PROPOSED NEW TEXAS DISCIPLINARY RULES: REVIEW FOR REAL ESTATE AND PROBATE ATTORNEYS

Presented by

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Jim received his B.A., cum laude, in 1964 from Washington & Lee University and his LL.B., cum laude, in 1967 from Southern Methodist University, where he was Editor-in-Chief of the SMU Law Review (formerly known as the Southwestern Law Journal). During the year 1967-68, Jim was the law clerk for the Honorable Irving L. Goldberg, Judge of the United States Fifth Circuit Court of Appeals.

During the years 1978-91 Jim served as an adjunct professor at SMU Law School, teaching a course entitled "Real Estate Transactions." In addition, since 1975 he has spoken at and chaired various conferences and institutes, including the University of Texas Law School Mortgage Lending Institute (Chair: 1979-1989), the State Bar of Texas Advanced Real Estate Law Course (Chair: 1989), the State Bar of Texas Advanced Real Estate Strategies Course, the State Bar of Texas Advanced Real Estate Drafting Course, the SMU Law School Real Estate Law Institute (Chair: 1989), the Texas Land Title Institute, the International Council of Shopping Centers Law Conference, and various programs sponsored by the American College of Real Estate Lawyers. He has also published three articles in the SMU Law Review.

Jim is a founding member of the American College of Real Estate Lawyers and the Texas College of Real Estate Attorneys. In 1988-89 he served as Chair of the Real Estate, Probate and Trust Law Section of the State Bar of Texas; and during the period of 1982-96, he served as Chair of that Section's Opinion Letter Committee. He has also served on two Drafting Committees sponsored jointly by the American Bar Association and American College of Real Estate Lawyers, each of which Committees published work products relating to opinion letters. During 1985-89 Jim served as Chair of the State Bar Real Estate, Probate and Trust Law Section's Subcommittee on Legal Fees Paid by Title Companies.

Since August 2005, Jim has served as a member of the State Bar of Texas Disciplinary Rules of Professional Conduct Committee.[†]

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[*] The opinions expressed by your speaker in this Outline are solely his own personal views and do not necessarily represent the views of his law firm or any clients of his law firm

[†] Although your speaker is a member of the State Bar of Texas Committee on Disciplinary Rules of Professional Conduct (in this Outline generally called the **"Disciplinary Rules Committee"**), the opinions expressed in this Outline are solely his own personal views and do not necessarily represent the opinions of the State Bar of Texas, the Disciplinary Rules Committee or any other members of the Disciplinary Rules Committee.

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I. INTRODUCTION: COMBINED EFFORTS OF THE TEXAS SUPREME COURT AND TWO LAWYER GROUPS.

The current version of the proposed new set of Disciplinary Rules of Professional Conduct has as its basis the work products presented to the Supreme Court of Texas by two groups of Texas lawyers, the State Bar of Texas Committee on Disciplinary Rules of Professional Conduct and the Task Force that was appointed by the Supreme Court in 2003.

A. **The Disciplinary Rules Committee.** The State Bar of Texas Committee on Disciplinary Rules of Professional Conduct (the **"Disciplinary Rules Committee"**) is a long-standing Committee of the State Bar of Texas, normally comprised of approximately 30 members of the State Bar. The Disciplinary Rules Committee has its recent origins in the Model Rules of Professional Conduct Committee of the State Bar which was formed in 1984, with Orrin W. Johnson of Harlingen, Texas as the Chair, and whose work product (after the Committee name had been changed to the State Bar of Texas Committee on Disciplinary Rules of Professional Conduct) eventually resulted in the 1989 State Bar Referendum in which the members of the State Bar approved a new set of Disciplinary Rules called the Texas Disciplinary Rules of Professional Conduct. For a more complete history, as well as an extensive analysis of the Texas Disciplinary Rules of Professional Conduct which was enacted in 1989, see Schuwerk and Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A Houston Law Review, published as a special booklet in October 1990. The work of the Disciplinary Rules Committee continued throughout the 1990's and into the 21st Century, with the Chair of the Disciplinary Rules Committee during most of that time being Professor Robert P. Schuwerk, University of Houston Law School. For an extensive analysis of a major portion of the work product of the Disciplinary Rules Committee during that period, see Soules, *Proposed Conflict of Interest and Confidentiality Rules*, 33 St. Mary's Law Journal 753 (2002). The immediate past Chair of the Disciplinary Rules Committee, having served in that position for several years through the Committee's submission to the Texas Supreme Court in December 2006 of a complete package of recommended new Rules, is Professor Linda S. Eads, SMU School of Law (as well as 2010-11 Chair of the Faculty Senate for Southern Methodist University). During the period of August 2007 through July 2010, the Chair has been Houston attorney Lillian B. Hardwick, who previously served as Vice Chair and is the author of various treatises on ethics topics, including Schuwerk and Hardwick, Handbook of Texas and Judicial Ethics (West 2009). At the 2007 Annual Meeting of the State Bar of Texas, Professor Eads received the Presidents' Award and Ms. Hardwick received the Certificate of Merit for their work during the preceding year on the Disciplinary Rules Committee; and at the 2010 Annual Meeting of the State Bar of Texas, Ms. Hardwick again received the Certificate of Merit for her work the preceding year. The current Chair is Beaumont attorney Patricia Chamblin. Ms. Chamblin is the current President of the Jefferson County Bar Association Foundation and the immediate past president of the Jefferson County Bar Association; and she is also a past Chair of the District III-A Grievance Committee for the State Bar.

B. **The Task Force.** By order dated August 29, 2003 (Supreme Court Misc. Docket No. 03-9147), the Texas Supreme Court appointed "members of the bench, bar and general public to review the Texas Disciplinary Rules of Professional Conduct" and specifically "to study the changes to the American Bar Association's Model Rules of Professional Conduct, adopted February 5, 2002, and compare these changes with the current Texas Disciplinary Rules of Professional Conduct as well as the rules of attorney conduct adopted by other states." The Supreme Court Task Force on the Texas Disciplinary Rules of Professional Conduct (the **"Task Force"**) was chaired by Thomas H. Watkins of Austin, Texas; and the members of the Task Force included, among other notables -- and the list of Task Force members includes quite a few notables -- Professor Robert P. Schuwerk, former Chair of the Disciplinary Rules Committee, and Luther H. Soules III, former member of the Disciplinary Rules Committee. The Final Report of the Task Force, including all proposed changes to the existing Texas Disciplinary Rules of Professional Conduct (but without any proposals with regard to the existing Comments to the Disciplinary Rules) is dated December 30, 2005, and was delivered to the Texas Supreme Court on that date.

C. **October 2009 Publication by the Supreme Court.** Following extensive deliberations and meetings with representatives of the Disciplinary Rules Committee and the Task Force during calendar years 2008 and 2009, the Supreme Court of Texas issued an order on October 20, 2009 [Supreme Court Miscellaneous Docket No. 09-9175], proposing a set of Disciplinary Rules that represents somewhat of a "mix-and-match" combination of the work products of both lawyer groups, plus the additional input of the Supreme Court itself. The October 20th Supreme Court order, with all proposed Disciplinary Rules attached, was published at 72 Texas Bar Journal 846 (November 2009), and it can also be accessed in a "pdf" format through the following web link:

http://www.supreme.courts.state.tx.us/miscdocket/09/09917500.pdf , and in a "Word" format through the following web link:
http://74.125.113.132/search?q=cache:l7CIsHil1NkJ:www.supreme.courts.state.tx.us/miscdocket/09/09917500.pdf+Texas+Supreme+Court+Misc.+Docket+No.+09-9175&cd=1&hl=en&ct=clnk&gl=us . A red-lined version comparing the October 20th set of proposed Disciplinary Rules with the existing Disciplinary Rules can be accessed through the following web link that was provided through the courtesy of Kennon L. Peterson, Rules Attorney for the Supreme Court:
http://www.supreme.courts.state.tx.us/advisories/overview_102909.htm .

D. **Submission by the Disciplinary Rules Committee of Potential Revisions to the Proposed Rules.** With the publication by the Texas Supreme Court of a proposed new set of Disciplinary Rules on October 20, 2009 (as discussed in Paragraph C immediately above), the Disciplinary Rules Committee's work on the proposed Rules was thought to have concluded; and the Disciplinary Rules Committee commenced work on proposed Comments to those proposed new Rules. However, two developments have caused a re-focus of the Disciplinary Rules Committee on the language of a few of the proposed new Rules: (1) public comment since October 20, 2009 [see the January 11, 2010 Texas Lawyer article at the following web page:

http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202437766958&slreturn=1&hbxlogin=1
with a January 18, 2010 correction of that article:
http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202438466925]; and (2) the Committee's own further review of the proposed new Rules while drafting the Comments. As of the date that this Outline is being prepared, the Disciplinary Rules Committee has submitted suggested changes to the Texas Supreme Court for Rules 1.06, 1.09 and 1.15. Since as of the date that this Outline is being prepared the Texas Supreme Court has not commented upon the Committee's suggestions, those suggestions will not be reproduced in this Outline. However, in the portions of this Outline dealing with proposed new Rules 1.06, 1.09 and 1.15, mention will be made as to the general content of the Committee's suggestions.

E. **April 2010 Publication of a Further Revised Set of Rules by the Supreme Court.** After reviewing the comments received from lawyers and the public regarding the October 2009 set of proposed Disciplinary Rules, the Texas Supreme Court on April 14, 2010, issued a further revised set of proposed Disciplinary Rules. See:

http://www.supreme.courts.state.tx.us/advisories/disciplinary_rules_042610.htm . And in a letter dated April 14, 2010, from Chief Justice Wallace B. Jefferson to the State Bar President Roland Johnson and President-Elect Terry Tottenham, the Supreme Court also requested that by October 6, 2010, the State Bar Board of Directors provide to the Texas Supreme Court any recommendations or comments that the Board may have to the new proposed Disciplinary Rules. The April 2010 revised set of proposed Disciplinary Rules are the ones being reviewed in this Outline. For a complete set of the revised proposed Disciplinary Rules, as well as the proposed Comments to those proposed Rules and an analysis by Kennon L. Peterson, Rules Attorney for the Supreme Court, start at the following web link:
http://www.supreme.courts.state.tx.us/rules/rules.asp;
then scroll down on the web page to the category entitled "Texas Disciplinary Rules of Professional Conduct" and select the applicable web link that is provided by the Supreme Court under that category title.

