imputation of the conflict-of-interest rules.*

As an alternative, in *Cofer*, the Texas Supreme Court offered a resolution of the conflict-of-interest problem:

> [T]he court may take appropriate action to ensure that the state attorneys who represent the opposing agencies are effectively "screened off" from each other, to the extent that the Attorney General has not already promulgated procedures to assure this. . . . [T]he court should carefully scrutinize all actions taken by the state attorneys who represent the opposing agencies, particularly in matters of compromise and settlement. The court should in all cases ascertain whether the

> proposed settlement of the dispute between the agencies has met with their approval. Finally, in the unlikely event that any state attorney should fail to adequately represent the interest of his client agency, the court may deal with such failure in the same manner in which it may address such problems with other lawyers who practice before it.

Should the Committee not provide the explicit protection from the imputation rule that many states provide, this office requests that it provide a Comment that references the above jurisprudential rule allowing the different attorneys in this office to represent different agencies in the same matter as long as they are screened from each other, and our office has implemented a system of protecting confidentiality.

The OAG has two other suggestions regarding the new Rule 1.10.

(2) Redundancy.

Currently existing Rules 1.06(f), 1.07(e), and 1.08(j) provide an imputation rule relevant to that particular rule. Upon adoption of Rule 1.10, those individual provisions will be redundant and could lead to misunderstandings or potential conflicts. Upon adoption of Rule 1.10, those paragraphs should be removed from the other rules.

(3) Notice Requirements.

Also, Comment 9 to Rule 1.10 should be included in the body of the rule, rather than just included as a comment. Comment 9 identifies requirements for the substance of the notice as well as timing to provide the notice. For example, Comment 9 could be pulled into (a)(2)(ii):

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.06 or 1.09, unless
>
> (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
>
> (2) the prohibition is based upon Rule 1.09(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, and
>
> (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (ii) written notice should be given to any affected former client as soon as practicable after the need for screening becomes apparent to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screened lawyer's prior representation, a description of the screening procedures employed; a statement of the firm's and

of the screened lawyer's compliance with these Rules, a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules, and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

RULE 3.09. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

(1) At a minimum, the proposed amendments are confusing.

"Timely disclosure of exculpatory or mitigating information is important. So too is clarity in describing the responsibilities placed upon prosecutors in this context." *Comm'n for Lawyer Discipline v. Hanna*, 513 S.W.3d 175, 183 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Importantly, although "'disciplinary rules need not satisfy the higher degree of specificity required of criminal statutes,' the rule must be set out in terms that an 'ordinary lawyer, with "the benefit of guidance provided by case law, court rules and the lore of the profession," could understand and comply with it.'" *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437–38 (Tex. 1998); *see also* Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 11 ("Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance . . . .").

Generally, subsection (g)—a subsection not found in the ABA Model Rules—is confusing and, possibly, misleading. Following subsection (f), it begins with a reference to a "duty to disclose exculpatory and mitigating evidence;" yet, subsection (f) only creates a duty to disclose *exculpatory* evidence that proves that a defendant *did not commit the crime* for which he was convicted, a rule broader than the constitutional requirements of *Brady*. The same is true of subsection (h). Subsection (g) also references "constitutional and statutory authorities" which are not mentioned elsewhere in the rule.

Perhaps, if subsection (g) stays in the rule at all, it should be located after subsection (d)—which does refer to exculpatory and mitigating evidence—or at the end of the rule and should specifically reference the previous subsections to which it applies.

To complicate matters, the comments give no guidance on the interpretation and application of subsection (g). They do not provide, for example, a sample scenario of how the rule would apply where a prosecutor has left the jurisdiction and later obtains knowledge of "exculpatory or mitigating evidence." To ensure compliance with the rule, a "continuing duty" needs to have a clear application framework; otherwise, attorneys who are or were prosecutors can fall into a "gotcha" trap resulting from these confusing professional conduct standards.

