

**STRUCTURING LAW FIRM ORGANIZATIONS
AND RELATED ETHICS ISSUES**

WILLIAM D. ELLIOTT, *Dallas*
Elliott, Thomason & Gibson, LLP

ELIZABETH S. MILLER, *Waco*
Professor of Law
Baylor University School of Law

State Bar of Texas
15TH ANNUAL
CHOICE, GOVERNANCE & ACQUISITION OF ENTITIES
May 19, 2017
San Antonio

CHAPTER 7

William D. Elliott



Elliott, Thomason & Gibson, LLP
2626 Cole Avenue, Suite 600
Dallas, Texas 75204
214.922.9393
bill@etglawfirm.com
www.etglawfirm.com

PRACTICE AREAS

Representing Families, Businesses and Owners
Taxation planning
Estate Planning
Business Transactions
IRS Controversies

EXPERIENCE

Introduction

William D. Elliott represents families, businesses and owners. Using innovative billing arrangements, Mr. Elliott believes that the client should be able to retain a lawyer on a fee basis that makes legal fees affordable and predictable, and creates an incentive for the lawyer to be efficient and attain the client goals on time and on budget. Mr. Elliott's typical fee arrangement encourages the client to seek legal counseling and consultation without fear of additional fees.

As an experienced tax lawyer, Mr. Elliott understands that taxes form a material part of most business decisions. Yet, the real world reality is that families and business owners want and need legal expertise spanning a wider array of services than just taxation. Therefore, Mr. Elliott's dual certificates of specialization - Taxation and Estate Planning & Probate - Texas Board of Legal Specialization equip Mr. Elliott to handle a family's and business owner's principal legal needs.

Tax Practice

Mr. Elliott's tax practice experience is extensive, representing taxpayers with disagreements with the IRS is a material part of his tax work. Also, Mr. Elliott has substantial experience with a full array of business transactions, such as the purchase and sale of business, reorganizations, management succession, buy-sell agreements, and other important milestones in the life of a business of which tax issues form a material part.

Estate Planning

An important facet of Mr. Elliott's practice is estate planning. Business owners and families want to transfer their assets to their love ones, but want to do so in a tax efficient manner. Even with the U.S. estate and gift tax applying less and less to middle income taxpayers, for more substantial wealth, the estate and gift tax remains a continuing issue. The estate planning employed by Mr. Elliott is sophisticated and nuanced, always attempting to avoid undue complexity in client lives, any more than necessary.

Bar Association & Professional Activities

Mr. Elliott frequently participates in a substantial number of Bar activities, and with other professional groups

Fellow, American College of Tax Counsel (present)

Member, Board of Directors, Texas Board of Legal Specialization (appointed by President of State Bar of Texas) (present)

Member, Section of Taxation (present)

Member, Section of Real Estate, Probate and Trust Law (present)

Member, Business Law Section (present)

Life Fellow, Texas Bar Foundation

Member, College of the State Bar of Texas, (1989-present)

Trustee, Center for Ethics and Professionalism (2013-2015)(appointed by President of State Bar of Texas)

Member, Standing Committee on Continuing Legal Education, State Bar of Texas (2010-2014)

Stanley J. Scott Award, Dallas Chapter of CPAs (for leadership in continuing education) (May 2010_

Past Program Chair, Dallas Chapter CPA Annual CPE Day (2010, 2011)

Dan Price Award, Texas Bar Foundation for leadership in continuing legal education and writing (June 2008)

Past Chair of Board of Directors, State Bar of Texas (2004-2005)

Past Member, Planning Committee, Advanced Estate Planning CLE Course, Texas Bar CLE

Past Chair, Standing Committee on Professionalism (2006-2007)

Past Member, Board of Directors, State Bar of Texas (2001-2005)

Past Member, Executive Committee, State Bar of Texas (2002-2005)

Past Chair, Finance Committee, State Bar of Texas (2003-2004)

Past Chairman, Section of Taxation, State Bar of Texas (1995-1996)

Past Chairman, Continuing Education Committee, Section of Taxation (2005-2007)

Past Course Director, Advanced Tax Law Institutes, Texas Bar CLE (2006, 1991 and 1990)

Past Member, Tax Law Examination Committee, Texas Board of Legal Specialization (1986, 1988-92, 1998)

TEXAS TAX LEGENDS PROJECT

In 2009, Elliott started the Texas Tax Legends Project with the sponsorship of the State Bar of Texas Tax Section. The project involves a filmed interview of leading tax lawyers in Texas and elsewhere about their careers.

Texas Tax Legend Filmed Interviews

David G. Glickman, Robert E. Davis, William P. Bowers luncheon panel discussion
2010 State Bar Tax Section Annual Meeting, Dallas (June 2010)

Buford P. Berry, Richard A. Freling, Ronald M. Mankoff luncheon panel
discussion, State Bar of Texas Section of Taxation Annual Meeting, Dallas (May 2011)

Buford P. Berry (September 2010)

Richard A. Freling (October 2010)

Ronald M. Mankoff (October 2010)

David G. Glickman (November 2010)

Larry B. Gibbs (May 4, 2011)

Robert E. Davis (September 2011)

Larry B. Gibbs Luncheon Interview 2011 State Bar Tax Section Annual Meeting,
San Antonio (June 2011)

Charles W. Hall (March 2012)

Charles W. Hall, Luncheon Interview, 2012 State Bar Tax Section Annual Meeting, Houston (June 2012)

Emily A. Parker (November 2012)

John E. (Buck) Chapoton (August 2013)

Stanley Johanson interview and classroom (January 2013)

Stanley Johanson Luncheon Interview, 2013 State Bar Tax Section Annual Meeting, Dallas Texas (June 2013)

Phillip L. Mann (December 2013)

Kenneth W. Gideon interview and luncheon interview, 2014 State Bar Tax Section Annual Meeting, Austin (June 2014)

Joint Interview of O. Donald Chapoton and John (Buck) Chapoton at Texas Federal Tax Institute, San Antonio, Texas (June 2015)

Robert E. Davis, Dallas Bar Association Tax Section (April 2015)

O. Donald Chapoton (May 2015)

Eric Solomon luncheon interview, Texas Federal Tax Institute, San Antonio, Texas (June 2015)

Sanders W. "Sandy" Shapiro, 2015 State Bar Tax Section Annual Meeting, San Antonio (June 2015)

Larry B. Gibbs Luncheon Interview Dallas Bar Tax Association (September 2015)

Richard A. Massman (October 2015)

Stanley Blend interview and luncheon interview 2016 State Bar Tax Section Annual Meeting, San Antonio (June 2016)

Pam Olsen, at Texas Federal Tax Institute, San Antonio, Texas (June 2016)

SELECTED CASES

United States Supreme Court

United States v. Rodgers, 461 U.S. 677 (1983), and the Fifth Circuit appeal, and the District Court trial. 5-4 decision in favor of United States. Case concerns foreclosure of a Federal tax lien of a deceased husband against the

Texas homestead interest of a widow, who was not the taxpayer.

United States Court of Appeals for Fifth Circuit

Hudgins v. Commissioner of Internal Revenue, No. 94 40211, 57 F.3d 1393 (5th Cir. June 28, 1995). Reported at: 1995 U.S. App. LEXIS 27954 (5th Cir. 1995) rev'g the United States Tax Court. (No. 5506 91) (U.S. prevailed). Case concerned the effectiveness of a Section 2032A election after an attorney mistake.

Blakeman v. United States, 997 F.2d 1084 (5th Cir. July 21, 1992). As Corrected. Withdrawn upon Grant of Rehearing July 28, 1993, Reported at: 1993 U.S. App. LEXIS 19401, cert. denied, 114 S. Ct. 687; 126 L. Ed. 2d 654 (1994), aff'd in part, rev'd in part, 750 F.Supp. 216 (N.D. Tex. 1990)(Judge John McBride) (Taxpayer prevailed). Case concerned the computation of a Texas homestead interest held by a widow in the face of a foreclosure of a Federal Tax lien arising out of an estate tax delinquency.

United States v. Rodgers, supra. (Taxpayer prevailed)

CIVIC PARTICIPATION

Mr. Elliott has a long history of civil involvement.

Board of Directors, North Texas Tollroad Authority (2013-present)(appointed twice by Gov. Perry)

Past Chairman, Farmer's Market Tax Increment Finance District, Dallas, Texas (appointed by Mayor Ron Kirk)

Former Member, Board of Directors, Trinity River Authority (1989-1995)(appointed by Governor Clements). [Executive Committee; Chairman, Administration Committee)

Member, Board of Directors, and Secretary, Center for Non-Profit Management, Dallas, Texas (1989-1992)

Past President, SMU Law School Alumni Association (1991-92)

Member, Board of Directors, Non-Profit Loan Center, Dallas, Texas (1990 1992)

Member, Board of Directors, Center for Non-Profit Management, Dallas, Texas (1988-1992)

Public Member, State of Texas Depository Board (1978-1980, 1980-

1982)(appointed twice by Governor Clements)

Chairman, Legal Advisory Committee, Dallas Citizens' Charter Revision Commission (1989)

Member, Economic Development Task Force for Southern Dallas (1982)(appointed by Mayor Starke Taylor)

Member, Leadership Dallas (1982)

WRITING & SPEAKING

| Books

FEDERAL TAX COLLECTIONS, LIENS AND LEVIES, Warren Gorham & Lamont, New York, New York (2d. ed. 2015).

TEXAS TAXES ANNOTATED, West Pub. Co. (2015)(co-authored with J. Scott Morris)

EFFECTIVELY REPRESENTING YOUR CLIENT BEFORE THE IRS, ABA, (2th Ed. 2009)(contributing author)(Note: now replaced with 6th edition by Keith Fogg)

| Recent Speaking Events

2016 Dallas Bar Association Section of Taxation, "Fiduciary & Transferee Liability Arising from Estate & Gift Taxes"

2015 Southern Federal Tax Institute, Atlanta, Georgia, (appearing with Larry Gibbs), "Most Important Tax Developments in Last 50 Years"

2015 Dallas Bar Tax Section, (appearing with Larry Gibbs), "Most Important Tax Developments in Last 50 Years"

2012 Texas A&M Ad Valorem Tax Conference, "Who's on First: Ethical Issues Arising from Multi-Party Representation"

2012 University of Texas School of Law LLCs, LLPs, and Partnership Conference, "Conflicts of Interest of Business Lawyers in Common Circumstances" (with George W. Coleman & Claude E. DuCloux)

2011 Tax Alliance Conference, "Federal Tax Liens: How They Arise, What They Attach To, Competing Liens, Certificates, Withdrawals and CDP Requests"

2011 University of Texas School of Law LLCs, LLPs, and Partnership Conference, "Representing Multiple Parties" (with George W. Coleman)

Presented, "Navigating the Dangerous Waters of Multi-Party Representation in LLC and Partnership Deals, University of Texas School of Law 2010 Conference on Partnership and Limited Liability Companies, July 22-23, 2010, Austin, Texas.

Presented, "The Future of Law Practice," Dallas Bar Association, Professionalism Committee, July 6, 2010, with George Coleman, Dallas, Texas.

| Published Articles and CLE Papers

CCH Taxes, July 2016, "Selected Problems and Issues with Estate and Gift Tax Liens"

CCH Taxes, July 2016, "Fiduciary and Transferee Liability Arising from Delinquent Estate & Gift Taxes – Part 3"

CCH Taxes, May 2016, "Fiduciary and Transferee Liability Arising from Delinquent Estate & Gift Taxes – Part 2"

CCH Taxes, March 2016, "Fiduciary and Transferee Liability Arising from Delinquent Estate & Gift Taxes – Part 1"

CCH Taxes, January 2016, "Chevron Deference"

CCH Taxes, November 2015, "Responsible Officer Cases"

CCH Taxes, September 2015, "Revisiting Ethics Issues with Multi-Party Representation: Conflicts with Current Clients Versus Conflicts with Former Clients"

CCH Taxes, July 2015, "Revisiting Multi-Party Representation"

CCH Taxes, May 2015, "Outer Reaches of Foreclosure Power"

CCH Taxes, March 2015, "Receivership as a Tax Collection Tool:

CCH Taxes, January 2015, "Lessons from the Witness Box"

CCH Taxes, November 2014, "Unrecorded Conveyances and Federal Tax Liens."

CCH Taxes, September 2014, ""Notable Developments Affecting Tax Practice."

CCH Taxes, July 2014, "Tax Practice Concepts: Privacy."

CCH Taxes, May 2014, "Selected Issues from the 2013 National Taxpayer Advocate Report."

CCH Taxes, January 2014, "Tax Collection Against Independent Contractors."

CCH Taxes, November 2013, "IRS as Claimant of Estate."

"Judge Irving L. Goldberg and the Federal Tax Law," Texas Tech Law Review, Spring 2014.