F. **Opposition from Various Lawyer Groups.** At least two groups of lawyers have sent out e-mail messages opposing some parts of the proposed new Disciplinary Rules. On August 17, 2010, an e-mail message to lawyers in the State signed by twelve Texas lawyers opposing the new proposed Disciplinary Rule 1.13 (entitled "Prohibited Sexual Relations") explained why in their opinion the proposed new rule "will neither protect clients, nor will it protect our profession in the eyes of the public." Their e-mail message concludes: "Please tell the

Texas Supreme Court and the State Bar to adopt a stronger rule. If they do not, please vote against the rule-amendment referendum." See a report on this opposition to proposed new Disciplinary Rule 1.13 at the following web site of the Texas Lawyer: http://texaslawyer.typepad.com/texas_lawyer_blog/2010/08/women-lawyers-contend-sexwithclients-rule-isnt-tough-enough.html. And on August 27, 2010, three Austin lawyers e-mailed a message to lawyers in the State explaining that such message would be the first of a series of messages explaining their opposition to some or all of the proposed new Disciplinary Rules. Despite the very impressive credentials of many of the lawyers who have sent out those e-mail messages (this author is particularly aware of the valuable contributions made by each of the three signatories to the August 27th e-mail message), this author believes that the proposed new Disciplinary Rules do represent a significant improvement over the current Disciplinary Rules. This author further believes that the proposed new Disciplinary Rules should and will be approved by the Board of Directors of the State Bar for a referendum by lawyers in the State.

G. **State Bar Board Approval.** After various revisions were recommended by the State Bar Discipline and Client Attorney Assistance Program Committee (frequently called "DCAAP"), the State Bar of Texas Board of Directors on October 1, 2010, made a recommendation that the proposed new Disciplinary Rules be submitted to a referendum of the member of the State Bar, but the Board qualified its October 1st recommendation with regard to four proposed new Disciplinary Rules concerning conflicts of interest (proposed Rules 1.06, 1.07, 1.08, and 1.09). The Board asked for more time to consider those Rules because members of the State Bar expressed concern that those particular Rules had not been fully considered. Then, after further meetings during October, the State Bar Board of Directors on November 5, 2010, approved final recommendations to the Supreme Court of Texas the proposed new Disciplinary Rules. The Board voted 35 to 1 to approve the recommendations of its DCAAP regarding proposed Rules 1.06–1.09, which concern conflicts of interest. By a separate 35 to 1 vote, the Board requested that the Court authorize the State Bar to conduct a referendum of Texas lawyers on all of the proposed new Disciplinary Rules.

H. **November 2010 Publication by Texas Supreme Court; Scheduling of a State Bar Referendum.** On November 16, 2010, the Supreme Court of Texas ordered a referendum of all Texas lawyers on proposed mew Disciplinary Rules. Texas lawyers will vote only on the Rules (not the Comments to the Rules) in a referendum to be held January 18 to February 18, 2011. The full set of proposed Texas Disciplinary Rules of Professional Conduct, in the version to be submitted for referendum, will be published in the December 2010 issue of the Texas Bar Journal; moreover, the set can also be accessed through each of the following web links:

www.texasbar.com/rulesupdate and http://www.supreme.courts.state.tx.us (scroll down to the section entitled "Latest News & Updates" and click on "Referendum Order on Proposed Disciplinary Rules Changes, to Begin January 18"). In addition, the following web link will provide the same material, plus the Order of the Texas Supreme Court and a copy of the Ballot to be used in the referendum:

http://www.supreme.courts.state.tx.us/MiscDocket/10/10919000.pdf . A copy of the Ballot is also attached as Exhibit "F" to this Outline.

I. **Two Areas of Proposed New Disciplinary Rules That Are Not Included in the Supreme Court Publications to Date But Are Still Under Discussion by the Disciplinary Rules Committee: Proposed New Rule 6.05 Relating to Pro Bono Legal Services and Proposed New Rules 5.05 and 8.05 Relating to Multi-State Practice**. The Texas Supreme Court did not include in its publications of proposed new Disciplinary Rules in October 2009 and April 2010 any proposed new Rule relating to pro bono legal services, which area was the subject of new ABA Model Rule 6.5. See Section III.K. of this Outline for a discussion of this topic, and see Exhibit "E" attached to this Outline for the version of the proposed new Disciplinary Rule 6.05 which the Disciplinary Rules Committee has presented to the Texas Supreme Court but which the Court has indicated will not likely be reviewed prior to the State Bar referendum mentioned in Paragraph I above. The Texas Supreme Court also did not include in its publications in October and April any proposed new Rules for multi-state practice issues, i.e., Rules 5.05 and 8.05. Instead, the Supreme Court has requested the Disciplinary Rules Committee to suggest proposed new Rules in that area during the summer of 2010. The Disciplinary Rules Committee completed preliminary drafts of proposed new Rules 5.05 and 8.05 during its meetings in Austin on May 21st and

May 22nd. See Exhibit "C" and Exhibit "D" attached to this Outline for the current status of the Disciplinary Rules Committee's drafts of a proposed new Rules 5.05 and 8.05. However, as of the date of preparation of this Outline, proposed new Rules 5.05 and 8.05 have not been presented by the Disciplinary Rules Committee to the Texas Supreme Court.

II. STANDARDS OF FACT AND KNOWLEDGE.

Throughout the proposed new Rules, changes from the current Rules have been made in the area of whether a violation occurs because of an objective fact or because of the lawyer's knowledge of that fact or "reasonable belief" as to that fact. For example, paragraph (a) of the proposed new Rule 1.05 changes the prohibition against revealing "confidential information of a client or a former client" to a prohibition against revealing "information the lawyer knows or reasonably should know is confidential." And as will be discussed below with regard to proposed new Rule 1.08, whereas the current Rule 1.08 requires that a lawyer not enter into a transaction with the lawyer's client unless the transaction is in fact "fair and reasonable to the client," the proposed new Rule 1.08 allows the lawyer to "reasonably believe" the transaction to be "fair and reasonable to the client." Numerous other examples are provided under the heading entitled **"Several rules contain new or revised scienter standards"** in the excellent analysis of Kennon L. Peterson, Rules Attorney for the Supreme Court, at 72 Texas Bar Journal 844 (November 2009), and it can also be accessed at: http://www.supreme.courts.state.tx.us/advisories/overview_102909.htm . Ms. Kennon's updated analysis on this subject can be accessed by starting at the following web link: http://www.supreme.courts.state.tx.us/rules/rules.asp ; then scrolling down on the web page to the category entitled "Texas Disciplinary Rules of Professional Conduct" and selecting the web link entitled "Overview of Revised Version of Proposed Amendments - April 2010." This Outline will not focus on the changes as to fact and knowledge that are included in the proposed new Rules; however, lawyers are urged to read the proposed new Rules carefully, and to compare them with the current Rules, to understand the changes that have been made.

III. SELECTED PROPOSED NEW RULES.

A. PROPOSED NEW RULES 1.06 AND 1.07.

1. Proposed New Disciplinary Rule 1.06 as Published on November 16, 2010, by the Texas Supreme Court:

Rule 1.06. Conflicts of Interest.

(a) A conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(b) A lawyer shall not, even with informed consent, represent opposing parties in the same matter before a tribunal.

(c) In situations other than the situation described in (b), when representation of a client will involve a conflict of interest the lawyer shall not represent the client unless:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the client;

(2) the representation complies with Rule 1.07 where the lawyer is considering representing multiple clients in the same matter; and

(3) the client provides informed consent, confirmed in writing.

(d) If a lawyer has accepted representation in violation of this Rule, or if a 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.

(e) When a lawyer is personally prohibited by this Rule from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter, unless the prohibition is based only on a personal interest of the personally prohibited lawyer and the affiliated lawyer reasonably believes that the affiliated lawyer will be able to provide competent and diligent representation.

2. ***Proposed New Disciplinary Rule 1.07 as Published on November 16, 2010, by the Texas Supreme Court:***

Rule 1.07. Conflicts of Interest: Multiple Clients in the Same Matter.

(a) A lawyer shall not represent two or more clients in a matter unless:

(1) the representation complies with Rule 1.06;

(2) prior to undertaking the representation or as soon as reasonably practicable thereafter the lawyer discloses to the clients that during the representation the lawyer:

(i) must act impartially as to all clients;

(ii) cannot serve as an advocate for one client in the matter against any of the other clients, as a consequence of which:

(A) each client must be willing to make independent decisions without the lawyer's advice to resolve issues that arise among the clients concerning the matter; and

(B) events might occur during joint representation that could require the lawyer to withdraw from representing any or all of the clients before the matter is completed; and

(3) as soon as reasonably practicable after making the disclosures required by (a)(2), the lawyer obtains each client's informed consent, confirmed in writing, to the representation.

(b) When a lawyer represents multiple clients in a matter pursuant to a court order or appointment, and the court requires or permits the lawyer to conduct the representation in accordance with standards that differ from those set out in this Rule, the lawyer may comply with those different standards notwithstanding this Rule.

(c) When a lawyer is personally prohibited by this Rule from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter.

3. ***Your Speaker's Conclusions with Regard to the Effect on Dual Representation in a Single Transaction That Would Result from Proposed New Rules 1.06 and 1.07.***

(a) Single Lawyer in a Dual Representation. May an individual lawyer represent both a seller and a purchaser in the same transaction, assuming that the lawyer obtains the "informed consent" (defined below) of both clients? [NOTE: The question might also be asked in the context of a lawyer representing both a lender and a borrower in a loan transaction, or representing both a financial partner and a development partner in preparing a partnership agreement.] **CONCLUSION: Although a dual representation as described above should not be undertaken without the lawyer's giving serious consideration to the possible ramifications as the transaction unfolds, the lawyer may undertake such a dual representation as long as:**

(1) the lawyer reasonably believes (a) that the relationship between the two clients is not hostile or likely to become hostile, (b) that the lawyer can be impartial during the representation, (c) that the lawyer can provide competent and diligent representation to both clients;

(2) the lawyer complies with the notification requirements inherent in the concept of "informed consent" as used in Rule 1.06(c) and throughout Rule 1.07 -- and as defined in Rule 1.01 of the proposed new Disciplinary Rules to mean "the agreement by a person to a proposed course of conduct after the lawyer has explained, in a manner that a reasonable

lawyer would believe sufficient for the person to understand, the material risks of and reasonably available alternatives to the proposed course of conduct." [NOTE: *See Exhibit "A" on pages 20-21 of this Outline for an example of notification letter attempting to comply with this requirement.*]; and

(3) the clients give their informed consent, "confirmed in writing" (a term defined in the Disciplinary Rules in a manner that does not actually require the signing of the "writing" by the clients, although it certainly would seem to be a good practice for a lawyer to have the clients sign in order to prevent different recollections at a later time).

