SUPPLEMENTAL REPORT BY THE STATE BAR OF TEXAS COMMITTEE ON THE DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

RULE PROVIDING EXCEPTIONS TO CONFLICTS OF INTEREST RULES FOR NONPROFIT AND LIMITED PRO BONO LEGAL SERVICES
MAY 25, 2016

In December 2014, the State Bar of Texas Disciplinary Rules of Professional Conduct Committee (Committee) recommended the adoption of a Rule that addresses conflicts of interest arising from lawyers' provision of pro bono legal services.[1] Generally, the Rule would facilitate the provision of pro bono legal services by (1) permitting a lawyer to accept a pro bono representation unless the lawyer knows of a conflict of interest that prohibits acceptance; (2) preventing the imputation of a conflict of interest that arises from a lawyer's provision of pro bono legal services, if the lawyer adequately protects the pro bono client's confidential information; and (3) preventing eligibility information collected by limited pro bono legal services programs from creating conflicts of interest in certain circumstances. The Committee's recommendation was referred to the State Bar of Texas Board Discipline and Client Attorney Assistance Program Committee (DCAAP) for consideration. Members of the Committee and DCAAP spoke about the recommendation in April 2015. DCAAP members then expressed concern about the Rule's permitting a lawyer in a firm with a lawyer who provided limited pro bono legal services to represent a party averse to the pro bono client in the same matter that the client discussed with the service provider.

In its next several meetings, Committee members discussed this concern. Committee members also discussed the proposed Rule with other interested groups, including the State Bar of Texas Pro Bono Working Group and the Texas Access to Justice Commission. While recognizing that the contemplated representation might be perceived as inappropriate, the Committee concluded that the proposed Rule should not be amended. Specifically, it concluded that the risk that an actual conflict of interest would arise is slight given the restricted scope of limited pro bono legal services, that the Rule adequately protects against this risk, and that the Rule's imputation provision is necessary to facilitate the provision of limited pro bono legal services. This conclusion was supported by other groups' endorsements of the Rule as drafted.[2] However, the Committee believed that it should better explain the imputation provision and therefore amended Comment 5 to the proposed Rule so that it reads as follows:

> Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that a conflict of interest arising from a lawyer's representation covered by this Rule will not be imputed to the lawyers in the pro bono lawyer's firm if the pro bono lawyer complies with subparagraphs

[1] See Report, attached as Exhibit 1.

[2] See Letter of Support from the Pro Bono Working Group, attached as Exhibit 2; Resolution of the Texas Access to Justice Commission, attached as Exhibit 3.

(b)(1) and (2). Therefore, by virtue of paragraph (b), a lawyer's provision of limited pro bono legal services does not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests averse to a client receiving the services.

With this amendment, the Committee again recommends the addition of its proposed Rule providing exceptions to conflicts of interest rules for nonprofit and limited pro bono legal services.

EXHIBIT 1

REPORT BY THE STATE BAR OF TEXAS COMMITTEE ON THE DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

RULE PROVIDING EXCEPTIONS TO CONFLICTS OF INTEREST RULES FOR NONPROFIT AND LIMITED PRO BONO LEGAL SERVICES
DECEMBER 12, 2014

The State Bar of Texas Committee on the Disciplinary Rules of Professional Conduct (Committee) submits this report to the State Bar President and Board of Directors. The Committee recommends the addition of a Rule that addresses conflicts of interests that arise from lawyers' provision of pro bono legal services. It further recommends that the Rule, if adopted, be added to Part VI of the Rules, which concerns public service. This recommendation replaces the Committee's 2010 recommendation that proposed Rule 6.05, which also addressed these conflicts of interest, be adopted.[1]

Overview

The Committee's proposed Rule was inspired by Model Rule 6.5.[2] The Model Rule was added in response to concern that strict application of conflict of interest rules may deter lawyers from volunteering to provide pro bono legal services.[3] Sharing this concern, the Committee endeavored to draft a similar rule.

To begin, the Committee requested that the Supreme Court ask people in Texas who are involved in providing equal access to justice and pro bono legal services to review Model Rule 6.5 to determine whether the Rule (1) is consistent with procedures already governing voluntary pro bono representation; (2) conflicts with how voluntary pro bono plans are administered in Texas; and (3) sufficiently addresses the conflict of interest problems pro bono representation presents or, on the other hand, provides too great an exception to general conflict of interest requirements. Subsequently, such people were added to, or identified on, the Committee, and it undertook a review of Model Rule 6.5.

The Committee found that the Model Rule's first provision, which generally permits a lawyer to accept a pro bono representation unless the lawyer knows of a conflict of interest that prohibits acceptance, was well considered and should be included in a Texas rule without substantive changes. However, the Committee found that the Model Rule's second provision, which generally prevents the imputation of

[1] See Report by the State Bar of Texas Committee on Texas Disciplinary Rule of Professional Conduct Rule 6.05 (New Rule), attached as Exhibit A. Please note that proposed Rule 6.05 was not part of the 2011 referendum on proposed amendments to the Disciplinary Rules.

