

# Ethics

## Considerations for Working with Councils and Boards

Texas City Attorneys Association  
2013 Summer Conference  
June 7, 2013



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## Role of the Attorney

- As **ADVISOR**, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.
- As **ADVOCATE**, a lawyer zealously asserts the clients position under the rules of the adversary system.
- As **NEGOTIATOR**, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.
- As **INTERMEDIARY BETWEEN CLIENTS**, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client.
- A lawyer acts as **EVALUATOR** by examining a client's affairs and reporting about them to the client or to others.
- Texas Disciplinary Rules Of Professional Conduct, Preamble, Section 2



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## Advisor

- In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.
- Texas Disciplinary Rules Of Professional Conduct, Section 2.01



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## Truthfulness in Statements to Others

- In the course of representing a client a lawyer shall not knowingly:
  - make a false statement of material fact or law to a third person; or
  - 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.
- Texas Disciplinary Rules Of Professional Conduct, Section 4.01



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## Organization as a Client

- **A lawyer employed or retained by an organization represents the entity.** While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (b) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.

– Texas Disciplinary Rules Of Professional Conduct, Section 1.12(a)



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## Organization as a Client

- A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:
  - an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;
  - the violation is likely to result in substantial injury to the organization; and
  - the violation is related to a matter within the scope of the lawyer's representation of the organization.
- Texas Disciplinary Rules Of Professional Conduct, Section 1.12(b)



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## Organization as a Client

- Except where prior disclosure to persons outside the organization is required by law or other Rules, a lawyer shall first attempt to resolve a violation by taking measures within the organization.
- Texas Disciplinary Rules Of Professional Conduct, Section 1.12 (c)



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## Organization as a Client

- In determining the internal procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), a lawyer shall give due consideration to
  - the seriousness of the violation and its consequences,
  - the scope and nature of the lawyers representation,
  - the responsibility in the organization and the apparent motivation of the person involved,
  - the policies of the organization concerning such matters, and
  - any other relevant considerations.
- Texas Disciplinary Rules Of Professional Conduct, Section 1.12 (c)



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## Organization as a Client

- Such procedures, actions and measures may include, but are not limited to, the following:
  - asking reconsideration of the matter;
  - advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
  - referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
- Texas Disciplinary Rules Of Professional Conduct, Section 1.12 (c)



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## Organization as a Client

- Upon a lawyer's resignation or termination of the relationship in compliance with Rule 1.15 (Relating to Terminating Representation), a lawyer is excused from further proceeding as required by paragraphs (a), (b) and (c), and any further obligations of the lawyer are determined by Rule 1.05(Relating to Confidentiality).
- Texas Disciplinary Rules Of Professional Conduct, Section 1.12(d)



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## Organization as a Client

- In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.
- Texas Disciplinary Rules Of Professional Conduct, Section 1.12(e)



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## Obligations of Council Members and Board Members

Things to remember



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## Obligations

- Statements and Oaths
- Bonds
- Qualifications for Position
- Meeting Requirements



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## Accountability Issues for Council and Board Members

- State Laws
- State Agencies
- Voters
- Residents
- Certificate of Formation and Bylaws (Non-Profits only)



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## Open Meetings Act

- Chapter 551, Texas Government Code
- Attorney General Approved Training Required
- Open Meetings Made Easy
- Open Meetings Handbook
- [https://www.oag.state.tx.us/open/publications\\_og.shtml](https://www.oag.state.tx.us/open/publications_og.shtml)



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## Open Meetings Act

- 72 Hours Notice of meeting (unless emergency)
- Notice must state time, date and place of meeting
- Notice must describe matters to be discussed sufficiently
- Public has right to attend



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## Open Meetings Act

- Closed Sessions
  - Consult with Attorney
  - Real Property Acquisition
  - Personnel Matters
  - Gifts to District
  - Other Exceptions



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## Communications with Attorney

