



## PROPOSED AMENDMENTS TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT: BRIEF BACKGROUND AND EXPLANATION UPDATED NOVEMBER 2010

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On October 20, 2009, in Misc. Docket No. 09-9175, the Supreme Court of Texas proposed amendments to the Texas Disciplinary Rules of Professional Conduct. The proposed amendments were prompted by extensive revisions to the American Bar Association's (ABA's) Model Rules of Professional Conduct, and they were the product of extensive consideration by the Court Task Force on the Texas Disciplinary Rules of Professional Conduct, the State Bar of Texas Committee on the Texas Disciplinary Rules of Professional Conduct (State Bar TDRPC Committee), and, ultimately, the Court.

Through the end of 2009, the Court invited public comments regarding the proposed amendments and received numerous comments in response. The comments resulted in revisions to the proposed amendments. Additional revisions stemmed from additional feedback received from individuals and entities such as the State Bar TDRPC Committee, the State Bar Board of Directors' Discipline and Client Attorney Assistance Program (DCAAP) Committee, and the State Bar Office of the Chief Disciplinary Counsel.

On April 14, 2010, the Court completed a revised version of the proposed amendments. The Court sent the proposed amendments, along with a copy of the Order numbered 09-9175, to then State Bar President Roland Johnson and State Bar President-Elect Terry Tottenham for distribution to, and consideration by, the State Bar Board of Directors. On the Court's behalf, Chief Justice Jefferson requested that the Board consider the proposed amendments and provide the Court with any recommendations or comments by October 6.

On July 7, the Court — with assistance from the State Bar TDRPC Committee — completed proposed interpretive comments for the proposed, amended rules. The Court sent the proposed rules and interpretive comments to State Bar President Terry Tottenham and Immediate Past President Roland Johnson, once again for distribution to, and consideration by, the Board. Chief Justice Jefferson also reiterated the Court's request that the Board provide the Court with any recommendations or comments by October 6.

Between August 30 and September 10, the State Bar held nine public-education hearings throughout Texas to educate and obtain feedback from Texas lawyers and members of the public regarding the proposed rules and interpretive comments. The State Bar also invited feedback on its website, through email, and during a public Board meeting on October 1.

On October 1, the Board — with assistance from its DCAAP Committee — finalized its recommendations for every pro-

posed rule and interpretive comment except proposed Rules 1.06–.09, relating to conflicts of interest, and associated interpretive comments. Shortly before October 1, concerns arose regarding these proposed rules. Because the concerns were not understood completely by October 1, the Board voted to recommend to the Court that a 30-day period be set aside to allow interested parties to address the concerns and offer suggestions for improvement. The Board also recommended that the DCAAP Committee prepare a recommendation for the Board to consider and vote on during its next scheduled meeting on January 28, 2011. Terry Tottenham sent a letter to Chief Justice Jefferson to convey the Board's recommendations. Chief Justice Jefferson responded with a letter requesting that the Board meet and make final decisions by November 5 and share its decisions with the Court by November 8. The Board complied.

On November 8, the Board provided the Court with its final recommendations for the proposed rules and interpretive comments. The Board also submitted a referendum timeline, a referendum ballot, and a resolution. The Court analyzed the Board's recommendations in conjunction with public comments and other related correspondence.

On November 16, in Misc. Docket 10-9190, the Court approved a referendum on the proposed rules. The approval Order contains the timeline for the referendum, the referendum ballot, a clean version of the proposed rules and interpretive comments (in Exhibit A), and a redlined version of the proposed rules compared with the current rules (in Exhibit B). The full Order is posted on the websites of the Court and State Bar. Everything except Exhibit B is published in this December issue of the *Texas Bar Journal*.

As mentioned in the prior version of this document, which was published in the November 2009 issue of the *Texas Bar Journal*, several goals influenced the content of the proposed rules. One of the primary goals was to enhance protection of the public. Another goal was to provide better guidance for lawyers dealing with distinct types of clients, such as prospective clients and clients with diminished capacity, and lawyers engaging in certain professional activities, such as law-reform activities and transactions with or relating to clients. Additional goals were to make the Texas rules more consistent with the ABA Model Rules of Professional Conduct and other states' disciplinary rules, to reflect current practices, and to clarify disciplinary standards overall in an effort to improve lawyers' compliance with these standards and thereby protect the integrity of the legal profession.

To facilitate comprehension of the proposed rules in this issue of the *Texas Bar Journal*, here is a brief overview of some of the most significant changes to the current rules:

**There are five new rules — Rules 1.00, 1.13, 1.14, 1.17, and 6.03.**

- **Rule 1.00** contains new terms that appear in the proposed

rules and revised versions of terms that appear in the “Terminology” section of the current rules. The following terms are new: affiliated, confirmed in writing, informed consent, personally prohibited, reasonably should know (replacing “should know”), represents, and writing/written. The following terms have been revised substantively: firm/law firm, fitness, fraud/fraudulent, partner, substantial/substantially, and tribunal. After each proposed rule, there is a terminology reference that identifies all defined terms that appear in the rule.

