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### Texas Legal Ethics

#### 1.7 Rule 1.7 Conflict of Interest: General Rule

##### [1.7:100](#) Comparative Analysis of Texas Rule

- **Primary Texas References:** [TX Rule 1.06](#)
- **Background References:** [ABA Model Rule 1.7](#), [Other Jurisdictions](#)
- **Commentary:**

##### 1.7:101 Model Rule Comparison

[Texas Rule 1.06](#), "Conflict of Interest: General Rule," bears the same name as Model Rule 1.7. The rules, however, are not identical. Paragraph (a) of Texas Rule 1.06 provides that "[a] lawyer shall not represent opposing parties to the same litigation." [Texas Rules Rule 1.06\(a\)](#). The text of [Model Rule 1.7](#) itself does not contain an analogous provision; however, the comment to Model Rule 1.7 states that "[p]aragraph (a) prohibits representation of opposing parties in litigation." [Model Rules Rule 1.7 cmt.](#)

Both rules generally recognize that a lawyer shall not represent conflicting interests without appropriate consent, and both rules generally recognize that such conflicts can be caused by a lawyer's obligations to another client, other third persons, or the lawyer's own interests. [Texas Rule 1.06](#) and [Model Rule 1.7](#) differ, however, regarding the parameters of precisely what constitutes a conflict of interest for purposes of professional discipline. Perhaps the most significant difference between the two rules in this regard is this: Texas Rule 1.06 incorporates a substantial relationship analysis into the framework. More specifically, the Texas Rule provides that, in the absence of consent, a lawyer shall not represent a person if the representation of that person:

- involves a *substantially related matter* in which that person's interest are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
- 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.

[Texas Rules Rule 1.06\(b\)](#) (emphasis added). Among other differences, Model Rule 1.7 does not include the "substantially related matter" language.

The subject matter of [paragraph \(f\)](#) of Texas Rule 1.06, regarding imputed

disqualification, is not directly paralleled in [Model Rule 1.7](#) itself. However, this subject matter is addressed in [Model Rule 1.10](#), the stand-alone rule regarding imputed disqualification. [Paragraph \(e\)](#) of Texas Rule 1.06, addressing withdrawal as may be called for should a conflict of interest arise, likewise is not directly paralleled in Model Rule 1.7 itself. [Model Rule 1.16](#), however, generally addresses the circumstances under which representation should be declined or terminated. Model Rule 1.16 does not speak specifically to conflicts of interest as a basis for withdrawal, but does note that a lawyer shall not represent a client or shall withdraw from representation of a client if "the representation will result in violation of the Rules of Professional Conduct or other law [.]" Model Rules Rule 1.16.

Further details regarding [Texas Rule 1.06](#), including unique provisions under the rule are addressed below.

#### 1.7:102 Model Code Comparison

Several provisions of the Model Code are analogous, though not necessarily identical to, [Texas Rule 1.06](#). The most relevant Canon from the Model Rule was Canon 5: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." DR 5-101(A) stated that, in the absence of client consent after full disclosure, a lawyer "shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." Model Code [DR 5-101\(A\)](#). [DR 5-105](#) used the phrase "differing interests" in the context of its conflicts framework. Paragraph (A) of DR 5-105 stated that "[a] lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by acceptance of the proffered employment or if it would be likely to involve him in representing differing interests," except as may be permitted by DR 5-105(C), the consent provision. Model Code [DR 5-105\(A\)](#). [Paragraph \(B\) of DR 5-105](#), in turn, paralleled paragraph (A), but addressed withdrawal from employment rather than acceptance of employment. Last, [paragraph \(D\) of DR 5-105](#) contained a rule of imputed disqualification. Compare [Texas Rules Rule 1.06\(f\)](#).

