

**UPDATING TEXAS ETHICS OPINIONS:
WHAT'S NEW?**

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State Bar of Texas
34TH ANNUAL
ADVANCED ADMINISTRATIVE LAW
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CHAPTER 8

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EDUCATION

University of Texas, Austin, B.A., 1972
St. Mary's University, San Antonio, J.D., December 1976

BAR ADMISSIONS

Texas 1977; California 1978, Colorado 2003
Various US District Courts and Circuit Courts of Appeal

EMPLOYMENT

Assistant General Counsel, State Bar of Texas: 1978-1980
Robinson, Felts, Starnes, Angenend & Mashburn; Civil Trial Attorney, 1980-1987
Wood, Lucksinger & Epstein; Civil Trial Attorney, 1987-1989
1989-2016 Hill, Ducloux, Carnes & de la Garza
2016 – pres. Attorney at Law, private practice, and Director of Education, Ethics and Compliance, Affinipay-LawPay

PROFESSIONAL ACTIVITIES

Member, Supreme Court Appointee to Committee on Disciplinary Rules and Referenda, 1-1-2018 – pres.
President, Travis County Bar Association (now, Austin Bar Association); 1997-1998; every officer position 92-97;
Chair, Texas Board of Legal Specialization, 1997-1998
Board Certified: Civil Trial Law, 1984; Civil Appellate Law, 1987
Chair, Texas Bar Foundation 2005-2006; Secretary-Treasurer (04-05); Trustee 2004-2008
Chair, Texas Center for Legal Ethics and Professionalism: 2004-06, Trustee 2003-07
Chair, College of the State Bar of Texas; 1992-94; Vice-Chair 1990-92; Director, 1988-98,
Chair, State Bar of Texas Annual Meeting (Texas Bar Convention), 2001
Chair, United States Fifth Circuit Judicial Conference, Austin 2004
President, St. Mary's Law School Alumni Association, 2006-07, Trustee, 2001-2008.

Associate, American Board of Trial Advocates, 1999- pres.
Director, State Bar of Texas; District 9, 1998-2001; Executive Committee 1999-2001
(Outstanding 3rd Year Director Award - 2001)
Director, Austin Lawyers Care (now: Volunteer Legal Services of Central Texas), 86-89
Director, Austin Young Lawyers Association, 1984-1986
Editor, Travis County Practice Handbook, 1984, 1986
Trustee; St Mary's University, San Antonio, Texas 2007-08
Member and Founder *Bar & Grill Singers*, Lawyer Group performing musical parody across the country, and raising (through Jan 2008) \$300,000 for *pro bono* causes.
Member, Supreme Court Advisory Committee on Court-Annexed Mediation, 1996-1998
Distinguished Mediator, Texas Mediator Credentialing Association, 2010
Appointed by Texas Supreme Court to Committee on Disciplinary Rules and Referenda (3 year term-Dec 2017-20)

PROFESSIONAL HONORS

Distinguished Lawyer Award – Austin Bar Association – Austin Bar Foundation 2019
Luke Soules Award – Litigation Council Award for Outstanding Service to Practice of Law 2019 (Statewide Award)
Lola Wright Foundation Award for Promotion of Legal Ethics, 2013 (Statewide Award)
Gene Cavin Award for Lifetime Excellence in CLE, State Bar of Texas, 2011 (Statewide Award)
Annual Professionalism Award, College of the State Bar of Texas, 2002 (Statewide Award)
W. Frank Newton Award (Statewide Annual Pro Bono Award given by State Bar of Texas), 2000
Outstanding Young Lawyer Award, 1987 (Awarded by Austin Young Lawyers Association)
Presidential Citation; State Bar of Texas, 2001 and 2006

Pro Bono Award, Volunteer Legal Services of Central Texas, 1991, 1993, 1997, 1999
Professionalism Award, Austin Bar Association, 2007
Outstanding Mentor of the Year Award, Austin Young Lawyers Association, 2007
SBOT- "Stars of the Bar" Award for Best Article Series "*Entre Nous*", 2003

LEGAL PUBLICATIONS

"Entre Nous" commentary bar journal columns, (1992- 2021 -119 columns published)
CLE Publications,- more than 100 educational articles presented.
CLE Speeches and Presentations – Approximately 509 CLE speeches from 01-01-2016 to 12-31-2021
Outstanding Program Award (National Award) -- American Inns of Court –“What? Me? Biased?” – 2018

