

Committee on Disciplinary Rules and Referenda

Agenda

Date and Time: Wednesday, September 7, 2022 – 10:00 a.m. CDT by Teleconference

Join by Meeting Link: <https://texasbar.zoom.us/j/81416417817>

Or Join by Telephone: 888-788-0099 (Toll Free); Meeting ID: 814 1641 7817

View Meeting Agenda and Materials: <https://www.texasbar.com/cdrr/participate>

1. Call to Order; Roll Call
2. Comments from the Chair
3. Discussion and Possible Action: Approval of the Minutes of the Last Meeting (Bates Numbers 000002 – 000003)
4. Discussion and Possible Action: Proposed Rule 3.09 Special Responsibilities of a Prosecutor, Texas Disciplinary Rules of Professional Conduct (TDRPC) (Bates Numbers 000004 – 000023)

Discuss Proposed Rule and Proposed Comments; Consider Recommendations of Subcommittee on Proposed Rule 3.09; Consider Possible Amendments to Proposed Rule and Recommendation of Proposed Rule to State Bar of Texas Board of Directors; Consider Possible Amendments to and Recommendation of Comments to Proposed Rule
5. Discussion: Proposed Rule Regarding Multijurisdictional Practice of Law (Bates Numbers 000024 – 000034)
6. Discussion: General Review of Texas Disciplinary Rules of Professional Conduct (TDRPC) and Texas Rules of Disciplinary Procedure (TRDP)
7. Agenda Items for Next Meetings
8. Adjourn

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**MEETING OF THE
COMMITTEE ON DISCIPLINARY RULES AND REFERENDA**

August 3, 2022
By Teleconference

MINUTES

CALL TO ORDER OF MEETING AND ROLL CALL

Chair Kinard called the meeting to order at 10:05 a.m. Mr. Squires called the roll, and a quorum was present.

Members Present: Chair M. Lewis Kinard; Timothy D. Belton; Amy Bresnen; Robert Denby; Claude Ducloux; Judge Phyllis Gonzalez; Rick Hagen; Professor Vincent Johnson; and Karen Nicholson.

State Bar of Texas Staff Present: Ray Cantu, Deputy Executive Director; Cory Squires, Staff Liaison; and Andrea Low, Disciplinary Rules and Referenda Attorney.

COMMENTS FROM THE CHAIR

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

APPROVAL OF THE MINUTES OF THE LAST MEETING

Mr. Ducloux moved to approve the Minutes of the June 1, 2022, meeting. Ms. Bresnen seconded the motion. The motion carried unanimously.

**PROPOSED RULE 3.09 (SPECIAL RESPONSIBILITIES OF A PROSECUTOR)
OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT**

Chair Kinard asked Mr. Hagen, chair of the subcommittee on Rule 3.09, to report on the meetings held on July 5 and July 28, 2022, in which the subcommittee considered alternative drafts of the proposed rule. Mr. Hagen summarized the subcommittee's discussions, recommended that the Committee allow the subcommittee to consider additional drafts of proposed Rule 3.09, and requested that the Committee not vote to publish a proposed rule at this time.

After discussing Mr. Hagen's report, the Committee reached consensus to consider this rule proposal at the next meeting.

PROPOSED RULE TO EXAMINE LAWYERS' CLIENT DUE DILIGENCE OBLIGATIONS, AS APPLIED TO CRYPTOCURRENCY

Ms. Bresnen discussed the memorandum dated December 15, 2021, from the American Bar Association (ABA) Center for Professional Responsibility on Possible Amendments to Model Rules of Professional Conduct Concerning Lawyers' Client Due Diligence Obligations. She explained that the ABA proposes to amend Model Rule 1.2(d), which is similar to Rule 1.02(c), TDRPC. The ABA is currently seeking public comment on its draft model rule. Ms. Bresnen noted that the Committee could depart from the ABA's draft model rule and may not want to change current Rule 1.02(c).

Mr. Denby stated that the Committee would be considering a lawyer's mandatory due diligence duty related to the use of cryptocurrency for money laundering, terrorist financing, ransomware, and unreasonable fees resulting from volatility of value.

Mr. Belton stated that there are legitimate uses of cryptocurrency, which many entities accept as legal tender. He expressed that a proposed rule should not assume malfeasance, although volatility presents an issue.

The Committee agreed to follow the development of amendments to the ABA Model Rules.

AGENDA ITEMS FOR FUTURE MEETINGS

Chair Kinard asked whether Committee members had any topics members would like to add to the agenda for the September 7, 2022, meeting. He restated the statutory charge of the Committee and explained his plan to divide the Texas Disciplinary Rules of Professional Conduct (TDRPC) and Texas Rules of Disciplinary Procedure (TRDP) into parts, with each Committee member taking a part to review. He asked each Committee member to decide by the next meeting which part to review. He reminded the public to send requests and suggestions to the Committee.

Mr. Belton suggested that the Committee catalogue and review the rule proposals from 2011, identify which rules the Committee has already addressed, and consider rules in addition to those included in the ABA Model Rules.

Ms. Nicholson requested that the Chief Disciplinary Counsel provide a list of issues that arise in the disciplinary process that the Committee could address.

