

MYTH BUSTERS
2024 NORTH TEXAS
PROBATE BENCH BAR

April 4, 2024
Presented by Jeanne Huey and Jason Friedman

1

<p>Lawyer-Client Relations</p> <p>Rule 1.01: Competence</p>	<ul style="list-style-type: none">• Rule 1.01(a) requires that lawyers exhibit “competence” in representing clients.• Comment 8: Each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology.• Opinion 665: “competency” requirement was applicable to a lawyer’s technological competence in preserving client confidential information including competence by lawyers and their staff regarding data protection considerations of cloud-based systems. <p><small>HUNT HUEY ATTORNEYS COUNSELORS</small> <small>FRIEDMAN & FEIGER ATTORNEYS AT LAW</small></p>
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2

Question #1: Yes or No?

SCENARIO:

You are at a lunch meeting and have left your firm laptop in your car. You return to the car after lunch to find the laptop has been stolen. Are you obligated to inform your client that their private and confidential information may have been inadvertently accessed by a third party?



3

Almost Certainly Yes.

- ABA Formal Opinion 483
- Ethics Opinions in Jurisdictions Where You Practice
- Your Insurance Carrier's Guidance or Policy Requirements
- Your Firm Policies and Procedures
- HIPPA for PHI or State or Federal Law regarding identify theft
- Certain Clients i.e. Financial Institutions and Insurance Companies are required to report breaches by vendors such as attorneys



4

Clients with Diminished Capacity (Rule 1.16)

Question #2:

Am I required under the disciplinary rules to take action to have a guardian appointed or seek other protective orders if I reasonably believe that my client's capacity to make adequately considered decisions in connection with a representation is diminished?

YES or NO???

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5

Answer:

NO

Rule 1.16(b)

You **may** take “reasonably necessary protective action” only if

1. there is a risk of substantial physical, financial, or other harm unless action is taken, **and**
2. the client cannot adequately act in their own interest.

Absent 1 and 2, in this circumstance you **shall**, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(1.16(a))

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6

What is “reasonably necessary protective action” under part (b)?

Such action may include, but is not limited to:

- consulting with individuals or entities that have the ability to take action to protect the client
- seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator
- submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client
- Disclosing the client’s confidential information to the extent you reasonably believe is necessary to protect the client’s interests.



7

Clients with Diminished Capacity (Rule 1.16)

Question #3:

Under Rule 1.16, if I believe the client’s capacity to make decisions in connection with a representation is diminished, but I don’t believe I need to take “protective action”, I can have a family member participate in attorney-client discussions to assist my client.

TRUE or FALSE ???



8

Answer:
TRUE
Comment
4
to Rule
1.16



The client may wish to have family members or other persons, including a previously designated trusted person, participate in discussions with the lawyer

You must still keep the client's interests foremost and only look to the client, not the family members or other persons, to make decisions on the client's behalf.

As part of the client in-take process, lawyers may wish to give new clients the opportunity to designate trusted persons who may be contacted by a lawyer if special needs arise.

Any such procedure should provide sufficient information for the client to understand and confer with the lawyer about the designation of a trusted person.

In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.



9

Fee
Agreements:
Just Another
Contract?

Question #4:

Attorney-client fee
agreements are
privileged.

TRUE or FALSE?

10

Answer: FALSE

- Fee agreements are generally discoverable and not protected by the attorney-client privilege if a party seeks attorneys' fees (*Jim Walter Homes, Inc. v. Foster*, 593 S.W.2d 749, 752 (Tex. Civ.App.—Eastland 1979, no writ)
- “[T]he attorney client privilege does not encompass such nonconfidential matters as the terms and conditions of an attorney’s employment, the purpose for which an attorney has been engaged, or any of the other external trappings of the relationship between the parties.” (*Duval Cnty. Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 634 (Tex.App.—Amarillo 1983, writ ref’d n.r.e.)
- **Best Practices Tip:** Instead of remembering to redact before production, reference any privileged documents but do not attach i.e. waivers of conflicts or other information about conflicts of interest



11

Fee
Agreements:
Just Another
Contract?

Question #5:

My fee agreement can require the client to pay for my time if I have to file a motion to withdraw or have a hearing on it.

TRUE or FALSE???



12

**Answer:
FALSE**

You cannot charge the client for preparing and prosecuting a motion to withdraw

You cannot charge the client for gathering the file or anything else associated with ending the representation

Once you decide to withdraw you are likely adverse to the client—so tread carefully

“No lawyer could form a reasonable belief that time spent adversarial to the client and in pursuit of the lawyer's own interests is the rendering of ”legal services” for the client.”

