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## **COMMERCIAL LITIGATION & BUSINESS TORTS UPDATE**

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Hon. Caroline Baker, 295th Judicial District Court**

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# Chapter 15

## Ethics

*Randy Johnston, Johnston Tobey Baruch, P.C.*

### 15-1 INTRODUCTION

Every practicing Texas lawyer that knows his/her law license is predicated upon continued adherence to the Texas Disciplinary Rules of Professional Responsibility. Most Texas lawyers also know that the Texas Rules differ in several significant respects from the ABA Model Rules. Every licensed lawyer has studied these Rules at least once in law school and has passed a bar exam that included some version of the rules (depending upon how long they have been licensed). Regrettably, however, many attorneys have not read the Rules since studying for the Bar exam.

The space limitations in this chapter preclude the author from discussing every ethical rule or answering every question that arises in connection with the ethical rules. Forty years of practice have persuaded the author, however, that there are common, predictable patterns when lawyers find that they have run afoul of the ethical rules. It is the goal of the author in this chapter to advise the practitioner of these common patterns so the Texas practitioner will at least know “when the ice is getting thin.” While it is certainly possible to avoid ethical violations, it is probably not possible in a modern, complex, law practice to avoid all of the situations which commonly give rise to ethical violations. When the practitioner finds himself/herself in one of those situations impacted by the ethical rules, the practitioner should at least know beforehand that he/she has ventured out onto the thin ice and should behave

differently than when on solid ground. While it is safest to avoid thin ice altogether, that is not always possible.

## 15-2 ETHICAL TRAPS

### 15-2:1 Texas Rules vs. the ABA Model Rules

#### 15-2:1.1 Texas Disciplinary Rules of Professional Conduct vs. American Bar Association Model Rules

Most states in the nation have adopted the American Bar Association Model Rules as their disciplinary rules for the practice of law. This is also the set of rules most lawyers studied in law school and were tested on as part of the multi-state exam. While the ABA Model Rules form the template and a basis for the Texas Disciplinary Rules of Civil Procedure, Texas modified the Model Rules in several significant respects. This chapter does not detail every instance in which the Texas Rules depart from the ABA Model Rules.<sup>1</sup> Should the reader want to make his/her own rule by rule comparison, the reader can look at the American Legal Ethics Library.<sup>2</sup>

The continued viability of a Texas law license is, obviously, predicated on continued adherence to the TDRPC. This does not, however, make the ABA Model Rules irrelevant to Texas attorneys. The most obvious use of the Model Rules is as an aid to the interpretation of (and often a contrast to) the Texas Rules. There is considerable authority across the nation on the interpretation and application of the Model Rules to attorneys' conduct and that authority can be (and usually is) persuasive in interpreting the Texas Rules when the Texas rule is similar. Similarly, when the Texas rule is different from the Model Rule, there is often a good argument that the caselaw interpreting the Model Rule should be ignored because Texas purposefully refused to adopt the Model Rule.

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<sup>1</sup> American Bar Association Model Rules can be accessed at: [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html).

<sup>2</sup> American Legal Ethics Library can be accessed at: [http://www.law.cornell.edu/ethics/tx/narr/TX\\_NARR\\_1\\_10.HTM](http://www.law.cornell.edu/ethics/tx/narr/TX_NARR_1_10.HTM).

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