

**CONFLICTS AND DEALING WITH
THE UNREPRESENTED PERSON**

Presented By:

GAINES F. WEST II

Partner

West, Webb, Allbritton & Gentry, P.C.

1515 Emerald Plaza

College Station, Texas 77845

Written By:

GAINES F. WEST II

AARON B. MICHELSON

West, Webb, Allbritton & Gentry, P.C.

University of Texas School of Law

State Bar of Texas Oil, Gas and Energy Resources Law Section

16TH ANNUAL GAS AND POWER INSTITUTE

October 5–6, 2017

Houston, Texas

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Conflicts and Dealing with the Unrepresented Person

I. INTRODUCTION

Texas lawyers are faced with difficult ethical issues on a daily basis. Potential investment opportunities and other business transactions frequently present themselves to oil and gas attorneys. Furthermore, these attorneys regularly communicate with parties not represented by an attorney. These common occurrences are rife with potential ethical pitfalls. The American Bar Association's Model Rules of Professional Conduct and the Texas Disciplinary Rules of Professional Conduct contain guidelines for oil and gas attorneys to stay within proper ethical parameters when dealing with these difficult situations in potential ethical gray areas.

II. TRUTHFULNESS IS STATEMENTS TO OTHERS

A. Texas Disciplinary Rules of Professional Conduct Rule 4.01

In pertinent part, Rule 4.01 of the Texas Disciplinary Rules of Professional Procedure states:

In the course of representing a client a lawyer shall not knowingly:

- (a) Make a false statement of material fact or law to a third party; or
- (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid...knowingly assisting a fraudulent act perpetrated by a client.

Rule 4.01 of the Texas Disciplinary Rules of Professional Conduct applies to all communications an attorney has in his capacity as an attorney—not just with other attorneys or clients. This rule also applies to any communications even with unrepresented adverse parties. *See* § III *infra* for further discussion with regard to an attorney's communications with unrepresented persons.

Making a "false statement of material fact" as described by Rule 4.01(a) is not, however, merely limited to telling outright lies. The prohibition also contemplates such actions as threatening to file a lawsuit against a party when the attorney knows that she will never file such a lawsuit. *See* Tex. Comm. On Professional Ethics Op. 484 at APPLICABLE AUTHORITY.

Furthermore, Rule 4.01(a) prohibits an attorney from holding himself out as the legal representative of a party if he does not have contractual privity with that client. State Bar of Texas Professional Ethics Committee Op. No. 630 at DISCUSSION. In the oil and gas context, such a situation might arise when a professional landman or other subsurface rights aggregator signs up a large number of interest holders in a single unit. In order for an attorney to communicate with other professionals that she represents the individual interest holders, each individual interest holder must agree to the representation. Otherwise, holding oneself out as the attorney representing the collective group, merely because of a contractual relationship with the aggregator, can readily run afoul of Rule 4.01.

Likewise, an attorney cannot skirt the mandate of Rule 4.01 by using his client as an intermediary communicator. Rule 4.01 prohibits an attorney from advising his client to make false statements of fact or law. Tex. Comm. On Professional Ethics Op. 488 at DISCUSSION. This extends past the obvious situation where a client must speak only the truth because she is under oath. While an attorney may not necessarily be required to advise his client to be truthful at all times regarding the subject matter of the representation (although this is a common sense best practice which every attorney should follow), an attorney must not affirmatively advise his client to make a false statement.

Such a situation may arise during deal negotiations, or when an attorney provides legal advice to a professional landman. Whereas it would likely lead to a better outcome for such a client to tell a "fib" to an adverse party or a prospective mineral interest seller in order to negotiate better

terms or prices, an attorney who advises her client to do so runs the real risk of being found in violation of Rule 4.01.

Where an attorney subsequently learns that a statement which he previously believed to be truthful was, in fact, untruthful, the attorney has a duty to make reasonable efforts to take corrective action. Tex. Comm. On Professional Ethics Op. 499 at DISCUSSION. This also applies where an attorney learns that a client has made a materially untruthful statement of law or fact. *Id.* Where the falsehood was a statement made by the attorney, she must correct such statement in a reasonable and timely manner. Where the untruth was a client's, the attorney must make reasonable efforts to persuade the client to correct the mistake. Where the client refuses to do so, the lawyer must be ready and willing to terminate the representation. (See Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct for more on termination of representation of a client, which is outside the scope of this writing.) Failure to disclose such a falsehood—even when the original false statement of material fact or law was made without malice or intent to mislead—can violate Rule 4.01(b). When the attorney learns of the false statement and does not take steps to mitigate the falsehood, the attorney can be found to be knowingly assisting the client's fraudulent actions.

The basic tenants of Rule 4.01 are clear: do not lie to an opponent, client, or third party; do not encourage or advise an opponent, client, or third party to lie. If and when an attorney learns that he or an opponent, client, or third party has lied—even mistakenly so—the attorney must take immediate reasonable steps to correct the infraction. Otherwise, the attorney leaves herself open to an attorney grievance complaint for violation of Rule 4.01.

B. American Bar Association Model Rules of Professional Conduct 4.1¹

¹ The ABA Model Rules prescribe a baseline standard of legal ethics promulgated by the ABA House of Delegates. These Model Rules are merely recommendations and are not binding on Texas lawyers as are the Texas Disciplinary Rules

In pertinent part, Rule 4.1 of the American Bar Association Model Rules of Professional Conduct states:

In the course of representing a client a lawyer shall not knowingly:

- (a) Make a false statement of material fact or law to a third person; or
- (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a...fraudulent act by a client, **unless disclosure is prohibited by Rule 1.6.**

Rule 1.6, to which Rule 4.1(b) refers, states:

- (a) A lawyer shall not reveal information relating to the representation of a client unless...the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary:

...

(2) to prevent the client from committing...fraud that is reasonably certain to result in substantial injury to the financial interests...of another and in furtherance of which the client has used or is using the lawyer's services; [or]

(3) to prevent, mitigate, or rectify substantial injury to the financial interests...of another that is reasonably certain to result or has resulted from the client's

of Professional Conduct. We look to these Model Rules—and formal opinions regarding them which are also propounded by the ABA—when attempting to interpret and give context to the Texas Disciplinary Rules of Professional Conduct.

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First appeared as part of the conference materials for the
16th Annual Gas and Power Institute session

"Ten Tips to Avoid a Grievance: Conflicts and Dealing with the Unrepresented Person"