

**ETHICS & LIABILITY ISSUES ARISING FROM
REPRESENTING MULTIPLE PARTIES**

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State Bar of Texas
**CHOICE AND ACQUISITION
OF ENTITIES IN TEXAS COURSE**
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CHAPTER 408

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**ETHICS & LIABILITY ISSUES ARISING
FROM REPRESENTING MULTIPLE
PARTIES**

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Representing Multiple Parties

This Power Point presentation is based, with permission,
on an Outline presentation prepared by

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A copy of the Outline accompanies this power point.

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Representing Multiple Parties
Recent Developments

- On October 20, 2009, the Texas Supreme Court published proposed amendments to the Texas Disciplinary Rules of Professional Conduct, in the first major reconsideration of the Rules since 1990.
- On April 14, 2010, the Texas Supreme Court sent a letter to the State Bar of Texas containing revised proposed amendments to the Texas Disciplinary Rules of Professional Conduct. The Court requests that the State Bar Board of Directors consider the revised proposed amendments no later than October 6, 2010.

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Representing Multiple Parties
(Basis of Liability)

- Basis of Liability
 - Liability for Violation of Tex Disciplinary Rules
 - Preamble to TX Rules, ¶ 15 – “These rules do not *** define *** civil liability of lawyers for professional conduct. Violation *** does not give rise to private cause of action nor does it create a presumption that a legal duty *** has been breached.”

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Representing Multiple Parties
(Negligent Representation)

- Negligent Misrepresentation
 - Claims based on negligent representation
 - Texas Supreme Court accepts 3rd party actions against attorney based on negligent representation:
 - Negligent representation is separate and distinct from professional malpractice and does not depend on the attorney-client relationship.

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Representing Multiple Parties
(Negligent Representation)

- Six elements required to prove negligent representation:
 - (1) Attorney made representation to claimant;
 - (2) Representation was made to induce claimant to take an action;
 - (3) Claimant relied on representation;
 - (4) Reliance by claimant was justified;
 - (5) The representation on which reliance was made was false; and
 - (6) The claimant suffered damages as a result.

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Representing Multiple Parties
(Basic Duties)

- Lawyer's Basic Duties
 - Competence, commitment, and loyalty to client's interests.

- 5 Core Duties - Texas Disciplinary Rules
 - Rule 1.03 – Communication: Keeping Client Informed
 - Rule 1.05 – Confidentiality
 - Rule 1.06 – Duty of Loyalty
 - Rule 1.09 – Conflict of Interest: Former Client
 - Rule 1.07 – Lawyer as Intermediary

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Representing Multiple Parties
(Rule 1.03)

- Rule 1.03 – Keeping the client informed
 - Elements of 1.03
 - Keep client reasonably informed about matter status
 - Obligation to keep client reasonably informed of relevant considerations and to explain their legal significance to permit client to make informed decisions
 - Promptly comply with reasonable client requests for information

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Representing Multiple Parties
(Rule 1.03)

- Standard of Discharge
 - Reasonableness is the standard – a question of fact
- Strategies
 - Provide client with copies of all pertinent correspondence, documents, and file materials
 - Advise clients, in writing, of risks involved in transaction – confirm in writing client decisions

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Representing Multiple Parties
(Rule 1.05)

- Rule 1.05 – Duty of Confidentiality
 - Rule. Lawyer shall not knowingly reveal a confidence or secret of a client, or former client, [or] use a confidence or secret to his or her advantage or for a third person's advantage.
 - May reveal to client's representatives or law firm.

