Discussion Materials for:

"Ruh-roh"

Ethical Issues and Legal Malpractice

Presented by

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Northern District of Texas
Bankruptcy Bench/Bar Conference

Unauthorized Practice of Law Statute
Texas Government Code

Sec. 81.101. DEFINITION. (a) In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

(b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.

(c) In this chapter, the "practice of law" does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforceability of that chapter.

Added by Acts 1987, 70th Leg., ch. 148, Sec. 3.01, eff. Sept. 1, 1987. Amended by Acts 1999, 76th Leg., ch. 799, Sec. 1, eff. June 18, 1999.

Sec. 81.1011. EXCEPTION FOR CERTAIN LEGAL ASSISTANCE. (a) Notwithstanding Section 81.101(a), the "practice of law" does not include technical advice, consultation, and document completion assistance provided by an employee or volunteer of an area agency on aging affiliated with the Texas Department on Aging who meets the requirements of Subsection (b) if that advice, consultation, and assistance relates to:

(1) a medical power of attorney or other advance directive under Chapter 166, Health and Safety Code; or

(2) a designation of guardian before need arises under Section 679, Texas Probate Code.

(b) An employee or volunteer described by Subsection (a) must:

(1) provide benefits counseling through an area agency on aging system of access and assistance to agency clients;

(2) comply with rules adopted by the Texas Department on Aging regarding qualifications, training requirements, and other requirements for providing benefits counseling services, including legal assistance and legal awareness services;

(3) have received specific training in providing the technical advice, consultation, and assistance described by Subsection (a); and

(4) be certified by the Texas Department on Aging as having met the requirements of this subsection.

(c) The Texas Department on Aging by rule shall develop certification procedures by which the department certifies that an employee or volunteer described by Subsection (a) has met the requirements of Subsections (b)(1), (2), and (3).

Added by Acts 2001, 77th Leg., ch. 845, Sec. 1, eff. Sept. 1, 2001.

Sec. 81.102. STATE BAR MEMBERSHIP REQUIRED. (a) Except as provided by Subsection (b), a person may not practice law in this state unless the person is a member of the state bar.

(b) The supreme court may promulgate rules prescribing the procedure for limited practice of law by:

(1) attorneys licensed in another jurisdiction;

(2) bona fide law students; and

(3) unlicensed graduate students who are attending or have attended a law school approved by the supreme court.

Added by Acts 1987, 70th Leg., ch. 148, Sec. 3.01, eff. Sept. 1, 1987.

Sec. 81.103. UNAUTHORIZED PRACTICE OF LAW COMMITTEE. (a) The unauthorized practice of law committee is composed of nine persons appointed by the supreme court.

(b) At least three of the committee members must be nonattorneys.

(c) Committee members serve for staggered terms of three years with three members' terms expiring each year.

(d) A committee member may be reappointed.

(e) Each year the supreme court shall designate a committee member to serve as chairperson.

(f) All necessary and actual expenses of the committee should be provided for and paid out of the budget of the state bar.

Added by Acts 1987, 70th Leg., ch. 148, Sec. 3.01, eff. Sept. 1, 1987. Amended by Acts 1991, 72nd Leg., ch. 795, Sec. 25, eff. Sept. 1, 1991.

Sec. 81.104. DUTIES OF UNAUTHORIZED PRACTICE OF LAW COMMITTEE. The unauthorized practice of law committee shall:

(1) keep the supreme court and the state bar informed with respect to:

(A) the unauthorized practice of law by lay persons and lay agencies and the participation of attorneys in that unauthorized practice of law; and

(B) methods for the prevention of the unauthorized practice of law; and

(2) seek the elimination of the unauthorized practice of law by appropriate actions and methods, including the filing of suits in the name of the committee.

Added by Acts 1987, 70th Leg., ch. 148, Sec. 3.01, eff. Sept. 1, 1987.

Sec. 81.105. LOCAL COMMITTEES. This chapter does not prohibit the establishment of local unauthorized practice of law committees to assist the unauthorized practice of law committee in carrying out its purposes.

Added by Acts 1987, 70th Leg., ch. 148, Sec. 3.01, eff. Sept. 1, 1987.