- A governmental body may use a telephone conference call, video conference call, or communications over the Internet to conduct a public consultation with its attorney in an open meeting of the governmental body or a private consultation with its attorney in a closed meeting of the governmental body.
  - Government Code § 551.129(a)
- Does NOT apply to attorneys who are employees of the governmental body
  - employee = compensation from which employment taxes are deducted by the governmental body



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## Communications with Attorney

- Each part of a public consultation by a governmental body with its attorney in an open meeting of the governmental body under [§ 551.0129 (a)] must be audible to the public at the location specified in the notice of the meeting as the location of the meeting.
  - Government Code § 551.129(b)



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## Communications with Attorney

- Does not:
  - authorize the members of a governmental body to conduct a meeting of the governmental body by telephone conference call, video conference call, or communications over the Internet; or
  - create an exception to the application of this subchapter.
    - Government Code § 551.129(c)



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## Closed Session

- **Government Code § 551.071. Consultation with Attorney; Closed Meeting**
  - A governmental body may not conduct a private consultation with its attorney except:
    - (1) when the governmental body seeks the advice of its attorney about:
      - (A) pending or contemplated litigation; or
      - (B) a settlement offer; or
    - (2) on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this chapter.



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## Attorney-Client Privilege

- **Rule 1.05(b) Confidentiality of Information**
- ... a lawyer shall not knowingly:
  - 1) Reveal confidential information of a client or a 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.



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## Attorney-Client Privilege

- **Rule 1.05(a) Confidentiality of Information**
  - Confidential information includes both privileged information and unprivileged client information.
  - ...



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## Attorney-Client Privilege

- 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.



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## Attorney-Client Privilege

- Privileged information refers to the information of a client protected by the lawyer-client privilege...
  - *Rule 5.03 of the Texas Rules of Evidence*
  - Rule 5.03 of the Texas Rules of Criminal Evidence, or
  - Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates.



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## Attorney-Client Privilege

- **RULE 503. LAWYER-CLIENT PRIVILEGE**
  - (a) **Definitions.** As used in this rule:
    - (1) A "client" is a person, public officer, or corporation, association, or other organization or entity either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.



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# Attorney-Client Privilege

- **RULE 503. LAWYER-CLIENT PRIVILEGE**

- (a) **Definitions (cont.)**

- (2) A "representative of the client" is
      - (i) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client or
      - (ii) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.



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# Attorney-Client Privilege

- **RULE 503. LAWYER-CLIENT PRIVILEGE**

- (a) **Definitions (cont.)**

- (3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.
    - (4) A "representative of the lawyer" is:
      - (A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or
      - (B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.



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# Attorney-Client Privilege

- **RULE 503. LAWYER-CLIENT PRIVILEGE**

- (a) **Definitions (cont.)**

- (5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.



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# Attorney-Client Privilege

- **(b) Rules of Privilege.**

- (1) *General rule of privilege.* 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...
  - (2) *Special rule of privilege in criminal cases.* In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.



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## Attorney-Client Privilege

- **(c) Who May Claim the Privilege.** The privilege may be claimed by the client, ... the successor, trustee, or similar representative of a corporation, association, or other organization... The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.



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## Attorney-Client Privilege

- **(d) Exceptions.** There is no privilege under this rule:
  - (1) *Furtherance of crime or fraud.*
    - If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
  - (2) *Claimants through same deceased client.*
  - (3) *Breach of duty by a lawyer or client.*
  - (4) *Document attested by a lawyer.*
  - (5) *Joint clients.*



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## Open Meetings Act

- What do you do if there is a violation?
- How do you counsel your clients about possible violations?
  - Email
  - Texting
  - Social Media
  - Walking Quorums



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## Organization as a Client

- A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:
  - an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;
  - the violation is likely to result in substantial injury to the organization; and
  - the violation is related to a matter within the scope of the lawyer's representation of the organization.
- Texas Disciplinary Rules Of Professional Conduct, Section 1.12(b)



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## Public Information Act

- Chapter 552, Texas Government Code
  - formerly the Open Records Act
- Attorney General Training Required
- Public Information Act Made Easy
- Public Information Handbook
- [https://www.oag.state.tx.us/open/publications\\_og.shtml](https://www.oag.state.tx.us/open/publications_og.shtml)



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## Public Information

- Cities and “the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds “ are subject to the Act.
- Unless excluded, all public information is subject to disclosure under the act.



