

# **Committee on Disciplinary Rules and Referenda**

## **Second Supplement for April 6, 2022, Public Hearing and Meeting**

- Public Comments on Proposed Rules 1.00, 1.09, 1.10, and 3.09 of the Texas Disciplinary Rules of Professional Conduct Received from April 4 to April 5, 2022 (Bates Numbers 000002-000074)
- Proposed Rules 1.00, 1.09, 1.10, and 3.09 of the Texas Disciplinary Rules of Professional Conduct as Published in the Texas Bar Journal on March 1, 2022 (Bates Numbers 000075-000089)

# **Committee on Disciplinary Rules and Referenda Proposed Rule Changes**

**Texas Disciplinary Rules of Professional Conduct**

**Rule 1.00. Terminology**

**Rule 1.09. Conflict of Interest: Former Client**

**Rule 1.10. Imputation of Conflicts of Interest: General Rule**

**Rule 3.09. Special Responsibilities of a Prosecutor**

**Public Comments Received  
(for Multiple Proposed Rules)**

**April 4 to April 5, 2022**

**From:** [Tasha Wilson](#)  
**To:** [cdrr](#)  
**Subject:** Burta Rhoads Raborn Family Law Inn of Court - Comments for Proposed Rules 1.00, 1.09, 1.10, and 3.09  
**Date:** Tuesday, April 5, 2022 1:47:31 PM  
**Attachments:** [image002.png](#)

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As the current president of the Burta Rhoads Raborn Family Law Inn of Court, we submit the following:

One of our teams met to discuss the proposed rule changes to the Texas Disciplinary Rules of Professional Conduct and there was some confusion as to the proposed change to the definition and purpose behind the definition of “writing” or “written” contained in proposed Rule 1.00(v). The proposed definition of “writing” or “written” includes audio or videorecording. We believe the purpose behind including audio or video recording as an acceptable form of writing without a comment in the Rules explaining the purpose behind it could result in confusion. For example, one could interpret the specific reference to audio or video recordings as a valid writing as a suggestion or recommendation that an attorney record their telephone calls or even Zoom meeting with their client. We believe that encouraging attorneys to record their conversations with their clients for the purposes of “papering the file” could present a host of issues including the possibility of undermining the trust between a client and their attorney. Would the attorney be required to disclose to their client that the conversation is being recorded even though Texas is a one-party consent state? If it's not disclosed initially but later it comes to light if, for example the client denies being informed or misremembers reality and then the attorney discloses the conversation was recorded (or if the client requests their file and discovers the recording in it), it could result in discord and distrust not just between the attorney and that particular client but also that client’s impressions and trust of our entire profession. Conversely, if an attorney is not required to disclose it’s being recorded but nonetheless wants to be transparent, the client could misinterpret that as the attorney’s distrust of the client which could forever change the relationship between the attorney and that client. Not to mention there’s enough that goes into maintaining the client file already and adding audio or video recordings to the mix will only become more burdensome and has even more potential for technological issues. I know many of us follow up oral conversations with an email to memorialize what was discussed and any agreements that were made and I believe people have come to expect as much, especially in this day and age when most of us communicate with our clients via email a majority of the time, but something about recording conversations with clients seems distasteful.

We suggest that a Comment be included in the proposed rule changes that better explains or clarifies the intent of the inclusion of audio and video recordings in the definition of a writing under the rules similar to a legislative history. I’m sure there is a reason why this is proposed to be included in the definition and we think it would be helpful for that ‘why’ to be explained in the Comments.

Also, we discussed that it might be helpful for there to be an addition to Comment 1 to proposed Rule 1.10 definition of “firm” were to specifically reference a situation in which a former Judge has transitioned to private practice (whether litigation or mediation based like many former Judges do) and a party or parties who were before the Judge in open court is now before them in the private sector. Would the former Judge be precluded from accepting that person as a Client if they presided over that person or someone adverse to that person during their time on the bench? The proposed

Comment 1 to Rule 1.10 as written references back to Rule 1.00(g) which includes a lawyer employed...in a unit of government. Is a former Judge considered an lawyer in a unit of government (the judiciary branch of government) sufficient to invoke the definition of a firm thereby making Rule 1.10 applicable and bestow an imputation of conflict?

***Tasha McInnis Wilson***

**Partner**

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# **Committee on Disciplinary Rules and Referenda Proposed Rule Changes**

**Texas Disciplinary Rules of Professional Conduct  
Rule 1.00. Terminology**

**Public Comments Received  
April 4 to April 5, 2022**

**From:** [Ryan Reneau](#)  
**To:** [cdrr](#)  
**Subject:** Participation in Tomorrow's Meeting  
**Date:** Tuesday, April 5, 2022 10:18:22 AM  
**Attachments:** [image001.png](#)

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

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

**S. Ryan Reneau**  
- JD LLM CPA CFA -

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

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

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

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

April 5, 2022

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

**Re: Proposed Rule Change to Rule 1.00 Terminology**

Dear Chair Kinard:

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

**Comments to the Committee**

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

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

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

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

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<sup>1</sup> *Haynes & Boone LLP v. NFTD, LLC*, 631 S.W.3d 65 (Tex. 2021); *Landry’s, Inc. v. Animal Legal Defense Fund*, 631 S.W.3d 40 (Tex. 2021).

<sup>2</sup> *Cantey Hanger v. Byrd*, 467 S.W.3d 477 (Tex. 2015).



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

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

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

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

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

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

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

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

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

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<sup>3</sup> *Haynes & Boone LLP v. NFTD, LLC*, 631 S.W.3d 65, 79 (Tex. 2021) (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Regards,

S. Ryan Reneau

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

<sup>5</sup> These comments are filed exclusively on my own behalf and should not be construed to be the opinion or statement of my employer.

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 491**

**April 29, 2020**

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

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

### **I. Introduction**

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

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

<sup>2</sup> See Debra Cassens Weiss, *Group Goes Undercover at 13 Law Firms to Show How U.S. Laws Facilitate Anonymous Investment*, A.B.A. J. (Feb. 1, 2016), [https://www.abajournal.com/news/article/group\\_goes\\_undercover\\_at\\_13\\_law\\_firms\\_to\\_show\\_how\\_us\\_laws\\_facilitate](https://www.abajournal.com/news/article/group_goes_undercover_at_13_law_firms_to_show_how_us_laws_facilitate); see also Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. TIMES (Feb. 7, 2015), <https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html>.

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

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

<sup>5</sup> “Client” refers hereinafter to “client and prospective client” unless otherwise indicated.

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

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

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

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

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

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

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

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

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

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

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<sup>8</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. [13] [hereinafter MODEL RULES].

<sup>9</sup> See MODEL RULES R. 1.16(a)(1); Section IV, *infra*. Rule 1.2(d) nevertheless permits a lawyer to “discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

<sup>10</sup> 324 A.2d 15 (N.J. 1974).

<sup>11</sup> *Id.* at 18 (emphasis added).

<sup>12</sup> *Id.* at 18–19; see also *In re Evans*, 759 N.E.2d 1064 (Ind. 2001) (mem.) (three-year suspension for filing fraudulent federal tax returns knowingly misrepresenting sale proceeds from real estate transaction); *In re Harlow*, 2004 WL 5215045, at \*2 (Mass. State Bar Disciplinary Bd. 2004) (suspending lawyer for violation of 1.2(d) for assisting client in knowing manipulation of state licensing agency’s escrow account requirements); *State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Mills*, 671 N.W.2d 765 (Neb. 2003) (two-year suspension for participating in illegal scheme to avoid estate taxes by knowingly backdating and preparing false documents); accord N.C. State Bar, Formal Op. 12, 2001 WL 1949450 (2001).

from circumstances.” Substantial authority confirms that a lawyer may not ignore the obvious.<sup>13</sup>

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

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

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

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

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

<sup>15</sup> Ind. State Bar Ass’n Comm. on Legal Ethics, Op. 2, at 4 (2001).

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

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

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

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

<sup>18</sup> N.Y.C Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2018-4, at 3 (2018).

<sup>19</sup> *Id.* Hypotheticals in Section V of this opinion, *infra*, identify circumstances that should prompt further inquiry.

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

<sup>21</sup> 427 S.E.2d 166 (S.C. 1993).

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

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



Criminal cases treat deliberate ignorance or willful blindness as equivalent to actual knowledge.<sup>23</sup> As the Supreme Court recently summarized:

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

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

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

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

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

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

### III. The Duty To Inquire Under Other Rules

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

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

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

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

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

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

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

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

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

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

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

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

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

include “examining the nature of the legal work involved, and where the [client’s] business is taking place.”<sup>33</sup>

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

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

#### IV. Other Obligations Incident to the Duty to Inquire

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

<sup>33</sup> ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 463, at 2 (2013) (summarizing GOOD PRACTICES GUIDANCE).

<sup>34</sup> *Id.*

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

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

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

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

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

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

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

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

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

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

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

<sup>41</sup> N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 6.

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

<sup>43</sup> MODEL RULES R. 1.16(c)(2).

<sup>44</sup> See N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 5.

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

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

## V. Hypotheticals

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>48</sup> This hypothetical is drawn from ABA Comm. on Ethics & Prof’l Responsibility, Informal Opinion 1470, which concludes that a lawyer must conduct further inquiry.

<sup>49</sup> For information about “high risk” jurisdictions, see GOOD PRACTICES GUIDANCE, *supra* note 7, at 15–16.

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

<sup>51</sup> See *supra*, Section IV.

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

<sup>53</sup> This hypothetical is drawn from GOOD PRACTICES GUIDANCE, *supra* note 7, at 8, and requires further inquiry.

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

## VI. Conclusion

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

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### AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

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

### CENTER FOR PROFESSIONAL RESPONSIBILITY

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



**Committee on Disciplinary Rules and Referenda  
Proposed Rule Changes**

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

**Public Comments Received  
April 4 to April 5, 2022**

**From:** [County Attorney - Scott Brumley](#)  
**To:** [cdrr](#)  
**Subject:** Request to address committee during 4-6-22 meeting  
**Date:** Monday, April 4, 2022 10:06:16 AM

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Good morning.

My name is Scott Brumley (SBN 00783738). I am the County Attorney of Potter County, Texas, and I respectfully request the opportunity to address the committee during the public hearing scheduled for 10:00 a.m. on April 6, 2022, concerning the proposed amendments to Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct.

Please feel free to contact me if there are any questions or issues with my request to address the committee. Thank you in advance for your kind consideration and assistance.



Scott Brumley  
POTTER COUNTY ATTORNEY  
500 South Fillmore, Room 301  
Amarillo, Texas 79101  
Phone: (806) 379-2255  
Fax: (806) 379-2267  
Email: [REDACTED]

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**From:** [Sherri Williams](#)  
**To:** [cdrr](#)  
**Subject:** 4/6/22 Hearing  
**Date:** Monday, April 4, 2022 10:07:04 AM  
**Attachments:** [image008.png](#)  
[image009.png](#)

---

Good morning,

DA Smith would like to be able to participate in the Wednesday hearing. What is the process to allow that to happen?

Thank you for your help!

Sherri Williams, ACP  
Office Manager  
Grayson County Criminal D.A.'s Office  
200 S. Crockett St., Ste. 116A  
Sherman, TX 75090  
903.813.4371



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**From:** [Patricia Nasworthy](#)  
**To:** [cdrr](#)  
**Subject:** request to speak at the teleconference on 4/6/22 at 10 am regarding proposed disciplinary rules changes  
regarding prosecutors  
**Date:** Monday, April 4, 2022 11:40:02 AM

---

Good morning,

I would like to sign up to speak at the teleconference.

What information do you need from me?

Thank you!

