DECEMBER 31, 2009

VIA HAND DELIVERY

Ms. Kennon L. Petersen
Rules Attorney
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78701

Re: Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct

Dear Ms. Petersen:

As the current President of the Texas Association of Defense Counsel ("TADC") I write to provide our organization's comments on the proposed amendments to the Texas Disciplinary Rules of Professional Conduct.

The TADC is an organization of Texas civil trial attorneys in private practice. Its purpose is to bring together by association, communication, and organization, lawyers of Texas whose practices principally involve litigation of civil cases, and who do not routinely represent personal injury plaintiffs. Our membership consists of approximately 2000 attorneys who conduct business throughout Texas, the United States, and internationally.

a. Overview

In its October 20, 2009 order, the Court commented that "many changes have occurred in the ethical and legal landscape that governs the conduct of lawyers in Texas" since the adoption of the current disciplinary rules in 1990. In addition, the Court noted that there have been significant revisions to the Model Rules and American Bar Association's Model Rules of Professional Conduct in response to recommendations from the Ethics 2000 Commission.[1] As a result, Texas lawyers today are representing clients in matters that are much more national, indeed international, in scope.

Given these developments, one would have expected the proposed amendments to bring the Texas rules more in line with the revised ABA rules. That is particularly true for those rules addressing conflicts of interest. Proposed Rules 1.06, 1.07, and 1.09, however, would do exactly the opposite by creating a set of conflict-of-interest rules with no counterpart in any other jurisdiction. There are several other proposed changes that TADC opposes.

[1] Order re Approval of Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct signed October 20, 2009 in Misc. Docket No. 09-1975 at 1.

b. Proposed Amendments to the Conflict-of-Interest Rules

i. Current Client Conflicts

Current Rule 1.06 (a) makes representation of opposing parties to the same litigation a non-consentable conflict. Proposed Rule 1.06(a) would expand that category to include situations where the lawyer's representation is or will be materially and adversely limited, and representation in violation of Proposed Rule 1.07. Representation is permitted under Proposed Rule 1.06(b) in situations that "may involve a conflict of interest" with informed consent confirmed in writing , and in compliance with Proposed Rule 1.07.

As others submitting comments have noted, the failure to define "conflict of interest" is problematic.[2] In every multiple representation, a theoretical possibility that the interests of the joint clients will diverge to some extent (*i.e.*, a potential conflict of interest) exists. In the large number of cases where there is no reasonable likelihood that the potential conflict will become an actual conflict, Current Rule 1.06 quite properly does not make lawyers subject to discipline for failing to follow a particular protocol given the wide range of situation where joint representation is both desirable and appropriate.

The proposed amendments would make drastic changes to current practices regarding conflict-waiver documentation. Current Rule 1.07 addresses the relatively rare situation where a lawyer acts as an intermediary for more than one client. Proposed Rule 1.07 has a very different scope. Proposed Rule 1.06(a)(3) requires compliance with Proposed Rule 1.07's onerous procedures every time a lawyer represents multiple clients in the same matter even if there is no reasonable likelihood of a potential conflict of interest actually will materialize.

Even where there is a reasonable likelihood that the respective interests may diverge in some respect, clients can, and often do, deal with the situation in various reasonable ways such as limiting the scope of the lawyers representation, reserving rights each client may have against the other, internal screening, etc. Terms and conditions that eliminate or substantially reduce the likelihood of an adverse limitation often are negotiated in the process of obtaining informed consent in writing to such a joint representation. The language of Proposed Rule 1.06(a) appears to prohibit such agreements by making adverse-limitation conflicts non-consentable.

The proposed changes are of particular concern in the insurance-defense context. Under the Court's *UPLC* decision,[3] the lawyer retained is presumed to represent the insurer and the insured. In many, if not the large majority of cases, there is no issue of coverage, and the limits are adequate. In other situations, the insurer may be obligated to defend and indemnify two defendants in the same matter. Again, in many if not most cases, there is no issue of coverage, each insured has adequate limits, and their defenses are not inconsistent. In business litigation, it is also common to represent multiple affiliated parties in the same matter where there is no reasonable likelihood that the interests of those entities or individuals will diverge in a material way. Yet in all of these situations, Proposed Rule 1.06 requires full compliance with the onerous procedural requirements of Proposed Rule 1.07.

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2 *See* Letter date December 21, 2009 from Paul M. Koning at 7 ("Koning Submission").

3 *Unauthorized Pract. of Law Comm. v. Am. Home Assur. Co.*, 261 S.W.3d 24, 35 (Tex. 2008).