[2] A comparison of the Committee's Rule and its Model Rule analogue, Rule 6.5, appears in Exhibit B.

[3] For a discussion of the conflict of interest problems involved with voluntary lawyer programs, see, Rachel Brill and Rochelle Sparko, Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest, 16 GEORGETOWN JOURNAL OF LEGAL ETHICS 553 (2003).

conflicts of interest that arise from a lawyer's provision of pro bono legal services, to be too broad. It therefore concluded that a similar Texas rule should prevent imputation only when specified conditions are satisfied, balancing (1) concerns of affiliated lawyers' that they will be prohibited from accepting future representations by conflicts created by pro bono work undertaken by one of them and (2) interests of pro bono clients in the confidentiality of information they disclose. The Committee further found that Model Rule 6.5 did not address unique problems caused by nonprofit legal services organizations' collection and possession of eligibility information applicants for services must provide. Finally, the Committee found that the Model Rule did not sufficiently define the kinds of services such a rule should target or clearly indicate that lawyers working in the same pro bono program were not necessarily working in the same firm. Each of these findings is reflected in the Committee's proposed Rule.

The Committee is comfortable that the modifications suggested by its recommended Rule advance the purposes underlying the Model Rule while protecting the interests of people who may need to use voluntary pro bono legal services. Notably, other states have adopted variations of Model Rule 6.5 more suited to their particular needs.[4]

Paragraph (a)

Paragraph (a) in Model Rule 6.5 combines a broad (and, in the Committee's opinion, incomplete) definition of the targeted services with an exemption from Model Rules concerning conflicts of interest. For clarity, the Committee has defined the targeted services separately, in paragraph (d).

The limitations on representation in Texas Rules 1.06, 1.07, and 1.09 effectively require lawyers to perform conflict checks so as not to accept a representation that conflicts with the interests of a current or former client, in reference to a client of both an individual lawyer and of lawyers in the same firm with that lawyer. Lawyers who perform the specific type of pro bono legal services defined in this Rule will often do so in the field, such as at sites established to help victims of natural disasters or at a weekend legal clinic. These lawyers will not have the luxury of time or access to the records needed to perform conflict checks. In such situations, these lawyers are prohibited by the proposed Rule from providing the limited pro bono representation only if they actually know of prohibiting conflicts when the representation presents itself, without performing a conflict check.

[4] See, e.g., New York Rule 6.5, Participation in Limited Pro Bono Legal Services Programs; New Hampshire Rule 6.5, Nonprofit and Court-Annexed Limited Legal Services Programs.

Paragraph (b)

Paragraph (b) provides a way for a lawyer who supplies limited pro bono legal services contemplated by this Rule to prevent the imputation of conflicts associated with that representation to other lawyers in the lawyer's firm. The lawyer simply has to make sure that confidential information of the pro bono client is not accessible to the other lawyers. Thus, the lawyer who volunteers at a covered program can take steps to avoid tainting the other lawyers at the lawyer's firm with confidential information the lawyer learns in the representation. Depending on the circumstances, a lawyer may shield them from exposure to potential conflicting information simply by not taking the information back to the lawyer's office or by not storing it in the lawyer's client files or database of the lawyer's firm, legal department, or agency.

A lawyer who provides limited pro bono services will be prohibited from representing other clients due to confidential information learned from the pro bono client, but this prohibition will not be imputed to other lawyers in the same firm unless the confidential information is effectively shared with them. If the pro bono lawyer, for example, places the pro bono client's confidential information into the firm database, it is effectively shared with the rest of the firm. This exception is a major difference between fee-based representation and pro bono representation. In the former, the knowledge of confidential client information by one lawyer is imputed to all lawyers in the firm, whether or not they actually have that knowledge.

Paragraph (c)

Paragraph (c) extends the scope of the proposed Rule beyond that of its Model Rule analogue to deal with the possession of eligibility information by legal services organizations. Its goal is to provide a means for preventing the possession of eligibility information from being used to disqualify legal services staff and pro bono lawyers from representing other clients.

People who seek pro bono legal services typically need to establish their eligibility for such services. Eligibility is generally based on financial, immigration, and residence criteria determined by funders such as the Texas Access to Justice Foundation, which administers funds from the Interest on Lawyers Trust Accounts program and other sources. This information exceeds, in its sensitivity, the kind of information a prospective client will usually share with a lawyer when seeking representation.