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Representing Multiple Parties
(Rule 1.05)

- Confidential Information
 - Division into privileged and unprivileged
 - Privileged refers to information gained through attorney-client relationship, protected under Rule 503 of Texas Rules of Evidence or Rule 501 of Federal Rules of Evidence
 - Unprivileged information means all other information furnished by or relating to client during representation

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Representing Multiple Parties
(Rule 1.05)

- Unprivileged Information: Duty to keep confidential is broad
 - Starts earlier and ends late
 - Duty to keep a confidence applies even when there is no attorney-client relationship (e.g., initial interview)
 - The duty to keep a confidence extends after termination of attorney's employment
 - Multi-party representation is a mine-field

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Representing Multiple Parties
(Rule 1.05)

– Five exceptions allowing disclosure:

- Client consent
- Reasonable belief of lawyer that disclosure is necessary to comply with order
- Enforcement of lawyer’s claim against client
- Establishment of malpractice defense
- Prevention of client from committing a crime or fraud

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Representing Multiple Parties
(Rule 1.06)

- Rule 1.06 – Duty of Loyalty
 - General – Lawyer is prohibited from representing conflicting interests.
 - Litigation Rule: Rule 1.06(a) prohibits representation by a lawyer of opposing parties in litigation.
 - Non-Litigation Rule: Multi-party representation is permitted by Rule 1.06(c) with consent.

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Representing Multiple Parties
(Rule 1.06)

- Multiple party representation is acceptable even if a conflict is present or may exist between parties, if three conditions exist:
 - Lawyer reasonably believes that representation of each will not be materially affected, and
 - Each party consents to this representation, and
 - After disclosure of existence, nature and implication of any conflict, including any possible adverse consequences of common representation and the advantages involved.

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Representing Multiple Parties
(Rule 1.06)

– Duty of Loyalty / Transaction Multi-Party

- Evaluating multi-party conflicts in transactional setting is difficult – a written waiver and disclosure is essential but not required.
- Comments to Rule 1.06 (estate planning and probate administration) suggest that lawyer should make clear lawyer's relationship to each party.

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Representing Multiple Parties
(Rule 1.06)

- Factors to consider when taking on multiple party representation are:
 - Length and intimacy of the lawyer-client relationships involved;
 - Functions being performed by the lawyer;
 - Likelihood that a conflict will actually arise; and
 - Probable harm to the client or clients involved if the conflict actually arises.

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Representing Multiple Parties
(Rule 1.09)

- Rule 1.09 – Conflict of Interest: Former Client
 - General Rule. After termination of attorney-client relationship, the lawyer continues to owe former client certain duties. The lawyer may not undertake a representation adverse to the former client without the prior consent of the former client if:

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Representing Multiple Parties
(Rule 1.09)

- Representation questions validity of lawyer's services or work product for the former client;
- Representation has a reasonable probability of involving a violation of Rule 1.05 (regarding the confidentiality of information); or
- Representation is the same or a substantially related matter.

– Same Matter and Substantially Related Matter

- Lawyer prohibited from switching sides in the middle of battle

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Representing Multiple Parties
(Rule 1.09)

- "Substantially related matters"
 - Comment 4 A to Rule 1.09 - "substantially related" involves a situation where a lawyer could have acquired confidential information concerning the former client to the advantage of the current client or another person.
- Waiver of Conflict by Former Client
 - A former client may consent to adverse representation.

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Representing Multiple Parties
(Rule 1.09)

- Waiver of Conflict by Former Client
 - The consent must be informed.
 - Lawyer must disclose all relevant circumstances to the former client, including the lawyer's past or intended role on behalf of each client.
- When Does Client Become a "Former Client"
 - The determination is important because it determines which of the professional ethics rules govern – the current client rules or the former client rules.

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Representing Multiple Parties
(Rule 1.07)

- Rule 1.07 – Lawyer as Intermediary

– Concept of Intermediary. Lawyers are permitted to act as an intermediary by jointly representing multiple clients in the same matter.

- This representation is possible when the joint clients have common goals and interests that outweigh potential conflicting interests.

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Representing Multiple Parties
(Rule 1.07)

Rule 1.07 – Lawyer as Intermediary

- Rather than acting in a partisan manner, advocating for interests of a particular person to the detriment of others, the role of the lawyer intermediary is to promote the interests of all of the clients - with the goal of achieving a resolution that benefits everyone.