Toward the other end of the scale is the more complex, but still common situation where the insurer elects to defend a matter under a reservation of rights, because it has identified potential coverage issues. The insurer must raise all possible coverage issues at the outset of the case in order to preserve the right to contest coverage later. As discussed in more detail by David Chamberlain, a former TADC President, requiring the retained lawyer to attempt to analyze and make disclosures concerning the substantive issues raised by a reservation-of-rights letter would be counterproductive.[4]

Generally, the most sensible course of action is for the lawyer the insurer retains to exclude advice on coverage issues from the scope of the representation, and proceed to defend the insured in the matter. The retained lawyer makes sure that the insured understands and accepts the limitation, but does not get immersed in the details of the reservation of rights. In this common situation, the clients can only agree to postpone resolution of potential coverage issues. This happens repeatedly, and in the large majority of cases, the potential dispute over coverage never materializes. One could argue, however, that requirements of Proposed Rule 1.07(b)(ii) are not satisfied by such an "agreement to disagree."

Where there is a reasonable likelihood of that an actual conflict exists or will develop, Current Rule 1.06 already requires a lawyer representing multiple clients to obtain consent "after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation, and the advantages involved, if any" As Comment 8 recognizes, what is appropriate to obtain informed consent depends on the particular circumstances. Yet Proposed Rule 1.07 dictates a laundry-list of disclosures that are assumed to apply in every circumstance. The administrative burden Proposed Rule 1.07 would impose is substantial. The disputes over compliance are likely to be numerous. And the benefits actually realized are likely to be negligible.

ii. Former Client Conflicts

Proposed Rule 1.09 is an apparent attempt to "clarify" the imputation rules that apply when a lawyer leaves one firm for another. But through an apparent omission, the proposed rule only imputes the disqualification of the transferring lawyer to the lawyers affiliated with the old firm. There is no imputation of the disqualification to those affiliated with the transferring lawyer's new firm. Nor is there any imputation of a lawyer's disqualification if no transfer occurs. Proposed Rule 1.09(e)'s definition of "substantially related" also appears broader than that developed through Texas case law.[5]

Under Current Rule 1.09, it is generally understood that the transferring lawyer's disqualification is imputed to all lawyers who are or become members of or associated with the

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[4] Letter dated December 23, 2009 from David E. Chamberlain ("Chamberlain Submission").

[5] *See In re Epic Holdings, Inc.*, 985 S.W.2d 41 (Tex. 1998). Proposed Rule 1.09 would define "substantially related" to include all matters that "involve the same transaction or legal dispute." In *Epic Holdings*, the challenging party filed two disqualification motions. The Court found that the trial court properly denied the first, even though the claims then asserted involved the same transaction. The Court found that the concerns embodied in Current Rule 1.09 were not implicated until later when it became clear that the work on the transaction was being challenged,. At that time Current Rule 1.09 became applicable, and disqualification was required. 985 S.W.2d at 53.

lawyer's new firm. There is no continuing imputation of the disqualification to the lawyers remaining or those who later join the lawyer's old firm unless the validity of the departing lawyer's services or work product is challenged, or a violation of Current Rule 1.05 on confidential information probably will result.

No substantial justification for changing the current rules on former client conflicts is apparent.

iii. Proposed Rule 1.17

As noted in the Koning Submission, Proposed Rule 1.17 is based upon ABA Model Rule 1.18, but without the screening provision. Thus the only way for a law firm to avoid disqualification based upon a single contact is to condition the contact on the prospective client's agreement that the information provided will not be considered confidential. It is in the best interests of prospective clients to be able to have meaningful interviews with multiple law firms. But it is not in the best interests of prospective clients to be forced to waive any claims to confidentiality on information disclosed in such interviews. As explained in the Koning Submission, including the screening provision from the ABA rule is in the best interests of lawyers and prospective clients. TADC endorses that suggestion.

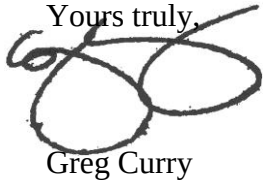
iv. Proposed Rule 8.03

Proposed Rule 8.03 would significantly alter a lawyer's responsibility to protect confidential client information while reporting professional misconduct. Under Current Rule 8.03(d), a lawyer's reporting obligation is not required to disclose knowledge or information protected as confidential by Current Rule 1.05.

Proposed Rule 1.05 limits the exemption to confidential information "the lawyer acquired in the course of or by reason of representing a lawyer to whom the information pertains." As pointed out in the Koning Submission, this proposed change would mandate the disclosure even of attorney-client privileges information in order to report the conduct of a lawyer or judge except in the rare situation of a lawyer-to-lawyer representation. TADC opposed this proposed change.

I respectfully request that you bring these comments to the attention of the Court. If you have any questions or need further information, please do not hesitate to contact me (214-969-1252; greg.curry@tklaw.com) or Luke Ashley (214-969-1255; luke.ashley@tklaw.com). Thank you very much for your cooperation and assistance.

Yours truly,



Greg Curry

GC/dsc