IN THE SUPREME COURT
OF THE
STATE OF TEXAS

MISC. DOCKET NO. 91-0065

ORDER FOR AMENDMENTS

OF THE

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

The Petition of the State Bar of Texas requesting an Order for the amendments of the Texas Disciplinary Rules of Professional Conduct ("Rules") has been considered by the Court. The Court has considered the Petition on file herein and is of the opinion that the same is well taken.

The Court thus finds that a number of misstatements, omissions, and ambiguities exist in the current Rules which should be eliminated and corrected by amendment.

IT IS THEREFORE ORDERED BY THE COURT that the following amendments be made to the Rules:

Proposed Amendment #1:

Paragraph 3 of "Preamble: A Lawyer's Responsibilities," the last sentence be amended as follows:

A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Texas Disciplinary Rules of Professional Conduct or other law.

Proposed Amendment #2:

Paragraph 7 of "Preamble: A Lawyer's Responsibilities," the third sentence be amended as follows:

The Texas Disciplinary Rules of Professional Conduct prescribe terms for resolving such tensions.

Proposed Amendment #3:

Paragraph 10 of "Preamble: A Lawyer's Responsibilities," the first and second sentences, be amended as follows:

The Texas Disciplinary Rules of Professional Conduct define proper conduct for purposes of professional discipline.

Proposed Amendment #4:

The first sentence of the definition of "Fitness" in "Terminology" be amended as follows:

"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.

Proposed Amendment #5:

The first sentence of Comment 5 to Rule 1.02 be amended as follows:

An agreement concerning the scope of representation must accord with the Texas Disciplinary Rules of Professional Conduct and other law.

Proposed Amendment #6:

Rule 1.05 (b) be amended to read as indicated (substituting a reference to "f" for one to "h"):

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and ~~(h)~~ (f), a lawyer shall not knowingly:

Proposed Amendment #7:

Rule 1.05 (c) (4) be amended as follows:

When 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.

Proposed Amendment #8:

The first sentence of Comment 3 to Rule 1.05 be amended as follows:

The principle of confidentiality is given effect not only in the Texas Disciplinary Rules of Professional Conduct but also in the law of evidence regarding the attorney-client privilege and in the law of agency.

Proposed Amendment #9:

The last sentence of Comment 14 to Rule 1.05 be printed in normal print and not in italics.

Proposed Amendment #10:

The first sentence of Comment 22 to Rule 1.05 be amended as follows:

Various other Texas Disciplinary Rules of Professional Conduct permit or require a lawyer to disclose information relating to the representation.

Proposed Amendment #11:

The second sentence of Comment 11 to Rule 1.06 be amended as follows:

However, there are circumstances in which a lawyer may act as advocate against a client, for a lawyer is free to do so unless this Rule or another rule of the Texas Disciplinary Rules of Professional Conduct would be violated.

Proposed Amendment #12:

The printing error in Rule 1.08 (h), (i), and (j) be corrected. The printing error is that sub-divisions (i) and (j) of Rule 1.08 have been printed as if they were sub-divisions of 1.08 (h) (2), whereas (i) and (j) are sub-divisions of 1.08, of the same rank as sub-division (h) and not as sub-divisions of (h) (2); correctly printed, there is no sub-division of Rule 1.08 (h) (2).

Proposed Amendments #13A, #13B, #13C, #13D, and #13E:

Proposed Amendments #13A, #13B, #13C, #13D, and #13E involve amendment of Rule 1.09 (a) and of its Comments 3, 4, and 7, and the addition of a new Comment #4A to the Comments to Rule 1.09. This group of related amendments is necessary because Rule 1.09 was amended (during the public-view period before the Rules were adopted) by insertion of a new sub-division (1) to Rule 1.09 and the renumbering of the prior two sub-divisions. The result was that the Rule and its Comments were, at best, inconsistent and, at worst, were not intelligible. These five related amendments are necessary to conform the Rule to the meaning that was intended by the pre-adoption amendment to Rule 1.09.

Amendment #13A:

Rule 1.09 (a) be amended as follows:

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

~~(2)~~ (1) in which such other person questions the validity of the lawyer's services or work product for the former client; ~~or~~

~~(3)~~ (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.

Amendment #13B:

Comment 3 to Rule 1.09 be amended as follows:

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 prohibition is against representation adverse to a former client if it is the same or a substantially related matter~~. The first ~~second~~ 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.

Amendment #13C:

Comment 4 to Rule 1.09 be amended as follows:

4. Paragraph (a)'s second ~~third~~ 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.

Proposed Amendment #13D:

The Comments to Rule 1.09 be amended by adding a new Comment 4A as follows:

4A. The third situation where representation adverse to a former client is prohibited is where the representation involves 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 sought in good faith to retain the lawyer. It can apply even if the lawyer declined 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. 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.