Fifth Circuit Review: Federal Taxation, Texas Tech Law Review, Spring 2016, 2015, 2014, 2013, 2012, 2011, 2010, 2009.

Elizabeth S. Miller is a Professor of Law at Baylor University School of Law where she teaches Business Organizations, Business Planning, and related courses. Professor Miller speaks and writes extensively on business organizations topics. She frequently appears on continuing legal education programs and is co-author of a three-volume treatise on *Business Organizations* published by Thomson Reuters/West as part of its Texas Practice Series (Vols. 19, 20, and 20A) and a one-volume treatise that is part of the *Texas Methods of Practice* subset of the Texas Practice Series (Vol. 13). Professor Miller has served as Chair of the LLCs, Partnerships and Unincorporated Entities Committee of the Business Law Section of the American Bar Association as well as the Partnership and Limited Liability Company Law Committee of the Business Law Section of the State Bar of Texas. She has also served as Chair of the Business Law Section of the State Bar of Texas. Professor Miller has been involved in the drafting of legislation affecting Texas business organizations for many years and has served in an advisory or membership capacity on the drafting committees for numerous prototype, model, and uniform statutes and agreements relating to unincorporated business organizations. She is an elected member of the American Law Institute, a Fellow of the American Bar Foundation and the Texas Bar Foundation, and a recipient of the Jean Allard Glass Cutter Award presented by the Business Law Section of the American Bar Association and the Martin I. Lubaroff Award presented by the LLCs, Partnerships and Unincorporated Entities Committee of the ABA Business Law Section.

TABLE OF CONTENTS

I. Introduction	1
A. Scope of Paper	1
B. Traditional Forms of Business Organization are Fairly New for Lawyers.....	1
C. New Forms of Organization are Not New But are Newly Considered.....	2
II. Ethical Issues to Test Traditional and New Forms of Organization.....	2
A. Ethical Rules Aimed at Lawyer and the Firm.....	2
B. Core Ethical Principles	2
C. Imputation of Conflicts of Interest.....	5
III. Traditional Forms of Business Entities Used in Law Practice	6
A. Introduction.....	6
B. Limited Liability Partnership (LLP)	7
C. Professional Limited Liability Company (PLLC).....	11
D. Limited Liability Limited Partnership (LLLP)	14
E. Professional Corporation (PC).....	15
IV. Forms of Law Practice Organization.....	17
A. Introduction.....	17
B. Of Counsel	17
C. Contract (or Temp) Lawyers.....	19
D. Rent Space; Subcontract Work with Tenant Lawyers	21
E. Referral of Work and Referral Fee	23
F. Lawyers Work Together on One Case.....	23
G. Firms Work Together on a Series of Cases	24
H. Firms Associate Together	25
I. Legal Networks.....	26
J. Virtual Law Firms.....	27
V. Conclusion	28
Exhibit A: Source of Law on Conflicts of Interest	35

STRUCTURING LAW FIRM ORGANIZATIONS AND RELATED ETHICS ISSUES

William D. Elliott
Elliott, Thomason & Gibson, LLP
Dallas, Texas

Elizabeth S. Miller
Baylor University School of Law
Waco, Texas

I. Introduction¹

A. Scope of Paper

1. This paper reviews the four principal forms of business entities used by Texas lawyers to organize themselves, along with eight informal sets of relationships that are being used in daily law practice to varying degrees. This paper is not intended as a complete analysis of choice of entity matters. There are ample materials elsewhere, indeed entire books, that consider the legal and tax implications of choosing one entity over another.
2. The goal of the authors is to survey the four principal business entities and the eight informal relationships and highlight selected issues, and the liability and ethics implications that they present.

B. Traditional Forms of Business Organization are Fairly New for Lawyers

1. In modern times, the manner in which lawyers organize themselves to practice underwent two dramatic changes. First, in the late 1960s and early 1970s, lawyers were permitted to incorporate their practice. Professional corporations were enabled, legislatively. Second, in the 1990s when the savings and loan fall-out occurred, lawyers persuaded legislatures to adopt more varied forms of limited liability business entities, such as the limited liability company and limited liability partnership.² An important objective was limits on vicarious liability.
2. Apart from the formal business entity used by lawyers to organize their practice, other less formal arrangements have emerged to the degree that any consideration of law firm organization should take these informal arrangements into account. Law practice now commonly crosses state lines, big firms are international in scope, large litigation matters involve lawyers from across the country, and globalization of business has forever changed how lawyers and law firms related to one another.

C. New Forms of Organization are Not New But are Newly Considered

1. The first part of this paper concerns the traditional forms of business entity for lawyers.
2. The second part of the paper deals with informal forms of practice association, ranging from of counsel, to temporary lawyers, to law firms associating together, to law firm networks and now virtual law firms.
3. These forms of association are not particularly new but currently are more prominent and thus are newly considered.

II. Ethical Issues to Test Traditional and New Forms of Organization

A. Ethical Rules Aimed at Lawyer and the Firm

1. Traditionally, ethics rules were and are aimed at individual lawyers, but over time, the rules have been broadened to include the firm. Today, the basic rule of ethics imputes knowledge among lawyers while associated in the same firm.³
2. The meaning of the word “firm” is elastic. A firm may include those lawyers who share office space if the implication is that they are part of a firm, or co-counsel who are representing the same party if confidential information has been exchanged or lawyers who act like they are in a firm.⁴

B. Core Ethical Principles

1. Loyalty

- a. The core value behind conflicts of interest is the notion that a client expects the client’s own lawyer and all lawyers in the firm to owe the client a duty of loyalty.⁵
- b. The concepts behind the imputation rule that derive from this duty of loyalty are: all lawyers in a firm share the confidences of all others in the firm, lawyers associated together share clients’ confidences, and clients would be overly burdened in attempting to prove those lawyers in a firm with adverse interests are isolated from all the rest of the firm.
- c. Imputed disqualification is an extension of the duty of loyalty from the lawyer and the lawyers who practice in a law firm. All lawyers of the law firm are treated as essentially one lawyer.
- d. **Texas Rule 1.06.** Lawyer is prohibited from representing conflicting interests.
 - 1) **Litigation Rule:** Texas Rule 1.06(a) prohibits representation by a lawyer of opposing parties in litigation. Texas Rule 1.06(a) speaks to litigation. If multiple parties are not in litigation, joint representation potentially could present a situation for conflict.

- 2) **Non-Litigation Rule.** Texas Rule 1.06(c) provides certain circumstances under which a client may consent to multiple legal representation. Even though a conflict, or potential conflict, may exist by a lawyer or firm representing co-plaintiffs or co-defendants, representation of multiple clients is permissible if:
 - a) The lawyer reasonably believes that the representation of each client will not be materially affected, and
 - b) Each affected or potentially affected client consents to such multiple client representation, and
 - c) The client receives full disclosure of the existence, nature and implications of the conflict and of the possible adverse consequences of common representation and the advantages involved, if any.
- e. **ABA Rule.** Model Rule 1.7 of the ABA Model Rules of Professional Conduct states in regard to conflict of interest that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - 1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - 2) Each client consents after consultation.
- f. Apart from attorney-client privilege, which is only present in a proceeding, the duty of confidentiality is always present.
- g. The privilege rules in joint representations have been fairly well understood. If litigation erupts between the joint clients, the privilege will not apply as to information shared between them and with their lawyer. The privilege will continue to protect that information as to the outside world.
- h. Potential conflicts can devolve into an actual conflict.
 - 1) As stated in Comment 3 of Rule 1.06: An impermissible conflict may exist or develop because of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities regarding settlement of the claims or liabilities in question.
 - 2) If such a situation should develop after properly accepting multiple representation under Rule 1.06, 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.

2. Confidentiality of Information

a. Duty of Confidentiality: Texas Rule 1.05; ABA Model Rule 1.6

- 1) **Statement of Rule.** Lawyer shall not knowingly reveal a confidence or secret of a client, or former client, use a confidence or secret to his or her advantage or for a third person's advantage.⁶
- 2) **Texas Rule.** Texas Rule 1.05 provides that a lawyer shall not knowingly reveal confidential information of a client or a former client to anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm, except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (h) of Rule 1.05.
- 3) **ABA Model Rule.** ABA Model Rule 1.6(a) provides that a lawyer shall not reveal information relating to the representation of a client, unless the client gives informed consent, or disclosure is impliedly authorized, or disclosure is permitted as an exception listed in Model Rule 1.6(b).

b. Beyond Privilege. This duty is broader than attorney-client evidentiary privilege.⁷

- 1) The duty to maintain confidential information applies even when there is no attorney-client relationship (e.g. initial interview).⁸
- 2) The duty of confidentiality extends after termination of attorney's employment with the firm or after termination of the client engagement.⁹

c. Privileged vs. Unprivileged Information. Confidential information divided into privileged and unprivileged information.

- 1) Privileged Information means that information gained through attorney-client relationship, protected under Rule 503 of Tx. Rules of Evidence, Rule 503 of Tx. Rules of Criminal Evidence or Rule 501 of Fed. Rules of Evidence.
- 2) Unprivileged Information means all other information furnished by or relating to client acquired by lawyer during course of or by reason of lawyer's representation.

d. Exceptions. Disclosure of client confidential information is permitted in certain circumstances, a selected list of which is:

- 1) Client gives informed consent,
- 2) Lawyer reasonably believes disclosure is necessary to comply with court order or law,
- 3) Enforce lawyer's claim against client (for fees),

- 4) Establish malpractice defense, or
- 5) Prevent client from committing crime or fraud.

All lawyers in the firm are treated as if they share confidential information with each other.¹⁰

C. Imputation of Conflicts of Interest

1. General Rules

- a. While lawyers are associated in a law firm, none of the lawyers may knowingly represent a client if any one of them would be prohibited from doing so by the basic rules of conflicts of interest for current clients and duties to former clients.¹¹
- b. Once lawyers are no longer associated with a firm, then different principles and rules apply.
- c. Various exceptions exist (and are not discussed here) regarding personal beliefs of the lawyers, roles of non-lawyers, law students or legal secretaries, government lawyers, lawyers as witness, or screening (as permitted by ABA Model Rules).
- d. **Texas Rule.** Texas Rule 1.06(f) concerns imputation of information by providing that if a lawyer is prohibited from engaging in particular conduct, then no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.
 - 1) *Smirl v. Bridewell*, 932 S.W.2d 743 (Tex. App.—Waco 1996, no writ) (as used in Texas Rule 1.06, “ ‘member’ means a partner or [a] shareholder in a professional corporation”, and ‘associated with’ refers to an associate ‘which means a lawyer ‘on the payroll of a law firm as an employee’ ”).
 - 2) Schuwerk & Hardwick criticize Texas Rule 1.06(f) as not having any scienter requirement.¹²
 - 3) **Former Client.** Texas Rule 1.09(b) provides that when lawyers are members or associated with a firm, none of the lawyers shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by Rule 1.09(a).
- e. **ABA Model Rule.** ABA Model Rule 1.10(a) is comparable to Texas Rule 1.09(b). It provides that as long as lawyers are associated in a firm, none of the lawyers shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ABA Model Rule 1.7 (general conflict) or Model Rule 1.9 (former client), and subject to various exceptions.
 - 1) The ABA Model Rule is aimed towards procedural disqualification rather than discipline. The Model Rule is a general rule of vicarious liability.