MILITARY SERVICE Unites States Army; 1st Cavalry Division, 1972-1974 (Awarded
Army Commendation Medal for Meritorious Service, 1974)

TABLE OF CONTENTS

POWERPOINT PRESENTATION –

Updating Texas Ethics Opinions: What's New? 1-23



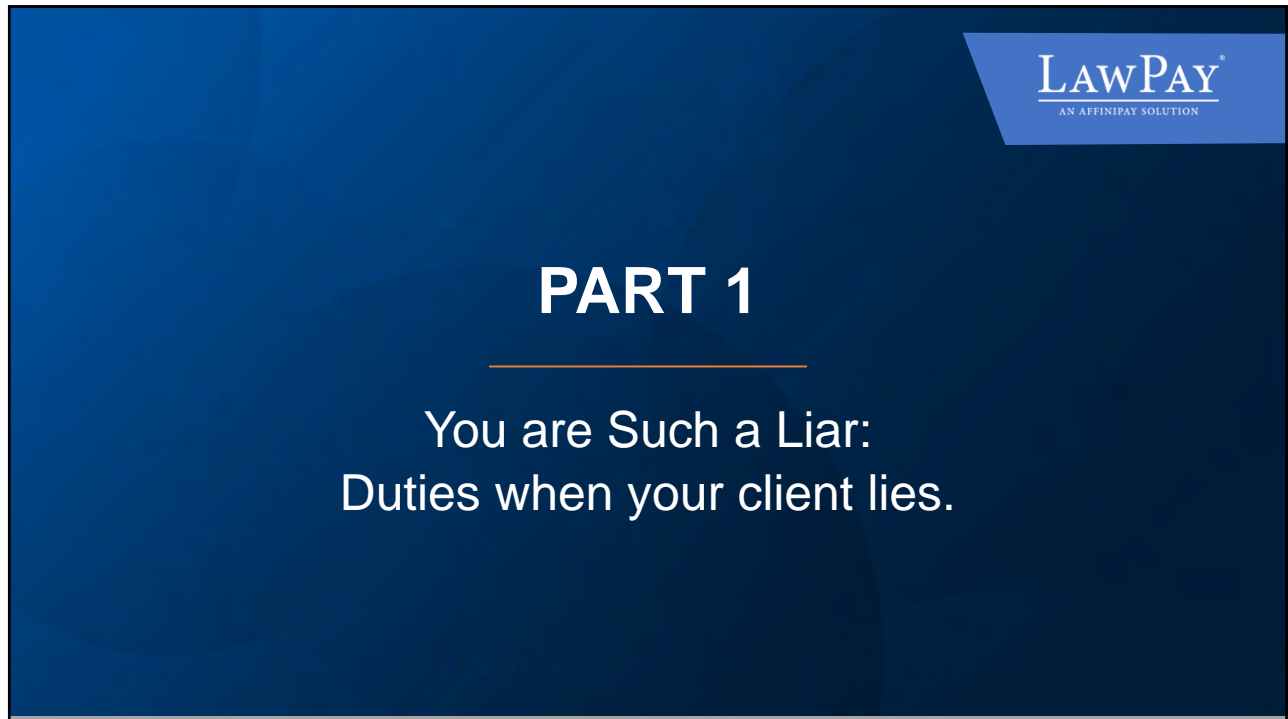
**Updating Texas Ethics Opinions
What's New?**

Claude E. Ducloux
Board Certified- Civil Trial Law & Civil Appellate Law
Texas Board of Legal Specialization
National Director of Education, Ethics, & State Compliance,
LawPay

State Bar of Texas
Advanced Administrative Law Course
June 16-17, 2022 – Webcast from Austin, Texas

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PART 1

**You are Such a Liar:
Duties when your client lies.**

2




3 Denny Defends Difficult David

- Denny Doherty is a defense lawyer with a good reputation for competency and ethics. He’s defending David Danger, who is accused of stealing corporate documents from Acme Company, his last employer.
- Denny learns from David that indeed, he did take some files from Acme, but claims privilege because those files were his work product. “Besides,” he says, “No one will ever know. I’m sure other employees do the same thing.”
- During David’s Deposition, David flatly denies taking any documents.
- No testimony has yet been used before a judge or introduced to support a motions.
- Denny calls you and says, “He Lied, I know he lied, and what should I do?”