Proposed new Comment 15 to proposed new Disciplinary Rule 1.06 seems to confirm the above conclusions:

> **15. Common representation is permissible when the clients are not in dispute, even though there is some difference in interest among them. For example, clients may ask a lawyer to memorialize a transaction between them after they have settled between themselves all material terms of the transaction. Similarly, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis, for example, in helping to organize a business involving two or more clients, working out the financial organization of an enterprise in which two or more clients have an interest, or arranging a property distribution of an estate.**

RECOMMENDATION: In a situation as described above in this paragraph, the lawyer should make clear that the dual representation will be governed by the "National Enquirer Rule" (see paragraph (d) on the second page of the suggested letter format that is attached as Exhibit "A" to this Outline) in order to avoid the quandary faced by the lawyer in *Baldasarre v. Butler*, 604 A.2d 112 (Superior Court of New Jersey 1992), reversed in part (but not on the issue discussed above in this paragraph) at 625 A.2d 45 (New Jersey Supreme Court 1993).

(b) Law Firm in a Dual Representation. May a law firm have one of its lawyers represent the seller and another of its lawyers in the same office of the law firm represent the purchaser in the same transaction, assuming that both clients, after full disclosure, agree to the dual representation and agree to waive the conflict of interest? Would the answer be different if the lawyers are in different offices of the law firm in different cities? Would it be a relevant fact if neither lawyer has ever represented (and perhaps does not even know) the other lawyer's client? [NOTE: As with the question in question (a) above, this question might also be asked in the context of a law firm representing both a lender and a borrower in a loan transaction, or representing both a financial partner and a development partner in preparing a partnership agreement.] **CONCLUSION: None of the above-described dual representations would be permitted under the proposed new Disciplinary Rules. See especially the parlay of Rule 1.06(c)(1) and Rule 1.06(e)[paragraph (e) being the so-called "imputation" provision in Rule 1.06], as well as the parlay of Rule 1.07(a)(2) and Rule 1.07(c)[paragraph (c) being the so-called "imputation" provision in Rule 1.07]. The "imputation" provisions of these proposed new Disciplinary Rules appear to be a bit different from similar provisions in the ABA Model Rules in two aspects. First, the ABA Model Rules include a single imputation Rule, i.e., Rule 1.10, as opposed to imputation provisions in the conflict Rules themselves, as in the Texas Rules, and paragraph (c) of that imputation Rule allows for waiver by the clients:**

> **ABA Model Rule 1.10 [NOTE: What follows is NOT a proposed new Texas Disciplinary Rule.] Imputation Of Conflicts Of Interest: General Rule**
>
> **(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless . . . .**
>
> *** * ***
>
> **(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7. [NOTE: ABA Model Rule 1.7 is comparable in basic content to proposed new Texas Disciplinary Rule 1.06.]**

Second, whereas the Comments to ABA Model Rule 1.10 tend to emphasize the loyalty of the law firm as a whole ("the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client" [excerpt from Comment 2 to ABA Model Rule 1.10]), the emphasis in the proposed Comments to the conflicts Rules in the proposed new Texas Disciplinary Rules is on the individual lawyer. See, for example, proposed new Comment 19 to paragraph (e) (the imputation provision) of proposed new Disciplinary Rule 1.06:

> **19. The concern underlying paragraph (e) is the possibility that a lawyer who cannot undertake a representation under this Rule will seek to avoid that prohibition by having another lawyer in the lawyer's firm who would not be individually subject to the prohibition assume responsibility for the representation. Because such a representation by an affiliated lawyer would not prevent the harm that this Rule is designed to prevent, paragraph (e) generally provides that the prohibition may not be so circumvented. . . [NOTE: Proposed Comment 13 to proposed new Disciplinary Rule 1.07 is essentially *verbatim* to the above Comment language.]**

4. Commentary on Your Speaker's Conclusions in Paragraph 3 Above With Regard to the Proposed New Rules 1.06 and 1.07.

One scenario that most members of the Disciplinary Rules Committee intended to prohibit during the Committee's 2005-06 deliberations regarding proposed new Rules 1.06 and 1.07 was a law firm's having one of its lawyers represent the seller and another of its lawyers in the law firm represent the purchaser in the same transaction (similarly, a landlord-tenant transaction, a mortgagee-mortgagor transaction or a financial partner-development partner transaction), even if both clients, after full disclosure, agree to the dual representation and accordingly agree to waive the conflict of interest. Although such intended prohibition would be consistent with the 1992 holding of the New Jersey Superior Court in Baldasarre v. Butler, 604 A.2d 112 (Superior Court of New Jersey 1992), reversed in part (but not on the issue discussed above in this paragraph) at 625 A.2d 45 (New Jersey Supreme Court 1993), it would not be consistent with (i) the ABA Model Rules, (ii) the applicable conflicts-of-interest rules of all other state bar associations, (iii) Section 122 of the Restatement 3d of The Law Governing Lawyers, published by the American Law Institute in the fall of 2000, and (iv) the 1982 Court of Appeals opinion in Dillard v. Broyles, 633 S.W.2d 636 (Ct. App. -- Corpus Christi 1982) n.r.e..

5. Your Speaker's Conclusions with Regard to the Effect of Proposed New Rule 1.06 on a Conflict of Interest Due to a Law Firm's Representing One Client in a Transaction Where the Other Party is Represented by the Law Firm on Other Matters.

If a lawyer ("Lawyer A") with a particular law firm handles ERISA work for a client ("Client A"), can another lawyer ("Lawyer B") with that same law firm represent a party ("Client B") seeking to sell real estate to Client A in a transaction where Client A is represented by a different law firm? **CONCLUSION: Proposed new Disciplinary Rule 1.07 is not applicable since that Rule applies only to dual representation in a single "matter" (more about that term in the next paragraph of this Outline). With regard to proposed new Disciplinary Rule 1.06, although the representation as described above should not be undertaken without the law firm's giving serious consideration to the possible ramifications to its client relationships, Lawyer B may represent Client B in the real estate transaction as long as:**

> **(1) Lawyer B reasonably believes (a) that Lawyer B will not be using confidential information about Client A that was received in connection with Lawyer A's representation of Client A, to the disadvantage of Client A, and (b) that the law firm's relationship with Client A will not preclude Lawyer B from providing competent and diligent representation to Client B;**
>
> **(2) the law firm complies with the notification requirements inherent in the concept of "informed consent" as used in Rule 1.06(c) -- and as defined in Rule 1.01 of the proposed new Disciplinary Rules to mean "the agreement by a person to a proposed course of conduct after the lawyer has explained, in a manner that a reasonable lawyer would believe sufficient for the person to understand, the material risks of and reasonably available alternatives to the proposed course of**

conduct." [NOTE: See Exhibit "B" of this Outline for an example of notification attempting to comply with this requirement.]; and

(3) the clients give their informed consent, "confirmed in writing" (a term defined in the Disciplinary Rules in a manner that does not actually require the signing of the "writing" by the clients, although it certainly would seem to be a good practice for a lawyer to have the clients sign in order to prevent different recollections at a later time).

6. Your Speaker's Conclusions with Regard to the Effect of Proposed New Rule 1.07 on a Multi-Faceted Transaction -- i.e., the Definition of "Matter" for Purposes of Rule 1.07.

If a lawyer (the "Seller's Lawyer") with a particular law firm represents a seller in selling real estate to a buyer that as part of the overall purchase transaction will need to negotiate and enter into a lease agreement with a tenant who is represented by another lawyer (the "Tenant's Lawyer") with that same law firm, is that overall transaction a "matter" as to which proposed new Disciplinary Rule 1.07 would apply? **CONCLUSION: Proposed new Disciplinary Rule 1.07 would not be applicable unless the nature of the transaction would involve direct substantive negotiations between the Seller's Lawyer and the Tenant's Lawyer. For example, in the opinion of your speaker, a customary estoppel letter process would not constitute sufficient direct substantive negotiations to cause the transaction to become a single "matter" for purposes of proposed new Rule 1.07. Nevertheless, your speaker recommends that if any negotiations are likely, albeit not substantive, the lawyers should consider obtaining a conflict waiver with an acknowledgment from the clients that their relationship does not constitute a single "matter." NOTE that the term "matter" is not defined in the Disciplinary Rules except for the following definition in Rule 1.10 (entitled "Special Conflicts of Interest: Former and Current Government Officers and Employees"):**

(f) As used in this Rule, the term "matter" includes:

(1) any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other comparable particular action or transaction involving a specific party or parties, but not regulation-making or rule-making proceedings or assignments; and

(2) any other action or transaction covered by conflict of interest statutes or by conflict of interest rules of the appropriate government entity.

Definitions in Black's *Law Dictionary* do not provide any further guidance, since they include rather generic terms such as "substance as distinguished from form" and "transaction, event, occurrence." However, the first sentence in proposed Comment 1 to Rule 1.07 indicates that a more direct relationship would be required for the overall transaction to fall within the scope of a "matter" as contemplated by the Rule: "This Rule provides lawyers with a clear statement of what they need to consider and tell clients before agreeing to represent multiple clients in a single matter." And the Comments frequently use terminology such as "joint representation of multiple clients in a matter," which your speaker believes to indicate that the clients have a substantive, direct relationship with each other.

B. **PROPOSED NEW RULE 1.08**

1. The Proposed New Rule 1.08 as Published on November 16, 2010, by the Texas Supreme Court ("Redlined" to Show All Changes from the Current Rule 1.08).

Rule 1.08. Conflicts of Interest: Prohibited Transactions.

(a) A lawyer shall not enter into a business transaction with a client**, other than a standard commercial transaction between the lawyer and the client for products or services that the client generally markets to others,** unless:

(1) **the lawyer reasonably believes that the terms of** the transaction ~~and terms on which~~ **between** the lawyer ~~acquires~~ **and** the ~~interest~~ **client**:

(i) are fair and reasonable **to the client; and**

(ii) if known to the lawyer and not known to the client ~~and~~**,** are fully disclosed in a manner ~~which~~ **that** can be reasonably understood by the client;

(2) ~~the client is given~~ **the lawyer advises the client of the desirability of seeking, and gives the client** a reasonable opportunity to seek, the advice of independent **legal** counsel ~~in~~ **on** the transaction; and

(3) the client ~~consents in writing thereto~~ **provides informed consent, confirmed in a writing signed by the client, to the material terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.**

(b) A lawyer shall ~~not~~ **neither** prepare **on behalf of a client** an instrument giving the lawyer or a person related to the lawyer ~~as a parent~~ **any substantial gift**, ~~child, sibling, or spouse~~ **nor solicit** any substantial gift from a client~~, including a testamentary gift, except where the client~~ **for the lawyer or for a person related to the lawyer, unless the lawyer or other person** is related to the ~~donee~~ **client. For the purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, and other relative or individual with whom the lawyer or the client maintains a close, familial relationship**.

