

# **ETHICS IT'S LEGAL, BUT IS IT RIGHT?**

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## **VI. ETHICS -- IT'S LEGAL, BUT IS IT RIGHT?**

### **A. Introduction and Scope of Paper**

Lawyers are presented with ethical questions every day. Can I represent a new client that will require me to take a position adverse to my partner's client? What are the limitations placed on me that prevent me from representing several parties to a transaction at the same time? What is the extent of my duty to zealously represent my client? Do I violate my professional responsibility if I refuse to do what I consider an improper act that my client is demanding? How we answer these questions can not only affect our practice, but also our standing in the community. As lawyers, we have a responsibility to know and understand the rules relevant to our professional obligations. However, with knowledge comes power, and the temptation to use the letter of the law to offensively abuse the principles the rules are there to protect must be vigilantly guarded against. In other words, the fact that certain conduct is permitted under the rules does not necessarily make it "right", and we as professionals have an obligation to continue to develop a community understanding as to what "right" is.

This paper is not meant to provide a comprehensive analysis of the law on conflicts of interest or aggressive litigation strategies. Although there is a plethora of important case law established in the federal circuits on these issues, this paper is limited to an analysis of Texas state law as interpreted by Texas state courts. It is intended to provide the course attendee with a general understanding of the relevant rules applicable to these topics, as well as to impress upon you the importance of maintaining the highest of ethical standards.

### **B. Texas State Bar Code of Ethics**

The Texas Disciplinary Rules of Professional Conduct, replacing the Texas Code of Professional Responsibility in 1990, provides Texas lawyers with guiding principles for their

practice. It addresses several areas of attorney professional responsibility, including the scope of obligations arising within the attorney-client relationship, the role of an attorney as a counselor and advocate, relationships to non-clients, responsibilities intrinsic to an attorney's role in a law firm or other association, and the duty of the lawyer to maintain the integrity of the profession. Although these rules are not the only source of guidance for professional responsibility questions, they do serve to provide a good starting point for answering any question that may arise.

### **C. Should I Take a Chance? Conflicts of Interest.**

#### **1. Introduction.**

The decision to represent a new client comes with many facets. Perhaps the most often ignored or overlooked issue by attorneys in making this decision is whether there exists a conflict of interest because of a former or concurrent representation of the adverse party. However, this can be an extremely costly oversight. Not only do conflicts of interest serve as a basis for disqualification, but they also can form a solid foundation for a malpractice claim against you and your firm. Traditionally lawyers have held the privilege of choosing their own targets during litigation. Now, the tables have turned and lawyers are finding that they are now the target. Their decision to represent parties adverse to former and current clients are increasingly under scrutiny.

#### **2. Successive Conflicts of Interest.**

One type of conflict that has been addressed by Texas courts is that which arises from the representation of a client in a proceeding that is adverse to a former client.

##### *a. The Texas Approach*

##### *i. Disciplinary Rule 1.09.*

Texas Disciplinary Rule of Professional Conduct 1.09 provides for more than one basis for disqualification, and states in relevant part:

- (a) Without prior consent, the lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a manner adverse to the former client:
  - (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
  - (2) if the representation in reasonable probability will involve a violation of Rule 1.05; *or*
  - (3) if it is the same or a substantially related matter.<sup>1</sup>

As the 14th Court of Appeals noted in *Clarke v. Ruffino*, “because of the ‘or’ strategically placed in this rule, there are now more than one bases for disqualification of an attorney.”<sup>2</sup> Thus, Rule 1.09(a) prohibits a lawyer who personally represented a client from representing another client in a matter adverse to the first client in three situations. First, Rule 1.09(a)(1) prohibits a lawyer from taking the representation under circumstances where the new client questions the position taken by the lawyer in the prior representation.<sup>3</sup> Second, Rule 1.09(a)(2) prohibits representation which will result in a disclosure of client confidences as defined by Rule 1.05.<sup>4</sup> Neither Rule 1.09(a)(1) or (2) require that the new representation be related to the prior representation. Finally, a lawyer may be disqualified where the prior representation is “substantially related” to the new matter.<sup>5</sup>

*ii. The Issue of Adversity*

Before any substantive analysis is performed as to whether any of the three grounds for disqualification are met, two essential facts must be established: (1) the existence of an attorney-client relationship between the former client and the attorney (not necessarily the law firm) in the current matter; and (2) that the current matter is adverse to the former client. The first has been discussed above, however, the second merits further discussion.

iii. *Where the New Client Questions the Former Position.*

Rule 1.09(a)(1) provides the first basis for disqualification. As indicated above, the representation is prohibited where the lawyer would represent a client who questions the validity of the lawyer's services or work product for the former client. Comment 3 to Rule 1.09 states that an example of such prohibited conduct is where a lawyer who drew a will bearing a substantial portion of the testator's property to a designated beneficiary is also representing the testator's heirs at law in an action seeking to overturn the will.<sup>6</sup> No reported Texas cases have addressed Rule 1.09(a)(1) in the context of disqualification motions.