#### [1.7:200](#) Conflicts of Interest in General

- **Primary Texas References:** [TX Rule 1.06](#)
- **Background References:** [ABA Model Rule 1.7](#), [Other Jurisdictions](#)
- **Commentary:** ABA/BNA § 55:101, ALI-LGL §§ 201-204, Wolfram §§ 7.1-7.6

The Texas Rules' "general" conflict of interest rule is [Texas Rule 1.06](#). Former client conflicts of interest are treated in [Texas Rule 1.09](#), and prohibited transactions are covered in Texas Rule 1.06. [Texas Rule 1.07](#) covers conflicts issues in intermediation, and [Texas Rule 1.10](#) addresses conflict issues that can be triggered by successive government and private employment.

#### 1.7:210 Basic Prohibition of Conflict of Interest

Under the Texas Rules, in the absence of appropriate client consent, a lawyer has a general duty to avoid conflicts of interest. For instance, a lawyer owes a general duty of loyalty to a current client. This general duty of loyalty includes an obligation to maintain the client's confidences unless the lawyer is authorized by the client, the Texas Rules, or other law to disclose such confidences. A lawyer also owes former clients a duty to maintain their confidences (again, unless such disclosure is authorized). Former client conflicts are addressed in [Texas Rule 1.09](#), discussed separately below.

[Texas Rule 1.06](#) focuses on potential conflicts of interest involving current clients. The rule begins with the prohibition that a "lawyer not shall represent opposing parties to the same litigation." [Texas Rules Rule 1.06\(a\)](#). In other situations, Rule 1.06 dictates that a lawyer shall not represent a person, absent client consent, if the representation of that person:

- 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 lawyer's firm; or
- reasonably appears to be or become adversely limited by the lawyer's or the law firm's responsibilities to another client or to a third person, or by the lawyer's or law firm's own interests.

#### [Texas Rules Rule 1.06\(b\)](#).

For instance, if a potential client came to a lawyer and asked the lawyer to file a lawsuit against *X*, a current client of the lawyer, the lawyer would first inquire whether the proposed representation is materially or directly adverse to the interests of *X*. Since this would be a lawsuit against *X*, direct adversity seems apparent. The lawyer might next inquire whether the contemplated litigation is "substantially related" to the work that the lawyer is currently doing for *X*. If the matters are substantially related, [subparagraph \(b\)\(1\)](#) of Texas Rule 1.06 would forbid the representation in the absence of consent. If the matters were not substantially related, however, the lawyer typically would conduct an analysis under the "reasonably appears to be or become adversely limited" prong set forth above. Client consent in appropriate cases can cure many conflicts. See [Texas Rules Rule 1.06\(c\)](#).

There are relatively few Texas cases applying Texas Rule 1.06, though a number cite it without extensive analysis. See, *e.g.*, **Vaughan v. Walther**, 875 S.W.2d 690 (Tex. 1994) (finding that client waived objection to conflict by failing to seek disqualification until day of final hearing); **Conoco, Inc. v. Baskin**, 803 S.W.2d 416 (Tex. App.—El Paso 1991, orig. proceeding) (focusing largely on consent/waiver issues).

#### 1.7:220 Material Adverse Effect on Representation

As discussed in [1.7:210](#), a conflict can arise where a lawyer's representation of one person appears to be or become "adversely limited" by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests. [Texas Rules Rule 1.06\(b\)\(2\)](#). This describes a situation in which "a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client." [Texas Rules Rule 1.06 cmt. 4](#). "A potential possible conflict does not itself necessarily preclude the representation. The critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." *Id.*

#### 1.7:230 Perspective for Determining Conflict of Interest

For discussion of subject matter related to this topic, see [1.7:210-220](#).

#### 1.7:240 Client Consent to a Conflict of Interest; Non-Consentable Conflicts

The first conflict provision contained in [Texas Rule 1.06](#)—the provision that a lawyer shall not represent opposing parties to the same litigation—does not appear to be

subject to waiver or client consent. The other conflict provisions of Texas Rule 1.06, however, are subject to client consent under [paragraphs \(c\)](#) and [\(d\)](#). If consent is necessary and appropriate for the representation in question, the consent must be obtained "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." [Texas Rules Rule 1.06\(c\)\(2\)](#).