What do you tell Denny to do?

3



4 Consider the following Disciplinary Rule:

Tex DRPC 3.03

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law **to a tribunal**;

...

(5) **offer or use** evidence that the lawyer knows to be false.

Comment 2: ...in certain situations, **failure** to make a disclosure is the **equivalent of an affirmative misrepresentation**. The obligation prescribed in Rule 1.02(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. See the Comments to Rules 1.02(c) and 8.04(a).

Assuming no trial or offer of this testimony yet, what does Denny do?

4

5

Consider this Disciplinary Rule, too:

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Rule 4.01. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Question: Does this Duty arise as a result of the deposition testimony?

Comment 4: Since 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 [*disclosures*] without having first undertaken those other remedial actions. See also Rule 1.05.

5

6 Corrective Action?

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Rule 3.03 Comment 5 -...Initially in such situations, a **lawyer should urge the client** or other person involved to not offer false or fabricated evidence. However, whether such evidence is provided by the client or by another person, the lawyer must refuse to offer it, regardless of the client’s wishes.

Comment 6 - If the request to place false testimony or other material into evidence came from the lawyer’s client, **the lawyer also would be justified in seeking to withdraw from the case**. See Rules 1.15(a)(1) and (b)(2), (4). If withdrawal is allowed by the tribunal, the **lawyer may be authorized under Rule 1.05(c)(7) to reveal the reasons for that withdrawal to any other lawyer subsequently retained by the client** in the matter; but normally that rule would not allow the lawyer to reveal that information to another person or to the tribunal.

- *Seems to leave the final duty to the lawyer present at the offer of false evidence.*

Comment 14 - ... the **obligation to rectify** the presentation of false testimony or other evidence varies from case to case but **continues as long as there is a reasonable possibility of taking corrective legal actions before a tribunal**.

6

7 You tell Denny to do this (which option is best):

- A. Determine if David actually “intended to deceive,” and if not, simply tell David he should correct it;
- B. Tell his client, David, that **if** ACME’s lawyers rely on that testimony to dismiss their case, that unless he corrects it, Denny will need to disclose it.
- C. Tell his client that he cannot use or offer that testimony, and he should commit to giving the correct information if asked the same questions in court.
- D. Deposition perjury is both a fraud and a crime. It is not confined to acts simply before a judge. If he fails to correct that testimony, Denny will withdraw.

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7

8 “Best” Answer: D

See, Fred C. Moss, “Deposition Perjury: Must the Lawyer Blow the Whistle?”
Texas Bar Journal, November, 2019:

“The failure of the offending **party’s lawyer** to ensure the correction of the deposition perjury condones and assist a fraud and undermines the justice system by allowing the client to maintain an improper advantage in the fight.

Thus: **Although all of the options were correct in some way, the threat of being part of the crime (and disbarment upon conviction) is additional motivation.**

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8

9 Hold your horses- New Texas Ethics Opinion!

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New Texas Ethics Opinion 692 (October 2021)

This new Opinion focuses on supposed different types of “perjury” -
Deposition v. Direct Exam v. Cross Exam

Deposition: Only need to correct if other side is relying on it.

Direct exam (it’s your witness) perjury triggers obligation under Disciplinary Rule 3.03

Cross Exam only triggers obligation to counsel your client to correct his testimony, explain pains & penalties of perjury, and refuse to rely or use it.

EXCEPTIONS: However, the circumstances may involve exception to confidentiality of DR 1.05 (c) which allows attorney to disclose to prevent another crime or criminal act; or to rectify when the client has used lawyers services to commit a fraud or crime.

9

10 Hold your horses- New Texas Ethics Opinion!

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New Texas Ethics Opinion 692 (October 2021)

Conclusion: A lawyer does not have a duty to correct intentionally false statements made by the client while being cross-examined by the opposing party’s counsel during a deposition. Nevertheless, the lawyer should:

- Urge the client to correct the false statements, including by explaining the potential civil and criminal ramifications of false testimony.
- If the client refuses, the lawyer may (but is not required to) withdraw from the client representation if permitted by the Rules.
- If the lawyer does not withdraw, the lawyer is not required to disclose the true facts but may not use the false deposition testimony in any way to advance the client’s case.