iv. *Disclosure of Confidential Information.*

A lawyer's representation of a current client against a former client is also limited under Rule 1.09(a)(2), which prescribes such a representation where there is a "reasonable probability" that the engagement would cause the lawyer to disclose confidential information relating to his former representation.<sup>7</sup> Interestingly, Rule 1.05(a) defines "confidential information as both privileged *and* non-privileged information."<sup>8</sup> Pursuant to this rule, a lawyer generally may not disclose confidential information of a former client unless: (1) the lawyer has been expressly authorized to do so; (2) the former client consents; (3) the disclosure is made to the former client or his representatives, agents or employees; (4) the lawyer is ordered to disclose the information by a court; (5) it is done in defense of a malpractice claim; (6) it is disclosed to establish a defense to a criminal charge or disciplinary complaint against the lawyer; (7) the lawyer has reason to believe disclosure is necessary to prevent the client from committing a criminal or fraudulent act; or (8) it reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent action the commission of which the lawyer's services had been used.<sup>9</sup>

Like Rule 1.09(a)(1), this rule has not been widely discussed by Texas courts. As is

discussed below, most cases involving disqualification focus on the “substantial relationship” test of Rule 1.09(a)(3). Nonetheless, when analyzing a potential conflict situation, the practitioner should review Rule 1.05 and its potential as a means for disqualifying opposing counsel.

v. *Substantial Relationship Test.*

(1) *The Coker Test.*

The seminal case in Texas regarding former client conflicts is *NCNB Texas Nat’l Bank v. Coker*.<sup>10</sup> There, the Texas Supreme Court, in construing the former Texas Code of Professional Responsibility,<sup>11</sup> ruled that disqualification of counsel is only proper when representation of the client involves matters which are “substantially related” to the matters embraced within the prior representation of the former client. The court noted that the party seeking disqualification “must prove the existence of a prior attorney-client relationship in which the factual matters involved were so related to the facts in the pending litigation *that it creates a genuine threat that confidences revealed to former counsel will be divulged to its present adversary.*”<sup>12</sup> The burden on the movant seeking to establish a “substantial relationship” is to show *facts* in the current representation indicating that “a genuine threat exists” that confidential information will be divulged. Sustaining this burden requires evidence of specific similarities capable of being cited in the disqualification order.<sup>13</sup> Mere conclusory statements and opinions are insufficient.<sup>14</sup> The Supreme Court has recently only required a showing of a “genuine threat” of disclosure and has required no showing of actual harm to the former client, i.e., materialized disclosure or wrongdoing by counsel.<sup>15</sup>

Further, to satisfy this test, the movant need not show identical legal and factual elements between the two representations.<sup>16</sup> Nor, under some circumstances, is a movant required to show

that actual confidences were violated or an appearance of impropriety.<sup>17</sup> There must, however, be more than just a “superficial resemblance” between issues relevant to the two representations.<sup>18</sup> Evidence showing only a remote possibility of a violation of the disciplinary rules is insufficient under the *Coker* standard.<sup>19</sup> In *Coker*, the Texas Supreme Court determined that the trial court’s finding “that the two representations were similar enough to give an ‘appearance’ that confidences which could be disclosed ‘might be relevant’ to the representations falls short of the requisites of the established substantial relation standard.”<sup>20</sup> However, a mere comparison of subject matter and issues is not the proper legal test and a superficial resemblance between issues is not enough to constitute a substantial relationship.<sup>21</sup>

The Texas Supreme Court has construed and applied the *Coker* test in several recent decisions that are worth reading. See *Texaco, Inc. v. Garcia*<sup>22</sup>, *Metropolitan Life Insurance v. Syntek Finance*<sup>23</sup>, and *National Medical Enterprises, Inc. v. Godbey*<sup>24</sup>

(2) *The Irrebuttable Presumptions of Disclosure.*

The *Coker* court concluded that once the matters are shown to be substantially related, the former client “is entitled to a *conclusive presumption* that confidences and secrets were imparted to the former attorney.”<sup>25</sup> The court noted that such a presumption is necessary to protect the former client from the necessity of being “forced to reveal the very confidences he wishes to protect.” The court also found a second conclusive presumption that the attorney would share this confidential information with other members of the firm.<sup>26</sup> The imputation of knowledge to and disqualification of the entire firm may be justified “because of the assumption there is interplay or a sharing of confidences between lawyers who practice together. The application of the presumption recognizes not only the realities of law practice but also the ethical considerations found in the Disciplinary Rules and is a way to avoid inquiry into actual details of

client confidences. Thus, once a substantial relationship is proven, the trial court *must* then perform its role in the internal regulation of the legal profession and disqualify counsel in the pending litigation.<sup>27</sup>