Merely gathering such information can, under a strict reading of the Rules, create a potential conflict of interest involving the applicant and other parties to the same or a substantially related legal matter. This conflict is imputed to every lawyer in the legal services organization. Indeed, even if an applicant is determined to be ineligible and is turned away before any legal services are provided, and the eligibility information is segregated or stored in a way that makes it inaccessible to the legal staff of the organization and its volunteer lawyers, the organization has no way of avoiding the

potential conflict of interest the information creates. Moreover, disingenuous parties too often apply for legal aid knowing they are ineligible solely to prevent their adversaries from accessing free legal services from the organization. These bad faith applications create false conflicts and block access to legal services for the second applicant because, in most of these cases, no alternative sources of free legal assistance are available.

Paragraph (c) provides that such eligibility information will not create a conflict of interest in certain situations. Subparagraphs (1) and (2) provide clear means for determining when the eligibility information does not pose a basis for a conflict. The first provides that, if the information is not material to the legal matter, then that information will not create a conflict. The second, an advance waiver to using confidential eligibility information as a basis for disqualification, is a new concept to the Texas Rules. The Committee's inspiration for this inclusion came from the following comment to the Model Rule concerning prospective clients:

> A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

As significant is that the Professional Ethics Committee (PEC) endorsed such advance waivers in its Opinion 608, which considered conflicts of a lawyer working for a legal services organization. The PEC concluded as follows:

> A lawyer for a legal services organization is permitted under the Texas Disciplinary Rules of Professional Conduct to represent a client in a child custody matter against an adverse party who had unsuccessfully applied for services of the legal services organization in the same matter, provided that the unsuccessful applicant had consented in writing, after appropriate disclosure by the organization of the relevant circumstances, that the provision of limited information requested by the organization to determine financial eligibility in the intake screening process would not by itself result in restricting the legal services organization or its lawyers from providing services to other persons who might be adverse to the unsuccessful applicant.

The PEC, in the absence of specifically relevant Texas Rules, fashioned its guidance out of a painstaking analysis of the current conflicts Rules. While certainly helpful in providing this guidance for legal services organizations, Opinion 608, like all ethics opinions, addressed only the factual scenarios presented. The Committee's proposed Rule, incorporating the scenarios addressed in Opinion 608, also provides

guidance for potential conflict scenarios with pro bono representation not dealt with in that opinion.

Paragraph (d)

Paragraph (d) supplies the definition of "limited pro bono legal services" for the Rule. It is designed to make clear the circumstances under which the narrow conflict of interest exceptions provided by this Rule apply: those where a lawyer offering limited pro bono legal services does not have the opportunity to perform a standard check for conflicts. If the lawyer takes on any other type of pro bono representation, then it does not qualify for the exemptions provided by this Rule. For example, a lawyer who attends a bar association legal aid clinic, agrees to help a client obtain a divorce, and assists that client over a multi-week or multi-month time period, has time to check for potential conflicts of interest and therefore is not providing "limited pro bono legal services" contemplated by this Rule. The legal services must be completed prior to the lawyer having such an opportunity or they will not qualify as "short-term services."

Additionally, to avoid creating an unintended opening for fee-based legal service providers, the Committee has made clear in the Rule that this Rule's exception applies only when the services are provided without any expectation of either extended representation or legal fees from the client.

Paragraph (e)

Paragraph (e) clarifies that volunteer lawyers merely working through the same legal services program at the same time as the lawyer providing the services are not deemed to be in a firm for the purposes of this Rule. This means, for example, that a group of lawyers who are not otherwise practicing law together as a firm may assemble at a location, such as natural disaster shelter, and confer with each other as necessary. Nor will the personal prohibition of a lawyer participating in the program be imputed to other lawyers solely because they are participating in the same program, unless there is another basis for barring representation, such as when lawyers in the same program are also in the same firm.

EXHIBIT A

REPORT BY
THE STATE BAR OF TEXAS COMMITTEE ON
TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT
RULE 6.05 (NEW RULE)

The State Bar of Texas Committee on the Texas Disciplinary Rules of Professional Conduct (Committee) submits this report to the Texas Supreme Court, to Roland Johnson, Texas State Bar President, and to the Board of Directors of the State Bar. This report addresses a new proposed Rule 6.05, to be added to those Rules that deal with public service and are currently located in Part VI. This recommendation supplements the Committee's prior recommendations regarding other Rules in current Part VI.[1]

The Committee's Rule 6.05 as compared with ABA Rule 6.5 appears in **Attachment A**. The current Texas Rules has no equivalent of Rule 6.05, nor did the Court-appointed Task Force make a recommendation regarding Rule 6.05.