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## Public Information Act

- What do you do if there is a violation?
- How do you counsel your clients about possible violations?
  - Email records
  - Text messages
  - Social Media messages and posts
  - Obstructing Access to other records



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- A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:
  - an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;
  - the violation is likely to result in substantial injury to the organization; and
  - the violation is related to a matter within the scope of the lawyer's representation of the organization.
- Texas Disciplinary Rules Of Professional Conduct, Section 1.12(b)



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## Ethical Issues for Council and Board Members

- Conflict of Interest
- Nepotism
- Dual Office Holding/Incompatibility

AG Handbook: Public Officers: Traps for the Unwary

[http://www.oag.state.tx.us/open/publications\\_og.shtml](http://www.oag.state.tx.us/open/publications_og.shtml)



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## Conflict of Interest

Why do we care?

- Conflict of interest rules are directed at preventing public officials from using their authority for personal benefit rather than for the benefit of the public. Thus, they govern situations where an officer's personal interest conflicts or may conflict with his or her public duty.



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# Conflict of Interest

- Prohibited Acts; Penalty
  - (a) A local public official commits an offense if the official knowingly:
    - (1) violates Section 171.004;
    - (2) acts as surety for a business entity that has work, business, or a contract with the governmental entity; or
    - (3) acts as surety on any official bond required of an officer of the governmental entity.
  - (b) An offense under this section is a Class A misdemeanor – punishable by up to 1 year in jail and/or up to \$4000 penalty.
- Texas Local Government Code, Sec. 171.003



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# Conflict of Interest

- **Affidavit and Abstention From Voting Required (LGC Sec. 171.004)**
  - (a) If a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter if:
    - (1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or
    - (2) in the case of a substantial interest in real property, it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.



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# Conflict of Interest

- **Substantial Interest in Business Entity (LGC 171.002)**
  - (a) For purposes of this chapter, a person has a substantial interest in a business entity if:
    - (1) the person owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or \$15,000 or more of the fair market value of the business entity; or
    - (2) funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year.
  - (b) A person has a substantial interest in real property if the interest is an equitable or legal ownership with a fair market value of \$2,500 or more.
- Applies to Spouse, Child and Parent Interests Too



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# Nepotism

Inviting the family to the  
government's party



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# Nepotism

- **Prohibition Applicable to Public Official (Gov't Code, Sec. 573.041)**

A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position that is to be directly or indirectly compensated from public funds or fees of office if:

(1) the individual is related to the public official within a degree described by Texas Government Code, Section 573.002; or

(2) the public official holds the appointment or confirmation authority as a member of a state or local board, the legislature, or a court and the individual is related to another member of that board, legislature, or court within a degree described by Section 573.002.



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# Nepotism

- **Prohibition Applicable to Public Official (Gov't Code, Sec. 573.041)**

- "Public official" means:

- (A) an officer of this state or of a district, county, municipality, precinct, school district, or other political subdivision of this state;
- (B) an officer or member of a board of this state or of a district, county, municipality, school district, or other political subdivision of this state; or
- (C) a judge of a court created by or under a statute of this state.

- Under *Aldine Independent School District v. Standley*, 280 S.W.2d 578 (Tex. 1955), an officer is an individual upon whom a "sovereign function of the government [has been] conferred . . . to be exercised by him for the benefit of the public largely independent of the control of others." *Id.* at 583.



