

Presented:
26th Annual Nonprofit Organizations Institute

January 15 – 16, 2009
Austin, Texas

Ethical Issues for Lawyers Serving Nonprofit Organizations

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RELEVANT PROVISIONS OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT	1
	A. PREAMBLE: A LAWYER’S RESPONSIBILITIES	2
	B. RULE 1.02 SCOPE AND OBJECTIVES OF REPRESENTATION.....	4
	C. RULE 1.03 COMMUNICATION	6
	D. RULE 1.05 CONFIDENTIALITY OF INFORMATION	8
	E. RULE 1.06 CONFLICT OF INTEREST: GENERAL RULE	11
	F. RULE 1.07 CONFLICT OF INTEREST: INTERMEDIARY	14
	G. RULE 1.09 CONFLICT OF INTEREST: FORMER CLIENT	18
	H. RULE 1.12 ORGANIZATION AS A CLIENT	22
	I. RULE 1.13 CONFLICTS: PUBLIC INTERESTS ACTIVITIES.....	26
	J. RULE 1.15 DECLINING OR TERMINATING REPRESENTATION.....	28
III.	RELEVANT PROVISIONS FROM BUSINESS ORGANIZATIONS CODE	32
IV.	MALPRACTICE CONCERNS	36

ETHICAL ISSUES FOR LAWYERS SERVING NONPROFIT ORGANIZATIONS

I. INTRODUCTION

Lawyers working with nonprofit organizations are sometimes faced with ethical dilemmas in carrying out their responsibilities to the nonprofit organizations, whether serving as board members, as counsel for the organizations, or both. When counsel for a nonprofit organization believes that the actions of an officer, director or employee of the organization are likely to substantially injure the organization, the Texas Disciplinary Rules of Professional Conduct require remedial action. That action includes bringing the action to the attention of the appropriate person(s) within the organization, usually the board of directors and/or the members, if any, and, if necessary, to the Attorney General. It may be argued that officers and directors have similar responsibilities, especially officers or directors who are lawyers. To be sure, a lawyer representing nonprofit organizations must be well versed in the laws of taxation and business organization. However, the prudent nonprofit organizations lawyer cannot stop there; in addition, the lawyer must have a thorough understanding of the rules regulating lawyer conduct.

Rules regulating lawyer conduct arise from several different sources including: (a) common law (e.g., tort law, fiduciary law, agency law); (b) criminal law; and (c) the rules of evidence. This presentation, however, focuses on the regulation of lawyer conduct under the Texas Disciplinary Rules of Professional Conduct (“TDRPC”). In particular, this presentation discusses certain rules (“Rules”) of the TDRPC that will likely affect the lawyer representing nonprofit organizations. This presentation does not discuss all of the Rules contained in the TDRPC, nor does it address every provision of a particular Rule. Accordingly, a lawyer should refer to the actual text of the TDRPC, including the comments, for more comprehensive guidance. [Note: Occasional references are made to parallel rules contained in the American Bar Association’s Model Rules of Professional Conduct. The ABA Model Rules are the blueprint for the TDRPC; however, there are some important differences between them.]

II. RELEVANT PROVISIONS OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

The Texas Disciplinary Rules of Professional Conduct (Article X, Section 9 of the State Bar Rules, promulgated by the Texas Supreme Court pursuant to the authority granted it in Section 81.024 of the Texas Government Code, the “Rules”) govern the conduct of lawyers for purposes of professional discipline. The Rules are imperatives, and use the terms “shall” and “shall not”. The Comments to the Rules are permissive, and generally use terms such as “may” and “should”. The Comments are intended to provide guidance for the interpretation of the Rules and are intended for use by a lawyer, in his or her exercise of discretion. (Preamble, paragraph 10.)

Violations of the Rules do not give rise to civil liability and the Rules are not intended to create any substantive legal duties. (Preamble, paragraph 15.) On the other hand, at least one appellate court has approved the use, by an expert witness, of the Rules

to demonstrate the standard of care and duties of an attorney to avoid conflict and keep a client informed in a malpractice and breach of fiduciary duty case against a lawyer and his law firm. *Two Thirty Nine Joint Venture v. Harry J. Joe, et al.*, 60 S.W.3d 896, 905 (Tex. App. – Dallas 2001), reversed on other grounds, 145 S.W.3d 150 (Tex. 2004). While the Court of Appeals permitted the consideration of testimony concerning the construction of a relevant Rule as evidence of the standard of care and breach of the standard, in a footnote, the Supreme Court noted, “the Rules do not define standards of civil liability of lawyers for professional conduct.” *Id.* at 158, fn. 2.

A. PREAMBLE: A LAWYER’S RESPONSIBILITIES

1. A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

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3. In all professional functions, a lawyer should zealously pursue clients’ interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Texas Disciplinary Rules of Professional Conduct or other law.

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7. In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from apparent conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interests. The Texas Disciplinary Rules of Professional Conduct prescribe terms for resolving such tensions. They do so by stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of these Rules many difficult issues of professional discretion can arise. The Rules and their Comments constitute a body of principles upon which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment. In applying these rules, lawyers may find interpretive guidance in the principles developed in the Comments.

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9. Each lawyer’s own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards

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First appeared as part of the conference materials for the
26th Annual Nonprofit Organizations Institute session
"Optional Ethics Breakfast

Ethical Issues for Lawyers Serving Nonprofit Organizations"