**Trish Nasworthy**

Deputy City Attorney  
200 W. Main  
Grand Prairie, TX 75050  
972-237-8606 office  
972-237-8650 fax

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Proposed Section 3.09(g)  
**Date:** Tuesday, April 5, 2022 4:13:18 PM

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

### Contact

<b>First Name</b>	PATRICIA
<b>Last Name</b>	NASWORTHY
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	17676900

### Feedback

<b>Subject</b>	Proposed Section 3.09(g)
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### Comments

I am a Deputy City Attorney for the City of Grand Prairie, Texas. I prosecute all class C misdemeanors in our City, including ordinance violations and violations of the Penal Code, Health and Safety Code, Transportation code and any other Texas statute which provides for a class C misdemeanor. Many of the cases can and are handled by the defendants without ever coming to court. This is done by pleas using the court's online system, or requesting defensive driving or deferred via mail or directly in person with the court clerks. All of those defendants enter pleas on their cases without ever seeing a prosecutor or having a prosecutor review their cases. Having prosecutors be responsible for discovery of exculpatory or mitigating evidence would be impossible on those pleas we never even know about. On the cases where the prosecutors do interact with defendants we do review the cases and provide discovery if requested. However, that discovery is not automatically provided to us by the police department. We must request information from the different agencies and we have no way of knowing what evidence actually exists, unlike prosecutors in higher courts who are provided that information by the police and the police have a duty to gather all of that information. Tex. Code of Criminal Procedure, article 2.1397, "Duties of Law Enforcement Agency Filing Case". Last year, the Texas Legislature, enacted SB 111 which established (article 2.1397) which enacted certain duties for law enforcement officers to provide the attorney representing the state with all documents, items, and information in the possession of the agency that are required to be disclosed to the attorney representing the state. The LEO must provide a statement to the prosecutors that all information has been provided to the attorney for the state. The article also make this duty of the Law Enforcement Agency an ongoing duty. (This bill was enacted to protect the prosecutors, since prosecutors don't have access to all information held by the police. I would highly recommend review of the comments and analysis and author's intent for SB111 for the purpose of understanding why the legislature felt the need to protect the prosecutors.) SB111, however, specifically excludes "attorneys representing the state in a justice or municipal court under Chapter 45" from the protections. Therefore, the city prosecutors and justice court prosecutors are at a disadvantage because we don't have access to all the police information and we don't have anyone from the police department stating that they have provided us with all necessary information. Because the legislature separated out "attorneys who represent the state in justice or municipal court under Chapter 45", I propose that should you find this disciplinary rule change to be necessary, that you specifically exclude "attorneys who represent the state in Justice or municipal court under Chapter 45" from the ongoing duties for thousands of class C misdemeanor cases where the prosecutors were never even involved in the cases nor were these prosecutors protected by article 2.1397. " Trish Nasworthy Deputy City Attorney 200 W. Main Grand Prairie, TX 75050 972-237-8606 office 972-237-8650 fax

**From:** [Patricia Nasworthy](#)  
**To:** [cdrr](#)  
**Subject:** re: Proposed changes to TDRPC-- specifically 3.09 (g)  
**Date:** Tuesday, April 5, 2022 4:16:30 PM

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Good afternoon,

I sent an email yesterday requesting to speak at the teleconference. Having reviewed the agenda, I do not see where there is time for public comments. Therefore, I am sending my comment via email. I would still like to attend the teleconference and if we have a chance to speak, I will be available.

I am a Deputy City Attorney for the City of Grand Prairie, Texas. I prosecute all class C misdemeanors in our City, including ordinance violations and violations of the Penal Code, Health and Safety Code, Transportation code and any other Texas statute which provides for a class C misdemeanor. Many of the cases can and are handled by the defendants without ever coming to court. This is done by pleas using the court's online system, or requesting defensive driving or deferred via mail or directly in person with the court clerks. All of those defendants enter pleas on their cases without ever seeing a prosecutor or having a prosecutor review their cases. Having prosecutors be responsible for discovery of exculpatory or mitigating evidence would be impossible on those pleas we never even know about.

On the cases where the prosecutors do interact with defendants we do review the cases and provide discovery if requested. However, that discovery is not automatically provided to us by the police department. We must request information from the different agencies and we have no way of knowing what evidence actually exists, unlike prosecutors in higher courts who are provided that information by the police and the police have a duty to gather all of that information. Tex. Code of Criminal Procedure, article 2.1397, "Duties of Law Enforcement Agency Filing Case".

Last year, the Texas Legislature, enacted SB 111 which established (article 2.1397) which enacted certain duties for law enforcement officers to provide the attorney representing the state with all documents, items, and information in the possession of the agency that are required to be disclosed to the attorney representing the state. The LEO must provide a statement to the prosecutors that all information has been provided to the attorney for the state. The article also make this duty of the Law Enforcement Agency an ongoing duty. (This bill was enacted to protect the prosecutors, since prosecutors don't have access to all information held by the police. I would highly recommend review of the comments and analysis and author's intent for SB111 for the purpose of understanding why the legislature felt the need to protect the prosecutors.)

SB111, however, specifically excludes "attorneys representing the state in a justice or municipal court under Chapter 45" from the protections. Therefore, the city prosecutors and justice court prosecutors are at a disadvantage because we don't have access to all the police information and we don't have anyone from the police department stating that they have provided us with all necessary information. Because the legislature separated out "attorneys who represent the state in justice or municipal court under Chapter 45", I propose that should you find this disciplinary rule change to be necessary, that you specifically exclude "attorneys who represent the state in Justice or municipal court under Chapter 45" from the ongoing duties for thousands of class C misdemeanor cases where

the prosecutors were never even involved in the cases nor were these prosecutors protected by article 2.1397. “

Thank you for your consideration.

Respectfully,

Trish Nasworthy  
Deputy City Attorney  
200 W. Main  
Grand Prairie, TX 75050  
972-237-8606 office  
972-237-8650 fax

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Proposed Rule 3.09(g)  
**Date:** Monday, April 4, 2022 3:12:14 PM

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

**Contact**

<b>First Name</b>	Steven
<b>Last Name</b>	Conder
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	04656510

**Feedback**

<b>Subject</b>	Proposed Rule 3.09(g)
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**Comments**

Members of the State Bar of Texas Committee on Disciplinary Rules and Referenda: I have served as an assistant criminal district attorney in Tarrant County for nearly thirty-two years, and have been board-certified in criminal appellate law since 2012. For the past two years, I have been Chief of the Tarrant County Criminal District Attorney's Office's Conviction Integrity Unit and served as the office's in-house ethical advisor. In my prosecution career, I have made numerous post-conviction disclosures regarding newly discovered exculpatory or mitigating evidence and, in multiple cases, have agreed that a defendant is innocent or entitled to a new trial based on newly discovered exculpatory or mitigating evidence. Proposed Rule 3.09(g) places a lifetime ethical obligation on prosecutors to disclose exculpatory and mitigating evidence regarding any prosecution that comes to their attention. I have significant concerns with both the breadth and length of this obligation especially given its vagueness and the absence of any comments addressing its source and scope. Proposed Rule 3.09(g) departs in significant ways from its inspiration Texas Code of Criminal Procedure Article 39.14 (commonly known as the Michael Morton Act). Article 39.14 imposes a continuing post-conviction obligation on the State to disclose any exculpatory, impeaching or mitigating evidence in its possession that tends to negate a defendant's guilt or tends to reduce his/her punishment for that offense. See Tex. Code Crim. Proc. art. 39.14(h), (k). That statutory continuing obligation, however, places a start date by limiting its application to prosecutions for offenses committed after its effective date of January 1, 2014. See *Commission for Lawyer Discipline v. Hanna*, 513 S.W.3d 175, 183 n.6 (Tex. App. – Houston [14th Dist.] 2016, no pet.). This "effective date" commencement aligns with the other new requirements that the State document the items disclosed to the defense and that the defense acknowledge in writing or open court the receipt of these items. See Tex. Code Crim. Proc. art. 39.14(i), (j). Running these new requirements together gives the prosecutor adequate resources to determine whether or if the "new" information has already been disclosed. Proposed Rule 3.09(g) places no start date for this new continuing obligation. The absence of a meaningful start date imposes an impossible duty for a prosecutor to determine whether information has been disclosed from an era when no such record keeping was mandated and potentially exposes a prosecutor to professional consequences for not disclosing information that, at the relevant time, was not statutorily required to be disclosed. Even more concerning, proposed Rule 3.09(g) places an unlimited obligation on prosecutors even when they are no longer associated with that criminal district attorney's office and may no longer even practice criminal law, and it does so without a modicum of guidance to former prosecutors. For example:

- This rule provides no guidance on how former prosecutors might deem some random information relevant to some long-disposed case when they no longer have access to that case.
- This rule provides no guidance on how former prosecutors now practicing criminal defense should act if they learn some relevant information from a client that might fall within this continuing lifetime obligation.
- This rule provides no guidance to current former prosecutors regarding their duty in cases they prosecuted in years or decades past. During my career, I spent eighteen years overseeing our office's responses to applications for writs of habeas corpus and intake reviewed more than five



thousand applications. Proposed Rule 3.09(g), with its lifetime obligation, vague language, and lack of any guiding commentary, is rife for abuse by rightfully convicted defendants who are unwilling to take responsibility for their criminal conduct. It is naïve to think that the same defendants who routinely abuse the appellate courts with frivolous claims challenging their convictions will not use this proposed rule to similarly abuse the grievance system with unfounded or frivolous grievances against their former prosecutors. Acknowledging that prosecutors hold a unique role in our legal system, I am not aware of any other area of practice where attorneys are bound by similar consequences long after they have left a legal position and moved to another area of law, began a non-legal career or retirement. Moreover, I find it interesting that the proposed rule places no corresponding obligation on criminal defense attorneys to act on their former client's behalf when the State does provide post-conviction disclosures. This committee should not adopt proposed Rule 3.09(g) as currently written. It creates an unprecedented lifetime obligation on former, current, and future prosecutors without any guidance on how it will be applied when adequate statutory remedies are in place to address the problems it purports to solve.

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Proposed changes to Rule 3.09  
**Date:** Monday, April 4, 2022 4:07:21 PM

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### Contact

<b>First Name</b>	Mark
<b>Last Name</b>	Pratt
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	16240550

### Feedback

<b>Subject</b>	Proposed changes to Rule 3.09
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### Comments

I, along with both of my assistant DAs, will be in Court tomorrow at the designated hearing time. Therefore, I am respectfully commenting here to reflect my opposition to the proposed changes to Rule 3.09. Perhaps after some more time and input a workable change can be made. Thank you for your kind consideration.

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: A CLUELESS STATE BAR REGARDING RULE 3.09  
**Date:** Monday, April 4, 2022 4:40:53 PM

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

### Contact

<b>First Name</b>	LANDON
<b>Last Name</b>	LAMBERT
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	24035773

### Feedback

<b>Subject</b>	A CLUELESS STATE BAR REGARDING RULE 3.09
----------------	------------------------------------------

### Comments

My name is Landon Lambert. I have a private practice AND served as the elected County Attorney in Donley County, Texas. I have practiced my entire 16 plus years in Texas and generally in the Texas panhandle. I have been an elected criminal prosecutor for about 15 years. From almost the beginning of my journey, I have become more and more disillusioned with the usefulness and appropriateness of our compulsory State Bar. The State Bar has demonstrated LITTLE usefulness to me as a solo practitioner in areas that really matter and EVEN LESS usefulness when it comes to relating to elected prosecutors; UNLESS AND UNTIL someone is running for State Bar President and wishes to glad hand us all and have a cocktail and ask us to vote for them and support them, almost like clockwork, and then this shit still happens. This institution has been taken over by progressive leftist wokesters and wanna be Social Justice Warriors, more affectionately known as "slactivists." Steve Fischer led the charge for sworn bar complaints. The aforementioned groups in charge and BigLaw shot that down, disproportionately exposing solo practitioners and other small office attorneys to unwarranted complaints that seem to be shotgunned through, regardless of if they even state an actionable offense by the complainant. Now, worst of all, those same people are swooping in, presenting themselves as our "betters" as elected prosecutors, and desiring to regulate prosecutors to a destructive end. Elected Prosecutors, ourselves, have led the charge to police unscrupulous and unethical practices and to expose "bad" prosecutors and punish and remove them from our profession and correct the damage left in their wake. This has led to several amazing success stories, including Michael Morton working WITH prosecutors and Elected Prosecutors to educate from an extremely negative personal experience with the criminal justice system. WE DID THAT. Long before the headlines from other states talking about "progressive" prosecutors, which has lately been seemingly determined to mean NOT prosecuting offenses because it may not serve certain peoples' ideas of EQUITY, which is NOT the goal. EQUALITY is the goal. Under the law and our profession. The GOOD parts of "progressive" prosecution, diversion programs, avenues to prevent people from getting convictions on their records who shouldn't have them, getting all of the evidence, and seeking to further ingrain our stated mandate TO SEEK JUSTICE in all cases; TEXAS WAS ALREADY DOING OR LEADING THE WAY. NOW, for seemingly no reason other than the noted progressive bend in the most vocal part of our State Bar membership, is greatly motivated, to regulate prosecutorial conduct to an extend never before contemplated WITH NO PROSECUTORIAL REPRESENTATION ON THE VERY COMMITTEE TASKED WITH DOING SO. If we were in Boston in the 1700s, this is the part where I would be DEMANDING to know where the State Bar's "harbor" is so that I might throw all of their tea into it. This is WHOLLY UNACCEPTABLE on every imaginable level. Again, as a former Board Member of TDCAA, I've been front row privy to the glad handing that the overtures of 'we'd sure love to have more prosecutors participating in the process' and 'our goal is to have more participation by the prosecutor section of our membership' etc. etc. etc. AND IT WAS ALL A MASSIVE LOAD OF BULLSHIT. BOTTOM LINE. I choose not to mince words here because there's no need to paraphrase Shakespeare or Jung or Nietzsche when Stone Cold Steve Austin already said it better. The proposed amendments are "cradle to grave" liability for prosecutors. Low

pay, long hours, and current public perception are already making it difficult to attract young attorneys to these difficult yet needed positions and to retain them once they are trained up. We do not need the State Bar, yet again, making things unnecessarily worse for prosecutors when not a damned person weighing in on this sea change IS ONE. Prosecutors and Elected DAs/CAs/CDAs MUST be invited to this committee to let it know what its potential actions could do. Unintended Consequences of well-meaning actors will be the destruction of the criminal justice system in Texas if we are not careful. Alternatively, if the State Bar is bound and determined to do something, then you best make this duty GLOBAL, to ALL attorneys. Prosecutors also need to be given more OFFENSIVE power to make sure law enforcement agencies, also made up of fallible human beings, turn over EVERYTHING, and I mean EVERYTHING. That's still an almost daily battle for me and I do misdemeanors. OR, it may just be high time that prosecutors form their own governing body. Our own 'state bar' as it were, to govern OUR profession, which is already under attack and placed under much different rules than even criminal defense attorneys currently BECAUSE OUR JOB IS TO SEEK JUSTICE, NOT CONVICTIONS. However we will NEVER shy away from convicting someone when the evidence warrants conviction. I should have been astonished when I was confronted with what was going on. Sadly, I was not.

