July 14, 2023

Ms. Kennon Wooten, Chair
State Bar of Texas Board of Directors
[redacted]

RE: Submission of Proposed Rule Recommendations – Rule 3.09, Texas Disciplinary Rules of Professional Conduct

Dear Kennon:

Pursuant to Section 81.0875 of the Texas Government Code, the Committee on Disciplinary Rules and Referenda initiated the rule proposal process for proposed Rule 3.09, Texas Disciplinary Rules of Professional Conduct, relating to Special Responsibilities of a Prosecutor. The Committee published the proposed rule in the *Texas Bar Journal* and the *Texas Register*. The Committee solicited public comments and held a public hearing on the proposed rule. At its May 3, 2023, meeting, the Committee voted to recommend the proposed rule to the Board of Directors.

Included in this submission packet, you will find the proposed rule recommended by the Committee, as well as other supporting materials. This proposed rule change has been in process since November 3, 2022, and there were numerous meetings as well as more than one public hearing for more than one published draft version. As a result, this submission package looks a little different than the others. For the Board's convenience, we split the supporting materials into four PDF files, numbered consecutively. Additional materials are available online through active hypertext links in files 3 and 4, to avoid the need to distribute many, many more pages.

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. And please let me know if there are any problems with the enclosed files of supporting materials or the additional materials posted on the CDRR website.

Sincerely,

Lewis Kinard
Chair, Committee on Disciplinary Rules and Referenda

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

Committee on Disciplinary Rules and Referenda
Overview and History of Proposed Rule

Texas Disciplinary Rules of Professional Conduct
Rule 3.09. Special Responsibilities of a Prosecutor

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda (Committee) related to proposed Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct (TDRPC), relating to Special Responsibilities of a Prosecutor. The Committee initiated the rule proposal process for the final recommended version of proposed Rule 3.09 on November 3, 2022.

Actions by the Committee

First Rule Proposal

- **Initiation** – The Committee voted to initiate the rule proposal process at its October 6, 2021, meeting.
- **Publication** – The proposed rule was published in the March 2022 issue of the *Texas Bar Journal* and the March 4, 2022, 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 March 7, 2022, and March 23, 2022. An additional email notification was sent to Committee email subscribers on April 1, 2022.
- **Public Comments** – The Committee established a public comment period that ended on April 5, 2022. However, the Committee continued to accept additional public comments after the end of the comment period. The Committee received fifty-nine (59) written public comments on the proposed rule from individuals and organizational representatives from October 19, 2021, to May 31, 2022.
- **Public Hearing** – On April 6, 2022, the Committee held a public hearing by Zoom teleconference. Eighteen (18) individuals and organizational representatives addressed the Committee at the public hearing.
- **Recommendation** – The Committee voted at its June 1, 2022, meeting not to recommend the proposed rule to the Board of Directors.

Second Rule Proposal

- **Initiation** – The Committee voted to initiate the rule proposal process at its June 1, 2022, meeting and to consider two alternative drafts of proposed Rule 3.09. At initiation, the Committee voted to delegate study of the rule proposal and the drafts to a subcommittee.

- **Publication** – The Committee voted at its November 3, 2022, meeting not to publish the proposed rule.

Third Rule Proposal

- **Initiation** – The Committee voted to initiate the rule proposal process at its November 3, 2022, meeting.
- **Publication** – The proposed rule was published in the January 2023 issue of the *Texas Bar Journal* and the January 13, 2023, issue of the *Texas Register*. The proposed rule was concurrently posted on the Committee's website. Information about the public hearing and the submission of public comments was included in the publications and on the Committee's website.
- **Additional Outreach** – Email notifications regarding the proposed rule were sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices), Committee email subscribers, and other potentially interested parties on March 21, 2023, and April 4, 2023. An additional email notification was sent to Committee email subscribers on April 7, 2023.
- **Public Comments** – The Committee accepted public comments through April 13, 2023. The Committee received written public comments on the proposed rule from thirty-nine (39) individuals and organizational representatives.
- **Public Hearing** – On April 12, 2023, the Committee held a public hearing by Zoom teleconference. Thirty-eight (38) individuals and organizational representatives addressed the Committee at the public hearing.
- **Recommendation** – The Committee voted at its May 3, 2023, meeting to recommend the proposed rule, as amended, to the Board of Directors.

Overview

Rule 3.09, TDRPC, enumerates the duties of a prosecutor in a criminal case. The recommended rule proposal would add Sections (f)-(h) to Rule 3.09. Sections (a)-(e) of Rule 3.09 would not be amended and would remain in effect. To clarify the duties enumerated by proposed Rule 3.09(f)-(h), the Committee recommends the addition of new interpretive comments to the proposed rule but does not recommend any amendments to the comments related to 3.09(a)-(e).[1]

Rule 3.09 currently does not impose a duty on a prosecutor who obtains new and credible information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted. Section (f) of the proposed rule would impose certain duties on the prosecutor if the conviction was obtained in the prosecutor's jurisdiction and different duties if the conviction was obtained in another jurisdiction. The proposed rule would require that a prosecutor disclose information to the defendant, defense counsel, tribunal, and entity that examines and litigates claims of actual innocence in the prosecutor's jurisdiction, take action to ensure the defendant is represented by counsel, and cooperate with defense counsel. If the

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

conviction was obtained in another jurisdiction. Section (f) of the proposed rule would require the prosecutor to disclose the information to the prosecutor in the jurisdiction where the conviction was obtained.

Section (g) would set limitations on the duty to disclose when the prosecutor acts in good faith. Section (h) defines "jurisdiction" as it would apply to the prosecutors affected by the proposed rule.

History

First Rule Proposal

The Committee initiated the rule proposal process for Rule 3.09 on October 6, 2021. The Committee expressed its intent to address the duties of a prosecutor that relate to wrongful convictions. Upon initiation, the Committee publicly requested the public to submit ideas and thoughts on the rule proposal, even prior to any public comment period. The Committee immediately solicited input from the associations of prosecutors, including the Texas District & County Attorneys Association (TDCAA), associations of defense attorneys, including the Texas Criminal Defense Lawyers Association (TCDLA), the Innocence Project of Texas (IPT), and law schools that sponsor Innocence Project Clinics.

