

Summary of Proposed Amendments

Please note that current rules may be renumbered and/or retitled.¹

Ballot Item A: Terminology

Proposed Rule 1.00 creates a new rule and adopts the current Terminology of the Texas Disciplinary Rules of Professional Conduct, defines five new terms, and clarifies the definition of one existing term. The new terms include: “Confirmed in writing”; “Informed consent”; “Represent,” “Represents,” or “Representation”; “Screened”; and “Writing” or “written.” The proposed rule clarifies the definition of “Fraud” or “Fraudulent” regarding negligent conduct.

Ballot Item B: Conflict of Interest: Prohibited Transactions

Proposed Rule 1.08(a) of the Texas Disciplinary Rules of Professional Conduct amends the existing rule and enumerates the requirements with which a lawyer must comply before acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client. The proposed rule specifies that a lawyer must, in writing, disclose and transmit the terms of the transaction to the client, advise the client to seek the advice of an independent lawyer, and obtain informed consent² to the terms of the transaction and the lawyer’s role in it.

Ballot Item C: Conflict of Interest: Former Client

Proposed Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct replaces current Rule 1.09 and prohibits a lawyer from representing another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of a former client. The proposed rule prohibits a lawyer from knowingly representing 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 whose interests are materially adverse to that person and about whom the lawyer had acquired confidential information. The proposed rule prohibits a lawyer who has formerly represented, or whose present or former firm has formerly represented, a client in a matter from using information relating to the representation to the disadvantage of the former client or revealing information relating to the representation except as the disciplinary rules would permit or require. The proposed rule permits a lawyer to obtain informed consent from a former client to represent another person with conflicting interests.

Ballot Item D: Imputation of Conflicts of Interest: General Rule

Proposed Rule 1.10³ of the Texas Disciplinary Rules of Professional Conduct creates a new rule and permits the use of screening⁴ to manage conflicts of interest, including those regarding former clients. In accordance with disciplinary rules that prohibit certain conflicts, a lawyer in a firm may represent a client if the prohibition is based on a personal interest of a disqualified lawyer and does not materially limit

the representation of the client by other lawyers in the firm. When a prohibition arises from a disqualified lawyer’s association with a prior firm, representation is permissible if the disqualified lawyer is timely screened from participation in the matter and an affected former client is notified of the firm’s screening procedures, compliance, and agreement to respond to inquiries and objections. A firm may represent a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any lawyer in the firm has confidential information material to the matter.

Ballot Item E: Duties to Prospective Client

Proposed Rule 1.18 of the Texas Disciplinary Rules of Professional Conduct creates a new rule and defines a “prospective client” as a person who consults with a lawyer in good faith about the possibility of forming a client-lawyer relationship, whereas a person who communicates without a good-faith intention to seek representation is not a “prospective client.” The proposed rule prohibits a lawyer from using or revealing information learned from a prospective client, except as the disciplinary rules permit or require, or if the information has become generally known or would not significantly harm the former prospective client. A lawyer is prohibited from representing a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could significantly harm the prospective client. If a lawyer is disqualified from representation, no lawyer in the firm with which the disqualified lawyer is associated may represent the client with adverse interests. Representation is permissible if: the affected client and prospective client give informed consent, the lawyer who received the information took reasonable measures to avoid receiving more disqualifying information, the disqualified lawyer is timely screened from participation, and written notice is promptly given to the prospective client.

Ballot Item F: Special Responsibilities of a Prosecutor

Proposed Rule 3.09(f)-(h) of the Texas Disciplinary Rules of Professional Conduct amends the existing rule and imposes a duty on a prosecutor who obtains new and credible information creating a reasonable likelihood that a defendant did not commit an offense for which the defendant was convicted. The proposed rule requires the prosecutor to disclose information to the defendant, defense counsel, the tribunal, and an entity that examines claims of actual innocence, move the court to determine whether the defendant is entitled to court-appointed counsel, and cooperate with defense counsel. If the conviction was

obtained in another jurisdiction, the prosecutor has a duty to disclose the information to the appropriate prosecutor in that jurisdiction. A prosecutor who concludes in good faith that information is not subject to disclosure would not violate the proposed rule.

Ballot Item G: Dealing With Unrepresented Persons

Proposed Rule 4.03 of the Texas Disciplinary Rules of Professional Conduct amends the existing rule and expressly prohibits a lawyer from giving legal advice to an unrepresented person, other than to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or may be in conflict with the interests of the lawyer's client. The proposed rule does not change the existing prohibition on stating or implying that the lawyer is disinterested or the existing duty to make reasonable efforts to correct any misunderstanding about the lawyer's role when dealing on behalf of a client with a person who is not represented by counsel.