Sec. 81.106. IMMUNITY. (a) The unauthorized practice of law committee, any member of the committee, or any person to whom the committee has delegated authority and who is assisting the committee is not liable for any damages for an act or omission in the course of the official duties of the committee.

(b) A complainant or a witness in a proceeding before the committee or before a person to whom the committee has delegated authority and who is assisting the committee has the same immunity that a complainant or witness has in a judicial proceeding.

Added by Acts 1991, 72nd Leg., ch. 795, Sec. 26, eff. Sept. 1, 1991.

Conflict Rules – Texas Disciplinary Rules of Professional Conduct

Rule 1.06. Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.
(b) In other situations and except to the extent permitted by paragraph (c), 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.
(c) A lawyer may represent a client in the circumstances described in (b) if:
(1) the lawyer reasonably believes the representation of each client will not be materially affected; and
(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.
(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.
(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.
(f) If 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.

Comment:

Loyalty to a Client

1. Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer must take effective action to eliminate the conflict, including withdrawal if necessary to rectify the situation. See also Rule 1.16. When more than one client is involved

and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by this Rule and Rules 1.05 and 1.09. See also Rule 1.07(c). Under this Rule, any conflict that prevents a particular lawyer from undertaking or continuing a representation of a client also prevents any other lawyer who is or becomes a member of or an associate with that lawyer's firm from doing so. See paragraph (f).
2. A fundamental principle recognized by paragraph (a) is that a lawyer may not represent opposing parties in litigation. The term "opposing parties" as used in this Rule contemplates a situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party. Moreover, as a general proposition loyalty to a client prohibits undertaking representation directly adverse to the representation of that client in a substantially related matter unless that client's fully informed consent is obtained and unless the lawyer reasonably believes that the lawyer's representation will be reasonably protective of that client's interests. Paragraphs (b) and (c) express that general concept.

Conflicts in Litigation

3. Paragraph (a) prohibits representation of opposing parties in litigation. 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). 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. 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. 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. Compare Rule 1.07 involving intermediation between clients.

Conflict with Lawyer's Own Interests

4. Loyalty to a client is impaired not only by the representation of opposing parties in situations within paragraphs (a) and (b)(1) but also 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. Paragraph (b)(2) addresses such situations. 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. It is for the client to decide whether the client wishes to accommodate the other interest involved. However, the client's consent to the representation by the lawyer of another whose interests are directly adverse is insufficient unless the lawyer also believes that there will be no materially adverse effect upon the interests of either client. See paragraph (c).
5. The lawyer's own interests should not be permitted to have adverse effect on representation of a client, even where paragraph (b)(2) is not violated. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.01 and 1.04. If the probity of a lawyer's own conduct in a transaction is in question, it may be difficult for the lawyer to give a client detached advice. A lawyer should not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Meaning of Directly Adverse

6. Within the meaning of Rule 1.06(b), 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 dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests. Even when neither paragraph (a) nor (b) is applicable, a lawyer should realize that a business rivalry or personal differences between two clients or potential clients may be so important to one or both that one or the other would consider it contrary to its interests to have the same lawyer as its rival even in unrelated matters; and in those situations a wise lawyer would forego the dual representation.

Full Disclosure and Informed Consent

7. A client under some circumstances may consent to representation notwithstanding a conflict or potential conflict. However, as indicated in paragraph (c)(1), when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to

make the full disclosure necessary to obtain informed consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

8. Disclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. While it is not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed.

9. In certain situations, such as in the preparation of loan papers or the preparation of a partnership agreement, a lawyer might have properly undertaken multiple representation and be confronted subsequently by a dispute among those clients in regard to that matter. Paragraph (d) forbids the representation of any of those parties in regard to that dispute unless informed consent is obtained from all of the parties to the dispute who had been represented by the lawyer in that matter.

10. A lawyer may represent parties having antagonistic positions on a legal question 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.

11. Ordinarily, it is not advisable for a lawyer to act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated and even if paragraphs (a), (b), and (d) are not applicable. However, there are circumstances in which a lawyer may act as advocate against a client, for a lawyer is free to do so unless this Rule or another rule of the Texas Disciplinary Rules of Professional Conduct would be violated. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in a matter unrelated to any matter being handled for the enterprise if the representation of one client is not directly adverse to the representation of the other client. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for declaratory judgment concerning statutory interpretation.