ADJOURNMENT

Mr. Ducloux moved to adjourn the meeting. Ms. Nicholson seconded the motion. The motion carried unanimously. The meeting adjourned at 11:16 a.m.

Andrea Low

From: Johnson, Vincent <[REDACTED]>
Sent: Wednesday, August 3, 2022 11:39 AM
To: Andrea Low
Cc: Johnson, Vincent
Subject: Essential Language To Be Added to the Rule on Prosecutors

Andrea:

This is the language that I discussed with the Committee today. It is taken from Model Rule 3.8(h) (2022).

"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: ...

"[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."

I believe that adding this language to TDRPC Rule 3.9 is essential to an effective updating of the rule.

Please circulate this message to members of the committee and include it in the packet for the next meeting.

Vincent R. Johnson

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ABA Model Rules of Professional Conduct
Advocate

Rule 3.8: Special Responsibilities of a Prosecutor

Rule Text —

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (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;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (g) 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.
- (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 —

[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 guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. 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 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] 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.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[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 (g) 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 (g) 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 4.2 and 4.3, 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 (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

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General Information

Date Filed Tue Jul 20 00:00:00 EDT 2021

Citation ABA Rule 3.8

Below is the proposed language for amendment of Rule 3.09, Texas Disciplinary Rules of Professional Conduct, which the members of the Texas District and County Attorneys Association Rule 3.09 Committee believe would garner fairly broad support from Texas prosecutors (or, at least, avoid widespread and vigorous opposition from them). Added proposed language is indicated by underlining.

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 evidence or information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall:
 - (1) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence to:
 - (i) the defendant or defendant's counsel of record, if any;
 - (ii) the tribunal in which the defendant's conviction was obtained; and
 - (iii) a statewide entity that examines and litigates claims of actual innocence; or
 - (2) if the conviction was obtained in another jurisdiction, promptly disclose that evidence to the appropriate prosecutor in the jurisdiction in which the conviction was obtained.

(g) A prosecutor who concludes in good faith that evidence or 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.

Comment:

...

7. When a prosecutor knows of new and credible evidence or information creating a reasonable likelihood that a person was convicted in that prosecutor's jurisdiction of a crime that person did not commit, paragraph (f)(1) requires disclosure to the defendant and the defendant's counsel of record (if any), to the tribunal in which the conviction was obtained, and to an appropriate statewide entity that may act upon the evidence for the defendant's benefit. If the person was convicted outside of the prosecutor's jurisdiction, paragraph (f)(2) requires disclosure to the appropriate prosecutor in the jurisdiction where the conviction occurred, thereby triggering the duties required under paragraph (f)(1) for the latter prosecutor. For purposes of this comment and section (f), the term "new" means unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, not disclosed to the defense, either deliberately or inadvertently. The term "credible" means evidence a reasonable person would find believable.

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- (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 is aware of s of new, credible and material information the prosecutor knows creates a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall:
 - (1) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that information to:
 - (i) the defendant or defendant's counsel of record, if any, unless a court authorizes delay;
 - (ii) the tribunal in which the defendant's conviction was obtained; and
 - (iii) a statewide entity that examines and litigates claims of actual innocence; or
 - (2) if the conviction was obtained in another jurisdiction, promptly disclose that information to the appropriate prosecutor in the jurisdiction in which 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.

Comment:

...

7. When a prosecutor knows of new, credible and material information the prosecutor knows creates a reasonable likelihood that a person was convicted in that prosecutor's jurisdiction of a crime that person did not commit, paragraph (f)(1) requires disclosure to the defendant or the defendant's counsel of record (if any), to the tribunal in which the conviction was obtained, and to an appropriate statewide entity that may act upon the evidence for the defendant's benefit. If the person was convicted outside of the prosecutor's jurisdiction, paragraph (f)(2) requires disclosure to the appropriate prosecutor in the jurisdiction where the conviction occurred. For purposes of this comment and section (f), the term "new" means unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, not disclosed to the defense. The term "credible" means evidence a reasonable person would find believable.

This Rule appears to be based on North Carolina Rule 3.09(g), which also doesn't have a materiality component. Here are other comments from North Carolina that may want to be considered:

[9] The word "new" as used in paragraph (g) means evidence or information unknown to a trial prosecutor at the time of the conviction or, if known to a trial prosecutor at the time of the conviction, never previously disclosed to the defendant or defendant's legal counsel. When analyzing new evidence or information, the prosecutor must evaluate the substance of the information received, and not solely the credibility of the source, to determine whether the evidence or information creates a reasonable likelihood that the defendant did not commit the offense.

[10] Nevertheless, a prosecutor who receives evidence or information relative to a conviction may disclose that evidence or information as directed in paragraph (g)(1) and (2) without examination to determine whether it is new, credible, or creates a reasonable likelihood that a convicted defendant did not commit an offense. A prosecutor who receives evidence or information subject to disclosure under paragraph (g) does not have a duty to undertake further investigation to determine whether the defendant is in fact innocent.

Other potential comments to consider

[] The duty under section (f) is triggered only when the prosecutor becomes aware of the evidence and knows that there is a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted.