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13

Trust Account Issues:



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14


Client Trust Accounts

Question #6:

I can transfer money from a client trust account only after (1) the invoice is sent and received by the client and (2) I have notified the client that I am making the transfer.

TRUE OR FALSE???








15

Answer: FALSE

It is a three step process: Clients must have a chance to review the invoice and only in the absence of a dispute (after the client has a reasonable time to review) may the lawyer withdraw funds from the Trust Account
(Comment 2 to Rule 1.14)







16

“HEY FACEBOOK GROUP – I HAVE A CASE WHERE...”



TEXAS ETHICS OPINION 673

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17

RULE 1.05:
confidentiality

Question #7:

You encounter a unique situation that you would like to ask other lawyers about. Can you post a “scenario” asking other lawyers about your case without using client names or court information without violating Rule 1.05 (confidentiality)?

YES or NO???

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18

Answer:
YES,
BUT . . .

Texas Ethics
Opinion 673

- Careful thought is required
- What we can and cannot say without revealing client confidences is actually very limited
- Questions about a statute or the law itself are safer
- Usually those are not the kinds of questions we want to discuss--so be cautious!
- The lawyers with the most expertise are also those most likely to be our next opponents

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19

As a representative of clients, a lawyer performs various functions:

Advisor
Advocate
Negotiator

Preamble to the Rules

As advocate, a lawyer zealously asserts the clients position under the rules of the adversary system

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20

Advocating with Zeal...

Question #8:

I JUST LEARNED THAT MY CLIENT CHANGED THE DATE ON AN EMAIL THAT I OFFERED INTO EVIDENCE TO MAKE IT LOOK LIKE IT WAS SENT AFTER INSTEAD OF BEFORE AN IMPORTANT EVENT IN THE CASE. WHEN I FIND OUT WHAT HE HAS DONE, MY CLIENT ORDERS ME NOT TO TELL THE JUDGE OR OPPOSING COUNSEL. CAN I FOLLOW MY CLIENT'S ORDERS?

YES or NO???

21

ANSWER:



NO

Duty of Candor to the Tribunal

Rule 3.03

RULE 3.03

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

22

COMMENT 8 to Rule 3.03

When a lawyer learns that the lawyer’s services have been improperly utilized in a civil case to place false testimony or other material into evidence:

- the lawyer must disclose the existence of the deception to the court or to the other party, if necessary rectify the deception
- This is an exception to the Rule regarding Confidentiality (Rule 1.05(h) and (g))
- Such a disclosure can result in grave consequences to the client, including loss of the case and perhaps a prosecution for perjury
- Unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer keep silent



23

During
Discovery...

Question #9:

My client lied to the opposing counsel during her deposition—and I know it. Do I have a duty to correct the lie?

YES or NO?



24

Answer:
NO

<p>Texas Ethics Opinion 692 (Oct. 2021)</p>	<p>-A lawyer does not have a duty to correct intentionally false statements made by the client while being cross-examined by the opposing party's counsel during a deposition. BUT:</p>	<p>-the lawyer should urge the client to correct the false statements, including by explaining the potential civil and criminal ramifications of false testimony.</p>
<p>-If the client refuses, the lawyer may (but is not required to) withdraw from the client representation if permitted by the Rules.</p>	<p>-If the lawyer does not withdraw, the lawyer is not required to disclose the true facts</p>	<p>-The lawyer may not use the false deposition testimony in any way to advance the client's case.</p>

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25

JUDGE'S DUTY TO REPORT LAWYER MISCONDUCT

The Judge is presiding over a personal injury lawsuit. During a hearing, the Judge personally observes that plaintiff's counsel, who they know to be healthy and fit, is clearly intoxicated and unable to maintain a coherent train of thought. At one point during the hearing the lawyer falls asleep at counsel table. After the hearing the Bailiff reports to the Judge that he smelled alcohol on plaintiff's counsel's breath. During the same hearing with the Judge, the defendant complains to the Judge that his lawyer is not responding to his requests for a status update and that he was not notified of the prior hearing.

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26

Pointing Fingers: Does the Judge Have to Report Them?

Question #10:

What action, if any, should the Judge take against either lawyer as a result of what they have just learned?


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27

PICK ONE

1. The Judge is **not required** to take any action against either lawyer, but they have the discretion to sanction or report either to the State Bar if they want.
2. The Judge **is required** to act only against plaintiff's lawyer and has **no basis to act** against defendant's lawyer. The Judge must either report plaintiff's lawyer to the State Bar or take other appropriate action.
3. The Judge **is required** to report plaintiff's lawyer to the State Bar and to give defendant the phone number for the State Bar grievance hotline as a public service.