(c) ~~Prior to~~ **Before** the conclusion of all aspects of the matter giving rise to ~~the~~ **a** lawyer's employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client ~~giving~~**, or anyone acting on that person's behalf, that gives** the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(d) A lawyer shall not provide financial assistance to a client in connection with ~~pending or~~ contemplated ~~litigation~~ or ~~administrative~~ **pending** proceedings **before a tribunal**, except that:

(1) a lawyer may advance or guarantee ~~court~~ **the** costs, **and** expenses of ~~litigation or administrative~~ **such** proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay ~~court~~ costs and expenses of ~~litigation~~ **such proceedings** on behalf of the client.

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client ~~consents;~~ **provides informed consent**;

(2) ~~there is no interference with the lawyer's independence of~~ **the lawyer reasonably believes that the lawyer's exercise of independent** professional judgment or ~~with~~**n behalf of** the ~~client lawyer relationship~~ **client will not be affected**; and

(3) information relating to representation of ~~a~~ **the** client is protected as required by Rule 1.05.

(f) ~~A~~**Except as otherwise authorized by law, a** lawyer who represents two or more clients shall not ~~participate in making~~ **make** an aggregate settlement of the claims of or against ~~the~~ **that lawyer's** clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless ~~each client has consented after consultation, including disclosure of~~ **the lawyer obtains the informed consent of each client, confirmed in writing, after advising each client of:**

(1) the total amount of the settlement or result of the agreement;

(2) the existence and nature of ~~all the~~ **material** claims**, defenses,** or pleas involved ~~and of~~**;**

(3) the nature and extent of ~~the~~ **each client's** participation ~~of each person~~ in the settlement **or agreement, whether by contribution to payment, share of receipts, or resolution of criminal charges;**

(4) the total fees, costs and expenses to be paid to the lawyer from the proceeds, or by an opposing party or parties; and

(5) the method by which the costs and expenses are to be apportioned to each client.

(g) A lawyer shall not**:**

(1) make an agreement **with a client** prospectively limiting the lawyer's liability to a client for malpractice ~~unless permitted by law and the client is independently represented~~ **or professional misconduct unless the client is represented by independent legal counsel** in making the agreement~~, or~~**;**

(2) make an agreement with a client that requires a dispute between the lawyer and client to be referred to binding arbitration unless either:

(i) the client is represented by independent legal counsel in making the agreement; or

(ii) the lawyer discloses to the client, in a manner that can reasonably be understood by the client, the scope of the issues to be arbitrated and the fact that the client will waive a trial before a judge or jury on these issues and that the rights of appeal may be limited; or

(3) settle a claim **or potential claim** for ~~such liability~~ **malpractice or other professional misconduct** with ~~an unrepresented~~ **a** client or former client ~~without first advising~~ **of the lawyer not represented by independent legal counsel with respect to that claim unless the lawyer advises** that person in writing ~~that independent representation is appropriate~~ **of the desirability of seeking and gives a reasonable opportunity to seek the advice of independent legal counsel** in connection therewith.

(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation **in which** the lawyer is ~~conducting for~~ **representing** a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

(i) ~~If a~~ **When one** lawyer ~~would be~~ **is** prohibited by this Rule from engaging in particular conduct, no ~~other lawyer while a member of or associated with that lawyer's firm may~~ **affiliated lawyer who knows or reasonably should know of the prohibition shall** engage in that conduct.

~~(j) As used in this Rule, "business transactions" does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.~~

2. ***Selected Provisions in the Proposed New Rule 1.08.***

- Subparagraph (a)(1)(i) of the proposed new Rule 1.08 lightens the requirement a bit for a lawyer contemplating a business transaction with a client. Whereas the current Rule 1.08 requires that the transaction to be in fact "fair and reasonable to the client," the proposed new subparagraph (a)(1)(i) allows the lawyer to "reasonably believe" the transaction to be "fair and reasonable to the client."

- Subparagraph (a)(1)(ii) of the proposed new Rule 1.08 also lightens the requirement a bit for a lawyer contemplating a business transaction with a client. Whereas the current Rule 1.08 requires that the lawyer "fully disclose" the transaction to the client, i.e., even if the client knows as much or more about the transaction than the lawyer, the proposed new subparagraph (a)(1)(ii) does not require such disclosure unless the transaction is "known to the lawyer and not known to the lawyer."

- **BUT NOTE** that subparagraph (a)(2) of the proposed new Rule 1.08 precludes a lawyer from entering into a business transaction with the lawyer's client unless the "lawyer ***advises*** the client" (emphasis added in this Outline) of the desirability of seeking the advice of independent legal counsel,

whereas the current Rule 1.08 merely required the lawyer to give the client a reasonable opportunity to do so. Also for a lawyer contemplating a business transaction with the lawyer's client, subparagraph (a)(3) of the proposed new Rule 1.08 adds a new requirement, i.e., a requirement that the lawyer must set specific information regarding the nature of the lawyer's role in the transaction, including the "possible material adverse consequences to the lawyer-client relationship."

- **ALSO NOTE** that subparagraph (g)(2) adds a prerequisite for an agreement between a lawyer and the lawyer's client that any dispute between the lawyer and the client will be resolved by binding arbitration. Either the client must be represented by independent legal counsel in making the agreement, or the lawyer must first disclose to the client "in a manner that can reasonably be understood by the client, the scope of the issues to be arbitrated and the fact that the client will waive a trial before a judge or jury on these issues and that the rights of appeal may be limited." On this issue, see State Bar of Texas Professional Ethics Committee Opinion No. 586, dated October 2008, published at 72 Texas Bar Journal 128 (February 2009), which analyzes current Disciplinary Rule 1.08 and concludes the under the current Rule it is permissible for a lawyer to include an arbitration provision in an engagement agreement with a client "provided that (1) the client is aware of the significant advantages and disadvantages of arbitration and has sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision, and (2) the arbitration provision does not limit the lawyer's liability for malpractice." 72 Texas Bar Journal at 129.

3. ***One Purposeful Omission from the Proposed New Rule 1.08.*** Paragraph (a) of the ABA Model Rules of Professional Conduct precludes a lawyer from "knowingly aquir[ing] an ownership, possessory, security or other pecuniary interest ***adverse*** to a client unless . . . (emphasis added in this Outline)" The current Rule 1.08 does not contain that restriction, and the Disciplinary Rules Committee purposefully refrained from recommending that restriction for inclusion in proposed new Rule 1.08. As explained by the Disciplinary Rules Committee in its written submission to the Texas Supreme Court: "First, the position in Texas has always been that these matters fall under fiduciary law and should not comprise bases for discipline as well . . . Second, the [ABA Model Rule] language is too sweeping. As an example, a lawyer may decide to invest in an automobile dealership for a different make of vehicle than that sold by the dealership owned by one of his clients, an activity that is unrelated to the representation of the client. Since the representation of the client would not be harmed by the lawyer's investment, the [Disciplinary Rules] Committee does not believe the investment should be barred."

C. PROPOSED NEW RULE 1.09.

1. *The Proposed New Rule 1.09 as Published on November 16, 2010, by the Texas Supreme Court.*

Rule 1.09. Conflicts of Interest: Former Client.

(a) Unless the former client provides informed consent, confirmed in writing:

> (1) a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client; and
>
> (2) if a lawyer personally prohibited by (a)(1) has left the firm with which the lawyer was affiliated at the time the lawyer personally represented the former client, no lawyer who is presently affiliated with that firm, and who knows or reasonably should know of the prohibition, shall represent another person in the same or a substantially related matter in which the formerly affiliated lawyer represented the client if any lawyer remaining in the firm has information protected by Rule 1.05 or 1.09(d) that is material to the matter.

(b) Unless the former client provides informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with

which the lawyer formerly was affiliated previously represented a client:

> (1) whose interests are materially adverse to the interests of that person; and
>
> (2) about whom the lawyer acquired information protected by Rule 1.05 or 1.09(d) that is material to the matter.

(c) Unless the former client provides informed consent, confirmed in writing:

> (1) a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client in which such other person questions the validity of the lawyer's services or work product for the former client; and
>
> (2) if a lawyer personally prohibited by (c)(1) has left the firm with which the lawyer was affiliated at the time the lawyer provided the services or work product to the former client, no lawyer who is presently affiliated with that firm, and who knows or reasonably should know of the prohibition, shall represent a person in a matter that requires a challenge to the formerly affiliated lawyer's services or work product for the former client.

(d) A lawyer who personally has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

> (1) use information relating to the representation to the disadvantage of the former client except as these Rules provide, or when the information is or becomes generally known or is readily obtainable from sources generally available to the public; or
>
> (2) disclose information relating to the representation except as these Rules provide.

(e) When a lawyer is personally prohibited by this Rule from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter.

2. ***Substantial Relationship.*** The concepts of a "substantially related matter" and a "substantial relationship" between matters, as used in proposed new Rule 1.09, are addressed in proposed Comment 5 for that Rule, which provides as follows:

> 5. The "substantial relationship" standard used in this Rule is also employed by courts in disqualification opinions. Courts in Texas have held that, for disqualification purposes, a matter is substantially related to another matter if a genuine threat exists that a lawyer may divulge in one representation confidential information acquired by a lawyer in another representation because the facts and issues involved in both are so similar. A lawyer should note the circumstances resulting in discipline may differ from those under which the lawyer may be disqualified by a court. For example, in deciding whether to disqualify a lawyer, a court will balance the competing interests of all litigants. The disciplinary standard found in this Rule does not require balancing competing interests. Therefore, while a review of disqualification decisions may help a lawyer understand the parameters of the "substantial relationship" standard, the rulings in such cases should not be used as conclusive statements that a disciplinary matter would have the same result.

3. ***No Provision Comparable to In re Basco.*** In 2007 the Texas Supreme Court issued its opinion in In re Basco, 221 S.W.3d 637 (Tex. 2007), which held that a lawyer may not represent a client when doing so will involve questioning the validity of legal work done by the lawyer's previous law firm, even when the lawyer was not personally involved in the legal work done at his or her previous firm. In comparison, the current Disciplinary Rule 1.09 precludes representation by a lawyer only if "the validity of ***the lawyer's*** services or work product for the former client" (emphasis added) is being questioned. And the proposed new Rule 1.09 continues the concept of the current Rule. Accordingly, while the Basco opinion governs a court's disqualification of an attorney under certain circumstances, the principal that forms the basis of the Basco opinion is not grounds for attorney discipline under either the current Disciplinary Rules or the proposed new Disciplinary Rules.