[] A prosecutor who knows of evidence and knows that it could raise a substantial question about whether a defendant was convicted of an offense that the defendant did not commit may, but is not required to, disclose that evidence as directed in paragraph (f) without further inquiry into whether the evidence actually raises such a question. A prosecutor's disclosure of evidence pursuant to this Rule is not an admission or concession that such evidence raises a substantial question about whether a defendant was convicted of an offense that the defendant did not commit and should not be considered as such in any subsequent litigation.



Bruce A. Green
Louis Stein Chair
Director, Stein Center for Law and Ethics

Phone: 212-636-6851
Fax: 212-636-6899

July 1, 2022

Re: Proposed Texas Rules 3.09(f) and (h)

Dear Committee on Disciplinary Rules & Referenda (CDRR) Subcommittee,

I write in support of the proposed amendment of Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct (“Texas Rules”) to codify criminal prosecutors’ professional obligation, as ministers of justice, to rectify wrongful convictions. Proposed Texas Rules 3.09(f) and (h), which are based on ABA Model Rules 3.8(g) and (h), would establish the remedial steps a prosecutor must take when confronted with evidence of a clear miscarriage of justice. I do not express an opinion on proposed Texas Rule 3.09(g), which would codify prosecutors’ ongoing duty to disclose exculpatory and mitigating evidence as provided by the disciplinary rules and other law.

In 2018, I submitted a similar letter to the Michigan Supreme Court and then testified in support of similar proposed rules, which the Court then adopted, rejecting arguments against the proposal like those now made by Texas state and federal prosecutors. As discussed below, 23 states have adopted disciplinary rules, generally as modified, based on Model Rules 3.8(g) and (h). I have no view on whether the current Texas proposal should be modified in any way to address the particularities of Texas law and procedure, but I respectfully urge the adoption of some version of these provisions to reinforce the importance of prosecutors’ professional obligation to rectify convictions of innocent people.

Personal background

By way of background: I hold the Stein Chair at Fordham Law School, where I direct the Stein Center for Law and Ethics. I teach in the areas of legal ethics and criminal law, including a seminar on ethics in criminal advocacy. While teaching at Fordham, I have engaged in various professional services relating to legal ethics and criminal law, including as Chair of the ABA Criminal Justice Section, and as chair of the legal ethics committees of the NY State Bar Association, the NY City Bar, the ABA Litigation Section, and the ABA Criminal Justice Section. Until recently, I chaired the committee that oversees the drafting of the ABA Standards for Criminal Justice, which include the Prosecution Function Standards, and I currently chair the committee that drafts the Multistate Professional Responsibility Examination (“MPRE”), which applicants to the bar must pass in Texas and most other states. Prior to joining the Fordham faculty in 1987, I was a prosecutor in the U.S. Attorney’s Office for the Southern District of New York, where I served as Chief Appellate Lawyer, and while at Fordham, I served for several years as a part-time federal prosecutor and as a member of the conviction integrity advisory panel for the District Attorney of New York County.

I had a hand in the development of ABA Model Rules 3.8(g) and (h), which correspond to Texas proposed Rules 3.09(f) and (h). To begin with, I served on the New York state bar committee that first proposed the adoption of professional conduct rules to address prosecutors' obligations post-conviction. Thereafter, I co-chaired the committee of the ABA Criminal Justice Section that drew on the state bar's work to develop the provisions that were ultimately adopted by the ABA House of Delegates as ABA Model Rules 3.8(g) and (h). Additionally, on behalf of the New York City Bar, I collaborated with federal and state prosecutors in my home state to develop New York's version of these provisions, which were adopted by our state judiciary in 2012. I have also consulted with bar representatives in other states who have sought to adopt these model rules to their own state practices. Drawing on my experience developing the provisions in conjunction with prosecutors, defense lawyers and judges around the country, I hope to serve as a resource to those reviewing proposed Texas Rules 3.09(f) and (h).

Drafting history

Proposed Texas Rules 3.09(f) and (h) would serve a variety of salutary functions. They would promote the training of prosecutors and future prosecutors regarding their obligation to rectify wrongful convictions and the minimum conduct that the requirement entails. In particular, they would provide guidance regarding prosecutors' disclosure obligations in the post-conviction context by codifying what prosecutors almost universally regard to be required as an aspect of their duty to seek justice, if not as a matter of constitutional obligation. In the rare cases in which prosecutors transgress, the provisions would provide a standard against which to evaluate prosecutors' professional misconduct.

Model Rules 3.8(g) and (h), on which the proposed Texas provisions are based, were the product of a lengthy, inclusive drafting process, in which many prosecutors participated. In 2006, the New York City Bar evaluated numerous aspects of prosecutors' responsibilities in the wake of wrongful convictions around the country. The findings were issued in a report that concluded that rules were needed to govern prosecutors' ethical responsibilities when a prosecutor becomes aware of new and material evidence that an innocent person was wrongfully convicted.¹ These recommendations led the New York State Bar Association to recommend professional conduct rules concerning prosecutors' post-conviction disclosure obligations that were drafted with significant input from state and federal prosecutors and representatives of the criminal defense bar.² The New York rules, which won widespread support from local bar associations and near unanimity in the state bar's House of Delegates, became the predecessor to provisions (g) and (h) of ABA Model Rule 3.8.³

¹ Proposed Prosecution Ethics Rules, The Committee on Professional Responsibility, 61 The Record of the Association of the Bar of the City of New York (2006).

