

PRESENTED AT

2021 Gas and Power Institute

October 14, 2021

Royal Sonesta Hotel, Houston, TX

Everyday Strategies for Avoiding Professional Misconduct and Sanctions

Scott Rothenberg

**Scott Rothenberg
Law Offices of Scott Rothenberg
6575 West Loop South, Suite 500
Bellaire, TX 77401-3509**

**scott@rothenberglaw.com
713.667.5300**

Table of Contents

Introduction - Tips for Avoiding Professional Misconduct and Sanctions	1
1. Stay up-to-date with changes to applicable disciplinary rules.	1
2. Do not give dispositive weight to an American Bar Association ethics opinion that is right on point.	3
3. Do not give dispositive weight to a Texas formal ethics opinion that is right on point.	3
4. Do not completely disregard ABA or Texas formal ethics opinions.	3
5. Do not contact a prospective expert solely for the purposes of disqualifying him or her. - EO 676 - 8/18	4
6. Do not renegotiate your fee in the middle of the representation unless you feel confident you can <u>prove</u> that the new agreement is fair to the client under all of the circumstances. EO 679 - 9/18	4
7. Be certain to understand the confidentiality risks in the technology that you use to maintain and store client communications. EO 680 - 9/18.	4
8. Make sure you know how to distribute client property when a third-party has a superseding interest in that property. EO 681 - 9/18	4
9. Just because no rule, ethics opinion, case, disciplinary rule or other authority prohibits it doesn't mean you can't be sanctioned for doing it. A finding of bad faith is the key	5
10. Do not threaten to file a grievance or criminal charges. Period.	5
11. Do not disclose Confidential Client Information in Social Media without Client Consent.	5
12. Do not respond to Clients' Adverse Comments using Confidential Information. EO 662 - 8/16.	8
13. Scrub Electronic Documents to Prevent Transmission of Confidential Metadata. EO 665 - 12/16.	8
14. Do not conduct or direct someone else to conduct an anonymous investigation to determine jurisdictional information. EO 671 - 3/18	8
15. Do treat the information that is shared with you by a prospective client who does not hire you as confidential client information. EO 691 - 6/21	8
16. Turn over the original of a former clients' file upon request. EO 657 - 5/16.	9
17. Do not charge a client for copying a client's file. Do not provide only a copy. EO 657 - 5/16	9
18. Convert the file to a format reasonably accessible at the attorney's cost. EO 657 - 5/16.	9
19. Do not enter into an agreement restricting the lawyer's ability to represent clients upon separation. EO 656 - 5/16.	9
20. Do not provide free stuff in order to get prospective clients "in the door." EO 654 - 3/16.	9
21. Do not communicate with a represented party directly when the lawyer is a pro se litigant. EO 653 - 1/16.	10
22. Do not use a collection agency to collect past due attorney's fees without dotting the I's and crossing the T's or report a nonpaying or slow paying client to a credit bureau. EO 652 - 1/16.	10