Interest of Person Paying for a Lawyer's Service

12. A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.08(e). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional

independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Non-litigation Conflict Situations

13. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is 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. The question is often one of proximity and degree.

14. 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.

15. 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 its beneficiaries. The lawyer should make clear the relationship to the parties involved.

16. A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

17. Raising questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice,

opposing counsel may properly raise the question. Such an objection should be viewed with great caution, however, for it can be misused as a technique of harassment. See Preamble: Scope.

18. Except when the absolute prohibition of this rule applies or in litigation when a court passes upon issues of conflicting interests in determining a question of disqualification of counsel, resolving questions of conflict of interests may require decisions by all affected clients as well as by the lawyer.

Rule 1.07. Conflict of Interest: Intermediary

(a) A lawyer shall not act as intermediary between clients unless:
(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;
(2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.
(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.
(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

Comment:

1. A lawyer acting as intermediary may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. For example, the lawyer may assist in organizing a business in which two or more clients are entrepreneurs, in working out the financial reorganization of an enterprise in which two or more clients have an interest, in

arranging a property distribution in settlement of an estate or in mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

2. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship; hence, the requirement of written consent. Moreover, a lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. See also Rule 1.06(b).

3. The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

4. In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible. Moreover, a lawyer cannot undertake common representation of clients between whom contested litigation is reasonably expected or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

5. The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

6. A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation, except as to such clients. See Rules 1.03 and 1.05. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the general rule is that as between

commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.
7. Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

8. In acting as intermediary between clients, the lawyer should consult with the clients on the implications of doing so, and proceed only upon informed consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.
9. Paragraph (b) is an application of the principle expressed in Rule 1.03. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.
10. Under this Rule, any condition or circumstance that prevents a particular lawyer either from acting as intermediary between clients, or from representing those clients individually in connection with a matter after an unsuccessful intermediation, also prevents any other lawyer who is or becomes a member of or associates with that lawyer's firm from doing so. See paragraphs (c) and (e).

Withdrawal

11. In the event of withdrawal by one or more parties from the enterprise, the lawyer may continue to act for the remaining parties and the enterprise. See also Rule 1.06(c)(2) which authorizes continuation of the representation with consent.

Rule 1.08. Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;
(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
(3) the client consents in writing thereto.
(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
(c) Prior to the conclusion of all aspects of the matter giving rise to the lawyer's employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former

client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:
(1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client consents;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.05.
(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.
(g) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
(2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.
(i) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.
(j) As used in this Rule, “business transactions” does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.

Comment:

Transactions between Client and Lawyer

1. This rule deals with certain transactions that per se involve unacceptable conflicts of interests.
2. As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the

client is often advisable. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others such as banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

3. A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (b) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

4. An agreement by which a lawyer acquires literary or media rights concerning the conduct of representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (c) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.04 and to paragraph (h) of this Rule.

Person Paying for Lawyer's Services

5. Paragraph (e) requires disclosure to the client of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.05 concerning confidentiality and Rule 1.06 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure. Where an insurance company pays the lawyer's fee for representing an insured, normally the insured has consented to the arrangement by the terms of the insurance contract.

Prospectively Limiting Liability

6. Paragraph (g) is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

Acquisition of Interest in Litigation

7. This Rule embodies the traditional general precept that lawyers are prohibited from acquiring a proprietary interest in the subject matter of litigation. This general precept, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for contingent fees set forth in Rule 1.04 and the exception for certain advances of the costs of litigation set forth in paragraph (d). A special instance arises when a lawyer proposes to incur litigation or

other expenses with an entity in which the lawyer has a pecuniary interest. A lawyer should not incur such expenses unless the client has entered into a written agreement complying with paragraph (a) that contains a full disclosure of the nature and amount of the possible expenses and the relationship between the lawyer and the other entity involved.

Imputed Disqualifications

8. The prohibitions imposed on an individual lawyer by this Rule are imposed by paragraph (i) upon all other lawyers while practicing with that lawyer's firm.

Conflict Rules – Model Rules of Professional Conduct

Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

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

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

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

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

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Texas Privilege Rule

Rule of Evidence 503. Lawyer–Client Privilege

(a) Definitions.