On February 2, 2022, after months of study and consideration of multiple drafts, the Committee voted to publish proposed Rule 3.09. The rule proposal was published in the March 2022 issue of the *Texas Bar Journal* and the March 4, 2022, issue of the *Texas Register*. The Committee held a public hearing by teleconference on April 6, 2022, after the public comment period ended on April 5, 2022.

In response to the issues raised during the public comment period and at the public hearing, the Committee considered: 1) separating proposed Rule 3.09 into multiple proposed rules, each with different changes to the published proposal; 2) terminating the rule proposal process, assigning the proposed rule to a subcommittee, and then reinitiating the rule proposal process; 3) recommending a proposed rule containing a narrower duty; or 4) continuing to discuss and consider the proposed rule. The Committee agreed to discuss and consider clarifying the evidentiary standards underlying the ethical duty for prosecutors and the duty of former prosecutors, as the public comments underscored these concerns.

The Committee continued to accept public comments through June 1, 2022. On that date, the Committee voted to allow the rule proposal initiated on October 6, 2021, to expire. The rule proposal was withdrawn by operation of law. However, the Committee continues to post the public comments received from October 19, 2021, through May 31, 2022, on its website.

Second Rule Proposal

The Committee initiated the rule proposal process for Rule 3.09 on June 1, 2022, specifying that the Committee would consider two newly proposed alternative drafts that derived from language submitted by members of the public. The Committee voted to authorize a subcommittee that included both Committee members and non-Committee members to study the rule proposal

generally and the alternative drafts particularly. The Chair appointed a subcommittee composed of three members of the Committee, the Executive Director of the Innocence Project of Texas, and the Chair of the TDCAA Rule 3.09 Committee.

The subcommittee members from the IPT and the TDCAA invited participants with expertise in criminal law and the criminal justice system to the meetings conducted by Zoom teleconference on the following dates in 2022: July 5 (18 participants); July 28 (14 participants); August 31 (25 participants); September 27 (5 participants); and October 19 (19 participants). On October 24, 2022, the subcommittee convened to discuss and draft a rule proposal considering comments received from prosecutors and defense attorneys. The subcommittee continued to receive and consider comments, including proposed drafts, from individuals and organizations that participated in the subcommittee meetings. The 3.09 subcommittee meetings were not open to the public and did not involve any deliberations by a quorum of the Committee.

After its six meetings, the subcommittee circulated a draft of proposed Rule 3.09 to the Committee. The Committee discussed proposed Rule 3.09 but could not publish a proposed rule in the *Texas Bar Journal* and *Texas Register* within the statutory six months after the vote to initiate the rule proposal process. At its November 3, 2022, meeting, the Committee voted not to publish the proposed rule. The rule proposal initiated on June 1, 2022, was withdrawn.

Third Rule Proposal

The 3.09 subcommittee recommended the draft the subcommittee had circulated with the addition of a duty to disclose information to the prosecutor in the appropriate jurisdiction. On November 3, 2023, the Committee voted to initiate the rule proposal process for Rule 3.09 a third time with the intent to publish the proposed rule in the *Texas Bar Journal* and *Texas Register* in January 2023.

Following publication in the January 2023 issue of the *Texas Bar Journal* and the January 13, 2023, *Texas Register*, the Committee voted to hold a public hearing on April 12, 2023, with the comment period ending on April 13, 2023. The Committee considered public feedback, including proposed language drafted by organizations and individual members of the public. On May 3, 2023, after discussion of the public comments received, the Committee voted to amend the published version of Rule 3.09(f)(1)(iii), related to the duty to cooperate, and recommend the proposed rule, as amended, to the Board of Directors of the State Bar of Texas.

Additional Documents

Included in this Submission to the Board of Directors are four (4) separate document files for: 1) Overview and History of Proposed Rule 3.09 with Final Recommended Version of Proposed Rule 3.09; 2) Rule Proposal Initiated October 6, 2021; 3) Rule Proposal Initiated June 1, 2022; and 4) Rule Proposal Initiated November 3, 2022.

Document file #1 includes: a) Submission letter from Chair Lewis Kinard (Bates Numbers 000001 – 000002); b) Overview and History of the Committee's action on proposed Rule 3.09 (Bates Numbers 000003 – 000007); c) Redline Version of the Final Recommended Rule (Bates

Numbers 000008 – 000010); and d) Clean Version of the Final Recommended Rule (Bates Numbers 000011 – 000013).

Document file #2 on the First Rule Proposal includes: a) Proposed Rule 3.09 as published in the March 2022 *Texas Bar Journal* (Bates Numbers 000014 – 000028); b) Proposed Rule 3.09 as published in the March 4, 2022, issue of the *Texas Register* (Bates Number 000029); c) a link to the public comments received from October 19, 2021, through May 31, 2022, in response to the publications (Bates Number 000030); d) a link to the video recording of the Committee's public hearing on proposed Rule 3.09 conducted by Zoom teleconference on April 6, 2022,[2] with the name of each speaker and time-stamp of the speaker's oral comments (Bates Number 000030); e) a memorandum on proposed Rule 3.09 dated September 10, 2021, from Committee Member Vincent R. Johnson (Bates Numbers 000031 – 000034); f) a draft of proposed Rule 3.09 dated November 3, 2021, from Committee Member Vincent R. Johnson (Bates Numbers 000035 – 000037); g) a letter to Directors of Innocence Clinics at Texas Law Schools dated November 4, 2021, from Committee Member Vincent R. Johnson (Bates Numbers 000038 – 000040); h) a draft of proposed Rule 3.09(f) dated January 4, 2022, from Committee Member Rick Hagen (Bates Number 000041); i) a memorandum on proposed Rule 3.09(f)-(h) dated April 21, 2022, from Committee Member Rick Hagen (Bates Numbers 000042 – 000046); and j) a memorandum on proposed Rule 3.09 dated May 23, 2022, from Committee Member Vincent R. Johnson (Bates Numbers 000047 – 000053).

