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Walking the Ethical Tightrope

The Challenges of a City Attorney

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AUTHOR'S BIO

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I. INTRODUCTION

All lawyers are aware that we are governed by a set of ethical standards called the Texas Disciplinary Rules of Professional Conduct ("Rules"). Unless a lawyer is a very recent graduate of law school, a lawyer may not recall or may have never fully been made aware of the intricacies of those Rules or recent changes to the Rules. Familiarity with the Rules is important for the lawyer not only to avoid ethical complaints against the lawyer, but perhaps, just as importantly, to foster existing relationships with clients. This paper outlines the Rules that seem to affect lawyers most, particularly those lawyers representing local governments. It includes analyses of those Rules governing: (a) billing practices; (b) confidential information; (c) conflicts of interest generally; (d) conflicts of interest related to former clients; and (e) successive government and private employment. Finally, the paper addresses the role of the Office of the Chief Disciplinary Council and the grievance process, and who may file a grievance. The purpose is not only to inform lawyers of the minimum requirements of the Rules, but to also offer suggestions where going beyond the required minimum is appropriate in order to enhance the lawyer's relationship with the lawyer's client.

II. BILLING PRACTICES

Lawyers who work in the private sector account for work performed by billing on a very regular basis, and any private law firm's viability is dependent on billing for work performed. Therefore, whether a lawyer is an in-house city attorney, or serves municipalities through a law firm, it is in every lawyer's best interest to establish standard and consistent billing practices, not only to ensure compliance with the Texas Disciplinary Rules of Professional Conduct, but also to maintain a good relationship with the lawyer's client. Billing practices include: (a) communication of fees; (b) types of fees; and (c) invoicing clients.

A. Communication of Fees

Rule 1.04(c) governs a lawyer's communication regarding the basis or rate of the lawyer's fee. It states:

> When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

This Rule assumes that when a lawyer ***has regularly*** represented a client that an understanding between the lawyer and the lawyer's client concerning the basis or rate of the fee exists. Therefore, the lawyer can assume that having a mutual understanding about rates is the first requirement.

Only when a lawyer ***has not regularly*** represented a client, does the Rule require that the basis or "rate be communicated, preferably in writing, before or within a reasonable time after commencing the representation." Much of the wording of this Rule is left to

interpretation. For example, what is "regular representation"? What is a "reasonable time"? The comments to the Rule clarify that in a ***new*** client-lawyer relationship, an understanding of the fee should be promptly established. Rule 1.04(c) does not require that every potential factor that may be the basis of the fee be established or communicated, just those factors that are directly involved in its computation.[1] For example, Rule 1.04(c) allows a lawyer to give an initial estimate as to what future fees may be. Then, if circumstances cause the initial estimate to be "substantially inaccurate," a revised estimate should be provided to the client.

Rule 1.04(c) is riddled with assumptions and recommendations. As such, it is difficult for a lawyer to decipher what the lawyer ***must*** do when communicating fees to: (a) a new client, and (b) an existing client, as opposed to what a lawyer only ***should*** do. Therefore, the following is a list of recommendations for lawyers to ensure compliance with Rule 1.04(c) and to help prevent discomfort on the part of the client:

New Client

- Before any legal work is performed, the lawyer should send out an engagement letter outlining the fee basis.
- While Rule 1.04(c) does not require it, the lawyer should also include in the engagement letter the lawyer's billing cycle, etc.

Existing Client

- Even if a mutual understanding of the lawyer's fees and basis for those fees exists already, if a lawyer has not already done so, the lawyer should send an engagement letter memorializing that understanding.
- Once the lawyer anticipates when and how those fees will change from the fee estimates represented in the initial engagement letter, the lawyer should send an amended engagement letter in advance of making the change.

B. Types of Fees

Rule 1.04 is somewhat vague thereby allowing lawyers quite a bit of flexibility with billing practices and the types of fees assessed on clients. Rule 1.04(a) prohibits a lawyer from assessing an ***unconscionable*** fee. It states:

> (a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

Because what is "reasonable" is often subjective and difficult to determine, Rule 1.04(a) is supported by Rule 1.04(b), which provides factors to consider in determining the reasonableness of a fee. Those factors include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular

[1] Tex. Disc. R. Prof. Conduct Rule 1.04, Comment 2.

employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

As the comments to Rule 1.04(b) admit, many of the factors are subjective factors, which make it difficult to determine whether a fee is determinatively unconscionable. Comment 7 to Rule 1.04 states, "[b]ecause those factors do not permit more than an approximation of a range of fees that might be found reasonable in any given case, there is a corresponding degree of uncertainty in determining whether a given fee is unconscionable." The majority of cases in Texas Courts interpreting Rule 1.04 include claims involving contingency fees.[2] However, at least a few cases involve hourly rates. For example, the San Antonio Court of Appeals found billing more than 24 hours in one 24-hour period to be unconscionable. The same Court found billing while sleeping to be unconscionable, no matter the circumstances.[3]

C. Invoicing Clients

While Rule 1.04 does not address practices involving ***invoicing*** clients, it is an issue, which if properly addressed, will likely reduce the risk of disputes when a client receives a bill. The following are recommendations for invoicing clients:

- Communicate frequency of invoicing to client.
- Invoice on a regular, consistent basis (i.e., every month, every two months, etc.)
- Avoid balloon invoices.
- Ensure that each invoice is submitted timely so that if a governing body must approve payment, the invoice is received prior to the governing body's regular meeting.