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Rule 3.09  
**Date:** Monday, April 4, 2022 5:02:43 PM

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### Contact

<b>First Name</b>	Greg
<b>Last Name</b>	Buckley
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	03300350

### Feedback

<b>Subject</b>	Rule 3.09
----------------	-----------

### Comments

I strongly disagree with the wording of Rule 3.09 there needs to be a good faith exception placed in the body of the rule and the cradle to the grave provision taken out. The rule needs to be totally reworked and reworded. Are there any prosecutors on the Committee on Disciplinary Rules and Referenda?

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Proposed change to Rule 3.09  
**Date:** Monday, April 4, 2022 5:37:42 PM

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### Contact

<b>First Name</b>	Jeffrey
<b>Last Name</b>	Swain
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	00792863

### Feedback

<b>Subject</b>	Proposed change to Rule 3.09
----------------	------------------------------

### Comments

I write as the elected District Attorney of Parker County to oppose the proposed change to Rule 3.09. The three letters from the Texas District and County Attorneys Association (TDCAA) from October, December, and January do an excellent job of explaining why the proposed rule change is both unnecessary as well as troublesome. Therefore, I will not re-state the position well set forth therein, which I share. However, I would like to make a few additional points. First, with regard to former prosecutors to whom the proposed rule would task additional duties after their prosecutorial career has ended, I would ask you how exactly are these lawyers supposed to get the records from the existing prosecutor to determine whether or not the information is new or not previously provided, let alone exculpatory? Having been a prosecutor for 26 years, I have prosecuted thousands of cases. The number of those that I remember well and with detail that are over a year in the past might be around 100. In the criminal prosecution field, the case file stays with the office and does not leave with the prosecutor that handled it. Nor is the individual prosecutor permitted to have a copy of his or her own to retain or work on separately. To do so would cause innumerable open records, privilege, and confidentiality issues. So, after the prosecutor leaves the office, how is he or she supposed to look at the potentially new information and determine if it was previously known or was exculpatory, in light of the actual facts of the case? Does the former prosecutor have the obligation to file an open records request to get the information necessary to make that determination? This provision is simply not practical and imposes an unfair obligation upon someone without access to the materials necessary to properly evaluate and take appropriate steps. Secondly, with regard to the obligation that, not only should the prosecutor turn over the information, but he or she also must investigate each and every claim, if the bar imposes such a duty, it is reasonable to assume that it will also fund the additional prosecutors and investigators necessary to perform the tasks necessary for that investigation. Has the bar or the Supreme Court inquired with members of the legislature to see if they are willing to fund that request? My home county, Parker County, is the 31st largest prosecuting district in the State of Texas. We have 7 prosecutors in the District Attorney's Office and 10 in the County Attorney's Office. Unlike the largest counties in our state, we do not have a "conviction integrity unit" or anything with similar purpose. I believe that I am making a reasonable assumption that the 134 prosecutorial districts in our state that are smaller than Parker County likewise do not have such a unit. That is not to say that we take our continuing obligation to do justice any less seriously than our larger neighbors. We believe that our duty to see that justice is done applies regardless of whether a conviction is on the horizon or in the rearview mirror. My point is to make it clear that this obligation would require many new positions to be filled and that requires funding. Otherwise, this is just another unfunded mandate, passed along to the counties. Also, since it is my understanding that no person on this committee is a prosecutor or has ever been one, I think there may be a misunderstanding as to how much work this will require. Our office receives hundreds (not over a hundred, multiple hundreds) of pieces of "jail mail" from inmates each and every year. Nearly all of those have some tale of woe. Must we consider all of those to be credible and open an investigation for fear that someone will later determine otherwise? Without further time

and investigation of each and every claim, how are we to determine if it is new or credible or material? This obligation would actually require investigation into every single claim to make that determination even if it did not ultimately require an investigation to be opened, or open the prosecutor to the risk of discipline. This proposed standard does not take into account the practicalities of prosecutors offices which are already stretching staffing to near impossible levels to handle existing obligations. Finally, I would ask the members of this committee to give due consideration to how incarcerated individuals will attempt to use this rule to harass prosecutors. We have a number of offenders that our office has prosecuted and incarcerated that use and abuse the writ process, open records requests, and DNA re-test provisions to no end other than attempting to tie up our office's resources or get a bus ride to our county from prison, among other things. I would submit that this rule would be used by such offenders as yet another tool to harass prosecutors. In closing, this committee needs to understand that the prosecutorial community in the State of Texas already recognizes the importance of providing exculpatory evidence before, during, and after trial, as required under existing law and disciplinary rules. We also embrace the core role that rectifying wrongful convictions plays in our obligation "to see that justice is done." There is no need to add unnecessary, redundant rules. Respectfully, Jeff Swain District Attorney Parker County, Texas (817)598-6124 [REDACTED]

**From:** [Lee Hon](#)  
**To:** [cdrr](#)  
**Subject:** Proposed 3.09 rule change.  
**Date:** Tuesday, April 5, 2022 9:07:32 AM

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Please include me on the list of those wishing to testify tomorrow on the proposed change to rule 3.09. Thanks.

William Lee Hon  
Polk County Criminal District Attorney  
101 West Mill Street, Suite 247  
Livingston, Texas 77351  
Tel. (936) 327-6868  
Facsimile (936) 327-6875  
Email: [REDACTED]



**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Rule 3.09 Concerns  
**Date:** Tuesday, April 5, 2022 10:09:01 AM

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#### Contact

<b>First Name</b>	Sunshine
<b>Last Name</b>	Stanek
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	24027884

#### Feedback

<b>Subject</b>	Rule 3.09 Concerns
----------------	--------------------

#### Comments

I would like to endorse and support the letter written on behalf of the TDCAA committee, by Scott Brumley, expressing our concerns as elected prosecutors with the proposed Rule 3.09 changes. I couldn't say it any better myself. Thank you for your thoughtful consideration. K. Sunshine Stanek  
Lubbock County Criminal District Attorney

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Rule 3.09  
**Date:** Tuesday, April 5, 2022 1:21:03 PM

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### Contact

<b>First Name</b>	Matthew
<b>Last Name</b>	Mills
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	24060282

### Feedback

<b>Subject</b>	Rule 3.09
----------------	-----------

### Comments

I'm writing as the elected Hood County Attorney. I read the proposed rule change, and I'm not sure how that would work well in real life. I'm particularly curious how it would apply to terminated prosecutors or any who left on bad terms. I can't imagine firing an assistant and then being forced to let them back in the office to rummage through files and interact with staff. Among other concerns already voiced, I believe this rule would be too burdensome.

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Proposed Amendment to Rule 3.09  
**Date:** Tuesday, April 5, 2022 1:56:09 PM

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

### Contact

<b>First Name</b>	Will
<b>Last Name</b>	Ramsay
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	24039129

### Feedback

<b>Subject</b>	Proposed Amendment to Rule 3.09
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### Comments

To the Members of this Committee: Thank you for the opportunity to comment on this proposed change to Rule 3.09. One cannot be a modern Texas prosecutor without living under the yoke of Brady and the Michael Morton Act. I do not use the term "yoke" in a negative context, but rather as a realization that the grave duty to be transparent and achieve true justice in our job is a weight that prosecutors pull every single day throughout our great State. It has been my honor to serve with men and women who advocate on behalf of victims of the most gruesome and gross acts, while also having to do the work of defense attorneys to make sure that the accused is wholly protected. Again, these are not complaints about the system we operate within but rather accolades for people who are looking in both directions so that justice is achieved. This committee is well aware of the strides made in Texas to protect against wrongful convictions. With the expansive Michael Morton Act and passage of Section 81.072 of the Texas Government Code, prosecutors are held to an extremely high burden, equal to their goal of justice. Respectfully, the proposed amendment requiring someone who has ever been in the role of prosecutor to, not only disclose, but investigate claims is not practical or feasible. Again, the men and women I have worked with would always disclose some evidence that came to their attention that they felt was exculpatory. However, giving the further (undefined) burden to investigate may not at all be possible for a former prosecutor to achieve. Rather, disclosing the information to a person who has the ability (whether they choose to or not) is the reasonable requirement. I do not disagree that many of the statutory duties of a prosecutor are also moral duties. However, requiring an individual to investigate when they lack the money or authority to competently do so, is setting that individual, as well as the convicted person, up for failure. I truly hope that the committee understands that there are thousands of prosecutors across this state who are on the front lines doing their jobs ethically and competently. They care for their victims. They care for their communities. They also, believe it or not, care for those they prosecute. They make sure that cases are transparent and fair because that it is the right thing to do and that is what their environment demands of them. The legislature has codified some requirements in recent years that obligate prosecutors to perform certain tasks and create remedies if they do not. However, no legislation or rule can amend a person's heart. It is an honor to be a Texas prosecutor because of how we achieve justice. We take the high road and do the right thing, even within a very adversarial system. To put the further task of investigation without the proper tools will do nothing to enhance an already working process. Frontline prosecutors across this State ask you to hear their plea. Thank you again. Will Ramsay 8th Judicial District Attorney

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Proposed Amendments to Rule 3.09  
**Date:** Tuesday, April 5, 2022 1:59:26 PM

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

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### Feedback

<b>Subject</b>	Proposed Amendments to Rule 3.09
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### Comments

To the Members of this Committee: Thank you for the opportunity to comment on this proposed change to Rule 3.09. One cannot be a modern Texas prosecutor without living under the yoke of Brady and the Michael Morton Act. I do not use the term "yoke" in a negative context, but rather as a realization that the grave duty to be transparent and achieve true justice in our job is a weight that prosecutors pull every single day throughout our great State. It has been my honor to serve with men and women who advocate on behalf of victims of the most gruesome and gross acts, while also having to do the work of defense attorneys to make sure that the accused is wholly protected. Again, these are not complaints about the system we operate within but rather accolades for people who are looking in both directions so that justice is achieved. This committee is well aware of the strides made in Texas to protect against wrongful convictions. With the expansive Michael Morton Act and passage of Section 81.072 of the Texas Government Code, prosecutors are held to an extremely high burden, equal to their goal of justice. Respectfully, the proposed amendment requiring someone who has ever been in the role of prosecutor to, not only disclose, but investigate claims is not practical or feasible. Again, the men and women I have worked with would always disclose some evidence that came to their attention that they felt was exculpatory. However, giving the further (undefined) burden to investigate may not at all be possible for a former prosecutor to achieve. Rather, disclosing the information to a person who has the ability (whether they choose to or not) is the reasonable requirement. I do not disagree that many of the statutory duties of a prosecutor are also moral duties. However, requiring an individual to investigate when they lack the money or authority to competently do so, is setting that individual, as well as the convicted person, up for failure. I truly hope that the committee understands that there are thousands of prosecutors across this state who are on the front lines doing their jobs ethically and competently. They care for their victims. They care for their communities. They also, believe it or not, care for those they prosecute. They make sure that cases are transparent and fair because that it is the right thing to do and that is what their environment demands of them. The legislature has codified some requirements in recent years that obligate prosecutors to perform certain tasks and create remedies if they do not. However, no legislation or rule can amend a person's heart. It is an honor to be a Texas prosecutor because of how we achieve justice. We take the high road and do the right thing, even within a very adversarial system. To put the further task of investigation without the proper tools will do nothing to enhance an already working process. Frontline prosecutors across this State ask you to hear their plea. Thank you again. Will Ramsay 8th Judicial District Attorney (Hopkins, Franklin and Delta Counties)

**From:** [Featherston, Brit \(USATXE\)](#)  
**To:** [cdrr](#)  
**Cc:** [Lowery, Jennifer \(USATXS\)](#); [Meacham, Chad \(USATXN\)](#); [Hoff, Ashley \(USATXW\)](#); [Mulkern, Patrice \(JMD\)](#); [Jackson, Alan \(USATXE\)](#)  
**Subject:** Texas U.S. Attorney's Office and the Department of Justice's Commentary letter on proposed rule 3.09  
**Date:** Tuesday, April 5, 2022 2:16:52 PM  
**Attachments:** [U.S. Department of Justice Comments on Proposed Texas Rule 3.09 fnl.pdf](#)

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Dear Chairman Kinard and the Committee on Disciplinary Rules & Referenda,

Please find attached the Department of Justice's commentary letter regarding additions to proposed Texas Rule 3.09. Thank you for allowing us to share comments on the proposal.