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Representing Multiple Parties
(Rule 1.07)

- Requirements of Lawyer as Intermediary
 - following conditions must be satisfied before intermediary engagement:
 - » Must consult with each client regarding implications of intermediary representation (advantages and risks involved; effect on attorney-client privilege);
 - » Each client consents (written) to intermediary representation; and

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Representing Multiple Parties

(Rule 1.07)

- » And Lawyer reasonably believes that:
- (1) the matter can be (i) resolved without litigation, (ii) on terms compatible with the best interests of each client;
 - (2) each client is able to make informed decision in the matter;
 - (3) if intermediation fails, risk of material prejudice to interests of any clients is small; and
 - (4) the lawyer can be impartial and representation does not negatively impact responsibilities of lawyer to any client.

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Representing Multiple Parties

(Rule 1.07)

- Evaluating the Propriety of Intermediation
 - Lawyer prohibited by Rule 1.07 from acting as intermediary, then firm cannot do so.
 - If either (i) contested litigation or (ii) contentious negotiations are reasonably expected, Intermediary engagement cannot or should not be undertaken.
 - Decline engagement if parties are seriously antagonistic, because possibility of all clients being in agreement is slight.

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Representing Multiple Parties

(Joint Representation)

- Confidentiality/Attorney-Client Privilege
 - In joint representation and intermediation, there are no secrets. All helpful information relating to matter obtained by lawyer should/must be disclosed to all clients.
 - If subsequent litigation occurs, as between the clients, the attorney-client privilege will not protect any communications between lawyer and any clients.

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Representing Multiple Parties

(Rule 1.07)

- Termination of Intermediation
 - Lawyer must withdraw (i) if client requests, or (ii) if any intermediary requirement ceases to exist. Withdrawal must be complete; no ongoing representation of any client in the same matter is permitted.
 - Continued representation of any one client would be improper even with consent of all clients.
 - Failure of intermediation or joint representation is harmful – each client needs separate counsel.

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Representing Multiple Parties

(Informed consent)

Informed Consent – Non-Litigation

- Client can waive conflict rules through informed consent.
- Informed consent requires three items:
 - Each affected client be aware of the material respects in which the representation could have an adverse effect on the client's interests;
 - Information required depends on the nature of the conflict and the nature of the risks of the conflicted representation – provided in writing; and

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Representing Multiple Parties

(Informed consent)

- The client must be aware of information reasonably adequate to make an informed decision.

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Representing Multiple Parties

(Informed consent)

- What is informed consent ?
 - Requires
 - (1) each client to be aware of material respects in which the representation could have an adverse effect on the interests of the client;
 - (2) information required depends on nature of the conflict and the nature of the risks; and
 - (3) information must be reasonably adequate for client to make an informed decision.

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Lateral Hire

- Kennedy v. Mindprint (In re Proeducation International, Inc), 587 F.3d 296 (5th Cir. 2009).
- Held that attorney had no conflict of interest requiring his disqualification.
- Rule 1.09(b), the personal conflicts of one attorney are imputed to all other members of a firm.

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Lateral Hire

- Rule 1.09, Comment 7, states that this imputation can be removed when an attorney leaves a firm, stating that “should *** other lawyers cease to be members of the same firm as the lawyers affected by this paragraph (a) without personally coming within its restrictions, that thereafter may undertake the representation against the lawyer’s former client unless prevented from doing so by some other of these Rules.

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Lateral Hire

- Court states that *** the codes produce the same result in application – they both require that a departing lawyer must have actually acquired confidential information about the former firm’s client or personally represented the former client to remain under imputed disqualification.

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Lateral Hire

- Court concludes that “[u]nder Texas Rule 1.09(b), Kennedy was conclusively disqualified by imputation from representing *** only while he remained at JW. When Kennedy ended his affiliation with JW without personally acquiring confidential information about MindPrint, his imputed disqualification ended.

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Representing Multiple Parties

EXAMPLES

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Representing Multiple Parties

Example 1

- Husband and Wife (married three years) have a premarital agreement under which no community property will be created.
- Husband's separate property owns 100% of membership interest in limited liability company (LLC).
- Wife is president of LLC.
- Husband asks Lawyer to help plan to develop his separate property invention, including adding investor.
- Husband wants to use LLC to house invention.
- Husband does not want to involve Wife in adding investor.

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Representing Multiple Parties

Example 2

- Law firm represents Dr. A in contract with hospital. Firm does no other work for Dr. A.
- At a party, friend approaches partner of law firm to make appointment to discuss suing Dr. A for malpractice.
- What duty is owed by firm to Dr. A?