In addition, subsections (f), (g), and (h) identify different standards of proof, creating confusion as to how the rule should be complied with. Subsection (f) creates a duty for the

prosecutor if there is "new, credible and material evidence." Whereas subsection (g) places a duty to disclose "exculpatory and mitigating evidence." Then, subsection (h) implements a prosecutorial duty where there is "clear and convincing evidence." These duties, relying on different types of evidence, risk creating confusion for attorneys trying to comply. For example, under subsection (h), does the prosecutor have a duty to disclose "clear and convincing evidence" that is not credible? What if the evidence is not new but neither the prosecutor nor the defense chose to present it at trial? Can a prosecutor be disciplined in such a situation for failure to comply with subsection (h)? Although there may be an assumption underlying these rules that a prosecutor should understand any nuances such as those between types of evidence, that assumption is beyond the standard required. The standard is not whether a prosecutor understands the rule but whether an ordinary lawyer does. As written, an ordinary lawyer, in addition to former or current prosecutors, would likely have some confusion as to what is required to comply.

(2) The proposed amendments are arguably superfluous.

The proposed amendments for Rule 3.09 add a continuing duty for prosecutors concerning certain exculpatory evidence. This change seems unnecessary considering current Texas statutes, such as Texas Code of Criminal Procedure article 39.14(h), which mandates that the State "shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged."

Further, the Court of Criminal Appeals, in 2021, clarified that article 39.14(h)

> places upon the State a free-standing duty to disclose all "exculpatory, impeaching, and mitigating" evidence to the defense that tends to negate guilt or reduce punishment. Our Legislature did not limit the applicability of Article 39.14(h) to "material" evidence, so this duty to disclose is much broader than the prosecutor's duty to disclose as a matter of due process under *Brady vs. Maryland*. This subsection blankets the exact type of exculpatory evidence at issue in the Michael Morton case while creating an independent and continuing duty for prosecutors to disclose evidence that may be favorable to the defense even if that evidence is not "material."

Watkins v. State, 619 S.W.3d 265, 277 (Tex. Crim. App. 2021) (cleaned up). The Court, in *Watkins*, explained that the State has a duty to disclose "*all* 'exculpatory, impeaching, and mitigating'" evidence. *Id.* (emphasis added). In addition, the Court already clarified that prosecutors have a "continuing duty" to disclose evidence that "may be favorable to the defense even if that evidence is not 'material.'" *Id.*

Further, under Rule 8.04(a)(12), a lawyer "shall not . . . violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law." The broad language of this rule encompasses a prosecutor's duty under article 39.14. Thus, the proposed amendments to Rule 3.09 appear redundant.

However, if Rule 3.09 is to be amended, at a minimum the duty in the Rule should reflect current Texas jurisprudence. Deviating from that creates confusion for lawyers who want to comply.

(3) Proposed Rule 3.09 creates an unfunded mandate.

Although subsections (f) and (h) parallel subsections (g) and (h) of ABA Model Rule 3.8, the OAG still has some concerns about the provisions as applied in the State of Texas. For example, subsection (f)(2)(ii) requires a prosecutor to "undertake further investigation or make reasonable efforts to cause an investigation" to determine if a defendant was convicted of an offense he did not commit. This is clearly an unfunded mandate—and an unnecessary one.

Any mandate that prosecutors must investigate potential wrongful convictions must come with the resources to accomplish that task. The OAG does not receive funding from the Legislature to conduct such investigation—although numerous entities in Texas do receive such funding. The Legislature has by statute and funding policy designated various groups other than prosecutors to be primarily responsible for the investigation of potentially wrongful convictions, including, law school innocence projects, the Forensic Science Commission, and the Office of Capital and Forensic Writs.

(4) Subsection (h) is overbroad and under-inclusive.

The duty to "seek a remedy" found in subsection (h) is vague and both overbroad and under-inclusive at the same time.

(5) Proposed Solutions

(a) Keep the current text of Rule 3.09 and do not amend.

Due to the above concerns, the OAG recommends keeping the current Rule 3.09 instead of amending it.

(b) Limit the amendments to adding a "continuing duty" as explained by the Court of Criminal Appeals and add a good-faith exception.

However, if Rule 3.09 is amended, any "continuing duty," at a minimum, should be consistent with the decision in *Watkins*. The proposed Rule 3.09 as written is not.

Of note, one issue with simply mirroring the language in *Watkins* is that the interpretation is unnecessarily broad, extending criminal discovery requirements beyond that constitutionally required. The better approach would be to simply state that a prosecutor has a duty to comply with Texas Criminal Code of Procedure article 39.14 and a failure to do so is a violation of Rule 3.09.