*Brit Featherston  
U.S. Attorney  
U.S. Attorney's Office  
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## U.S. Department of Justice

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April 5, 2022

Via Email: [cdr@texasbar.com](mailto:cdr@texasbar.com)

Chairman M. Lewis Kinard  
 Committee on Disciplinary Rules &  
 Referenda (CDRR)  
 7272 Greenville Avenue  
 Dallas, TX 75231

Dear Chairman Kinard:

The United States Department of Justice (“Department”), which includes the United States Attorneys for the Eastern, Northern, Southern, and Western Districts of Texas, appreciates the opportunity to comment on the proposed revisions to Texas Disciplinary Rule of Professional Conduct (“Texas Rule” or “the Rule”) 3.09. We fully support the goals underlying the proposed revisions to ensure the timely disclosure of substantial evidence demonstrating that a person did not commit a crime for which the person had been convicted.

The Department always has sought to hold its attorneys to the highest standards of professional conduct and expects its prosecutors to disclose exculpatory evidence as soon as possible.<sup>1</sup> This includes credible information of a defendant's innocence whenever it may be obtained—pre-trial, during trial, or after conviction. At the same time, the Department has a

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<sup>1</sup> The Department’s Justice Manual imposes disclosure obligations upon federal prosecutors that go beyond the requirements of substantive law. *See, e.g.*, U.S. Dep’t of Justice, Justice Manual (hereinafter “JM”) § 9-5.001 (2020) (prosecutors are advised to disclose exculpatory and impeachment information beyond that which is constitutionally and legally required); JM § 9-5.002 (2017) (prosecutors are encouraged to provide discovery that is broader and more comprehensive than discovery rules and statutes require); and JM § 9-5.003 (2017) (the Department’s policy to provide discovery over and above the minimum legal thresholds applies to cases with forensic evidence).

Moreover, since 2010, all federal prosecutors receive mandatory criminal discovery training pursuant to the Justice Manual. *See* JM 9-5.001(E) (“All new federal prosecutors assigned to criminal matters and cases shall complete, within 12 months of employment, designated training through the Office of Legal Education on *Brady/Giglio*, and general disclosure obligations and policies. All federal prosecutors assigned to criminal matters and cases shall annually complete two hours of training on the government’s disclosure obligations and policies. This annual training shall be provided by the Office of Legal Education or, alternatively, any United States Attorney’s Office or DOJ component.”). This training, both for new and experienced prosecutors, has been developed and administered under the leadership of Andrew Goldsmith, the Department’s National Criminal Discovery Coordinator (and one of the signatories of this letter), a career prosecutor in the Office of the Deputy Attorney General.

significant interest in ensuring that any obligations imposed on federal prosecutors by the State of Texas are clear, appropriate, and consistent with a Department prosecutor's obligations under federal law.

We agree with the members of the Texas District and County Attorneys Association (TDCAA) that, in light of existing legal and ethical rules, Rule 3.09 does not require amending. Even if there are gaps in current law, the proposed amendment will not fill them. As discussed below, vague and undefined terms in the proposed amendment raise significant questions about interpretation and application. Despite the best intentions, the amended rule will not provide meaningful guidance to prosecutors about their post-conviction disclosure obligations. In addition, proposed subsection (g), which appears to impose ethical duties on anyone who ever served as a prosecutor, raises serious concerns regarding the management of ongoing criminal investigations and control over the government's confidential information. No other jurisdiction has adopted a similar provision.

### **I. The Proposed Rule 3.09 Changes are Unnecessary to Achieve the Rule's Purpose.**

Existing Texas Rules adequately ensure that prosecutors take appropriate action when confronted with substantial evidence that a person was wrongly convicted, the apparent concern motivating the proposed changes to Rule 3.09. In particular, Texas Rule 8.04 already prohibits all attorneys—including prosecutors—from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation or that constitutes obstruction of justice. See TEXAS DISC. RULES OF PROF'L CONDUCT R. 8.04(a)(3) and (4). A prosecutor or former prosecutor who knowingly suppresses evidence of actual innocence would run afoul of these Rules.<sup>2</sup> We doubt that an additional rule is necessary to address the extreme moral impropriety of such conduct. Likewise, it is unlikely the proposed rule will change the conduct of a badly motivated prosecutor who is willing to suppress evidence of innocence.

### **II. Few States have Adopted Rules Similar to the Proposed Rule 3.09 Amendments.**

Proposed Sections (f) and (h) are adopted from American Bar Association (ABA) Model Rules 3.8(g) and (h) and the accompanying commentary. Significantly, in the 14 years since the ABA added these provisions to Rule 3.8, only a few states have adopted the ABA's specific language.<sup>3</sup> Other states, which have adopted a version of the ABA Rules, often modify—sometimes significantly—either the text and/or the rule's commentary.<sup>4</sup> The Texas Supreme Court routinely has not adopted the Model Rules verbatim.

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<sup>2</sup> Compare Ohio Bd. of Comm'rs on Grievances and Discipline Op. 99-8, 1999 WL 1244453 (Dec. 2, 1999) (bar authority concluded that a defense attorney or prosecutor who becomes aware of a clerical error in a criminal judgment that changes the plea, verdict, findings, or sentence has a duty to notify the court even if the knowledge comes to the attorney's attention years later, and that failure to notify the court would constitute conduct prejudicial to the administration of justice).

<sup>3</sup> See, e.g., CAL. RULES OF PROF'L CONDUCT R. 3.8(G)-(H); MONT. RULES OF PROF'L CONDUCT R. 3.8(G)-(H); S.D. RULES OF PROF'L CONDUCT R. 3.8(G)-(H). A small number of jurisdictions have adopted both the language of the Model Rule and its commentary. See, e.g., IDAHO RULES OF PROF'L CONDUCT R. 3.8(G)-(H), CMTS. [7]-[9]; W. VA. RULES OF PROF'L CONDUCT R. 3.8(G)-(H), CMTS. [7]-[9].

<sup>4</sup> See, e.g., ALASKA RULES OF PROF'L CONDUCT R. 3.8(G) & CMT. ¶¶ 6-7; ARIZ. RULES OF PROF'L CONDUCT R. 3.8(G)-(I) & CMT. [7]; CAL. RULES OF PROF'L CONDUCT R. 3.8 CMTS. [7]-[8]; COLO. RULES OF PROF'L CONDUCT R. 3.8(G)-(H) & CMT. [7]-[9A]; CONN. RULES OF PROF'L CONDUCT R. 3.8(6) & CMT. ¶ 4; DEL. RULES OF PROF'L CONDUCT R. 3.8(D)(2) & CMT. [3]; HAW. RULES OF PROF'L CONDUCT R. 3.8(C)-(D) & CMT. [5]; IOWA RULES OF PROF'L CONDUCT

That the majority of jurisdictions have chosen not to adopt Model Rules (g) and (h) demonstrates that the rule is unnecessary in light of other well-established rules that cover this conduct. In addition, these Model Rule provisions and their commentary contain ambiguous and undefined terms (the most significant of which we discuss below) and impose new duties that a federal prosecutor, at least, might not have the ability to fulfill. Authorities defining or interpreting some of these terms in other contexts only add to the confusion. To be effective, ethical guidance should be clear to prosecutors and capable of fair enforcement by bar counsel and courts. Insofar as courts have recognized that attorneys cannot be disciplined for violating rules that are unclear,<sup>5</sup> adopting the ambiguous provisions would fall short of their intended purpose.

### **III. The Proposed Rules Impose Impractical And Unrealistic Obligations.**

Proposed Rule 3.09(f) imposes obligations on prosecutors even with regard to prosecutions occurring in other jurisdictions. A prosecutor cannot reasonably be expected to assess the credibility and materiality of evidence relating to a conviction obtained in another jurisdiction, especially one obtained years ago. A prosecutor in one jurisdiction is unlikely to know the substantive and procedural rules in a different jurisdiction. A prosecutor who is not thoroughly familiar with the evidence presented in the case, the legal issues that had been raised, or the credibility of the witnesses who testified at trial cannot make an informed determination whether the information is “new, credible, and material.”<sup>6</sup>

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R. 32:3.8 CMT. [7]; ILL. RULES OF PROF'L CONDUCT R. 3.8(i); MASS. RULES OF PROF'L CONDUCT R. 3.8(i)-(k) & CMTS. [7]-[8]; MICH. RULES OF PROF'L CONDUCT R. 3.8(f)-(h) & CMT.; N.M. RULES OF PROF'L CONDUCT R. 16-308(g) & CMTS. [7]-[10]; N.Y. RULES OF PROF'L CONDUCT R. 3.8(c)-(e) & CMTS. [7]-[8]; N.C. RULES OF PROF'L CONDUCT R. 3.8(g)-(h) & CMTS. [8]-[10]; N.D. RULES OF PROF'L CONDUCT R. 3.8(g)-(h) & CMTS. [7]-[8]; OKLA. RULES OF PROF'L CONDUCT R. 3.8(h)-(j) & CMTS. [7]-[8]; S.C. RULES OF PROF'L CONDUCT R. 3.8(g)-(i) & CMTS. [7]-[12]; TENN. RULES OF PROF'L CONDUCT R. 3.8(g)-(h) & CMTS. [6]-[7]; WASH. RULES OF PROF'L CONDUCT R. 3.8(g)-(i) & CMT. [7]; WIS. RULES OF PROF'L CONDUCT SCR 20:3.8(g) & CMT. ¶ 2; WYO. RULES OF PROF'L CONDUCT R. 3.8(f) & CMT. [8]. The District of Columbia Court of Appeals is currently considering whether to adopt a modified version of Model Rule 3.8(g) and (h). See D.C. RULES OF PROF'L CONDUCT REV. COMM., PROPOSED AMENDMENTS TO SELECTED RULES OF THE D.C. RULES OF PROF'L CONDUCT (Feb. 2020).

<sup>5</sup> See, e.g., *In re Kline*, 113 A.3d 202, 215-16 (D.C. 2015) (finding that it was inappropriate to discipline Kline because, without the benefit of the court's opinion, his decision was “wrong but . . . not unreasonable” under the circumstances, including Kline's lack of professional responsibility training, conflicting legal authority, the contrary comment to the D.C. Rule, and ABA Formal Opinion 09-454); *Att'y Grievance Comm'n v. Gansler*, 835 A.2d 548, 567-69 (Md. App. Ct. 2003) (concluding that, because there was “no settled definition” of a Maryland Rule of Professional Conduct, the Rule did “not provide adequate guidance” required to impose sanctions for violating the provision).

<sup>6</sup> Some evidence, such as a DNA match obtained using methods that did not exist at the time of the conviction or a recent confession to a publicized crime in a prosecutor's own district, may provide clear evidence that would trigger application of proposed Rule 3.09(f). Other information may be much less obvious.

For example, proposed Rule 3.09(f) could apply to a federal prosecutor in Austin who hears from a bank robber with a history of heroin abuse whom the prosecutor is preparing as a witness for trial that the bank robber previously committed a string of similar robberies in the Oklahoma City area. The prosecutor would not know whether this witness's claim about the commission of robberies in Oklahoma City is new evidence suggesting a convicted person did not commit the crime. The prosecutor would not know how much to trust the robber's vague memory of particular locations robbed, memories for which the prosecutor would have no facts against which to test. Moreover, were there some other defendant convicted of a roughly contemporaneous bank robbery in Oklahoma City, who claimed to be innocent, the prosecutor would not know whether the witness's admission bore materially on that case. Yet, the proposed rule might subject the Austin prosecutor to discipline for failure to make these determinations even if the prosecutor was not aware of the evidence presented, the legal issues raised, or the credibility of the witnesses who testified during the trial in Oklahoma City.