In this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity—whether public or private—that: (A) is rendered professional legal services by a lawyer; or (B) consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A "client's representative" is: (A) a person who has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered; or (B) any other person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(3) A "lawyer" is a person authorized, or who the client reasonably believes is authorized, to practice law in any state or nation.

(4) A "lawyer's representative" is: (A) one employed by the lawyer to assist in the rendition of professional legal services; or (B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.

(b) Rules of Privilege.

(1) General Rule. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client: (A) between the client or the client's representative and the client's lawyer or the lawyer's representative; (B) between the client's lawyer and the lawyer's representative; (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action; (D) between the client's representatives or between the client and the client's representative; or (E) among lawyers and their representatives representing the same client.

(2) Special Rule in a Criminal Case. In a criminal case, a client has a privilege to prevent a lawyer or lawyer's representative from disclosing any other fact that came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney–client relationship.

(c) Who May Claim. The privilege may be claimed by:

(1) the client;

(2) the client's guardian or conservator;

(3) a deceased client's personal representative; or

(4) the successor, trustee, or similar representative of a corporation, association, or other organization or entity—whether or not in existence.

The person who was the client's lawyer or the lawyer's representative when the communication was made may claim the privilege on the client's behalf—and is presumed to have authority to do so.

(d) Exceptions. This privilege does not apply:

(1) Furtherance of Crime or Fraud. If the lawyer's services 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. If the communication is relevant to an issue between parties claiming through the same deceased client.

(3) Breach of Duty By a Lawyer or Client. If the communication is relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer.

(4) Document Attested By a Lawyer. If the communication is relevant to an issue concerning an attested document to which the lawyer is an attesting witness.

(5) Joint Clients. If the communication: (A) is offered in an action between clients who retained or consulted a lawyer in common; (B) was made by any of the clients to the lawyer; and (C) is relevant to a matter of common interest between the clients.

Federal Privilege Rule

Rule of Evidence 501. Privilege in General

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Texas Ethics Opinion 648

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer communicate confidential information by email?

STATEMENT OF FACTS

Lawyers in a Texas law firm represent clients in family law, employment law, personal injury, and criminal law matters. When they started practicing law, the lawyers typically delivered written communication by facsimile or the U.S. Postal Service. Now, most of their written communication is delivered by web-based email, such as unencrypted Gmail.

Having read reports about email accounts being hacked and the National Security Agency obtaining email communications without a search warrant, the lawyers are concerned about whether it is proper for them to continue using email to communicate confidential information.

DISCUSSION

The Texas Disciplinary Rules of Professional Conduct do not specifically address the use of email in the practice of law, but they do provide for the protection of confidential information, defined broadly by Rule 1.05(a) to include both privileged and unprivileged client information, which might be transmitted by email.

Rule 1.05(b) provides that, except as permitted by paragraphs (c) and (d) of the Rule:

"a lawyer shall not knowingly:

(1) Reveal 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."

A lawyer violates Rule 1.05 if the lawyer knowingly reveals confidential information to any person other than those persons who are permitted or required to receive the information under paragraphs (b), (c), (d), (e), or (f) of the Rule.

The Terminology section of the Rules states that "'[k]nowingly' . . . denotes actual knowledge of the fact in question" and that a "person's knowledge may be inferred from circumstances." A determination of whether a lawyer violates the Disciplinary Rules, as opposed to fiduciary obligations, the law, or best practices, by sending an email containing confidential information, requires a case-by-case evaluation of whether that lawyer knowingly revealed confidential information to a person who was not permitted to receive that information under Rule 1.05.

The concern about sending confidential information by email is the risk that an unauthorized person will gain access to the confidential information. While this Committee has not addressed the propriety of communicating confidential information by email, many other ethics committees have, concluding that, in general, and except in special circumstances, the use of email, including unencrypted email, is a proper method of communicating confidential information. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011); State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2010-179 (2010); Prof'l Ethics Comm. of the Maine Bd. of Overseers of the Bar, Op. No. 195 (2008); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 820 (2008); Alaska Bar Ass'n Ethics Comm., Op. 98-2 (1998); D.C. Bar Legal Ethics Comm., Op. 281 (1998); Ill. State Bar Ass'n Advisory Opinion on Prof'l Conduct, Op. 96-10 (1997); State Bar Ass'n of N.D. Ethics Comm., Op. No. 97-09 (1997); S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 97-08 (1997); Vt. Bar Ass'n, Advisory Ethics Op. No 97-05 (1997).