Also, when billing, a lawyer representing a government entity should be aware that the public has a right to review a lawyer's bills under the Texas Public Information Act.[4] Therefore, each lawyer should be cognizant of information that, although not privileged attorney-client information, the lawyer should refrain from making public through the lawyer's bills.

III. CONFIDENTIAL INFORMATION

One of the Rules that is triggered most often in the practice of law for all types of lawyers is the Rule that governs what a lawyer may and may not do with confidential information from a client. Rule 1.05 is the rule that governs confidential information. It is a lengthy rule that could affect

[2] *See Brazos Elec. Power Coop. v. Weber*, 238 S.W.3d 582 (Tex. App.—Dallas 2007); *McCleery v. Comm'n for Lawyer Discipline*, 227 S.W.3d 99 (Tex.App.—Houston [1st Dist.] 2006).
[3] *Goodyear Dunlop Tire North America, LTD. v. Gamez*, 151 S.W.3d 574 (Tex. App.—San Antonio 2004).
[4] Tex. Gov't Code Ann. §552.022(a)(16).

many different fact scenarios. However, for the sake of brevity, this section will be limited to: (a) what confidential information is; (b) to whom a lawyer may reveal the client's confidential information; and (c) when the lawyer's obligation to refrain from revealing the client's confidential information ends. This section also clarifies the role of a lawyer in possession of confidential information as it relates to a client when the client is an organization such as a city, and not a single individual.

A. Confidential Information Defined

Paragraph (a) to Rule 1.05 states, "[c]onfidential information includes both privileged information and unprivileged client information." Each is explained below.

1. Privileged Information

   Privileged information is that which is protected by the attorney-client privilege of Rule 5.03 of the Texas Rules of Evidence. Rule 5.03 states, "a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:" between a client and the client's lawyer.[5] The last part of 5.03(1) includes a list of people who could potentially engage in communications throughout the rendition of legal advice. In sum, however, privileged information is between the client, or the client's representatives and the lawyer and the lawyer's representatives. For example, the mayor of a city reveals to the city attorney that the city council is considering terminating the employment of the chief of police and is seeking legal advice on how to do so in a manner that minimizes the risk of legal action against the city as a result. In the course of the communication, the mayor communicates to the city attorney certain facts about the chief of police's employment that, if disclosed to the public, could affect the city's ability to terminate the employment of the chief of police without risk of legal action in response. In this scenario, the communication of facts to the city attorney is privileged information because it was made for the purpose of facilitating the rendition of professional legal services to the client.

2. Unprivileged Information

   The definition of unprivileged information is more expansive. Rule 1.05 states, "[u]nprivileged information means all information relating to a client or furnished by a client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client." In using the example above, the mayor, in the same conversation, communicates the fact that the mayor plans not to run for reelection in the next election. That communication was made during the course of the city attorney's representation of the city. Even though that communication was not made for the purpose of facilitating the rendition of professional legal services to the client, and is therefore ***not privileged***, it was still made during the course or by reason of the representation of the client and is therefore still ***confidential***.

[5] Tex. R. Evid. 5.03(a).

B. To Whom the Lawyer May Reveal Confidential Information

Rule 1.05(b)(1) states that, except as permitted or required under 1.05, a lawyer shall not knowingly, "[r]eveal confidential information of a client or former client to:

> (i) A person that the client has instructed is not to receive the information; or
> (ii) Anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

Basically, unless an exception (discussed below) applies, Rule 1.05 only allows a lawyer to reveal confidential information to the client, a client's representative, or members of the lawyer's firm. A "client's representative" is defined as:

> (A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client; or
>
> (B) any other person who, for the purpose of effectuating legal representation for the client, makes or receives confidential communication while acting in the scope of employment for the client.[6]

A lawyer should not assume who the client's representatives are, and when in doubt, should request permission in writing from the client distinguishing with whom the lawyer may discuss confidential information.

Rule 1.05 paragraphs (c) and (d) provide those situations when a lawyer ***may reveal*** confidential information. Rule 1.05(c) and (d) include a lengthy list of exceptions. The most important exception includes those situations that involve the client consenting to the revelation of the communication, which for a municipal lawyer involves a majority vote of the City Council. Another is when the revelation of confidential information is in order to prevent a crime from occurring. The last exception is when it is necessary to effectively represent the client. Rule 1.05(e) requires a lawyer to reveal confidential information when "a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person." Note that in this situation governed by Rule 1.05(e), disclosure is mandatory, not discretionary.

