

**TDRPC - Rule 1.06 "Conflict of Interest: General Rule"**

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm;  
or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

## LIST OF AUTHORITIES (Prof. Moss, 10/12)

Burnap v. Linnartz, 914 S.W.2d 142 (Tx.App.-San Antonio 1995) appeal after remand, 38 S.W.3d 612 (2000, no writ).

In a legal malpractice action brought by partner after he discovered that he was personally liable on a note following default by partnership, a fact issue precluding summary judgment was presented as to whether the partner was represented by attorneys who had been retained by a separate partner to draft documents for withdrawal of partners and release by bank to which partnership had become obligated on note of individual partners.

Aguirre v. Reyna, 2004 WL 35471 (Tex.App.-Corpus Christi Jan 08, 2004, rev. denied).

Attorney's duties to vendor regarding sale of real property were limited by dual representation agreement among vendor, purchaser, and attorney, and thus attorney fulfilled his duties by effectuating marketable conveyance of property, despite vendor's claims that attorney failed to properly advise him regarding sale, the price, or the amount of realty being sold; dual representation agreement set forth scope of employment in which attorney stated he was "hired solely to advise you and document this real estate transaction," and vendor and purchaser both accepted terms of representation and signed agreement.

SMWNPF Holdings, Inc. v. Devore, 165 F.3d 360 (5<sup>th</sup> Cir. (Tex.),1999).

Under Texas law, no attorney-client relationship existed between hotel purchaser and attorney who prepared an assignment, conveying limited partnership's right to purchase hotel to purchaser, and other closing documents, even though attorney solicited information from purchaser and purchaser paid closing costs that included attorney fees, where purchaser and limited partnership were sophisticated business entities, and purchaser knew that attorney and law firm represented limited partnership.

Texas Ethics Opinion 512 (June 1995)

Where several entities formed a joint venture and had in-house counsel perform legal services for the venture rather than for the entities, Rule 1.06 applied, not Rule 1.07, which applies "when the lawyer is representing in the same matter two clients with potentially conflicting interests who seek to consummate a transaction or resolve a dispute between or among themselves....usually...with respect to a single matter."

Texas Ethics Opinion 448 (Sept. 1987)

Where Lawyer was delivered an Earnest Money Contract signed by Seller and Buyer listing his firm as representing both Seller and Buyer but the Contract required preparation of instruments which might contain elaborate clauses not addressed by the parties in striking their deal, and where the Lawyer had no contact with either Seller or Buyer concerning the transaction, the should not proceed to prepare a Warranty Deed retaining a Vendor's Lien, a Deed of Trust, and a Note with a Deed of Trust to secure a Second Lien. Even without any attempt to favor one party over the other, the lawyer's independent professional judgment on behalf of one party would be likely to be adversely affected by the representation of the other party and hence a violation of DR 5-105(A) and/or (B) unless there was full disclosure by the Lawyer of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each, as well as the consent of each party thereafter to the representation of both parties.

## Texas Rule 1.07. Conflict of Interest: Intermediary

(a) A lawyer shall not act as intermediary between clients unless:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.

(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

### COMMENT:

1. A lawyer acting as intermediary may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. For example, the lawyer may assist in organizing a business in which two or more clients are entrepreneurs, in working out the financial reorganization of an enterprise in which two or more clients have an interest, in arranging a property distribution in settlement of an estate or in mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

2. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship; hence, the requirement of written consent. Moreover, a lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. See also Rule 1.06(b).

3. The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

4. In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible. Moreover, a lawyer cannot undertake common representation of clients between whom contested litigation is reasonably expected or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

5. The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

### **Confidentiality and Privilege**

6. A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation, except as to such clients. See Rules 1.03 and 1.05. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the general rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

7. Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

### **Consultation**

8. In acting as intermediary between clients, the lawyer should consult with the clients on the implications of doing so, and proceed only upon informed consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

9. Paragraph (b) is an application of the principle expressed in Rule 1.03. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

10. Under this Rule, any condition or circumstance that prevents a particular lawyer either from acting as intermediary between clients, or from representing those clients individually in connection with a matter after an unsuccessful intermediation, also prevents any other lawyer who is or becomes a member of or associates with that lawyer's firm from doing so. See paragraphs (c) and (e).

### **Withdrawal**

11. In the event of withdrawal by one or more parties from the enterprise, the lawyer may continue to act for the remaining parties and the enterprise. See also Rule 1.06(c)(2) which authorizes continuation of the representation with consent.