Document file #3 on the Second Rule Proposal includes: a) a link to the list of participants invited to speak at the Committee's 3.09 subcommittee meetings (Bates Number 000054); and b) a link to email communications, letters and statements regarding the proposed rule, draft language recommended for the proposed rule, research material, and other documents discussed by the Committee's 3.09 subcommittee at meetings by Zoom teleconference on July 5, 2022, July 28, 2022, August 31, 2022, September 27, 2022, October 6, 2022, October 19, 2022, and October 24, 2022 (Bates Number 000054).

Document file #4 on the Third Rule Proposal includes: a) proposed Rule 3.09 as published in the January 2023 *Texas Bar Journal* (Bates Numbers 000055 – 0000057); b) proposed Rule 3.09 as published in the January 13, 2023, issue of the *Texas Register* (Bates Numbers 000058 – 000062); c) a link to the video recording of the Committee's public hearing on proposed Rule 3.09 conducted by Zoom teleconference on April 12, 2023,[3] with the name of each speaker and time-stamp of the speaker's oral comments (Bates Number 000063); and d) a link to public comments received in response to the publications for the period ending on April 13, 2023 (Bates Number 000063).

[2] The Committee also heard public comments on proposed Rules 1.00, 1.09, and 1.10, TDRPC, on April 6, 2022.
[3] The Committee also heard public comments on proposed Rules 1.08, 5.01, 5.05, and 8.05, TDRPC, on April 12, 2023.

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct

Rule 3.09. Special Responsibilities of a Prosecutor (Final Recommended Version)

Proposed Rule (Redline Version)

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 and credible information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay,

(1) if the conviction was obtained in the prosecutor's jurisdiction:

(i) promptly disclose that information to:

(A) the defendant;

(B) the defendant's counsel, or if there is none, the indigent defense appointing authority in the jurisdiction, if one exists;

(C) the tribunal in which the defendant's conviction was obtained; and

(D) a statewide entity that examines and litigates claims of actual innocence.

(ii) if the defendant is not represented by counsel, or if unable to determine whether the defendant is represented by counsel, move the court in which the defendant was convicted to determine whether the defendant is indigent and thus entitled to the appointment of counsel.

(iii) cooperate with the defendant's counsel by providing all new information known to the prosecutor as required by the relevant law governing criminal discovery.

(2) if the conviction was obtained in another jurisdiction, promptly disclose that information to the appropriate prosecutor in the jurisdiction where the conviction was obtained.

(g) A prosecutor who concludes in good faith that information is not subject to disclosure under paragraph (f) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

(h) In paragraph (f), unless the context indicates otherwise, "jurisdiction" means the legal authority to represent the government in criminal matters before the tribunal in which the defendant was convicted.

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).~~ A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause, that guilt is decided upon the basis of sufficient evidence, that any sentence imposed is based on all unprivileged information known to the prosecutor, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standard of Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. ~~In addition a~~ A prosecutor should not initiate or exploit any violation of a suspect's right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pretrial, trial or post-trial rights from

unrepresented persons. ~~See paragraphs (b) and (c). In addition, a prosecutor is obliged to see that the defendant is accorded procedural justice, that the defendant's guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor. See paragraph (d). Finally, a~~ 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 (c) 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. In many instances, it may be appropriate for a prosecutor to inform his or her supervisor about information related to the duties set down by this Rule.

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.

Proposed Rule (Clean Version)

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 and credible information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay,

(1) if the conviction was obtained in the prosecutor's jurisdiction:

(i) promptly disclose that information to:

(A) the defendant;

(B) the defendant's counsel, or if there is none, the indigent defense appointing authority in the jurisdiction, if one exists;

(C) the tribunal in which the defendant's conviction was obtained; and

(D) a statewide entity that examines and litigates claims of actual innocence.

(ii) if the defendant is not represented by counsel, or if unable to determine whether the defendant is represented by counsel, move the court in which the defendant was convicted to determine whether the defendant is indigent and thus entitled to the appointment of counsel.

(iii) cooperate with the defendant's counsel by providing all new information known to the prosecutor as required by the relevant law governing criminal discovery.

(2) if the conviction was obtained in another jurisdiction, promptly disclose that information to the appropriate prosecutor in the jurisdiction where the conviction was obtained.

(g) A prosecutor who concludes in good faith that information is not subject to disclosure under paragraph (f) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

(h) In paragraph (f), unless the context indicates otherwise, "jurisdiction" means the legal authority to represent the government in criminal matters before the tribunal in which the defendant was convicted.

Comment:

Source and Scope of Obligations

1. A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause, that guilt is decided upon the basis of sufficient evidence, that any sentence imposed is based on all unprivileged information known to the prosecutor, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standard of Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. A prosecutor should not initiate or exploit any violation of a suspect's right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pretrial, trial or post-trial rights from unrepresented persons. 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 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. In many instances, it may be appropriate for a prosecutor to inform his or her supervisor about information related to the duties set down by this Rule.

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.

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.

The State of Texas ("State") gives notice of the following proposed resolution of an environmental enforcement action under the Texas Water Code. Before the State may enter into a voluntary settlement agreement, pursuant to section 7.110 of the Texas Water Code, the State shall permit the public to comment in writing. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreement if the comments disclose facts or considerations indicating that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the law.

Case Title and Court: *State of Texas v. Liberty Materials, Inc.;* Cause No. D-1-GN-20-006780 in the 201st Judicial District Court, Travis County, Texas.

Background: Defendant Liberty Materials, Inc. ("Liberty") owns and operates a surface sand mining operation at 19515 Moorhead Road, Conroe, Montgomery County, Texas (the "Facility"). Liberty registered the Facility with the Texas Commission on Environmental Quality ("TCEQ") as an active aggregate production operation that primarily produces industrial sand. The Facility contains an active mining area, processing plant, multiple process and settling ponds for wastewater, and multiple stormwater ponds. The State filed suit against Liberty for the unauthorized discharge of wastewater into the West Fork of the San Jacinto River due to a breach of a berm surrounding a process pond in November 2019, in violation of the Texas Water Code and the rules promulgated by the TCEQ.

Proposed Settlement: Without an admission of fault or liability by Liberty to any of the alleged violations of any statute, regulation, or rule as described in the State's Original Petition, the parties propose an Agreed Final Judgment which provides for an award to the State of $30,000 in civil penalties and $5,000 in attorney's fees.