#### 1.7:250 Imputation of Conflict of Interest to Affiliated Lawyers [see [1.10:200](#)]

Rule 1.06 provides in paragraph (f) that "[i]f a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct." [Texas Rules Rule 1.06\(f\)](#). As noted elsewhere, however, many of the provisions of Rule 1.06 clearly are subject to client consent and waiver. See, e.g., [1.7:240](#).

#### 1.7:260 Sanctions and Remedies for Conflicts of Interest

Like the other Texas Rules, [Texas Rule 1.06](#) is designed to function as a substantive standard for attorney discipline. It is not intended to serve as a rule for procedural decisions, including motions to disqualify. However, Texas courts often look to the Texas Rules as guides in considering motions to disqualify. See **Conoco, Inc. v. Baskin**, 803 S.W.2d 416 (Tex. App.—El Paso, orig. proceeding). For a federal decision considering a motion to disqualify filed by a current client, see **In re Dresser Industries, Inc.**, 972 F.2d 540 (5th Cir. 1992). For a discussion of lawyer liability issues, see [1.1:310](#).

#### 1.7:270 Positional Conflicts

"A lawyer may represent parties having antagonistic positions on a legal position that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court." [Texas Rules Rule 1.06 cmt. 10](#).

#### 1.7:280 Relationship to Other Rules (e.g., MRs 1.13, 2.2, 5.7, 6.3, 6.4)

[Texas Rule 1.06](#) is related to several other Texas rules. For instance, [Texas Rule 1.15](#), "Declining or Terminating Representation," provides that a lawyer shall decline to represent a client, or where representation is commenced, shall withdraw, unless ordered to continue the representation by a tribunal, if continued representation would result in violation of any Texas rule or other law. Additionally, Rule 1.13, "Conflicts: Public Interests Activities," provides that a lawyer serving as a director, officer or member of a legal services, civic, charitable or law reform organization—apart from the law firm in which the lawyer practices— shall not knowingly participate in a decision or action of the organization

- if participation in the decision would violate the lawyer's obligations to a client under Rule 1.06, or
- where the decision would have a material adverse effect on the representation of any client of the organization whose interests are adverse to a client of the lawyer.

[Texas Rules Rule 1.13](#). Moreover, [Texas Rule 1.12](#), "Organization as a Client," recognizes in official comment 5 that a lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, *subject* to the provisions of Rule 1.06. [Texas Rules Rule 1.12 cmt. 5](#) ("If the organization's consent to the dual representation is required by Rule 1.06, the

consent of the organization should be given by the appropriate official or officials of the organization other than the individual who is to be represented, or by the shareholders.") .

### [1.7:300](#) Conflict of Interest Among Current Clients (Concurrent Conflicts)

- **Primary Texas References:** [TX Rule 1.06](#)
- **Background References:** [ABA Model Rule 1.7](#), [Other Jurisdictions](#)
- **Commentary:** ABA/BNA §§ 51:101, 51:301, ALI-LGL §§ 209-212, Wolfram §§ 7.1-7.3

As a general proposition, a lawyer owes a current client a duty of loyalty. The parameters of this duty for purposes of professional discipline are set forth in [Texas Rule 1.06](#), which is not identical to [Model Rule 1.7](#). For a more detailed discussion of this subject matter, see [1.7:210-1.7:280](#) and [1.7:310-1.7:340](#).