- **Rule 1.13** addresses prohibited sexual relations between a lawyer and, among other persons, a client.
- **Rule 1.14** addresses a lawyer’s obligations and options when the lawyer represents a client with diminished capacity. Current Rule 1.02(g), which touches on the same subject matter, has been deleted.
- **Rule 1.17** addresses a lawyer’s obligations relating to a prospective client.
- **Rule 6.03** addresses a lawyer’s obligations when the lawyer participates in law-reform activities that may affect the interests of the lawyer’s client.

**Four rules have been renumbered — Rules 1.13, 1.14, 1.15, and 5.08.**

- **Rule 1.13** has been renumbered as Rule 6.02.
- **Rule 1.14** has been renumbered as Rule 1.15.
- **Rule 1.15** has been renumbered as Rule 1.16.
- **Rule 5.08** has been renumbered as Rule 5.07, to fill a blank space.

**Several rules contain new or revised scienter standards.**

- As indicated above, the scienter standard “should know” has been changed to “reasonably should know” throughout the rules.
- New and revised scienter standards govern the use and disclosure of a client’s confidential information. See Rule 1.05(b)(1)-(2) and (c)(3).
- There are new and revised scienter standards relating to a lawyer’s conflicts of interest. See Rule 1.08(a)(1) and (e)(2) and Rule 1.10(c).
- Likewise, there are new and revised scienter standards relating to an affiliated lawyer’s imputed conflicts of interest. See Rules 1.06(e); 1.07(c); 1.08(i); 1.09(a)(2), (c)(2), and (e); 1.10(b) and (d); 1.11(c); and 1.17(c).
- For more examples of new and revised scienter standards, see Rules 1.12(b); 1.14(b)-(c); 1.15(b)(2), (b)(5), and (c); 3.03(b), (d), and (e); 3.04(a); 3.07(a); 3.08(a)-(b); 5.03(b); and 6.03.

**There are enhanced requirements for lawyer-client communications.** See, for example, Rules 1.03(a)(1)-(2); 1.04(c) and (d)(4); 1.07(a)(2); 1.08(a)(2)-(3), (f), and (g)(2)(ii); and 1.15(b)(1).

**New standards govern a lawyer’s conduct during a representation.** Rule 1.01 requires a lawyer to act with reasonable diligence and promptness in representing a client. Gone from this rule is language providing that a lawyer shall not “frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.”

**The standard governing a lawyer’s fee has changed.** The fee standard in Rule 1.04(a) has changed from “unconscionable” to “clearly excessive.” But the factors that may be considered in determining the reasonableness of a fee have not changed.

**Confidential information is defined differently, and Rule 1.05 is rewritten accordingly.** “Confidential information” is no longer defined in reference to “privileged information” and “unprivileged client information.” There is also a clear differentiation between confidential information of a client or former client versus that of a prospective client. Rule 1.05 has been rewritten to reflect, among other things, these definitional changes and the modified scienter standards addressed above. Paragraph (a) contains the new definition of confidential information, while paragraphs (b) through (d) address the use and disclosure of confidential information.



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## Standards governing conflicts of interest are modified in Rules 1.06 through 1.11.

- **Rule 1.06** begins with a new standard for a lawyer to use when determining whether a conflict of interest exists. This rule then addresses representations a lawyer shall not undertake, even with a client's informed consent, and representations a lawyer may undertake with a client's informed consent, despite the existence of a conflict of interest. Of note, the "substantially related matter" standard has been removed from Rule 1.06. The standard for an affiliated lawyer's imputed conflicts of interest has been modified in paragraph (e) of this rule and is similar to the modified imputation standards in Rules 1.07(c); 1.08(i); 1.09(a)(2), (c)(2), and (e); 1.10(b) and (d); and 1.11(c). An interpretive comment to Rule 1.06 clarifies that the rule does not abrogate a government lawyer's authorization under law to engage in representations.
- **Rule 1.07** has been rewritten to address a lawyer's obligations relating to the representation of multiple clients in the same matter. This rule provides that the representation must be in compliance with Rule 1.06. In addition, the rule provides that, before undertaking the representation or as soon as reasonably practicable thereafter, the lawyer must disclose to the clients all of the things listed in subparagraph (a)(2). Finally, under subparagraph (a)(3), the lawyer must obtain each client's informed consent, confirmed in writing, to the representation. Paragraph (b), however, allows the lawyer to proceed under standards that differ from these standards if the lawyer represents multiple clients pursuant to a court order or appointment that entails different standards.
- **Rule 1.08** has been revised to define more clearly the bounds of prohibited transactions. For example, paragraph (b) restricts a lawyer's ability to solicit a substantial gift from a client and contains a modified definition of the relationships that fall within its confines. Paragraph (f) imposes restrictions on aggregate settlements (in civil matters) and aggregated agreements (in criminal matters) and, as indicated above, enhances the disclosures a lawyer must

make to a client before executing such a settlement or agreement. Subparagraph (g)(1) addresses explicitly a lawyer's ability to prospectively limit liability to a client not only for malpractice, but also for professional misconduct, such as a breach of a fiduciary duty. Subparagraph (g)(2) sets forth new standards for agreements between lawyers and clients to refer their disputes to binding arbitration. Finally, similar to subparagraph (g)(1), subparagraph (g)(3) addresses explicitly lawyer's ability to settle a claim or potential claim for professional misconduct, in addition to malpractice. An interpretive comment for subparagraphs (g)(1) and (g)(3) provides that neither subparagraph authorizes a lawyer to make an agreement with a client that limits the lawyer's obligations under the rules or the enforcement of the rules.