4. ***One Concept that the Texas Supreme Court Rejected for the Proposed New Rule 1.09: "Screening".*** The Disciplinary Rules Committee's initial submission in December 2006 to the Texas Supreme Court included in proposed Rule 1.09 a limited "screening" concept for law firms -- i.e., permission for the law firm to "screen" a newly employed lawyer who is precluded from participation in a matter due to a conflict of interest arising from his or her prior employment, thereby allowing the law firm to continue handling a particular matter -- similar to what was included in the proposed new Rule 1.10 ("Special Conflicts of Interest for Former and Current Government Officers and Employees"). In fact, both the current Rule 1.10 and the proposed new Rule 1.10 permit a limited "screening" for a law firm employing a former government officer or employee. The Disciplinary Rules Committee, by the "narrowest of voting margins" (quoted from the report to the Texas Supreme Court by the Disciplinary Rules Committee), proposed a limited "screening" concept for a lawyer who "was not substantially involved in representing the former client" [favored by some members of the Disciplinary Rules Committee, including your speaker, as being in effect a "Young Lawyer Mobility Rule"]. In fact, the recommended "screening" permission for law firms, as proposed to the Texas Supreme Court by the Disciplinary Rules Committee, was quite a bit more limited than the "screening" permitted under the American Bar Association's amendment in 2009 to ABA Model Rule 1.10 (the equivalent ABA Rule to Texas Rule 1.09), which now permits screening when a lawyer moves from one private law firm to another. And even before the ABA action last year as to its Model Rule 1.10, nearly half of the states had amended their state bar disciplinary rules to permit private lateral screening. See the report on the ABA action at the following web site: http://www.abanet.org/litigation/litigationnews/trial_skills/pretrial-model-rule-110.html. However, the Texas Supreme Court declined to follow either the ABA Model Rules or the recommended limited "screening" permission that was suggested by the Disciplinary Rules Committee. Accordingly, the proposed new Rule 1.09 does not contain any "screening" provision.

D. **PROPOSED NEW RULE 1.12.**

1. ***The Proposed New Rule 1.12 as Published on November 16, 2010, by the Texas Supreme Court ("Redlined" to Show All Changes from the Current Rule 1.12).***

Rule 1.12. Organization as a Client.

(a) ~~A~~**Notwithstanding that a** lawyer ~~employed or retained by~~ **reports to and takes direction from** an ~~organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's~~ **organization's** duly authorized constituents, ~~in the situations described in paragraph (b) the lawyer~~ **a lawyer employed or retained to provide legal services for an organization represents that organization and** shall proceed as reasonably necessary in the best **legal** interest of the organization ~~without involving unreasonable risks of disrupting theorganization and of revealing information relating to the representation to persons outside the organization~~ **at all times, including the situations described in (d)**.

(b) A lawyer shall explain that the lawyer represents the organization rather than a constituent of the organization when the lawyer knows or reasonably should know the organization's interests are adverse to the interests of that constituent, or when an explanation appears reasonably necessary to avoid misunderstanding on the part of that constituent.

(c) A lawyer shall not jointly represent the organization and a constituent of the organization in a matter unless the joint representation is in conformity with Rule 1.07.

(~~b~~**d**) A lawyer ~~representing~~ **who represents** an organization ~~must take~~ **shall take** reasonable remedial actions whenever the lawyer ~~learns or knows~~ **has information clearly establishing** that:

> (1) ~~an~~ **a** ~~officer, employee, or other person associated with~~ **constituent of** the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law ~~which~~ **that** reasonably ~~might~~ **may** be imputed to the organization;

(2) he violation is likely to result in substantial injury to the organization; and

(3) he violation is related to a matter within the scope of the lawyer's representation of the organization.

(~~c~~**e**) ~~Except where prior disclosure to persons outside the organization is~~ **Unless otherwise** required by law or **these** ~~other~~ Rules, ~~a lawyer shall first attempt to resolve a violation by taking measures within the organization. In determining the internal procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), a lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures~~ **reasonable remedial actions** may include, but are not limited to, **one or more of** the following:

(1) asking **for** reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to **an** appropriate authority ~~in~~ **within** the organization; and

(3) referring the matter to **a** higher authority ~~in~~ **within** the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act ~~in~~ **on** behalf of the organization as determined by applicable law.

(f) If, despite the lawyer's initiation of reasonable remedial action, the organization continues to pursue, or fails to address in a timely and appropriate manner, a matter called to its attention by the lawyer pursuant to (d) and (e), then the lawyer may disclose confidential information to the extent permitted by Rule 1.05.

2. ***Recommendation: A Constant Reference Source.*** For lawyers representing an organization, proposed new Rule 1.12 (as well as the current Rule 1.12, especially if proposed new Rule 1.12 is not adopted) should be a constant reference source.

3. ***The Relationship of Proposed New Rule 1.12 with other Proposed Rules.***

- Especially in light of the discussion above in this Outline regarding the disclosure requirements under proposed new Rule 1.07, special note should be taken to paragraph (c) of proposed new Rule 1.12: "A lawyer shall not jointly represent the organization and an owner, director, officer, employee, or other constituent of the organization in a matter unless the joint representation is in conformity with Rule 1.07."

- The Disciplinary Rules Committee's initial submission in December 2006 to the Texas Supreme Court recognized the impact of the Sarbanes-Oxley Act of 2002 with regard to this area of lawyer representation. However, the Disciplinary Rules Committee concluded that Disciplinary Rule 1.05 ("Confidentiality") adequately sets out standards for when a lawyer may or should reveal information that would otherwise be confidential. Accordingly, subparagraphs (f) and (g) of proposed new Rule 1.12 refrain from attempting to establish totally independent so-called "whistle-blower" requirements but instead reference Rule 1.05.

E. PROPOSED NEW RULE 1.13.

1. ***The Proposed New Rule 1.13 as Published on November 16, 2010, by the Texas Supreme Court (a Totally New Rule).***

Rule 1.13. Prohibited Sexual Relations.

(a) A lawyer shall not condition the representation of a client or prospective client, or the quality of such representation, on having any person engage in sexual relations with the lawyer.

(b) A lawyer shall not solicit or accept sexual relations as payment of fees or expenses.

(c) A lawyer shall not have sexual relations with a client that the lawyer is personally representing unless the lawyer and client are married to each other, or are engaged in an ongoing consensual sexual relationship that began before the representation.

2. ***Note the Per Se Prohibition.*** Note that paragraph (c) establishes a *per se* prohibition. A lawyer who violates paragraph (c) is subject to sanction regardless of who initiated the relationship and without regard to whether the lawyer's services were adversely affected or the client was harmed by the relationship. This absolute prohibition is comparable to the prohibition in ABA Model Rule 1.8(j), and it seems to reflect the current consensus on the subject. However, during past years the State Bar of Texas Board of Directors had considered a rule prohibiting a sexual relationship only if the lawyer believed the client could not make an informed decision about the relationship [see a 2001 analysis at http://www.texasbar.com/Template.cfm?Section=Home&Template=/ContentManagement/ContentDisplay.cfm&ContentID=1369]. And in some states a sexual relationship between lawyer and client is prohibited only if it is exploitative of the client or adversely affects the competency of the lawyer's services or other interests of the client (with occasionally a presumption being created that such adverse effect has occurred, with the burden on the lawyer to prove the contrary by a preponderance of the evidence).

3. ***Opposition.*** As already mentioned in Paragraph I.H. of this Outline, at least one group of lawyers believes the proposed new Rule 1.13 is not tough enough. See the following Texas Lawyer article dated August 20, 2010: http://texaslawyer.typepad.com/texas_lawyer_blog/2010/08/women-lawyers-contend-sexwithclients-rule-isnt-tough-enough.html

F. **PROPOSED NEW RULE 1.14**

1. ***The Proposed New Rule 1.14 as Published on November 16, 2010, by the Texas Supreme Court (currently Rule 1.02(g) in the existing Disciplinary Rules, which will be quoted in paragraph 2 below).***

Rule 1.14. Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer ***shall***, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. [***emphasis*** added]

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer ***may*** take reasonably necessary protective action. Such action ***may*** include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client. [***emphasis*** added]

(c) When taking protective action pursuant to (b), the lawyer ***may*** disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests, unless otherwise prohibited by law. [***emphasis*** added]

2. ***The Current Texas Disciplinary Rule 1.02(g) and Cross-reference in a Comment to Current Texas Disciplinary Rule 1.05:***

Rule 1.02 Scope and Objectives of Representation

* * *

(g) A lawyer ***shall*** take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client. [***emphasis*** added]

Current Comment 17 to Current Rule 1.05 ("Client Under a Disability")

17. In some situations, Rule 1.02(g) ***requires*** a lawyer representing a client under a disability to seek the appointment of a legal representative for the client or to seek other orders for the protection of the client. The client may or may not, in a particular matter, effectively consent to the lawyer's revealing to the court confidential information and facts reasonably necessary to secure the desired appointment or order. Nevertheless, the lawyer is authorized by paragraph (c)(4) to reveal such information in order to comply with Rule 1.02(g). . . . [***emphasis*** added]

3. ***Compare to the ABA Model Rule***

Rule 1.14 Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

4. ***Quandary if Ballot Item D is not Passed but Ballot Item A Does Pass:***

One of the Ballot items (see Exhibit "F" of this Outline for the Ballot that was approved by the Texas Supreme Court) is Item D, which is as follows:

D. Prohibited Sexual Relations, Diminished Capacity, and Prospective Clients:

Do you favor the adoption of new Proposed Rules 1.13, 1.14, and 1.17 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

If the lawyers in the State vote against Item D (perhaps because of Rule 1.13 regarding Prohibited Sexual Relations) but vote in favor of Item A (which revises Rule 1.02 and leaves off the above-quoted paragraph (g) regarding the client's lack of legal competence, which of the following will occur?

- The Texas Supreme Court will re-insert the current paragraph (g) back into Rule 1.02, so that there will be some provision in the Disciplinary Rules relating to legal competence/diminished capacity; or

- The Texas Supreme Court will insert into Rule 1.02 the language of the proposed new Rule 1.04, assuming that the rejection vote was aimed solely at Rule 1.13; or

- The Texas Supreme Court will allow the Texas Rules to have no provision as to a client's legal competence/diminished capacity.