#### 1.7:310 Representing Parties with Conflicting Interests in Civil Litigation

"A lawyer shall not represent opposing parties to the same litigation." [Texas Rules Rule 1.06\(a\)](#). "Simultaneous representation of parties whose interests in litigation are not actually directly adverse but where the potential for conflict exists, such as co-plaintiffs or co-defendants, is governed by paragraph (b)." [Texas Rules Rule 1.06 cmt. 3](#). Paragraph (b) provides that, in the absence of client consent, a lawyer shall not represent a person if the representation of that person:

- 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
- reasonably appears to be or becomes 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.

#### [Texas Rules Rule 1.06\(b\)](#).

"An impermissible conflict may exist or develop by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." [Texas Rules Rule 1.06 cmt. 3](#). "Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant." *Id.* On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met." *Id.*

#### 1.7:315 Insured-Insurer Conflicts [see also [1.8:720](#)]

For a discussion of this subject, see section [1.8:720](#).

#### 1.7:320 Conflicts of Interest in Criminal Litigation

For discussion of this subject matter, see [1.7:310](#).

#### 1.7:330 Multiple Representation in Non-Litigated Matters

"Conflicts of interest in contexts other than litigation sometimes may be difficult to

assess. Relevant factors in determining whether there is a potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise." [Texas Rules Rule 1.06 cmt. 13](#). "The question is often one of proximity and degree." *Id.*

"For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation may be permissible where the clients are generally aligned in interest even though there is some difference of interest among them." [Texas Rules Rule 1.06 cmt. 14](#). "Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration, it may be unclear whether the client is the fiduciary or is the estate or trust, including the beneficiaries. The lawyer should make clear the relationship to the parties involved." [Texas Rules Rule 1.06 cmt. 15](#).

In **Texas Ethics Opinion 448**, the Ethics Committee considered a situation in which the lawyer was delivered an earnest money contract signed by the buyer and seller listing his firm as representing both the buyer and seller. Applying the Texas Code, the committee indicated that the dual representation would be appropriate if the lawyer made full disclosure to the buyer and seller "of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each," and each consented. The committee also referred to a form of dual representation and disclosure letter that appears in the 50 Tex. Bar J. at 290-91 (1987). See **Texas Ethics Opinion 448 (1988)**.

1.7:340 Conflicts of Interest in Representing Organizations

For discussion of this subject matter, see [1.13:400-1.13:530](#).

[1.7:400](#) Conflict of Interest Between Current Client and Third-Party Payor

- **Primary Texas References:** [TX Rule 1.06](#)
- **Background References:** [ABA Model Rule 1.7](#), [Other Jurisdictions](#)
- **Commentary:** ABA/BNA § 51.901, ALI-LGL §§ 215, 216, Wolfram § 8.8

For discussion of this subject matter, see [1.8:700](#).

1.7:410 Insured-Insurer Conflicts [see [1.7:315](#) and [1.8:720](#)]

For discussion of this subject matter, see [1.8:720](#).

1.7:420 Lawyer with Fiduciary Obligations to Third Person [see [1.13:520](#)]

For a general discussion of conflicts with a client's interests that can arise from a lawyer's responsibilities to others, see [1.7:210](#).

[1.7:500](#) Conflict of Interest Between Current Client and Lawyer's Interest [see also [1.8:200](#)]

- **Primary Texas References:** [TX Rule 1.06](#)
- **Background References:** [ABA Model Rule 1.7](#), [Other Jurisdictions](#)

- **Commentary:** ABA/BNA § 51:501, ALI-LGL §§ 206-208, Wolfram § 8.11

Texas Rule 1.06 recognizes that, in addition to conflicts being created by a lawyer's duties to another client, conflicts may arise by virtue of the lawyer or law firm's own interests. [Texas Rules Rule 1.06\(b\)\(2\)](#).

Official comment 4 to Rule 1.06 states, in pertinent part, that "[l]oyalty to a client is impaired . . . in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client . . . . A potential possible conflict does not itself necessarily preclude the representation." [Texas Rules Rule 1.06 cmt. 4](#). The critical questions are "the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Texas Rules Rule 1.06 cmt. 4.