10

PART 2

Bob, Are You Okay? Or, Do I Need A Guardian?

11

12 What Do I Do Now?

- Mary Jones is a 30-year practitioner with a good reputation in her mid-size Texas city. Like many lawyers, she has represented many people for decades.
- One day, her longtime-client Bob comes in for an appointment. Bob is agitated and tells her, "I need a new will, I want to cut my daughter out completely, and give everything to my son."
- Mary is a bit startled, but asks good questions. When she asks, "What do you want to do with the acreage you received from your Mother?" Bob replies, "What acreage?"
- Mary is very concerned that Bob is showing signs of mental decline.

12

13 What Do I Do Now?

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- Mary's communications are governed by the attorney-client privilege, so -- Who can Mary talk to?
- What are the limitations on what she can say?
- Should she create a guardianship?
- Do the rules require Mary to reveal her fears learned during the attorney client communication?
- Would Mary's duties to Bob change if she were court-appointed to act for him?
- Finally, would Mary's rights or duties change if Bob were a brand new client showing signs of dementia or mental decline?

13

14 What Do I Do Now?

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Mary Consults You for Ethics Advice and You say:

- A. Without instructions from the client, you must create a guardianship for Bob if you believe he needs protective action from making bad decisions.
- B. You should ask the Court to appoint you as an Attorney in fact only for his estate, but not his person.
- C. You can reach out to a trusted person, and reveal your fears about Bob's mental acuity.
- D. You have a duty to reach out to a trusted person, and protect Bob from his mental limitations



14

Correct Answer:

c. You “may” reach out to “Trusted Person”

Clients with Diminished Capacity New Rule 1.16



What has Changed in the Disciplinary Rule?

- Current Rule 1.02(g) deleted and new Disc. Rule 1.16 added.

Key Provision: The new rule makes clear that a “lawyer may take reasonably necessary protective action . . . [that] may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client,” such medical providers or even family members.

Permissive– not mandatory!

15

15

Does this rule apply to new clients, too?

SUPREME COURT COMMENTS

Comments to New Disciplinary Rule 1.16: DIMINISHED CAPACITY

EXCEPTION TO CONFIDENTIALITY: Clarify that diminished capacity rule applies to existing client relationships:

- **Comment 5:** “Paragraph (b) [of the rule] contains a non-exhaustive list of action a lawyer may take to protect an **existing client** who does not have a guardian or other legal representative...”
- **Comment 6:** [Summary] Duties of court-appointed attorneys for clients with disabilities unaffected;
- **Comment 6:** “Nothing in this rule modifies or reduces a lawyer’s obligations under other law.”

16

16

PART 3

Moving On UP to the New Firm

17

¹⁸ Paul Gets a New Offer

Paul is a skilled administrative practitioner and his firm, **Jones & Jones** regularly represents the Public Utility Commission in rate hearings for the before the Office of Administrative Hearings.

Biggus & Largesse wants to hire Paul away, but Biggus frequently represents Utilities and Ratepayers at the Public Utility Commission, and currently has a case in which Jones & Jones is opposing counsel.

Paul is worried that “migrating” his practice (even though he takes no clients) will conflict OUT his new firm, and that Paul can’t be screened to prevent that.

18

19 Questions to Answer:

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- Did Paul Personally represent the PUC in the case? Does that matter:
- Even if he didn't, are conflicts imputed to Paul?
- Can Paul and Biggus argue that anything strategies or confidentialities are subject to the "generally known" exception of Rule 1.05 – ie., governmental hearings are open, and there is a very slight likelihood of possession true confidential information.
- And, why can't Paul simply be "screened?"

19

20 What Should Paul do?

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Paul comes to you, and you say:

- Stay Away.** Paul should delay his hiring completely until the current case is over.
- He can Use Rule 1.10** to "screen" himself if he didn't actually participate in this litigation.
- Conflicts are minimized by the **Generally Known** exception in public litigation.
- Paul needs consent of the PUC:** Paul shouldn't go unless he gives notice of his moving to the new firm receives permission to move.

