# *Ethical Considerations in Multiparty Construction Defect Litigation*

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Multiparty litigation can be a maze of investigation, discovery and depositions that often leads to complications between opposing parties and the counsel that represents them. When defending construction defect litigation, one will eventually encounter such large multiparty litigation. It becomes quickly apparent that "multiparty means multitasking." Included in the multitasking is the determination of several ethical considerations. The following is a comparative look at the ABA Model Rules and The Texas Disciplinary Rules of Professional Conduct (TDRPC).

## *Joint Representation and Conflicts of Interests*

Joint representation of more than one defendant can be useful tool for reducing both client's costs and reduces the economic pressure to settle meritless litigation. However, joint representation can also open the door to many ethical considerations. Texas Disciplinary Rule of Professional Conduct 1.06 is the starting point for any analysis regarding conflicts of interests. Generally, Rule 1.06 provides that a lawyer cannot represent a client under three broad circumstances:

1. A lawyer may not represent opposing parties to the same litigation. [1]
2. A lawyer may not represent a party in a substantially related matter that is "materially and directly adverse" to another client's interests.[2]
3. A lawyer may not represent a party if it reasonably appears that the lawyer's representation will be "adversely limited" by the lawyer's responsibilities to another client. [3]

[1] See; TDRPC Rule 1.06(a)
[2] TDRPC Rule 1.06(b)(1)
[3] TDRPC Rule 1.06(b)(2).

The first of these three circumstances is rather self-explanatory. It is the second and third circumstances that can raise many questions. Which begs the question: when does something become "materially and directly adverse?" According to Rule 1.06, Comment 6 the focus is the lawyer's ability to exercise judgment on behalf of his clients:

> The representation of one client is directly adverse to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client. [4]

Fortunately, Rule 1.06 (c) provides relief to an attorney in the above circumstances. Rule 1.06 (c) (2) provides that by obtaining consent from each potentially effected client, the lawyer may resolve the conflict and proceed with representation of both parties. However, coupled with consent, the lawyer also must reasonably believe that each client will not be materially affected.[5] Moreover, it should be noted that Rule 1.06, Comment 7 provides that a lawyer should not ask for such consent if a *disinterested lawyer* would conclude that the client should not consent.

The ABA Model Rules provide for relatively the same standards in determining potential conflicts. However, where the Texas Rules provide that a lawyer may not represent a client when his abilities are "adversely limited," the Model Rules require that there not be a "significant risk" that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.[6] The Model Rules provide that "the critical questions are the likelihood that a difference in interests will

[4] TDRPC Rule 1.06, cmt.6.
[5] TDRPC Rule 1.06(c)(1).
[6] ABA Model Rule of Prof'l Conduct 1.07(a)(2).

eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment. . . ."[7]

The Model Rules also afford some protection to a lawyer who may be presented with a conflict. Much like Texas Rule 1.06(c) discussed above, Model Rule 1.07(b) provides that "notwithstanding the existence of concurrent conflict" a lawyer is permitted to represent a client if the lawyer reasonably believes that he will be able to provide "competent and diligent representation." Unfortunately, the comments to the Model Rules give little guidance as to defining a standard for competent and diligent representation, but it is clear that the Model Rules maintain that the core concern is the duty of loyalty owed to each client. [8]

The contrast between the Model Rules and the current Texas Rules is seemingly a point of interest to the powers that be in our state. Most notably, the recently Proposed Amendments to the Texas Rules clearly choose to rewrite the current Rule 1.06 to more closely track the language of Model Rule 1.07 for conflicts of interests. [9] The Proposed Amendments supplemented the "adversely limited" language found in the current Rule 1.06(b) by adding the "significant risk" analysis that is used by the Model Rules.[10] Under the Proposed Amendment, a lawyer cannot represent a client if the client's interest is "adversely limited" OR there is a "significant risk" that the representation of the client will be materially limited.[11] The "significant risk" is to be evaluated in a substantially similar fashion as in Model Rule 1.07.[12]

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[7] ABA Model Rule 1.07, cmt. 8.
[8] ABA Model Rule 1.07, cmts. 1-7.
[9] See; Supreme Court of Texas, Misc. Docket No. 09-9175 (October 2010). (The authors are discussing the Proposed Amendments, despite their failure to pass by the recent referendum, in the belief that some version of at least some of them will be proposed again.)
[10] Proposed Amendment to TDRPC Rule 1.06(a)(2).
[11] Proposed Amendment to TDRPC Rule 1.06(a)(1)-(2).
[12] Proposed Amendment to TDRPC Rule 1.06, cmt. 6: (the critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment).