² See discussion, Letter from Patricia Hynes, President, New York City Bar, to Hon. Jonathan Lippman, Chief Judge, New York Court of Appeals (Feb. 3, 2010), *available at* <http://www.nycbar.org/pdf/report/uploads/20071856-LetterregardingRule3.8RulesofProfConduct.pdf>.

³ *Id.*

Similarly, the ABA's 2008 amendments to Model Rule 3.8 were proposed to the House of Delegates by the ABA Criminal Justice Section with support from a wide range of co-sponsors.⁴ Importantly, the governing Council of the ABA Criminal Justice Section is comprised of prosecutors and defense lawyers in equal number, and representatives of the U.S. Department of Justice, the National District Attorneys Association, and the National Association of Attorneys General all have a seat at the table. The ABA House of Delegates adopted the new provisions with little opposition. In the intervening years since the ABA's adoption of provisions (g) and (h), almost half the states have adopted some version of the rules, verbatim or with modifications. The state rules based on Model Rules 3.8(g) and (h) are cited in footnotes 3 and 4 of the April 5, 2022 letter submitted by the U.S. Department of Justice in opposition to the proposed provisions.⁵

Since 2008, the guidance provided by the rules has also been endorsed by prosecutors' associations in other jurisdictions. Wisconsin, which was the first state to adopt the new provisions to Model Rule 3.8, did so at the encouragement of the Wisconsin District Attorneys Association, which filed a petition urging the Wisconsin Supreme Court to adopt the ABA's new provisions. In its petition calling for the Court to enact a post-conviction ethical rule governing prosecutorial disclosure, the Wisconsin District Attorneys Association noted that, "the prosecutor's duty to seek justice not only requires the prosecutor to take precautions to avoid convicting innocent individuals but also requires action when it appears likely that an innocent person was convicted."⁶

Likewise, during the Tennessee Supreme Court's consideration of provisions (g) and (h), the Tennessee District Attorneys General Conference (TDAGC) drafted a petition in support. The TDAGC explained its strong interest in the new "innocence provisions" and noted:

The TDAGC is dedicated to preventing mistaken convictions and rectifying the

⁴ These included the ABA Death Penalty Representation Project, the Section of Individual Rights and Responsibility, the Section of Litigation, the Section of State and Local Government Law, the Standing Committee on Ethics and Professional Responsibility, the Government and Public Sector Lawyers Division, the ABA Commission on Domestic Violence, the New York State Bar Association, the Association of the Bar of the City of New York, and the National Organization of Bar Counsel. See Stephen Saltzburg, *Changes to Model Rules Impacts Prosecutors*, ABA, 23 CRIMINAL JUSTICE (Spring 2008), http://www.americanbar.org/content/dam/aba/events/criminal_justice/Forensics_Ethics_Saltzburg.authcheckdam.pdf.

⁵ According to the Department of Justice, 23 states have adopted a version of Model Rules 3.8(g) and (h). Four states (California, Idaho, Montana, West Virginia) have adopted the specific language proposed by the ABA, and 19 other states have adopted modified versions of one or both provisions: Alaska, Arkansas, Arizona, Colorado, Connecticut, Delaware, Hawaii, Iowa, Illinois, Michigan, New York, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Washington, Wisconsin and Wyoming. One other jurisdiction, the District of Columbia, has a modified version of the proposed rules under review.

⁶ *In the Matter of the Amendment of Supreme Court Rules Chapter 20 Rules of Professional Conduct for Attorneys*, Pet. (Wis. Sept. 19, 2008).

very few mistaken convictions that occur. The TDAGC believes the addition [of] proposed paragraphs (g) and (h) to Rule 3.8, Special Responsibilities Of A Prosecutor, sets a clear standard for prosecutors and will increase confidence in our criminal justice system. In addition and just as importantly these amendments will lead to a greater understanding of the unique role of prosecutors to seek the truth over and above winning a case.⁷

To be sure, as in Texas, state and/or federal prosecutors' offices or associations in some other states have opposed the adoption of these provisions. While affirming their support for the principles underlying the provisions, some prosecutors have raised concerns about unintended harms that they anticipate the provisions might cause. Happily, in my home state and other states that now have a version of Rule 3.8(g) and (h), the experience has not borne out prosecutors' concerns. I am unaware of any reports of problems created by the rules in any of the 23 states that have adopted them. Likewise, state and federal prosecutors' letters opposing the proposed rules in Texas and elsewhere have not cited problems with the rules in other jurisdictions.

Federal prosecutors' objections

For more than a decade, when state courts have considered adopting versions of Model Rules 3.8(g) and (h), federal prosecutors have sometimes filed letters in opposition. Their arguments have varied. In their April 5, 2022 letter, Texas federal prosecutors and the Department of Justice recycle some of the arguments that have been offered to state courts in the past and rejected. Notably, what is omitted is any discussion of actual problems based on the actual experience of federal and state prosecutors in the 23 states that have adopted versions of Model Rules 3.8(g) and (h).