- 2) By contrast, the Texas Rule provisions should be more limited than the ABA Model Rules and are not concerned with disqualification.¹³ The Texas Supreme Court has stated:

*As we said recently in In re Epic Holdings, Inc., “[w]e have repeatedly observed that ‘[t]he Texas Disciplinary Rules of Professional Conduct do not determine whether counsel is disqualified in litigation, but they do provide guidelines and suggest the relevant considerations.’ ” Technical compliance with ethical rules might not foreclose disqualification, and by the same token, a violation of ethical rules might not require disqualification.*¹⁴

III. Traditional Forms of Business Entities Used in Law Practice¹⁵

A. Introduction

1. The subject of law firm organization is dynamic. Starting in the early 1990s, in the wake of the S&L earthquakes, legislation and regulation policy of the legal profession has witnessed a sea change in attitude about vicarious liability, ethical considerations, and even tax law.
2. Today, the LLP predominates in law firm organizational form on a national level. The other forms commonly encountered, the PLLC and PC, are found in substantial numbers in Texas, but their availability and popularity varies across the country. The limited partnership and LLLP are less conventional for law firms, but have found some usage in the law firm context.
3. Nevertheless, the factors to consider - the preferences among the lawyers, the financial and tax considerations, ethical rules and risks, liability concerns – in combination make the choice of business entity for a lawyer and a law firm among the most complicated of issues.
4. **Ethics Issues.** There are common ethics issues arising in all the forms of business entities in which Texas lawyers might choose to operate. The Texas Disciplinary Rules of Professional Conduct do not prescribe specific forms of organization for law firms.
 - a. Under the Texas Disciplinary Rules, a lawyer practicing law in Texas is required to comply with applicable Texas legal requirements concerning the practice of law. Rule 8.04(a)(12) prohibits violation of any laws of Texas not otherwise specified in Rule 8.04(a) “relating to the professional conduct of lawyers and to the practice of law.” Accordingly, a Texas lawyer must structure his or her law practice in a form that is permissible under Texas law.
 - b. *Unauthorized Practice of Law Committee v. American Home Assurance Co.*, 261 S.W.3d 24, 33 (Tex. 2008) (Except for professional corporations specifically authorized under Title 7 of the TBOC as noted above, the general rule is that “a corporation is not authorized to engage in the practice of law.”)¹⁶

- c. **Texas Rule 5.04.** Rule 5.04 does prohibit arrangements that would undermine a lawyer's professional independence, such as sharing legal fees with a non-lawyer; forming a partnership for the practice of law with a non-lawyer; or forming a professional corporation or association for the practice of law for profit if a non-lawyer owns any interest in the entity, is a corporate director or officer of the entity, or has the right to direct or control the lawyer's professional judgment.
 - d. **Texas Rule 5.01.** Texas Rules regarding law firms and associations address responsibilities of a partner or supervisory lawyer.
 - e. **Texas Rule 5.02.** Concerns responsibilities of a supervised lawyer. A lawyer is not relieved from compliance with these Disciplinary Rules because the lawyer acted under the supervision of an employer or other person.
 - f. **Texas Rule 5.03.** Concerns responsibilities regarding non-lawyer assistants. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.
 - g. **Texas Rule 5.05.** Concerns unauthorized practice of law and is pertinent in examining the business entity in which the lawyer has chosen to practice.
 - h. **Texas Rule 5.06.** Concerns restrictions on right to practice law. An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.
 - i. **Texas Rule 5.08.** Concerns prohibited discriminatory activities.
5. A dominant consideration of lawyers selecting a business entity within which to operate is limitation of liability, especially professional and vicarious liability.

B. Limited Liability Partnership (LLP)

1. Description of LLP Practice Model

- a. **Alter Personal Liability Rule.** A limited liability partnership (LLP) is a partnership that has availed itself of statutory procedures to alter the traditional rule that the general partners have personal liability for all partnership debts and obligations.¹⁷
- b. **Nature of LLP.** An LLP is a general or limited partnership that has registered with the secretary of state by filing an appropriate document.¹⁸ The effect of the filing is to protect the partners from vicarious liability, thus altering the traditional rule that general partners have personal liability for partnership debts and obligations.

- c. **Liability Limitation.** The general partnership that is an LLP is distinguished from a general partnership that is not an LLP because of the limitation on the personal liability of partners in an LLP. A partner in an LLP is not individually liable for obligations of the partnership incurred while the partnership is an LLP.¹⁹
 - 1) LLP status does not shield a partner from liability imposed by law or contract independently of the partner's status as a partner, such as when a partner personally commits a tort or personally guarantees a contractual obligation.²⁰
 - 2) The individual liability limitation does not affect the liability of the partnership to pay its obligations out of partnership property or the manner in which service of citation or other civil process may be served in an action against a partnership.²¹
- d. **Report Requirement.** Since January 1, 2016, the annual renewal procedures formerly utilized for LLPs have been replaced by an annual report requirement.
 - 1) The annual report is due on June 1 of each year, but the failure to file the report by that date will not result in automatic loss of LLP status.²² Instead, the LLP will have a period of one year to cure the delinquency. If the delinquent report is not filed by May 31 of the following year, the LLP's registration will automatically terminate.²³
 - 2) After involuntary termination of the registration, there is a three-year period during which the registration may be retroactively reinstated.²⁴
 - 3) Thus, the risk of a lapse in liability protection is substantially lessened under the new annual reporting scheme.
 - 4) The 2015 amendments also include a provision regarding the effect of acceptance by the secretary of state of an LLP registration and a provision specifying a "substantial compliance" standard with respect to the registration and annual reporting requirements. Effective January 1, 2016, an LLP registration that is accepted by the secretary of state is an effective registration and is conclusive evidence of the satisfaction of all conditions precedent to an effective registration.²⁵
 - 5) Additionally, except in a proceeding by the state to terminate an LLP's registration, the registration continues in effect so long as there has been substantial compliance with the registration and annual reporting requirements of the statute.²⁶ This standard should mitigate potential liability concerns arising from minor compliance errors, such as an error in reporting the number of partners.

- e. **Historical Development.** The original LLP provisions were contained in the Texas business law amendments of 1991 as part of a major revision of Texas business law.²⁷ The original Texas statute limited the vicarious liability protection to malpractice claims, generally sounding in negligence.²⁸ In 1997, the LLP statute was broadened to provide protection from all debts and obligations of the partnership.²⁹

2. Liability Limitations in Practice in LLP Form

- a. **General Rule on Liability Limitation in LLP Form.** The principal goal of operating in LLP form is the limitation on personal liability of partners in an LLP. The TBOC provides that a partner in an LLP is not liable, individually, for debts and obligations of the partnership incurred while the partnership is an LLP.³⁰
- b. **Exceptions from (or Caveats to) Liability Protection of the Partners in LLP**
 - 1) **Lawyer Creates the Liability.** Liability imposed by law or contract independently of the partner's status as a partner, such as when a partner personally commits a tort or personally guarantees a contractual obligation.³¹
 - 2) **“Full Shield” Liability Protection Under Current Law.** The current Texas LLP provisions shield partners from vicarious liability for any obligation of the partnership incurred while the partnership is registered as an LLP.³² Originally, the statutory vicarious liability protection only extended to tort-type liabilities (errors, omissions, negligence, incompetence, and malfeasance), and that protection was subject to certain exceptions (if the tort was committed under the partner’s supervision, if the partner was directly involved, or if the partner had notice or knowledge of the tortious conduct).³³ The partners were not protected from liability for the contractual obligations of the LLP. In 1997, the statutory liability protection was expanded to all types of liabilities, but exceptions providing for tort liability of supervising partners, partners with direct involvement, or partners with notice or knowledge of the tortious conduct were retained.³⁴ In 2011, these exceptions were removed from the statute.³⁵
 - 3) **Distributions.** Unlike the corporate and LLC context, there are no TBOC provisions addressing liability for distributions in the general partnership context. A creditor would have to rely solely on the Texas Uniform Fraudulent Transfer Act to recover distributions from a partner. In a general partnership that is not an LLP, the partners are personally liable for partnership obligations so that a creditor of the partnership may directly pursue the partners if the partnership is unable to satisfy the obligation owed to the creditor. In the case of an LLP, the partners do not have personal liability for the obligations of the partnership, but a creditor of the partnership may be able to claw back distributions made to partners under the Texas Uniform Fraudulent Transfer Act if the distributions were made while the partnership was insolvent.³⁶

- 4) **Liability of Last Remaining Partner.** Generally, a partnership is described by statute as an association of two or more persons carrying on as co-owners a business for profit.³⁷ If a partner dies or otherwise withdraws leaving only one remaining partner in a general partnership that has registered as an LLP, it is unclear what the rights, liabilities, and obligations of the last remaining partner are. Must the partnership business be wound up? Arguably, winding up is implicitly required by the statute on the basis that the business no longer satisfies the statutory definition of a partnership.³⁸ However, death or withdrawal of a partner is not included among the numerous events requiring winding up of a general partnership (including an LLP) specified by the TBOC, and the statute explicitly provides that a general partnership continues after death or other events of withdrawal of a partner.³⁹ Even assuming the remaining partner may continue the business of the partnership without a winding up, it does not seem that the continuing business would still be a partnership if it has only one partner. Would the LLP registration continue to protect the last remaining partner from vicarious liability during winding up or continuation of its business,⁴⁰ or does the firm cease to be a partnership immediately on the death or withdrawal of the penultimate partner so that it is no longer an LLP even if the registration is still in effect? These are perplexing issues that may make the LLP form unattractive for a partnership in which the departure of partners may leave a single remaining partner.
- 5) **Additional Expense of Maintaining Liability Protection in LLP.** Another factor to consider in choosing whether to form a firm as an LLP is the additional cost of maintaining liability protection as compared to a PLLC or PC. Liability protection is obtained at the formation of a PLLC or PC, which involves a one-time initial filing fee of \$300. The LLP protection is obtained by filing a registration statement with a filing fee of \$200 per partner. To maintain an LLP's status, however, an annual report must be filed each year with a filing fee of \$200 per partner. There is no additional yearly filing fee associated with a PLLC or PC. LLPs, PCs, and PLLCs are all taxable entities subject to the franchise tax, so there is no state tax advantage to the LLP form over the PLLC or PC form. From a federal income tax perspective, the PLLC has the same tax flexibility as an LLP.
- 6) **Differences in Treatment of Claims in Winding Up of LLP versus PCs and PLLCs.** In the case of a PLLC or PC, the phases of winding up and termination are more well-defined than in the case of a general partnership, including a general partnership that is an LLP. After a decision by its owners to wind up, the PLLC or PC winds up the business and files a certificate of termination with the secretary of state. The filing of a certificate of termination terminates the existence of the PLLC or PC subject to a three-year survival period during which the entity continues to exist for limited purposes.⁴¹ After the filing of a certificate of termination, the PLLC or PC is only liable for an "existing claim" that is brought within the three-year survival period.⁴² An existing claim is: (1) a claim that existed prior to the filing of the certificate of termination and is not barred by limitations, or (2) a

contractual obligation incurred after termination.⁴³ If an action on an existing claim is not brought before the expiration of the three-year survival period, the claim is extinguished.⁴⁴ There are also provisions available to a PLLC or PC for an expedited claims resolution process.⁴⁵ A general partnership that has registered as an LLP is not a “filing entity” to which these statutory winding up provisions are applicable; rather, it is a “nonfiling entity.”⁴⁶ As such, its existence terminates upon the completion of the winding up of its business and affairs,⁴⁷ a point in time that may not be clear if claims are left unsatisfied or unresolved. Overall, the winding up and termination provisions applicable to PLLCs and PCs appear to provide more certainty and finality than one finds in the LLP context.

- 7) **Limited Case Law Experience.** The case law discussing the limited liability nature of the LLP is limited, so to speak. Many cases precede the 2011 and 2013 amendments and concern legal aspects no longer pertinent, such as failure to renew the registration annually (the annual renewal requirement has been replaced with an annual reporting requirement), and failure to maintain insurance requirements (the insurance requirement has been eliminated).⁴⁸ There are as of yet no cases in Texas that analyze whether the concept of “veil piercing” applies to an LLP.

3. Ethical Issues Arising in LLP Form

- a. **ABA.** Lawyers may practice in an LLP or “similar form of limited liability entity” in which each lawyer is responsible for his own professional actions, and depending on applicable state law, those whom he supervises. ABA Formal Opinion 96-401.
- b. **Texas.**
 - 1) **Texas Rule 7.01.** Law firm name cannot be a trade name, a misleading name concerning the identity of the lawyers practicing under such name, a firm name containing names other than those of one or more lawyers in the firm except for an entity designator (e.g., “LLP”).
 - 2) **Texas Rule 5.04(b).** Proscription against entering into a partnership with a non-lawyer if any of the activities of the partnership constitute the practice of law. Out-of-state lawyers are treated as non-lawyers for purposes of unauthorized practice of law if legal services provided on continuous, systematic basis, but not if provided from time to time.⁴⁹

C. Professional Limited Liability Company (PLLC)

1. Description of PLLC Practice Model

- a. **Statutory Purpose.** A professional limited liability company is an LLC that is governed as a professional entity under Title 7 of the TBOC and is formed for the purpose of providing a professional service. The PLLC may render a professional

service in Texas, but only through a licensed member, manager, officer, employee, or agent.⁵⁰

- 1) A limited liability company (LLC) is an entity formed and governed by Title 3 (and Title 1 to some degree) of the TBOC.⁵¹
- b. The issue arises whether an attorney (or any licensed professional) can use a regular LLC, because the PLLC form is available specifically for this purpose.
 - 1) An LLC can be formed and operated for any lawful purpose.
 - 2) The Texas secretary of state's office states that the LLC form cannot be used by attorneys (or any licensed professional).⁵²
- c. The PLLC is subject to statutory restrictions similar to those that apply to a PC with respect to its owners, management officials, and those providing the professional service by the PLLC. Only professional individuals or the professional organization may render the professional service.⁵³ Multi-state firms may encounter difficulties registering or qualifying a Texas PLLC to transact business in some states whose laws are less flexible than Texas with respect to ownership, governance or other matters.
- d. A PC (professional corporation) may own the membership interest in the PLLC. TBOC §§301.003(5), 301.003(7) and 301.004 provide that owners of PLLC entities may be professional organizations that are owned by professional individuals who engage in the same profession as the PLLC.