Overview

When the Committee submitted its initial report on the Rules regarding the duties and responsibilities of a lawyer engaged in public service legal work, it believed that ABA Rule 6.5 seemed to be an excellent idea. The ABA Rule was added in response to the concern that strict application of the conflict of interest rules may deter lawyers from serving as volunteers in programs that provide legal services pro bono. However, ABA Rule 6.5 provides a very broad exception to conflict of interest prohibitions that are at the core of the fiduciary duty a lawyer owes a client and that are imputed to other lawyers with whom the lawyer practices.[2]

Before adopting this Rule, the Committee concluded that those in Texas knowledgeable about the process of providing equal access to justice and with providing legal services pro bono should look at this ABA Rule initially and decide whether the ABA Rule (1) matches any procedures already governing voluntary pro bono representation; (2) poses any problems with how voluntary pro bono plans are being administered in Texas; and (3) sufficiently addresses the conflict

[1] In its original report, the Committee made the following recommendations regarding the Rules in current Part VI:

1. Move current Texas Rule 1.13 to make it 6.02 and then amend it in order to make it substantially identical to ABA 6.3
2. Adopt ABA 6.4 (making it Texas 6.03) with only one change
3. Not adopt ABA 6.1
4. Keep current Texas Rule 6.01, which is identical to ABA Rule 6.2

[2] For a discussion of the conflict of interest problems involved with voluntary lawyer programs, see, Rachel Brill and Rochelle Sparko, Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest, 16 GEORGETOWN JOURNAL OF LEGAL ETHICS 553 (2003).

of interest problems in pro bono representation, or on the other hand, provides too great an exception to general conflict of interest requirements.

Therefore, the Committee recommended that the Supreme Court send ABA Rule 6.5 to those in Texas who are most involved in providing equal access to justice. After that time, the Committee became equipped to consider the issues with ABA Rule 6.5 and is comfortable that the modifications afforded by its recommended Rule 6.05 advance the purposes underlying the Model Rule while protecting the interests of members of the public who may need to use voluntary pro bono legal services.

Working with the goals of Rule 6.05 and the approach taken by the ABA posed three major problems. First, the Committee recognized—through the pro bono experiences of many of its members—that an individual lawyer may be deterred from providing free legal services even at a help desk or disaster relief center by pressure from affiliated lawyers who may fear that they will be prohibited from taking a future fee-based representation due to conflicts created by the one lawyer's pro bono work out of the office. Second, the relaxation of the prohibitions on representation in the various conflicts Rules (e.g., Rules 1.06, 1.07, 1.09, and the new 1.17), on both the lawyer providing the pro bono representation and affiliated lawyers, would need to be carefully crafted so as to provide protection to the pro bono clients consistent with that provided to fee-paying clients. Third, although the Committee immediately recognized problems with the ABA formulation, virtually every state that has adopted a pro bono legal services Rule has tracked the ABA language, providing no guidance for deviation. New York has substantially amended ABA Rule 6.5, and the Committee was guided by its innovation (due to New York using the Model Rule numbering and format, strict adherence to New York's language was not possible and, for other reasons, was not desirable).

The Committee concluded that it could address all three problems by following the general approach of the ABA in making this an unconventional disciplinary Rule. That is, by its language, the Rule neither prohibits nor requires specific behavior but instead provides a narrow exception to certain provisions of indicated conflicts Rules. Also, the Committee believed it could curtail abuse of the lifting of some of the representation prohibitions in the indicated conflicts Rules with a careful definition of kind of services targeted, which is not fully developed in the ABA Rule. Finally, the Committee has provided protection for the pro bono client that is simply missing in the ABA Rule.

Paragraph (a)

Paragraph (a) in ABA Rule 6.5 combines a broad (and, in the Committee's opinion, incomplete) definition of the targeted services with an exemption from Model Rules 1.6 1.9(a), and 1.10. For clarity, the Committee has defined the targeted services separately, in paragraph (d). As the ABA Model Rules place

aspects of the conflicts Rules in different places than do the Texas Rules (for example, the ABA addresses imputation to affiliated lawyers in its Rule 1.10, while the Texas Rules do so within each Rule, when it applies), the references in ABA Rule 6.5 are simply unworkable for Texas. Moreover, the equivalent Texas Rule numbers may not simply be substituted, as exemptions are provided only for limited portions of the indicated conflicts Rules.

In paragraph (a), a majority of the Committee voted to deviate from strict disciplinary Rule format (e.g., "a lawyer shall" or "a lawyer shall not") mainly to exert a visual appeal to lawyers to provide pro bono legal services. Those opting for this format believed that lawyers would be discouraged by strictly prohibiting or mandatory language. The Committee considered making this a purely permissive "Rule" with "may" (as in proposed new Rule 6.02, "A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer."), but decided that its proposal was more clearly an exception.

The limitations on representation in Rules 1.06, 1.07, 1.09, and proposed 1.17 effectively require lawyers to perform conflicts checks so as not to take on a representation that conflicts with a representation of a current or former client, both of the individual lawyer or lawyers affiliated with that lawyer. Lawyers who perform pro bono legal services as defined in this Rule will often do so in "the field," such as at impromptu sites established to help victims of natural disasters or at a weekend legal clinic. These lawyers will not have the luxury of time or access to the requisite records to perform conflicts checks. Thus, the lawyers are prohibited from taking the pro bono representation only if they actually know at the time of prohibiting conflicts, without performing a conflicts check. A comment will explain that, if they have simply forgotten and, in the fullness of time, might have recalled a conflict, they may use the exemption provided by this Rule.