This time, the federal prosecutors' principal objection (at pages 4-6 of their letter) is that some of the terms of the proposed rules are unclear. Contrary to this concern, there is no indication that prosecutors in the other 23 jurisdictions find the provisions hard to understand or to implement. As the New York City Bar's ethics committee observed, "the terms of [the rules] generally have ordinary, everyday meanings."⁸ The exception is the knowledge requirement, which the federal prosecutors characterize as unclear and ambiguous, but which is a defined term (*see* Texas Rules, Terminology) and which is used in many other provisions of the Texas Rules.⁹ Further, the rules

⁷ *In re Petition for the Adoption of Amended Tennessee Rules of Professional Conduct*, Comments of the Tennessee District Attorneys General Conference, No. M2009-00979-SC-RL1-RL at 2 (Tenn. Nov. 30, 2009).

⁸ N.Y. City Bar, Comm. On Prof'l Ethics, Formal Op. 2018-2 (2018), available at: <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-2-prosecutors-post-conviction-duties-regarding-potential-wrongful-convictions>.

⁹ The rules' limitation to situations where prosecutors know that exculpatory evidence is "new, credible and material" is meant to protect prosecutors by limiting the rules' reach. Well-intentioned prosecutors who are uncertain whether exculpatory evidence is new, credible and material can err on the side of caution by making disclosure and conducting an investigation. In

codify principles that are familiar to prosecutors. As the United States Supreme Court recognized in *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976), prosecutors are “bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.”¹⁰ And, like other lawyers, prosecutors can take advantage of processes for seeking clarification or guidance if uncertainties arise about the meaning or application of ethical obligations, including these.

The federal prosecutors (at pages 3-4 of their letter) also object that the proposed rules impose unrealistic and impractical obligations – for example, a prosecutor in one jurisdiction may not *know* whether evidence exonerating a person convicted in another jurisdiction is new, credible, and material. The answer, of course, is that the rule does not apply if the prosecutor lacks the requisite knowledge. While a well-intentioned prosecutor may make some inquiry or, as a matter of prudence, disclose the exculpatory evidence to the office that secured the conviction, the rule does not obligate the prosecutor to act. Consequently, as prosecutors in 23 other states have evidently found, the proposed rule is not particularly demanding. It states a minimal obligation. It leaves it to prosecutors’ discretion whether, in the interest of justice, to take remedial measures in situations in which the rule is not applicable – for example, when new evidence raises serious doubts about the convicted defendant’s guilt but does not establish “a reasonable likelihood” of the defendant’s innocence.

Finally, the federal prosecutors (at pages 5-8 of their letter) assert what I believe to be a new argument, namely, that they lack adequate resources to investigate cases when new exculpatory evidence shows that they probably convicted an innocent person, and that they cannot remedy convicted people’s convictions when clear and convincing exonerating evidence shows them to be innocent. Given the investigative resources and other resources available to federal prosecutors, one might be skeptical if not astonished by this argument. But even accepting federal prosecutors’ assertion that they may lack adequate resources to rectify wrongful convictions, this is not a compelling objection to the proposed provisions, which accommodate resource limitations. Proposed Rule 3.09(f) calls on prosecutors to make “*reasonable efforts* to cause an investigation” of new exculpatory evidence, and proposed Rule 3.09(h) calls on prosecutors to “*seek to remedy*” convictions known to be wrongful. Prosecutors who make reasonable efforts, given available evidentiary or legal resources, are not subject to discipline under these provisions.

TDCAA objections

The December 21, 2021 letter of the Texas District Attorneys and County Attorneys Association (“TDCAA”) is principally directed at a different proposed provision, but it also opposes the

contrast to rules requiring lawyers for individual clients to make difficult judgments about whether confidentiality or disclosure is required (e.g., Texas Rule 3.03(b)), prosecutors have no countervailing confidentiality obligations that foreclose them from voluntarily making disclosures that are not ethically compelled.

¹⁰ Other courts and commentators have echoed this understanding. See, e.g., *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992); *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992); *Monroe v. Butler*, 690 F. Supp. 521 (E.D. La. 1988).

adoption of proposed Rules 3.09(f) and (h). Its stated objections (at pages 1-3 of its letter) are that (1) there is no need for the rule because wrongful convictions caused by prosecutorial misconduct are not prevalent, and (2) if prosecutors have a moral obligation to rectify wrongful convictions, then all other lawyers should have precisely the same obligation.

To be clear, Rules 3.09(f) and (h) are not directed exclusively at wrongful convictions resulting from prosecutorial misconduct. The provisions would establish prosecutors' obligations regarding all convictions of innocent people, regardless of the cause. There may be room to debate the prevalence of prosecutorial misconduct and the extent to which it is responsible for the convictions of innocent people. But one cannot credibly argue that the criminal process is infallible. DNA exonerations and exonerations in other cases leave no doubt that wrongful convictions occur. Often, experience shows, prosecutors learn of or discover post-conviction evidence that would lead to an exoneration. The provisions, addressing prosecutors' obligations in such cases, makes no assumptions about the causes of wrongful convictions or the prevalence of wrongful convictions, but simply rests on the unassailable understanding that wrongful convictions sometimes occur and should be the object of concern to prosecutors when they do.