23.	Treat prospective client information confidentially if your web site does not warn that the info provided will not be treated confidentially. EO 651 - 11/15.	10
24.	Do not participate in the drafting of a sham affidavit.	11
25.	Do not charge a client for the time it takes to withdraw from representation of the client.	11
26.	Do not retain the general right to control the representation on behalf of the client.	12
27.	Do not retain the right to control whether or not a case will settle and upon what terms.	12
28.	Do not accept a contingent fee in a criminal representation.	12
29.	Do not enter into an oral contingent fee agreement.	13
30.	What if I do enter into an “oral contingent fee contract”?.	13
31.	In most cases, do not attempt to recover attorney’s fees under quantum meruit for an “oral contingent fee contract.”	13
32.	Do not attempt to recover attorney’s fees as a “piece of the client’s action” without dotting the I’s and crossing the T’s.	13
33.	Do not accept compensation from a third-party other than a client, for representation of the client, without dotting the I’s and crossing the T’s.	14
34.	Do not attempt to prospectively limit your liability for professional negligence, in writing or otherwise.	14
35.	Do not exercise a unilateral right to convert a fixed-fee or hourly fee agreement to a contingent fee agreement after the commencement of the representation.	14
36.	Have a written representation agreement signed by the attorney and the client and initialed on all pages by both the attorney and the client.	15
37.	Do not accept an assignment of a portion of another attorney’s contingent fee agreement with a client without independently determining that the other attorney complied with TDRPC 1.04 in all respects.	15
38.	Obtain a guardian ad litem to protect the client’s interests if you have reason to believe that a potential new client lacks legal competence to enter into the representation agreement.	16
39.	Do not charge a non-refundable retainer without being CERTAIN you understand <i>Cluck v. Comm’n for Lawyer Discipline</i> , 214 S.W.3d 736, 739–40 (Tex. App.– Austin 2007, no pet.).	16
40.	Make certain your representation agreement contains a specific description of the professional legal services that you and/or your firm will provide, and those that you and/or your law firm will not provide.	17
41.	Include in your representation agreement a very detailed explanation of how the attorney’s fee will be calculated.	17
42.	Address frequency of billing in your written representation agreement, and comply with the frequency set forth in the written representation agreement.	17
43.	Address frequency of client communications in your written representation agreement and comply with the agreement as written.	18
44.	Address in the written representation agreement the specific expenses that will be charged by you or your firm, and the rates for each.	18

45. Include the statute-mandated information that must be provided to each client with respect to the availability of the grievance process. 18

46. Include in your written representation agreement the specific identity of the client. 18

47. Include in your written representation agreement the identity of which persons are entitled to receive confidential communications, and in what manner. 18

48. Include in your written representation agreement the manner in which it can be terminated by the attorney and by the client “for good cause,” the manner of calculating the attorney’s fee if the agreement is terminated “for good cause,” and if it is not terminated “for good cause.” 18

49. Address in your written representation agreement the time and manner of disposition of the client’s file at the conclusion of the representation. 21

50. Address in your written representation agreement the specific manner of dispute resolution to be utilized by the attorney and the client. 21

51. Expressly state the manner of communications with client, and the ethical, security, and confidentiality issues surrounding them. 21

52. Obtain the client’s permission to perform a background check of the client. 22

53. Disclose in writing the risk of various rule, statute and common law bases of sanctions potentially applicable to your representation of the client. 22

54. Include a merger clause and a no-reliance clause in your written representation agreement, if factually appropriate. 22

55. Include “anti-contract of adhesion” language to your agreement, where factually appropriate. 23

56. Attach a copy of or a link to the applicable disciplinary standards to your written representation agreement and expressly incorporate its terms into your representation of the client. 23

57. Encourage your new client to have your proposed form of representation agreement reviewed by counsel of the client’s own choosing, at the client’s own cost, to ensure that you are both satisfied that the individual terms of the agreement, and the agreement as a whole, are fair to both the attorney and the client. 23

Bonus Material - Why you should have a comprehensive representation agreement. 23

EVERYDAY STRATEGIES FOR AVOIDING PROFESSIONAL MISCONDUCT AND SANCTIONS

Scott Rothenberg
Law Offices of Scott Rothenberg
6575 West Loop South, Suite 500
Bellaire, Texas 77401-3509
(713) 667-5300 telephone
(713) 667-0052 telecopier
scott@rothenberglaw.com email

Notice to all readers: The opinions and other statements set forth in this paper are those of the author in his individual capacity only, and are not made in any representative capacity whatsoever for any agency or entity, including but expressly not limited to, the State Bar of Texas or any of its constituent parts, and the District 4-6 Grievance Committee, over which the author is panel chair, and of which the author is a member.

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.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Everyday Strategies for Avoiding Professional Misconduct and Sanctions

Also available as part of the eCourse

[First Friday Ethics \(March 2022\)](#)

First appeared as part of the conference materials for the
2021 Gas and Power Institute session

"Everyday Strategies for Avoiding Professional Misconduct and Sanctions"