Moreover, the Proposed Amendment to Rule 1.06 removes the language of "substantially related matters" from the rule and therefore changes the circumstances in which a lawyer must consider himself to be presented with a conflict of interest. (See above discussion on three broad circumstances presented by current Rule 1.06). Under the Proposed Amendment a lawyer may not represent one client's interests against another client even in matters wholly unrelated, unless the requirements of the Amended Rule 1.06(c) are satisfied. [13] The amended 1.06(c) in essence requires written consent from the client, even in matters wholly unrelated, and requires "reasonable and diligent" representation (tracking the language found in Model Rule 1.07). [14] However, the comments to the Proposed Amendment offer a limited window of exception to paragraph (c):

> Simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require compliance with paragraph (c).[15]

The Proposed Amendments to the Texas Rules include a completely rewritten Rule 1.07 in order to address the representation of multiple parties.[16] The proposed changes include dropping the current "intermediary" language in favor of addressing the concerns of "multiple clients in the same matter."[17] Though the title of the rule seems to change the underlying focus the rule, the amended rule itself keeps several of the same requirements that are found in the current Rule 1.07. Among these requirements are; 1) that the lawyer reasonably believes he can deal impartially with each client, 2) each client

[13] Proposed Amendment to TDRPC Rule 1.06, cmt. 5.
[14] Proposed Amendment to TDRPC Rule 1.06 (c)(1),(3).
[15] Proposed Amendment to TDRPC Rule 1.06, cmt. 5.
[16] Proposed Amendment to TDRPC Rule 1.07.
[17] Id.

is capable of making informed decisions about their interests, 3) that there is little risk of material prejudice to each client.[18]

For all the similarities, the Proposed Amendment creates a new requirement for a lawyer engaged in the representation of multiple parties. Under the Amended Rule, a lawyer is required to give each client a set of "mini Miranda warnings" pertaining to the lawyer's representation.[19] The proposed amendment requires the following:

> (3) prior to the undertaking the representation or as soon as practicable there after the lawyer discloses to the clients that during the representation the lawyer:
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> (i) must act impartially as to all clients and;
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> (ii) cannot serve as and advocate for one client in the matter against any of the other clients as a consequence of which:
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> (A) each client must be willing to make independent decisions without the lawyer advice to resolve issues that arise amount the clients concerning the matter and;
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> (B) events might occur during joint representation that could require the lawyer to withdraw from representing any or all of the clients before the matter is completed.[20]

After making the required disclosure, the lawyer is then required to obtain the written consent of each client who was subject to the warnings.[21] Though these requirements would certainly add a new burden to representing multiple clients in the same matter, it is clear that the underlying intent of the amended rule is to promote the communication of potential conflicts to the clients involved.[22] However it could certainly be argued that these required warnings are an unnecessary change. This is because, as discussed above,

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[18] *Compare;* TDRPC Rule 1.07(a)(2),(3) *and* Proposed Amendment to TDRPC Rule 1.07(a)(2)(i-iv). *See also*; Proposed Amendment to TDRPC Rule 1.07, cmt. 8 (stating that "reasonable belief" is an objective standard to be viewed from the perspective of a disinterested attorney).
[19] Proposed Amendment to TDRPC Rule 1.07(a)(3).
[20] Id.
[21] Proposed Amendment to TDRPC Rule 1.07(a)(4).
[22] Proposed Amendment to TDRPC Rule 1.07, cmts. (5), (12), (13).

the current Texas Rules already indicate that communication of potential conflicts to one's clients is certainly the best avenue to avoid a conflict of interests.

Though the comparisons between the various rules are merely hypothetical in nature, the common thread between any of the above-discussed rules is the importance of the duty of loyalty owed to each client.[23] It is this duty that must be in the forefront of any lawyer's mind.