Those ethics opinions often make two points in support of the conclusion that email communication is proper. First, the risk an unauthorized person will gain access to confidential information is inherent in the delivery of any written communication including delivery by the U.S. Postal Service, a private mail service, a courier, or facsimile. Second, persons who use email have a reasonable expectation of privacy based, in part, upon statutes that make it a crime to intercept emails. See, e.g., Alaska Bar Ass'n Ethics Comm. Op. 98-2 (1998); D.C. Bar Legal Ethics Comm., Op. 281 (1998). The statute cited in those opinions is the Electronic Communication Privacy Act (ECPA), which makes it a crime to intercept electronic communication, to use the contents of the intercepted email, or to disclose the contents of intercepted email. 18 U.S.C. § 2510 et seq. Importantly, the statute provides that "[n]o otherwise privileged . . . electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." 18 U.S.C. § 2517(4).

The ethics opinions from other jurisdictions are instructive, as is Texas Professional Ethics Committee Opinion 572 (June 2006). The issue in Opinion 572 was whether a lawyer may, without the client's express consent, deliver the client's privileged information to a copy service hired by the lawyer to perform services in connection with the client's representation. Opinion 572 concluded that a lawyer may disclose privileged information to an independent contractor if the lawyer reasonably expects that the independent contractor will not disclose or use such items or their contents except as directed by the lawyer and will otherwise respect the confidential character of the information.

In general, considering the present state of technology and email usage, a lawyer may communicate confidential information by email. In some circumstances, however, a lawyer should consider whether the confidentiality of the information will be protected if communicated by email and

whether it is prudent to use encrypted email or another form of communication. Examples of such circumstances are:

communicating highly sensitive or confidential information via email or unencrypted email connections;

sending an email to or from an account that the email sender or recipient shares with others;

sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer (see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011));

sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;

sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or

sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, with or without a warrant.

In the event circumstances such as those identified above are present, to prevent the unauthorized or inadvertent disclosure of confidential information, it may be appropriate for a lawyer to advise and caution a client as to the dangers inherent in sending or accessing emails from computers accessible to persons other than the client. A lawyer should also consider whether circumstances are present that would make it advisable to obtain the client's informed consent to the use of email communication, including the use of unencrypted email. See Texas Rule 1.03(b) and ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011). Additionally, a lawyer's evaluation of the lawyer's email technology and practices should be ongoing as there may be changes in the risk of interception of email communication over time that would indicate that certain or perhaps all communications should be sent by other means.

Under Rule 1.05, the issue in each case is whether a lawyer who sent an email containing confidential information knowingly revealed confidential information to a person who was not authorized to receive the information. The answer to that question depends on the facts of each case. Since a "knowing" disclosure can be based on actual knowledge or can be inferred, each lawyer must decide whether he or she has a reasonable expectation that the confidential character of the information will be maintained if the lawyer transmits the information by email.

This opinion discusses a lawyer's obligations under the Texas Disciplinary Rules of Professional Conduct, but it does not address other issues such as a lawyer's fiduciary obligations or best practices with respect to email communications. Furthermore, it does not address a lawyer's

obligations under various statutes, such as the Health Insurance Portability and Accountability Act (HIPAA), which may impose other duties.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, and considering the present state of technology and email usage, a lawyer may generally communicate confidential information by email. Some circumstances, may, however, cause a lawyer to have a duty to advise a client regarding risks incident to the sending or receiving of emails arising from those circumstances and to consider whether it is prudent to use encrypted email or another form of communication.

Texas Ethics Opinion 651

QUESTIONS PRESENTED

1. If a law firm's web site provides email links for prospective clients to use to contact the firm or its lawyers, is the law firm required to include a warning notice informing persons who use the email link that, unless the sender ultimately becomes a client of the law firm, any confidential information transmitted in the email will not be treated as confidential by the law firm and may be used against the person sending the information?