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# Nepotism

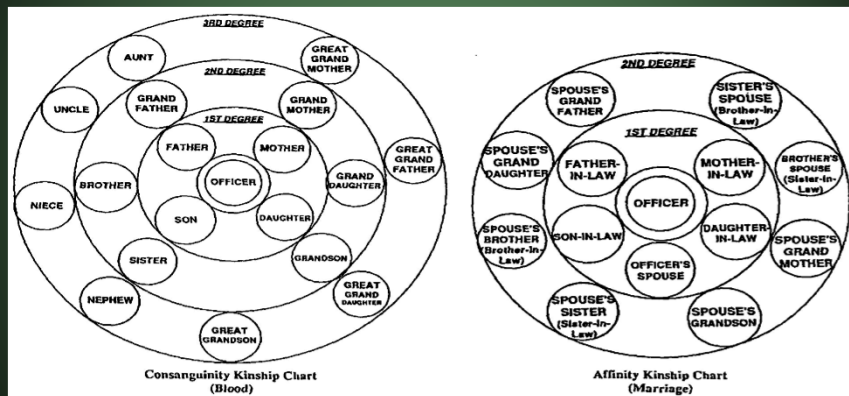
## Degrees of Relationship

Except as provided by Texas Government Code, Section 573.043, this chapter applies to relationships within the third degree by consanguinity or within the second degree by affinity.



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# Nepotism



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# Dual Office Holding

## Government Service Addiction



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# Dual Office Holding

## Article 16 - GENERAL PROVISIONS

### Section 40 - HOLDING MORE THAN ONE OFFICE; EXCEPTIONS; RIGHT TO VOTE

(a) No person shall hold or exercise at the same time, more than one civil office of emolument, ...



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## Dual Office Holding

- A position is one "of emolument" if its emoluments are fixed by statute or by a governmental body. Tex. Attorney General Opinion No. JM-333 (1985).



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## Incompatibility

- Self Appointment
- Self Employment
- Conflicting Loyalties



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# Incompatibility

- Self Appointment
  - “It is because of the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.”
    - Ehlinger v Clark, 8 S.W.2d 666 (Tex. 1928).



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# Incompatibility

- Self Employment
  - Ordinarily, self-employment incompatibility will arise only where one position is an office and the other an employment.
  - But, can arise when position is subordinate to the governing body in some of its principal duties.



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# Incompatibility

- Conflicting Loyalties
  - both positions must be “offices”
  - the relationship between the positions creates conflict
    - if authorized to contract with each other
    - if both have the power of taxation
      - even if one district imposes an ad valorem property tax and the other imposes a sales tax that must be approved by the voters.
    - if boundaries overlap
    - whenever one governmental body has authority to impose its will on the other in any matter whatsoever.



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# Other Issues



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## Declining or Terminating Representation

- (a) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, except as stated in paragraph (c), from the representation of a client, if:
  - (1) the representation will result in violation of Rule 3.08 (Related to the Lawyer as a witness), other applicable rules of professional conduct or other law;
  - (2) the lawyer’s physical, mental or psychological condition materially impairs the lawyers fitness to represent the client; or
  - (3) the lawyer is discharged, with or without good cause.



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## Declining or Terminating Representation

- (b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:
  - (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
  - (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes may be criminal or fraudulent;
  - (3) the client has used the lawyer’s services to perpetrate a crime or fraud;
  - (4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;
  - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services, including an obligation to pay the lawyer’s fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
  - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
  - (7) other good cause for withdrawal exists.



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## Declining or Terminating Representation

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.



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## Communications with One Represented by Counsel

- In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- Texas Disciplinary Rules Of Professional Conduct, Section 4.02(a)



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## Communications with One Represented by Counsel

- For the purpose of this rule, organization or entity of government includes:
  - those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or
  - those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.
- Texas Disciplinary Rules Of Professional Conduct, Section 4.02(a)



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## Communications with One Represented by Counsel

- When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.
- Texas Disciplinary Rules Of Professional Conduct, Section 4.02(d)



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## Dealing with Unrepresented Persons

- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- Texas Disciplinary Rules Of Professional Conduct, Section 4.03



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## Respect for Rights of Third Persons

- In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- A lawyer shall not present, participate in presenting, or threaten to present:
  - criminal or disciplinary charges solely to gain an advantage in a civil matter; or
  - civil, criminal or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness or potential witness therein.
- Texas Disciplinary Rules Of Professional Conduct, Section 4.04



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# TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

[Link to Rules at Supreme Court Website](#)



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## QUESTIONS?

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