(3) *The Evolving Coker Standard.*

A strict construction of Rule 1.09 raises questions as to the present applicability of the *Coker* conclusive presumptions.<sup>28</sup> Texas cases decided since *Coker* have struggled with the applicability of the conclusive presumption. Although every subsequent case has recognized their existence, several courts have declined to apply them under the specific facts of the case. Moreover, *Coker* only found the conclusive presumptions available under Rule 1.09(a)(3), with respect to the substantial relationship test. In those circumstances not involving a substantially related matter and governed by Rule 1.09(a)(1) or (2), the conclusive presumptions are rendered inapplicable.<sup>29</sup>

Even a cursory review of recent cases indicates that the courts are still struggling with the *Coker* test and the conclusive presumptions. In fact, some courts have questioned the applicability of *Coker* now that the Texas Disciplinary Rules have been adopted.<sup>30</sup> This has led some commentators to note that some courts have adopted Rule 1.09 as the standard for disqualification in contravention of the *Coker* test. Adding to the confusion is some court's incorrect use of the "appearance of impropriety" standard.<sup>31</sup> The confusion most likely results from the fact that the test for disqualification is one of the case law and not of the Texas Disciplinary Rules.<sup>32</sup> At least one Texas court has recognized the need for "bright lines . . . to be drawn for the guidance of the bench and bar" in this area.<sup>33</sup>

3. Concurrent Conflict of Interest.

Another source of conflicts of interests that may result in disqualification is concurrent

representation of adverse clients.

*a. The Texas Approach.*

The standards relating to conflicts with existing clients are quite simple. “A lawyer shall not represent opposing parties to the same litigation.”<sup>34</sup> However, the Texas authority with respect to how such a standard is interpreted merits further review.

*i. Rule 1.06: The General Standard.*

Texas Rule of Professional Conduct 1.06 sets forth the general rules for concurrent conflicts of interest.<sup>35</sup> Specifically, Rule 1.06 states, in relevant part:

- (a) A lawyer shall not represent opposing parties to the same litigation.
- (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
  - (1) involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; or
  - (2) reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.<sup>36</sup>

Certainly, Rules 1.06(a) and (b) contemplate three separate, but related, grounds for disqualification: (1) simultaneous representation of opposing parties to a litigation; (2) concurrent representation of directly adverse parties to a substantially related matter; and (3) the reasonable appearance of limitation of responsibilities to each client.<sup>37</sup> This rule is intended to protect certain societal interests, such as “the preservation of the intangible representation elements of loyalty and client confidence essential to any attorney-client relationship, the preservation of client confidences, the assurance of unfettered advocacy on behalf of each client, and avoidance of additional costs of representation and litigation occasioned by inopportune changes in counsel.”<sup>38</sup>

Relatively few cases in Texas have construed conflicts arising from concurrent representations and the duties owed under Rule 1.06.<sup>39</sup> One such case is *Conoco, Inc. v. Baskin*.<sup>40</sup> There, a company attempted to disqualify a firm from representing an opposing party in a suit against the company where the firm also represented Conoco in several other suits. The conflict arose when two lawyers moved to the firm and brought with them a case filed against Conoco. Their lateral move was at a time when the firm was handling six other lawsuits on behalf of Conoco. The firm, pursuant to Rule 1.06(c), withdrew from the representation of Conoco, but not the adverse party. The court held that disqualification was not warranted under the circumstances.<sup>41</sup> In reaching its conclusion, the Court noted that Rules 1.06(b)(1) and (2) applied. However, the complaint based on substantial relationship had been dropped by Conoco, leaving only the “adversely limited” test. With respect to that issue, the Court construed the following interests protected by the rule.<sup>42</sup> The court concluded that the alleged conflict did not rise to the level required under Rule 1.06(b)(2), stating that: (1) there was no evidence of a reasonable detriment to Conoco in the pending litigation; (2) no damage of disclosure of confidences; and (3) the firm would have withdrawn anyway if it had withdrawn from both representations, rather than just one representation, so there was no real hardship imposed upon Conoco.<sup>43</sup>

*ii. Exceptions to the General Standard.*

Rule 1.06 does provide for certain exceptions to the general prohibition against concurrent representations. Specifically, Rule 1.06(c) states:

- (c) A lawyer may represent a client in the circumstances described in (b) if:
  - (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
  - (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature,

implications, and possible adverse consequences of the common representation and the advantages involved, if any.<sup>44</sup>

Both the lawyer's assessment of the conflict *and* the client's offer of consent after full disclosure are critical to this rule. Certainly, the rule as written does not contemplate concurrent representation where the representation would be materially affected even if the clients consent. The lawyer must reasonably believe that his representation will be reasonably protective of that clients interests,<sup>45</sup> However, if a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer should not ask for the consent or represent the client.<sup>46</sup>

*iii. Vicarious Disqualification.*

Rule 1.06 also provides grounds for vicarious disqualification. Specifically, Rule 1.06(f) provides that:

- (f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.<sup>47</sup>

Thus, where an attorney is precluded from representation of a particular client, his entire law firm is also disqualified from the representation under certain circumstances. Because Rule 1.06 refers generally to all conflicts, it is not limited to conflicts arising out of just concurrent representation.