Further, it should be beyond question that prosecutors *do* have a professional obligation to rectify wrongful convictions, as Comment [1] to ABA Model Rule 3.8 states. The very fact that an association of prosecutors questions the existence of this professional obligation and implies that it should exist only if the same obligation is imposed on lawyers for private clients shows the need for this rule both to educate current and future prosecutors and to influence the culture of prosecutors' offices. It is important for prosecutors to understand that their job is not just to secure convictions. It is equally important to avoid convicting innocent people and to rectify the convictions of innocent people. Adopting the proposed rules would reaffirm these principles. Conversely, rejecting the proposed rules – which, it should be noted, are studied by law students in professional responsibility courses and tested on the MPRE – could be read as an expression of indifference, if not hostility, to these principles.

I take no view on whether lawyers other than prosecutors should disclose their knowledge of wrongful convictions, or whether other lawyers' confidentiality obligations (when applicable) are of greater importance. But the Texas prosecutors' association is certainly wrong to suggest that the obligations of prosecutors must be precisely the same as those of lawyers for private clients, and that unless other lawyers are obligated to rectify wrongful convictions, prosecutors should not have to. As Comment 1 to Texas Rule 3.09 states: "A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate." Proposed Rules 3.09(f) and (h) give concrete meaning to prosecutors' obligation – different from that of other advocates – "to see that justice is done." It is surprising that the Texas prosecutors' association evidently rejects prosecutors' unique obligation to seek justice, which is a bedrock principle of the American criminal process.

Conclusion

No rule is perfect. One could probably raise concerns about every existing provision of the Texas Rules. If perfection were required, Courts could not adopt ethics rules at all. If the proposed provisions are adopted, and experience in Texas later reveals glaring imperfections, the

provisions can be amended or, if necessary, repealed. Tellingly, in the 23 states that have adopted provisions based on ABA Model Rules 3.8(g) and (h), not a single prosecutor has asked the state judiciary to amend or repeal the state's rule on account of unanticipated (or anticipated) problems.

With these considerations in mind, I reiterate my support for the proposed Texas Rules 3.09(f) and (h), subject to refinement as the Committee deems appropriate in light of Texas's law and procedure and other relevant considerations.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Bruce A. Green', with a stylized, flowing script.

Bruce A. Green

Andrea Low

From: Christopher Hernandez <[REDACTED]>
Sent: Sunday, August 7, 2022 2:45 PM
To: cdrr
Subject: Proposed Rule 3.09 Changes

To Whom it May Concern:

I am a deputy public defender who is assigned to the complex litigation unit at my office, I routinely deal with scientific evidence and conducts post-conviction litigation. After watching the committee's last meeting, I would like to provide my views on 3.09 from the point of view of a practitioner in my position.

1. I do not feel that it is necessary to include a duty for the prosecutor to investigate. If as full disclosure is made, then *Strickland* and its progeny would cause an investigation into the facts to occur. *Strickland v. Washington*, 466 U.S. 668 (1984) (*Inter alia* created a duty for defense counsel under the 6th Amendment to the United State's Constitution to conduct a reasonable investigation).

If a prosecutor investigates the facts surrounding the wrongful conviction that could expedite appointed counsel's investigation, but would not relive them of their obligation to do their own investigation. Further, art. 26.044(c-1)(6); 26.047(c)(6); 26.05(d)(h); 26.052(f) TEX. CODE CRIM. PROC. all anticipate that appointed counsel will conduct a reasonable investigation and provided with funds to do so. The code further requires that the counsel appointed be appropriately experienced; if they are appropriately experienced then conducting a reasonable investigation and acquiring funding for such an investigation are not an issue.

2. I believe that the duty to remedy should be included in the proposed rule. This can be done by inserting a comment to say: "A prosecutor fulfils their duty to remedy a wrongful conviction under this rule by attempting to seek the appointment of counsel for the wrongfully convicted person, if they are unrepresented by counsel. If the wrongfully convicted person is represented by counsel, then the prosecutor fulfils their duty to remedy a wrongful conviction under this rule by making a prompt and complete disclosure of the information or evidence described by paragraph (f)." This language will ensure that at paragraph (f)'s requirements will be met to correct the injustice by providing the wrongfully conviction person with the means to advocate for the remedy they feel is appropriate free from any interference by the prosecution.

I hope the committee removes the duty to investigate as the prosecutors have raised valid concern to its inclusion and including it is unnecessary to accomplish the proposed rule's objective. Conversely, I would like to see the committee include a duty to remedy with a comment like the one I proposed to facilitate the proposed rule's objective without creating new costly obligations.

Lastly, I would urge the subcommittee to explore the duties of former prosecutors and confidentiality before it completes its work. I understand that these are contentious issues, but they are only contentious because they create real issues that impact practitioners and need a resolution--if at all possible.