Ballot Item H: Responsibilities of a Partner or Supervisory Lawyer

Proposed Rule 5.01 of the Texas Disciplinary Rules of Professional Conduct replaces current Rule 5.01 and imposes a duty on lawyers in firm management to implement measures to ensure that all lawyers in the firm comply with the disciplinary rules. The proposed rule imposes a duty on a supervising lawyer with direct authority over another lawyer to make reasonable efforts to ensure the other lawyer complies with the disciplinary rules. A lawyer is responsible for another lawyer's violation of the disciplinary rules if the lawyer orders or ratifies the conduct. The responsibility extends to a lawyer with direct supervisory authority over another lawyer or a lawyer with managerial authority in the firm who fails to remedy the consequences of the conduct.

Ballot Item I: Unauthorized Practice of Law; Remote Practice of Law

Proposed Rule 5.05 of the Texas Disciplinary Rules of Professional Conduct amends the current rule and addresses the multijurisdictional and remote practice of law. The proposed rule permits a lawyer who is admitted to practice law in a jurisdiction outside of Texas to provide legal services in Texas if the services are solely for the lawyer's employer when pro hac vice admission is not required. The proposed rule permits a lawyer admitted in another jurisdiction to practice from a location in Texas if the lawyer does not hold out that the lawyer is authorized to practice in Texas or has an office in Texas for the practice of law, does not accept clients on matters that the lawyer knows primarily require advice on the state or local law of Texas, and makes diligent efforts to correct that misunderstanding if a person mistakenly believes the lawyer is authorized to practice in Texas.

Ballot Item J: Jurisdiction

Proposed Rule 8.05 of the Texas Disciplinary Rules of Professional Conduct replaces current Rule 8.05 and states that a lawyer admitted to practice law in Texas is subject to the disciplinary authority of Texas regardless of where the conduct occurred. A lawyer who is not admitted to practice in Texas is subject to the disciplinary authority of Texas if the lawyer offers legal services in Texas. A lawyer may be subject

to the disciplinary authority of both Texas and another jurisdiction for the same conduct.

Ballot Item K: Choice of Law

Proposed Rule 8.06 of the Texas Disciplinary Rules of Professional Conduct creates a new rule and explains how the Texas disciplinary authority applies the rules of professional conduct. For conduct in a matter pending before a tribunal in Texas, the Texas rules apply. For any other conduct, the rules of the jurisdiction where the conduct occurred apply, except if the conduct had its predominant effect in a different jurisdiction, in which case the rules of that jurisdiction apply. A lawyer is subject to the Texas disciplinary authority for advertising that is intended to be received by prospective clients and to secure employment in Texas, even if the lawyer broadcasts or disseminates the advertisement in another jurisdiction and complies with the disciplinary rules in that jurisdiction. A lawyer is subject to the Texas disciplinary authority for a written solicitation mailed to an addressee in Texas or to secure employment to be performed in Texas, even if the communication complies with the disciplinary rules governing lawyers in that jurisdiction.

Ballot Item L: Termination of Custodianship

Proposed Rule 13.05 of the Texas Rules of Disciplinary Procedure creates a new rule and sets forth the events that terminate custodianship. Termination occurs upon the transfer of all active client files and property in possession of the custodian to attorneys assuming responsibility or to the client or client's representative, an order of a court, or the return to practice of the attorney who appointed the custodian prior to completion of the custodianship and resumption of representation of active client matters. If the appointing attorney and the appointed custodian disagree on the appointing attorney's competence, either party may petition a court for a determination. The custodian may seek a court order concerning the disposition of closed client files, distribution of active files for which a client is nonresponsive or cannot be located, and distribution of any client property held pursuant to a representation by the appointing attorney, including funds held in an IOLTA account.

Note: The State Bar of Texas staff has provided this document as a general summary of the proposed amendments to the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure. It does not address every aspect of the proposed amendments, and reasonable minds may differ on the characterization of the proposed amendments. Voters are strongly encouraged to directly review the proposed amendments, which are available at texasbar.com/rulesvote.

texasbar.com/rulesvote

Notes

1. State Bar members will vote only on the proposed rules, not on proposed interpretive comments.
2. Proposed Rule 1.00(j) defines "Informed consent."
3. Proposed Rule 1.10 references proposed Rule 1.09 (see Ballot Item C), which replaces current Rule 1.09. Proposed Rule 1.10 also references Rule 1.11, which is current Rule 1.10 (Successive Government and Private Employment) after proposed renumbering.
4. Proposed Rule 1.00(s) defines "Screened."