Additionally, disclosure by a prosecutor who did not handle a case originally, but who elected to disclose the information to a court in an abundance of caution, may be viewed as implying or conceding that the information is actually new, credible and material, when, in fact, it is none of those. This disclosure could then cast doubt on the actual guilt of a convicted defendant where none should exist, create unnecessary and potentially costly litigation, and raise questions about the conduct of the actual prosecutor without basis.

#### **IV. The Level of “Knowledge” Triggering a Violation is Unclear.**

Both subsections (f) and (h) apply when a prosecutor “knows” of particular evidence. Proposed Rule 3.09(f) applies 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.” (emphasis added). Proposed Rule 3.09(h) applies 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.”

Both provisions are ambiguous on several levels. First, the rule and commentary refer to “evidence.” Is this distinguished from “information”? Under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, as well as Department regulations, federal prosecutors are required to disclose any exculpatory, impeaching, or mitigating information, regardless of admissibility or materiality. Ordinarily, the term “evidence” would imply information that is admissible in relevant court proceedings under applicable evidence rules. (Indeed, the *Brady* rule has been construed to exclude information that is not legally material because it is not admissible under the tribunal’s law. See *Wood v. Bartholomew*, 516 U.S. 1 (1995)). It seems unlikely the intent is to limit disclosures to admissible evidence, but the proposed Rule is not clear.

Second, the scope and meaning of “knows” are not clear. Does the prosecutor’s knowledge extend only to the existence of such evidence, or must the prosecutor also know the information meets the prescribed standard—evidence that creates a reasonable likelihood the defendant was innocent or that establishes the defendant’s innocence by “clear and convincing evidence”? The term “knows” is undefined in this Rule and its comments. The term “know” is defined in the Terminology section of the Texas Rules as “actual knowledge of the fact in question” but this definition is not helpful in distinguishing these two possible interpretations of the Rule. See TEXAS DISC. RULES OF PROF’L CONDUCT, TERMINOLOGY.

Third, the differing standards in (f) and (h) add to the confusion. If the prosecutor “knows” the evidence creates a “reasonable likelihood” the defendant was convicted of a crime the defendant did not commit, then the prosecutor must make the requisite disclosures (to the appropriate court, authority, and defendant) and undertake or cause an investigation under Rule 3.09(f). If the prosecutor knows the evidence establishes the defendant was convicted of a crime the defendant did not commit by “clear and convincing evidence,” then the prosecutor must “seek to remedy the conviction” under Rule 3.09(h). Setting aside questions about the difference between giving notice and seeking a remedy discussed below, how does the prosecutor assess and decide between the two standards in the two provisions?

#### **V. The Meaning of the Term “Material” is Unclear.**

Proposed Rule 3.09(f) states in relevant part that a prosecutor shall:

[P]romptly disclose new, credible, and *material* evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted to an appropriate court or authority. (emphasis added).

The term “material” is not defined in proposed Rule 3.09(f) or the commentary. Although many Rules include the word “material,” neither those Rules nor their commentary define the term.<sup>7</sup> Defining this term is critical to a prosecutor’s understanding of the type of evidence that would trigger the obligations under proposed Rule 3.09(f).

Although the United States found no cases or bar opinions defining “material” in the context of Model Rule 3.8(g) or the states’ versions of that Rule, the term “material” has been construed broadly in substantially similar state rules of professional conduct, including those in Texas, to mean important, relevant to establish a claim or defense, or relevant to a fact finder.<sup>8</sup>

On the other hand, in the criminal context, the term “material” usually is defined in accordance with *Brady* and its progeny, which defines evidence as material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” See *United States v. Bagley*, 473 U.S. 667, 682 (1985). “A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Id.* The language in proposed Rule 3.09(h) —“creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted”—suggests it is intended to incorporate the definition of materiality embodied in the criminal law. Without further guidance in proposed Rule 3.09(h) or the commentary however, a prosecutor, bar authority, or court would not know how the term “material” should be interpreted.

## **VI. Federal Prosecutors have Limited Capacity to Investigate Independently.**

Proposed Texas Rule 3.09(f)(2) imposes a duty to “undertake further investigation, or make reasonable efforts to cause an investigation” if the conviction that is now in question occurred in the prosecutor’s jurisdiction. Federal prosecutors are not investigators and have neither the general investigative powers nor the staff or financial resources to investigate every possible legal theory or

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<sup>7</sup> “Material” or “materially” appears in the terminology section in the definition of “informed consent.” See TEXAS DISC. RULES OF PROF’L CONDUCT, TERMINOLOGY; see also *id.* R. 1.06(b)(2) (prohibiting a lawyer from representing a client if the representation of that person involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm”); *id.* R. 1.10(b) (relating to imputed disqualification); *id.* R. 1.15(a) (declining or terminating representation); *id.* R. 3.03(a)(1) and (b) (prohibiting a lawyer from making materially false statements and requiring a lawyer to correct “material” false statements made to a court); *id.* R. 4.01(a) (prohibiting a lawyer from knowingly making a “material” false statement of fact or law to a third person).

<sup>8</sup> See *Cohn v. Comm’n for Lawyer Discipline*, 979 S.W.2d 694, 698 (Tex. App. 1998) (opining that a false statement to the trial court was material and stating that “in the context of Rule 3.03(a)(1), materiality encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act on in making a ruling. This includes a ruling that might delay or impair the proceeding or increase the cost of litigation.”); see also *In re Packaged Ice Antitrust Litigation*, Nos. 08-md-01952, 10-cv-11689, 2011 WL 611894, at \*5 (E.D. Mich. Feb. 11, 2011) (materiality in context of rule of professional conduct regarding conflicts defined as information sufficient to reveal the conflict’s scope and severity); *Def. v. Idaho State Bar*, 2 P.3d 147, 152 (Idaho 2000) (materiality in context of rule of professional conduct regarding candor defined as “whether (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it”) (internal citations omitted).

claim of additional evidence. United States Attorney's Offices generally do not employ in-house criminal investigators for this purpose. Although prosecutors use grand juries to investigate suspected crimes it is doubtful a grand jury could be properly used in this context. Thus, the proposed rule imposes an obligation that federal prosecutors—despite their best efforts—might be unable to fulfill.

## **VII. The Standard for Initiating an Investigation Is Unclear.**

The threshold standard for initiating an investigation into the validity of a conviction is critical. Proposed Rule 3.09(f)(2)(ii) triggers prosecutors' obligation to act if they learn 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." As stated above, several Texas Rules include the term "material," but neither the Rules nor their comments define it. "Credible" is not used in the text of another rule or defined anywhere in the Texas Rules. The proposed rule leaves unanswered the question of what degree of corroboration is required before the prosecutor must initiate an investigation into the validity of the conviction. The proposed rule uses the phrase "creating a reasonable likelihood that a convicted defendant did not commit an offense," but the definition of "reasonable" in the Texas Rules provides little guidance to interpret this phrase: "'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." See TEXAS DISC. RULES OF PROF'L CONDUCT R. TERMINOLOGY.<sup>9</sup>

## **VIII. Federal Prosecutors have Limited Ability "to Remedy the Conviction."**

The United States agrees wholeheartedly that when there is clear and convincing evidence that indicates a person was wrongly convicted of a crime, action must be taken to remedy the conviction. However, if proposed Rule 3.09(h) were adopted, it could create obligations that conflict with substantive federal law that place limits on a federal prosecutor's ability to act in court to remedy a conviction.

Under proposed Rule 3.09(h), if the prosecutor concludes there is clear and convincing exculpatory evidence, the prosecutor "shall seek to remedy the conviction." In addition, proposed Comment [8] states:

Necessary steps [to remedy the conviction] *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.

The Comment suggests that the duty to "seek to remedy the conviction" may be satisfied by disclosure, notice, and, at most, a motion to the court for appointment of counsel for an indigent defendant. Although proposed Comment [8] is helpful in explaining the scope of the obligation, it does not resolve the problem created by this section of the proposed rule because it is not clear

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<sup>9</sup> For example, convicted defendants serving prison sentences, or their family members and friends, often write letters to the prosecutor claiming they were wrongly convicted. The question is whether a letter, standing alone, is sufficient to trigger the obligation under proposed Rule 3.09(f)(2)(ii). Does a press conference where the defendant's family stands with a lawyer proclaiming their loved one's innocence trigger the obligation? Does a protest outside a courthouse trigger the obligation? At bottom, the proposed rule is unclear about the level of evidence that would trigger the obligation to investigate.

notice, disclosure, and a motion for appointment of counsel is all that is required to “remedy” a conviction.

In its report accompanying the recommendation to amend Model Rule 3.8, the ABA’s Criminal Justice Section acknowledged the list in Comment [8] is not exhaustive:

Although the proposed Comments identify steps that might be taken when necessary to remedy a wrongful conviction, the list is not exclusive. Sometimes disclosure to the defendant or the court, or making or joining in an application to the court, will suffice, whereas in jurisdictions where courts lack jurisdiction to release an innocent individual, the appropriate steps may be to make, or join in, an application for executive clemency.

ABA Criminal Justice Section, Report to the House of Delegates at 5 n.10 (2008). Thus, even if the comment were adopted, a defendant or bar authority may argue that a prosecutor faced with clear and convincing evidence of a defendant’s innocence is ethically required to do more. This is problematic because federal prosecutors do not have a legal or procedural mechanism to “remedy” a conviction. Indeed, several states have made substantive revisions to the Model Rule’s language, perhaps in recognition of the inconsistent obligation the Model Rule imposes on some prosecutors.<sup>10</sup>

Federal law provides no specific statutory or procedural mechanisms for the prosecutor to seek relief based on information that exculpates a convicted defendant. Rather, Congress and the courts have placed the responsibility to remedy a conviction on the defendant, and those remedies have limits. Under Federal Rule of Criminal Procedure 33(a), a defendant may move to vacate a judgment and for the grant of a new trial “if the interests of justice so require.” *See* FED. R. CRIM. P. 33(a). However, there are time limits on such a motion. A defendant basing his motion for a new trial on newly discovered evidence only has three years from the date of the verdict to file the motion. Any motion for a new trial based upon anything other than newly discovered evidence must be filed within 14 days of the verdict. *See* FED. R. CRIM. P. 33(b).

Under 28 U.S.C. § 2255, a defendant may challenge a conviction on constitutional or other legal grounds, but with limited exceptions, must do so within one year of the judgment of conviction, the occurrence of the constitutional violation, the establishment of the constitutional right, or the date that new facts would be discoverable.<sup>11</sup> The courts meet late claims with skepticism and the bar to such claims is high, requiring the defendant to prove the conduct is no

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<sup>10</sup> For example, Alaska, Hawaii, New Mexico, North Carolina, and Washington rules contain no “remedy the conviction” language. *See* ALASKA RULES OF PROF’L CONDUCT R. 3.8(G); HAW. RULES OF PROF’L CONDUCT R. 3.8(C)-(D); N.M. RULES OF PROF’L CONDUCT R. 16-308(G); N.C. RULES OF PROF’L CONDUCT R. 3.8(G)-(H); WASH. RULES OF PROF’L CONDUCT R. 3.8(G), (I). Others have modified the language. *See, e.g.,* ARIZ. RULES OF PROF’L CONDUCT R. 3.8(H) (“take appropriate steps, including giving notice to the victim, to remedy the conviction”); COLO. RULES OF PROF’L CONDUCT R. 3.8(H) (“take steps in the appropriate court, consistent with applicable law, to set aside the conviction”); N.Y. RULES OF PROF’L CONDUCT R. 3.8(D) (“ . . . shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.”).

<sup>11</sup> Congress has created a procedure to permit convicted defendants to seek to compel post-conviction DNA testing in extremely limited circumstances. *See* 18 U.S.C. § 3600. If, however, such testing is ordered and if the test results exclude the applicant as the source of the DNA evidence, he may then file a new trial motion “[n]otwithstanding any law that would bar a motion under this paragraph as untimely.” 18 U.S.C. § 3600(g)(1).

longer a crime under a Supreme Court decision made retroactive to cases on collateral review, *Reyes-Requenav. United States*, 243 F.3d 893, 903-906 (5th Cir. 2001), or to demonstrate “that it is more likely than not that no reasonable juror would have convicted [the defendant] in light of the new evidence.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Thus, even if a court or bar authority were to construe proposed Rule 3.09(h) to require a federal prosecutor to do more than the disclosure, notice, and investigation, the prosecutor already had taken under proposed Rule 3.09(h), no rule of criminal procedure or statute exists for a federal prosecutor to move the court to act to “remedy” a conviction.