2. Liability Limitations Arising from PLLC Form

- a. **Similar to LLC.** Limited liability for members of a PLLC is provided as in a regular LLC. The professional rendering the professional service is liable for the professional's own errors, omissions, negligence or incompetent acts or malfeasance.⁵⁴ The PLLC's liability for professional negligence is joint and several with the professional committing the error in the course of employment for the PLLC.⁵⁵
- b. **Limited Liability of Members.** A member of an LLC is not liable for the debt, obligations, and liabilities of the LLC.⁵⁶ The LLC liability protection does not extend to protecting members or managers from liability in tort or contract apart from the status of the person as a member or manager.
- c. **Negligent Supervision.** The potential for personal liability of an LLC member or manager exists for negligently failing to supervise agents of the LLC. A Texas Court of Appeals called the state of Texas law on this point "unsettled."⁵⁷
- d. **Distributions.** Distributions that render the LLC insolvent are prohibited by the TBOC.⁵⁸ The balance sheet test for insolvency is used. Reasonable compensation is not included in the prohibited distributions.⁵⁹ The recipient of a distribution is

not obligated to return the distribution unless the member knew the statutory proscription was violated. Thus, a knowing receipt of a distribution would carry a concomitant obligation to return the distribution.⁶⁰ A creditor of an LLC may also be able to force the return of a distribution under the Texas Fraudulent Transfer Act even if the member does not know the distribution is improper.⁶¹

- e. **Veil Piercing.** In general, courts respect the LLC as a separate legal entity distinct from the LLC members. The concepts of limited liability in corporate law are adhered to, generally speaking, in the LLC. Plaintiffs have aggressively pursued circumstances under which veil piercing in a particular case should occur. Texas courts have refused to accept the LLC limits on liability for its members as an absolute bar. Fraud is often asserted as a reason for piercing, but informal record keeping does not appear to justify a court in imposing personal liability on a member.⁶²
- f. **Risk of Using LLC to Practice Law.** An LLC certificate of organization that states as its purpose “any lawful purpose” when the intended purpose is the practice of law would not be obvious and is not a permissible use of the LLC form for law practice (or other professionals).
 - 1) Among the risks of a lawyer or lawyers using the LLC form is the unauthorized practice of law by the LLC entity, inappropriate fee splitting with a non-approved entity (the LLC), and the loss of limited liability.
 - 2) See, e.g. in another context, *Doctors Hospital of Renaissance, Ltd. v. Andrade* (limited partnership operating a health care facility could not practice medicine and is not vicariously liable for physician’s negligence; since limited partnership entity is not authorized to practice, for it to do so would be unauthorized practice of medicine).⁶³

3. Ethical Issues Arising in PLLC Form

- a. **Firm Name.** A professional limited liability company may adopt a name not contrary to the law or ethics regulating the practice of the professional service rendered through the professional limited liability company.⁶⁴
- b. **ABA.** Trade names permitted, with restrictions.
- c. **Texas.** Texas Rule 7.01(a)(lawyer shall not practice under trade name, a misleading name, or a firm name containing names other than lawyers practicing in the firm except for an entity designator such as PLLC).
- d. **Texas Rule 1.08.** Lawyers not prohibited from practicing law in the form of a LLC.⁶⁵

D. Limited Liability Limited Partnership (LLLP)

1. Description of LLLP Practice Model

- a. In Texas, both general partnerships and limited partnerships are permitted to register as limited liability partnerships. The Secretary of State of Texas does not maintain statistics separating the number of general partnership LLP registrations and limited partnership LLP registrations, but lawyers at the Secretary of State's office have the impression (based on their observations and certain analyses of their data base) that a relatively small percentage of LLP registrations are made by limited partnerships as opposed to general partnerships. A limited partnership that has registered as a limited liability partnership is often referred to as a "limited liability limited partnership" (LLLP). Not all states permit a limited partnership to elect LLP status.
- b. The LLLP is formed as a limited partnership and elects to provide limited liability for the general partners (who would otherwise have joint and several personal liability for all debts and obligations of the partnership) by registering as a limited liability partnership. In addition, a limited partnership's LLLP registration will provide liability protection to a limited partner (who will ordinarily be protected from liability in any event) to the extent a limited partner is otherwise at risk of liability for a partnership obligation where a partnership creditor reasonably believes the limited partner is a general partner based on the limited partner's "participation in the control" of the business.⁶⁶
- c. A principal advantage of the LLLP form of practice is the well-developed limited partnership law. The general partner of an LLLP may have more stringent duty of loyalty obligations to the limited partners than those in a managerial role in other forms of practice, at least in theory. Limited partners do not owe the same duties that general partners owe,⁶⁷ but a limited partner who acts as an agent of the partnership will have fiduciary duties in that capacity.⁶⁸ The liability shield of limited partners might be thought clearer, more stable, than afforded to LLC members; however, there is an increasing body of case law in Texas demonstrating that the liability protection afforded an LLC member is at least as strong as that afforded a corporate shareholder. Additionally, there are expenses and complexities in maintaining the liability protection of a limited partner in an LLLP that are not present in an LLC (such as the additional cost of the annual filings required to maintain the LLP status of the limited partnership and a limited partner's risk of liability if the registration is terminated and the limited partner "participates in the control" of the partnership business in a manner that is not protected by statute and that leads a person who transacts business with the limited partnership to believe the limited partner is a general partner).

2. Ethical Issues in Practicing in LLLP Form

- a. **ABA.** Although initially resistant, the ABA has ruled favorably on the use of a limited partnership or LLLP.

- b. **Texas.** The governing ethics opinion does not foreclose Texas lawyers practicing in any form permitted by the TBOC.⁶⁹

E. Professional Corporation (PC)

1. Description of PC Practice Model

- a. **Statutory Purpose.** A professional corporation in Texas is a corporation governed as a professional entity under Title 7 of the TBOC and is “formed for the purpose of providing a professional service, other than the practice of medicine by physicians, surgeons, or other doctors of medicine, that by law a corporation governed by Title 2 is prohibited from rendering.”⁷⁰
- b. **Restrictions.** The professional corporation is restricted in various ways to require that the professional service rendered by a professional corporation be only through a professional individual or a professional organization.⁷¹
 - 1) Shareholders must be professional organizations or professional individuals.⁷² Directors and officers must be professional individuals.⁷³
 - 2) The term professional individual means an individual licensed by Texas or another state to provide the same professional service rendered by the professional corporation.⁷⁴ A professional organization is an entity, such as a professional corporation or professional LLC, that renders the same professional service as the professional corporation only through owners, managerial officials, employees, or agents, each of whom is a professional individual or professional organization.⁷⁵
 - 3) Of note, PEC Op. 642 (May 2014) (law firm could not confer a title on a non-lawyer employee, such as “chief executive officer” or “chief technology officer” or “principal” without violating the Texas Rules). After substantial criticism, the PEC Opinion 642 was withdrawn. See PEC Op. 642 (Revised) (September 2015) (withdrawing original PEC Op. 642 (May 2014)).
 - 4) Multi-state firms may encounter difficulties registering or qualifying a Texas professional corporation to transact business in some states whose laws are less flexible than Texas with respect to ownership, governance or other matters.

2. Liability Limitations Arising from PC Form

- a. **Similar to Corporation.** Limited liability of shareholders of a PC is provided as in a regular corporation. The professional rendering the professional service is liable for the professional’s own errors, omissions, negligence or incompetent acts or malfeasance.⁷⁶ The PC’s liability for professional negligence is joint and several with the professional committing the error in the course of employment for the PC.⁷⁷

- b. **Limited Liability of Shareholder.** Concerning limitations on liability, the professional corporation resembles other business corporations by protecting shareholders of the PC from liabilities for the debts and obligations of the PC.⁷⁸ The corporate liability protection does not extend to protecting shareholders from liability in tort or contract apart from their status as shareholders. The shareholders of a professional corporation do not have any duty to supervise the officers and employees of the PC.⁷⁹
 - c. **Negligent Supervision.** The potential for personal liability of an officer of a corporation exists for negligently failing to supervise agents of the corporation. A Texas Court of Appeals called the state of Texas law on this point “unsettled.”⁸⁰
 - d. **Distributions.** The TBOC provides that directors of a PC have joint and several personal liability for a distribution by a PC that renders the PC insolvent.⁸¹ A liquidity test is used to determine insolvency.⁸² The shareholders of a PC who knowingly receive an impermissible distribution are liable in contribution to the directors.⁸³ Shareholders could be held liable to return a distribution under the Texas Fraudulent Transfer Act even if they did not know it was improper.⁸⁴
 - e. **Veil Piercing.** Corporate veil piercing principles apply to PCs.⁸⁵
3. **Ethical Issues Arising in PC Form**
- a. **Permissibility of Practicing in Corporation Form**
 - 1) **ABA.** ABA Formal Opinion. 303 (November 1961) (lawyer may practice in corporation form if lawyer rendering service remains personally responsible to the client).
 - 2) **Texas.** PEC Op. 486 (1994) (comparable to ABA Formal Opinion 303).
 - b. **Firm Name**
 - 1) **ABA.** Trade names permitted, with restrictions.⁸⁶
 - 2) **Texas.** Texas Rule 7.01(a) (lawyer shall not practice under trade name, a misleading name, or a firm name containing names other than lawyers practicing in the firm except for an entity designator such as PC).
 - c. Texas Rule 5.04(d) prohibits practicing law in the form of a professional corporation or association if a non-lawyer either owns any interest therein, is a corporate officer or director, or has the right to direct or control the professional judgment of the lawyer.
 - d. Texas Ethics Opinion 597 (May 2010). Lawyers licensed in other states and foreign countries (which licenses lawyers in a system similar to Texas) is a lawyer for purposes of Texas Rule 5.04 and thus fees may be shared.

- e. Texas Ethics Opinion 597 (May 2010) also held that for purposes of authorized practice of law, lawyers licensed in another state or country who provide legal services in Texas from time to time and in compliance with applicable local rules, without a systematic and continuous presence in Texas are permitted.
- f. Texas Ethics Opinion 642 (May 2014) concluded that a law firm could not confer on a non-lawyer the title of CEO or CTO or principal because to do so would imply ownership or control over a firm's affairs. The Opinion 642 was replaced with Texas Ethics Opinion 642 (revised)(Sept. 2015) relenting somewhat to allow certain titles on non-lawyer employees as long as title does not indicate authority over lawyers.

IV. Forms of Law Practice Organization

A. Introduction

- 1. Apart from the major forms of law firm organization, e.g. LLP, PLLC, PC, a significant trend has developed in other forms of organization as lawyer and law firms experience mobility of lawyers and clients, demand by client for legal services over a broader geographical area, and flexibility in the form of delivering legal services.
- 2. Large firms continue to expand into other cities and states and even internationally, by acquiring a local firm as a base, or starting de novo. Smaller law firms choose other means to expand or diversify. These forms are explored.
- 3. Ethics codes in Texas and nationally and the ABA have kept pace with new forms of organization but trail the new developments in some instances. For example, screening for lateral hires is an accepted policy in the ABA Model Rules, but not in Texas.

B. Of Counsel

1. Description of “Of Counsel” Practice Model

- a. Designation of a lawyer as “of counsel” to a firm suggests a close and continuing relationship with a firm, but who is not an associate, member or partner.⁸⁷
- b. The principal ABA opinion on the meaning of “of counsel” is ABA Formal Opinion 90-357 (May 10, 1990). It supersedes prior opinions on the subject and expresses the idea described above that “of counsel” should be limited to those lawyers with whom the law firm has a close, regular and personal relationship and offers four examples of appropriate situations for an “of counsel” designation (part-time, inactive retired, probationary to-be, and permanent lawyer existing between an associate and partner).

- 1) Texas Ethics Opinion 402 (Oct. 1981) is comparable in stating that “of counsel” should denote a regular, continuing and substantial relationship between a law firm and an attorney. In practical effect, the of counsel lawyer is treated as part of the law firm for applying conflict of interest provisions.⁸⁸
- c. In some instances, when the term “of counsel” is used, it signifies a relationship in a specific case such as when a lawyer not in the firm works on a brief.⁸⁹
 - 1) Texas Ethics Opinion 402 (Oct. 1981) is not as liberal as the ABA Formal Opinion 90-357 in that it stresses the relationship as being “close, regular, personal” and “regular, continuing and substantial” which implies that a single relationship is impermissible in Texas.
- d. In some instances, when the term “of counsel” is used, a law firm is permitted by ABA Formal Opinion 90-357 to become of counsel to another lawyer or firm. Many states do not allow such a relationship.⁹⁰
 - 1) The prior ABA opinion 330 was contrary, not permitting an attorney to have “of counsel” relationships with more than one firm.
 - 2) Texas Ethics Opinion 402 followed ABA Formal Opinion 330 and opined that an “of counsel” relationship could only exist with one firm. The Texas Ethics Opinion 402 has not been changed or updated in light of the change of the ABA opinion.

