

Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct
~Brief Background and Explanation: Take Two~
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On October 20, 2009, in Misc. Docket No. 09-9175, the Supreme Court of Texas proposed amendments to the Texas Disciplinary Rules of Professional Conduct as part of the State Bar's continuing self-governance process. The proposed amendments were the product of extensive debate and careful consideration by the Court, Task Force on the Texas Disciplinary Rules of Professional Conduct, and State Bar Committee on the Texas Disciplinary Rules of Professional Conduct.

The Court invited public comments regarding the proposed amendments and received numerous comments in response. These comments resulted in revisions to the proposed amendments. The Court made additional revisions in response to feedback that it received from other individuals and entities, including the State Bar Discipline Client Attorney Assistance Program Committee, Chief Disciplinary Counsel Linda Acevedo, and State Bar Committee on the Texas Disciplinary Rules of Professional Conduct.

On April 14, 2010, the Court completed a revised version of the proposed amendments to the Texas Disciplinary Rules of Professional Conduct. On April 16, the State Bar Board of Directors received the revised version of the proposed amendments, along with a copy of Misc. Docket No. 09-9175 and a letter from Chief Justice Jefferson to State Bar President Roland Johnson and State Bar President-Elect Terry Tottenham. In his letter, Chief Justice Jefferson requested that the Board of Directors consider the proposed amendments and provide the Court with any recommendations or comments by October 6.

The Court's website contains copies of the following documents:

1. *Original, Proposed Amendments (Misc. Docket No. 09-9175)*
<http://www.supreme.courts.state.tx.us/MiscDocket/09/09917500.pdf>;
2. *Redlined Version of Original, Proposed Amendments*
<http://www.supreme.courts.state.tx.us/MiscDocket/09/09917501.pdf>;
3. *Clean, Revised Version of Proposed Amendments*
<http://www.supreme.courts.state.tx.us/rules/pdf/TDRPCAmendments-041410.pdf>;
and
4. *Redlined, Revised Version of Proposed Amendments*
<http://www.supreme.courts.state.tx.us/rules/pdf/RedlinedTDRPCAmendments-041410.pdf>.

As noted in the October 2009 version of this document, several goals influenced the content of the proposed amendments. One of the primary goals was to enhance protection of the public. Another goal was to provide better guidance for lawyers dealing with distinct types of clients, such as prospective clients and clients with diminished capacity, and lawyers engaging in certain professional activities, such as law-reform activities and transactions with or relating to clients. Additional goals were to reflect current practices and to clarify disciplinary standards overall in an effort to improve lawyers' compliance with these standards and thereby protect the integrity of the legal profession.

To facilitate comprehension of the proposed amendments (as revised in April 2010), here is a brief overview of some of the most significant changes to the existing rules:

❖ **There are five new rules — Rules 1.00, 1.13, 1.14, 1.17, and 6.03.**

- Rule 1.00 replaces the “Terminology” section and contains definitions of terms that appear in the rules. The following terms are new: affiliated, confirmed in writing, informed consent, personally prohibited, personally represents, reasonably should know (replacing “should know”), represents, writing, and written. The following terms have been revised substantively: firm, fitness, fraud, fraudulent, law firm, partner, substantial, substantially, and tribunal.
- Rule 1.13 addresses prohibited sexual relations between a lawyer and client.
- Rule 1.14 addresses a lawyer’s obligations and options when the lawyer represents a client with diminished capacity. Existing Rule 1.02(g), which touches on the same subject matter, has been deleted.
- Rule 1.17 addresses a lawyer’s obligations relating to a prospective client.
- Rule 6.03 addresses a lawyer’s obligations when the lawyer participates in law-reform activities that may affect the interests of the lawyer’s client.

❖ **Four rules have been renumbered — Rules 1.13, 1.14, 1.15, and 5.08.**

- Rule 1.13 has been renumbered as Rule 6.02.
- Rule 1.14 has been renumbered as Rule 1.15.
- Rule 1.15 has been renumbered as Rule 1.16.
- Rule 5.08 has been renumbered as Rule 5.07, to fill a blank space.

❖ **Several rules contain new or revised scienter standards.**

- As indicated above, the scienter standard “should know” has been changed to “reasonably should know” throughout the rules.
- There are new and revised scienter standards governing the use and disclosure of a client’s confidential information. See Rule 1.05(b)(1)-(2) and (c)(3).