A comment will also explain that, if, in the brief amount of time a lawyer will spend on the services defined in this Rule, the lawyer learns of a conflict that prohibits the lawyer's personal representation of the pro bono client, then the lawyer must take the same steps as Rule 1.06, 1.07, and 1.09 provide for a fee-paying client. New York, one of the few states to vary from the ABA Model Rule 1.6, has this as a specific provision.[3]

[3] New York's rule provides as follows: "(e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation."

Paragraph (b)

Paragraph (b) provides a way for the lawyer who supplies limited pro bono legal services contemplated by this Rule to prevent the imputation of conflicts associated with that representation to affiliated lawyers. The lawyer simply has to make sure that confidential information of the pro bono client (or the prospective pro bono client, if the representation does not occur) is not accessible to affiliated lawyers. Thus, the lawyer who volunteers at a covered program should intend at the outset to take steps to avoid tainting affiliated lawyers with confidential information the lawyer learns in the representation. Depending on the circumstances, a lawyer may shield affiliated lawyers from exposure to potential conflicting information simply by not storing confidential information from the limited assistance client in the lawyer's client files or database of the lawyer's firm, legal department, or agency.

While the lawyer who provides the limited pro bono services will be prohibited from representing other clients due to confidential information learned from the pro bono client to the same extent as if the pro bono client were a fee-paying client, this prohibition will not be imputed to affiliated lawyers unless the confidential information is effectively shared with them. If the pro bono lawyer, for example, places the pro bono client's confidential information into the firm database, it is effectively shared with affiliated lawyers. This is a major difference between fee-based representation and pro bono representation. In the former, the knowledge of confidential client information by one lawyer is imputed to affiliated lawyers, whether or not they actually have that knowledge.

Paragraph (c)

People who seek pro bono legal services typically need to establish their eligibility for such services. Eligibility is generally based on financial, immigration, and residence criteria as determined by funders such as the Texas Access to Justice Foundation, which administers funds from the Interest on Lawyers Trust Accounts program and other sources, and such criteria are mandatory conditions under which the sponsoring organization may use grant funds to provide free legal assistance through its staff and volunteers. This information exceeds, in its sensitivity, the kind of information a prospective client will usually share with a lawyer under Rule 1.17. Applicants for free legal assistance must be determined eligible before even receiving the assistance. Accordingly, greater protection is afforded the eligibility information of the pro bono client than the information of the non-pro bono prospective client, in that Rule 1.17 permits a lawyer to condition a discussion with a prospective client on a waiver as to the use of confidential information imparted in that discussion. Such a waiver prevents a prospective client from unilaterally creating a prohibition on a lawyer or law firm's representation of an opposing party simply by sharing confidential information. No waiver is possible with the prospective pro bono client because of the nature of the information and the different goals of the pro bono client (who needs to

obtain limited legal services in often emergency situations) and the fee-paying client (who may simply be assessing a number of lawyers for the most desirable, given the issues and circumstances).

Paragraph (c), then absolutely prevents the lawyer from using the pro bono client's eligibility information to the disadvantage of the individual, whether or not the individual becomes a pro bono client. In reality, the lawyer who provides the pro bono services may never have access to such information. However, a lawyer in an impromptu setting may need to make eligibility determinations on the spot in accordance with the eligibility guidelines of the funding source sponsoring the event. A comment will explain that the mere receipt of such information by the lawyer, when the prospective client is rejected and not helped, will not create a conflict of interest for the lawyer regarding a different representation in the same or a substantially related matter.

Rules 1.05 and 1.17 continue to apply to protect any confidential information provided during the eligibility interview and limit the lawyer's ability to undertake a representation based on information other than that required to establish eligibility or where the same information is material to an issue in the representation. Once the lawyer has agreed to provide legal services, then all of the disciplinary Rules apply to the relationship except as expressly stated in this Rule.

Paragraph (d)

Paragraph (d) supplies the definition of "limited pro bono legal services" for the Rule. It is designed to make clear the circumstances under which the narrow exceptions provided by this Rule apply: those where a lawyer does not have the opportunity to perform a standard check for conflicts. If the lawyer takes on any other type of pro bono representation, then it does not qualify for the exemptions provided by this Rule. For example, a lawyer who attends a bar association legal aid clinic, agrees to help a client obtain a divorce, and assists that client with the various steps over a multi-week or multi-month time period, has plenty of time to return to the office and check for potential conflicts of interest and therefore exceeds the "limited pro bono legal services" contemplated by this Rule. The legal services must be completed prior to the lawyer having such an opportunity or they will not qualify as "short-term services."

Additionally, in order to avoid creating an unintended opening for fee-based legal service providers, the Committee has made clear in the Rule that this Rule's exception applies only when the services are provided without any expectation of either extended representation or legal fees from the client.