- Christopher Hernandez

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.

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 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 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.

From: "Moss, Fred" <[REDACTED]>
Date: 8/22/22 3:57 PM (GMT-06:00)
To: [REDACTED]
Subject: Need for a rule of ethics on the multijurisdictional practice of law

Lewis,

I hope you can properly consider this a request to the TCRR.

The request is simple. Texas is way behind the curve in not having an ethics rule that outlines what is proper in the multijurisdictional practice of law. As you know, this issue had come to a very fine point recently as a result of the pandemic. Lawyers who reside just outside the state in which they are licensed routinely advise their clients despite not be admitted where they were when they assisted their clients. Also, it is common today for lawyers to travel to states where they are not admitted to assist clients, e.g., to take a deposition or to negotiate a business deal. In the latter situation and when representing a client in a mediation, the "out of state" lawyer cannot seek admission pro hac vice. Then there is the very common situation where in-house counsel for a Texas company is not admitted in Texas. Are they engaged in the UPL??

Texas lawyers have no guidance on what is permissible. This was noted in the only Texas Ethics Opinion I could find that dealt with multijurisdictional practice, Op. 597 (2010). It noted:

"In the absence of a specific rule or substantial case-law development on this subject, the contours of the term "unauthorized practice of law" in Texas Disciplinary Rule 5.05(b) as applied to multijurisdictional practice are not currently well defined. In spite of the present uncertainty as to exactly what conduct would constitute unauthorized practice of law in Texas in the case of multijurisdictional practice,"

Note that there was no proposed rule on multijurisdictional practice on the 2011 Referendum ballot.

The ABA Model Rules extensively cover the topic in Rule 5.5. The Restatement of law Governing Lawyers covers it with an extremely brief rule, Section 3.

In short, I submit that the TCRR should look seriously into proposing a rule on this subject and plug the yawning gap in our Rules.

Thanks, as always, for your consideration.

Fred

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[REDACTED]

"Do you ever read any of the books you burn?" "That's against the law!" "Oh. Of course." -Ray Bradbury, science-fiction writer (22 Aug 1920-2012)

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 597**

May 2010

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a Texas lawyer practice law as a partner or shareholder in a Texas office of a law firm that includes partners or shareholders who are licensed to practice law only in jurisdictions other than Texas and who work principally in offices of the law firm outside of Texas but who from time to time perform legal services in the law firm's Texas office?

STATEMENT OF FACTS

Partnership XYZ is a law firm composed of three partners – X, Y, and Z. The partnership has three offices – one in Texas, one in New Mexico, and one in Mexico. X, who is a Texas resident and a member of the State Bar of Texas, has his office in Texas and most of his work is done in that office. Y, a lawyer licensed to practice law in New Mexico, has his office in New Mexico and conducts most of his law practice in the New Mexico office. Z is a citizen and resident of Mexico who is licensed to practice law in Mexico and has his office in Mexico, where he carries out most of his legal work. Y and Z are not licensed to practice law in Texas.

In their law practice as partners in XYZ, X, Y, and Z are in contact daily by telephone and e-mail. In addition, from time to time each of the lawyers participates by telephone or electronically in work for XYZ clients who are located out of the state or country in which the particular lawyer has his office. Also, from time to time Y and Z travel to Texas to work on legal matters for clients of XYZ. The work done by Y or Z in Texas is normally for brief periods of a week or less but occasionally the work on a particular project may require Y or Z to work primarily in Texas for a longer period of up to several months. If Y or Z participates in representation of clients before courts or administrative bodies in Texas, he complies with all applicable local rules of the court or administrative body concerned, including any requirements with respect to admission to practice *pro hac vice*. Similarly, from time to time X travels to New Mexico or Mexico and performs legal services related to a particular project for a temporary period that may extend up to several months in unusual cases.

DISCUSSION

The Texas Disciplinary Rules of Professional Conduct govern the conduct of lawyers

licensed in Texas. See Rule 8.05. Thus X is subject to the Texas Disciplinary Rules, but Y and Z are not themselves generally subject to these Rules.

Rule 5.04(a) prohibits the sharing of legal fees with a non-lawyer in most circumstances. Rule 5.04(b) prohibits a Texas lawyer from practicing law in a law partnership with a non-lawyer. Rule 5.04(d) applies essentially the same prohibition to the practice of law in a professional corporation or association if a non-lawyer owns any interest in, or has a control position in, the corporation or association. For purposes of these Rules, the term “lawyer” must include lawyers licensed in jurisdictions other than Texas; a contrary interpretation would require the obviously erroneous conclusion that Texas attorneys are barred from practicing in any law firm having a partner or member who is licensed in another state but who is not licensed in Texas. Thus, for purposes of Rules 5.04(a), (b) and (d), the term “non-lawyer” does not include a lawyer licensed in any state of the United States, in Mexico, or in any other country that licenses lawyers under a system that is similar to the licensing system used in Texas. This conclusion is consistent with American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 01-423 (September 22, 2001), which concluded that it is permissible under similar provisions of the Model Rules of Professional Conduct for U.S. lawyers to form law partnerships with foreign lawyers, so long as the foreign lawyers are members of a recognized legal profession in a foreign jurisdiction and the arrangement is in compliance with the laws of jurisdictions where the firm practices. The conclusion reached here also finds support in Rule 7.01 of the Texas Disciplinary Rules concerning permissible law firm names and letterhead. Rule 7.01(b) requires in the case of a law firm with offices in more than one jurisdiction only that “identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.”