2. Liability Issues in Of Counsel Form

- a. Malpractice insurance will typically treat an of counsel lawyer as part of the law firm. Disclosure of the of counsel relationships will be required on the malpractice insurance application. Will the of counsel lawyer have his or her own malpractice insurance? Will the firm and the of counsel’s malpractice insurance conflict?⁹¹
- b. Vicarious liability may exist for the of counsel lawyer. Actual authority of the “of counsel” lawyer could be a factor in establishing liability. Listing the “of counsel” lawyer on the firm letterhead creates apparent authority.

3. Ethics Issues Arising in Of Counsel Form

a. General Guidance

- 1) **ABA.** A law firm is permitted by ABA Formal Opinion 90-357 to become of counsel to another lawyer or firm. Many states do not allow such a relationship.⁹² The principal ABA opinion on the meaning of “of counsel” is ABA Formal Opinion 90-357 (May 10, 1990), which supersedes prior opinions on the subject and expresses the idea that of counsel should be limited to those lawyers with whom the law firm has a close, regular and

personal relationship). The opinion offers four examples of appropriate situations for an “of counsel” designation (part-time, inactive retired, probationary to-be, and permanent lawyer existing between an associate and partner). Lawyer permitted to be of counsel to two law firms.

- 2) **Texas.** Texas Ethics Opinion 402 (Oct. 1981) is the general authority for “of counsel” lawyers. The title “of counsel” denotes “a regular, continuing and substantial relationship between a law firm and an attorney. An attorney's mere availability for consultation with firm members, or prior, sporadic association is not sufficient to fulfill this requirement.”

- a) Further, Texas Ethics Opinion 402 states that an attorney may not be "of counsel" to more than two firms.

b. Disqualification Extended to Of Counsel Lawyer (and the Firms)

- 1) Of counsel lawyers are treated as being associated with a firm for purposes of imputed disqualification. A lawyer serving as of counsel to two law firms means that the lawyer and both law firms are treated as one firm for purposes of disqualification.⁹³
- 2) Most of the time, the issue in of counsel conflicts of interest cases pertains to former client conflicts, such as when lawyer left Firm A to become of counsel to Firm B. In litigation, Firm B represents a client of Firm A in a substantially related matter to prior representation. Is there attribution of information from the lawyer to Firm B thus disqualifying Firm B? Cases necessarily involve an examination of the facts.
- 3) Texas Ethics Opinion 445 (May 1987). Of counsel lawyer C to a law firm partnership composed of A and B. Client had dispute with A and B over commercial partnership and ceased using A and B as lawyers. Client sued A and B and wishes C to represent him in suit against A and B. Lawyer C is a lawyer in or associate with Lawyers A and B for ethics purposes.

- c. **Imputed Knowledge.** Of counsel lawyer would have imputed knowledge of the information available to the law firm.

C. Contract (or Temp) Lawyers

1. Description of Contract (or Temp) Lawyer Practice Model

- a. A temporary lawyer might be hired for a specific time period or project. The temp lawyer solves a staffing need or provides a skill or knowledge to a situation.
 - b. The temp lawyer might and probably does work for multiple firms simultaneously.

2. Liability Issues in Contract (or Temp) Lawyer Form

- a. **Vicarious Liability.** The general rule that vicarious liability does not extend to acts of independent contractors is well-known. This general rule invites consideration of the role of the contract lawyer and his or her independence from the law firm.
- b. **Malpractice.** The law firm's duty of care and competence to the client is arguably breached by the negligent act of a contract lawyer.

3. Ethics Rules Arising with Contract (or Temp) Lawyers

a. Supervision

- 1) **ABA.** ABA Model Rule 5.2. Lawyer is bound by Model Rules even though acting at the direction of another lawyer, and does not violate the Model Rules if acting per supervisory lawyer's reasonable resolution of an arguable question of professional duty.
- 2) **Texas.** Texas Rule 5.02, Responsibilities of a supervised lawyer. A supervised lawyer is bound by the Texas Rules even though acting under the supervision of another person, except if supervised lawyer acts in accordance with supervisory lawyer's reasonable resolution of an arguable point of professional conduct.

b. Imputation of Information

- 1) The direct conflict of interest rules treat the temp lawyer just like any other lawyer in the firm. The temp lawyer could not personally work on matters for clients of different firms if the representation is directly adverse to one another.
- 2) For imputed disqualification, the inquiry involves the particular facts of the work of the temp lawyer. If the temp lawyer only works on a single matter and does not have access to the broader client information, then the temp lawyer is not associated with the firm, but is treated as separate from the law firm, just like two law firms associating together for a case.
- 3) If the temp lawyer works on a variety of client matters and has information access across the broad array of client information, then the temp lawyer will be treated as associated for purpose of the imputation rule.⁹⁴
- 4) The principal ABA opinion on temp lawyers is ABA Formal Opinion 88-356 (1988) and defines a temp lawyer as "a lawyer engaged by a firm for a limited period, either directly or through a lawyer placement agency." Access to information is the principal determinant. A temp lawyer with wide-ranging access to law firm client information could be deemed an associate.⁹⁵

c. Fee Splitting and Disclosure

- 1) **Texas.** Texas Rule 1.04, Fees. Lawyer has a duty to charge only a reasonable fee. Subparagraph (f) requires fees divided among lawyers not in the same firm to be proportional to services performed, or among lawyers assuming joint responsibility for representation if a client consents to another arrangement with full disclosure as provided in the rule.
 - a) Texas Professional Ethics Opinion Op. 577 (March 2007) (contract lawyer is not considered to be in the same law firm for whom the lawyer is working; if contract lawyer's time spent working on a matter is billed to the client involved at a rate higher than the compensation being paid to that lawyer by the firm, then there is a division of fees between two firms within the meaning of Texas Rule 1.04(f), thus requiring the firm and that lawyer to comply with that Rule; but if no markup is involved, such a division does not occur).
- 2) **ABA.** ABA Model Rule 1.5. Lawyer shall not agree to an unreasonable fee, and listing factors. Subparagraph (e) permits division of fees among lawyers of different firms if proportional, or among lawyers assuming joint responsibility where the client agrees and total fee is reasonable.

d. Employee Leasing Company

- 1) Texas Professional Ethics Opinion 508 (1994) does not permit use of an employee leasing company to hire attorneys, temporary or contract or otherwise, if the leasing company provides similar services to other law firms; it was the equivalent of one large law firm. Later, in Texas Professional Ethics Opinion 515 (1996) staff attorneys were permitted to be leased under conditions. Finally, Professional Ethics Opinion 560 (2005) concluded that it was ethically permissible for a law firm to lease lawyers; the lawyers were employees of the leasing company for payroll tax purposes, and again with conditions.

D. Rent Space; Subcontract Work with Tenant Lawyers**1. Description of Rent Space or Subcontract Practice Form**

- a. **Scenario 1:** Lawyers rent space from one another, and perhaps arrange for other services also, such as clerical or secretarial services.
- b. **Scenario 2:** Lawyers hold themselves out as a law firm, but in reality just share space.

2. Liability Issues in Renting Space or Subcontract Work Form

- a. Liability issues should be the common ones for landlord-tenant for a real estate lease relationship between law firm and tenant lawyer.

- b. Liability risks could expand depending upon the nature of the public disclosure of the relationship.
3. **Ethics Issues Arising in Renting of Space or Subcontract Form**
- a. **Misleading Firm Name.**
 - 1) **ABA.**
 - 2) **Texas.** PEC Op. 478 (1991)(solo practice lawyers who rent space together could not practice under the name “Law Office of A and B” without disclaimer of partnership status). PEC Op. 478 (1991)(lawyers who shared space could not practice under “Smith, Jones and Washington – Law Offices of Independent Practitioners”)
 - b. **Imputation of Knowledge About Client**
 - 1) There should not be an imputation of confidential information in Scenario 1 just because space is rented or services are obtained. The lawyers are not associated.
 - 2) A distinction is drawn when the lawyers hold themselves out to the public as a firm. Apart from issues about false advertising, the mutual access to information is the issue. If the office space is open, and there are no physical barriers preventing another lawyer from looking at confidential information, then disqualification is a distinct possibility.⁹⁶
4. **Other Ethics Issues**
- a. As described by Schuwerk & Hardwick, in their treatise, there are two Texas ethics opinions dealing with the issue of implying two or more lawyers are practicing together, when they are not.
 - 1) The earlier of the two opinions concluded that practicing together under the name of “Law Offices of A and B” would cause a reasonable person to conclude that they practice together.⁹⁷ A affirmative disclaimer would solve the problem, said the opinion.
 - 2) The second of the two opinions confronted a proposed label, “SMITH, JONES AND WASHINGTON—Law Offices of Independent Practitioners.” This was not sufficient, in the view of the opinion, to constitute a disclaimer of partnership.⁹⁸
 - b. Firms sharing office space must maintain adherence to Texas Rule 1.04(f) concerning division of fees. The firms should maintain separate IOLTA accounts.

- c. Schuwerk & Hardwick at §12.1 describe other issues if law firms sharing space also share staff, computers, e-mail systems creating the risk of sharing confidential information.

E. Referral of Work and Referral Fee

1. Description of Referral Practice

- a. A firm refers a case to another firm and materially participates in the case to be entitled to a referral fee.⁹⁹

2. Liability Issues Arising in Referrals Form

- a. **Malpractice.** The referring attorney may create liability by his or her actions incident to the referral, such as making incorrect representations to the handling attorney, or to the client (e.g. failing to advise client of impending expiration of limitations).¹⁰⁰
- b. **Negligent Referral.** A failure to refer a matter to a specialist may create liability risks or referral of a matter to an incompetent attorney.¹⁰¹
- c. **Joint Enterprise Liability.** Liability can exist when the referring and handling attorney are found to have engaged in a joint venture.¹⁰²

3. Ethics Issues Arising in Referral of Work Form

- a. **ABA.** Model Rule 1.5(e). Provides for concept of joint responsibility for representation if there is a referral fee.
- b. **Texas.** Texas Rule 1.04(f). Division of fees among lawyers not in the same firm may be made if the division is proportional to services performed or among lawyers who accept joint responsibility for the representation if client consents.¹⁰³
- c. **Imputation of Knowledge About Client Between the Two Firms**
 - 1) The issue is whether there is a likelihood of sharing of confidential information between the referring and referred firm, in light of the substantial participation requirement.
 - 2) In a number of decided cases, an incentive to share information was found and the court imputed knowledge from one firm to the other.

F. Lawyers Work Together on One Case

1. Description of Lawyers Working Together on One Case Practice Form

- a. Two law firms come together to work for a common client on a single matter. This could be a general counsel firm and a local counsel firm working on a common and single litigation matter for the client.

- b. Then suppose that the two law firms are adverse in another matter.
- 2. **Liability Issues Arising from Lawyers Working Together on One Case**
 - a. The risk of vicarious liability and supervisory liability is most significant on the one case, but not in a broader context.
- 3. **Ethics Issues Arising in Lawyers Working Together on One Case Practice Form**
 - a. **Imputation of Knowledge**
 - 1) The single matter coordination between the firms limits the risk of broader imputation. Courts will look for a showing of actual disclosure.¹⁰⁴
 - 2) For example, in *American Can Co. v. Citrus Feed Co.*¹⁰⁵ local counsel for plaintiff was taking deposition of the defendant. The local counsel firm in which the attorney taking the deposition was a partner was also representing another defendant in an IRS tax audit, and in which the attorney arguably learned confidential information about the defendant. The local counsel firm was disqualified because knowledge about the defendant learned in the tax audit representation was imputed to the attorney taking the deposition. The general counsel law firm which was working with the local firm in the litigation matter was not disqualified.
 - 3) See also *Brennan's Inc. v. Brennan's Restaurants, Inc.*¹⁰⁶ (a lawyer who represented the defendant over a long period could not represent plaintiff here suing defendant; lawyer retained to assist on this single case was not disqualified).
 - 4) See also, *Smirl v. Bridewell*,¹⁰⁷ in which local counsel for defendant withdrew from case because plaintiff contacted the firm, but did not hire the firm, did not taint defendant's regular counsel and did not require disqualification, within the meaning of Texas Rule. 1.06; local firm was not associated with regular counsel.

G. Firms Work Together on a Series of Cases

- 1. **Description of Firms Working Together on a Series of Cases Practice Form**
 - a. Two or more firms work together on a series of cases involving an issue, such as mass torts of various kinds.
 - b. The continuing nature of the firms' relationship suggests the risk that a greater quantity of confidential information might be shared.