New York's version of ABA Rule 6.5 contains a separate definition of the services to be affected by its Rule. The committee in New York formed to recommend changes to its Rules based on the 2003 Model Rules (previously,

New York still had the ABA Model *Code*, not even the 1983 Model Rules) essentially suggested the ABA version. New York's court, however, added three provisions, a separate definition being one of them.[4]

Paragraph (e)

Paragraph (e) clarifies that "affiliated" in reference to other lawyers than the lawyer providing the pro bono legal services does not include other volunteer lawyers merely working through the same legal services program at the same time as the lawyer providing the services. Thus, the lawyer providing the services does not have to be concerned about safeguarding confidential client information of the pro bono legal services clients or applicants. This means, for example, that a group of lawyers who are otherwise unaffiliated may assemble at a location, such as natural disaster shelter, and confer with each other as necessary. Nor will the personal prohibition of a lawyer participating in the program be imputed to other lawyers solely because they are participating in the same program, unless there is another basis for barring representation, such as when lawyers in the same program are also in the same firm.

[4] New York's definition is as follows: "(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance."

ATTACHMENT A:
RULE 6.05—ABA & COMMITTEE PROPOSED

ABA Version	Proposed Committee Version
Rule 6.5 Nonprofit and Court-annexed Limited Legal Services Programs (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter: (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.	**Rule 6.05 Pro Bono Legal Service Programs** (a) The conflicts of interest limitations on representation in Rules 1.06, 1.07, 1.09, and 1.17 do not prohibit a lawyer from providing limited pro bono legal services unless the lawyer knows at the time the services are provided that the lawyer would be prohibited by those limitations from providing the services. (b) If the lawyer providing limited pro bono legal services maintains any confidential information of the limited assistance client or prospective client in a manner that would render that information inaccessible by lawyers affiliated with that lawyer, conflicts of interest in Rules 1.06, 1.07, 1.09, and 1.17 shall not be imputed to those affiliated lawyers. (c) A lawyer who receives confidential information provided by an applicant or prospective client required for a determination of eligibility for limited pro bono legal services or for free legal services from a program sponsored by a court, bar association, accredited law school, or an organization funded by the IOLTA program, shall not use that information to the disadvantage of the applicant or prospective client, except as required by Rule 1.05. (d) As used in this rule, “limited pro bono legal services” means legal services that are: (1) provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, nonprofit legal services program, or nonprofit organization funded

ATTACHMENT A:
RULE 6.05—ABA & COMMITTEE PROPOSED

ABA Version	Proposed Committee Version
	through the Interest on Lawyers Trust Account (IOLTA) program; (2) short-term services such as legal advice or other brief assistance with pro se documents or transactions, provided either in person or by phone, hotline, internet, or video conferencing; and (3) provided without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter. (e) As used in this rule, "affiliated" does not include mere association through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, nonprofit legal services program, or nonprofit organization funded through the Interest on Lawyers Trust Account (IOLTA) program.

EXHIBIT B

Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services

Texas Rule Language	Proposed Comments to Texas Rule	ABA Rule Language	Comments to ABA Rule
	[1] Nonprofit legal services organizations, courts, law schools, and bar associations have programs through which lawyers provide short-term limited legal services typically to help low-income persons address their legal problems without further representation by the lawyers. In these programs, such as legal-advice hotlines, advice-only clinics, disaster legal services, or programs providing guidance to self-represented litigants, a client-lawyer relationship is established, but there is no expectation that the relationship will continue beyond the limited consultation and there is no expectation that the lawyer will receive any compensation from the client for the services. These programs are normally operated under circumstances in which it is not feasible for a lawyer to check for conflicts of interest as is normally required before undertaking a representation. [2] Application of the conflict-of-interest rules is deterring lawyers from participating in these programs, preventing persons of limited means from obtaining much needed legal services. To facilitate the provision of free legal services to the public, this Rule creates narrow exceptions to the conflict-of-interest rules for limited pro bono legal services. These exceptions are justified because the limited and short-term nature of the legal services rendered in such programs reduces the risk that conflicts will arise between clients represented through the program and other clients of the lawyer or the lawyer's firm. [3] A lawyer who provides services pursuant to this Rule should secure the client's consent to the limited scope of the representation after explaining to the client what that means in the particular circumstance. See Rule 1.02(b). If a short-term limited representation would not be fully sufficient under the circumstances, the lawyer may offer advice to the client but should also advise the client of the need for further assistance of counsel. See Rule 1.03(b).		[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services -- such as advice or the completion of legal forms -- that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10. [2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