Although a lawyer licensed under the laws of jurisdictions other than Texas is a “lawyer” rather than a “non-lawyer” for purposes of the requirements of Rule 5.04, the provisions of Texas law prohibiting persons who are not lawyers licensed in Texas from engaging in the unauthorized practice of law in Texas, section 81.101 et seq. of the Texas Government Code, are applicable to such non-Texas lawyers. Under Rule 5.05(b) of the Texas Disciplinary Rules of Professional Conduct, a Texas lawyer is prohibited from assisting “a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.” Thus, under Rule 5.05(b), X would be prohibited from assisting lawyers not licensed in Texas, including Y and Z, in the unauthorized practice of law in Texas. Y and Z would be subject to legal action if they engaged in unauthorized practice of law in Texas contrary of the prohibitions of Texas law. As noted in Comment 3 to Rule 5.05, the question of what constitutes “the unauthorized practice of law” is not addressed in the Texas Disciplinary Rules of Professional Conduct and instead the definition is left to judicial development. Comment 3 adds:

“Judicial development of the concept of ‘law practice’ should emphasize that the concept is broad enough – but only broad enough – to cover all situations where there is rendition of services for others that call for the professional judgment of a

lawyer and where the one receiving the services generally will be unable to judge whether adequate services are being rendered and is, therefore, in need of the protection afforded by the regulation of the legal profession.”

Comment 5 to Rule 5.05 sets forth general principles that may guide in the application of the concept of unauthorized practice of law in the case of lawyers licensed in other jurisdictions:

“Authority to engage in the practice of law conferred in any jurisdiction is not necessarily a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where doing so violates the regulation of the practice of law in that jurisdiction. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by individual states. In furtherance of the public interest, lawyers should discourage regulations that unreasonably impose territorial limitations upon the right of a lawyer to handle the legal affairs of a client or upon the opportunity of a client to obtain the services of a lawyer of his or her choice.”

In 2002, the American Bar Association House of Delegates adopted recommendations of the American Bar Association Commission on Multijurisdictional Practice. A principal recommendation adopted was an amended version of American Bar Association Model Rule of Professional Conduct 5.5, the prior version of which was essentially the same as the current version of Rule 5.05 of the Texas Disciplinary Rules. The amended Model Rule 5.5(b)(1) generally prohibits a lawyer who is not admitted to practice in a jurisdiction from establishing “an office or other systematic and continuous presence” in that jurisdiction for the practice of law. Model Rule 5.5(c) specifies several circumstances in which a lawyer licensed in another state is permitted to provide legal services in a jurisdiction on a temporary basis. Although a number of states have adopted a form of the current version of Model Rule 5.5, the Texas Disciplinary Rules of Professional Conduct have not been amended on the subject of multijurisdictional practice.

In the absence of a specific rule or substantial case-law development on this subject, the contours of the term “unauthorized practice of law” in Texas Disciplinary Rule 5.05(b) as applied to multijurisdictional practice are not currently well defined. In spite of the present uncertainty as to exactly what conduct would constitute unauthorized practice of law in Texas in the case of multijurisdictional practice, it is the opinion of this Committee with respect to the circumstances here considered that the activities of Y and Z in Texas do not constitute the unauthorized practice of law in Texas and consequently that X is not in violation of Rule 5.05(b). Thus, in cases where a Texas lawyer is a partner or member of a law firm that also includes duly licensed non-Texas lawyers who normally practice in offices of the firm outside of Texas, the Texas lawyer does not violate Rule 5.05(b)’s prohibition on assisting in the unauthorized practice of law when non-Texas lawyers who are members of the firm from time to time provide, in compliance with any applicable local rules and without themselves establishing a systematic and continuous presence in Texas, legal services in Texas.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a Texas lawyer may practice law as a member of a law firm with lawyers who are licensed only in jurisdictions other than Texas and who practice law in offices of the law firm located outside of Texas. The Texas lawyer does not improperly assist in the unauthorized practice of law when non-Texas lawyers, who are members of the law firm duly licensed in another jurisdiction and who normally practice in offices of the law firm outside of Texas, from time to time provide, in compliance with any applicable local rules and without themselves establishing a systematic and continuous presence in Texas, legal services in Texas as members of the law firm.

ABA Model Rules of Professional Conduct
Law Firms and Associations

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

Rule Text —

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
 - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
 - (4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
- (d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:
- (1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
 - (2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.
- (e) For purposes of paragraph (d):
- (1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

Comment —

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply,

however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should

consult the [*Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*].

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. See also *Model Rule on Temporary Practice by Foreign Lawyers*. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See *Model Rule for Registration of In-House Counsel*.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., *Model Rule on Practice Pending Admission*.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

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General Information

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