28

Correct Answer: No. 2

- **The Judge is required to act** against plaintiff’s lawyer because they have knowledge that the lawyer has committed a violation of the disciplinary rules that *raises a substantial question as to his fitness as a lawyer* (Rule 1.01 competence, among others).
- **The Judge can either** report him to the State Bar or take other *appropriate action* within their discretion, such as to sanction the lawyer without letting the State Bar know or make a call to TLAP (Texas Lawyer’s Assistance Program)—but they must do something.

Texas Code of Judicial Conduct 3.D.2.



29


Pointing
Fingers:
Do I Have to
Report
Them?

BONUS
Question #11:

Is defendant’s lawyer required to act after he **IS CONFIDENT** that plaintiff’s lawyer is intoxicated at the hearing?



30

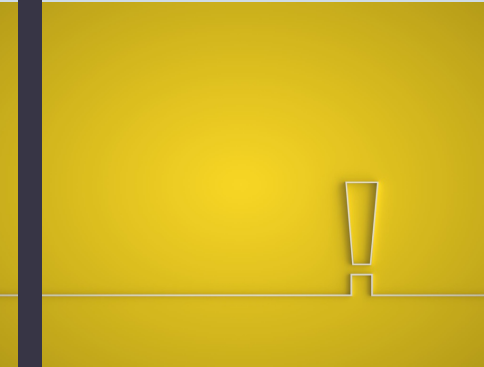


PICK ONE

1. **No**, since he knows that the Judge is required to act under the Judicial Code of Conduct.
2. Yes, **he must report** plaintiff’s lawyer to the Chief Disciplinary Counsel since he has knowledge that plaintiff’s lawyer’s conduct is not just a rule violation but that it *“raises a substantial question as to his fitness as a lawyer”*.
3. Yes, **he must report** plaintiff’s lawyer for the reasons in No. 2, but since it involves a possible substance abuse issue, he has the **discretion** to discharge his duty to report by only notifying TLAP.

31

Correct Answer: No. 3



- **Lawyers must take action** by reporting when they have knowledge of another lawyer’s behavior that *“raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”*. They can either report the misconduct to the Chief Disciplinary Counsel or, if it involves an impairment (substance or mental illness), they can discharge their duty by reporting to TLAP
- **Exception to duty to report** - Lawyers are not required to report if it would violate their duty of confidentiality under Rule 1.05 or rules governing TLAP

TDRPC Rule 8.03: Reporting Professional Misconduct

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32

**WHAT
knowledge
TRIGGERS
A DUTY
to report?**

1. **Behavior that “raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”**
JUDGES AND LAWYERS both have a duty to report
2. **Behavior “clearly establishing” any other type of rule violation by a lawyer**
JUDGES should but are not required to take “appropriate action”
LAWYERS have no duty to report
3. **Behavior that meets No. 1 and likely involves an impairment (substance or mental illness)?**
JUDGES AND LAYWERS can discharge their duty by reporting to TLAP which is anonymous

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33

**WE ARE
HERE TO
HELP**



THE TEXAS LAWYERS ASSISTANCE PROGRAM (TLAP) “PROVIDES CONFIDENTIAL HELP FOR LAWYERS, LAW STUDENTS, AND JUDGES WHO HAVE PROBLEMS WITH SUBSTANCE ABUSE AND/OR MENTAL HEALTH ISSUES.” ITS CONFIDENTIAL HOTLINE CAN BE REACHED ANY TIME OF DAY OR NIGHT AT 800/343-8527.

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WWW.TEXASBAR.COM/TLAP

34

Some Resources:

- Texas Center for Legal Ethics: www.txethics.org
- State Bar of Texas: adreview@texasbar.com; Ethics Hotline: 1-800-566-4616
- Ad Review Specifics:
<https://www.texasbar.com/Content/NavigationMenu/ForLawyers/MembershipInformation/AdvertisingReview2/>
- The Texas Young Lawyer’s Association: TYLA Pocket Guide: Social Media 101
[http://www.tyla.org/tyla/assets/File/Social%20Media 101%20booklet.pdf](http://www.tyla.org/tyla/assets/File/Social%20Media%20101%20booklet.pdf)
- American Bar Association:
http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising.html
- Jeanne’s Blog: <https://legalethicstoday.com> for current news and commentary on the ethical issues facing the 24/7 lawyer



35

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36