

**PRESENTED AT**

**29<sup>th</sup> LLCs, LPs and Partnerships**

**July 23-24, 2020**

**Austin, TX**

## **Multi-Representation for the Business Lawyer- 2020 Revisited**

**William D. Elliott (co-speaker and author of research paper)**

**George W. Coleman (co-speaker)**

Author Contact Information:

William D. Elliott

Elliott, Thomason & Gibson, LLP

Dallas, TX

[bill@etglawfirm.com](mailto:bill@etglawfirm.com)

214.922.9393

**MULTI-PARTY REPRESENTATION FOR THE BUSINESS LAWYER  
2020 REVISTED**

**TABLE OF CONTENTS**

	<u>Page</u>
<b>1. INTRODUCTION .....</b>	<b>1</b>
<b>2. OVERVIEW OF BASIC CONFLICT OF INTEREST RULES .....</b>	<b>3</b>
A. Texas Conflict of Interest Rules.....	5
B. ABA Conflict of Interest Rules.....	5
<b>3. RULE 1.06 CONFLICTS OF INTEREST: GENERAL RULE .....</b>	<b>6</b>
A. Absolute Prohibition in Litigation: Rule 1.06(a) .....	6
(1) Representing Multiple Parties on Same Side in Litigation .....	9
(2) Suing a Client in an Unrelated Matter.....	9
(3) ABA Rule 1.7 Comparison .....	10
B. Non-Litigation Situations: Rule 1.06(b) .....	11
(1) General Rule: Multiple Representation Allowed.....	11
(2) Major Exception-Lawyer Reasonably Relieves Representation Will Not Be Materially Affected and Client Consents .....	19
(3) ABA Rule 1.7 Comparison .....	22
(4) Conflict with Lawyer's Interests .....	23
C. Prohibited Transactions: Rule 1.08 Conflict of Interest: Prohibited Transactions .....	24
<b>4. RULE 1.09 CONFLICT OF INTEREST: FORMER CLIENT .....</b>	<b>26</b>
A. Introduction to the Potentially Messy Situation of Ethical Duties	

	Owed to Former Clients .....	26
B.	Disqualification Risk.....	27
C.	Texas Rule 1.09(a) Conflict of Interest: Former Client .....	27
	(1) Three Circumstances in Rule 1.09 Preventing Conflict with Former Client .....	28
	(2) ABA Model Rule 1.9(a) .....	29
	(3) Adversity of Interest to Former Client .....	31
	(4) Appearance of Impropriety .....	31
	(5) The Presumptions.....	32
	(6) Prospective Clients and Taint Shopping .....	33
D.	Dormant Client.....	33
	(1) Distinction Between Active and Inactive Clients .....	33
	(2) Dormant Clients: Lesser but Continuing Duties .....	34
	(3) Client Expectations .....	34
E.	Rule 1.09(b): Extension of Rule 1.09(a) to All Firm Lawyers .....	35
	(1) ABA Rule 1.9(b) is Similar to Texas Rule 1.09(b).....	37
	(2) Removal of the Imputation.....	38
F.	Rule 1.09(c): Former Partners or Associates .....	38
	(1) Conflict Facing Transferring Lawyer.....	40
	(2) Conflict Facing Remaining Lawyers at Firm A, After Departure of Transferring Lawyer.....	40
	(3) Substantial Relationship Test.....	41
G.	Seven-Step Framework for Analyzing Conflicts with Former Clients .....	42
5.	RULE 1.12 ORGANIZATION AS CLIENT.....	42