20

21 Best Answer: D- Notice and Permission



Texas Professional Ethics Opinion 693 –Nov 2021

- The bar is quite low on what amount of information creates a conflict
- It might be a small amount of limited advice, and not full on representation
- Rule 1.10 (availability of screening) does not apply to private lawyers migrating, but only to government lawyers migrating to private firms

BOTTOM LINE- Stay away absent notice and permission

21

22 However, New Potential Rule Changes on Horizon



THE CDRR IS NOW PUBLISHING PROPOSED NEW Rules 1.09 and 1.10

1.10: Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client, . . . unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.09(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is **timely screened** from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) **written notice is promptly given** to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall **include a description of the screening procedures employed**; a statement of the firm's and of the screened lawyer's compliance with these Rules; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

22

PART 4



Tell Me What to Do!

23

Scenario 2: What is my Ethical Duty?

- Chester has a high-profile real estate practice:
- He has learned that two of his major development clients are bidding against each other for a prime piece of downtown property. Lucy is a well-known expert in Ethics. Chester calls Lucy to get advice on the effect of this conflict of interest.
- What are Chester's limitations in communicating with Lucy?
- How does rendering ethics advice affect Lucy's own ethical obligations?

24

24

Securing Legal Ethics Advice



- New provision added to **Disc. Rule 1.05(c)(9)** to clarify that a lawyer is permitted to disclose **confidential information** to secure legal advice about the lawyer's compliance with the Texas Disciplinary Rules of Professional Conduct.
- "A lawyer may reveal **confidential information** *** (9) To secure legal advice about the lawyer's compliance with these Rules."

25

25

Must the ethics expert treat the information from Lucy as privileged?

New Rule Disc Conduct 1.05 (c)(9) Authorizing disclosure of confidences to receive ethics advice:

Comment 23: [last sentence:] "A lawyer who receives **confidential information** for the purpose of rendering legal advice to another lawyer or law firm under this Rule is subject to the same rules of conduct regarding disclosure or use of **confidential information** received in a confidential relationship."

26

26

What Is Confidential Information?

- “Confidential information” includes **both** “privileged information” and “unprivileged client information.”
- “Unprivileged client information” means **all** information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.



27

27

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PART 5

I'm Worried About You

28

29 "I'm Worried about You"

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Family Law and Bankruptcy lawyers frequently work with stressed clients.

Danny's client, Walter, is enduring a debilitating bankruptcy and has just been served with divorce papers. Danny is worried about Walter and calls him.

Walter says, "Well this is pretty much the end of the trail, I guess. I've lost my business, and now my wife. I know how to make my problems go away. I've got a bottle of whiskey and a .44 at home, and I'm going to just relax tonight."

Danny believes Walter is in danger of self-harm.

29

30 Who, if anyone, can Danny call?

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Consider:

Rule 1.05 (c) (7) allows lawyers to reveal confidences to prevent fraud

Rule 1.05 (e) to prevent an act likely to result in death or serious bodily injury.

But can you disclose that you think a client is at risk of suicide?

Who can you call?

And . . . MUST you call someone?

30

31 Who, if anyone, can Danny call?

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Which of these is the best option:

- A. Call the local police department and ask them to check
- B. Call a relative of Walter's if you know one
- C. You may reach out to a trusted person and disclose your concerns.
- D. You have a duty to make a reasonable effort to reduce the likelihood of self harm.
- E. Any one of the options above are appropriate.

31

32 Best Option- C: Reaching out to "Trusted Person"

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Confidentiality Exception to Permit Disclosure to Prevent Client Death by Suicide –

- **New Rule 1.05(c)(10)** added to the rule on confidentiality to clarify that a lawyer is permitted to disclose confidential information when that is reasonably necessary to prevent a client from dying by suicide.
- "When a lawyer has reason to believe it is necessary to reveal confidential information in order to prevent the client from dying by suicide, the lawyer shall have the option of making that disclosure."

Again: Permissive– not mandatory!