- There are new and revised scienter standards relating to a lawyer’s conflicts of interest. See Rule 1.08(a)(1) and (e)(2) and Rule 1.10(c).
 - Likewise, there are new and revised scienter standards relating to an affiliated lawyer’s imputed conflicts of interest. See Rules 1.06(e); 1.07(c); 1.08(i); 1.09(a)(2), (c)(2), and (e); 1.10(b) and (d); 1.11(c); and 1.17(c).
 - For more examples of new and revised scienter standards, see Rules 1.12(b); 1.14(b)-(c); 1.15(b)(2), (b)(5), and (c); 3.03(b) and (d); 3.04(a); 3.06(f); 3.07(a); 3.08(a)-(b); 5.03(b); and 6.03.
- ❖ **There are enhanced requirements for lawyer-client communications.** See, for example, Rules 1.03(a)(1)-(2); 1.04(c) and (d)(4); 1.07(a)(3); 1.08(a)(2)-(3), (f), and (g)(2)(ii); and 1.15(b)(1).
 - ❖ **The standard governing a lawyer’s representation has changed.** Amended Rule 1.01 requires a lawyer to act with reasonable diligence and promptness in representing a client. Gone from this rule is language providing that a lawyer shall not “frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.”
 - ❖ **The standard governing a lawyer’s fee has changed.** The fee standard in Rule 1.04(a) has changed from “unconscionable” to “clearly excessive.” But the factors that may be considered in determining the reasonableness of a fee have not changed.
 - ❖ **Confidential information is defined differently, and Rule 1.05 is rewritten accordingly.** “Confidential information” is no longer defined in reference to “privileged information” and “unprivileged client information.” There is also a clear differentiation between confidential information of a client or former client versus that of a prospective client. Rule 1.05 has been rewritten to reflect, among other things, the definitional changes and the modified scienter standards addressed above. Paragraph (a) contains the new definition of confidential information, while paragraphs (b) through (d) address the use and disclosure of confidential information.
 - ❖ **Standards governing conflicts of interest are modified in Rules 1.06 through 1.11.**
 - Rule 1.06 begins with a new standard for a lawyer to use when determining whether a conflict of interest exists. This rule then addresses representations a lawyer shall not undertake, even with a client’s informed consent, and representations a lawyer may undertake with a client’s informed consent, despite the existence of a conflict of interest. Of note, the “substantially related matter” standard has been removed from Rule 1.06. The standard for an affiliated lawyer’s imputed conflicts of interest has been modified in paragraph (e) of this rule and is similar to the modified imputation standards in Rules 1.07(c); 1.08(i); 1.09(a)(2), (c)(2), and (e); 1.10(b) and (d); and 1.11(c).

- Rule 1.07 has been rewritten to address a lawyer's obligations relating to the representation of two or more clients (*i.e.*, multiple clients) in the same matter. This rule requires a lawyer to evaluate the situation before undertaking multiple-client representation and reasonably believe that the conditions in subparagraph (a)(2) are met. Also before undertaking the representation, or as soon as practicable thereafter, the lawyer must disclose to the clients all of the things listed in subparagraph (a)(3). Finally, under subparagraph (a)(4), the lawyer must obtain the clients' informed consent, confirmed in writing, to the representation. Paragraph (b), however, allows the lawyer to proceed under standards that differ from these standards if the lawyer represents multiple clients pursuant to a court order or appointment that entails different standards.
- Rule 1.08 has been revised to define more clearly the bounds of prohibited transactions. For example, paragraph (b) prohibits a lawyer from soliciting a substantial gift from a client and contains a modified definition of the relationships that fall within its confines. Paragraph (f) imposes restrictions on aggregate settlements (in civil matters) and aggregated agreements (in criminal matters) and, as indicated above, enhances the disclosures a lawyer must make to a client before executing such a settlement or agreement. Subparagraph (g)(1) now restricts a lawyer's ability to prospectively limit the lawyer's liability to a client not only for malpractice, but also for professional misconduct. Subparagraph (g)(2) sets forth new standards for agreements between lawyers and clients to refer their disputes to binding arbitration. Finally, similar to subparagraph (g)(1), subparagraph (g)(3) restricts a lawyer's ability to settle a claim for professional misconduct, in addition to malpractice.
- Rule 1.09 has been revised substantively and restructured. Paragraphs (a) and (b) restrict a lawyer's ability to represent a person in a matter in which the person's interests are materially adverse to the interests of a former client if the matter is the same as, or substantially related to, a matter in which the lawyer represented the former client. Paragraph (c), in turn, restricts a lawyer's ability to represent a person in a matter adverse to a former client in which the person questions the validity of the lawyer's services or work product for the former client. New to Rule 1.09, paragraph (d) limits explicitly a lawyer's use and disclosure of information relating to the representation of the former client.
- Rule 1.10 contains revised definitions of the terms "matter" (in paragraph (f)) and "private client" (in paragraph (g)) and a new definition of the term "screened" (in paragraph (h)). This rule also contains revised standards for a lawyer who is or has been a public officer or employee. See, for example, paragraphs (c) and (e). Rule 1.10 clarifies further, in paragraphs (a) and (c), when restrictions relate to *personal* representation, as opposed to representation. Finally, subparagraph (b)(2) enhances notice requirements.
- Rule 1.11 has been revised to reflect the revised definition of the term "tribunal" (which impacts the definition of the term "adjudicatory official")