Proposed Amendment #13E:

Comment 7 to Rule 1.09 be amended as follows:

7. Thus, the effect of paragraphs (b) ~~and (c)~~ 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 sub-paragraphs (a)(1) or (a)(2). Finally, s~~S~~hould those other lawyers cease to be members of the same firm as the lawyer affected by paragraph (a) without ~~themselves~~ 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.

Proposed Amendment #14:

The first sentence of Comment 2 to Rule 1.10 be amended as follows:

A lawyer licensed or specially admitted in Texas and representing a government agency is subject to the Texas Disciplinary Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.06 and the protection afforded former clients in Rule 1.09.

Proposed Amendment #15:

In the final draft of "The Proposed Texas Disciplinary Rules of Professional Conduct" as submitted for the bar referendum, Comment 3 to Rule 1.13 appeared in italics. This was a drafting error, and Comment 3 to Rule 1.13 is to be printed in normal print and not in italics.

Proposed Amendment #16:

The first sentence of Comment 2 to Rule 1.15 be amended as follows:

A lawyer ordinarily must decline employment if the employment will cause the lawyer to engage in conduct that the lawyer knows is illegal or that violates the Texas Disciplinary Rules of Professional Conduct.

Proposed Amendments #17A, #17B, and #17C:

Comments 1, 4 and 5 to Rule 4.01 should be amended to alert lawyers to the scope of coverage of Rule 4.01 and other rules that are cross-referenced. No change is required in Rule 4.01 itself.

Proposed Amendment #17A:

Comment 1 to Rule 4.01 be amended as follows:

1. Paragraph (a) of this Rule refers to statements of material fact. Whether a particular statement should be regarded as one of material fact can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category. Similarly, under generally accepted conventions in negotiation, a party's supposed intentions as to an acceptable settlement of a claim ~~are~~ may be viewed merely as negotiating positions rather than as accurate representations of material fact. Likewise, according to commercial conventions, the fact that a particular transaction is being undertaken on behalf of an undisclosed principal need not be disclosed except where non-disclosure of the principal would constitute fraud.

Proposed Amendment #17B:

Comment 4 to Rule 4.01 be amended as follows:

4. When a lawyer discovers that a client has committed

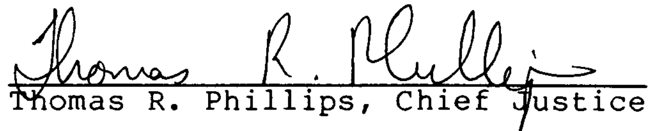
a criminal or fraudulent act in the course of which the lawyer's services have been used, or that the client is committing or intends to commit any criminal ~~a crime~~ or fraudulent act, other of these Rules require the lawyer to ~~should~~ urge the client to take appropriate action. See Rules 1.02(d), (e), (f); 3.03(b). Since the ~~The~~ disclosures called for by paragraph (b) of this Rule will be "necessary" only if the lawyer's attempts to counsel his client not to commit the crime or fraud are unsuccessful~~.~~, a lawyer is not authorized to make them without having first undertaken those other remedial actions. See also Rule 1.05.

Proposed Amendment #17C:

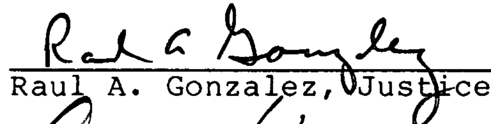
Comment 5 to Rule 4.01 be amended as follows:

5. A lawyer should never knowingly assist a client in the commission of a criminal act or a fraudulent act. See Rule 1.02(c).

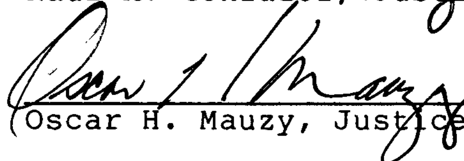
By the Court en banc, in chambers, this 23rd day of October, 1991.



Thomas R. Phillips, Chief Justice

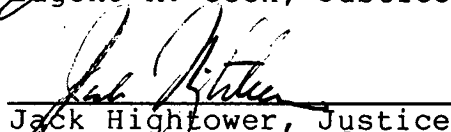


Raul A. Gonzalez, Justice

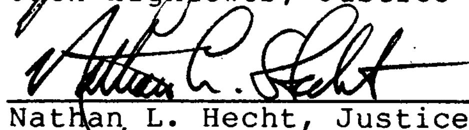


Oscar H. Mauzy, Justice

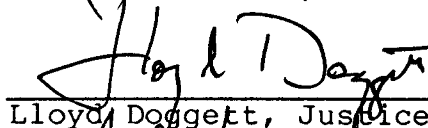
Eugene A. Cook, Justice



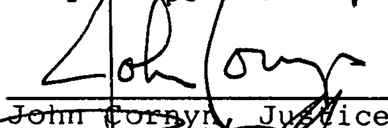
Jack Hightower, Justice



Nathan L. Hecht, Justice



Lloyd Doggett, Justice



John Cornyn, Justice

Bob Gammage, Justice

Concurring Opinion by Justice Doggett

CONCURRING OPINION TO SUPREME COURT ORDER
Misc. Docket No. 91-0065

With some degree of apprehension, I concur in this order solely on the basis that it is designed "to correct or eliminate [what are relatively modest] misstatements, ambiguities or omissions in the current rules . . . ." My apprehension results from concern that this court's overuse of "its inherent power" is inherently dangerous.