A.	Introduction .....	42
B.	Texas Rule 1.2.....	43
C.	Entity as Client.....	45
	(1) Lawyer's Duty Runs to Entity .....	45
	(2) Type of Entity as Influencing Attorney-Client Identification Issue .....	46
	(3) Size of Entity as Influencing Attorney-Client Identification Issues .....	46
	(4) Other Factors as Influencing Attorney-Client Identification Issues .....	47
	(5) Who Does the Lawyer for a Business Represent? .....	47
	(6) Who Does the Lawyer for General Partnership Represent? .....	49
	(7) Who Does the Lawyer for Limited Partnership Represent? .....	50
	(8) Who Does the Lawyer for a Family Limited Partnership or Other Family Business Represent? .....	51
	(9) Loose Knit Group as an Organization.....	52
	(10) Conflict Between Entity and Constituents .....	53
	(11) Problems When Control of Entity in Doubt.....	54
	(12) Dual Representation of Entity and Constituents .....	55
D.	Decisions by Constituent .....	56
E.	Entity in Formation .....	57
	(1) Representing Only the Entity .....	57
	(2) Representing the Entity and One Constituent .....	59
	(3) Representing the Entity and All Constituents .....	61
F.	Representing an Affiliate or Another Entity .....	62

G.	Governmental Agencies as Client .....	64
H.	Disclosure of Client Information: Balancing Act .....	64
<b>6.</b>	<b>INFORMED CONSENT .....</b>	<b>66</b>
A.	Circumstances When Client Consent is Permissible .....	66
B.	Risk to Non-Litigator of Failing to Obtain Informed Consent .....	67
C.	What is Informed Consent?.....	68
D.	Suggestions About Consents from Texas Lawyers Insurance Exchange .....	70
(1)	Put it in writing .....	70
(2)	Gather information .....	70
(3)	Analyze .....	70
(4)	Avoid adverse representation of an existing client .....	70
(5)	Disclose risks and obtain consent .....	70
(6)	Include all necessary clients.....	71
(7)	Monitor for changes .....	71
(8)	React to changes.....	71
(9)	Act consistently .....	71
(10)	Reconsider whether you should walk away .....	71
E.	Advanced Waivers .....	71
F.	Thoughts on Informed Consent.....	73
<b>7.</b>	<b>LAWYER AS "OF COUNSEL" .....</b>	<b>73</b>
A.	Imprecise Phrase .....	73
B.	The Controlling ABA Opinion on "Of Counsel" .....	73
C.	Conflict of Interest Implications of "Of Counsel" .....	74

<b>8.</b>	<b>SPECIAL PROBLEMS OF PREPARING ESTATE PLAN OR REPRESENTING FIDUCIARY OR BENEFICIARY .....</b>	<b>75</b>
A.	Introduction .....	75
	(1) ACTEC Resources .....	75
B.	Attorney Client Relationship .....	76
	(1) Overlapping Roles and Responsibilities .....	76
	(2) Heightened Responsibility .....	77
	(3) Finding an Attorney-Client Relationship.....	77
	(4) Privity .....	79
C.	Duty of Maintaining and Preserving Confidential Client Information .....	81
	(1) Basic Rule: Not Reveal Confidential Information .....	81
	(2) Confidentiality When Representing Multiple Persons- Unworkable? .....	81
D.	Competence.....	83
	(1) Breadth of Practice .....	83
E.	Fiduciary Exception to the Attorney-Client Privilege .....	85
F.	Conflicts of Interest for Fiduciary .....	86
	(1) How Many Hats are Being Worn? .....	86
	(2) 2-Hat Client.....	87
	(3) Best Practices .....	88
	(4) 3-Hat Client.....	89
G.	Relationship of Lawyer for Fiduciary to Beneficiaries.....	89
	(1) Duty of Care.....	89
	(2) Communications with Beneficiaries .....	89

9.	SUGGESTIONS ON CONSIDERING MULTIPLE PARTY REPRESENTATION .....	90
A.	Documentation .....	90
	(1) Before Commencement of Representation .....	90
B.	Commencement of Representation .....	91
C.	Fee Agreements.....	92
D.	Disclosures .....	92
	(1) During Representation .....	93
	(2) At Conclusion of Representation .....	93
	BIBLIOGRAPHY .....	95
	EXHIBIT 1 - TLIE MODEL LANGUAGE FOR CURRENT CLIENT CONFLICT DISCLOSURE AND CONSENT .....	97
	FORM ENGAGEMENT LETTERS .....	99