G. **PROPOSED NEW RULE 1.15.**

1. ***The Proposed New Rule 1.15 as Published on November 16, 2010, by the Texas Supreme Court (currently Rule 1.14 in the existing Disciplinary Rules).***

Rule 1.15. Safekeeping Property

(a) When, in connection with a representation, a lawyer receives property that belongs in whole or in part to a client or third person, the lawyer shall safeguard the property and hold it in trust separately from the lawyer's own property. In addition, the lawyer shall:

(1) deposit any funds into one or more accounts designated as trust accounts, maintained in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person;

(2) identify any other property as such and safeguard it appropriately; and

(3) create and maintain complete records of all trust-account funds and other property and preserve those records for five years after termination of the representation.

(b) Upon receiving the property described in (a), the lawyer shall with reasonable promptness:

(1) notify the client of the receipt and proposed distribution of such property;

(2) notify the third person of the receipt of such property the lawyer knows belongs to the third person;

(3) distribute to the client or third person such property the client or third person is entitled to receive, except as otherwise specifically provided by this Rule or law;

(4) upon the client's request or when otherwise specifically required by these Rules, render a full accounting to the client as to such property the lawyer is holding in trust; and

(5) upon the third person's request, render an accounting to the third person as to such property the lawyer knows belongs to the third person.

(c) When, in the course of representation, a lawyer possesses property to which the lawyer knows two or more persons, one of whom may be the lawyer, claim a right and a dispute arises concerning their rights, the lawyer shall, unless the lawyer reasonably believes the claim giving rise to the dispute is not valid, retain disputed funds in a trust account and continue to safeguard other property appropriately, deposit disputed funds or other property into the registry of a court, or otherwise safeguard the disputed funds or other property in a manner agreeable to those claiming a right. When the dispute has been resolved, the lawyer shall with reasonable promptness distribute the property in the lawyer's possession to persons entitled to the property.

(d) A lawyer shall deposit unearned fees and advanced expenses into a client trust account, to be withdrawn by the lawyer only as fees are earned or expenses are incurred.

(e) Notwithstanding (a), a lawyer may deposit the lawyer's own funds into a client trust account for the purpose of paying service charges on that account.

2. ***Controversy as to Notice and Distribution Requirements in the First Published Version of Proposed New Rule 1.15.*** Quite a few lawyers who wrote comments to the Texas Supreme Court after its October 2009 publication of the proposed new Disciplinary Rules objected to what some referred to as a "bill collector" requirement in proposed new Rule 1.15. As quoted in the Texas Lawyer article that was cited above in this Outline [http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202437766958&slreturn=1&hbxlogin=1], one lawyer stated: "I am afraid this will open a huge Pandora's Box for every medical provider to file a complaint against any attorney who fails to 'protect their interest,' even if the attorney had no idea they even had an interest in the proceeds." It appears that the April 14, 2010 version of proposed Rule 1.15 (which was not changed in the November 16, 2010 version) has removed those concerns. Your speaker believes that the controversy was primarily one relating to a tort-related legal practice; however, all lawyers should review the so-called "safekeeper" provisions of proposed new Rule 1.15.

3. ***Topics Covered in the post-October suggestions by the Disciplinary Rules Committee and Deliberations by the Texas Supreme Court.***

- When the "safekeeper" lawyer is required to notify third parties (i.e., parties other than the lawyer's client).
- When the "safekeeper" lawyer is required to pay third parties.

H. PROPOSED NEW RULE 1.17

1. ***The Proposed New Rule 1.17 as Published on November 16, 2010, by the Texas Supreme Court (totally new).***

Rule 1.17. Prospective Clients

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

(b) A lawyer shall not use or disclose confidential information provided by the prospective client, except as provided in Rule 1.05 or (d)(2).

(c) A lawyer who has received confidential information from a prospective client shall not represent a person with interests materially adverse to those of the prospective client in the same or a substantially related matter, except as provided in (d)(1) or (d)(2). When a lawyer is personally prohibited by this paragraph from representing a person in a matter, no lawyer who is affiliated with the

personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter.

(d) When a lawyer has received confidential information from 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.

2. ***The Balance Created by Proposed New Rule 1.17.*** Paragraph (a) of the proposed new Rule 1.17 looks at the status of the parties from the perspective of the non-lawyer, i.e., a "person who in good faith discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter relationship" is classified as a "prospective client." However, subparagraph (d)(2) permits the lawyer to protect himself or herself from the confidentiality rules by "condition[ing] 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." Note that while subparagraph (d)(2) does require that the prospective client give "informed consent" to the non-confidentiality agreement ("informed consent" being defined in proposed new Rule 1.00 ["Terminology"] as being "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"), it does not require that the consent be "confirmed in writing" as most other "informed consent" provisions in the proposed new Rules require.

3. ***Substantial Relationship.*** The concepts of a "substantially related matter" and a "substantial relationship" between matters, as used in proposed new Rule 1.17, are addressed in proposed Comment 7 for that Rule which is similar to proposed Comment 5 for Rule 1.09 and which provides as follows:

> 7. The "substantial relationship" standard used in this Rule is also employed by courts in disqualification opinions. Courts in Texas have held that, for disqualification purposes, a matter is substantially related to another matter if a genuine threat exists that a lawyer may divulge in one representation confidential information acquired by a lawyer in another representation because the facts and issues involved in both are so similar. A lawyer should note the circumstances resulting in discipline may differ from those under which the lawyer may be disqualified by a court. For example, in deciding whether to disqualify a lawyer, a court will balance the competing interests of all litigants. The disciplinary standard found in this Rule does not require balancing competing interests. Therefore, while a review of disqualification decisions may help a lawyer understand the parameters of the "substantial relationship" standard, the rulings in such cases should not be used as conclusive statements that a disciplinary matter would have the same result.

I. PROPOSED NEW RULE 5.03.

1. ***The Proposed New Rule 5.03 as Published on November 16, 2010, by the Texas Supreme Court ("Redlined" to Show All Changes from the Current Rule 5.03).***

Rule 5.03. Responsibilities Regarding Nonlawyer<u>s.</u> ~~Assistants~~

~~With respect~~ **<u>A lawyer shall be subject</u>** to **<u>discipline for the conduct of</u>** a non-lawyer employed **<u>by,</u>** ~~or~~ retained by**<u>,</u>** or ~~associated~~ **<u>affiliated</u>** with a lawyer **<u>or law firm that would be a violation of these Rules if engaged in by a lawyer, if</u>**:

(a) ~~a~~ **<u>the</u>** lawyer ~~having~~ **<u>has</u>** direct supervisory authority over the nonlawyer ~~shall~~ **<u>and fails to</u>** make reasonable efforts to ensure that the ~~person's~~ **<u>nonlawyer's</u>** conduct is compatible with the **<u>lawyer's</u>** professional obligations ~~of the lawyer; and~~

(b) ~~a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if: (1)~~ the lawyer orders, encourages, or **knowingly** permits the conduct involved; or

(~~2~~**c**) the lawyer:

(~~i~~**1**) ~~is a partner~~ **has managerial authority** in the law firm ~~in which the person is employed, retained by, or associated with; or is the general counsel of a government agency's legal department in which the person is employed, retained by or associated with;~~ **that has retained, employed, or affiliated the nonlawyer,** or has direct supervisory authority over such ~~person~~ **nonlawyer**; and

(~~ii~~**2**) with knowledge of such misconduct by the non-lawyer knowingly fails to take reasonable remedial action **within the scope of the lawyer's authority** to avoid or mitigate the consequences of that ~~person's misconduct~~ **nonlawyer's misconduct**.

2. ***A Shift of Concept from "Partner" to "Authority".*** Recognizing that the term "partner" is no longer adequate to denote a lawyer with authority, the proposed new Rule 5.03 removes that term and substitutes "direct supervisory authority" in paragraph (a) and "managerial authority" in subparagraph (c)(1).

3. ***Recommendation for Lawyers.*** Note that paragraph (a) does not impose strict liability for a supervising attorney whose nonlawyer assistant violates a Disciplinary Rule. Instead, paragraph (a) requires each lawyer with "direct supervisory authority" to "make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations." The Rule, in effect, encourages training of nonlawyers by their supervising lawyers as a "safe harbor" against a wrongful act by a nonlawyer that is not encouraged or sanctioned by the supervising lawyer.

J. **PROPOSED NEW RULE 6.02.**

1. ***The Proposed New Rule 6.02 as Published on November 16, 2010, by the Texas Supreme Court (Renumbered from current Rule 1.13 and "Redlined" to Show All Changes from the Current Rule 1.13).***

Rule ~~1.13~~ 6.02. ~~Conflicts: Public Interests Activities~~ Membership in Legal Services Organization.

A lawyer serving as a director, officer, or member of a legal services~~, civic, charitable or law reform~~ organization, apart from the law firm in which the lawyer practices, shall not knowingly participate in a decision or action of the organization **if**:

(a) ~~if~~ participating in the decision would violate the lawyer's obligations to a client under Rule 1.06; or

(b) ~~where~~ the decision could have a material adverse effect on the representation of any client of the organization whose interests are adverse to a client of the lawyer.

2. ***Reasons for Changes in the Proposed New Rule 6.02.*** As can readily be seen from the "redlined" version of proposed new Rule 6.02 above, the only substantive change from current Rule 1.13 is the removal of "civic, charitable or law reform" organizations from the Rule's coverage. A totally new Rule regarding "law reform" organizations, essentially taken from ABA Model Rule 6.4, has been added by the proposed new Rule 6.03 (see below in this Outline). The removal of "civic" and "charitable" organizations from proposed new Rule 6.02 reflects the conclusion of the Disciplinary Rules Committee, which recommended the deletion to the Texas Supreme Court, that attempting to restrict a lawyer's work for civic or charitable organizations was beyond the scope of a state bar's disciplinary rules. To be sure, a conflict of interest issue and/or an issue of fiduciary duty can possibly arise, such as when a civic or charitable organization desires to construct or remodel a building and the lawyer's client is an architect or contractor bidding on the project. But such conflict of interest and fiduciary duty issues are amply covered by existing legal principles and other Disciplinary Rules and need not be included in proposed new Rule 6.02. In addition, the removal of "civic" and "charitable" organizations from proposed new Rule 6.02 will cause that Rule to be consistent

with ABA Model Rule 6.3, which does not include such organizations.

K. PROPOSED NEW RULE 6.03.

1. The Proposed New Rule 6.03 as Published on November 16, 2010, by the Texas Supreme Court (Totally New).

Rule 6.03. Law Reform Activities Affecting Client Interests.