Texas Rule Language	**Proposed Comments to Texas Rule**	**ABA Rule Language**	**Comments to ABA Rule**
(a) The conflicts of interest limitations on representation in Rules 1.06, 1.07, and 1.09 do not prohibit a lawyer from providing, or offering to provide, limited pro bono legal services unless the lawyer knows, at the time the services are provided, that the lawyer would be prohibited by those limitations from providing the services.	Paragraph a [4] Paragraph (a) exempts compliance with Rules 1.06, 1.07, and 1.09 for a lawyer providing limited pro bono legal services unless the lawyer actually knows that the representation presents a conflict of interest for the lawyer or for another lawyer in the lawyer's firm. A lawyer providing limited pro bono legal services is not obligated to perform a conflicts check before undertaking the limited representation. If, after commencing a representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis or the lawyer charges a fee for the legal assistance, the exceptions provided by this Rule no longer apply.	(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter: (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.	[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter. [5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Texas Rule Language	**Proposed Comments to Texas Rule**	**ABA Rule Language**	**Comments to ABA Rule**
(b) Lawyers in a firm with a lawyer providing, or offering to provide, limited pro bono legal services shall not be prohibited by the imputation provisions of Rules 1.06, 1.07, and 1.09 from representing a client if that lawyer does not: (1) disclose confidential information of the pro bono client to the lawyers in the firm; or (2) maintain such information in a manner that would render it accessible to the lawyers in the firm.	Paragraph b [5] Paragraph (b) provides that a conflict of interest arising from a lawyer's representation covered by this Rule will not be imputed to the lawyers in the pro bono lawyer's firm if the pro bono lawyer complies with subparagraphs (b)(1) or (2). [6] To prevent a conflict of interest arising from limited pro bono legal services from being imputed to the other lawyers in the firm, subparagraph (b)(1) requires that the pro bono lawyer not disclose to any lawyer in the firm any confidential information related to the pro bono representation. [7] Subparagraph (b)(2) covers the retention of documents or other memorialization of confidential information, such as the pro bono lawyer's notes, whether in paper or electronic form. To prevent imputation, a pro bono lawyer who retains confidential information is required by subparagraph (b)(2) to segregate and store it in such a way that no other lawyer in the pro bono lawyer's firm can access it, either physically or electronically.	(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.	[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices.

Texas Rule Language	**Proposed Comments to Texas Rule**	**ABA Rule Language**	**Comments to ABA Rule**
(c) The eligibility information that an applicant is required to provide when applying for free legal services or limited pro bono legal services from a program described in subparagraph (d)(1) by itself will not create a conflict of interest if: (1) the eligibility information is not material to the legal matter, or (2) the applicant's provision of the eligibility information was conditioned on the applicant's informed consent that providing this information would not by itself prohibit a representation of another client adverse to the applicant.	Paragraph c [8] Paragraph (c) recognizes the unusual and uniquely sensitive personal information that applicants for free legal assistance may be required to provide. Organizations that receive funding to provide free legal assistance to low-income clients are generally required, as a condition of their funding, to screen the applicants for eligibility and to document eligibility for services paid for by those funding sources. Unlike other lawyers, law firms, and legal departments, these organizations ask for confidential information to determine an applicant's eligibility for free legal assistance and are required to maintain records of such eligibility determinations for potential audit by their funding sources. Required eligibility information typically includes income, asset values, marital status, citizenship or immigration status, and other facts the applicant may consider sensitive. Paragraph (c) provides a limited exception to the normal conflict of interest rules that apply to potential clients when an applicant provides this information. This exception is available only in the two situations described in subparagraphs (c)(1) and (c)(2). [9] The first situation where the paragraph (c) exception is available is where none of the eligibility information is material to an issue in the legal matter. Alternatively, under subparagraph (c)(2), if the applicant provided confidential information after giving informed consent that the eligibility information would not prohibit the persons or entities identified in the consent from representing any other present or future client, then the eligibility information alone will not prohibit the representation. The lawyer should document the receipt of such informed consent, though a formal writing is not required. What constitutes informed consent is discussed in the comments to Rule 1.06. [10] Rule 1.05 continues to apply to the use or disclosure of all confidential information provided during an intake interview. Similarly, Rule 1.09 continues to apply to the representation of a person in a matter adverse to the applicant. Notably, Rule 1.05(c)(2) permits a lawyer to use or disclose information provided during an intake interview if the applicant consents after consultation to such use or disclosure, and Rule 1.09(a)(3) permits a lawyer to represent a person adverse to the applicant in the same or a substantially related matter if the applicant consents to such a representation.		