C. Time Period for Prohibition from Revealing Confidential Information

A lawyer's duty to protect a client's confidential information does not terminate after the lawyer stops representing a client. Section (b)(3) of Rule 1.05 states that a lawyer shall not knowingly:

> Use confidential information of a former client to the disadvantage of the former client after the representation has concluded unless the former client consents after consultation or the confidential information has become generally known.

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[6] *Id.*

Unless it falls under one of the exceptions of Rule 1.05(c) and (d), a lawyer may only reveal confidential information if one of two things happens: either consent is given or the information is public knowledge. Comment 8 to Rule 1.05 states, "[t]he duty not to misuse client information continues after the client-lawyer relationship has terminated." It does not end until the former client consents or the information has become generally known. Therefore, the duty not to reveal confidential information may never end. More importantly, Rule 1.05(b)(3) could affect a lawyer's effective representation of future clients. For example, representation of a client is prohibited when confidential information received by the lawyer by a previous client affects the case of a subsequent client. A lawyer should be aware of all information communicated by the client to the lawyer throughout the lawyer's representation of that client because the information communicated in the past could prevent ethical representation under Rule 1.05 and Rule 1.09 (discussed below) of a future client. The Dallas Court of Appeals found that where a departing attorney sought out a former client's confidential information from her former law partner and used it to the former client's detriment when representing the opposing party, disqualification was required.[7] In any situation, the knowledge of confidential information of one client could create a conflict of interest when representing the next client. Conflicts of interest are governed by Rule 1.06 (discussed further below).

D. Confidential Information and the Client as an Organization

Rule 1.12 governs a lawyer's duty when a lawyer represents an organization as opposed to an individual. Rule 1.12 clarifies that a lawyer retained by an organization, such as a city, represents the entity and not any one of its individual members. In this role, the lawyer must proceed as reasonably necessary in the best interest of the organization as a whole. In the context of confidential information, it is therefore important that the lawyer realize the lawyer's role. It is the responsibility of the lawyer to inform the individual member that communications between individuals of the entity and the city attorney are not confidential between the city attorney and the individual if they are adverse to the entity as a whole. The lawyer has an obligation to inform the organization of those communications.[8] For example, if in the example from Section A(1) above, the city attorney advises the mayor regarding the termination of the employment of the chief of police. The chief of police senses the possible termination of his employment and contacts the city attorney to seek legal advice about the possible termination of his employment. In this scenario, the city attorney has a duty to notify the chief of police that a potential conflict exists and that the city attorney represents the city as a whole, and does not represent the chief of police in the chief's individual capacity. The city attorney should inform the chief of police to obtain independent counsel.[9]

[7] *See Pollard v. Merkel*, 114 S.W.3d 695, (Tex. App.—Dallas 2003).
[8] *State v. DeAngelis,* 116 S.W.3d 396 (Tex. App.—El Paso, 2003).
[9] *Id.*

IV. GENERAL CONFLICT OF INTEREST

Perhaps the broadest Rule and the Rule most frequently contemplated in the practice of law is Rule 1.06, which governs conflict of interest in the general sense. Its scope includes: (a) conflicts of interest in litigation; (b) outside of litigation; and (c) exceptions to the Rule.

A. Opposing Parties in Litigation

Rule 1.06(a) prohibits a lawyer from representing opposing parties in the same litigation. According to the comments, the term "opposing parties" applies to the situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party. Most of the cases interpreting Rule 1.06 interpret other paragraphs, not paragraph (a). This is likely because subsection (a) is fairly narrow in scope as it only applies to litigation, and does not leave much room for interpretation. For example, a lawyer who represents all members of a city council and the city's auditor in a lawsuit against several other members of the city staff is prohibited from representing the auditor individually in a cross claim against the other individual council members.[10] Furthermore, the lawyer is also prohibited from representing one of the city council members in a counter claim against the members of the city staff.[11]

B. General Rule Outside of Litigation

The general rule is that 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.

While paragraph (c) provides exceptions to the general rule which are discussed below, the general idea is that a lawyer must remain loyal to the lawyer's client. When loyalty to one client will negatively affect loyalty to another of the lawyer's client, the lawyer must cease representation of one of the lawyer's clients. The two elements of Rule 1.06(b)(1) are that the representation of one client is: (a) ***substantially related***, and (b) ***directly adverse*** to another client.

1. Substantially Related

   A potential breach of loyalty may only exist if the lawyer's representation of one client involves a ***substantially related*** matter of another client. "Substantially related" is not defined in the Rule, nor is it defined in the comments to Rule 1.06, nor is it

[10] *See Wasserman v. Black*, 910 S.W.2d 564, 568 (Tex. App.—Waco 1995). This case interprets the facts under Rule 1.09, but could be interpreted under Rule 1.06, as well.
[11] *Id.*

defined in case law interpreting Rule 1.06. The term is, however, defined in Rule 1.09. As described in Rule 1.09 and further below herein, the term primarily involves "situations where a lawyer could have acquired confidential information concerning a prior client that could be used either to that prior client's disadvantage or for the advantage of the lawyer's current client or some other person." Therefore, the lawyer should evaluate the likelihood that confidential information could be acquired by one client and used to the advantage of another client.