Rules of professional conduct should not try to address matters of substantive or procedural law. The regulations interpreting 28 U.S.C. § 530B, the statute making rules of professional conduct applicable to federal government attorneys, state that the statute “should not be construed in any way to alter federal substantive, procedural or evidentiary law.” 28 C.F.R. § 77.1(b) (2007); accord *Stern v. United States Dis. Ct. for the Dist. of Mass.*, 214 F.3d 4, 20 (1st Cir. 2000).

### **IX. Proposed Subsection (g)’s Scope Is Overly Broad and Unenforceable.**

We agree with the TDCAA that proposed subsection (g) should be withdrawn. The proposed subsection is inconsistent with the Rule’s scope and improperly imposes expansive obligations on a lawyer who previously was a prosecutor in a criminal case. The proposal would require unchecked disclosures that could disadvantage the lawyer’s former or current government client, devastate ongoing prosecutions and investigations by jeopardizing witness safety and the government’s confidential information and interfere with the orderly administration of criminal prosecutions. It also may exceed the Texas Supreme Court’s authority with respect to federal prosecutors. We also agree with the TDCAA that adoption of this burdensome and impractical obligation would be a deterrent to attracting talented lawyers to serve as prosecutors.

Proposed subsection (g) states:

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

This language expands the scope of the Rule, which governs the “Special Responsibilities of a Prosecutor” and applies to “[t]he prosecutor in a criminal case.” The Rule is designed to provide ethical guidance to active prosecutors in criminal cases who have a “responsibility to see that justice is done, and not simply to be an advocate.” See TEXAS DISC. RULES OF PROF’L CONDUCT. cmt [1]. The Rule does not apply broadly to all lawyers; it focuses only on those serving as active prosecutors in a specific criminal case.

However, the proposal attempts to extend the Rule’s “special responsibilities” regarding the disclosure of exculpatory and mitigating information to *any* lawyer who ever served as a prosecutor no matter the length of service or the lawyer’s current affiliation to the case at issue. The proposal would impose an ethical obligation to fulfill the disclosure obligations under subsections (d),<sup>12</sup> (f)

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<sup>12</sup> Rule 3.09(d) requires a prosecutor to “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.” TEXAS DISC. RULES OF PROF’L CONDUCT R. 3.09(d).

and (h) as well as a prosecutor's constitutional and statutory disclosure obligations for the duration of a lawyer's legal career, even if the lawyer no longer serves as a prosecutor on the case at issue. Moreover, the Rule appears to govern prosecutors within the same office whose cases are transferred to other colleagues.<sup>13</sup> Such an expansion would be unprecedented, conflict with the Rule's text, and cause chaos in investigations and prosecutions.

The limitation imposed by the Rule's opening clause, "[t]he prosecutor in a criminal case," makes sense. The prosecutor in a criminal case is the lawyer who has special responsibilities to ensure that justice is carried out in a particular case. Moreover, that prosecutor is best situated to assess any piece of information, in proper context and subject to whatever sensitivities are in place in the case, to determine if it is exculpatory or mitigating. Also, that prosecutor, who is factually familiar with all aspects of the case, is the one who should assess the impact of disclosure on witnesses and others and apply for appropriate protective and other limiting orders regarding the information when necessary. *See* TEXAS DISC. RULES OF PROF'L CONDUCT R. 3.09 cmt. [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.").

A former prosecutor, or a prosecutor who is no longer part of the prosecution team for a criminal case, likely would not possess adequate case knowledge to appreciate whether the information is truly exculpatory or mitigating under the case's present posture. The former prosecutor's knowledge of information may be cumulative to that which the prosecutor in the case has already disclosed or obtained permission to withhold. Because many requests for relief from disclosure are under seal, a former prosecutor or a prosecutor who is not affiliated with a case may be legally prohibited from knowing all of the relevant circumstances which might affect whether disclosure would be necessary or required. Simply put, a lawyer who is no longer affiliated with a prosecution should not disclose information directly to defendants or their attorneys without knowing whether the disclosure would impermissibly harm the prosecution or jeopardize the safety and well-being of an important person or interest.<sup>14</sup> The proposed subsection does not address this serious concern. Even if proposed subsection (g) was consistent with the Rule's intent, its adoption would wreak havoc upon the orderly administration of criminal prosecutions and investigations.

Moreover, the proposed subsection interferes with the former prosecutor's obligations to the government client. For example, *Roviaro v. United States*, 353 U.S. 53, 59-60 (1957), permits the government to withhold an informant's identity in certain circumstances to protect witnesses. Proposed subsection (g) raises questions regarding whether a former prosecutor, or a prosecutor

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<sup>13</sup> In this regard, the proposed subsection is not practical in light of the realities facing prosecutors' offices. A large percentage of prosecutions are handled by multiple prosecutors at various stages of a criminal case. One may do intake; another may present to the grand jury; others may cover pretrial proceedings and guilty pleas; and several may conduct the trial and sentencings. Prosecutors may be reassigned for any number of reasons. Under the proposal, each of these prosecutors would have an independent duty to disclose information even if the prosecutor is no longer affiliated with the case and unaware of all relevant facts and circumstances, including whether the disclosures already had been made and whether any limitations on disclosures had been requested or received by the trial prosecutor.

<sup>14</sup> For example, if a former prosecutor were to learn allegations about the whereabouts of an eyewitness in one of the former prosecutor's previous cases that contradicted the eyewitness, and the prosecutor made a disclosure of that information directly to the defense, it may expose that witness to harm if the government had successfully acquired permission to withhold the identity of the witness and the witness's cooperation with the government for that person's safety. Similar considerations may exist for information involving national security or other government privileges.

who was no longer assigned to the case at issue, might have to disclose the government client's confidential information despite the government's assertion of the informant privilege. *See* TEXAS DISC. RULES OF PROF'L CONDUCT R. 1.05(c)(4) (permitting disclosures to "[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law."). All lawyers, including former prosecutors, have a duty to protect a former client's confidential information, even after they withdraw from a representation. *See* TEXAS DISC. RULES OF PROF'L CONDUCT R. 1.05, cmt. [21] ("After withdrawal, a lawyer's conduct continues to be governed by Rule 1.05."). Proposed subsection (g) also raises questions about the extent to which a former prosecutor could make the disclosure without consulting the former government client. If a former prosecutor were required to make disclosures directly to others besides the former client, without the former client's knowledge and consent, such action could seriously interfere with the criminal process to the former client's detriment and contrary to other Texas Rules. *See, e.g.,* TEXAS DISC. RULES OF PROF'L CONDUCT R. 1.05(b) (prohibiting a lawyer from using or revealing information to the disadvantage of the former client, except as the Rules would permit or require).<sup>15</sup> Ultimately, proposed subsection (g) raises more questions than it answers.

Finally, proposed subsection (g) is not limited to regulating ethical requirements, but also appears to regulate the substantive constitutional and statutory obligations of a lawyer who once served as a "prosecutor in a criminal case." The proposed subsection is more akin to a rule of criminal procedure than ethical guidance. An ethics rule is not the appropriate forum to regulate the timing and scope of criminal discovery. Those issues already have been the subject of a long-running debate involving legislatures, courts and committees responsible for considering changes to rules of procedure, as well as the policies of the relevant prosecutor's offices. We are unaware of any legal obligation that imposes a requirement on any lawyers who ever served as prosecutors to make the disclosures called for by the proposal for as long as they practice law. Therefore, this proposed subsection may raise conflicts with controlling federal law. *Cf. United States v. Supreme Ct. of New Mexico*, 839 F.3d 888, 923-28 (10th Cir. 2016) (holding that certain "provisions of Rule 16-308(E) [of the New Mexico Rules of Professional Conduct] conflict with federal law and are preempted").

Ultimately, we agree that all lawyers, including prosecutors and former prosecutors, should seek to ensure that justice is done in all aspects of their representations. However, a former prosecutor, or a prosecutor who is no longer affiliated with a case, should not be compelled to make disclosures, without the benefit of all relevant information, that may interfere with prosecutions and negatively impact the government's law enforcement efforts and the prosecutor's former client.

## **X. Conclusion**

Respectfully, we submit that existing legal and ethical standards already appropriately hold lawyers fully responsible, protect wrongly convicted defendants more effectively, and implement clear, enforceable standards. Thus, we join with the members of the TDCAA and urge the CDRR to reconsider its proposal to amend Texas Rule 3.09 to add post-conviction disclosure obligations and to extend disclosure obligations with respect to exculpatory and mitigating information to lawyers who are no longer prosecutors on a specific criminal case. If, however, the CDDR intends to move forward with such an amendment, we would welcome the opportunity to work with you on

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<sup>15</sup> Even the reporting rule for attorney misconduct makes clear that disclosure of information protected by Texas Rule 1.05 is not required. *See* TEXAS DISC. RULES OF PROF'L CONDUCT R. 8.03(d) & cmt. [1] (observing that self-regulation of the legal profession requires members of the profession [to] initiate disciplinary investigations when they have knowledge *not* protected by Rule 1.05 that a violation of these Rules has occurred.") (emphasis added).

this issue. We also request that U.S. Attorney Featherston be provided the opportunity to speak at the hearing on April 6, 2022, on behalf of the Department.

Respectfully submitted,



BRIT FEATHERSTON  
*United States Attorney*  
*Eastern District of Texas*



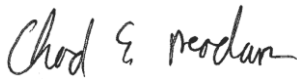
ANDREW D. GOLDSMITH  
*Associate Deputy Attorney General*  
*National Criminal Discovery Coordinator*



ASHLEY C. HOFF  
*United States Attorney*  
*Western District of Texas*



JENNIFER B. LOWERY  
*United States Attorney*  
*Southern District of Texas*



CHAD E. MEACHAM  
*United States Attorney*  
*Northern District of Texas*



**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Proposed 3.09  
**Date:** Tuesday, April 5, 2022 2:18:37 PM

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### Contact

<b>First Name</b>	Martha
<b>Last Name</b>	Montgomery
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	24034586

### Feedback

<b>Subject</b>	Proposed 3.09
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### Comments

I am against the proposed changes to Rule 3.09.

**From:** [Philip Furlow](#)  
**To:** [cdrr](#)  
**Subject:** April 6, 2022 - Meeting of the Committee on Disciplinary Rules and Referenda  
**Date:** Tuesday, April 5, 2022 2:43:43 PM

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The purpose of this email is to request that I be allowed to testify regarding proposed Rule 3.09.

My name is Philip Mack Furlow. I am the District Attorney for the 106<sup>th</sup> Judicial District of Texas and also currently serve on a Grievance Committee. I was also the Attorney Pro Tem Appointed on the Clinton Young Case in Midland County after the sitting District Attorney discovered a Conflict for her office in the case.

I would appreciate the opportunity to Testify.

Sincerely,

Philip Mack Furlow

**From:** [Kriste Burnett](#)  
**To:** [cdrr](#)  
**Subject:** comment on proposed rule 3.09  
**Date:** Tuesday, April 5, 2022 3:44:04 PM  
**Attachments:** [KBurnett comment.docx](#)

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Dear Committee members,

Attached please find my comment regarding the proposed changes to rule 3.09. Thank you for your time and consideration.

Sincerely,

**KRISTE BURNETT**

**District Attorney**  
**29th Judicial District**  
**P.O. Box 340**  
**Palo Pinto, TX 76484**  
**Office: (940) 659-1251**  
**Fax: (940) 659-3885**

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I submit this comment as the current elected District Attorney for Palo Pinto County and as an attorney who has spent her entire practice in the field of criminal law, with 24 years as a prosecutor in various counties in Texas. All of the counties I have practiced in for the past 30 years have been rural, with the exception of Johnson County, a fast growing suburban area which is on Tarrant County's southern border. Johnson County had 10 prosecutors in the District Attorney's office during the time I worked there, but had no conviction integrity unit. All other counties I have worked in have been one or two attorney offices, with no additional funding or personnel for a conviction integrity unit. I am aware of, and have received significant training throughout my career on my duty to disclose exculpatory, mitigating or impeachment evidence to the defense. It is a duty I gladly bear, since my statutory obligation is to see justice done in each case I handle. The Texas legislature has done an outstanding job of addressing the issue of wrongful convictions as it pertains to prosecutorial actions with the amendments to Article 39.14 of the Texas Code of Criminal Procedure through the Michael Morton Act in 2014. Analysis of data collected by the National Registry for Exonerations shows that out of 114 total exonerations in Texas for the period of 2014-2021 (post-Morton Act), only one of those exonerations was due to prosecutorial misconduct. The proposed changes to Rule 3.09 are redundant and unnecessary in my opinion since the perceived "problem" has already been adequately addressed by the legislature. However, passage of the proposed changes, particularly the "cradle to grave" provision proposed by Mr. Hagen, would put undue burdens on attorneys who at any point in their career have served as a prosecutor in any capacity. When you contemplate the scope of such a rule, that anyone who at any point in their career served as a prosecutor would now have to not only disclose, but investigate and remedy, I ask this committee to discuss how this would be practically applied. How is an attorney who twenty years ago worked for a year as a prosecutor in a county which may be across the state from where he currently practices supposed to access the records from that old case to determine whether or not the information was new, credible or material? Is the attorney supposed to make an open records request to the jurisdiction where the conviction occurred? The duty to remedy, as worded in the new proposed language, presents a conflict of interest problem that would subject current prosecutors to possible disciplinary issues as well. The duty to investigate is in direct conflict with laws regarding prosecutorial immunity. All of these issues have been discussed in great detail in the three letters sent to you by the TDCAA Rule 3.09 committee and I urge you all to read those letters and evaluate closely the lack of any real world need to make these proposed changes.