32

PART 6

Transition Planning

33

Scenario 5: Transition/Emergency Planning:

- *The ABA predicts that 50,000 Lawyers will cease practice voluntarily -- and involuntarily – without any prior planning. This leaves a dangerous mess for their firms, their families and their clients.*
- Your friend and colleague, John Johnson, has a sudden stroke. His wife comes to you and said, “I need help closing down John’s practice.”
- What is the safest way to do that?
- How can lawyers plan in advance?

34

34

Scenario 5: Transition/Emergency Planning:

For more than 20 years, the Texas Rules of Disciplinary **PROCEDURE** (Specifically Rules 13.01, 13.02, and 13.03) Have allowed lawyers to be appointed as “custodians” by appointment of the District Court in the home county of the affected lawyer.

What’s the benefit of appointment? You get “Good Samaritan” protection of sorts: the custodian cannot be sued for your service except for “intentional misconduct or gross negligence.”

But why not have a right to non-judicial appointment and service as a Custodian?

35

35

Voluntary Appointment of Custodian Attorney for Cessation of Practice New Rule 13.04



- **New Rule Disc Procedure 13.04** of the Texas Rules of Disciplinary Procedure authorizes a lawyer to voluntarily designate a custodian attorney to assist with the designating attorney’s cessation of practice and provides limited liability protection for the custodian attorney.

36

36

Voluntary Appointment of Custodian Attorney for Cessation of Practice New Rule 13.04

- What is the role of a custodian?
- Can you have more than one custodian?
- May a custodian take over the representation of the client?

37

37

SUPREME COURT REQUESTED COMMENT:

WHAT HAPPENS WHEN THE CUSTODIAN TAKES OVER REPRESENTING THE CLIENT:

New Rule of Disciplinary Procedure 13.04 Authorizing Appointment of Custodian:

Comment: “Performing the duties of a custodian under this Rule of Disciplinary Procedure does not create a client-lawyer relationship. If a lawyer serving as custodian assumes representation of a client, the lawyer’s role as custodian terminates, and the lawyer’s actions are subject to the Rules of Professional Conduct regarding the client-lawyer relationship.”

38

38

PART 7

Miscellaneous Recent Opinions

39

Most Recent Opinions



Opinion 693 – Feb 2022 May a lawyer who practices in a private law firm that regularly represents a public entity accept a position with a hiring law firm that is routinely adverse to the public entity, without creating a conflict for all lawyers in the hiring firm?


Discussed above in this presentation

Opinion 692 – Oct 2021 Duty to correct false statements, *discussed above*.

Opinion 691 – June 2021 When may a lawyer represent a client adverse to a former prospective client?– Wife consulted law Partner A about divorce 5 years ago. Took no action. May Partner B accept representation of Husband 5 years later? NO. disqualification of A imputed to B.

40

40



PART 8

Legal or... Unauthorized Practice of Law?

41



⁴² Plunder & Carpetbag, Attorneys at Law

The California firm of Plunder & Carpetbag want to start a Dallas Office to provide legal services to its Clients with Texas business interests.

None of the California Partners or associates are licensed in Texas.

P&G Hires a Texas Lawyer, Taylor, as an associate, to open that office and Taylor will be the only licensed Texas lawyer and will be responsible for all Texas work product.

Is this legal?

42

43 Consider Previous Texas Ethics Opinions

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Texas Opinions 319 (October 1966) and 400 (July 1981) allowed the out of state law firm to operate in Texas if:

- There is on staff a resident partner licensed in Texas;
- All representations made to public (letterhead, cards, ads) identify the states in which the members of the firm are licensed.

BUT in our example the *only resident attorney* will not be a partner, but merely an associate or contract lawyer for the firm.

Can they open the Dallas Office?

43

44 Answer: Yes.... Provided...

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See, Texas Professional Ethics Committee Op. 686 – Jan 2020

The resident lawyer need not be a partner provided:

- (1) The non-partner lawyer is truly a member “in” the firm (see Opinion 577 (2007) for factors to be “in” a firm; and
- (2) The resident lawyer is given the responsibility and authority to make decisions about the firm’s practice of law in Texas.

Side issue: Who will teach the California lawyers to file motions for sanctions with every exchange of discovery?

44

Improve and Defend Your Profession

Support the fair administration of justice.

Our legal profession will be:

- Courteous – if you are
- Strong – if you are active in it
- A source of service – if you serve
- A source of resolution – if you share your talents



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46