A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact to the organization but need not identify the client.

2. ***Basis for Proposed New Rule 6.03.*** As was mentioned above in the discussion of proposed new Rule 6.02, proposed new Rule 6.03 has for the most part been taken from ABA Model Rule 6.4.

L. NO CURRENTLY PROPOSED NEW RULE EQUIVALENT TO ABA MODEL RULE 6.5.

1. ABA Model Rule 6.5 (NOTE: The following is an ABA Model Rule, NOT a current Texas Rule or a proposed new Rule for Texas).

ABA Model Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs [NOTE: Cross references in the following ABA Model Rule are to other ABA Model Rules.]

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

> (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
>
> (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

2. ***Reason for Not Currently Including an Equivalent to ABA Model Rule 6.5 in the Proposed New Rules.*** The Disciplinary Rules Committee concluded that although the basis for ABA Model Rule 6.5 was valid, the details of a proposed Rule regarding nonprofit and court-annexed limited legal services programs should be reviewed by those knowledgeable in the pro bono organizations and activities to decide (quoting from the Disciplinary Rules Committee's report) "(1) whether the ABA Rule matches the procedures, if any exist, already governing voluntary pro bono representation; (2) whether the ABA Rule poses any problems with how voluntary pro bono plans are being administered in the State; and (3) whether the ABA Rule sufficiently address the conflict of interest problems in pro bono representation, or on the other hand, provides too great an exception to general conflict of interest requirements." See also: Brill and Rochelle Sparko, *Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest,* 16 Georgetown Journal of Legal Ethics 553 (2003), which was cited in the report by the Disciplinary Rules Committee.

3. ***Status of a Possible Equivalent to ABA Model Rule 6.5.*** In 2009 legal aid specialist Lewis Kinard was added to the membership of the Disciplinary Rules Committee, and Mr. Kinard led discussions on the topic of pro bono activities during the Disciplinary Rules Committee meetings in December 2009 and April 2010. Then, during meetings held in Austin on May 21st and 22nd, the Disciplinary Rules Committee completed a proposed new Rule 6.05 and presented it to the Texas Supreme Court for review. See Exhibit "E" attached to this Outline. As of the date that this Outline is being prepared, no response has been received from the Texas Supreme Court.

EXHIBIT "A"

SAMPLE FORMAT FOR A CONFLICT WAIVER LETTER FROM A SINGLE ATTORNEY REPRESENTING BOTH THE SELLER AND THE BUYER[1]

[addressed to both the seller and the buyer]

Re: Proposed sale of _____, _____, Texas (the "Property") by _____ ("Seller") to _____ ("Buyer")

Dear _____ and _____:

I am pleased that each of you has asked me to represent you in connection with the potential sale of the Property from Seller to Buyer. I believe that with your consent, but only if you give your consent, it is permissible for me to represent both of you in this matter; however, I also believe it advisable to confirm with you the following disclosures and protocol regarding any potential conflicts of interest in my representation of both Seller and Buyer:

(a) **Possible Need to Withdraw.** Under the Texas Code of Professional Responsibility, I should not undertake, nor continue, the representation of either Seller or Buyer in this transaction if I believe that it will adversely affect either party.[2] At this time I do not believe that either of you will be adversely affected; however, if during the course of this transaction, litigation should develop or be threatened between Seller and Buyer, or if any other factor should cause me to conclude that my representation of either party will adversely affect the other party, I may be obliged to withdraw from my representation of both parties; and such withdrawal, in addition to likely creating discomfort as to either or both of you, would also necessitate additional costs and delays in having the new legal counsel become familiar with the transaction.

(b) **Required Impartiality; Possible Concern for Favoritism.** I will try to represent each of you fairly and to be impartial during the course of this dual representation; in fact, that will be my obligation to each of you in accepting this dual representation. But if either of you, after reflecting on my relationship to each of you, has any concern that I may favor the other, either consciously or unconsciously, then **DON'T SIGN THIS LETTER**. I do not believe there is a significant likelihood of any such favoritism; however, you should consider this possibility before granting your consent.

(c) **Missing Out on Advantages.** There are advantages of being represented by your own separate legal counsel, and you should consider those advantages. For example, with regard to my disclosure explained in paragraph (b) immediately above, either or both of you may conclude that you would prefer to have a lawyer represent you exclusively, so that you will have an advocate in your corner instead of a neutral attorney representing both parties. As I have explained, I cannot serve as an advocate for one of you against the other, but instead must assist both of you in pursuing your common purposes; therefore, as a consequence of my impartial role, each of you must be willing to make independent decisions without my advice concerning whether to agree to any proposed resolution of any issues concerning this transaction.

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[1] This letter attempts to satisfy all requirements which would become effective if the proposed new Disciplinary Rule 1.07 is adopted. Moreover, in the opinion of your speaker, this letter is advisable even if no changes are made to the existing Disciplinary Rules.

[2] Of course, this letter would be irrelevant if the lawyer concludes that dual representation is not permitted because the representation of either or both clients will likely be materially affected or that that the common representation cannot reasonably be expected to be undertaken impartially and without improper effect on other responsibilities that the lawyer to either client.

(d) **The "National Enquirer Rule"; No Attorney-Client Privilege.** During the course of my dual representation, I may become aware of confidential information regarding each party. You should be aware of the fact that information which I may receive from one of you (the "Information Giver") during the course of this dual representation is not confidential as to the other (the "Other Client"). To the contrary, in this transaction my role will be similar to that of the National Enquirer; in other words, I will disclose information concerning this transaction to the Other Client if I believe that the information which I have received from the Information Giver would likely materially affect the position of the Other Client, even if requested by the Information Giver that I not do so. The only way in which I will be able to avoid operating under this "National Enquirer Rule" will be for me to withdraw from representing both of you, as I advised you I might do in paragraph (a) above. In addition, and even if I withdraw from representing you after this transaction commences, in the event of any litigation between the two of you, the attorney-client privilege would not likely apply; therefore, even if I have withdrawn from representing you, I might be required in any such litigation to disclose client confidences from each of you.

(e) **The "Ethics Ombudsman Rule".** Similar to my disclosure in paragraph (d) immediately above, I will be required to correct any false or misleading statement or omission concerning this transaction made by or on behalf of the Information Giver, if I believe that the failure to do so would likely materially affect the position of the Other Client, even if I am requested by the Information Giver not to do so. Similar to my analysis in paragraph (d) above, the only way in which I will be able to avoid operating under this "Ethics Ombudsman Rule" will be for me to withdraw from representing both of you, as I advised you I might do in paragraph (a) above. And as I advised you in paragraph (d), even if I withdraw from representing you after this transaction commences, in the event of any litigation between the two of you, the attorney-client privilege would not likely apply; therefore, even if I have withdrawn from representing you, I might be required in any such litigation to make the disclosures indicated above in this paragraph (e).

(f) **Effect of Terminating My Representation in This Transaction.** I may not be able to continue representing either of you in this transaction if I am discharged by one of you or if I withdraw from representing either of you, as I have indicated above may occur. However, even if I cease to represent either or both of you in this transaction, by your signing below, you acknowledge and agree that I may continue to represent either or both of you in other, unrelated transactions for which you may request my services.

If after reflecting upon the above disclosures you continue to desire to continue my dual representation as stated in this letter, please sign below to confirm your consent. Of course, if you have any questions or comments for us on this matter, please do not hesitate to contact me.

Finally, I will certainly understand that you each may wish -- and in fact I encourage you -- to consult on this with your own respective independent legal counsel, that is, attorneys who are not affiliated with me.

Sincerely yours,

[signature of lawyer]

CONSENT GRANTED:

_____ _____

[signature of Seller] [signature of Buyer]

EXHIBIT "B"

SAMPLE FORMAT FOR A CONFLICT WAIVER LETTER FROM TWO LAWYERS IN THE SAME LAW FIRM: DIFFERENT MATTERS

[addressed to both the landlord and the tenant]

Re: Proposed lease of _____, _____, _____
(the "Premises") by _____ ("Landlord") to _____ ("Tenant")

Ladies and Gentlemen:

Landlord has asked _____ of this law firm, together with other lawyers and paralegals associate with _____ (collectively, the "Landlord Representatives"), to represent Landlord in connection with the potential lease of the above-described Premises to Tenant ("this Lease Transaction"). As you know, other lawyers and paralegals in our law firm ("Tenant Representatives") have represented Tenant and/or its affiliated companies (collectively, "Tenant Entities") in other transactions; and various Tenant Entities have indicated that they may wish to use our law firm in other transactions in the future (the past and future transactions being referred to hereinafter as the "Other Transactions"). Under the Texas Code of Professional Responsibility, our law firm should not undertake the representation of Landlord in the Lease Transaction if we believe that such representation will adversely affect either Landlord in this Lease Transaction or a Tenant Entity in one or more of the Other Transactions. At this time we do not believe that either Landlord or any of the Tenant Entities will be adversely affected; therefore, we believe that with your consent (but only if you give your consent), it is permissible for our law firm to represent both Landlord in the Lease Transaction and a Tenant Entity in the Other Transaction.[3] However, we also believe it advisable to confirm with you the following disclosures regarding any potential conflicts of interest in these representations:

(a) **Possible Need to Withdraw.** If during the course of this Lease Transaction litigation should develop or be threatened between Landlord and Tenant, or if any other factor should cause us to conclude that our representation of either party will adversely affect the other party, we may be obliged to withdraw from our representation of Landlord in this Lease Transaction. And such withdrawal, in addition to likely creating discomfort as to either or both of you, would also necessitate additional costs and delays in having the new legal counsel become familiar with the transaction. Without limiting the generality of the foregoing sentences, we want to make it clear that our law firm's representation of Landlord will not involve the assertion against Tenant or any other Tenant Entity of any claim of fraud, misrepresentation or other dishonest conduct.

[3] Of course, this letter would be irrelevant if either or both of the lawyers conclude that dual representation is not permitted because the representation of either or both clients will likely be materially affected or that that the common representation cannot reasonably be expected to be undertaken impartially and without improper effect on other responsibilities that the law firm has to either client.

(b) **Possible Concern for Lack of Zealous Representation or Favoritism.** Even though different attorneys and paralegals in our law firm will be representing Landlord in this Lease Transaction from those representing Tenant Entities in Other Transactions, you may conclude that in the negotiations relating to this Lease Transaction, our attorneys may be inclined to show special courtesies to the Tenant due to our firm's representation of Tenant Entities in Other Transactions. If either of you, after reflecting on our respective relationships with you, has any concern that our law firm may fail to represent you zealously, or may even favor one of you over the other, either consciously or unconsciously, then **DON'T SIGN THIS LETTER**. We do not believe that these special courtesies, if any, will be material or will rise to the level of bargaining concessions; however, you should consider this possibility before granting your consent.

