

PRESENTED AT

28th Annual LLCs, LPs and Partnerships

July 18-19, 2019

Austin, TX

**ETHICS OF MULTIPLE PARTY REPRESENTATION
2019**

William D. Elliott

George W. Coleman

Karen Hart

Author Contact Information:

William D. Elliott
Elliott Thomason & Gibson, LLP
Dallas, TX

bill@etglaw.com
214.922.9393

ETHICS OF MULTIPLE PARTY REPRESENTATION 2019

TABLE OF CONTENTS

1. INTRODUCTION TO TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT	6
2. OVERVIEW OF BASIC CONFLICT OF INTEREST RULES	6
a. Texas Conflict of Interest Rules	7
b. ABA Conflict of Interest Rules.....	8
3. RULE 1.06 CONFLICTS OF INTEREST: GENERAL RULE	8
a. Absolute Prohibition in Litigation: Rule 1.06(a)	8
1) Representing Multiple Parties on Same Side in Litigation.....	11
2) Suing a Client in an Unrelated Matter	11
3) ABA Rule 1.7 Comparison.....	12
b. Non-Litigation Situations: Rule 1.06(b).	13
1) General Rule: Multiple Representation Allowed	13
2) Major Exception – Lawyer Reasonably Believes Representation Will Not Be Materially Affected & Client Consents	21
3) ABA Rule 1.7 Comparison.....	24
4) Conflict with Lawyer’s Interests	25
c. Prohibited Transactions: Rule 1.08 Conflict of Interest: Prohibited Transactions	25
4. RULE 1.09 CONFLICT OF INTEREST: FORMER CLIENT.....	27
a. Texas Rule 1.09(a) Conflict of Interest: Former Client.....	29
1) Three Circumstances in Rule 1.09 Preventing Conflict with Former Client.....	29
2) ABA Model Rule 1.9(a)	31

3)	Adversity of Interest to Former Client	32
4)	Appearance of Impropriety.....	33
5)	The Presumptions	33
6)	Prospective Clients & Taint Shopping	34
b.	Rule 1.09(b): Extension of Rule 1.09(a) to All Firm Lawyers	34
1)	ABA Rule 1.9(b) is similar to Texas Rule 1.09(b).....	36
2)	Removal of the Imputation	37
c.	Rule 1.09(c): Former Partners or Associates	37
1)	Conflict Facing Transferring Lawyer	39
2)	Conflict Facing Remaining Lawyers at Firm A, After Departure of Transferring Lawyer	39
3)	Substantial Relationship Test	41
d.	A Seven-Step Framework for Analyzing Conflicts with Former Clients.....	41
5.	RULE 1.12 ORGANIZATION AS CLIENT	42
a.	Entity as Client.....	44
1)	Lawyer’s Duty Runs to Entity	44
2)	Communications Through Constituents	44
3)	Loose Knit Group as an Organization	45
4)	Conflict Between Entity and Constituents.....	46
5)	Problems when Control of Entity in Doubt	47
6)	Dual Representation of Entity and Constituent	48
b.	Decisions by Constituent	49
c.	Entity Formation	49
	• Lawyer represents one of the constituents of the contemplated entity, and then may represent the entity later.....	49

- Lawyer represents all of the constituents during formation and may involve representation of the entity later. 49
- Lawyer may disclaim representation of individual constituents completely, and only represent the entity both at the formation and later stages..... 49
- 1) Representing Only the Entity 49
- 2) Representing the Entity and One Constituent..... 51
- 3) Representing the Entity and All Constituents..... 53
- d. Representing an Affiliate or Another Entity 54
- e. Governmental Agencies as Client..... 56
- 6. INFORMED CONSENT 56
- a. Circumstances When Client Consent is Permissible 56
- b. Risk to Non-Litigator of Failing to Obtain Informed Consent 57
- c. What is Informed Consent? 57
- d. Advanced Waivers 60
- 7. LAWYER AS “OF COUNSEL” 63
- a. Imprecise phrase 63
- b. The Controlling ABA Opinion on “Of Counsel” 63
- c. Conflict of Interest Implications of “Of Counsel” 63
- 8. SUGGESTIONS ON CONSIDERING MULTIPLE PARTY REPRESENTATION..... 64
- a. Documentation..... 64
- 1) Before commencement of representation 64
- 2) Commence of representation 65
- 3) During Representation..... 66
- 4) At Conclusion of Representation..... 66
- BIBLIOGRAPHY 68

Restatement of Law 68
National Books..... 68
National Articles 68
Texas Treatise 68
Texas Related Articles 68
Internet Based Resources 69

ETHICS OF MULTIPLE PARTY REPRESENTATION 2019

By: William D. Elliott
Elliott, Thomason & Gibson, LLP
Dallas, Texas

1. INTRODUCTION TO TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Ethical rules dictate standard of conduct to which attorneys should conform. They are quasi-statutory and enforced by disciplinary proceedings and represent standards of conduct.¹

Violation of State Bar rules does not create private cause of action.²

2. OVERVIEW OF BASIC CONFLICT OF INTEREST RULES

Conflict of interest rules derive from the need to protect client confidences and assure clients of the lawyer's loyalty. Conflict of interest rules reflect competing concerns:

- Undivided loyalty of lawyer to client.³
- Zealous representation.
- Avoiding representation when attorney's judgment may be distorted by other concerns.
- Enhance effectiveness of legal representation.
- Safeguarding of client information.⁴

¹ See Tex. Disciplinary Rules Prof. Conduct preamble ¶ 10, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R., art. X § 9) ("The Texas Rules of Professional Conduct define proper conduct for purposes of professional discipline."). *Sealed Party v. Sealed Party*, No. CIV.A.H-04-2229, 2006 WL 1207732, at *8 (S.D. Tex. May 4, 2006) ("The [Texas Disciplinary Rules of Professional Conduct] are quasi-statutory and are enforced in disciplinary proceedings by the State Bar."). See D. Beck & A. Roberts, *Legal Malpractice in Texas* Third Edition, 70 *Baylor L. Rev.* 213, 411-412 (2018).

² Tex. Disciplinary Rules Prof. Conduct preamble ¶ 15; *Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc.*, 779 S.W.2d 474, 479 (Tex. App.--El Paso 1989, writ denied) ("[A] violation of state bar rules does not create a private cause of action."); *Wright v. Sydow*, 173 S.W.3d 534, 549 (Tex. App.--Houston [14th Dist.] 2004, pet. denied) ("A violation of the Disciplinary Rules does not necessarily establish a cause of action, nor does it void an otherwise valid contract executed outside of the attorney-client relationship.").

³ See Tex. Disciplinary Rules Prof. Conduct Preamble ¶¶ 2-3.

⁴ See Tex. Disciplinary Rules Prof. Conduct R. 1.05(b)(1)(i); *Paxton v. City of Dallas*, 509 S.W.3d 247, 253 n.33 (Tex. 2017) ("Texas Disciplinary Rule of Professional Conduct 1.05(b) imposes a duty of confidentiality and prohibits a lawyer from knowingly revealing confidential information."); *P & M Elec. Co. v. Godard*, 478 S.W.2d 79, 80 (Tex. 1972) ("An attorney may not represent conflicting interests; and may not divulge a client's secrets or

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 \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Ethics of Multi-Party Representation: 2019

Also available as part of the eCourse

[2019 LLCs, LPs, and Partnerships eConference](#)

First appeared as part of the conference materials for the
28th Annual LLCs, LPs and Partnerships session

"Ethics of Multi-Party Representation: 2019"