For a complete description of the proposed settlement, the Agreed Final Judgment should be reviewed in its entirety. Requests for copies of the proposed judgment and settlement, and written comments on the same, should be directed to Logan Harrell, Assistant Attorney General, Office of the Attorney General of Texas, P.O. Box 12548, MC-066, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911; email: Logan.Harrell@oag.texas.gov. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-202200629
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: February 22, 2022

♦ ♦ ♦

State Bar of Texas

Committee on Disciplinary Rules and Referenda Proposed Rule Changes Texas Disciplinary Rules of Professional Conduct Rules 1.00 Terminology, 1.09 Conflict of Interest: Former Client, 1.10 Conflict of Interest: General Rule, 3.09 Special Responsibilities of a Prosecutor

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure is not included in the print version of the Texas Register. The figure is available in the on-line version of the March 4, 2022, issue of the Texas Register.)

TRD-202200611
Andrea Low
Disciplinary Rules and Referenda Attorney
State Bar of Texas
Filed: February 22, 2022

♦ ♦ ♦

Comptroller of Public Accounts

Certification of the Average Closing Price of Gas and Oil - January 2022

The Comptroller of Public Accounts, administering agency for the collection of the Oil Production Tax, has determined, as required by Tax Code, §202.058, that the average taxable price of oil for reporting period January 2022 is $53.54 per barrel for the three-month period beginning on October 1, 2021, and ending December 31, 2021. Therefore, pursuant to Tax Code, §202.058, oil produced during the month of January 2022, from a qualified low-producing oil lease, is not eligible for credit on the oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined, as required by Tax Code, §201.059, that the average taxable price of gas for reporting period January 2022 is $3.50 per mcf for the three-month period beginning on October 1, 2021, and ending December 31, 2021. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of January 2022, from a qualified low-producing well, is eligible for a 25% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of West Texas Intermediate crude oil for the month of January 2022 is $82.98 per barrel. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall not exclude total revenue received from oil produced during the month of January 2022, from a qualified low-producing oil well.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of gas for the month of January 2022 is $4.26 per MMBtu. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall exclude total revenue received from gas produced during the month of January 2022, from a qualified low-producing gas well.

Inquiries should be submitted to Jenny Burleson, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-202200645
William Hamner
Special Counsel for Tax Administration
Comptroller of Public Accounts
Filed: February 22, 2022

♦ ♦ ♦

Concho Valley Workforce Development Board

Request for Qualifications/Quotations: Request for Proposal (RFP) Evaluators

DATE: February 22, 2022

SUBMIT QUOTES TO: Executive Director Yolanda Sanchez

ysanchez@cvworkforce.org

36 East Twohig Ste 805

San Angelo, Texas 76903

Committee on Disciplinary Rules and Referenda

Proposed Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct

Public Comments and Public Hearing

Public Comments Dated October 19, 2021, to May 31, 2022

https://www.texasbar.com/Content/NavigationMenu/CDRR/PublicComments/SpecialResponsibilitiesofaProsecutorInitiated10.6.21_PublicComments.pdf

Video of Public Hearing on April 6, 2022

https://texasbar-wo4m90g.vids.io/videos/709edeb51815eac0f9/cdrr-meeting-april-6-2022

Comments on proposed Rule 3.09:

Micheal Jimerson at 00:21:59

Jack Roady at 00:28:49

Scott Brumley at 00:34:49

Brian Middleton at 00:41:46

Bobby Bland at 00:49:48

Kim Ogg at 00:59:26

Lee Hon at 01:12:30

Philip Furlow at 01:19:09

Brit Featherston at 01:22:54

Patricia Nasworthy at 01:28:59

Barbara Hervey at 01:33:34

Jorge Aristotelidis at 01:38:38

Doug Norman at 01:44:41

Erik Kalenak at 01:46:44

Mike Ware at 01:50:01

Tillman Roots at 02:02:45

Stacey Soule at 02:06:50

Christopher Hernandez at 02:09:46

Proposed Changes to Texas Disciplinary Rule of Professional Conduct 3.09

Format

From: Vincent R. Johnson
To: CDRR Subcommittee (Rick Hagen, Amy Bresnen, Karen Nicholson)
Cc: Andrea Low

September 10, 2021

This document shows the current version of Texas Rule 3.09 and its Comments with proposed additions shown with MS Word Track Changes underlining and proposed deletions shown with MS Word Track Changes strikeout text.

Articles from Duquesne Law Review and South Texas Law Review are attached. They address issues related to wrongful convictions and cite Model Rule 3.8 throughout. At page 270, the Duquesne article says 19 states have adopted wrongful conviction rules.

Rule 3.09 Special Responsibilities of a Prosecutor[1]

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.

[1] This document shows the current version of Texas Rule 3.09 and its Comments with proposed additions marked with underlining and proposed deletions marked with strike out text.

(f)[2] 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)[3] 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.

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[2] Paragraph (f) contains the language of Model Rule 3.8(g).
[3] Paragraph (g) contains the language of Model Rule 3.8(h).

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. Sub-paragraph (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][4] 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][5] Under paragraph (g), 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.

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[4] This is the language of Model Rule 3.8 cmt. 7. Cross-references which have been updated to refer to the current or proposed Texas Rules, rather than the Model Rules, are highlighted in yellow.

[5] This is the language of Model Rule 3.8 cmt. 8. Cross-references which have been updated to refer to the current or proposed Texas Rules, rather than the Model Rules, are highlighted in yellow.

[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 (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.[6]

[6] This is the language of Model Rule 3.8 cmt. 9. Cross-references which have been updated to refer to the current or proposed Texas Rules, rather than the Model Rules, are highlighted in yellow.

Proposed Changes to Texas Disciplinary Rule of Professional Conduct 3.09

Format

From: Prof. Vincent R. Johnson

November 3, 2021

This document shows the current version of Texas Rule 3.09 and its Comments with proposed additions shown with underlining and proposed deletions shown with strikeout text.

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)[1] 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

[1] Paragraph (f) contains the language of Model Rule 3.8(g).

(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)[2] 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

[2] Paragraph (g) contains the language of Model Rule 3.8(h).