2. If the law firm's web site does not contain a warning notice concerning the absence of confidentiality with respect to information transmitted by prospective clients who use an email link provided on the law firm's web site, are the law firm and its lawyers required to treat the information received in such transmissions as confidential and not available for use against the person transmitting the information?

3. If a law firm's web site contains an effective warning notice that must be accepted before an email link can be used by a prospective client to transmit information to a law firm or its lawyers, may the law firm and its lawyers use the information received in such email communications for the benefit of current and future clients of the firm and adversely to the person transmitting the information?

STATEMENT OF FACTS

A law firm maintains a web site that is intended to be accessed by persons who could become clients of the law firm. The web site provides information about the law firm, its practice areas, and the lawyers who work in the firm. The web site provides email links so that prospective clients may email lawyers who work in the law firm. The web site is arranged so that the person seeking to email the firm or one of its lawyers receives the following prominently displayed warning notice and must affirmatively accept its terms before sending information:

Warning: Do not send or include any information in any email generated through this web site if you consider the information confidential or privileged. By submitting information by email or other communication in response to this web site, you agree that the communication does not create a lawyer-client relationship between you and the law firm and its lawyers and that any information submitted is not confidential and is not privileged. You further acknowledge that, unless the law firm subsequently enters into a lawyer-client relationship with you, any information you provide will not be treated as confidential and any such information may be used adversely to you and for the benefit of current or future clients of the law firm.

A prospective client locates the law firm's web site, accepts the warning notice quoted above, and transmits through an email link on the web site a request that a lawyer in the law firm represent the prospective client in a matter. In the request, the prospective client transmits confidential information concerning the matter. The lawyer receiving the email determines that the law firm

already represents a client in the matter and that the current client is adverse to the prospective client. The lawyer communicates to the prospective client that the law firm will not be able to represent the prospective client. Information contained in the email transmission from the prospective client would be helpful in the law firm's representation of the current client. The law firm proposes to use this information from the prospective client adversely to the prospective client in representing its current client.

DISCUSSION

This opinion addresses situations in which the law firm web site expressly invites prospective clients to send information to the law firm or its lawyers. The opinion does not address unsolicited communications from potential clients. The questions presented must be considered in connection with Rule 1.05 (Confidentiality of Information) of the Texas Disciplinary Rules of Professional Conduct.

Rule 1.05 defines confidential information and, subject to exceptions not involved here, prohibits a lawyer from knowingly revealing confidential information of a client or using such information to the disadvantage of the client unless the client consents after consultation. Under the facts presented, the prospective client does not actually become a client; however, the duty of confidentiality may arise before the formation of a lawyer-client relationship.

"Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. For purposes of determining the lawyer's authority and responsibility, individual circumstances and principles of substantive law external to these rules determine whether a client-lawyer relationship may be found to exist. But there are some duties, such as of that of confidentiality, that may attach before a client-lawyer relationship has been established."

Texas Disciplinary Rules of Professional Conduct, Preamble: Scope, paragraph 12.

In addition, Comment 1 to Rule 1.05 notes that a lawyer may be required to protect the confidences of one who seeks to employ the lawyer:

"Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought to employ the lawyer. Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance."

Thus, a lawyer's duty to protect confidential information of potential clients may exist even if the lawyer ultimately declines the representation. When a lawyer's web site solicits potential clients to submit information, a prospective client may have a reasonable expectation that the lawyer will

maintain the confidentiality of the information submitted. Even if a lawyer-client relationship is never created, it may be reasonable for a prospective client to expect that the information provided to a lawyer will be maintained as confidential. See Professional Ethics Committee Opinion 494 (February 1994) (a lawyer may not represent a wife in a divorce action where the husband had consulted briefly with the lawyer on domestic relations matters several years earlier). If a lawyer has an obligation to protect confidential information of a person who consulted with the lawyer concerning representation even when a lawyer-client relationship is not ultimately created, the receipt of confidential information from the potential client may create a conflict of interest for the lawyer with respect to an existing client of the lawyer that would have to be dealt with appropriately under the Rules.