(c) **Protocol as to Confidential Information; Possible Exception.** During the course of our various representations, our law firm will likely become aware of confidential information regarding each party. We commit to you that without your mutual agreement, no member of the Landlord Representatives will perform work on behalf of a Tenant Entity, and no member of the Tenant Representatives will perform work on behalf of Landlord; moreover, we further commit to use our good faith efforts to assure that confidential client information regarding one party is not disclosed to the other party, and we understand from your signing this letter that all parties wish to observe such protocol during this transaction. However, either or both of you may determine that despite our efforts, there may be instances where such confidential information is disclosed. In addition, in the event of any litigation between Landlord and Tenant, the attorney-client privilege would not apply; therefore, we could be required in any such litigation to disclose client confidences from each of you.

(d) **Effect of Terminating Our Representation in This Lease Transaction.** If our law firm is discharged by Landlord in this Lease Transaction, or if our law firm withdraws either from this Lease Transaction or from any Other Transaction under any of the Rules in the applicable Code[s] of Professional Responsibility, then by your signing below, you acknowledge and agree that we may continue to represent either or both of you in other, unrelated transactions for which you may request our services.

If after reflecting upon the above disclosures you continue to desire the respective representations stated at the beginning of this letter, please sign below to confirm your consent. Of course, if you have any questions or comments for us on this matter, please do not hesitate to contact either of us. And we will certainly understand that you each may wish -- and in fact we encourage you -- to consult on this matter with your own respective independent legal counsel, that is, attorneys who are not affiliated with our law firm.

Sincerely yours,

[signatures of both lawyers]

CONSENT GRANTED:

_____

[signature of Landlord]

_____

[signature of Tenant Entity]

EXHIBIT "C"

RULE 5.05

CURRENT TEXAS RULE	ABA MODEL RULE	TEXAS DISCIPLINARY RULES COMMITTEE 5/22/10 DRAFT (NOTE: THIS DRAFT HAS *NOT* BEEN PRESENTED TO THE TEXAS SUPREME COURT AS OF THE DATE THAT THIS OUTLINE HAS BEEN PREPARED)
Rule 5.05 Unauthorized Practice of Law A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.	**Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law** (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so. (b) A lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that: (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a	**Rule 5.05: Assisting a Person Other Than a Texas Lawyer in the Practice of Law** (a) A lawyer shall not assist any person to practice law in Texas who is not admitted to practice law in Texas, unless the lawyer reasonably believes that the person is admitted to practice law in another United States jurisdiction and is not currently suspended or disbarred by any jurisdiction, that the person's practice of law in Texas is being and will be conducted in accordance with these Rules, and that the legal services provided by the person in Texas are provided only: (1) as authorized by Texas or federal law, rule, or court order; (2) as services to the person's employer or its organizational affiliates that are not services for which admission or court order is required; or (3) on a temporary basis and are undertaken (i) in association or consultation with a lawyer who is admitted to practice in Texas and who actively participates in the matter; (ii) in or reasonably related to representation of a client in a pending or potential proceeding before a tribunal in Texas or another jurisdiction, if the lawyer who is not licensed to practice law in Texas is authorized by law, rule, or order to appear in such a proceeding

	person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. (d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that: (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.	or reasonably expects to be so authorized; (iii) in or reasonably related to representation of a client in a mediation or other nonbinding alternative dispute resolution proceeding in Texas or another jurisdiction for which the forum does not require pro hac vice admission, if the services arise out of or are reasonably related to the person's practice in a jurisdiction in which the lawyer is admitted to practice; or (iv) not within (a)(3)(ii) and (iii) but are reasonably related to the person's representation of the same clients in a jurisdiction in which the person is licensed to practice law. (b) A lawyer who is not licensed to practice law in Texas shall not practice law in Texas except to the extent that a Texas lawyer would be authorized to assist that lawyer's practice under (a). (c) If a lawyer knows or reasonably should know that a person is not licensed or admitted to practice in Texas or any other jurisdiction, the lawyer shall not assist the person in the performance of activity that constitutes the unauthorized practice of law.

EXHIBIT "D"

RULE 8.05

CURRENT TEXAS RULE	ABA MODEL RULE	TEXAS DISCIPLINARY RULES COMMITTEE 5/22/10 DRAFT (NOTE: THIS DRAFT HAS *NOT* BEEN PRESENTED TO THE TEXAS SUPREME COURT AS OF THE DATE THAT THIS OUTLINE HAS BEEN PREPARED)
Rule 8.05 Jurisdiction (a) A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined in this state for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04. (b) A lawyer admitted to practice in this state is also subject to the disciplinary authority of this state for: (1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state; and (2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules	**Rule 8.5: Disciplinary Authority; Choice of Law** (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct. (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably	**Rule 8.05 Reach of Disciplinary Authority** (a) A lawyer who is subject to the disciplinary authority of this state is answerable for the lawyer's conduct in connection with a matter in Texas, regardless of where that conduct occurs. A Texas lawyer is responsible for any other violation of these Rules occurring in Texas. A Texas lawyer is also responsible for conduct occurring in another jurisdiction, if that conduct is professional misconduct under both these Rules and the professional conduct rules of the other jurisdiction. . (b) A lawyer admitted to practice in this state is also subject to the disciplinary authority of this state for: (1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in Texas and is intended to secure employment to be performed in Texas; and (2) a written, electronic, or digital solicitation communication that does not comply with these Rules and that is sent, delivered, or transmitted from another jurisdiction, even if the communication

governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.. .	believes the predominant effect of the lawyer's conduct will occur.	complies with the rules governing such solicitation communications by lawyers in that jurisdiction, if the communication is directed to an addressee in Texas or is intended to secure employment to be performed in Texas.

EXHIBIT "E"

RULE 6.05

ABA MODEL RULE	NEW YORK BAR RULE	TEXAS DISCIPLINARY RULES COMMITTEE 5/22/10 DRAFT (NOTE: THIS DRAFT HAS *NOT* BEEN APPROVED BY THE TEXAS SUPREME COURT AS OF THE DATE THAT THIS OUTLINE HAS BEEN PREPARED
Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter: (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter. (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.	**Rule 6.05 Limited Free Legal Assistance Programs** (a) A lawyer who provides limited pro bono legal services shall comply with prohibitions against taking a representation in Rules 1.06, 1.08, 1.09, and 1.17 only if the lawyer has actual knowledge at the time of commencement of the representation that it is prohibited under those Rules. (b) Lawyers who are affiliated with a lawyer who provides limited pro bono legal services shall comply with prohibitions in Rules 1.06, 1.08, 1.09, and 1.17 against taking a representation due to the pro bono representation only if the affiliated lawyers have actual knowledge that a representation is prohibited under those Rules. For purposes of this Rule, "affiliated" does not include mere association through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, nonprofit legal services program, or nonprofit organization funded through the Interest on Lawyers Trust Account (IOLTA) program. (c) A lawyer who receives confidential information provided by an applicant or prospective client applicable to the determination of eligibility for limited pro bono legal services or for free extended legal services from a program sponsored by a court, bar association, accredited law school, or an organization funded by the IOLTA program, shall not use that	**Rule 6.05 Pro Bono Legal Service Programs** (a) The conflicts of interest limitations in Rules 1.06, 1.07, 1.09, and 1.17 do not prohibit a lawyer from providing limited pro bono legal services unless the lawyer knows at the time the services are provided that the lawyer would be prohibited by those limitations from providing the services. (b) If the lawyer providing limited pro bono legal services maintains any confidential information of the limited assistance client or prospective client in a manner that would render that information inaccessible by lawyers affiliated with that lawyer, conflicts of interest in Rules 1.06, 1.07, 1.09, and 1.17 shall not be imputed to those affiliated lawyers. (c) A lawyer who receives confidential information provided by an applicant or prospective client applicable to the determination of eligibility for limited pro bono legal services or for free extended legal services from a program sponsored by a court, bar association, accredited law school, or an organization funded by the IOLTA program, shall not use that information to the disadvantage of the applicant or prospective client, except as required by Rule 1.05. (d) As used in this rule, "limited pro bono legal services" means legal services that are :

	information to the disadvantage of the applicant or prospective client, except as required by Rule 1.05. (d) As used in this rule, "limited pro bono legal services" means legal services that are provided: (1) through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, nonprofit legal services program, or nonprofit organization funded through the Interest on Lawyers Trust Account (IOLTA) program; (2) as short-term services, such as legal advice or other brief assistance with pro se documents or transactions, either in person or by phone, hotline, internet, or video conferencing; and (3) without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter.	(1) provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, nonprofit legal services program, or nonprofit organization funded through the Interest on Lawyers Trust Account (IOLTA) program; (2) short-term services such as legal advice or other brief assistance with pro se documents or transactions, provided either in person or by phone, hotline, internet, or video conferencing; and (3) provided without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter. (e) As used in this rule, "affiliated" does not include mere association through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, nonprofit legal services program, or nonprofit organization funded through the Interest on Lawyers Trust Account (IOLTA) program.

EXHIBIT "F"

FORM OF BALLOT

A. Terminology, Competent and Diligent Representation, Scope of Representation and Allocation of Authority, Communication, Fees, Confidentiality, Safekeeping Property, and Declining or Terminating Representation:

Do you favor the adoption of Proposed Rules 1.00-1.05 and 1.15-1.16 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

□ YES □ NO

B. Conflicts of Interest: Multiple Clients in the Same Matter:

Do you favor the adoption of Proposed Rule 1.07 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

□ YES □ NO

C. Other Conflicts of Interest:

Do you favor the adoption of Proposed Rules 1.06 and 1.08-1.12 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

□ YES □ NO

D. Prohibited Sexual Relations, Diminished Capacity, and Prospective Clients:

Do you favor the adoption of new Proposed Rules 1.13, 1.14, and 1.17 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

□ YES □ NO

E. Advocate, Law Firms and Associations, Public Service, and Maintaining the Integrity of the Profession:

Do you favor the adoption of Proposed Rules 3.01-3.10, 5.01-5.07, 6.01-6.03, and 8.01-8.05 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

□ YES □ NO

F. Counselor, Non-Client Relationship, Information About Legal Services, and Severability of Rules:

Do you favor the adoption of Proposed Rules 2.01-2.02, 4.01-4.04, 7.01-7.07, and 9.01 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

□ YES □ NO