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. Sub-paragraph (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][3] 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][4] Under paragraph (g), 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 (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.[5]

[3] This is the language of Model Rule 3.8 cmt. 7. Cross-references which have been updated to refer to the current or proposed Texas Rules, rather than the Model Rules, are highlighted in yellow.
[4] This is the language of Model Rule 3.8 cmt. 8. Cross-references which have been updated to refer to the current or proposed Texas Rules, rather than the Model Rules, are highlighted in yellow.
[5] This is the language of Model Rule 3.8 cmt. 9. Cross-references which have been updated to refer to the current or proposed Texas Rules, rather than the Model Rules, are highlighted in yellow.

November 4, 2021

TO: Directors of Innocence Clinics at Texas Law Schools

FROM: Vincent R. Johnson
South Texas Distinguished Professor of Law, St. Mary's University
Member, Committee on Disciplinary Rules and Referenda

By appointment of the Texas Supreme Court, I serve on the Committee on Disciplinary Rules and Referenda (CDRR), a small committee that formulates amendments to the Texas Disciplinary Rules of Professional Conduct (TDRPC).

I have proposed that the CDRR recommend adoption of the provisions in the ABA Model Rules that articulate the obligations of prosecutors dealing with remedying wrongful convictions. How my proposal would change TDRPC Rule 3.09 is shown on the attachment. (The new provisions are parts (f) and (g) of the blackletter rule and comments 7-9.)

At the CDRR meeting on Zoom yesterday, I suggested that the committee invite law professors with relevant expertise to submit their views to the CDRR in writing regarding the wisdom of this proposal. Therefore, I am writing to ask for your help.

We would particularly be interested in your views on two questions:

1. Are wrongful convictions a significant problem in Texas that needs to be addressed by the ethics rules?
2. If so, would adoption of the proposed amendments be a good way to address this problem.

It would be most helpful to hear from you no later than Friday December 3 so that your comments could be distributed to the members of the CDRR before the committee's next meeting on Wednesday December 8.

If time is short, a brief statement of your views will suffice. However, if time allows, a longer expression of your views would be most welcome. The CDRR has already received an 8-page

single-spaced letter in opposition to the proposed amendments. If you favor the adoption of the proposed changes, this is an excellent time to voice your views. If you want to join with other professors in crafting a joint letter, that would be fine

If the CDRR recommends the adoption of the proposed amendments, the process then moves forward through the Texas Supreme Court and State Bar Board of Directors, then eventually to a referendum of attorneys licensed in Texas. The process of passing an amendment to the ethics rules typically takes a couple of years. Information about the CDRR can be found at: www.texasbar.com/cdrr

Thank you for your help. Let me know if you have questions. You may share this information with others who may be interested.

You can send your letter by email or regular mail to:

> Ms. Andrea Low, Disciplinary Rules and Referenda Attorney
> Committee on Disciplinary Rules and Referenda
> Office of the Chief Disciplinary Counsel
> State Bar of Texas, P.O. Box 12487, Austin, Texas 78711-2487
> (512) 427-1323 – office, (737) 465-3851 – mobile
> Andrea.Low@TEXASBAR.COM

Sincerely,
Vincent R. Johnson
Vincent R. Johnson
South Texas Distinguished Professor of Law
St. Mary's University

Distribution List

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Innocence Project of Texas
Mel Leroy, Development Director
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CC: Karen L. Kelley, Assistant Dean for Clinical Programs
St. Mary's University
[redacted]

STATE BAR COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

Proposed addition to Rule 3.09 Special Duties of Prosecutor by adding a new subsection (f)

(f) 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.

Submitted by Rick Hagen
January 5, 2022

JACKSON HAGEN
CRIMINAL LAW
CONFIDENCE • TOUGHNESS • LEADERSHIP

MEMORANDUM

TO: **CDRR COMMITTEE**
FROM: **RICK HAGEN**
DATE: **APRIL 21, 2022**
RE: **COMMENTS AT PUBLIC HEARING HELD ON APRIL 6, 2022, REGARDING RULE 3.09**

On April 6, 2022, this committee held a public hearing and received comments regarding proposed revisions to Rule 3.09. The comments were insightful, engaging, and well received by the committee. At least eighteen lawyers appeared at the public hearing and provided comment. This memorandum is a summary of that public hearing, done without the benefit of a transcript, and not intended to voice any opinions.

The proposed additions to Rule 3.09, as published in the Texas Bar Journal, are attached as Exhibit 1 to this memorandum. Summarized, the additions add the following subsections:

> *(f) requiring a prosecutor to investigate or cause an investigation if the prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense.*
>
> *(g) making the duty to disclose exculpatory evidence a continuing duty, whether or not the prosecutor is still working as a prosecutor.*
>
> *(h) requiring a prosecutor to remedy the conviction if the prosecutor knows of clear and convincing evidence that a convicted defendant did not commit the offense.*

Proposed additions (f) and (h) are essentially the same as those contained in the ABA Model Rules of Professional Responsibility.

The lawyers who spoke on the proposed additions seemed to address proposed additions (f) and (h) collectively. Consequently, this summary will combine a discussion of those comments.

Comments regarding proposed additions (f) and (h)

Currently, *Art. 39.14(k) V.A.C.C.P.*, requires a prosecutor to promptly disclose any exculpatory material before, during, or *after trial* to the defendant or the court. Virtually

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every prosecutor who commented found this duty to disclose to be reasonable. Several prosecutors stated that the current legislative rules were sufficient to prevent and remedy wrongful convictions. Multiple prosecutors voiced concerns regarding the duty to investigate and the duty to remedy.

Polk County Criminal District Attorney Lee Hon provided his objection to (f) and (g) by way of example. Hon described a murder conviction obtained in his county in which a drug deal went bad involving a vehicle. DNA evidence was found on the vehicle's door handle, but no match was found at the time of trial.

Ten years after the conviction, the DNA was identified as that of an individual being prosecuted for murder in a neighboring county. Hon stated that upon receipt of the DNA match, he contacted the Innocence Project of Texas and asked an outside agency to investigate the new evidence. Hon voiced his concerns regarding a potential conflict of interest and the "optics" of how it would look for anyone associated with his office to investigate the newly discovered evidence.