4. The Dangers of Taking the Chance.

*a. Disqualification.*

Although disqualification of counsel can be based on any number of grounds, disqualification is usually based on violation of one or more of the attorney disciplinary rules.<sup>48</sup> Although the disciplinary rules in federal court are not binding or controlling as standards on motions to disqualify, the Texas Disciplinary Rules of Professional Conduct as construed in

Texas state courts “have been viewed by the courts as guidelines that articulate considerations relevant to the merits of such motions.”<sup>49</sup>

Disqualification is, however, a “severe remedy.”<sup>50</sup> Such motions are subject to “an exacting standard” both to protect a party’s right to counsel of choice as well as discourage the use of such motions as a “dilatory trial tactic.”<sup>51</sup> The burden is on the party moving to disqualify counsel to establish with specificity a violation of one or more of the disciplinary rules, and mere allegations of unethical conduct or evidence showing a remote possibility of a violation of disciplinary rules will not suffice.<sup>52</sup> In effect, the law of Texas does not permit disqualification of a law firm based on a conflict that might occur or upon adversity that might arise.

Moreover, some Texas courts have held that the party seeking disqualification must demonstrate “actual prejudice resulting from the opposing lawyer’s service in dual roles.”<sup>53</sup> In addition, these courts have held the movant “must show that there is a specifically identifiable appearance of the occurrence of improper conduct and the likelihood of public suspicion or obloquy outweighs the social interest in obtaining counsel of one’s choice.”<sup>54</sup> Similarly, the Texas Supreme Court has held that “to prevent such misuse of Texas Disciplinary Rule 3.08 [the attorney-witness rule], “the trial court should require the party seeking disqualification to demonstrate actual prejudice to itself resulting from the opposing lawyer’s service in the dual rules.”<sup>55</sup>

*b. Malpractice.*

*i. Elements.*

A malpractice action in Texas is based on negligence and requires proof of four well-known elements: (1) the existence of a duty; (2) a breach of that duty; (3) that the breach of the duty proximately caused certain damages; and (4) that the plaintiff was damaged.<sup>56</sup> Because an

attorney owes his client a fiduciary duty;<sup>57</sup> where a conflict in interests arises that causes a breach of that duty, the attorney will be responsible for all damages proximately resulting therefrom.

Although attorney malpractice actions have traditionally centered on the assertion that the attorney caused the client to lose his case, malpractice actions arising out of conflicts of interest are uniquely different.<sup>58</sup> In a malpractice action arising out of a conflict of interest, it is questionable whether a plaintiff would have to prove the “suit within a suit” because the real issue is breach of fiduciary duty owed to the client. Similarly, it is conceivable that a former client could recover for malpractice of the attorney even in a situation where the client is successful in the litigation where it is sued by its former attorney.

*ii. Paying the Price.*

Several recent cases have brought the issue of malpractice and conflicts of interest to the forefront. As is self-evident from the verdicts rendered in these cases, the stakes are high when dealing with malpractice based on conflicts of interest. Although, these cases deal specifically with “large” Texas firms, smaller law firms are equally endangered with respect to malpractice liability. However, the specter of conflicts of interest haunts larger firms perhaps more significantly just by virtue of their size. The more lawyers, clients, and diverse representation undertaken by large law firms renders them particularly susceptible to conflict issues.

One example is the case of *Anne E. Moran, et. al. v. Vinson & Elkins*. As a result of this suit, V&E is currently appealing a \$35.7 million judgment entered against it in 1994.<sup>59</sup> The suit is based on alleged conflicts of interest asserted by two heirs of William T. Moran, a Houston multi-millionaire. The heirs claim that V&E failed to disclose conflicts of interest it had when representing the estate and beneficiaries from 1984 to 1989. The two heirs also maintain that V&E tried to prolong administration of the estate in an effort to charge additional unnecessary

attorneys' fees, was negligent in rendering certain tax advice, and conspired with others in an effort to decrease the value of certain estate assets. No decision has been reached by the Fourteenth Court of Appeals.

**D. Zealous Representation or Vexatious Practices.**

1. Zealous Representation.

Texas Disciplinary Rule of Professional Conduct 1.01, comment 6, is the source of the modern understanding that an attorney should “zealously” represent his or her client in any and all matters. Specifically, comment 6 instructs, in relevant part, as follows:

Having accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with *zeal in advocacy* upon the client's behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer.<sup>60</sup>

2. Vexatious Practices.

Despite the clear message sent by Rule 1.01 that an attorney must pursue with diligence and “zeal” any matter entrusted to him by a client, the Texas Disciplinary Rules of Professional Conduct simultaneously place clear restrictions and limitations on the extent to which an attorney may engage the representation. The following is a few of the more relevant rules that codify these limitations.

a. Rule 1.021(f): Improper Conduct Demanded by Client.