2. Directly Adverse
According to the comments, the representation of one client is directly adverse to the representation of another client if the "lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be, or is reasonably likely to be, adversely affected by the lawyer's representation of, or responsibilities to, the other client." The comments contrast "directly adverse" with "generally adverse."[12] For example, if one lawyer represents two small municipalities that are close to one another, a conflict likely does not exist with regard to the lawyer's general representation of each. However, once a situation arises, such as a goal to expand a city's extraterritorial jurisdiction (ETJ) into the same land by each municipality, a conflict likely exists. In that scenario, the lawyer's independent judgment with a course of action to proceed regarding ETJ expansion for one city could and likely would be adversely affected because the lawyer would inevitably have to consider the goals of the other city. Because the two goals cannot be reconciled, the lawyer would be prohibited from representing both parties unless the lawyer complies with paragraph (c).

Additionally, as Rule 1.06(b)(2) provides: when a lawyer's loyalty to a client reasonably appears to 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, the lawyer shall cease representation. The Professional Ethics Committee found that a lawyer who served as a city commissioner in a small city could not represent criminal defendants in the county and district courts in cases where the city police department participated in the investigation or arrest and when the arrest and search warrant were issued by the municipal judge.[13] The Committee found the lawyer's position of city commissioner could influence the city judge, city manager, city attorney, and possibly the city police. Therefore, a conflict existed.

C. Permissible Representation (Exceptions to the Rule)

Paragraph (c) permits a lawyer to represent a client even if the representation is otherwise prohibited by paragraph (b) as long as:

(1) The lawyer reasonably believes the representation of each client will not be materially affected; and

[12] Tex. Disc. R. Prof. Conduct Rule 1.06, Comment 6.
[13] Tex. Comm. On Prof. Ethics, Opinion 497 (August 1994).

(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.

Two elements must be present to allow representation when a conflict is present: (a) the lawyer's reasonable belief that the representation is prudent; and (b) client consent.

1. Lawyer's Reasonable Belief
   The standard of a lawyer's reasonable belief set forth in Comment 7 to Rule 1.06 is whether "a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances." If that standard is met, then the lawyer should not move to the second step of seeking the client's consent. It is likely difficult for an involved lawyer to be the "disinterested lawyer." Therefore, a lawyer in this situation should consider obtaining an unbiased second opinion in writing by a truly disinterested lawyer. Further, while the Rule or comments do not discuss this further step, it might be worthwhile for the lawyer to ask the disinterested lawyer to provide the disinterested lawyer's analysis and determination in writing. This step goes well beyond the scope and requirement of the Rule and comments, but is a step to ensure avoidance of a grievance or motion for disqualification from either client. This additional step could also further foster the lawyer's relationship with both clients by promoting open communication and dialogue about potential conflicts.

2. Client Consent
   Once the lawyer representing the two clients determines that there is no reasonable belief that the representation of each client will be materially affected, the lawyer then may seek consent by both clients to maintain representation of each. Comment 7 to Rule 1.06 contemplates an important and likely common scenario. That scenario is where circumstances may exist where it is impossible to make the full disclosure necessary to obtain informed consent from the clients. The comment gives the example where one of the clients refuses to consent to the disclosure of information necessary to inform the other client of necessary facts for the other client to make an informed decision of whether to consent. Going back to the earlier example, one of the cities, City A, which is considering ways to expand its ETJ into the same land as a nearby city, City B, prohibits the lawyer from disclosing City A's intent to expand its ETJ into a specific area of land to City B in order to gain consent of representation of City A. In that situation, the lawyer is prohibited from representing either client related to the ETJ expansion into the specific area of land that brought about the conflict.

   The lawyer must obtain consent to the representation by ***each*** party. While consent in writing is not required, the lawyer should request the consent in writing to further protect the lawyer and the relationship between the lawyer and each client.

While Rule 1.06 contemplates conflicts of interest that arise during the simultaneous representation of clients, conflicts of interest also arise in the sequential representation of clients as well. That scenario is governed by Rule 1.09.

V. REPRESENTATION OF CURRENT CLIENT ADVERSE TO FORMER CLIENT

This section outlines those circumstances that prevent a lawyer from representing a client in a matter adverse to a former client. Rule 1.09 governs conflicts of interest as they pertain to former clients. Specifically, paragraph (a) governs the scenario of a lawyer representing another person adverse to a former client. It states:

> (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
>
> (1) 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.

A. Without Consent

The first element to show a violation of Rule 1.09(a) is to prove that the former client did not consent to the lawyer's subsequent representation in a matter adverse to the former client. Therefore, if a lawyer received consent from the former client, then the subsequent representation is permissible even if the other elements of Rule 1.09(a) are met. As with receiving consent to do most anything, it is always wise to have that consent in writing. Rule 1.09(a) does not require that the consent be in writing. However, to prevent any possible disputes about whether consent was actually given, any lawyer in this situation should require that consent be in writing prior to representing the subsequent client against the former client. Additionally, the Supreme Court has found a "written waiver of any potential conflict of interest" to constitute valid consent.[14] The lawyer may even consider going a step further and suggesting that the client seek an independent opinion from another lawyer.