In January 1989, the then president of the State Bar and others meeting in closed conference with the court urged as one alternative that we ignore the attorney referendum process provided for in Texas Gov't Code § 81.024 and implement new disciplinary rules by fiat through our inherent power. Fortunately the court rejected this approach. In the following months, after extensive discussion and review by Bar committees, the proposed Texas Disciplinary Rules of Professional Conduct were modified to a form that involved substantial changes from that which we had been asked to mandate. The Bar leadership did an outstanding job of educating lawyers across the state concerning the importance of these rules and planned changes in the disciplinary mechanism through which they would be enforced. I believe such lawyer involvement makes more probable both acceptance of and compliance with these new professional standards.

A decision to accept the original recommendation that this court use the inherent power doctrine[1] to impose professional

[1] See generally J. Cratesley, Inherent Powers of the Courts (National Judicial College 1973).

conduct standards from the top down rather than from the bottom up through lawyer participation would seriously erode the process that worked so effectively to produce these rules. I write separately because today's action should not be viewed as a precedent by those who may desire to shortcut the referendum process on some future controversial, substantive change in the disciplinary rules. The only statutory authority for this court to promulgate disciplinary rules provides that this be accomplished "under Section 81.024", the attorney referendum provision. See 1991 Tex. Gen. Laws 2801, ch. 795 § 21 (to be codified at Tex. Gov't Code Ann. § 81.072).

My concern in this regard is heightened by other requests for this court to invoke inherent powers. The court, for example, recreated over my objection its Grievance Oversight Committee in defiance of a statute abolishing this entity. See 1991 Tex. Gen. Laws 2801, ch. 795, § 21, (to be codified at Tex. Gov't Code Ann. § 81.096). While continued judicial leadership to assure the highest possible standards of professional conduct among the state's lawyers is highly desireable, this court had notice of the planned statutory abolition before the legislative process was completed. Immediate recreation of the committee involved a use of the inherent powers doctrine that was both inappropriate and unnecessary. We were also recently urged to increase reliance upon the inherent powers doctrine in connection with another agency over which we have supervisory responsibility. These requests come against a background of this court's having written expansively, perhaps over-expansively, concerning its inherent powers. See Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex. 1979); see also Bruff, Separation

of Powers Under the Texas Constitution, 68 Tex. L. Rev. 1348-1351.

On at least one previous occasion, this court's use of its inherent powers undoubtedly accomplished great public good through a requirement of mandatory participation in the Texas Equal Access to Justice IOLTA (Interest on Lawyers' Trust Accounts) Program. Supreme Court of Texas, State Bar Rules art. XI, § 5 (1989) (located in pocket part for Volume 3 of the Texas Government Code in title 2, subtitle G app., following § 83.006 of the Gov't Code). There may well be such occasions when in order to preserve the public interest in the administration of justice it is necessary for this court to act unilaterally. However, such powers should be utilized with the greatest restraint and only after an opportunity for meaningful public input. The court should be particularly reluctant to rely upon inherent powers where its exercise of authority would conflict with a statute such as the State Bar Act.[2] As one scholar of legal ethics has observed,

> [A]n unwarranted exercise of [the inherent powers doctrine] . . . carries obvious risks of judicial abuse and maladministration. In some of its manifestations it bears the marks of a nakedly political grasp for unbridled power.[3]

Understanding that the modest changes accomplished by today's

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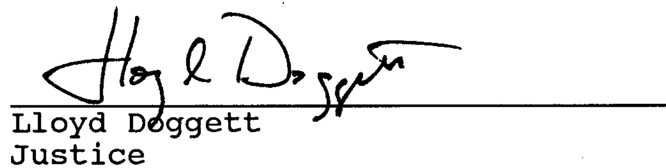
[2] In Texas regulation of the practice of law has been a shared responsibility. In 1990, this court informally chose not to pursue one alternative course of action by which it would have assumed sole responsibility for the State Bar and regulation of the legal profession by not renewing the State Bar Act and ignoring the Sunset process provided for in Tex. Gov't Code §§ 325.001 <u>et seq.</u> (1988 & Supp. 1991).

[3] C. Wolfram, Modern Legal Ethics 24 (1986).

order are in the interest of both lawyers and non-lawyers and are of such a nature as not to justify a state-wide referendum and further that these changes are consistent with the spirit of what has previously been approved by referendum, I join in their approval.



Lloyd Doggett
Justice

Opinion delivered: October 23, 1991