Prosecutors seemed unanimous in their concerns regarding funding for investigations, the perceived conflict of interest issue, and staffing concerns. Multiple prosecutors commented on their desire to have an outside agency, potentially established by the legislature, created to evaluate newly discovered evidence. The prosecutors who spoke were genuinely concerned with remedying wrongful convictions but appeared to prefer a legislative solution, rather than a rule solution, to the issue.

Several elected prosecutors voiced their concerns regarding how the rule would apply when the elected prosecutor had no knowledge of the case. Examples were given regarding convictions obtained before an elected prosecutor took office and how the prosecutor should react to seemingly exculpatory evidence in a case for which the prosecutor had no knowledge of the facts. Prosecutors cited these circumstances as a need for some sort of "clearinghouse" and legislative solution to these scenarios.

Of particular interest were the comments made by the office of Comal County Criminal District Attorney Jennifer Tharp regarding prosecutorial immunity. The United States Supreme Court has made clear that a prosecutor enjoys absolute immunity when acting as an officer of the court. However, that absolute immunity may not apply when a prosecutor is engaged in investigative tasks. Additionally, absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation. See: *Van de Kamp v. Goldstein, 129 S.Ct. 855 (2009) and Wooten v. Roach, 964 F.3d 395 (5th Cir. 2020).* Tharp's office preferred a requirement that an outside entity, such as an innocence project, conduct investigations to avoid losing immunity.

At least one prosecutor stated that the proposed additions (f) and (h) would effectively close the courthouse because prosecutors would be discouraged from filing cases. Municipal prosecutors expressed their concerns regarding the proposed rule noting that in a substantial number of cases the municipal prosecutor knows nothing about the underlying facts and has no contact with the defendant. The States Prosecuting

Attorney, Stacey Soule, noted that her offices jurisdiction is limited to the Court of Criminal Appeals and inquired how the rule would apply to her office.

Doug Norman from Nueces County stated that *Art. 11.07(4) V.A.C.C.P.* currently provides a remedy and that the proposals were not necessary. Judge Barbara Hervey, currently sitting on the Court of Criminal Appeals, expressed that the proposals were not necessary. Michael Ware, Executive Director of the Innocence Project of Texas, expressed his support of the proposed revisions.

Comments regarding proposed addition (g)

Proposed addition (g) imposes a continuing duty to disclose regardless of whether the lawyer is working as a prosecutor or not. Michael Ware expressed his opposition because the proposal deviates from the ABA Model Rules. Multiple prosecutors voiced their concerns whether the duties to investigate and remedy contained in (f) and (h) would apply if the prosecutor was no longer working as a prosecutor. Multiple prosecutors also voiced objections to what was generally described as a "cradle to grave" duty to disclose. Several prosecutors commented that the continuing duty to disclose, if passed, should apply to all lawyers.

Christpher Hernandez with the Office of the El Paso County Public Defender addressed the case of Alton Logan in Chicago. Logan was convicted of murder and received a life sentence. Meanwhile, a different man, Andrew Wilson, confessed to his lawyers that he committed the offense for which Logan was convicted. Wilson's lawyers were prohibited by rule from disclosing the confession but obtained a waiver from Wilson that they could disclose upon Wilson's death. If (g) were added to the rules, Hernandez's comments reflect the creation of a conflict in rules had Wilson's lawyer been the prosecutor who obtained Logan's conviction.

RICK HAGEN

See attachment

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

EXHIBIT 1 P. 1 of 2

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.

Exhibit 1 p. 2 of 2

Proposed Changes to Texas Disciplinary Rule of Professional Conduct 3.09

TO: CDRR

From: Professor Vincent R. Johnson

May 23, 2022

This document shows the current version of Texas Rule 3.09 and its Comments with my proposed additions shown with underlining and proposed deletions shown with strikeout text.

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)[1] 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.

[1] Paragraph (f) contains language similar to Model Rule 3.8(h).

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. Sub-paragraph (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][2] Under paragraph (f), 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 section (f), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.[3]

[2] This language is similar to Model Rule 3.8 cmt. 8.
[3] This language is similar to Model Rule 3.8 cmt. 9.

Appendix

[For purposes of comparison with my new proposal relating to Texas Disciplinary Rule 3.09 dated May 23, 2022, I am attaching in this Appendix my earlier proposal dated November 3, 2021. VRJ]

Johnson's Earlier Proposal regarding Texas Disciplinary Rule 3.09 dated November 3, 2021.

Proposed Changes to Texas Disciplinary Rule of Professional Conduct 3.09

From: Prof. Vincent R. Johnson

November 3, 2021

This document shows the current version of Texas Rule 3.09 and its Comments with proposed additions shown with underlining and proposed deletions shown with strikeout text.

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)[4] 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)[5] 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.

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[4] Paragraph (f) contains the language of Model Rule 3.8(g).
[5] Paragraph (g) contains the language of Model Rule 3.8(h).

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. Sub-paragraph (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][6] 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][7] Under paragraph (g), 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

[6] This is the language of Model Rule 3.8 cmt. 7. Cross-references which have been updated to refer to the current or proposed Texas Rules, rather than the Model Rules, are highlighted in yellow.
[7] This is the language of Model Rule 3.8 cmt. 8. Cross-references which have been updated to refer to the current or proposed Texas Rules, rather than the Model Rules, are highlighted in yellow.

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 (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.[8]

[8] This is the language of Model Rule 3.8 cmt. 9. Cross-references which have been updated to refer to the current or proposed Texas Rules, rather than the Model Rules, are highlighted in yellow.

Committee on Disciplinary Rules and Referenda
Proposed Rule 3.09, Texas Disciplinary Rules of Professional Conduct
Initiated June 1, 2022

List of Members of the Subcommittee on Proposed Rule 3.09 and Participants Invited to Speak at the Subcommittee Meetings:

https://www.texasbar.com/Content/NavigationMenu/CDRR/PublicComments/Attendees-Subcommittee-meetings.pdf

Documents dated June 1, 2022, to November 2, 2022, for Discussion by the Subcommittee on Proposed Rule 3.09 at Meetings on July 5, 2022, July 28, 2022, August 31, 2022, September 27, 2022, October 6, 2022, October 19, 2022, and October 24, 2022, by Zoom Teleconference:

https://www.texasbar.com/Content/NavigationMenu/CDRR/PublicComments/Document-File-Number-3-redacted.pdf

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

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 rule. The committee will accept comments concerning the proposed rule through April 13, 2023. Comments can be submitted at texasbar.com/CDRR. The committee will hold a public hearing on the proposed rule by teleconference at 10 a.m. CDT on April 12, 2023. For teleconference participation information, please go to texasbar.com/cdrr/participate.