B. Personal Representation

The second element of paragraph (a) of Rule 1.09 is that the lawyer is one "who personally has formerly represented a client in a matter..." Comment 2 to Rule 1.09 includes a list of factors to assist in determining whether such a personal attorney-client relationship existed. Those factors are:

- how the former representation was actually conducted within the firm;
- the nature and scope of the former client's contacts with the firm (including any restrictions the client may have placed on the dissemination of confidential information within the firm); and
- the size of the firm.

Based on those factors, the requirement that the relationship was personal is really most relevant when a firm is involved. The personal relationship requirement is there

[14] *See In re Cerberus Capital Mgmt., L.P.,et. al,* 164 S.W.3d 379 (Tex. 2005).

to ensure that the lawyer accused of the violation actually had ***personal knowledge*** of the representation of the first client and not that the personal relationship existed solely based on the fact that the lawyer's firm represented the first client. For example, the second factor is the nature and scope of the former client's contacts with the firm. Courts have found that a personal appearance on behalf of a client constituted personally representing a client.[15] Comment 2 also includes size of the firm as a relevant factor. For example, a personal attorney-client relationship for each lawyer in a firm will be much easier to show between a lawyer and a client if a small firm of three lawyers represented the client than if a large firm of fifty plus lawyers represented a client.

C. Adverse Matter

The third element of Rule 1.09(a) is that the representation by the lawyer be adverse to the former client. The term "adverse matter" is not defined within Rule 1.09, nor is it defined in the comments. The Waco Court of Appeals interpreted "adverse" under Rule 1.09 as a lawyer having possession of confidential information of a former client when that confidential information could be used to benefit the lawyer's current client to the detriment of the former client.[16] It is worth noting, however, that the dissenting opinion took issue with the majority's definition of adverse matter and states that adverse really means "against" and that the parties were required to be against each other in litigation. Outside of case law, Black's Law Dictionary does not define "adverse matter," but defines "adverse interest" as "an interest that is opposed or contrary to that of someone else."[17] That definition is broader and coincides with the Waco Court's majority opinion. In using the broader definition, Rule 1.09 governs areas of general practice outside of litigation, such as contract negotiations.

D. Three Prohibited Circumstances

A violation of Rule 1.09(a) is limited to three types of representation, any one of which alone constitutes a violation of Rule 1.09(a).

1. The first scenario occurs when the second client of the attorney ***questions the validity of the work product for the first client***. The example provided in the comments is a lawyer who drew a will leaving a substantial portion of the testator's property to a designated beneficiary. The same lawyer violated paragraph (a) by subsequently representing the testator's heirs at law in an action seeking to overturn the will.[18] Basically, lawyers are deterred from benefiting from their own previous poor work product.

2. The second scenario prohibits a lawyer from undertaking representation against a former client if a reasonable probability that the representation would cause the lawyer to ***violate the obligations owed the former client under Rule 1.05.*** Paragraphs (b)(1) and (b)(3) of Rule 1.05 are most relevant in relation to Rule 1.5's interpretation

[15] *Pollard v. Merkel*, 114 S.W.3d 695, 699 (Tex. App.—Dallas 2003).
[16] *See Wasserman v. Black*, 910 S.W.2d 564, 568 (Tex. App.—Waco 1995).
[17] *Black's Law Dictionary* 22 (Second Pocket ed. 2001).
[18] Tex. Disc. R. Prof. Conduct Rule 1.09, Comment 3.

under Rule 1.09 because they both address confidences of former clients. A lawyer shall not knowingly reveal confidential information of a former client to anyone else, and shall not knowingly use confidential information of a former client to the detriment of the former client after the representation is concluded. For example, a city attorney who represents a city as an organization may draft an employment contract between the city and the city manager as the city's attorney. However, that same lawyer who then ceases representation as the city attorney is prohibited from representing the city manager to review and advise the city manager on renewal or even a separate employment contract with the city.

3. The third scenario prohibits representation by a lawyer which is adverse to a former client where the representation ***involves the same or substantially related matter***. Comment 4 to Rule 1.09 acknowledges that Rule 1.09(a)(3) is very similar and overlaps 1.09(a)(2). Comment 4 points out that while "substantially related" is not defined in the Rule, it "primarily involves situations where a lawyer could have acquired confidential information concerning a prior client that could be used either to that prior client's disadvantage for the advantage of the lawyer's current client or some other person." The key words in the comment are where the lawyer "could have acquired confidential information." Therefore, a lawyer is in violation of Rule 1.09(a) not only if the lawyer actually did acquire confidential information concerning the prior client, but also where the lawyer could have acquired the confidential information. Courts have interpreted this element to mean that a party seeking to prove a violation of Rule 1.09 must show that during the existence of lawyer's attorney-client relationship with the first client, factual matters were involved that are so related to the facts in the adverse matter involving the new client that a genuine threat now exists that confidences revealed to the lawyer will be divulged to the lawyer's new client.[19] For example, a former city attorney who advises the city on a legal matter in the executive session of a city council meeting cannot thereafter represent a party adverse to the city related to that same legal matter. Because of the stated purposes of executive session, a reasonable assumption can be made that the city attorney received confidential information in executive session and is prohibited from turning around and using that information to the city's detriment.[20]