Rule 1.02(f) addresses the situation where an attorney discovers that he has been retained for an illegal purpose or where he discovers that his client intends for him to breach his duties under the Rules. In such a case, the Rule instructs the attorney to “consult with the client regarding the relevant limitations on the lawyer's conduct.” Unfortunately, the rule offers little guidance as to the scope of this consultation, nor does it provide any help as to the effect of a

consultation that is ignored. Clearly, however, the attorney always has the option of withdrawing from the representation where he feels uncomfortable, provided that he meets the disclosure requirements contained in the Rules and the Texas Rules of Civil Procedure.

b. Rule 3.02: Duty to Minimize Burdens and Delays of Litigation.

Rule 3.02 comments on a lawyers' duty to minimize the burdens and delays of litigation. Specifically, it provides that "[i]n the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter."<sup>61</sup> Comment 1 to this rule recognizes the conflict between this rule and the duty to the client to zealously represent it and states "[b]ecause [intentional delay] tactics are frequently an appropriate way of achieving the legitimate interests of the client that are at stake in the litigation, only those tactics that are 'unreasonable' are prohibited."<sup>62</sup> This obviously gives the practitioner little guidance as to where to draw the line, except for the lawyer's own subjective belief of what is reasonable and what is not. However, the commentary does state That a lawyer's duties under this rule are "substantially fulfilled" if Rules 3.01, 3.03 and 3.04 are complied with.

As for the lawyer's duty to minimize costs of litigation, the comments to Rule 3.02, as with the issue of delay, also recognize that litigation is costly and that such increases in costs and economic burdens can be entirely legitimate in the litigation context.<sup>63</sup> However, the comments also state that not all increases in litigation "can be justified in this manner" and that "one example of such impermissible conduct is a lawyer who counsels or assists a client in seeking a multiplication of the costs or other burdens as the primary purpose, because the client perceives himself as more readily able to bear those burdens than is the opponent, and so hopes to gain an advantage in resolving the matter unrelated to the merits of the client's position."<sup>64</sup>

c. Rule 3.03: Duty to Exercise Candor to Tribunal.

Rule 3.03 expresses the State Bar's position on the duty of an attorney to exercise candor toward the tribunal.<sup>65</sup> Specifically, the rule provides that an attorney may not knowingly:

1. Make a false statement of material fact or law to a tribunal;
2. Fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
3. In an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;
4. Fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
5. Offer or use evidence that the lawyer knows to be false.<sup>66</sup>

Unlike other disciplinary rules, Rule 3.03 also provides the lawyer guidance as to what options are available to him to cure any problems created by a violation of any of the above:

If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.<sup>67</sup>

The lawyer's duty to abide by these provisions continues until the remedial measures are no longer reasonably possible.<sup>68</sup>

The net sum of these provisions is stated in comment 1 to Rule 3.03 where it is stated that "[t]he advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal."<sup>69</sup>

d. Rule 3.04: Fairness in Adjudicating Proceedings.

Rule 3.04 governs the duty of an attorney to be fair in adjudicatory proceedings.<sup>70</sup> The specific provisions of the rule prohibit the obstruction of access to evidence, the destruction of relevant evidence, the falsification of evidence, payment of a fee to a witness contingent on the

outcome of the case, intentionally state irrelevant information to the tribunal, ask any question intended to degrade a witness except where relevant, engage in conduct to disrupt the proceedings, or advise a client to disobey a court's order.<sup>71</sup> The essence of Rule 3.04 is summed up in the first comment to the rule:

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like.<sup>72</sup>

*e.      Rule 3.05: Impartiality of the Tribunal.*

Rule 3.05 requires an attorney to maintain the impartiality of the tribunal.<sup>73</sup> Specifically, the rule prohibits an attorney from influencing a court in a pending matter “by means prohibited by law or applicable rules of practice or procedure.”<sup>74</sup> The most obvious situation where an attorney could find herself in violation of this particular rule is “ex parte” contact with the judge. This has historically been the subject of the tightest control “because of the potential for abuse such contacts present.”<sup>75</sup> The rule does state that an attorney is permitted to contact the judicial official: (1) in the course of an official proceeding in the cause; (2) in writing if a copy of the writing is promptly delivered to opposing counsel or party if not represented by counsel; and (3) orally if the opposing counsel or party not represented by counsel is notified in advance.<sup>76</sup>

