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[LEGAL ethics]

COMMENT ON DISCIPLINARY RULES' PROPOSED AMENDMENTS

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On Oct. 20, the Texas Supreme Court issued broad and extensive proposed amendments to the Texas Disciplinary Rules of Professional Conduct. The court noted that it will accept public comments about the changes until Dec. 31.

Under the amendments there are five newly defined terms that apply to the entire body of rules. There are 40 revised rules. There are four new rules — five if you count Rule 1.00, the new terminology rule. And there are 11 rules that have not been amended except through the terminology changes added by Rule 1.00.

Not since Jan. 1, 1990, have the disciplinary rules undergone this level of revision. About a year after the 1990 revisions, the number of disciplinary sanctions against Texas lawyers substantially increased, and the number of sanctions did not return to normal even nine years later.

If there is one lesson lawyers can learn from the last time the rules were substantively amended, it is that it can take a decade or more for attorneys to conform their conduct to substantial rule changes.

Unfortunately, discussing the breadth and depth of the rule amendments would take more space than is available here. Therefore, I have included only a few changes that likely will affect many lawyers.

Until the amendments, there was no disciplinary rule or definition in the disciplinary rules that required that a client's consent be "informed consent." Nor did the rules require that consent be evidenced in writing. Rule 1.00(k) provides that "informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has adequately explained the material risks of and reasonably available alternatives to the proposed course of conduct.

The term "informed consent" is used 30 times in the proposed amendments. My prediction about the definition of "informed consent" is that it will spawn many years of litigation before it is fully defined. The question of what constitutes an adequate explanation likely will be affected by an analysis of the substantive law affecting the representation and will keep ethics experts testifying in our state for many years. While it is expected that the issue of informed consent will be measured based on the information available to a lawyer at the time of the request for consent, the amendments do not state when the timing of the adequacy of the explanation is to be evaluated.

Affiliated Lawyers and Entities

The amendments add a new definition of when lawyers and entities are "affiliated."

A lawyer is "affiliated" with a firm if either the lawyer or the lawyer's professional entity:

• (i) is a shareholder, partner, member, associate or employee of that firm;

• (ii) has any other relationship with that firm, regardless of the title given to it, that provides the lawyer with access to the confidences of the firm's clients that is comparable to that typically afforded to lawyers in category (i); or

• (iii) is held out as being in category (i) or (ii).

A lawyer is "affiliated" with another lawyer if the lawyers or their professional entities have any of the relationships described in categories (i)-(iii) above.

The term "affiliated" is used 25 times in the proposed rule amendments, and the definition is referenced throughout all of the proposed rule amendments.

Who is "affiliated" is significant for conflicts analysis because it potentially expands the scope of persons for whom conflicts analysis will be applied. For instance, under the amendments, poorly crafted marketing materials could hold out a lawyer or firm in such a way that the lawyer or firm is determined to be affiliated. I predict that conflicts checks for many firms will become more difficult than they are under the present rules.

Prospective Clients

Most lawyers have been at social gatherings where they were asked what they thought of some fact pattern. During the holiday season, the likelihood increases that party-goers will ask lawyers their opinions on a variety of legal questions. Thus, consider proposed new Rule 1.17, which states, in part:

(a) A person who in good faith discusses with a lawyer the possibility of forming an attorney-client relationship with respect to a matter is a prospective client.

(d) When a lawyer has received confidential information during a discussion with a prospective client, representation of a client with interests materially adverse to those of the prospective client in the same or a substantially related matter is permissible if:

(1) the prospective client has provided informed consent, confirmed in writing to the representation; or

(2) the lawyer conditioned the discussion with the prospective client on the prospective client's informed consent that no information disclosed during the discussion would be confidential or prohibit the lawyer from representing a different client in the matter.

Under Rule 1.17(a) the focus of the inquiry regarding who is a prospective client is on whether the nonlawyer has, in good faith, discussed the possibility of forming an attorney-client relationship with the lawyer. Under Rule 1.17(a), the issue will turn on the nonlawyer's perspective. The lawyer may be able to protect himself from being conflicted out of adverse representations by obtaining informed consent to be adverse to the nonclient before the confidential information is conveyed or by conditioning the discussion on treatment of the information as nonconfidential. Nevertheless, because informed consent applies to both exemptions under Rule 1.17(d) and must be in writing, at a minimum the lawyer could be at a disadvantage and may not be able to stop an aggressive nonclient from conflicting him out of adverse representations.

It is somewhat comical to imagine a lawyer at a party with his computer and printer handing out notices in an attempt to give informed consent to nonlawyers. Some may suggest that under Comment 2 to Rule 1.05 of the existing disciplinary rules, there can be a duty of confidentiality to prospective clients. But there is a difference. A lawyer can be sanctioned for a violation of a disciplinary rule, but under the Preamble to the Disciplinary Rules, a lawyer cannot be disciplined for a violation of a comment to the rules.

All lawyers should take the opportunity to comment on the proposed amendments to the disciplinary rules. Perhaps more time should be allowed to comment on them. Nevertheless, if the amendments go into effect as drafted, Texas lawyers will hopefully adjust their conduct to meet the standards more quickly than they did last time. TTL

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