### **NOTES OF DECISIONS**

Where lawyer was delivered an earnest money contract signed by seller and buyer listing his firm as attorney representing buyer and seller, contract did not contemplate routine transaction, and lawyer had no personal contact with the parties, full disclosure by the lawyer of possible effect of such representation on the exercise of his independent professional judgment on behalf of each, as well as the consent of each party thereafter to such representation of both parties, such consent preferably in writing, were prerequisites to representation of both parties. Ethics Committee Opinion 448.

SBOT DISCIPLINARY RULES COMMITTEE'S PROPOSED NEW RULE 1.07

Rule 1.07. Representing Multiple Clients in a Matter.

- (a) A lawyer shall not undertake or continue to represent two or more clients in a matter if the proposed representation would violate this rule or any other of these rules.
- (b) A lawyer shall not undertake or continue to represent two or more clients in a matter unless:
  - (1) the lawyer reasonably believes that:
    - (i) the representation does not violate Rule 1.06;
    - (ii) the clients can agree among themselves to a resolution of any issue concerning the matter;
    - (iii) each client is capable of understanding what is in that client's best interest and making informed decisions;
    - (iv) the lawyer can deal impartially with each of the clients; and
    - (v) multiple representation is unlikely to result in material prejudice to the interests of any of the clients; and
  - (2) prior to undertaking the representation, or as soon as practicable thereafter, the lawyer discloses to the clients in writing the following aspects of joint representation in the matter:
    - (i) that the client might gain some advantages if represented by separate counsel;
    - (ii) that the lawyer cannot serve as an advocate for one client in the matter against any of the other clients, but instead must assist all of them in pursuing their common purposes, as a consequence of which each must be willing to make independent decisions without the lawyer's advice concerning whether to agree to any proposed resolution of any issues concerning the matter;
    - (iii) that the lawyer must deal impartially with each of the clients;
    - (iv) that information received by the lawyer or by any affiliated lawyer or firm from or on behalf of any jointly represented client concerning the matter may not be confidential as between the clients;
    - (v) that the lawyer will be required to disclose information concerning the matter to any jointly represented client if the lawyer knows that information would likely materially affect the position of that client, even if requested by another jointly represented client not to do so;
    - (vi) that the lawyer will be required to correct any false or misleading statement or omission concerning the matter made by or on behalf of any jointly represented client, if the lawyer knows failure to do so would likely materially affect the position of any client, even if requested by another jointly represented client not

to do so;

- (vii) that the lawyer may not be able to continue representing any of the clients if discharged by any one of them or if the lawyer is required to withdraw from representation under these rules; and
  - (viii) that while the representation of all clients by a single lawyer or firm could expedite handling of the matter and reduce associated attorneys' fees and expenses, it also could result in delays and increased attorneys' fees and expenses; and
- (3) the lawyer obtains each client's informed consent to the representation after making the determinations required by subparagraph (b)(1), and as soon as reasonably practicable after making the disclosures required by subparagraph (b)(2).
- (c) It shall be the duty of a lawyer representing two or more clients in a matter to conduct the representation in accordance with the determinations and disclosures set forth in subparagraphs (b)(1) and (b)(2), except that
- (1) the duty to disclose information described in subparagraph (b)(2)(v) may be waived by all clients' informed consent that the lawyer will keep mutually agreed upon specified information confidential, and
  - (2) the lawyer may rely on this informed consent only if a disinterested lawyer would reasonably conclude that all clients could make adequately informed decisions about the matter without having the information otherwise required to be disclosed under subparagraph (b)(2)(v).
- (d) A lawyer representing multiple clients in a matter;
- (1) must withdraw from representing each client in the matter if the lawyer, for whatever reason, will not make disclosures required in subparagraph (b)(2)(v), unless the failure to make such disclosures is permitted by paragraph (c);
  - (2) must withdraw from representing each client in the matter if the lawyer, for whatever reason, will not make disclosures required in subparagraph (b) (2) (vi).
- (e) A lawyer shall not represent a client in a matter when the lawyer knows or reasonably should know that an affiliated lawyer is representing another client in the same matter, and that a single lawyer could not represent those clients without violating this Rule.
- (f) When a lawyer represents multiple clients pursuant to a court order or appointment, and the court orders or permits the lawyer to conduct the representation in accordance with standards that differ from those set out in paragraphs (a)-(e), the lawyer may comply with those different standards notwithstanding this rule.