*f.      Rule 3.06: Duty to Maintain Integrity of the Jury System.*

Rule 3.06 addresses the lawyer's duty to maintain the integrity of the jury system.<sup>77</sup> With respect to the issue of vexatious trial tactics, this rule states that an attorney is prohibited from conduct, “by financial support or otherwise, to conduct a vexatious or harassing investigation of a venireman or juror.”<sup>78</sup> This rule also places certain restrictions on the attorney's influence and contact with veniremen and jury members. The purpose behind this is to “safeguard the

impartiality that is essential to the judicial process” by protecting the veniremen and jury members from “extraneous influences.”<sup>79</sup> The comments are particularly strong as to the importance of this rule, and direct any attorney who has knowledge of its violation to “initiate appropriate disciplinary proceedings.”<sup>80</sup>

### 3. The Texas Lawyer’s Creed.

On November 7, 1989, the Texas Supreme Court and the Court of Criminal Appeals issued the Texas Lawyer’s Creed in an effort to eliminate abusive tactics by lawyers which “are a disservice to our citizens, harmful to clients, and demeaning to our profession.” The Order of Adoption describes the rules in the Creed as aspirational and charges us as lawyers to “rededicate ourselves to practice law so we can restore public confidence in our profession, faithfully serve our clients, and fulfill our responsibility to the legal system.”

The approach of the Creed is to specify simple rules of civil, courteous and fair conduct required of lawyers in their dealings with clients, other lawyers, and the judge. Specific examples which the Courts felt compelled to articulate include requirements that the lawyer advise his client of proper and expected behavior, including avoiding conduct intended primarily for delay or to harass or drain financial resources of the opposing party. In dealings with other lawyers, the Creed imposes obligations to prepare documents faithful to agreements, to agree to reasonable requests for extensions of time and to waive procedural formalities, to attempt to resolve pleading and discovery objections by agreement, to use their best efforts to schedule matters by agreement, to stipulate to undisputed facts, and to comply with all reasonable discovery requests. The Creed also compels respect for the dignity of the court by a lawyer’s conduct, punctuality, and citation of facts and authorities.

The Courts clearly signaled that when understanding and voluntary conduct or peer

pressure and public opinion fail to secure compliance with the goals of the Creed, courts should enforce the rules “through their inherent powers and rules already in existence.” Indeed, the Creed has found its way into the arsenal of enforcement options of courts who must oversee the conduct of litigators.<sup>81</sup> Thus, particularly in the course of litigation, the court’s inherent power to enforce the Creed provides avenues and grounds, in addition to the Rules of Civil Procedure, for relief from inappropriate conduct.

**E.. Conclusion.**

The duty to be vigilant in the protection of our personal and professional standards can be daunting. It is up to the profession as a whole to promulgate standards of conduct by which we agree to abide. However, even the most complex of codification cannot address every situation, and it is up to the individual lawyer to exercise his own professional judgment to determine not only what is legal, but what is “right.”

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<sup>1</sup> TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 (1991) (emphasis added).

<sup>2</sup> 819 S.W.2d at 951. The *Clarke* opinion cited DR 4-101(B), a prior version of Rule 1.09 codified in the Texas Code of Professional Responsibility, however the substance of the above discussion is unaffected.

<sup>3</sup> TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(a)(2).

<sup>4</sup> *Id.* 1.05(a)(1) (1991).

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<sup>5</sup> *Id.* 1.09(a)(3) (1991).

<sup>6</sup> *Id.* 1.09 cmt. 3 (1994).

<sup>7</sup> *Id.* 1.05(a)(2).

<sup>8</sup> *Id.* 1.05(a) (1991).

<sup>9</sup> *Id.* 1.05(c)(1)-(8).

<sup>10</sup> 765 S.W.2d 398 (Tex. 1989) (orig. proceeding).

<sup>11</sup> The Court, in *Coker*, construed Texas Code of Professional Responsibility DR 4-101(B), which discusses representation by attorneys with alleged conflicts of interest arising from prior representation of adverse parties. *Id.* This provision has been replaced by the current Texas Disciplinary Rule of Professional Conduct 1.09. TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 (1991).

<sup>12</sup> *Coker*, 765 S.W.2d at 401. (emphasis added) (restated and affirmed in *Metropolitan Life Ins. v. Syntek Finance*, 881 S.W.2d at 320).

<sup>13</sup> *Id.*

<sup>14</sup> *JK. and Susie L. Wadley Research Inst. and Blood Bank v. Morris*, 776 S.W.2d 271 (Tex. App. – Dallas 1989, orig. proceeding) (“a party moving to disqualify cannot rely upon conclusory statements; he must provide the trial court with sufficient information so that it can engage in a painstaking analysis of the facts.”)

<sup>15</sup> *See Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex. 1995); *Texaco, Inc. v. Garcia*, 891 S.W.2d 255, 257 (Tex. 1994); *Grant*, 888 S.W.2d at 467.