In view of the above, there is no requirement under the Texas Disciplinary Rules that the law firm or any of its lawyers provide a warning notice on the law firm's web site concerning confidential information that may be sent to the law firm or its lawyers by means of email links provided by the firm's web site. However, if an effective warning notice is not provided to prospective clients who use email links to communicate with the law firm or its lawyers, lawyers who receive communications from a prospective client that contain the prospective client's confidential information may have obligations to protect and not adversely use the confidential information provided by the prospective client. As a result, for the reasons described above, conflicts of interest may arise that would have to be appropriately dealt with under the Rules by the law firm and its lawyers with respect to their representation of a current client who is adverse to a prospective client who communicates confidential information to the law firm or its lawyers through the law firm's web site email links.

In the circumstances here considered, the law firm web site contains an effective warning statement to the effect that any information provided in an email communication generated through the web site will not be treated as confidential and may be used against the person sending the information, and this warning must be affirmatively accepted by any person using an email link on the web site. In such circumstances, it is the opinion of the Committee that the law firm and its lawyers will not have an obligation to protect or refrain from using information received through an email generated by the web site's email link.

CONCLUSIONS

1. Under the Texas Disciplinary Rules of Professional Conduct, a law firm is not required to include in the law firm's web site a notice warning persons who use the web site's email links that any confidential information transmitted to the law firm or one of its lawyers in such an email will not be treated as confidential and may be used against the person sending the information.

2. If a web site solicits email communications from potential clients and does not contain an effective warning notice concerning the absence of confidentiality with respect to information transmitted to a law firm or one of its lawyers by prospective clients who use an email link provided on the law firm's web site, the law firm's lawyers may be required to treat the information received

in such emails from prospective clients as confidential and therefore not available for use against the person transmitting the information. Such limitations on the disclosure and use of confidential information received in emails from prospective clients may result in a conflict of interest for the law firm and its lawyers that would have to be addressed appropriately under the Texas Disciplinary Rules.

3. If a law firm's web site contains a warning notice substantially similar to that described in this opinion that must be affirmatively accepted before an email link on the law firm's web site is used to send an email to the firm or one of its lawyers, the law firm and its lawyers may use any information received in such email communications from persons who do not become clients of the law firm for the benefit of current and future clients of the firm and adversely to the person transmitting the information.

Mark X. Mullin

Mark X. Mullin was sworn in as a bankruptcy judge for the Northern District of Texas on September 18, 2015. Mark received his B.S.B.A. degree in accounting from Creighton University in 1979 and his J.D. from St. Mary's University School of Law in 1986. Prior to attending law school, Mark held CPA licenses in Nebraska and Texas and was employed by the international accounting firm of Peat, Marwick, Mitchell & Co. (n/k/a KPMG). After graduating from law school in 1986, Mark joined the Dallas, Texas office of Haynes and Boone, LLP where he became a member of the Bankruptcy and Business Restructuring practice group. Mark became an equity partner in the firm in 1995 and he continued to practice law with the firm until September 17, 2015.

Mark has served in leadership roles in many local and national legal organizations, including serving as President of the Bankruptcy Section of the Dallas Bar Association, President and Executive Committee Member of the Hon. John C. Ford American Inn of Court, and Education Director and Co-Chair of the Secured Credit Committee of the American Bankruptcy Institute. Mark was also named as a 2010 honoree inducted into the DFW Serjeants of the Inn.

Mark and his wife Holli have two children, Ryan (married to Courtney) and Lacie (married to Chase Arthur), and two grandsons, Ryder and Asher.

CARRINGTON COLEMAN

KELLI M. HINSON

Partner and Firm General Counsel

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As head of Carrington Coleman's Professional Liability group, Kelli helps navigate cases for major law firms, healthcare institutions, and corporations, and the professionals who run them.

Her ability to clarify a professional's and corporation's legal duties—to plaintiff's attorneys, judges, and juries—often brings these cases to quick and successful conclusions. She applies the same informed expertise to shareholder disputes, derivative claims, and officer and director suits, making her a "go-to" attorney for business litigation.

Being an amazingly quick study, she has yet to meet a legal problem she couldn't eventually master. Her meticulous dissection of cases against her clients can leave the other side wondering what hit them. Kelli has obtained major victories for her clients, including overturning an $88 million verdict in a "shareholder oppression" case; obtaining dismissal of the claims against her client who served as outside counsel and on the board of directors for a privately-traded company that ultimately filed bankruptcy; obtaining summary judgment in bankruptcy court on a legal malpractice claim against a large international law; and obtaining summary judgment for a publicly-traded oil and gas company in a pollution case filed by a land-owner seeking over $38 million in alleged clean up costs under the federal Oil Pollution Act.