2. Liability Issues Arising from Firms Working Together on a Series of Cases Form

- a. The traditional issues of vicarious and supervisory liability are the principal risks.

3. Ethics Issues Arising in Firms Working Together on a Series of Cases Form

a. Imputation of Knowledge

- 1) When firms work together on substantial matters, and regularly share information and strategy, then disqualification in another matter is a possibility.
- 2) For example, three law firms have brought products liability cases against a corporate defendant and have worked together closely in the cases. One of the firms hires a lateral lawyer who had worked for another firm that had defended the corporate defendant. The confidences that the lateral lawyer brought into the firm would disqualify the firm.
- 3) The other two firms would likely have access to the lateral lawyer information as well, in view of the close relationship between the firms and would likely be disqualified.
- 4) Screening could be an option, at least insofar as the ABA rules are concerned, which permit screening.

H. Firms Associate Together

1. Description of Firms Associating Together Practice Form

- a. Firms with separate names and managed separately decide to jointly handle some cases or matters or regularly refer cases to each other that are within their respective geographic areas or areas of concentration. The firms announce publicly that they are associated or affiliated.

2. Liability Issues Arising in Firms Associating Together Form

- a. The traditional issues of vicarious liability and supervisory liability seem to be the principal issues.

3. Ethics Issues Arising in Firms Associating Together

- a. **ABA.** The leading ABA opinion on associated or affiliated law firms is ABA Formal Opinion 84-351 (1984), which described the relationship among the associated or affiliated law firms as close and regular, continuing and semi-permanent and indicated imputation of knowledge among the law firms and all lawyers in the firms.¹⁰⁸

- 1) In 1994, the ABA admitted that its earlier efforts to define the principles of networked or associated firms were unsuccessful.¹⁰⁹
- 2) In *Mustang Enterprises, Inc. v. Plug-In Storage Systems, Inc.*,¹¹⁰ disqualification was extended to the associated firm, the court basing its conclusion on ABA Formal Opinion 84-351. The court concluded that the firms were closely related mostly based on how the firms held themselves out.

4. Other Ethics Issues

- a. Texas Rule 7.01(d) prohibits the misrepresentation of a lawyer's status as a partner or association. Thus, two separate law firms who associated together to joint venture cases solely in another jurisdiction, but kept their firms separate, were not permitted to combine their names as in "M & N Law Firm"¹¹¹
 - 1) Texas Ethics Opinion 591¹¹² concluded that three law firms that were handling a group of cases together could not say "Firm A Group" for to do so created the misleading impression of an existing law firm and violated Texas Rule 7.01(a) (misleading firm name).
 - 2) Texas prohibits use of firm trade names. The ABA permits their use.¹¹³
- b. Texas Ethics Opinion 597 (May 2010) permits fee sharing with non-Texas lawyers and further establishes guidelines for when non-Texas lawyers can provide legal services in Texas without engaging in unauthorized practice of law by using the phrase "time to time" and not "continuous and systematic."

I. Legal Networks

1. Description of Practice Model

- a. A legal network is a group of law firms that join together as equal members, under a name different from their individual firm names, to share expertise, information and referrals.
- b. Again, the facts are determinative. An occasional referral does not make a law firm.

2. Ethics Issues Arising in Law Firm Networks

a. Informing Clients

- 1) Clients need to be informed of what the network means or of the nature of the network arrangements.¹¹⁴

b. Imputation of Knowledge

- 1) The leading opinion on legal networks is ABA Formal Opinion 94-388¹¹⁵ in which the opinion said the ethical implications of a legal network depend upon the meaning of the relationships.
- 2) If the network is only for casual referrals then inference of a single firm is not raised and Model 1.7(b) is not implicated, if there was no sharing of clients, confidences, fees or other professional engagements.
- 3) A close relationship among firms in the network, on the other hand, would more likely lead to disqualification between the firms, absent client consent.
- 4) Professor Morgan asks whether lawyers in the same network but who are on opposite sides of a matter would pull punches, which, if so, might lead a court to find one firm.¹¹⁶

3. Professional Independence of Lawyer: Rule 5.04

- a. Texas Rule 5.04 prohibits a lawyer or law firm from sharing a legal fee with a non-lawyer, with some exceptions there noted.
- b. Lawyers licensed and in good standing in another state (or country) are treated for this rule as being lawyers.¹¹⁷

4. Unauthorized Practice of Law

- a. Texas Ethics Opinion 597 (May 2010) permits out of state lawyers to provide legal services in Texas without it being unauthorized practice of law if the services are not provided on a continuous, systematic, basis. The opinion also permitted a similar rule for foreign lawyers, if the licensing method in a foreign country is similar to Texas.¹¹⁸

J. Virtual Law Firms**1. Description of Practice Model**

- a. The advent of the internet has introduced the idea of the virtual law firm, the form of which has yet to emerge in specific form. Early indicators are that a virtual firm exists only on the internet, but there is no indication of the sharing of information among the lawyers in the virtual firm.

2. Ethics Issues Arising in Virtual Law Firms**a. Imputation of Knowledge About Client Between Firms**

- 1) The ethical implications are unclear, but will turn on the facts.

- 2) Should the lawyers in the virtual firm be treated as associating together for one single case? If so, the conflicts are generally not imputed to the others. If the facts reveal close coordination and consultation among the lawyers, then they might be viewed as associated together.
- 3) The core inquiry about a virtual law firm is about the sharing of confidences and common financial interests.¹¹⁹

V. Conclusion

BIBLIOGRAPHY

The principal resources consulted in the preparation of this paper and upon which substantial reliance has been placed, are listed below. Individual citations to these important works are generally omitted throughout this paper in the interest of convenience.

Treatises:

Robert P. Schuwerk & Lillian B. Hardwick, *Handbook Of Texas Lawyer And Judicial Ethics: Attorney Tort Standards, Attorney Ethics Standards, Judicial Ethics Standards, Recusal and Disqualification of Judges*, Texas Practice Series, 48 Tex. Prac., Tex. Lawyer & Jud. Ethics (2016 ed.)

Elizabeth S. Miller & Robert A. Ragazzo, Part IV, *Professional Entities and Other Miscellaneous Business Corporations*, 20 Texas Practice Series: Business Organizations §§ 12:2-12:21, 24:1-24:12, 24:25-24:35 (3d ed. Oct. 2016)

E. Bennett, E. Cohen & H. Gunnarsson (eds), *Annotated Model Rules of Professional Conduct* (ABA 8th ed.)

Articles:

Thomas Morgan, *Conflicts of Interest and The New Forms of Professional Associations*, 39 S. Tex. L. Rev. 215, 219 (1998);

Elizabeth S. Miller, *The Perils and Pitfalls of Practicing in a Texas Limited Liability Partnership*, 43 Tex. Tech L. Rev. 563 (2011) (amendments in 2011 and 2015 have ameliorated several of the perils and pitfalls discussed in this article);

Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences – The Traps of Limited Liability Law Firms*, 54 Wash. & Lee L. Rev. 717 (1997).

¹ Citations to the Texas Rules: Supreme Court of Texas, rules governing the state bar of Texas art. X, § 9 (Texas Disciplinary Rules of Professional Conduct) (“Tex. Rules,” “Texas Rules”). Citations to ABA Model Rules: Model Rules of Professional Conduct (1983) (“ABA Model Rules” or “Model Rules.”).

² See Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences – The Traps of Limited Liability Law Firms*, 54 Wash. & Lee L. Rev. 717 (1990) for history and description of the second phase of the development of limited liability entities.

³ ABA Rule 1.10(a).

⁴ See, e.g., ABA Formal Opinion 94-388 (Dec. 4, 1994)

⁵ Texas Rule 1.06, Comment 1 (“Loyalty is an essential element in the lawyer’s relationship to a client.”).

⁶ Texas Rule 1.05(b); ABA Rule 1.6.

⁷ See *Brennan’s, Inc. v. Brennan’s Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979) for excellent discussion of the distinction between privilege and duty of confidentiality.

⁸ *Sherwood v. South*, 20 S.W.2d 805 (Tex. App. - San Antonio, 1930, writ ref'd); *Lott v. Ayres*, 611 S.W.2d 473 (Tex. App. - Dallas, 1980, writ ref'd n.r.e.).

⁹ Texas Rule 1.09(a)(3).

¹⁰ See, e.g., ABA Formal Opinion 94-388 (Dec. 4, 1994) ("Relationships Among Law Firms").

¹¹ Model Rule 1.10(a); 1.7 (Conflict of Interest: Current Client), 1.9 (Duties to Former Clients).

¹² *Schuwerk & Hardwick* at §6.6.

¹³ *Schuwerk & Hardwick* at §6.6.

¹⁴ *In re Users System Services, Inc.*, 22 S.W.3d 331, 334 (Tex. 1999) (footnote omitted); cited in *Schuwerk & Hardwick* at §6.6 at n108.

¹⁵ See generally, Elizabeth S. Miller & Robert A. Ragazzo, *Professional Entities and Other Miscellaneous Business Organizations*, 20 Tex. Prac. Business Organizations §24:1 (3d. ed. 2016).

¹⁶ See also Texas Attorney General Opinion No. MW-99 (December 13, 1979) at page 4 ("The Texas Business Corporation Act [predecessor of the provisions of the TBOC governing ordinary for-profit corporations] and the Texas Professional Corporation Act [predecessor of the provisions of Title 7 of the TBOC governing professional corporations] are as a general matter mutually exclusive . . .").

¹⁷ See generally Elizabeth S. Miller, *The Perils and Pitfalls of Practicing Law in a Texas Limited Liability Partnership*, 43 Texas Tech. L. Rev. 563 (2011).

¹⁸ See Tex. Bus. Orgs. Code Ann. §§ 152.801-152.805 (West 2016).

¹⁹ Tex. Bus. Orgs. Code Ann. § 152.801(a) (West 2016).

²⁰ Tex. Bus. Orgs. Code Ann. § 152.801(d)(2)(West 2016).

²¹ Tex. Bus. Orgs. Code Ann. §152.801(d)(1), (3)(West 2016).

²² Tex. Bus. Orgs. Code Ann. §152.806(a), (b)(West 2016).

²³ Tex. Bus. Orgs. Code Ann. §152.806(c)(West 2016).

²⁴ Tex. Bus. Orgs. Code Ann. §152.806(e)-(h) (West 2016).

²⁵ Tex. Bus. Orgs. Code Ann. § 152.802(c-1) (eff. Jan. 1, 2016) (West 2016).

²⁶ Tex. Bus. Orgs. Code Ann. § 152.802(k) (eff. Jan. 1, 2016) (West 2016).

²⁷ Act of Aug. 26, 1991, ch. 901, § 46, 1991 Tex. Sess. Law Serv. When Texas subsequently approved the Texas Revised Partnership Act (TRPA), it included LLP provisions. Tex. Rev. Civ. Stat. Ann. art. 6132b-3.08(a) (West 1995). TRPA also allowed a limited partnership to become a registered LLP. Id. art. 6132b-3.08(e). See David B. Rae, *Limited Liability Partnerships*, Houston Law., Jan./Feb. 1993, at 47; Robert R. Keatinge, Allan G. Donn, George W. Coleman, Elizabeth G. Hester, *Limited Liability Partnerships: The Next Step in the Evolution of the Unincorporated Business*, 31 Bus. Law. 147, 159 (1995).

²⁸ Tex. Rev. Civ. Stat. Ann. art. 6132b, § 15 (West 1970 & Supp. 1995). To same effect after Texas adopted TRPA, Act of June 19, 1993, ch. 917, § 1, 1993 Tex. Sess. Law Serv. 3890, 3897-98 (Vernon) (codified at Tex. Rev. Civ. Stat. Ann. art. 6132b, § 3.08) (West Supp. 1995)).

²⁹ Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 113, 1997 Tex. Gen. Laws 1516, 1594-95 (amending § 3.08 of the Texas Revised Partnership Act (Article 6132b-3.08, Vernon's Texas Civil Statutes)) (expired Jan. 1, 2010, pursuant to Act of May 13, 2003, 78th Leg., R.S., ch. 182, § 11, 2003 Tex. Gen. Laws 267, 596 (amending Article XI of the Texas Revised Partnership Act (Article 6132b-11.01 et seq., Vernon's Texas Civil Statutes) by adding § 11.05)); Act of May 13, 2003, 78th Leg., R.S., ch. 182, § 1, 2003 Tex. Gen. Laws 267, 526 (effective Jan. 1, 2006) (current version at Tex. Bus. Orgs. Code Ann. § 152.801(a) (West 2016)).

³⁰ Tex. Bus. Orgs. Code Ann. § 152.801(a) (West 2016).

³¹ Tex. Bus. Orgs. Code Ann. § 152.801(e)(2) (West 2016).

³² Tex. Bus. Orgs. Code Ann. § 152.801(a) (West 2016).

