

TEXAS SUPREME COURT ADVISORY

Contact: Osler McCarthy, staff attorney for public information
512.463.1441 or click for [email](#)

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SELECTED PROPOSED DISCIPLINARY RULES AMENDMENTS LINKED TO REDLINED CHANGES

The Supreme Court of Texas has issued an order proposing amendments to the rules governing Texas attorneys' professional conduct. The amendments are intended to enhance the public's protection, provide better guidance to lawyers, reflect current practices, and clarify disciplinary standards to reduce uncertainty and improve lawyers' compliance with these standards. The overall objective in that was protecting the legal profession's integrity.

The amendments are the product of extensive debate by the Court, the Task Force on the Texas Disciplinary Rules of Professional Conduct and State Bar's Committee on the Texas Disciplinary Rules of Professional Conduct.

The amended rules are redlined against the current rules in a document that is posted on the websites of the [Court](#) and [State Bar](#).

The following is an overview of the most significant proposed amendments by the Court's rules attorney, Kennon L. Peterson ([email her](#)). Her analysis deems certain changes most significant, but that determination is her own – not the Court's or any justice's.

Five new rules – Rules 1.00, 1.13, 1.14, 1.17, and 6.03 – are created.

¶ [Rule 1.00](#) contains definitions of terms that appear in the rules, including these new terms: “[affiliated](#),” “[confirmed in writing](#),” “[informed consent](#),” “[personally represents](#),” “[reasonably should know](#)” (replacing “should know”), “[represents](#),” “[writing](#),” and “[written](#).” In addition, substantive revisions have been made to the following terms: “[firm](#),” “[fraud](#),” “[fraudulent](#),” “[law firm](#),” “[partner](#),” “[substantial](#),” “[substantially](#)” and “[tribunal](#).”

¶ [Rule 1.13](#) addresses prohibited sexual relations between a lawyer and client.

¶ [Rule 1.14](#) addresses a lawyer's obligations and options when the lawyer represents a client with diminished capacity. Current Rule 1.02(g), addressing the same, has been deleted.

¶ [Rule 1.17](#) addresses a lawyer's obligations relating to a prospective client.

¶ [Rule 6.03](#) addresses a lawyer's obligations when the lawyer participates in law-reform activities that may affect the interests of the lawyer's client.

Four rules have been renumbered — Rules 1.13, 1.14, 1.15, and 5.08.

¶ [Rule 1.13](#) has been renumbered as [Rule 6.02](#).

¶ [Rule 1.14](#) has been renumbered as Rule 1.15.

- ¶ [Rule 1.15](#) has been renumbered as Rule 1.16.
- ¶ [Rule 5.08](#) has been renumbered as Rule 5.07, to fill a blank space.

Several rules contain new or revised scienter standards – those standards based on knowledge that establishes legal responsibility.

¶ The scienter standard “should know” has been changed to “reasonably should know” throughout the amended rules.

¶ The scienter standards governing use and disclosure of a client’s confidential information have been revised. See [Rule 1.05\(b\)\(1\)-\(2\)](#) and [\(c\)\(3\)](#).

¶ New and revised scienter standards relating to a lawyer’s conflicts of interest are proposed. See [Rules 1.08\(a\)\(1\)](#) and [\(e\)\(2\)](#), [1.09\(a\)\(1\)](#) and [\(c\)\(1\)](#), and [1.10\(c\)](#).

¶ New and revised scienter standards have been established relating to an affiliated lawyer’s imputed conflicts of interest. See [Rules 1.06\(d\)](#), [1.08\(i\)](#), [1.09\(a\)\(2\)](#) and [\(c\)\(2\)](#), [1.10\(b\)](#) and [\(d\)](#), and [1.11\(c\)](#).

¶ For more examples of new and revised scienter standards, see [Rules 1.12\(b\)](#), [1.15\(d\)\(2\)](#) and [\(e\)\(2\)](#), [3.03\(b\)](#) and [\(d\)-\(e\)](#), [3.07\(a\)](#), [3.08\(a\)-\(b\)](#), and [5.03\(b\)](#).

¶ Enhanced requirements are established for lawyer-client communications. See, for example, [Rules 1.03\(a\)\(1\)-\(2\)](#), [1.04\(c\)](#) and [\(d\)\(4\)](#), [1.07\(b\)\(2\)](#), [1.08\(a\)\(2\)-\(3\)](#) and [\(f\)](#), and [1.15\(d\)\(1\)](#).

The standard governing a lawyer’s fee has changed. The fee standard in [Rule 1.04\(a\)](#) has changed from “unconscionable” to “clearly excessive.” But the factors that may be considered in determining the reasonableness of a fee have not changed.