<sup>16</sup> *See Home Ins. Co. v. Marsh*, 790 S.W.2d 749, 753 (Tex. App. --El Paso 1990, orig. proceeding).

<sup>17</sup> *Hoggard*, 770 S.W.2d at 588.

<sup>18</sup> *Arkla Energy Resources v. Jones*, 762 S.W.2d 694, 695 (Tex. App. -- Texarkana 1988, orig. proceeding).

<sup>19</sup> *Coker*, 765 S.W.2d at 400.

<sup>20</sup> *Id.*

<sup>21</sup> *Wadley*, 776 S.W.2d at 278; *Coker*, 765 S.W.2d at 400. Several Texas courts have disqualified counsel after finding the existence of a substantial relationship. *See Clarke v. Ruffino*, 819 S.W.2d at 949 (finding lawyer disqualified where lawyer represented a client regarding a real estate refinancing and later represented an adverse party to the first client in an action where the refinancing was an issue); *Gleason v. Colman*, 693 S.W.2d 564, 565 (Tex. App. -- Houston [14th Dist.] 1985, writ ref'd n.r.e.) (finding lawyer disqualified where lawyer represented a man in a divorce matter that ended in reconciliation and later represented the wife in a second divorce proceeding between the two persons); *Westergren*, 794 S.W.2d at 812 (finding disqualification where a lawyer had represented an insured and, on an “accommodation or pro forma” basis, the insurance company, and subsequently represented the insured against the insurer in a bad faith claim arising from settlement of the earlier claim). *Compare Arkla*, 762 S.W.2d at 694 (finding no substantial relationship between representation of an employer in workers’ compensation case and subsequent negligence lawsuits involving other plaintiffs); *Lou v. Ayres*, 611 S.W.2d 473 (Tex. Civ. App. - Dallas 1980, writ ref'd n.r.e.) (finding no substantial relationship where lawyer represented movant’s wife, and briefly husband, in personal injury claim, and later lawyer represented the wife in a divorce action against the husband).

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<sup>22</sup> 891 S.W.2d at 257.

<sup>23</sup> 881 S.W.2d at 321.

<sup>24</sup> 39 Tex.Sup.Ct.J. 698 (June 6, 1996).

<sup>25</sup> *Coker*, 765 S.W.2d at 400 (emphasis added).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Whether the substantial relationship test will be replaced by the new broader test in Rule 1.09 for the purposes of disqualification is yet to be seen, however courts have already begun applying the new tests in cases such as *Clarke*. See TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 cmt. 9 (1991) (“Whether the ‘substantial relationship’ test will continue to be employed as a standard for procedural disqualification is a matter beyond the scope of these Rules.”). However, the comments to Rule 1.09 indicate that Rule 1.09(a)(3) is not the broad brush that some courts may believe it to be. Specifically, comment 8 notes that “[a] lawyer is not subject to discipline under Rule 1.05(b)(1), (3) or (4), however, unless the protected information is actually used.” TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 cmt. 8 (1991). Likewise, a lawyer is not subject to discipline under this Rule unless the new representation by the lawyer in reasonable probability would result in a violation of those provisions. *Id.* Further, Comment 3 to Rule 1.09 states that Rule 1.09 does not however, absolutely prohibit a lawyer from ever representing a client against a former client. TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 cmt. 3 (1991).

<sup>29</sup> See TEX. DISCIPLINARY R. PROF. CONDUCT 1.09 cmt. 4 (1991) (providing that a “reasonable probability” of disclosure of confidences is a “question of facts”).

<sup>30</sup> See *Clarke*, 819 S.W.2d at 949 (denying writ of mandamus based on application of the Texas Disciplinary Rules to the facts of the case, but returning to the *Coker* test in its analysis).

<sup>31</sup> See *Hoggard*, 770 S.W.2d at 588 (holding that substantial similarity between actions created an appearance of impropriety); see also Lori Gallagher & Andrew S. Hanen, *Attorney-Client Conflicts of Interest and Disqualification of Counsel in Texas Litigation*, 24 TEX. TECH. L. REV. 1039, 1082 (1993).

<sup>32</sup> See TEN. DISCIPLINARY R. PROF. CONDUCT, Preamble ¶ 15 (“these rules are not designed to be standards for procedural decisions”).

<sup>33</sup> *Wadley*, 776 S.W.2d at 271.

<sup>34</sup> TEXAS DISCIPLINARY R. PROF. CONDUCT 1.06(a) (1990).

<sup>35</sup> *Id.* 1.06.

<sup>36</sup> *Id.* 1.06(a)-(b).

<sup>37</sup> *Id.*

<sup>38</sup> *Conoco Inc. v. Baskin*, 803 S.W.2d 416 (Tex. App. -- El Paso 1991, no writ) (citing generally the comments to Texas Rule 1.06).