³³ Tex. Rev. Civ. Stat. Ann. Art. 6132b, § 15(2) (repealed Jan. 1, 1999). These provisions were carried forward in substantially similar form in TRPA when it became effective January 1, 1994.

³⁴ Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 113, 1997 Tex. Gen. Laws 1516, 1594-95 (amending § 3.08 of TRPA. These provisions were carried forward in the TBOC. Tex. Bus. Orgs. Code Ann. § 152.801(b) (West 2010). The exceptions in Section 152.801(b) to the liability protection provided by Section 152.801(a) were removed from the statute effective September 1, 2011.

³⁵ Act of May 27, 2011, 82nd Leg., R.S. ch. 139, 2011 Tex. Gen. Laws 651 (amending § 152.801(b) of the TBOC).

³⁶ Tex. Bus. & Com. Code Ann. § 24.006 (West 2016).

³⁷ Tex. Bus. Orgs. Code Ann. § 152.051(b) (West 2016).

³⁸ See *Leal v. Mokhabery* (In re Leal), 360 B.R. 231, 240 n. 6 (Bankr. S.D. Tex. 2007).

³⁹ Tex. Bus. Orgs. Code Ann. §§ 11.051, 11.057, 152.502 (West 2016). Recent amendments to the Revised Uniform Partnership Act specify that the passage of 90 days during which the partnership does not have at least two partners is an event of dissolution requiring a winding up (UNIF. P'SHIP ACT § 801(6) (2013)), but the Texas statute is silent regarding this situation.

⁴⁰ The Secretary of State will not accept for filing an LLP registration or annual report that indicates there is only one partner.

⁴¹ Tex. Bus. Orgs. Code Ann. §§ 11.102, 11.356 (West 2016).

⁴² Tex. Bus. Orgs. Code Ann. §§ 11.351, 11.359(a) (West 2016).

⁴³ Tex. Bus. Orgs. Code Ann. § 11.001(3) (West 2016).

⁴⁴ Tex. Bus. Orgs. Code Ann. § 11.359(a) (West 2016).

⁴⁵ Tex. Bus. Orgs. Code Ann. § 11.359(b) (West 2016).

⁴⁶ Tex. Bus. Orgs. Code Ann. § 1.002(57).

⁴⁷ Tex. Bus. Orgs. Code Ann. § 11.103.

⁴⁸ See Elizabeth S. Miller, *The Perils and Pitfalls*, *supra*.

⁴⁹ State Bd of Tex Professional Ethics Comm'n, Op. 597 (May 2010). See Schuwerk & Hardwick, §10.4 at n. 32.

⁵⁰ Tex. Bus. Orgs. Code Ann. §§ 301.003(6), 301.006(b) (West 2016).

⁵¹ Tex. Bus. Orgs. Code Ann. §§ 401.001, 402.003 (West 2016).

⁵² See <http://www.sos.state.tx.us/corp/forms/entitychart.pdf>. This chart indicates that attorneys may use the PC and PLLC form, but not the LLC form and is based on FAQ No. 9 found at <http://www.sos.state.tx.us/corp/formationfaqs.shtml#BF9>. If an attorney forms a LLC and uses in the statement of purpose that the LLC will engage in "any lawful purpose" and does not specifically indicate that the entity will be providing legal services in the entity name or the stated purpose, then the Secretary of State's office will not readily catch the intention.

⁵³ Tex. Bus. Orgs. Code Ann. §§ 301.004(2), 301.006(b), (d).

⁵⁴ See also Tex. Bus. Orgs. Code Ann. § 301.010(a) (West 2016).

⁵⁵ Tex. Bus. Orgs. Code Ann. §301.010(a) (West 2016).

⁵⁶ Tex. Bus. Orgs. Code Ann. §§ 101.002, 101.114, 304.001 (West 2016).

⁵⁷ *Watkins v. Basurto*, 2011 WL 1414135 (Tex. App.—Houston [14th Dist.] 2011, no pet.). See discussion at E. Miller & R. Ragazzo *Business Organizations* at §18.8.

⁵⁸ Tex. Bus. Orgs. Code Ann. § 101.206 (West 2016).

-
- ⁵⁹ Tex. Bus. Orgs. Code Ann. § 101.206(f) (West 2016).
- ⁶⁰ Tex. Bus. Orgs. Code Ann. § 101.206(d) (West 2016).
- ⁶¹ Tex. Bus. & Com. Code Ann. § 24.006 (West 2016).
- ⁶² See discussion at E. Miller & R. Ragazzo Business Organizations at §20.7.
- ⁶³ 493 SW3d 545 (Tex. 2016).
- ⁶⁴ Tex. Bus. Orgs. Code Ann. § 5.060 (West 2016).
- ⁶⁵ State Bd of Tex Professional Ethics Comm'n, Op. 486 (March 1994).
- ⁶⁶ Tex. Bus. Orgs. Code Ann. §§ 153.102, 153.353 (West 2016).
- ⁶⁷ Tex. Bus. Orgs. Code Ann. § 153.003(c) (West 2016).
- ⁶⁸ *Strebel v. Wimberly*, 371 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).
- ⁶⁹ State Bd of Tex Professional Ethics Comm'n, Op 618 (June 2012).
- ⁷⁰ Tex. Bus. Orgs. Code Ann. § 301.003(3) (West 2016).
- ⁷¹ Texas Rule 5.04(d).
- ⁷² Tex. Bus. Orgs. Code Ann. §§ 301.007(b), 301.004(2), 301.003(5), (7); (West 2016). PEC Opinion 597 (May 2010)(for purposes of Rule 5.04, “the term ‘lawyer’ must include lawyers licensed in jurisdictions other than Texas,” because “a contrary interpretation would require the obviously erroneous conclusion that Texas attorneys are barred from practicing in any law firm having a partner or member who is licensed in another state but who is not licensed in Texas.”). See also, *In re Hollis*, 2011 WL 1168403 (Bankr. E.D. Tex. 2011) (professional corporation may only issue shares to individuals who are licensed professionals; invalidates attempts to transferred shares in the P.C., which was formed to provide legal services, to family trust).
- ⁷³ Tex. Bus. Orgs. Code Ann. §301.007(b) (West. 2016).
- ⁷⁴ Tex. Bus. Orgs. Code Ann. §301.003(5) (West. 2016).
- ⁷⁵ Tex. Bus. Orgs. Code Ann. § 301.003(7) (West 2016).
- ⁷⁶ Tex. Bus. Orgs. Code Ann. § 301.010(a) (West 2016).
- ⁷⁷ Tex. Bus. Orgs. Code Ann. §301.010(a) (West 2016).
- ⁷⁸ Tex. Bus. Orgs. Code Ann. §§ 21.223, 303.001 (West 2016). See also Tex. Bus. Orgs. Code Ann. § 303.002(b) (West 2016) (“A shareholder of a professional corporation is subject to no greater liability than a shareholder of a for-profit corporation.”).
- ⁷⁹ Tex. Bus. Orgs. Code Ann. § 303.002(a) (West 2016) (“A shareholder of a professional corporation is not required to supervise the performance of duties by an officer or employee of the corporation.”). There remains a general duty for the professional corporation to supervise or liability for negligently failing to do so. *Burnap v. Linnartz*, 38 S.W.3d 612, 622 (Tex. App.—San Antonio 2000, no pet.).
- ⁸⁰ *Watkins v. Basurto*, 2011 WL 1414135 (Tex. App.—Houston [14th Dist.] 2011, no pet.). See discussion at E. Miller & R. Ragazzo Business Organizations at §18.8.
- ⁸¹ Tex. Bus. Orgs. Code Ann. §§ 21.316(a), 21.303, 303.001 (West 2016).
- ⁸² Tex. Bus. Orgs. Code Ann. § 1.002(40) (West 2016).
- ⁸³ Tex. Bus. Orgs. Code Ann. § 21.21.318(a) (West 2016).
- ⁸⁴ Tex. Bus. & Com. Code Ann. § 24.006 (West 2016).
- ⁸⁵ Tex. Bus. Orgs. Code Ann. §§ 21.223-21.225, 303.001(West 2016).
- ⁸⁶ ABA Model Rule 7.5(a).
- ⁸⁷ See State Bd of Tex Professional Ethics Comm'n, Op. 402 (1981).

⁸⁸ See State Bd of Tex Professional Ethics Comm'n, Op. 445 (1987).

⁸⁹ ABA Comm. on Ethics and Professional Responsibility, Formal Op. 90-357 (May 10, 1990).

⁹⁰ See Harold G. Wren & Beverly J. Glascock, *The Of Counsel Agreement: A Guide for Law Firm and Practitioner* (ABA, 2005, 3d ed.).

⁹¹ Bassingthwaighe, Counsel for Those Thinking About Entering Into Of Counsel Relationships, 42-Oct. Mont. Law. 32 (2016)(article authored by experienced malpractice insurance attorney and thus focuses on these issues).

⁹² See Harold G. Wren & Beverly J. Glascock, *The Of Counsel Agreement: A Guide for Law Firm and Practitioner* (ABA, 2005, 3d ed.).

⁹³ ABA Comm. on Ethics and Professional Responsibility, Formal Op. 90-357 (May 10, 1990)(“[T]he effect of two or more firms sharing an of counsel lawyer is to make them all effectively⁸ a single firm, for purposes of attribution of disqualification.”). See Harold G. Wren & Beverly J. Glascock, *The Of Counsel Agreement: A Guide for Law Firm and Practitioner* (ABA, 2005, 3d ed.).

⁹⁴ ABA Comm. on Ethics and Professional Responsibility, Formal Op. 90-357 (May 10, 1990). The law firm could prove otherwise, of course, and the imputation (or disqualification) could be avoided.

⁹⁵ See generally K. Maher, *The Permanent Legacy of the ABA Opinion on Temporary Lawyers*, 13 Prof. Law., no. 1, at 18 (2001).

⁹⁶ See *Monroe v. City of Topeka*, 988 P.2d 228 (Kan. 1999) (indicia of lawyers presenting themselves to public as a firm for purposes of imputed disqualification include sharing office space, telephone, facsimile number, and mailing address); D.C. Ethics Op. 303 (2001) (whether sharing office space leads to imputed disqualification depends upon specific arrangements); Or. Ethics Op. 2005-50 (2005) (imputation if lawyers share common employee with access to protected information).

⁹⁷ State Bd of Tex Professional Ethics Comm'n, Op. 478 (1991).

⁹⁸ State Bd of Tex Professional Ethics Comm'n, Op. 509 (1994).

⁹⁹ Model Rule 1.5(e).

¹⁰⁰ E.g. *Scott v. Francis*, 838 P.2d 596 (Or. 1992). See Note, *Is the Model Rule Outdated? Texas Carries Referral Fee Responsibility into the Limited Liability Era*, 84 Texas L. Rev. 509 (2005) from which some of this discussion was taken.

¹⁰¹ E.g. *Tormo v. Yormark*, 398 F. Supp. 1159, 1171 (D.N.J. 1975).

¹⁰² E.g. *Duggins v. Guardianship of Wash.*, 632 So. 2d 420 (Miss. 1993).

¹⁰³ See Schuwerk & Hardwick §6.4 for extensive discussion of the Texas rules on referral fees and their history.

¹⁰⁴ See Restatement (Third) of the Law Governing Lawyers § 123 cmt. (c)(iii) (2000) (conflict imputed within firm not extended to lawyers in another firm working on another matter).

¹⁰⁵ 425 F.2d 1125 (5th Cir. 1971).

¹⁰⁶ 590 F.2d 168 (5th Cir. 1970).

¹⁰⁷ 932 S.W.2d 743 (Tex. App. Waco, 1996), orig. proceeding (leave denied).

¹⁰⁸ *Mustang Enterprises, Inc. v. Plug-In Storage Systems, Inc.*, 874 F. Supp. 881 (N.D. Ill. 1995)(disqualifying both associated or affiliated firms). See also *Johnson v. Shaines & McEachern, P.A.*, 835 F. Supp. 685 (D.N.H. 1993) (holding that two firms could be treated as partners in malpractice suit for failure to file claim after undertaking representation where firms had entered into joint venture agreement).

¹⁰⁹ ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-388 (1994).

¹¹⁰ 874 F. Supp. 881 (N.D. Ill. 1995).

¹¹¹ State Bd of Tex Professional Ethics Comm'n, Op. 638 (Oct. 2013).

¹¹² State Bd of Tex Professional Ethics Comm'n, Op. 591 (Jan. 2010).

¹¹³ Texas Rule 7.01(a); Model Rule 7.5(a).

¹¹⁴ ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-388 (1994)

¹¹⁵ ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-388 (1994).

¹¹⁶ Thomas D. Morgan, Conflicts of Interest and The New Forms of Professional Associations, 39 S. Tex. L. Rev. 215, 241 (1998).