Texas Rule Language	**Proposed Comments to Texas Rule**	**ABA Rule Language**	**Comments to ABA Rule**
(d) As used in this Rule, "limited pro bono legal services" means legal services that are: (1) provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, or nonprofit legal services program; (2) short-term services such as legal advice or other brief assistance with pro se documents or transactions, provided either in person or by phone, hotline, internet, or video conferencing; and (3) provided without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter.	Paragraph d [12] This Rule applies only to services offered through a program that meets one of the descriptions in subparagraph (d)(1), regardless of the nature and amount of support provided. Some programs may be jointly sponsored by more than one of the listed sponsor types. [13] The second element of "limited pro bono legal services," set forth in subparagraph (d)(2) is designed to ensure that the services offered are so limited in time and scope that there is little risk that conflicts will arise between clients represented through the program and other clients of the lawyer or the lawyer's firm. [14] The third element of the definition, set forth in subparagraph (d)(3), is that the services are offered and provided without any expectation of either extended representation or the collection of legal fees in the matter. Before agreeing to proceed in the representation beyond "limited pro bono legal services," the lawyer should evaluate the potential conflicts of interest that may arise from the representation as with any other representation. Likewise, the exceptions in paragraphs (a) and (b) do not apply if the lawyer expects to collect any legal fees in the limited assistance matter.		

Texas Rule Language	**Proposed Comments to Texas Rule**	**ABA Rule Language**	**Comments to ABA Rule**
(e) As used in this Rule, a lawyer is not "in a firm" with other lawyers solely because the lawyer provides limited pro bono legal services with the other lawyers.	Paragraph e [15] Lawyers are not deemed to be part of the same firm simply because they volunteer through the same pro bono program. Nor will the personal prohibition of a lawyer participating in a pro bono program be imputed to other lawyers participating in the program solely by reason of that volunteer connection.		[4] Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

EXHIBIT 2

STATE BAR OF TEXAS

November 30, 2015

Board of Directors
State Bar of Texas
1414 Colorado
Austin, Texas 78701

RE: Proposed Disciplinary Rule of Professional Conduct 6.05

Dear Directors,

On behalf of the State Bar's Pro Bono Workgroup, we write in support of the State Bar of Texas Committee on the Disciplinary Rules of Professional Conduct's (Committee) proposed Rule 6.05 addressing conflicts of interest during the provision of limited pro bono legal services.

As you may know, the Pro Bono Workgroup was formed in 2013 with the mission of enhancing the culture of pro bono service in Texas. The adoption of a rule that addresses conflicts of interest during the provision of limited pro bono legal services is a priority for our Workgroup. The issue of conflicts in settings such as legal advice clinics is a barrier to pro bono service that is repeatedly raised both by lawyers and legal aid providers alike. We believe that adopting a rule clarifying the issue of conflicts in these limited settings will increase the number of lawyers who are willing and able to provide pro bono legal services, and increase the numbers of low-income Texans who receive the legal assistance they need.

The Pro Bono Workgroup supports the Committee's proposed rule 6.05 because it does a good job of balancing the important issue of conflicts of interest with the realities of providing limited pro bono legal services at a pro bono clinic or similar setting. Additionally, the Committee's proposed rule clarifies and improves upon Model Rule 6.5 in important ways that we believe will make the rule successful in Texas.

Removing barriers to pro bono service is a critical issue if we intend to make strides in addressing the "justice gap" in our state. Adopting proposed rule 6.05 will remove a significant barrier preventing many attorneys from participating in pro bono efforts. Therefore, we strongly support the Committee's proposed Rule 6.05, and respectfully request that the Board takes the necessary steps for adopting the rule without delay.

Sincerely,

Terry Tottenham
Former SBOT President
Co-chair Pro Bono Workgroup

Roland K. Johnson
Former SBOT President
Co-chair Pro Bono Workgroup

EXHIBIT 3

RESOLUTION SUPPORTING PROPOSED RULE 6.05 TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

WHEREAS, the Texas Access to Justice Commission embraces the principles that our nation promises justice for all, not just for those who can afford to pay for it.

WHEREAS, the most recent U.S. Census reports that more than 5.8 million Texans qualify for civil legal aid.

WHEREAS, the Preamble to the Texas Disciplinary Rules of Professional Conduct states that "...a lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.", and that "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees is a moral obligation of each lawyer as well as the profession generally."

WHEREAS, civil legal aid providers and pro bono attorneys work tirelessly to provide free legal services to as many Texans as possible and whose services are invaluable to communities across the State.

WHEREAS, attorneys who are willing to volunteer their time to provide pro bono legal assistance to low-income Texans but do not do so because of a concern that they will be unable to meet the requirements of the conflict of interest rule in certain limited settings like a legal advice clinic.

WHEREAS, ABA Model Rule 6.5 was developed in response to the concern that strict application of the conflicts of interest rules may deter attorneys from volunteering to provide pro bono legal services.

WHEREAS, the State Bar of Texas Committee on the Disciplinary Rules of Professional Conduct shares the ABA's concern and has promulgated Texas Disciplinary Rule of Professional Conduct 6.05, a modified version of Model Rule 6.5, to address this concern.

THEREFORE, BE IT RESOLVED that the Texas Access to Justice Commission supports proposed Rule 6.05 to the Texas Disciplinary Rules of Professional Conduct which will increase access to justice for many Texans.

SIGNED this 4th day of February, 2016.

Harry M. Reasoner
Chair