Most of the court cases involving interpretations of Rule 1.09 are not cases involving grievances filed against lawyers, but instead involve Motions to Disqualify by the former client to prohibit representation by the lawyer of the subsequent client. Courts have noted that the Texas Disciplinary Rules of Professional Conduct ("Rules") are not controlling as standards governing motions to disqualify.[21] However, the Rules are guidelines that articulate considerations relevant to the merits of such motions.[22] Therefore the Rules are heavily relied upon by courts in considering Motions to Disqualify. Therefore, the limitations of Rule 1.09 are not only necessary for a lawyer to understand to avoid ethical complaints, but also for

[19] *See In re Drake*, 195 S.W.3d 232, 236 (Tex. App.—San Antonio 2006, no pet.), *citing Metropolitan Life Ins. v. Syntek Fin. Corp.,* 881 S.W.2d 319, 320-21 (Tex. 1994).
[20] Tex. Gov't Code Ann. §§551.071-551.076.
[21] *Id.*, at 235, *citing Ayres v. Canales*, 790 S.W.2d 554, 556 n. 2 (Tex. 1990 orig. proceeding).
[22] *Id.*

that lawyer to be able to continue representation without the risk of being disqualified and wasting time and money.

VI. SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

Comment 1 to Rule 1.09 states, "[w]hether a lawyer, or that lawyer's present or former firm, is prohibited from representing a client in a matter by reason of the lawyer's successive government and private employment is governed by Rule 1.10." Therefore, Rule 1.10, and not Rule 1.09, governs the situation where a lawyer works for a government entity, leaves that employment, and then represents a private party. Comment 3 to Rule 1.10 provides that in this successive representation by a lawyer of a private client after that lawyer worked for a public agency, the risk exists that power or discretion vested in public authority might be used for the special benefit of the private client. Rule 1.10 states in part:

> (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.
>
> (b) No lawyer in a firm with which a lawyer subject to paragraph (a) is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) The lawyer subject to paragraph (a) is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is given with reasonable promptness to the appropriate government agency.
>
> (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows or should know is confidential government information about a person or other legal entity acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person or legal entity.
>
> (d) After learning that a lawyer in the firm is subject to paragraph (c) with respect to a particular matter, a firm may undertake or continue representation in that matter only if that disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

A. Two Prohibitions

In reading Rule 1.10 paragraphs (a) and (c), Rule 1.10 prohibits representation of a private client by a former public officer or employee in two circumstances: (1) when the subsequent representation involves a matter in which the lawyer ***participated personally and substantially*** as a public officer or employee unless the government agency consents (see paragraph (a)); or (2) when the subsequent representation is adverse to a legal entity about whom the lawyer ***acquired confidential government information*** while a public officer or employee (see paragraph (c)).

1) Personal & Substantial Participation

Neither Rule 1.10 nor the comments to Rule 1.10 define personal and substantial participation. The Supreme Court has identified personal and substantial to mean "hands-on involvement," and that the hands-on involvement cannot be imputed based on title of office or the existence of statutory authority.[23] When a governmental lawyer received non-confidential information of an injury to an employee within the governmental agency resulting from a chair and then instructed a subordinate to check other chairs statewide within the governmental agency, the Court found that she did not participate personally and substantially. Thus, that lawyer was permitted to subsequently represent the injured employee in his workers' compensation action in opposition to the government agency.[24]

Rule 1.10(a) is specific to a specific ***matter, not to the client in general.*** So, a lawyer may represent a client who is involved in an adverse matter with the lawyer's former client as long as the matter for which the lawyer is representing the new client is not related to that adverse matter.

2) Confidential Government Information

Paragraph (c) is related to the client generally and prohibits a lawyer from representing a private client whose interests are adverse to the government. The prohibition is triggered when that lawyer has information that the lawyer knows or should know is confidential government information that the lawyer acquired when the lawyer was a public officer or employee. Comment 7 to Rule 1.10 clarifies that Rule 1.10(c) only operates when the lawyer in question has "***actual as opposed to imputed knowledge*** of the confidential government information" (emphasis added). This standard is higher than the standard in Rule 1.09 of situations where the lawyer "could have acquired confidential information." The Supreme Court interpreted the standard for a violation of Rule 1.10 (c), unlike Rule 1.09, to require actual knowledge of confidential government information as well.[25]

Paragraph (a) is specific to a matter, not generally to the client. Additionally paragraph (a) does not require proof of the exchange of confidential information. On the other hand, paragraph (c) creates a prohibition of representation of the private client completely when the lawyer acquired confidential information about a person or entity when the lawyer was a public officer and the private client's interests are adverse to that person or entity.