Proposed Rule (Redline Version)

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 and credible information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay,

(1) if the conviction was obtained in the prosecutor's jurisdiction:

(i) promptly disclose that information to:

(A) the defendant;

(B) the defendant's counsel, or if there is none, the indigent defense appointing authority in the jurisdiction, if one exists;

(C) the tribunal in which the defendant's conviction was obtained; and

(D) a statewide entity that examines and litigates claims of actual innocence.

(ii) if the defendant is not represented by counsel, or if unable to determine whether the defendant is represented by counsel, move the court in which the defendant was convicted to determine whether the defendant is indigent and thus entitled to the appointment of counsel.

(iii) cooperate with the defendant's counsel by promptly providing all information known to the prosecutor regarding the underlying matter and the new information.

(2) if the conviction was obtained in another jurisdiction, promptly disclose that information to the appropriate prosecutor in the jurisdiction where the conviction was obtained.

(g) A prosecutor who concludes in good faith that information is not subject to disclosure under paragraph (f) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

(h) In paragraph (f), unless the context indicates otherwise, "jurisdiction" means the legal authority to represent the government in criminal matters before the tribunal in which the defendant was convicted.

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).~~ A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause, that guilt is decided upon the basis of sufficient evidence, that any sentence imposed is based on all

unprivileged information known to the prosecutor, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standard of Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. ~~In addition a~~ A prosecutor should not initiate or exploit any violation of a suspect's right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pretrial, trial or post-trial rights from unrepresented persons. ~~See paragraphs (b) and (c). In addition, a prosecutor is obliged to see that the defendant is accorded procedural justice, that the defendant's guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor. See paragraph (d). Finally, a~~ 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. In many instances, it may be appropriate for a prosecutor to inform his or her supervisor about information related to the duties set down by this Rule.

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.

Proposed Rule (Clean Version)

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 and credible information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay,

(1) if the conviction was obtained in the prosecutor's jurisdiction:

(i) promptly disclose that information to:

(A) the defendant;

(B) the defendant's counsel, or if there is none, the indigent defense appointing authority in the jurisdiction, if one exists;

(C) the tribunal in which the defendant's conviction was obtained; and

(D) a statewide entity that examines and litigates claims of actual innocence.

(ii) if the defendant is not represented by counsel, or if unable to determine whether the defendant is represented by counsel, move the court in which the defendant was convicted to determine whether the defendant is indigent and thus entitled to the appointment of counsel.

(iii) cooperate with the defendant's counsel by promptly providing all information known to the prosecutor regarding the underlying matter and the new information.

(2) if the conviction was obtained in another jurisdiction, promptly disclose that information to the appropriate prosecutor in the jurisdiction where the conviction was obtained.

(g) A prosecutor who concludes in good faith that information is not subject to disclosure under paragraph (f) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

(h) In paragraph (f), unless the context indicates otherwise, "jurisdiction" means the legal authority to represent the government in criminal matters before the tribunal in which the defendant was convicted.

Comment:

Source and Scope of Obligations

1. A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause, that guilt is decided upon the basis of sufficient evidence, that any sentence imposed is based on all unprivileged information known to the prosecutor, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standard of Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. A prosecutor should not initiate or exploit any violation of a suspect's right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pretrial, trial or post-trial rights from unrepresented persons. 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 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. In many instances, it may be appropriate for a prosecutor to inform his or her supervisor about information related to the duties set down by this Rule.

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. **TBJ**

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of the Attorney General

Texas Health and Safety Code and Texas Water Code
Settlement Notice

The State of Texas gives notice of the following proposed resolution of an environmental enforcement action under the Texas Water Code and the Texas Health and Safety Code. Before the State may enter into a voluntary settlement agreement, pursuant to Section 7.110 of the Texas Water Code, the State shall permit the public to comment in writing. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreement if the comments disclose facts or considerations indicating that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the law.

Case Title and Court: *State of Texas v. TotalEnergies Petrochemicals & Refining USA, Inc.;* Cause No. D-1-GN-22-007073; in the 200th Judicial District Court, Travis County, Texas.

Background: Defendant TotalEnergies Petrochemicals & Refining USA, Inc. (TotalEnergies) owns and operates a petroleum refinery located at 7600 32nd Street, Port Arthur, Jefferson County, Texas, which had experienced multiple, recurring instances of unauthorized emissions of air contaminants from the refinery. On behalf of the Texas Commission on Environmental Quality (TCEQ), the State filed suit against TotalEnergies for its violation of the Texas Clean Air Act, and TCEQ rules and permits issued thereunder.

Proposed Settlement: The parties propose an Agreed Final Judgment and Permanent Injunction, which requires TotalEnergies to implement a series of corrective actions according to an agreed compliance schedule. The proposed judgment also assesses against TotalEnergies a civil penalty of $1.3 million, and attorney's fees to the State in the amount of $100,000.

For a complete description of the proposed settlement, the Agreed Final Judgment and Permanent Injunction should be reviewed in its entirety. Requests for copies of the proposed judgment and settlement, and written comments on the same, should be directed to Phillip Ledbetter, Assistant Attorney General, Office of the Attorney General of Texas, Post Office Box 12548, MC 066, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911, email Phillip.Ledbetter@oag.texas.gov. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-202300027
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: January 3, 2023

♦ ♦ ♦

State Bar of Texas

Committee on Disciplinary Rules and Referenda Proposed Rule Changes Rule 3.09 Special Responsibilities of a Prosecutor

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

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 rule. The committee will accept comments concerning the proposed rule through April 13, 2023. Comments can be submitted at texasbar.com/CDRR. The committee will hold a public hearing on the proposed rule by teleconference at 10 a.m. CDT on April 12, 2023. For teleconference participation information, please go to texasbar.com/cdrr/participate.