If this committee is dead set on making these proposed changes to rule 3.09, I request that you look at how at least 10 of the other states who have adopted some version of the model rule have implemented their changes and include the "good faith exception" into the body of the rule instead of in the comments. Also, please consider making this duty applicable to all attorneys in Texas. After all, if this is a moral imperative (as stated more than once by Professor Johnson) shouldn't that moral imperative apply to all who are licensed to practice law in our great state? At the very least, it should apply equally to those who have ever practiced criminal defense. An analysis of the data from the National Registry for Exonerations for the post-Morton Act time frame set out above shows that there were 20 exonerations in Texas for that time period which were due to Inadequate Legal Defense while only one for Prosecutor Misconduct. In fact, if you study the data for exonerations in Texas all the way back to 1989 through 2021, there were a total of 79 exonerations due to inadequate legal defense versus 37 due to prosecutorial misconduct (36 of those before the Morton Act in 2014). So what the data shows is that there are bigger problems to address in the area of adequate legal defense when discussing exonerations in Texas (that have not already been addressed by the legislature). The application of these proposed changes to

defense counsel as well as prosecutors would be of greater benefit those accused of crimes based upon the empirical evidence than the narrowly drawn proposal before you now.

Thank you for your time,

Kriste Burnett

29<sup>th</sup> District Attorney

Palo Pinto County, Texas

(940) 659-1251



**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: proposed new Rules 3.09(f),(g)&(h) and corresponding new comments, 7-9  
**Date:** Tuesday, April 5, 2022 4:07:49 PM

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

### Contact

<b>First Name</b>	Mike
<b>Last Name</b>	Ware
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	20864200

### Feedback

**Subject** | proposed new Rules 3.09(f),(g)&(h) and corresponding new comments, 7-9

### Comments

My name is Mike Ware. I have been board certified in criminal law since 1990. From 2007-2011 I was the head of the Dallas County District Attorney's Office Conviction Integrity Unit. Since 2016, I have been the executive director of the Innocence Project of Texas. Speaking on behalf of myself and the Innocence Project of Texas, I want to express our strong support of these excellent and much needed proposed new rules and comments regarding Special Responsibilities of a Prosecutor. I will simply reference a letter I wrote to this Committee dated December 2, 2021 as well as an op ed I wrote that was published in the Houston Chronicle on January 4, 2022, linked here: <https://www.houstonchronicle.com/opinion/outlook/article/Opinion-Adopt-rules-for-prosecutors-to-identify-16749795.php>. I do want to reiterate that the proposed new rules do not address the causes of wrongful convictions or point the finger at any member of the legal profession or anyone else as the cause. They simply give common sense and much needed guidance to prosecutors who come across what that person believes may be an innocent person who has been wrongfully convicted. Thank you for the opportunity to comment on this very important matter.

**From:** [Barbara Hervey](#)  
**To:** [cdrr](#)  
**Subject:** April 6, 2022 hearing  
**Date:** Tuesday, April 5, 2022 4:11:10 PM

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This is Judge Hervey from the Court of Criminal Appeals and I would like to address the committee tomorrow regarding proposed amendment to rule 3.09. As I have another meeting scheduled for noon, is there any way to speak out of turn or can you estimate the length of the hearing as this item is last?

Thank you in advance

Barbara Hervey

Sent from my iPhone

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Amendments to Ethics Rule 3.09  
**Date:** Tuesday, April 5, 2022 4:25:54 PM

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

### Contact

<b>First Name</b>	Wally
<b>Last Name</b>	Hatch
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	09214925

### Feedback

<b>Subject</b>	Amendments to Ethics Rule 3.09
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### Comments

To the Committee on Disciplinary Rules and Referenda: Currently, prosecutors have a continuing duty post-conviction to disclose exculpatory and mitigating evidence and will encounter potential grievances for any violations producing a wrongful conviction. The existing rule enumerates specific ethical obligations for a prosecutor. We, as members of the Bar, appreciate the work of the Committee to ameliorate issues with the current rules and set a high standard for lawyers who choose to practice in Texas. But this proposal requires elucidation. This Committee, with no intervening circumstance, proposes to address an esoteric "moral duty" that presumptively is not cured by the existing rules and is ostensibly ignored by prosecutors. The policy behind the Committee is to maintain a trustworthy, responsible, ethical Bar Association, comprised of attorneys expanding through different fields of practice. Our work affects people's lives. And that statement is not just true for prosecutors. It's true for all attorneys that practice in Texas. Texas prosecutors are not shrinking away from their duty to disclose, but of the untenable continuing duty to do so. This proposal is cumulative and excessive for current and retired prosecutors alike. If the onus to create a greater ethical duty for attorneys has become too significant for this Committee to ignore, shouldn't such increased obligation be put on all members of the Bar? Fundamentally, to suggest any other outcome would tell the public that the State Bar of Texas, in all cases other than criminal matters, accepts less ethical consideration and behavior from their lawyers. This proposal is an imbalanced and radical result under an un-explicated pretense of "moral duty." For these reasons, I oppose the proposed amendments to Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct. Wally Hatch District Attorney 64th and 242nd Judicial Districts Hale County, Texas



**From:** [Mark A. Richman](#)  
**To:** [cdrr](#)  
**Subject:** Proposed Rule 3.09 Amendment to TDRPC  
**Date:** Tuesday, April 5, 2022 4:40:31 PM

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Dear Members of the Committee,

The new proposed Rule 3.09 for the Texas Disciplinary Rules of Professional Conduct, particularly the requirement of continued responsibility to disclose even after no longer serving as a prosecutor, is highly concerning as it expands the scope of requirements for prosecutors in a manner that is both unnecessary and harmful to the practice of law.

The new proposed rule is unnecessary because the current rules provide ample requirements to prosecutors to disclose exculpatory and mitigating information to defendants and defense counsel to provide for the interest of justice. Prosecutors are already required to make such disclosures at any point in the case and the requirements of Brady v. Maryland and CCP 39.14 are properly encoded in the TDRPC.

The rule requiring disclosures by prosecutors even after they cease working for the appropriate jurisdiction or even after they cease working as prosecutors is extremely problematic.

First, this creates potential ethical conflicts for many attorneys in private practice. Most prosecutors who leave prosecution move into the private practice of law where they will have ethical duties to maintain the confidentiality of client communications and zealously represent their clients. The most likely method of receiving disclosable information would be in the service of clients and would create an ethical conflict between disclosure of exculpatory information and confidentiality of client communications and their ethical responsibility to zealously represent their clients. A large portion of the criminal defense bar and private civil bar are former prosecutors, all of whom could be subject to this requirement.

Second, this creates a chilling effect on recruitment of prosecutors. Any young attorney looking to gain experience as a prosecutor, or veteran attorney looking for a change of career, is going to think more than twice before being subjected to a lifetime requirement of disclosure even should they stop being prosecutors and move to the private practice of law. Starving prosecutor's offices of promising recruits will lead to lower quality attorneys and understaffed prosecutor's offices, which is more likely to aggravate the issues of disclosure that are sought to be ameliorated leading to more, not less, injustice.

Thank you for considering my statement here.

Respectfully,

Mark Richman  
SB# 24117195



**From:** [Amy Wills](#)  
**To:** [cdrr](#)  
**Subject:** Comment submission - Proposed Rules 1.00, 1.09, 1.10, 3.09  
**Date:** Tuesday, April 5, 2022 4:52:49 PM  
**Attachments:** [image001.png](#)  
[SBOT Proposed Rules OAG comment.pdf](#)

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Good afternoon,

Please see the attached comment provided by the Office of the Attorney General.

To ensure that the comment was received, please respond with a confirmation of receipt.

Thanks so much!

Sincerely,



**Amy Wills**  
Assistant Attorney General  
General Counsel Division  
OFFICE OF THE ATTORNEY GENERAL  
P.O. Box 12548  
Austin, Texas 78711-2548



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**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 5, 2022

State Bar of Texas  
Texas Law Center  
1414 Colorado Street  
Austin, Texas 78701  
Attn: Committee on Disciplinary Rules

Re: Comment on proposed disciplinary rules

Dear Committee Members,

The Office of the Texas Attorney General, Criminal Justice Division (hereinafter referred to as "OAG"), submits these comments—some minor, some substantive—in response to the proposed Texas Disciplinary Rules of Professional Conduct, Rules 1.00, 1.10, and 3.09.

**RULE 1.00. TERMINOLOGY**

**(1) Represent.**

The definition of "Represent," "Represents," or "Representation" is circular and vague. The material term "client" is not defined. There is no comment to help clarify its purpose, meaning, or application. The prior proposed rule is better.

**(2) Order of Words.**

In addition, the definition of "confirmed in writing" should precede the definition of "Consult."

## **RULE 1.10. IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE**

### **(1) Jurisprudential Mandate for Attorney General to Represent Conflicting Interests.**

As is commonly acknowledged by academics and courts alike, the practice of law in an attorney general's office creates many conflicts of interest not found in other law firms. First and foremost, the OAG represents the interests of Texas. But, pursuant to the Texas Constitution and various statutes, it also represents each of the state agencies. When one agency has different legal interests than another, a conflict of interest, as defined in Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct, can exist. Nevertheless, the Texas Supreme Court has recognized that the OAG *must* represent both agencies. See *Pub. Util. Comm'n of Texas v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988). See also *State v. Brabson*, 966 S.W.2d 49, 498 (Tex. Crim. App. 1998) (Womack, J., concurring), *en banc*. As recognized in *Cofer*, many states allow this dual representation. *Cofer*, 754 S.W.2d at 126. *This office requests that this jurisprudential mandate be recognized in the Comments to Rule 1.10.*

The Rules of Professional Conduct in different states treat this potential conflict in different ways. For example, the District of Columbia, Maine, and Utah exclude government agencies from the definition of "firm" for purposes of imputation. See D.C. R. Prof. Conduct 1.10 [Comment 1] ("the term 'firm' . . . does not include a government agency or other government entity"); M.R. Prof. Conduct Rule 1.10 (d) ("For purposes of Rule 1.10 only, 'firm' does not include government agencies."); M.R. Prof. Conduct, Preamble [Comment 18] ("Also, lawyers under the supervision of [the attorney general] may be authorized to represent several government agencies in legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority."); Utah R. Prof. Cond. 1.10 (f) ("An office of government lawyers who serve as counsel to a governmental entity such as the office of the Utah Attorney General, the United States Attorney, or a district, county, or city attorney does not constitute a "firm" for purposes of Rule 1.10 conflict imputation." *This office requests that Texas adopt a similar paragraph in Proposed Rule 1.10 that would protect the lawyers in this office from imputation of the conflict-of-interest rules.*

As an alternative, in *Cofer*, the Texas Supreme Court offered a resolution of the conflict-of-interest problem:

[T]he court may take appropriate action to ensure that the state attorneys who represent the opposing agencies are effectively "screened off" from each other, to the extent that the Attorney General has not already promulgated procedures to assure this. . . . [T]he court should carefully scrutinize all actions taken by the state attorneys who represent the opposing agencies, particularly in matters of compromise and settlement. The court should in all cases ascertain whether the

proposed settlement of the dispute between the agencies has met with their approval. Finally, in the unlikely event that any state attorney should fail to adequately represent the interest of his client agency, the court may deal with such failure in the same manner in which it may address such problems with other lawyers who practice before it.

Should the Committee not provide the explicit protection from the imputation rule that many states provide, this office requests that it provide a Comment that references the above jurisprudential rule allowing the different attorneys in this office to represent different agencies in the same matter as long as they are screened from each other, and our office has implemented a system of protecting confidentiality.

The OAG has two other suggestions regarding the new Rule 1.10.

## **(2) Redundancy.**

Currently existing Rules 1.06(f), 1.07(e), and 1.08(j) provide an imputation rule relevant to that particular rule. Upon adoption of Rule 1.10, those individual provisions will be redundant and could lead to misunderstandings or potential conflicts. Upon adoption of Rule 1.10, those paragraphs should be removed from the other rules.