B. Other Members of the Firm

Paragraph (b) of Rule 1.10 only allows a lawyer to represent a private client in connection with a matter in which the lawyer's firm has participated personally and substantially as a government officer if: (a) the lawyer is screened from participation of the matter and not apportioned any part of the fee; and (b) written notice is given to the government agency. The Supreme Court of Texas interpreted this to mean that a disqualification of a lawyer

[23] *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 657 (Tex. 1990).
[24] *Id.*, at 655.
[25] *See Spears,* at 657.

under Rule 1.10 (b), does not, however, extend to other members of the firm if the former government attorney is screened from any participation in the matter and is not apportioned any of the resulting fee.[26] Comment 3 to Rule 1.10 states that the Rules governing lawyers employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. Therefore, the Rules provide a method – through screening and waiver- to avoid the imposition of an overly restrictive rule.

C. The Reverse: Former Representation of Private Client by Current Government Employee

Paragraph (e) of Rule 1.10 basically provides for the reverse of the fact scenario contemplated by paragraph (a). It prohibits a current public officer or employee from participating in a matter involving a private client when the lawyer had represented that client in the same matter while in private practice. The exception to paragraph (e) is when, under applicable law, no one else by lawful delegation is authorized to act in the lawyer's place in the representation.

Paragraph (e) also prohibits a lawyer from negotiating for private employment with any person who is involved as a party in a matter in which the lawyer is participating personally and substantially. In other words, a current government employee may not try to get a job in private employment from someone if the lawyer is involved with that person personally and substantially in the lawyer's role as a public officer or employee.

D. Exemptions to Rule 1.10: Definition of Matter

Paragraph (f) to Rule 1.10 exempts ***Regulation-Making and Rule-Making*** from the definition of the word "matter" as used in Rule 1.10. In doing so, these two situations are exempted from the prohibitions of Rule 1.10.

On the other hand, Rule 1.10 includes the following in the definition of the work matter:

- Adjudicatory proceedings;
- Application;
- Request for a ruling or other determination;
- Contract;
- Claim;
- Controversy;
- Investigation;
- Charge accusation;
- Arrest or other similar, particular transaction involving a specific party or parties; and
- Any other action or transaction covered by the conflict of interest rules of the appropriate government agency.

[26] *Id.*

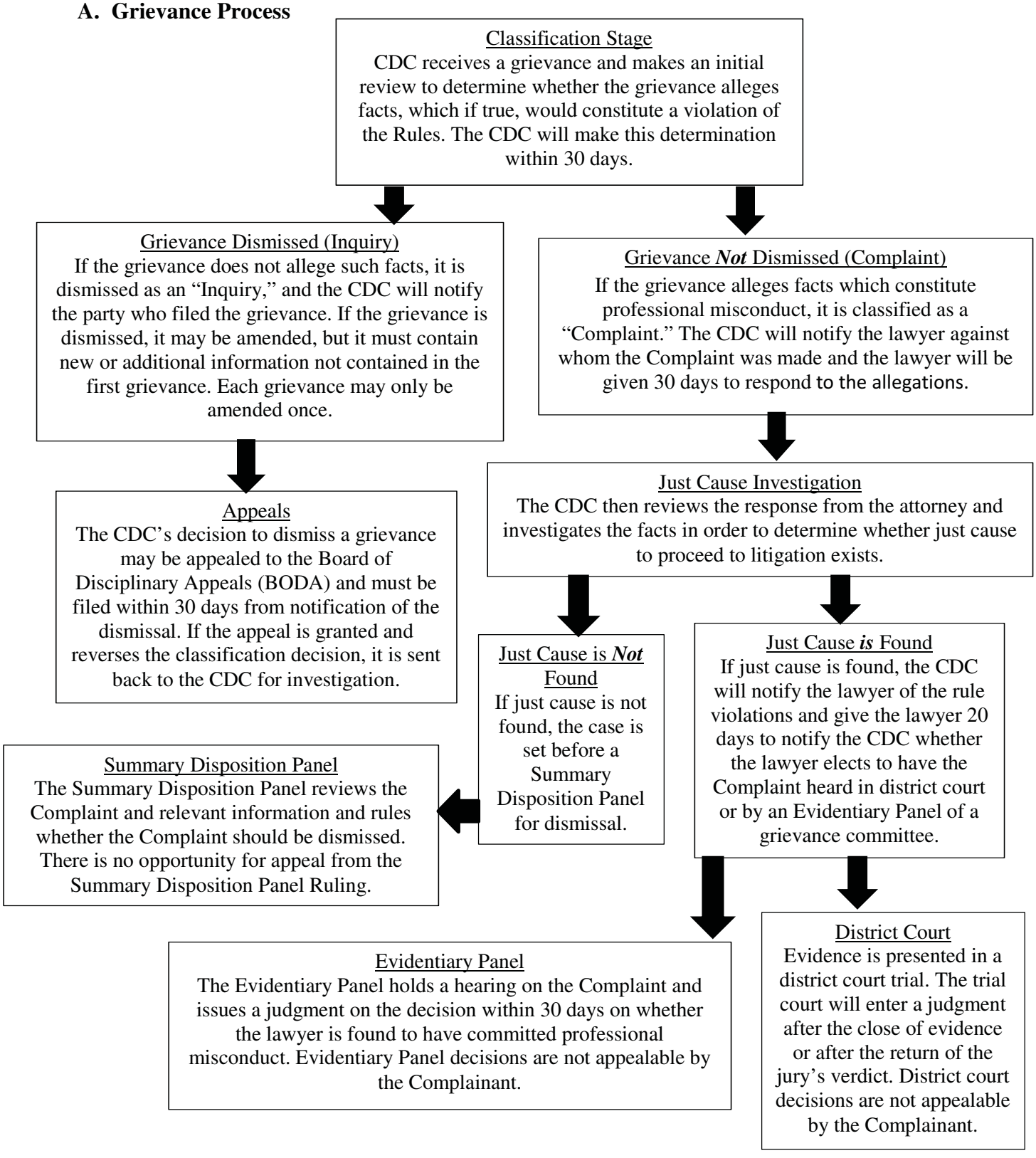
Therefore, if a lawyer participates personally and substantially in any of the above activities and as a public officer, the lawyer is prohibited from representing a private client in connection with that matter unless the appropriate government agency consents.