***Former Clients***

The duty owed to a client does not end when you settle the matter or get a judgment, or even when representation ceases. A lawyer has the duty to avoid a conflict of interest with a former client long after representation ends. TDRPC Rule 1.09 states the following:

> (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
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> (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
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> (2) if the representation in reasonable probability will involve a violation of Rule 1.05;
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> or
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> (3) if it is the same or a substantially related matter.[24]

Rule 1.09 focuses heavily on the protection of confidential information. This is apparent in both the language of the rule itself as well as judicial interpretation of the

[23] *Compare*; TDRPC Rule 1.06, cmt. 1; ABA Model Rule 1.07, cmt. 1; Proposed Amendment to TDRPC Rule 1.06, cmt.1.
[24] TDRPC Rule 1.09(a)(1)-(3).

rule.[25] Rule 1.09(a)(2) specifically requires lawyers to cross reference Rule 1.05, pertaining to the use of confidential client information. Further, comment 4A to Rule 1.09 states that, for the purposes of this rule, "substantially related matters" are defined as a circumstance where a lawyer could have acquired confidential information concerning a prior client that could be used either to that prior client's disadvantage or for the advantage of the lawyer's current client or some other person.[26]

Texas courts have closely guarded the protection of former clients and the State Bar has also addressed this topic frequently.[27] As such, lawyers should be particularly cognizant of Rule 1.09 and its potential to be used as grounds for disqualification from proceeding as counsel. This concern has recently been addressed by the 14th District Court of Appeals which held:

> The propriety of disqualification of counsel rests not on whether confidential information has been divulged or used to the detriment of the former client; disqualification is appropriate when there is a *reasonable probability* of such information being used or divulged.[28]

This holding by the appellate court allows for disqualification of a lawyer even in situations where confidential information has not yet been disclosed. The presence of a *possibility* of disclosure is enough to provide for disqualification.

It is important to note that under the current Texas Rules the protections afforded to former clients are expressly imputed upon members of a lawyer's firm.[29]

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[25] TDRPC Rule 1.09, cmt. 4A; See also; *In Re Epic Holdings, Inc.*, 985 S.W.2d 41 (Tex. 1998) (holding "substantially related" to mean a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar).
[26] TDRPC Rule 1.09, cmt. 4A.
[27] See; *In Re Epic Holdings*, 985 S.W.2d at 48, 51; *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996); *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994); Prof'l Ethics Comm. for the State Bar of Tex., Op. 584 (2008); Prof'l Ethics Comm. for the State Bar of Tex., Op. 598 (2010).
[28] *In re Hoar Constr., L.L.C.*, 256 S.W.3d 790 (Tex. App. - Houston [14th Dist.] 2008) (emphasis added).
[29] TDRPC Rule 1.09(b),(c).

Unfortunately, the determination of when a lawyer may be in violation of the rule involves the rather cumbersome interpretation of several comments to the Rule.[30] However, under the plain language Rule 1.09(b), it is important to remember that if any one member of a firm would be disqualified under the Rule, then all members of that firm are as well.[31]

The Proposed Amendments to the TDRPC extensively revise Rule 1.09 in an attempt to further clarify proper use of confidential information.[32] Under the Amended Rule a lawyer may not represent a client in a "substantially related matter" whose interests are "materially adverse" to that of another client. This revision exchanges the current Texas Rule's language of "adverse" interests for the language of "materially adverse," more closely tracking the ABA Model Rules.[33] Further, the comments to the Proposed Amendments focus on defining a "substantially related matter" for the purposes of disqualification (a topic that the current Texas Rules seem hesitant to discuss).[34] The comments to the Proposed Amendments directly track the language used by the Texas Supreme Court in *Epic Holdings*: "substantially related" means a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar.[35] However, the Proposed Amendments clearly state that the subsequent use of "generally know" or "readily obtainable" information about a client is not precluded.[36]

The Proposed Amendments also maintain the same effect Rule 1.09 has on a lawyer's firm. The amended version of the rule adds multiple subparts in an effort avoid