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Representing Multiple Parties

Example 3

- Lawyer is attorney for multi-generational family and its businesses. Principal client contact (PCC) has adult child (C) by previous marriage.
- Lawyer has prepared trusts for PCC with C as beneficiary. Lawyer has never met C.
- PCC wants to loan C \$2.0 M to enable C and her husband (H) to start a business.

Continued

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Representing Multiple Parties

Example 3 continued

- Lawyer is asked to:
 - prepare LLC papers for C and H for new business;
 - prepare loan to enable PCC to loan \$2.0 M to C;
 - prepare irrevocable trust for benefit of C who is already vested in existing trust created by PCC, so that existing trust assets are contributed to new trust for C's life with PCC as trustee.

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Representing Multiple Parties

Example 4

- Elderly woman has five adult children.
- Children are anticipating inheritance and wanting mother to make substantial gifts to children while mother is alive.
- Law firm for family asks Lawyer A (not in law firm) to represent elderly woman in advising about gifts to children. Law firm represents one of the children.

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Representing Multiple Parties

Example 4 continued

- Elderly woman relies on another child, Child B, as her advisor. Woman has difficulty understanding legal concepts and wants Child B to participate in all meetings and communications with Lawyer A.

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Representing Multiple Parties

Example 5

- Client of Lawyer is a close personal friend and long-time client.
- Client invites Lawyer to invest in client business. Lawyer recruits two other clients to invest, who do so.
- C has two key employees who have co-authored intellectual property, along with client.

continued

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Representing Multiple Parties

Example 5 continued

- Client wants Lawyer A to form partnership among the three co-authors of intellectual property.
- Client suffers significant losses in first year. Lawyer A suggests client permit special allocation of losses to all investors. Client questions whether doing so is in his best interest.

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Representing Multiple Parties

Example 6

- Lawyer has relationship with small business owned by M. M dies, leaves business to two adult daughters (Ds), one of whom (D1) has worked in business.
- Ds approach Lawyer to mediate disputes among the Ds, including possible buy-out of D1 by D2.
- Lawyer realizes he had not prepared a buy-sell agreement, thus aggravating difficulties of buy-out.

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Representing Multiple Parties

Example 7

- Long-time Client of Lawyer calls to ask for appointment to discuss new business. Lawyer meets Client in lobby, along with two persons who Client announces will be partners with him in the new business.
- Client tells everyone that Lawyer will act for all.

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Representing Multiple Parties

Example 8

- X calls Lawyer. Lawyer does not know X. A real estate partnership is to be formed.
- Lawyer meets with X along with two other persons (Y and Z) who are introduced as partners.
- Development money will be funded by insurance company, a future partner. Lawyer's Houston office has represented insurance company.

continued

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Representing Multiple Parties

Example 8 continued

- Lawyer is to draw agreement between three partners, X, Y, and Z. Partners live in three states. Lawyer discovers that X is being sued for securities fraud. X asks L not to disclose to Y and Z.
- Lawyer's Houston office notes a conflict.
- Lawyer is asked to review insurance company partnership proposal on behalf of X, Y, and Z. X, Y, and Z disagree on terms of partnership agreement with insurance company.

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Representing Multiple Parties

Example 9

- Lawyer represents Father who is majority owner of family business. Three children work in and own rest of business. Lawyer sits on Board and also represents business.
- Lawyer meets with A, the new president, and B, the new CFO, who tell Lawyer that they have evidence that Father has been transferring funds to an account in Father's individual name in the Caymans. The Caymans account does not show on the books of the family business.

Continued

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Representing Multiple Parties

Example 9 continued

- A asks Lawyer to go to meeting with Father to confront Father with "facts." Lawyer is also asked to draft an agreement with Father removing him as CEO, removing him as a director, and evidencing repayment of monies Father diverted from business.

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Lateral Hires

Example 10

- Five-year associate leaves litigation group and goes to litigation group of second firm.
- One year later associate contacted by 3rd party to intervene in case.
- Original firm has been representing one party to case since inception.

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