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Navigating Conflicts of Interest

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I. INTRODUCTION.

As attorneys, our professional responsibility to our clients should be of primary concern. Attorneys must constantly and consistently watch for and prevent conflicts of interest, waivers of client privilege and breaches of confidential information particular to our clients as they navigate the objectives presented by the particular case at hand. Attorneys must not venture into areas that may either create a conflict of interest or cause the attorney-client privilege and confidential nature of client information to be jeopardized.

The Texas Disciplinary Rules of Professional Conduct (the “Rules”) provide a roadmap to all attorneys licensed in Texas. First published in 1979 and subsequently revised both in 1986 and in 1997, the Rules are timely and relevant, in spite of the fact that they have not been successfully updated to include rule modifications pertaining to our ever changing world of technology. Advances in technology have clearly affected the legal profession as evidenced by the advent of electronic discovery, electronic execution of documents, electronic filing and recording of documents and most recently, electronic acknowledgements taken by remote notary publics.

This brief paper, together with the discussion points presented by our ethics panel, are intended to provoke thought leadership and discussion concerning the issues that conflicts of interest continue to present to attorneys practicing in the primary area of real estate.

II. CONFLICTS OF INTEREST

A. Analysis of General Rule. Article I of the Rules pertains to the Client-Lawyer Relationship. This Article arguably may be the section that generates (or reveals) more issues and controversy pertaining to professional responsibility than any other Article in the Rules. The general rule for conflicts of interest is contained in Rule 1.06 and is cited in its entirety in Appendix A. As with all of the Rules, Rule 1.06 is intended to cover all areas of the law. Although a simple reading of Rule 1.06 may seem clear enough, issues repeatedly arise in real estate and corporate transactions which may not be commonplace in the litigation area.

Some conflict issues tend to arise due to large firm environments. Detailed conflict of interest checks among attorneys at firms with multiple offices across the region, nation and even the world invariably create situations of conflict. Some attorneys may be married to attorneys who practice at other firms which may ultimately create a separate conflict of interest scenario. Similarly, conflicts may arise in certain rural areas of the state simply due to the paucity of practicing attorneys in the area. In some jurisdictions, there are attorneys who also serve as part-time judges which tends to create new opportunities for conflicts to arise.

Consider the situation where two attorneys, who are married to each other, work in different firms within the same city. One attorney represents a seller of commercial real estate. The purchaser is represented by an attorney practicing within the spouse’s firm. The transaction could potentially lead to litigation.

Rule 1.06(b)(2) states that a lawyer shall not represent a client if that representation “reasonably appears to be or become adversely limited by the lawyer’s...responsibilities...to a third person or by the lawyer’s...own interests.” Comment 4 to Rule 1.06 succinctly reminds us that an attorney’s loyalty to a client could be impaired if such attorney’s loyalty and responsibilities to others (a spouse) prevented clear and effective representation of the client.

One could argue that Rule 1.06(b)(2) might always be implicated by a marriage relationship because each respective spouse would likely have an innate interest and desire towards achieving success in their respective careers. A lawyer’s desire to achieve success could necessarily be conflicted by such lawyer’s intimate personal relationships with and responsibilities toward their spouse. Rule 1.06(b)(2) would seem to be especially relevant if, as in the facts presented, one of the spouses is directly involved with the transaction. Would the outcome be different if the parties were involved in a lawsuit as opposed to a conveyance of real property which, on its face, does not appear to carry controversy?

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