¶ “Confidential information” is no longer defined in reference to “privileged information” and “unprivileged client information.” [Rule 1.05](#) has been rewritten accordingly. A clear differentiation now exists between a client’s or former client’s confidential information and that of a prospective client. Rewritten Rule 1.05 reflects, among other things, new definitions of terms and modified scienter standards.

Standards governing interest conflicts are clarified in Rules 1.06 through 1.11.

¶ [Rule 1.06](#), for example, is structured to define what a lawyer may not do, even with a client’s informed consent, and what the lawyer may do in other cases.

¶ [Rule 1.07](#) has been rewritten to address a lawyer’s obligations relating to the representation of two or more clients in a matter.

¶ [Rule 1.08](#) has been revised significantly to define more clearly the bounds of a lawyer’s prohibited transactions. Of note, subparagraph [\(g\)\(2\)](#) contains new disciplinary standards for arbitration agreements between lawyers and clients.

¶ [Rule 1.09](#) has been revised significantly to improve clarity, explicitly limit use and disclosure of information relating to a former client’s representation and define “substantially related” matters for purposes of this rule.

¶ [Rule 1.10](#) has a new title and contains, among other things, new and revised definitions of terms, as well as revised standards for a lawyer serving as a public officer or employee. The amended rule also clarifies when restrictions relate specifically to personal representation, as opposed to representation.

¶ [Rule 1.11](#) has a new title and has been revised to reflect the revised definition of “tribunal” (which affects the definition of “adjudicatory official”), specifically to address third-party neutrals, to provide and define the new term “court lawyer,” and to clarify when restrictions relate to personal representation.

¶ Revised standards govern lawyers who represent organizations. [Rule 1.12](#) has been restructured and revised substantively to clarify a lawyer’s obligations when representing an organization. For example, the amended rule clarifies the lawyer’s duty to protect the organization’s best legal interests, modifies the standard for initiating reasonable remedial measures, and addresses the limited situations in which the lawyer may disclose the organization’s confidential information or jointly represent the organization and the organization’s representative or representatives.

¶ Revised standards also govern the lawyer’s safekeeping property. Renumbered [Rule 1.15](#) has been changed to clarify the lawyer’s obligations when holding someone else’s property. For example, the amended rule addresses when the lawyer may deposit the lawyer’s own money in a client trust account and when the lawyer may withdraw fees and expenses from a client trust account, differentiates between the lawyer’s duties to a client and those to a third person and clarifies what the lawyer must do in a dispute regarding the property.

¶ Aspects of a lawyer’s duty of candor toward the tribunal have changed. In addition to being restructured to improve clarity, [Rule 3.03](#) has been revised substantively to modify a lawyer’s duty of candor toward the tribunal. For example, the amended rule refines the lawyer’s duty relating to criminal or fraudulent conduct and expands the lawyer’s duty relating to the offer or use of false, material evidence. With an exception for criminal matters, the rule also permits the lawyer to refuse to offer or use evidence that the lawyer reasonably believes, but does not know, is false.

¶ New and revised standards governing trial publicity have been proposed. [Rule 3.07](#) has undergone significant revisions. Paragraphs [\(b\)](#) and [\(c\)](#), which contain examples of what may or may not violate paragraph [\(a\)](#), have been deleted. The content of those paragraphs will be in comments instead. A new paragraph [\(b\)](#) addresses permissible conduct and a new paragraph [\(c\)](#) addresses imputation.

¶ Managerial and supervisory lawyers are subject to new obligations. [Rules 5.01](#) and [5.03](#) have been revised to impose duties on lawyers with managerial or supervisory authority, rather than on partners who do not always have this authority. In addition, the amended rules clarify that a lawyer is not expected to take reasonable remedial action beyond the scope of the lawyer’s authority. [Rule 5.03](#) has also been restructured to better guide lawyers who are managing or supervising nonlawyers.

¶ A lawyer has a clear duty to represent a person upon being appointed to do so. [Rule 6.01](#) has been revised to make clear that when a tribunal appoints a lawyer to represent a person, the lawyer is obligated to represent the person until the representation is terminated in accordance with [Rule 1.16\(c\)](#).

¶ A lawyer must report certain findings of guilt and deferred-adjudication orders. Under new paragraph (f) of [Rule 8.03](#), a lawyer is obligated to report to the Office of the Chief Disciplinary Counsel a finding of guilt or an order deferring adjudication by any court for the commission of an intentional or serious crime, as defined by the Texas Rules of Disciplinary Procedure. Regardless of whether the lawyer appeals the finding or order, the lawyer must report within 30 days of the finding or order.