Kelli graduated *summa cum laude* with a business degree from McMurry University and then graduated *magna cum laude* from SMU Dedman School of Law, where she was a Hatton W. Sumner Scholar and the Editor of the SMU Law Review Air Law Symposium. She has been named a "Super Lawyer" in the Texas Monthly magazine every year since 2012 (before that she was a ""Rising Star"), and has been recognized as one of D Magazine's Best Lawyers in Dallas since 2014.

Kelli is the immediate past Co-Chair of the DBA Legal Ethics Committee and of Attorneys Serving the Community, and is on the board of directors for the Dallas Women Lawyers Association and The City Club of Dallas. She is also a frequent author and speaker on issues involving ethics and legal malpractice, as well as how to avoid and litigate business disputes.

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PRACTICE AREAS

- Business Litigation
- Professional Liability
- Ethics Advice
- State Bar Grievances

OVERVIEW:

Nicole LeBoeuf is a civil trial lawyer with active experience in both state and federal courts, as well as arbitration. She is also an arbitrator with the Financial Industry Regulatory Authority (FINRA).

Nicole regularly represents Dallas law firms and individual attorneys in a variety of matters. She has extensive experience in the representation of business owners and companies in complex and multi-party lawsuits concerning such matters as employment discrimination, deceptive trade practices, breach of contract, fraud, defamation, negligence, breach of fiduciary duty, conspiracy and other business-related claims. Nicole especially enjoys trying cases to juries.

As an officer of the William “Mac” Taylor Inn of Court, and a community leader and volunteer in several organizations including Attorneys Serving the Community, Altrusa and Dallas CASA, Nicole is actively involved with the DFW community.

Nicole regularly speaks to attorneys, engineers and other professionals regarding their ethical obligations, teaches trial and deposition skills to young lawyers, and is a guest lecturer at the University of Texas Naveen Jindal School of Management.

RECOGNITION:

- Rated A/V Preeminent by Martindale-Hubbell, 2006 to the Present
- Named to “Best Lawyers in America by U.S. News and World Report, 2012-2016
- Named a Texas Super Lawyer in 2014 and 2015 by Thompson Reuters
- Master, William “Mac” Taylor American Inn of Court
- Texas Bar Foundation Fellow
- Dallas Bar Foundation Fellow
- College of the State Bar of Texas

SELECTED SPEAKING ENGAGEMENTS:

- University of Texas School of Law, 49th Annual William W. Gibson, Jr. Mortgage Lending Institute, Speaker, November 5, 2015 University of Texas School of Law 2015 Trial Skills Training Competition Panelist, September 25, 2015
- Annual Civil Collaborative Law Training, Dallas Bar Association, Speaker and/or Panelist, 2007, 2011-14
- Ethical Issues in Construction Defects and Failures, Half Moon Seminars, Speaker, 2012-14
- Texas Bar CLE, Receiverships in Texas, Speaker, Nov. 9, 2012
- State Bar of Texas, Collaborative Law Course, 2009, 2012, 2013

PROFESSIONAL AND COMMUNITY INVOLVEMENT:

- NITA Deposition Skills Training, Faculty
- Dallas Bar Association, Trial Skills Training, Faculty
- William “Mac” Taylor Chapter of the American Inns of Court, Secretary/Treasurer
- High School Mock Trial, DISD and Regional, Volunteer Judge, 2010-Present
- Collaborative Law Section, Dallas Bar Association, Officer, 2008-Present
- Dallas CASA, Advocate
- Altrusa International of Downtown Dallas, Inc., Officer
- Attorneys Serving the Community, Member

EDUCATION:

- Juris Doctor, University of Texas at Austin (1994)
- University of Texas at Austin, B.A. (1989)

BAR ADMITTANCES:

- Licensed by the State Bar of Texas since 1994
- U.S. Supreme Court
- Fifth Circuit Court of Appeals
- United States District Courts for the Northern, Southern, Eastern and Western Districts of Texas