In addition, the text of Comment 9 should be part of the rule, not buried in the comments. Comment 9 identifies a good-faith exception for a prosecutor's defense. Because Comment 9 reads as creating a substantive defense versus a guideline used to interpret the rule, the good-faith exception should be included in the Rule if the Rule is amended.[1]

In addition to the above comments, the OAG also supports, and adopts as if fully set forth herein, the comments sent to your office by the Texas District and County Attorneys Association in their letters dated October 19, 2021, December 17, 2021, and January 24, 2022, copies of which are attached.

Sincerely,

Austin Kinghorn
General Counsel

Amy Wills
Assistant Attorney General
General Counsel Division

Michelle Ghetti
Special Counsel
Legal Strategy

/Encl.

[1] In the Scope section of the ABA Model Rules, Note 21 provides that the "*Comments are intended as guides to interpretation, but the text of each Rule is authoritative.*" (Emphasis added).

From: Robert Schuwerk
To: cdrr; [redacted]
Subject: Proposed amended TDRPC Rules 1.00, 1.09 and 1.10
Date: Wednesday, April 6, 2022 2:25:35 PM

I realize this comment is a day late, but want to submit it anyhow. I had intended to be at the public hearing on April 6 to deliver it but somehow missed out on where it was to be held and so didn't do that either. … My concerns are about the "represent a client" definition and its use in the referenced rules. My core concern is the failure to either include a separate definition of what it means to "personally" represent a client or else to confine the definition of what it means to "represent" a client to ones where the lawyer either personally is engaged by the client or, if instead the lawyer's firm is so engaged, the particular lawyer either personally works on the matter or actually acquires confidential information concerning it. The idea would be that while every lawyer in a firm should be deemed to "represent" any client of that firm while the lawyer remains at that firm, s/he would not be deemed to have represented such a client once the lawyer departs from the firm, merely because s/he had that status at his or her former firm. … I realize that proposed Rule 1.09(b) by implication seems to treat "untainted" migrating lawyer differently from "tainted" ones, but by lumping such lawyers with one having an actual taint together in Rule 1.10(a)(2), the current proposal seems to require that both categories must be screened by a new firm in order to comply with these Rules, when screening an untainted lawyer serves no useful purpose. Indeed, it will cause a lot of trouble, as such a migrating lawyer may have no idea that a particular (substantially related) matter was handled by that lawyer's prior firm, and so not have been screened from any involvement in it; and by the time that becomes evident, it will be too late to screen him or her. … Rule 1.09 would be clearer if paragraph (a) read "formerly personally represented" rather than "formerly represented" (assuming there was an appropriate definition of "personally represent" contained in Rule 1.00), as that appears to have been the drafters' intent, and otherwise paragraph (a) swallows up the presumably distinguishable circumstances of paragraph (b). A good definition of "personally represent," as well as of comments to it, could be constructed from recent Texas Committee on Professional Ethics Opinion 693.

Sent from Mail for Windows

Videos of Public Hearings on Proposed Rules 1.00, 1.09, and 1.10 of the Texas Disciplinary Rules of Professional Conduct

Held on September 17, 2020, June 10, 2021, and April 6, 2022, by the Committee on Disciplinary Rules and Referenda

Video of Public Hearing on September 17, 2020

https://www.texasbar.com/september_2020_CDRR_Part1

https://www.texasbar.com/september_2020_CDRR_Part2

No comments on proposed Rule 1.00

Video of Public Hearing on June 10, 2021

https://www.texasbar.com/june_2021_CDRR

Comments on proposed Rule 1.00:

Jerry Hall at 4:24

Steven Earl at 8:54

Video of Public Hearing on April 6, 2022

https://www.texasbar.com/april_2022_CDRR

Comment on proposed Rule 1.00:

Ryan Reneau at 7:20

Comment on proposed Rule 1.10:

Christopher Hernandez at 16:43

June 19, 2020

TO: Terminology Subcommittee (Claude Ducloux and Amy Bresnen)

FROM: Vincent R. Johnson ***VRJ***

RE: Amending the Terminology Provisions of the Texas Disciplinary Rules

In the course of making revisions to the Texas ethics rules that sometimes reflect terminology used in the Model Rules, we have begun to use words that are defined in the Terminology section of the Model Rules. Some of those defines terms should be incorporated into the Texas rules.

The interlineations below show how I think the current Texas terminology section should be changed.

Rule 1.00 Terminology [the paragraphs below should be numbered (a), (b), etc., once the list is final}

"Adjudicatory Official" denotes a person who serves on a Tribunal.

"Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.

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

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

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

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.[1]

"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

"Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas

[1] "Confirmed in writing" is a term used in the proposed rule on Duties to Prospective Clients, tentatively numbered proposed Texas Rule 1.18(d)(1).

Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

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

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.[2]

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

"Law firm": see "Firm."

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

"Person" includes a legal entity as well as an individual.

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

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

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

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.[3]

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

"Tribunal" denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. "Tribunal" includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors,

[2] The term "informed consent" is used in various provisions in the current Texas ethics rules (*see, e.g.*, TDRPC Rule 1.01(a)(1) & cmts. 4 & 5; Rule 1.06 cmts. 2, 7, 8, & 9), as well as in the proposed rules on Sale of a Law Practice and Duties to Prospective Clients.

[3] The term "screened" is used in the proposed rule on Duties to Prospective Clients, as well as in the current rules on Successive Government and Private Employment (Rule 1.10) and Adjudicatory Official or Law Clerk (Rule 1.11).

prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.[4]

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

[2] Whether two or more lawyers constitute a firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[4] The terms "writing" or "written" are used at various points in the current Texas ethics rules (e.g., the rule on contingent fees) and in the proposed rules (e.g. the proposed rule on sale of a law practice).

[5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other ~~person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b)~~. The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter.

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules that expressly permit screening.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the

matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

June 19, 2020 *(Updated August 5, 2020)*

TO: Terminology Subcommittee (Claude Ducloux and Amy Bresnen)

FROM: Vincent R. Johnson ***VRJ***

RE: Amending the Terminology Provisions of the Texas Disciplinary Rules

In the course of making revisions to the Texas ethics rules that sometimes reflect terminology used in the Model Rules, we have begun to use words that are defined in the Terminology section of the Model Rules. Some of those defines terms should be incorporated into the Texas rules.

The interlineations below show how I think the current Texas terminology section should be changed.

Rule 1.00 Terminology [the paragraphs below should be numbered (a), (b), etc., once the list is final}

"Adjudicatory Official" denotes a person who serves on a Tribunal.

"Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.

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

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

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

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.[1]

"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

"Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas

[1] "Confirmed in writing" is a term used in the proposed rule on Duties to Prospective Clients, tentatively numbered proposed Texas Rule 1.18(d)(1).

Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

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

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about material risks of and reasonably available alternatives to the proposed course of conduct.[2]

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

"Law firm": see "Firm."

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

"Person" includes a legal entity as well as an individual.

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

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

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

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.[3]

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

"Tribunal" denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. "Tribunal" includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors,

---

[2] The term "informed consent" is used in various provisions in the current Texas ethics rules (*see, e.g.*, TDRPC Rule 1.01(a)(1) & cmts. 4 & 5; Rule 1.06 cmts. 2, 7, 8, & 9), as well as in the proposed rules on Sale of a Law Practice and Duties to Prospective Clients.

[3] The term "screened" is used in the proposed rule on Duties to Prospective Clients, as well as in the current rules on Successive Government and Private Employment (Rule 1.10) and Adjudicatory Official or Law Clerk (Rule 1.11).

prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.[4]

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

[2] Whether two or more lawyers constitute a firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[4] The terms "writing" or "written" are used at various points in the current Texas ethics rules (e.g., the rule on contingent fees) and in the proposed rules (e.g. the proposed rule on sale of a law practice).

[5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person ~~person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b)~~. The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter.

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules that expressly permit screening.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the

matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

TO: CDRR Subcommittee on Texas Disciplinary Rule 1.09 (Former Client Conflicts of Interest) (Claude Ducloux; Carl Jordan; Amy Bresnen)

CC: Lewis Kinard, Andrea Low

FROM: Vincent R. Johnson ***VRJ***

DATE: October 1, 2021

The current version of Texas Rule 1.09 raises questions and uncertainties related to former-client conflicts of interest in general, and the movement of lawyers between law firms in particular. To resolve those issues, I recommend that the current version of Texas Rule 1.09 be deleted and that the text of ABA Model Rules 1.9 (Duties to Former Clients) and ABA Model Rule 1.10 (Imputation of Conflicts of Interest: General Rule) be substituted (as modified below) as Proposed Texas Rules 1.09 and 1.10.