VII. ROLE OF THE OFFICE OF CHIEF DISCIPLINARY COUNSEL

In addition to having a good understanding of the Rules, lawyers should be familiar with the process of filing a grievance under the Rules and the consequences of a filed grievance. The Chief Disciplinary Counsel (CDC) is the branch of the State Bar of Texas that receives and reviews grievances filed against lawyers in the state of Texas. The process of a grievance and the consequences of a grievance are outlined below:[27]

[27]State Bar of Texas: Attorney Complaint Information Brochure: the information from the Brochure is the basis for the chart.
http://www.texasbar.com/Content/NavigationMenu/ForThePublic/TheGrievanceProcess/AttorneyComplaintInformation.pdf

A. Grievance Process



At any stage during the grievance process after a grievance is dismissed, the matter is referred to a voluntary mediation and dispute resolution procedure called the Client Attorney Assistance Program.

B. Consequences of a Grievance

A lawyer who has been found guilty of professional misconduct may receive a sanction. Any public sanction will become part of the lawyer's record. The sanctions include one or more of the following:

1) a reprimand, which may be public or private;
2) suspension from the practice of law, all or part of which may be probated; or
3) disbarment.

VIII. WHO MAY FILE A GRIEVANCE

The State Bar encourages complaints of professional misconduct against lawyers in order to enforce the high standard of ethical conduct that lawyers must have with their clients. The State Bar's goal is to "reduce and prevent harm to the public and the legal profession."[28] Therefore, the State Bar accepts complaints from almost anyone.

A. Citizen at Large

Any person with knowledge of what that person believes to be professional misconduct by a lawyer has the ability to file a grievance.

B. Another Lawyer

The rule for lawyers reporting professional misconduct is governed by Rule 8.03. The general rule is that a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate disciplinary authority. The two exceptions to this rule are: (a) if the conduct of the lawyer who has committed a violation of the Rules is impaired because of chemical dependency on alcohol or drugs or mental illness; and (b) if the disclosure of knowledge or information is otherwise protected as confidential information. If the exception is under the first one above, then the lawyer may instead report that lawyer to an approved peer assistance program.

Many lawyers would prefer not to file a grievance against another lawyer. Comment 4 to Rule 8.03 states that:

> [i]f a lawyer were obligated to report every violation of these rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent.

[28] *Id.*

Limiting the reporting obligation to "those offenses that a self-regulating profession must vigorously endeavor to prevent" is anything but a bright-line rule. Nonetheless, it seems the requirement for lawyers when self-regulating is to focus on those offenses that, if repeated, could harm the profession as a whole and not to frivolously police violations of the Rules. The goal is to assist in preventing harm to the public and the legal profession. Therefore, in accordance with that goal, the lawyer's duty is to report violations that are in contrast to the ideal reputation that lawyers wish to have of ourselves.

IX. CONCLUSION

A full understanding of the Rules is important to any lawyer in order for the lawyer to: (a) avoid any ethical complaints against the lawyer; (b) to recognize when another lawyer's violation of the Rules affects a client of the lawyer; and (c) to enhance the lawyer's relationship with existing and potential clients. The Rules provide a minimum set of standards with which a lawyer must comply. In various circumstances, the lawyer may find it in the lawyer's and client's best interests to go a step or more beyond the requirements of the Rules to foster the lawyer's relationship with clients. A lawyer representing a municipality will inevitably encounter ethical issues unique to the practice of municipal law. Therefore, a municipal lawyer should be aware of these Rules most encountered by municipal lawyers outlined in this paper. In doing so, the lawyer will be better equipped to take action that not only complies with the Rules, but also maximizes the benefits to the client. Undoubtedly, the municipal lawyer will benefit as well.