**WILLIAM D. ELLIOTT**  
**Elliott Thomason & Gibson, LLP**  
**2626 Cole Avenue, Suite 600**  
**Dallas, Texas 75204**  
**214-922-9393**  
**Fax: 214-853-4177**

## **BIOGRAPHICAL INFORMATION**

### **Education**

B.S. in Accounting, Southeastern State College

J.D., Southern Methodist University

LLM (in Taxation), New York University

### **Professional Activities**

Of Counsel, Elliott, Thomason & Gibson, LLP

Board Certified, Tax Law and Estate Planning, Probate & Trust Law

Fellow, American College of Tax Counsel

Past Chair, Board of Directors, State Bar of Texas

Past Chair, Section of Taxation, State Bar of Texas

Outstanding Texas Tax Lawyer, Section of Taxation, State Bar of Texas, 2018

### **Publications, Appointments, and Honors**

Author, *Federal Tax Collection, Liens & Levies* (WGL 2020, 2d ed.)

Author, *Texas Taxes Annotated* (Thompson Reuters West 2019)(with Scott Morris)





# MULTI-PARTY REPRESENTATION FOR THE BUSINESS LAWYER 2020 REVISTED

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

## 1. INTRODUCTION

Commonly, the lawyer will represent multiple parties at the same time. Often, this type of representation occurs in a family context. When forming a business entity, the lawyer may represent an original client while non-clients are recruited as investors. The investors may look to the lawyer as their lawyer.

Despite risks or the appropriateness of concurrent representation of multiple business owners or family members, this is common practice among lawyers. For lawyers who think of themselves as counselors, not litigators, intertwined multiple representation is recognized and even perhaps encouraged. Clients may even be better served by such representation. It is economical and offers coordination of the business or family goals. The common goals predominate over narrow, individual and possibly inconsistent interests. Much of legal work is and should be non-adversarial.<sup>1</sup>

The ABA has recognized this reality in a formal opinion,

*[c]onsiderable efficiency is gained through having one lawyer or firm manage the legal affairs of all family members. The firm learns about family businesses, assets, documents, and personalities and thus is able to provide quality representation requiring less time.*<sup>2</sup>

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.<sup>3</sup>

---

<sup>1</sup> Am. C. Of Tr. & Est. Couns. Found., Commentaries on the Model Rules of Prof'l Conduct 91 (5<sup>th</sup> ed. 2016) [hereinafter "ACTEC COMMENTARIES"]. One of the main themes of the ACTEC Commentaries is "the utility and propriety, in this area of the law, of representing multiple clients, whose interests may differ but are not necessarily adversarial." Am. C. of Tr. & Est. Couns. Found., Commentaries on the Model Rules of Prof'l Conduct Reporter's Note (1st ed. 1993). Mary F. Radford, Ethical Challenges in Representing Families in Family Limited Partnerships, 35 ACTEC J. 1 (2009).

<sup>2</sup> ABA Comm. on Ethics and Prof'l. Responsibility, Formal Op. 02-428 (2002), n.2 (citing Am. C. of Tr. & Est. Couns. Found., Commentaries on the Model Rules of Prof'l Conduct 149-50 (3d ed. 1999)).

<sup>3</sup> See Tex. Disciplinary Rules Prof. Conduct preamble ¶ 10, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2019) (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

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: Multi-Party Representation for the Business Lawyer – 2020 Revisited

Also available as part of the eCourse

[2020 LLCs, LPs, and Partnerships eConference](#)

First appeared as part of the conference materials for the  
29<sup>th</sup> Annual LLCs, LPs and Partnerships session

"Multi-Party Representation for the Business Lawyer – 2020 Revisited"