## **(3) Notice Requirements.**

Also, Comment 9 to Rule 1.10 should be included in the body of the rule, rather than just included as a comment. Comment 9 identifies requirements for the substance of the notice as well as timing to provide the notice. For example, Comment 9 could be pulled into (a)(2)(ii):

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

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

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

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

(ii) written notice should be given to any affected former client as soon as practicable after the need for screening becomes apparent to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screened lawyer's prior representation, a description of the screening procedures employed; a statement of the firm's and

of the screened lawyer's compliance with these Rules, a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules, and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

### **RULE 3.09. SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

#### **(1) At a minimum, the proposed amendments are confusing.**

“Timely disclosure of exculpatory or mitigating information is important. So too is clarity in describing the responsibilities placed upon prosecutors in this context.” *Comm’n for Lawyer Discipline v. Hanna*, 513 S.W.3d 175, 183 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Importantly, although “‘disciplinary rules need not satisfy the higher degree of specificity required of criminal statutes,’ the rule must be set out in terms that an ‘ordinary lawyer, with ‘the benefit of guidance provided by case law, court rules and the lore of the profession,’ could understand and comply with it.” *Comm’n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437–38 (Tex. 1998); *see also* Tex. Disciplinary Rules Prof’l Conduct preamble ¶ 11 (“Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance . . .”).

Generally, subsection (g)—a subsection not found in the ABA Model Rules—is confusing and, possibly, misleading. Following subsection (f), it begins with a reference to a “duty to disclose exculpatory and mitigating evidence;” yet, subsection (f) only creates a duty to disclose *exculpatory* evidence that proves that a defendant *did not commit the crime* for which he was convicted, a rule broader than the constitutional requirements of *Brady*. The same is true of subsection (h). Subsection (g) also references “constitutional and statutory authorities” which are not mentioned elsewhere in the rule.

Perhaps, if subsection (g) stays in the rule at all, it should be located after subsection (d)—which does refer to exculpatory and mitigating evidence—or at the end of the rule and should specifically reference the previous subsections to which it applies.

To complicate matters, the comments give no guidance on the interpretation and application of subsection (g). They do not provide, for example, a sample scenario of how the rule would apply where a prosecutor has left the jurisdiction and later obtains knowledge of “exculpatory or mitigating evidence.” To ensure compliance with the rule, a “continuing duty” needs to have a clear application framework; otherwise, attorneys who are or were prosecutors can fall into a “gotcha” trap resulting from these confusing professional conduct standards.

In addition, subsections (f), (g), and (h) identify different standards of proof, creating confusion as to how the rule should be complied with. Subsection (f) creates a duty for the

prosecutor if there is “new, credible and material evidence.” Whereas subsection (g) places a duty to disclose “exculpatory and mitigating evidence.” Then, subsection (h) implements a prosecutorial duty where there is “clear and convincing evidence.” These duties, relying on different types of evidence, risk creating confusion for attorneys trying to comply. For example, under subsection (h), does the prosecutor have a duty to disclose “clear and convincing evidence” that is not credible? What if the evidence is not new but neither the prosecutor nor the defense chose to present it at trial? Can a prosecutor be disciplined in such a situation for failure to comply with subsection (h)? Although there may be an assumption underlying these rules that a prosecutor should understand any nuances such as those between types of evidence, that assumption is beyond the standard required. The standard is not whether a prosecutor understands the rule but whether an ordinary lawyer does. As written, an ordinary lawyer, in addition to former or current prosecutors, would likely have some confusion as to what is required to comply.

**(2) The proposed amendments are arguably superfluous.**

The proposed amendments for Rule 3.09 add a continuing duty for prosecutors concerning certain exculpatory evidence. This change seems unnecessary considering current Texas statutes, such as Texas Code of Criminal Procedure article 39.14(h), which mandates that the State “shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.”

Further, the Court of Criminal Appeals, in 2021, clarified that article 39.14(h)

places upon the State a free-standing duty to disclose all “exculpatory, impeaching, and mitigating” evidence to the defense that tends to negate guilt or reduce punishment. Our Legislature did not limit the applicability of Article 39.14(h) to “material” evidence, so this duty to disclose is much broader than the prosecutor’s duty to disclose as a matter of due process under *Brady vs. Maryland*. This subsection blankets the exact type of exculpatory evidence at issue in the Michael Morton case while creating an independent and continuing duty for prosecutors to disclose evidence that may be favorable to the defense even if that evidence is not “material.”

*Watkins v. State*, 619 S.W.3d 265, 277 (Tex. Crim. App. 2021) (cleaned up). The Court, in *Watkins*, explained that the State has a duty to disclose “all ‘exculpatory, impeaching, and mitigating’” evidence. *Id.* (emphasis added). In addition, the Court already clarified that prosecutors have a “continuing duty” to disclose evidence that “may be favorable to the defense even if that evidence is not ‘material.’” *Id.*



Further, under Rule 8.04(a)(12), a lawyer “shall not . . . violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.” The broad language of this rule encompasses a prosecutor’s duty under article 39.14. Thus, the proposed amendments to Rule 3.09 appear redundant.

However, if Rule 3.09 is to be amended, at a minimum the duty in the Rule should reflect current Texas jurisprudence. Deviating from that creates confusion for lawyers who want to comply.

**(3) Proposed Rule 3.09 creates an unfunded mandate.**

Although subsections (f) and (h) parallel subsections (g) and (h) of ABA Model Rule 3.8, the OAG still has some concerns about the provisions as applied in the State of Texas. For example, subsection (f)(2)(ii) requires a prosecutor to “undertake further investigation or make reasonable efforts to cause an investigation” to determine if a defendant was convicted of an offense he did not commit. This is clearly an unfunded mandate—and an unnecessary one.

Any mandate that prosecutors must investigate potential wrongful convictions must come with the resources to accomplish that task. The OAG does not receive funding from the Legislature to conduct such investigation—although numerous entities in Texas do receive such funding. The Legislature has by statute and funding policy designated various groups other than prosecutors to be primarily responsible for the investigation of potentially wrongful convictions, including, law school innocence projects, the Forensic Science Commission, and the Office of Capital and Forensic Writs.

**(4) Subsection (h) is overbroad and under-inclusive.**

The duty to “seek a remedy” found in subsection (h) is vague and both overbroad and under-inclusive at the same time.

**(5) Proposed Solutions**

**(a) Keep the current text of Rule 3.09 and do not amend.**

Due to the above concerns, the OAG recommends keeping the current Rule 3.09 instead of amending it.

**(b) Limit the amendments to adding a “continuing duty” as explained by the Court of Criminal Appeals and add a good-faith exception.**

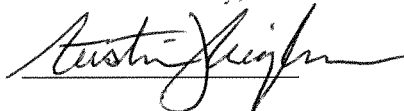
However, if Rule 3.09 is amended, any “continuing duty,” at a minimum, should be consistent with the decision in *Watkins*. The proposed Rule 3.09 as written is not.

Of note, one issue with simply mirroring the language in *Watkins* is that the interpretation is unnecessarily broad, extending criminal discovery requirements beyond that constitutionally required. The better approach would be to simply state that a prosecutor has a duty to comply with Texas Criminal Code of Procedure article 39.14 and a failure to do so is a violation of Rule 3.09.

In addition, the text of Comment 9 should be part of the rule, not buried in the comments. Comment 9 identifies a good-faith exception for a prosecutor’s defense. Because Comment 9 reads as creating a substantive defense versus a guideline used to interpret the rule, the good-faith exception should be included in the Rule if the Rule is amended.<sup>1</sup>

In addition to the above comments, the OAG also supports, and adopts as if fully set forth herein, the comments sent to your office by the Texas District and County Attorneys Association in their letters dated October 19, 2021, December 17, 2021, and January 24, 2022, copies of which are attached.

Sincerely,



Austin Kinghorn  
General Counsel

Amy Wills  
Assistant Attorney General  
General Counsel Division

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Special Counsel  
Legal Strategy

/Encl.

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<sup>1</sup> In the Scope section of the ABA Model Rules, Note 21 provides that the “*Comments are intended as guides to interpretation, but the text of each Rule is authoritative.*” (Emphasis added).

# COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

## Texas Disciplinary Rules of Professional Conduct

### Rule 100. Terminology

#### Rule 1.09. Conflict of Interest: Former Client

#### Rule 110. Imputation of Conflicts of Interest: General Rule

#### Rule 3.09. Special Responsibilities of a Prosecutor

*The Committee on Disciplinary Rules and Referenda, or CDRR, was created by Government Code section 81.0872 and is responsible for overseeing the initial process for proposing a disciplinary rule. Pursuant to Government Code section 81.0876, the committee publishes the following proposed rules. The committee will accept comments concerning the proposed rules through April 5, 2022. Comments can be submitted at [texasbar.com/CDRR](https://texasbar.com/CDRR) or by email to [cdrr@texasbar.com](mailto:cdrr@texasbar.com). The committee will hold a public hearing on the proposed rules by teleconference at 10 a.m. CDT on April 6, 2022. For teleconference participation information, please go to [texasbar.com/cdrr/participate](https://texasbar.com/cdrr/participate).*

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

### Proposed Rules (Redline Version)

#### Rule 100. Terminology

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **Comment:**

#### **Confirmed in Writing**

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

2. Whether two or more lawyers constitute a firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful

cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

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

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

#### **Fraud**

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

#### **Informed Consent**

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

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

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

### **Screened**

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

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

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

### **Rule 1.09. Conflict of Interest: Former Client**

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

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

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

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

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

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

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

### **Comment:**

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

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

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

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

### **Lawyers Moving Between Firms**

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

5. Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.05 and 1.09(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b)<sup>7</sup> for the restrictions on a firm once a lawyer has terminated association with the firm.

6. Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer

may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

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

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

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

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

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

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

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

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

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

### **Comment:**

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



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

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

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

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

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

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

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

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

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

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

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

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

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

#### **Rule 110. Imputation of Conflicts of Interest: General Rule**

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

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

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

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

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

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

(1) the matter is the same or substantially related to that in

which the formerly associated lawyer represented the client; and

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

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

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.<sup>7</sup>

#### **Comment:**

##### **Definition of “Firm”**

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

##### **Principles of Imputed Disqualification**

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

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

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



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

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

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

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

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

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

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

### **Rule 3.09. Special Responsibilities of a Prosecutor**

The prosecutor in a criminal case shall:

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

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

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

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

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

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

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

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

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

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

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

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

### **Comment:**

#### **Source and Scope of Obligations**

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

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

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

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

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

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

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

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

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

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

## Notes

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

# COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

## Texas Disciplinary Rules of Professional Conduct

### Rule 1.00. Terminology

#### Rule 1.09. Conflict of Interest: Former Client

#### Rule 1.10. Imputation of Conflicts of Interest: General Rule

#### Rule 3.09. Special Responsibilities of a Prosecutor

*The Committee on Disciplinary Rules and Referenda, or CDRR, was created by Government Code section 81.0872 and is responsible for overseeing the initial process for proposing a disciplinary rule. Pursuant to Government Code section 81.0876, the committee publishes the following proposed rules. The committee will accept comments concerning the proposed rules through April 5, 2022. Comments can be submitted at [texasbar.com/CDRR](https://texasbar.com/CDRR) or by email to [cdrr@texasbar.com](mailto:cdrr@texasbar.com). The committee will hold a public hearing on the proposed rules by teleconference at 10 a.m. CDT on April 6, 2022. For teleconference participation information, please go to [texasbar.com/cdrr/participate](https://texasbar.com/cdrr/participate).*

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

### Proposed Rules (Clean Version)

#### Rule 1.00. Terminology

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **Comment:**

##### **Confirmed in Writing**

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

2. Whether two or more lawyers constitute a firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would

not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

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

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

#### **Fraud**

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

#### **Informed Consent**

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

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

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

### Screened

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

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

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

### Rule 109. Conflict of Interest: Former Client

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

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

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

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

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

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

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

### Comment:

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

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



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

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

### Lawyers Moving Between Firms

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

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

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

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

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

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

### Rule 1.10. Imputation of Conflicts of Interest: General Rule

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

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

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

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

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

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

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

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

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

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.<sup>7</sup>

#### **Comment:**

##### **Definition of "Firm"**

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

##### **Principles of Imputed Disqualification**

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

3. The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not

effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

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

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

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

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

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

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

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

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

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

### **Rule 3.09. Special Responsibilities of a Prosecutor**

The prosecutor in a criminal case shall:

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

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

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

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

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

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

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

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

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

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

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

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

### **Comment:**

#### **Source and Scope of Obligations**

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

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

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



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

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

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

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

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

8. Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of

the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

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

## Notes

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