Proposed Rule (Redline Version)

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 and credible information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay,

(1) if the conviction was obtained in the prosecutor's jurisdiction:

(i) promptly disclose that information to:

(A) the defendant;

(B) the defendant's counsel, or if there is none, the indigent defense appointing authority in the jurisdiction, if one exists;

(C) the tribunal in which the defendant's conviction was obtained; and

(D) a statewide entity that examines and litigates claims of actual innocence.

(ii) if the defendant is not represented by counsel, or if unable to determine whether the defendant is represented by counsel, move the court in which the defendant was convicted to determine whether the defendant is indigent and thus entitled to the appointment of counsel.

(iii) cooperate with the defendant's counsel by promptly providing all information known to the prosecutor regarding the underlying matter and the new information.

(2) if the conviction was obtained in another jurisdiction, promptly disclose that information to the appropriate prosecutor in the jurisdiction where the conviction was obtained.

(g) A prosecutor who concludes in good faith that information is not subject to disclosure under paragraph (f) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

(h) In paragraph (f), unless the context indicates otherwise, "jurisdiction" means the legal authority to represent the government in criminal matters before the tribunal in which the defendant was convicted.

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).~~ A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause, that guilt is decided upon the basis of sufficient evidence, that any sentence imposed is based on all

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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.

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Proposed Rule (Clean Version)

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

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(ii) if the defendant is not represented by counsel, or if unable to determine whether the defendant is represented by counsel, move the court in which the defendant was convicted to determine whether the defendant is indigent and thus entitled to the appointment of counsel.

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(2) if the conviction was obtained in another jurisdiction, promptly disclose that information to the appropriate prosecutor in the jurisdiction where the conviction was obtained.

(g) A prosecutor who concludes in good faith that information is not subject to disclosure under paragraph (f) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

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1. A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause, that guilt is decided upon the basis of sufficient evidence, that any sentence imposed is based on all unprivileged information known to the prosecutor, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standard of Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. A prosecutor should not initiate or exploit any violation of a suspect's right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pretrial, trial or post-trial rights from unrepresented persons. 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 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. In many instances, it may be appropriate for a prosecutor to inform his or her supervisor about information related to the duties set down by this Rule.

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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.

TRD-202300008
Haksoon Andrea Low
Disciplinary Rules and Referenda Attorney
State Bar of Texas
Filed: January 2, 2023

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Capital Area Rural Transportation System

CARTS RFQ - Smithville Rehab - Professional Services

Capital Area Rural Transportation System (CARTS) invites qualified proposers to submit proposals for the architectural and engineering services CARTS requires to complete the renovation of its Smithville Station facility located at 300 NE Loop 230., Smithville, Texas 78957

An RFQ will be available for download on the CARTS Website beginning at 5:00 p m., Thursday, December 22, 2022. Go to: http://ridecarts.weebly.com/rfq-smithville-renovation.html, and follow the instructions.

A non-mandatory pre-proposal meeting will be conducted at 2:00 p.m. January 10, 2023, at the Smithville Station.

Following are the required timeframes for the procurement:

Release of RFQ: December 22, 2022, 5:00 p m.

Pre-Proposal/Pre-Response meeting: January 10, 2023, 2:00 p m.

Written Questions: January 16, 2023, 5:00 p m.

Responses to questions: January 20, 2023, 5:00 p m.

Response Due Date: January 24, 2023, 2:00 p m.

Interviews (if necessary): January 26, 2023 (TBD)

Selection and Award: February 2, 2023

Successful implementation/begin project: 30 days after notice to proceed

TRD-202205266
David L. Marsh
CARTS General Manager
Capital Area Rural Transportation System
Filed: December 29, 2022

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005 and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 01/09/23 - 01/15/23 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 01/09/23 - 01/15/23 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005 and 303.009[3] for the period of 01/01/23 - 01/31/23 is 18% for Consumer/Agricultural/Commercial credit through $250,000.

The monthly ceiling as prescribed by §303.005 and 303.009 for the period of 01/01/23 - 01/31/23 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

[3] For variable rate commercial transactions only.

TRD-202300022
Leslie L. Pettjohn
Commissioner
Office of Consumer Credit Commissioner
Filed: January 3, 2023

♦ ♦ ♦

Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075, requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075, requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **February 14, 2023**. TWC, §7.075, also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p m. on **February 14, 2023**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission's enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075, provides that comments on the AOs shall be submitted to the commission in writing.

(1) COMPANY: City of China; DOCKET NUMBER: 2022-1453-UTL-E; IDENTIFIER: RN101276855; LOCATION: China, Jefferson County; TYPE OF FACILITY: retail public utility, exempt utility, or provider or conveyor of potable or raw water service that furnishes water service; RULE VIOLATED: TWC, §13.1394(b)(2), by failing to adopt and submit to the TCEQ for approval an emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: $510; ENFORCEMENT COORDINATOR: Carlos Flores, (915) 834-4964; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(2) COMPANY: City of Iraan; DOCKET NUMBER: 2022-1340-UTL-E; IDENTIFIER: RN101386241; LOCATION: Iraan, Pecos County; TYPE OF FACILITY: retail public utility, exempt utility, or provider or conveyor of potable or raw water service that furnishes water service; RULE VIOLATED: TWC, §13.1394(b)(2), by failing to adopt and submit to the TCEQ for approval an emergency preparedness plan that demonstrates the facility's ability to provide emergency

Committee on Disciplinary Rules and Referenda

Proposed Rule 3.09, Texas Disciplinary Rules of Professional Conduct

Public Hearing and Public Comments

Video of Public Hearing on April 12, 2023

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

Comments on proposed Rule 3.09:

Brit Featherston at 00:08:00

Brent Mayr at 00:13:16

Jack Roady at 00:18:05

Robert Kepple at 00:24:17

Cory Session at 00:25:52

Michael Ware at 00:30:24

Heather Barbieri at 00:37:55

Adam Veary at 00:41:27

Jerry Hall at 00:43:51

Anthony Graves at 00:47:43

Betty Blackwell at 00:53:46

Steven Conder at 00:58:06

Public Comments Received through April 13, 2023

https://www.texasbar.com/Content/NavigationMenu/CDRR/Comments/Final-Posted-3.09-2023-04-17-.pdf