- **Rule 1.09** has been revised substantively and restructured. Paragraphs (a) and (b) restrict a lawyer's ability to represent a person in a matter in which the person's interests are materially adverse to the interests of a former client if the matter is the same as, or substantially related to, a matter in which the lawyer or the lawyer's former firm represented the former client. Paragraph (c), in turn, restricts a lawyer's ability to represent a person in a matter adverse to a former client in which the person questions the validity of the lawyer's services or work product for the former client. New to Rule 1.09, paragraph (d) limits explicitly a lawyer's use and disclosure of information relating to the representation of the former client.
- **Rule 1.10** contains revised definitions of the terms "matter" (in paragraph (f)) and "private client" (in paragraph (g)) and a new definition of the term "screened" (in paragraph (h)). Subparagraph (b)(2) contains enhanced requirements for the notice that must be given when screening is implemented. The rule also contains revised standards for a lawyer who is or has been a public officer or employee. See, for example, paragraphs (c) and (e).
- **Rule 1.11** has been revised to reflect the revised definition of the term "tribunal" (which impacts the definition of the term "adjudicatory official") and specifically address third-party neutrals. See paragraphs (a) and (b). This rule also contains the new term "court lawyer," defined in paragraph (d). Finally, similar to Rule 1.10, subparagraph (c)(2) contains enhanced requirements for the notice that must be given when screening is implemented.

**Revised standards govern lawyers who represent organizations.** Rule 1.12 has been restructured and revised substantively to clarify the obligations of a lawyer who is representing an organization. For example, the rule clarifies the lawyer's obligation to protect the organization's best *legal* interests (as the lawyer is retained to protect those interests), modifies the standard for initiating reasonable remedial measures, and addresses

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the limited situations in which the lawyer may disclose the organization's confidential information or jointly represent the organization and the organization's constituent or constituents.

**Revised standards govern the lawyer's safekeeping of property.** Renumbered Rule 1.15 has been restructured and revised substantively to clarify the obligations of a lawyer who holds the property of others. For example, the rule differentiates between the lawyer's obligations to a client versus a third person, clarifies the lawyer's obligations when there is a dispute regarding the property, and addresses when the lawyer may withdraw fees and expenses from a client trust account and when the lawyer may deposit the lawyer's own funds into the account.

**Aspects of a lawyer's obligation of candor toward a tribunal have changed.** Rule 3.03 has been restructured and revised substantively to clarify a lawyer's obligation of candor toward a tribunal. The rule refines the description of the lawyer's obligation relating to criminal or fraudulent conduct and expands the description of the lawyer's obligation relating to the offer or use of false, material evidence. With an exception for criminal matters, this rule also permits the lawyer to refuse to offer or use evidence that the lawyer reasonably believes, but does not know, is false.

**New and revised standards govern trial publicity.** Rule 3.07 has undergone significant revisions. Current paragraphs (b) and (c), which contain examples of what may or may not violate paragraph (a), have been deleted. The content of those paragraphs is in interpretive comments instead. There is a new paragraph (b), which addresses permissible conduct, and a new paragraph (c), which addresses imputation.

**Rules specify managerial and supervisory lawyers' duties.** Rules 5.01 and 5.03 have been revised to reflect duties imposed on lawyers with managerial or supervisory authority, rather than duties imposed on partners who do not always have this authority. In addition, the rules clarify that a lawyer is not expected to take reasonable remedial action beyond the scope of the lawyer's authority. Rule 5.03 has also been restructured to better guide lawyers who are managing or supervising nonlawyers who are employed by, retained by, or affiliated with a lawyer or law firm.

**A lawyer has a clear duty to represent a person upon being appointed to do so.** Paragraph (a) has been added to Rule 6.01 to clarify that when a tribunal appoints a lawyer to represent a person, the lawyer is obligated to represent the person until the representation is terminated in accordance with Rule 1.16(c).

**A lawyer must report certain findings of guilt and deferred-adjudication orders.** Under new paragraph (f) of Rule 8.03, a lawyer must report to the Office of the Chief Disciplinary

Counsel a finding of guilt or an order deferring adjudication by any court for the commission of an Intentional Crime or a Serious Crime, as defined by the Texas Rules of Disciplinary Procedure. Regardless of whether the lawyer appeals the finding or order, the lawyer must report within thirty days of the finding or order.

*This article contains a summary of the proposed amendments to the Texas Disciplinary Rules of Professional Conduct that the Court's rules attorney deemed most significant. Reasonable minds may differ on the amendments she has deemed significant, as well as her characterization of the amendments. This article does not represent the views or opinions of the Court or any of its members. The Court encourages each member of the State Bar of Texas to analyze the proposed rules and interpretive comments and make independent determinations in preparation for voting on the content of the proposed rules.*



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