and specifically address third-party neutrals. See paragraphs (a) and (b). This rule also contains the new term “court lawyer,” which is defined in paragraph (d). Similar to Rule 1.10, Rule 1.11(a) has been revised to clarify when restrictions relate to *personal* representation. Also similar to Rule 1.10, subparagraph (c)(2) of this rule contains enhanced notice requirements.

- ❖ **Revised standards govern lawyers who represent organizations.** Rule 1.12 has been restructured and revised substantively to clarify a lawyer’s obligations when representing an organization. For example, the amended rule clarifies the lawyer’s obligation to protect the organization’s best *legal* interests (as the lawyer is retained to protect those interests), modifies the standard for initiating reasonable remedial measures, and addresses the limited situations in which the lawyer may disclose the organization’s confidential information or jointly represent the organization and the organization’s constituent or constituents.
- ❖ **There are also revised standards governing the lawyer’s safekeeping of property.** Renumbered Rule 1.15 has been restructured and revised substantively to clarify the obligations of a lawyer who holds the property of others. For example, the amended rule differentiates between the lawyer’s obligations to a client versus a third person, clarifies the lawyer’s obligations when there is a dispute regarding the property, and addresses when the lawyer may withdraw fees and expenses from a client trust account and when the lawyer may deposit the lawyer’s own funds into the account.
- ❖ **Aspects of a lawyer’s obligation of candor toward a tribunal have changed.** Rule 3.03 has been restructured and revised substantively to clarify a lawyer’s obligation of candor toward a tribunal. The amended rule refines the description of the lawyer’s obligation relating to criminal or fraudulent conduct and expands the description of the lawyer’s obligation relating to the offer or use of false, material evidence. With an exception for criminal matters, this rule also permits the lawyer to refuse to offer or use evidence that the lawyer reasonably believes, but does not know, is false.
- ❖ **There are new and revised standards governing trial publicity.** Rule 3.07 has undergone significant revisions. Existing paragraphs (b) and (c), which contain examples of what may or may not violate paragraph (a), have been deleted. The content of those paragraphs will be in comments. There is a new paragraph (b), which addresses permissible conduct, and a new paragraph (c), which addresses imputation.
- ❖ **Rules specify managerial and supervisory lawyers’ duties.** Rules 5.01 and 5.03 have been revised to reflect duties imposed on lawyers with managerial or supervisory authority, rather than duties imposed on partners who do not always have this authority. In addition, the amended rules clarify that a lawyer is not expected to take reasonable remedial action beyond the scope of the lawyer’s authority. Rule 5.03 has also been restructured to better guide lawyers who are managing or supervising nonlawyers who are employed by, retained by, or affiliated with a lawyer or law firm.

- ❖ **A lawyer has a clear duty to represent a person upon being appointed to do so.** Paragraph (a) has been added to Rule 6.01 to clarify that when a tribunal appoints a lawyer to represent a person, the lawyer is obligated to represent the person until the representation is terminated in accordance with Rule 1.16(c).

- ❖ **A lawyer must report certain findings of guilt and deferred-adjudication orders.** Under new paragraph (f) of Rule 8.03, a lawyer is obligated to report to the Office of the Chief Disciplinary Counsel a finding of guilt or an order deferring adjudication by any court for the commission of an Intentional or Serious Crime, as defined by the Texas Rules of Disciplinary Procedure. Regardless of whether the lawyer appeals the finding or order, the lawyer must report within thirty days of the finding or order.

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This article contains a summary of the proposed amendments to the Texas Disciplinary Rules of Professional Conduct that the Court's Rules Attorney deemed most significant. Reasonable minds may differ on the amendments she has deemed significant, as well as her characterization of the amendments. This article does not represent the views or opinions of the Court or any of its members. The Court encourages each member of the State Bar of Texas to analyze the proposed amendments and make independent determinations, as each member will ultimately be able to vote on the content of the rules.