¹¹⁷ State Bd of Tex Professional Ethics Comm'n, Op. 597 (May 2010).

¹¹⁸ Schuwerk & Hardwick, at §10.4 criticize the breath of this rule insofar as foreign lawyers is concerned.

¹¹⁹ Thomas D. Morgan, Conflicts of Interest and The New Forms of Professional Associations, 39 S. Tex. L. Rev. 215, 242 (1998).

Exhibit A

Source of Law on Conflicts of Interest

Researching conflicts of interest issues can be difficult. Useful sources are unfamiliar. Even when pertinent information is found, the context of that information may mislead.¹ Rules of ethics are a critical component of conflicts research.

Texas Disciplinary Rules of Professional Conduct

Texas Disciplinary Rules of Professional Conduct can be commonly found.

1. In Vernon's, the rules appear following Chapter 81 of the Government Code, with annotations to cases and Texas ethical opinions.
2. West's Texas Rules of Court also have the rules.
3. Online, the State Bar has a copy of the rules at http://www.txethics.org/reference_rules.asp?view=conduct (Last visited May 11, 2009).

Federal Courts

Federal courts do not always rely solely on state rules in coming to ethics conclusions.² See *Rand v. Monsanto Co.*,³ which contains a comprehensive survey of the ethical rules adopted by the federal district courts. In federal courts, the ethical standards that govern the conduct of attorneys are determined by federal law.⁴ Where a federal court has adopted by local rule a state's ethical rules, the rules are applicable because the court "has chosen to require attorneys to

¹This discussion taken from Texas Lawyers' Insurance Exchange, Legal Research on Conflict of Interest, reprinted at <http://www.tlie.org/newslet/adv0807/0807-2.htm> (Last visited May 11, 2009).

²This portion of the discussion taken from D. Garland, Ethical Conflicts and Professional Considerations -- Selected Issues, Employment Discrimination and Civil Rights Actions in Federal and State Courts, SD52 ALI-ABA 547 (July 3, 1999).

³926 F.2d 596, 601-03 (7th Cir. 1991).

⁴In re Snyder, 472 U.S. 634, 645 n.6 (1985); See also Schlumberger Technologies, Inc. v. Wiley, 113 F.3d 1153, 1158 (11th Cir. 1997); United Transportation Local Unions 385 and 77 v. Metro North Commuter Railroad Co., 1995 U.S. Dist. LEXIS 15989, *17 (S.D.N.Y. Oct. 30, 1995); Application of Mosher, 25 F.3d 397, 400 (6th Cir. 1994); Resolution Trust Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993); Miano v. AC&R Advertising, Inc., 148 F.R.D. 68, 74 (S.D.N.Y. 1993); In re Finkelstein, 901 F.2d 1560, 1564 (11th Cir. 1990); University Pa-tents, Inc. v. Kligman, 737 F. Supp. 325, 327 (E.D. Pa. 1990).

follow its guidelines, and federal interpretation . . . must therefore prevail."⁵ Thus, even where a federal district court has adopted the ethical rules followed by the state in which it sits, the federal court is not bound by the state court's interpretation of the rules.⁶

In view of this inherent power to govern the conduct of attorneys, federal courts may choose to disregard a provision of a state code of ethics (even as adopted by local rule) when it conflicts with a federal rule of procedure.⁷

Some specialized federal courts have their own rules. For example patent law presents unique issues.⁸

ABA Model Rules

Texas lawyers often work with clients in other jurisdictions where another state's ethics rules may affect liability. For these reasons, it is important to consider the ABA Model Rules as well as any state rules that might affect a particular situation.

The ABA Model Rules also may shed light on ethical issues not directly addressed by the Texas rules.

Also, comparison of Texas and ABA language often sheds light on the intent of the Texas rules. The ABA Model Rules, along with the history of changes in those rules, is online at http://www.abanet.org/cpr/mrpc/model_rules.html. (Last accessed May 11, 2009).

⁵Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990).

⁶Bell Atlantic Corp. vs. Bolger, 2 F.3d 1304, 1316 (3d Cir. 1993); Blasena v. Conrail, 898 F. Supp. 282, 283 n. 1 (D.N.J. 1995); Suggs v. Capital Cities/ABC, Inc., 54 Empl. Prac. Dec. 40,195 (S.D.N.Y. April 24, 1990); County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1413 (E.D.N.Y. 1989) aff'd., 907 F.2d 1295 (2d Cir. 1990); Figueroa-Olmo v. Westinghouse Elec. Corp., 616 F. Supp. 1445, 1449- 50 (D.P.R. 1985); Black v. State of Missouri, 492 F. Supp. 848, 874-75 (W.D. Mo. 1980); J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359-1360 (2d Cir. 1975) (concurring opinion) ("[A] court need not treat the Canons of Professional Responsibility as it would a statute that we have no right to amend. We should not abdicate our constitutional function of regulating the Bar to that extent.").

⁷See Rand, 926 F.2d at 600-01 (held that DR 5-103(B) of the Model Code of Professional Responsibility, which had been adopted by local rule of the Northern District of Illinois, conflicted with Fed. R. Civ. P. 23 and could not be applied to class actions); County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1413-1415 (E.D.N.Y. 1989) aff'd., 907 F.2d 1295 (2d Cir. 1990); See also Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981) (Supreme Court expressed a willingness to allow counsel to contact potential class members notwithstanding possible ethical problems arising from such communication). See Judith A. McMorrow, The (F)utility of Rules: Regulating Attorney Conduct in Federal Court Practice, SF 13 ALJ-ABA 317 (2000).

⁸See D. Hricik, How Things Snowball: the Ethical Responsibilities and Liability Risks Arising from Representing a Single Client in Multiple Patent-related Representations, 18 Geo. J. Legal Ethics 1 (2005). See generally Pamela Phillips & John Steele, Ethics Issues in IP Practice: Trends and Practical Strategies, SH085 ALI-ABA 411 (2003)

The ethics rules are primarily law in disciplinary matters. In legal malpractice cases, ethics rules are evidence of the standard of care, presented by the testimony of expert witnesses.

Ethics opinions are an important source of information on conflicts that may be used by experts. While ethics opinions are advisory only, they are frequently cited in court opinions.

ABA opinions are available individually from the ABA. Information on those opinions is at http://www.abanet.org/cpr/mrpc/model_rules.html (Last accessed May 11, 2009).

Opinions can sometimes be found online on other websites.

Other states' opinions are often available online on dedicated sites.

The ABA/BNA Lawyers' Manual on Professional Conduct is a subscription service providing ABA ethics opinions and rules as well as digests of new cases and ethical opinions from every state.

Texas Ethics Opinions

Texas ethics opinions now appear in the Texas Bar Journal, but without an accompanying consolidated index.

Older opinions were published in the Baylor Law Review.

The Texas Center for Legal Ethics and Professionalism has posted most Texas ethics opinions on their website at http://www.txethics.org/reference_opinions.asp.

The most recent opinions are not yet posted, so reference to the Bar Journal may be necessary for Opinion 577 and higher.

Conflict of Interest Cases

Cases on conflicts of interest can be divided into three general categories:

1. discipline,
2. malpractice, and
3. disqualification.

Each of these types of cases has certain pitfalls when applied in a different context, particularly since lawyers want to avoid problems in all three areas.

Discipline cases often fail to address common situations faced in a liability or disqualification context, and may focus on one particular rule to the exclusion of other considerations.

Malpractice cases require damages for a finding of liability, which may not be required in disqualification or disciplinary contexts.

Disqualification cases often turn upon issues such as when the motion for disqualification is raised, rather than the merits of the ethical issues involved.

A number of sources have compiled legal malpractice cases.

1. Ronald E. Mallen and Jeffrey W. Smith, *Legal Malpractice* 2008 ed. (Thomson West 2008), is a thorough hornbook of legal malpractice cases in the US which includes some loss prevention forms and suggestions.

2. A conflicts specific website maintained by William Freivogel, <http://www.freivogelonconflicts.com/>, is very useful for getting a quick survey of US cases on particular conflict of interest issues.

Two Texas specific publications providing information and analysis of Texas ethics and malpractice issues are:

1. Charles F. Herring, *2008 Texas Legal Malpractice and Lawyer Discipline* (American Lawyer Media 2008)

2. Robert P. Schuwerk and Lillian B. Hardwick, *Handbook of Texas Lawyer and Judicial Ethics: Attorney Tort Standards, Attorney Ethics Standards, Judicial Ethics Standards, Recusal and Disqualification of Judges*, 2007-2008 ed. (Vol. 48 & 48A, Texas Practice Series).

Restatement of the Law Governing Lawyers

The Restatement (Third) of the Law Governing Lawyers (American Law Institute, 2000), is an attempt to synthesize a US law of lawyering in all contexts. Despite the name, this is the first restatement of the law of lawyering by ALI.

The Restatement is not primary law in any jurisdiction, but is cited with increasing frequency by courts.

Cases citing or illustrating the Restatement are updated annually in a pocket part.

Having the juxtaposition of disqualification, malpractice and disciplinary considerations is of some help in making decisions regarding ethical and malpractice prevention problems.

Unlike the ABA Model Rules, the Restatement includes a number of hypotheticals that help to flesh out the nuances of conflict issues.

Still, in some cases additional practical analysis is needed to avoid ethical and malpractice problems.

Web-based resources⁹

The Texas Center for Legal Ethics and Professionalism

TCLEP is a non-profit center funded in large part by the Texas Bar Foundation. Resources on this site include the Texas Disciplinary Rules, Ethics Opinions, A Guide to the Basics of Law Practice, the Ethics Course, and other Texas specific materials. This a thorough collection of relevant Texas ethics materials, though some recent opinions are not yet posted.¹⁰

University of Houston Texas Ethics Reporter

This site includes Texas Disciplinary Rules of Conduct and Procedure, as well as Ethics Opinions, and includes prior versions of the rules.

Judges Ethics Information

The Code of Judicial Conduct and Judicial Ethics Opinions are available online at <http://www.courts.state.tx.us/Judethics/judethics-home.asp>. Information on laws affecting judicial candidates are available at <http://www.courts.state.tx.us/Judethics/candidacy.asp> (Last visited May 11, 2009).

Cornell Legal Information Institute, Legal Ethics

This site includes information regarding ethical and malpractice rules relating to Texas. Of particular note is the American Legal Ethics Library Narrative for Texas, which was prepared by the Houston law firm of Vinson & Elkins.¹¹ This is a searchable discussion of the law of BOTH malpractice and ethics in the state of Texas.

The law of malpractice is included in the Narrative. Links from this page enable search of other states' law on legal malpractice and ethics.

Law Practice Management Program of the State Bar of Texas

The Law Practice Management Program, part of texasbarcle.com, has as its goal facilitating law firm management-the details not taught in law school. The program includes both seminars and office consultations. Books and videos available are described on the site. The resources section of the site includes a number of pamphlets on various law firm administration topics. Many of these pamphlets, such as How to Document Client Expenses and Attorney's

⁹Taken from Texas Lawyers' Insurance Exchange, Online Legal Malpractice and Ethics Research, reprinted at <http://www.tlie.org/riskmgmt/links.htm> (Last accessed May 11, 2009).

¹⁰<http://www.txethics.org/reference.asp> (Last accessed May 11, 2009).

¹¹<http://www.law.cornell.edu/ethics/> (Last accessed May 11, 2009).

Fees, are directly relevant to malpractice prevention. A links page connects to a number of sites that focus on law firm management.

ABA Standing Committee on Lawyers' Professional Liability

The ABA Standing Committee offers a number of important resources for attorneys interested in lawyers professional liability and insurance. A number of materials can be purchased online, including The Lawyer's Desk Guide to Legal Malpractice.

ABA Center for Professional Responsibility

The Center for Professional Responsibility coordinates most of the ABA's activities regarding legal ethics. There are usually a couple of commissions or subcommittee working on hot topics, and they will have links on this page. There are some free and some paid resources available from the site. Summaries of relatively recent ABA Formal Opinions are included on the site. <http://www.abanet.org/cpr/home.html> (Last visited May 11, 2009).

Legalethics.com

This website focuses on ethical aspects of the use of technology by lawyers.

Legal Ethics Forum

This is a blog by law professors who specialize in legal ethics, and provides a good source for current news on ethics.

<http://www.legalethicsforum.com/blog/2009/04/legal-ethics-and-facebook.html> (last accessed May 11, 2009)

William Freivogel's Conflicts Website

This website collects cases on conflicts issues in an easy to use format.

Cite: <http://www.freivogelonconflicts.com/> last accessed May 11, 2009).

Nabrico Sites

TLIE is a member of the National Association of Bar Related Insurance Companies. The websites for the companies often provide valuable loss prevention advice and forms.

<http://www.nabrico.org/> (Last accessed May 11, 2009).