Notably, this proposed change would entail an endorsement of the use of screening to manage former-client conflicts of interest under Proposed Rule 1.09 and other conflicts arising under Current Texas Rule 1.06. Presently, the use of screening is limited to conflicts occurring in specific contexts (paralegals, former public officials and public employees, and (under our proposed rule) prospective clients.

Under this proposal, Current Texas Rule 1.10 (Successive Government and Private Employment) and subsequent Current or Proposed Texas Rules in part 1 would be renumbered beginning with the number 1.11. Cross-references have been inserted below based on the assumption that renumbering has occurred.

Proposed Texas Rule 1.09[1]

~~Rule 1.9 Duties to Former Clients~~Rule 1.09: Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules ~~1.6~~1.05 and 1.09(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

[1] This language is the text of ABA Model Rule 1.9, with proposed changes shown by redlining.

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. ~~The lawyer's involvement in a matter can also be a question of degree.~~[2] When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. ~~Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions.~~[3] The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of

[2] Deleted because of vagueness.
[3] Deleted because of vagueness.

specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.05~~6~~ and 1.09(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.05~~6~~ and 1.09(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See

Rule 1.0(__e). With regard to the effectiveness of an advance waiver, see Comment [__22] to Rule __1.7.[4] With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Proposed Texas Rule 1.10[5]

Rule 1.10: Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.067 or 1.09, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.09(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.056 and 1.09(c) that is material to the matter.

---

[4] These cross-references need to be completed if this proposed rule moves forward.
[5] This language is the text of ABA Model Rule 1.10, with proposed changes shown by redlining.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.06~~7~~.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(__~~e~~). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [__2]-[__4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.09(b) and 1.10(a)(2) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(__~~k~~) and ___~~5.3~~.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm ~~may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm~~ may not represent a~~the~~ person where the matter is the same or substantially related to that in which the formerly associated lawyer represented

the client and any other lawyer currently in the firm has material information protected by Rules 1.056 and 1.09(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.067. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(__k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (dc), not this Rule. Under Rule 1.11(d), Wwhere a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.[6]

[12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.08, paragraph (ik) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[6] Query: Is this the rule in Texas?

This Proposal would delete Texas Disciplinary Rule of Professional Conduct 1.09 (Conflict of Interest: Former Client) which now provides:

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

~~(1) in which such other person questions the validity of the lawyer's services or work product for the former client;~~

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

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

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

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

~~COMMENT:~~

~~1. Rule 1.09 addresses the circumstances in which a lawyer in private practice, and other lawyers who were, are or become members of or associated with a firm in which that lawyer practiced or practices, may represent a client against a former client of that lawyer or the lawyer's former firm. Whether a lawyer, or that lawyer's present or former firm, is prohibited from representing a client in a matter by reason of the lawyer's successive government and private employment is governed by Rule 1.10 rather than by this Rule.~~

~~2. Paragraph (a) concerns the situation where a lawyer once personally represented a client and now wishes to represent a second client against that former client. Whether such a personal attorney-client relationship existed involves questions of both fact and law that are beyond the scope of these Rules. See Preamble: Scope. Among the relevant factors, however, would be how the former representation actually was conducted within the firm; the nature and scope of the former client's contacts with the firm (including any restrictions the client may have placed on the dissemination of confidential information within the firm); and the size of the firm.~~

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

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

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

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

5. Paragraph (b) extends paragraph (a)'s limitations on an individual lawyer's freedom to undertake a representation against that lawyer's former client to all other lawyers who are or become members of or associated with the firm in which that lawyer is practicing. Thus, for example, if a client severs the attorney-client relationship with a lawyer who remains in a firm, the entitlement of that individual lawyer to undertake a representation against that former client is governed by paragraph (a); and all other lawyers who are or become members of or associated with that lawyer's firm are treated in the same manner by paragraph (b). Similarly, if a lawyer severs his or her association with a firm and that firm retains as a client a person whom the lawyer personally represented while with the firm, that lawyer's ability thereafter to undertake a representation against that client is governed by paragraph (a); and all other lawyers who are or become members of or associates with that lawyer's new firm are treated in the same manner by paragraph (b). See also paragraph 19 of the comment to Rule 1.06.

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

7. Thus, the effect of paragraphs (b) is to extend any inability of a particular lawyer under paragraph (a) to undertake a representation against a former client to all other lawyers who are or become members

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

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

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

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