<sup>39</sup> However, several significant ethics opinions have been issued with respect to Rule 1.06. See e.g., Texas Ethics Opinion 487, Texas Commission on Professional Ethics (1994).

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<sup>40</sup> 803 S.W.2d 416 (Tex. App. -- El Paso 1991).

<sup>41</sup> *Id.* At 422.

<sup>42</sup> *Id.* At 421.

<sup>43</sup> *Id.* At 421-422.

<sup>44</sup> TEX. DISCIPLINARY R PROF. CONDUCT 1.06(c) (1990).

<sup>45</sup> *Id.* Cmt. 2.

<sup>46</sup> *Id.*

<sup>47</sup> TEX. DISCIPLINARY R. PROF. CONDUCT 1.06 (1991).

<sup>48</sup> *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654 (Tex. 1990) (orig. proceeding); *Coker*, 765 S.W.2d at 400.

<sup>49</sup> *Spears*, 797 S.W.2d at 656; *see also Ayres v. Canales*, 790 S.W.2d 554, 556 n.2 (Tex. 1990) (orig. proceeding). Compare *Koch Oil Co. v. Anderson Producing, Inc.*, 883 S.W.2d 784, 787 (Tex. App. -- Beaumont 1994, orig. proceeding) (giving Texas Disciplinary Rules of Professional Conduct the same force and effect as the Texas Rules of Civil Procedure); *Warrilow v. Norrell*, 791 S.W.2d 515, 519 (Tex. App. -- Corpus Christi 1989, writ denied) (holding disciplinary rules are mandatory in nature because “they establish the minimum level of conduct below which no lawyer may fall.”).

<sup>50</sup> *Coker*, 765 S.W.2d at 399.

<sup>51</sup> *Id.*; *Spears*, 797 S.W.2d at 656.

<sup>52</sup> *Id.*; *see also, Hydril Co. v. Multiflex*, 553 F.Supp. 552, 556 (S.D. Tex. 1982) (“A potential conflict based on potential issues is simply not the standard”).

<sup>53</sup> These cases essentially concern the “taint” standard as enunciated in comment 17 to TEX. DISCIPLINARY R. PROF. CONDUCT, 1.06 where opposing counsel may raise the question of conflict of interest. TEX. DISCIPLINARY R. PROF. CONDUCT, 1.06 (1991) (“Raising questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. . . . Where the conflict is such as to clearly call in question the fair or efficient administration of justice, opposing counsel may properly raise the question.”). *Usury v. Grey*, 804 S.W.2d 232 (Tex. App. -- Fort Worth 1991, no writ).

<sup>54</sup> *Id.* at 237 (quoting *Haggard v. Snodgrass*, 770 S.W.2d 577 (Tex. App. -- Dallas 1989, no writ)).

<sup>55</sup> *Ayres v. Canales*, 790 S.W.2d 554, 558 (Tex. 1990), (citing TEXAS DISCIPLINARY RULE cmt. 3.08, 10).

<sup>56</sup> *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989).

<sup>57</sup> *See Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988).

<sup>58</sup> *See Mackie v. McKenzie*, 900 S.W.2d 445, 449 (Tex. App. -- Texarkana 1995, writ denied) (“To succeed in a legal malpractice action, the plaintiff must prove ‘a suit within a suit’ by showing that he would have prevailed in the underlying action but for his attorney’s negligence.” *MND Drilling Corp. v. Lloyd*, 866 S.W.2d 29, 31 (Tex. App.— Houston [14th Dist.] 1987, no writ) (holding that client has the burden of proving his case would have been successful but for the negligence of the attorney).

<sup>59</sup> *Vinson & Elkins v. Ann E. Moran, et. al.* (No. 14-95-00348-CV).

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<sup>60</sup> TEX. DISCIPLINARY R. PROF. CONDUCT 1.01, cmt. 6 (1990).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* cmt. 1.

<sup>63</sup> *Id.* cmt. 6.

<sup>64</sup> *Id.* cmt. 7.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* 3.03(a).

<sup>67</sup> *Id.* 3.03(b).

<sup>68</sup> *Id.* 3.03(c).

<sup>69</sup> *Id.* cmt. 1.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* cmt. 1.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* cmt. 3.

<sup>76</sup> *Id.* 3.05(b).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* 3.06(a)(1).

<sup>79</sup> *Id.* cmt.

<sup>80</sup> *Id.* cmt. 4.

<sup>81</sup> *See Show v. Greater Roust on Transp. Co.*, 791 S.W.2d 204, 211 (Tex. App. -- Corpus Christi 1990, no writ) (Chief Justice Nye quotes the Creed in full to condemn trial judge for improper conduct and failure to show appropriate respect for participants or proceedings); *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n.*, 121 F.R.D. 284 (N.D.Tex.1989) (en banc) (adopting standards for professionalism derived from the Texas Lawyer's Creed and the Dallas County Bar Association's Guidelines of Professional Courtesy).