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Everyday Strategies for Avoiding Professional Misconduct and Sanctions

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EVERYDAY STRATEGIES FOR AVOIDING PROFESSIONAL MISCONDUCT AND SANCTIONS

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Introduction - Tips for Avoiding Professional Misconduct and Sanctions

Lawyers are busier than ever. Courts issue opinions and orders multiple times per week. We are expected to keep up with procedural law, the substantive law that controls disposition of our clients' legal matters, and the law controlling our ethical duties to our clients. Those ethical duties are spelled out in numerous different ways. Court opinions construing attorney fiduciary duties, professional negligence, fraud and the like provide some of that guidance. The Texas Disciplinary Rules of Professional Conduct, the ethical opinions that construe them, and restatements, cases, statutes, and rules from other jurisdictions all form part of the kaleidoscope of information that we must process in order to assure that we meet the ethical obligations that we owe to our clients and to the legal system as a whole.

This paper is an effort to help Texas attorneys stay current with new ethics information that has become available over the past month or months, or year or years, as the case may be. It is a good start to assisting the average practitioner in meeting his or her ethical obligations to his or her clients, and to the legal system as a whole. With that, let's explore 50+ everyday strategies that lawyers can use to avoid professional misconduct and sanctions.

1. Stay up-to-date with changes to applicable disciplinary rules.

The good news is that for the most part, ethical rules applicable to Texas attorneys do not change all that often. The bad news is that a set of rules amendments became effective July 1, 2021 (with one new comment effective on June 15, 2021). So what are these amendments, and what practical effect do they have on my ethical practice of the law?

A full-blown analysis of the new disciplinary amendments is beyond the scope of this paper. The redline version of the new rules amendments takes up 41 pages at this link: https://www.txcourts.gov/media/1452266/219061.pdf.

What *is* within the scope of this paper is a brief synopsis of the rules amendments so that you can take your time perusing the ones that are most impactful on your practice.

The first important change is the deletion of TDRPC 1.02(g), which was replaced by new TDRPC 1.16. Old rule 1.02(g) required ("A lawyer shall...") Texas attorneys to take reasonable action to secure the appointment of a guardian or other legal representative whenever the lawyer reasonably believed the client lacked legal competence and such action

should be taken to protect the client. Now, when a lawyer reasonably believes that a client has diminished capacity, in many circumstances outlined in the rule, new rule 1.16(b) permits, but does not require, the lawyer to "take reasonably protective action." The rule then provides non-exclusive examples of actions that a lawyer may take to protect their client. Additionally, when taking the protective action authorized by new rule 1.16(b), 1.16(c) authorizes (but does not require) an attorney to disclose the client's confidential information "to the extent the lawyer reasonably believes is necessary to protect the client's interests." This is a big, new, and potentially very useful tool for Texas attorneys' bat utility belts.

The second important change is the addition of two new factual situations in which lawyers may reveal a client's confidential information. New rule 1.05(c)(9) authorizes Texas lawyers to reveal confidential information "to secure legal advice about the lawyer's compliance with these Rules." New comment 23 to rule 1.05 makes clear that a lawyer who receives confidential information for the purpose of rendering legal advice to another lawyer or law firm is subject to the same rules of conduct regarding disclosure or use of confidential information received in a confidential relationship. Additionally, new rule 1.05(c)(10) authorizes Texas attorneys to reveal confidential information "when the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide."

The third important change is the creation of a "conflict of interest" exception pertaining to nonprofit and limited pro bono legal services. If your practice includes these areas, I encourage you to study these new rules very carefully. I will not analyze them in this paper because they only apply to a small subset of Texas attorneys.

Perhaps the biggest set of comprehensive changes to the disciplinary rules are those contained in Part VII, pertaining to "information about legal services." The essence of Part VII is ably summed up in Rule 7.01(a), which states: "A lawyer shall not make or sponsor a false or misleading communication about the qualifications or services of a lawyer or law firm. Information about legal services must be truthful and nondeceptive. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. A statement is misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation, or if the statement is substantially likely to create unjustified expectations about the results the lawyer can achieve."

The biggest specific change to Part VII is found in Rule 7.01(c), which authorizes the use of non-false and non-misleading trade names. The rule states: "Lawyers may practice law under a trade name that is not false or misleading. A law firm name may include the names of current members of the firm and of deceased or retired members of the firm, or of a predecessor firm, if there has been a succession in the firm identity. The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. A law firm with an office in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located."

The remainder of Part VII contains a number of revisions to previous practices prior to the effective date of the amendments. Since only a small percentage of Texas attorneys advertise to the general public, a detailed analysis of these provisions is outside the scope of this paper. Readers are strongly urged to familiarize themselves with these new rules amendments if advertising is part of the lawyer's practice.

Next, TDRPC 8.03(f) was amended to require lawyers who have been disciplined by a federal court or federal agency to notify the chief disciplinary counsel within 30 days after the date of the order or judgment. "Discipline" means a public, reprimand, suspension or disbarment, but does not include a letter of "warning" or "admonishment" or similar advisory by a federal court or federal agency.

Old TRDP 3.02A required that a judge assigned to a disciplinary matter not reside in the Administrative Judicial District in which the Respondent resides. New TRDP 3.02A requires only that the assigned judge's district not include the county of appropriate venue for the disciplinary proceeding. This should result in judges not having to travel such far distances in order to preside in disciplinary matters. Additionally, procedures for recusal and disqualification of judges in disciplinary matters were amended in TRDP 3.02A to bring them in line with recusal and disqualification in civil matters generally.

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