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[30] TDRPC Rule 1.09, cmts 5-7.
[31] TDRPC Rule 1.09(b).
[32] See; Proposed Amendment to TDRPC Rule 1.09, cmt. 4. (Expressly stating "this Rule is intended to prevent a former client's confidential information from being used or disclosed in a subsequent representation…")
[33] ABA Model Rule 1.09(b)(1).
[34] *Compare*; Proposed Amendment to TDRPC Rule 1.09, cmt. 6, *and* TDRPC Rule 1.09 cmts. 8-9.
[35] Id.; See also; *In Re Epic Holdings*, 985 S.W.2d at 51.
[36] Proposed Amendment to TDRPC Rule 1.09, cmt. 12.

having to interpret a web of comments to the Rule.[37] The comments to Proposed Amendment to Rule 1.09 have also been rewritten and organized by corresponding subpart, but the ease of the revised comments is traded for very lengthily and verbose language within the Rule itself.[38] Regardless, both versions of the Rule maintain the importance this Rule can have in considerations that can affect your whole firm.

As with most ethical considerations, full disclosure to your current client is the most effective avenue to ensure you do not violate any disciplinary rules.[39] This underlying theme is also present in the Proposed Amendment to Rule 1.09, which adds a provision requiring written consent to each subpart of the Amended Rule.[40] Rule 1.09, is an important rule to maintain an understanding of due to its propensity to expose your current client to satellite litigation. Communicating these concerns to your present client is certainly the best way to keep the attorney/client relationship moving forward.

***Conflicts in Insurance Cases***

Conflicts of interests can often arise in situations involving insurance. The so-called "tri-partite relationship" between an insurer, the insured and the defense counsel can become a tricky situation, and "has been well documented as a source of unending ethical, legal and economic tension."[41] There are certain cases that every lawyer should keep in mind to help resolve conflicts that may come up. The first of these is the Texas Supreme Court decision of *Employers Casualty Co. v. Tilley*.[42] It was here that the Texas Supreme Court expressly stated the test that is to be used in analyzing the interaction between the parties:

> Custom, reputation, and honesty of intention and motive are not the tests for determining the guidelines which an attorney must follow when

[37] See; Proposed Amendment to TDRPC Rule 1.09(a)(2), (b), (c)(2).
[38] *Compare;* TDRPC Rule 1.09 *and* Proposed Amendment to TDRPC Rule 1.09.
[39] TDRPC Rule 1.09, cmts. 9-10.
[40] See; Proposed Amendment to TDRPC Rule 1.09(a),(b),(c)(written consent required by the first sentence of each subpart).
[41] *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 633 (Tex. 1998) (Gonzalez, J. dissenting).
[42] *Employers Cas. Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973).

> confronted with a conflict between the insurer who pays his fee and the insured who is entitled to his *undivided loyalty* as his attorney of record. . . and as such [an attorney] owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured. [43]

The Court held that this duty of loyalty meant that a lawyer must be consistently cognizant of potential conflicts that may arise between the parties.[44] The Court went further to hold what has become known as the *Tille*y doctrine:

> In any claim or in any suit where the attorney selected by the company to defend the claim or action becomes aware of . . . any other conflict of interests between the company and the insured with respect to the defense of the matter, the attorney should promptly inform both the company and the insured, preferably in writing, of the matter and the extent of the conflicting interest . . .[45]

Finally, the Court stated that when a conflict of interest arises, the insurer and the lawyer selected to provide the defense, should not continue the defense unless the insured acquiesces. [46]

The "tri-partite relationship" was again addressed by the Texas Supreme Court in *State Farm v. Traver*.[47] Here the Court analyzed whether an insurer could be held vicariously liable for the acts of the lawyer who is selected to defend the insured. The Court eventually held that under the circumstances of the case, the insurer could not be held vicariously liable for the acts of the selected lawyer.[48] However, in reaching its decision the Court came to several conclusions. First, the Court found that under the principals of agency, the selected defense attorney was an independent contractor making

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[43] Id. at 558 (emphasis added).
[44] Id.
[45] Id. at 559.
[46] Id.
[47] 980 S.W.2d 625.
[48] Id. at 628.

him therefore the party in charge of the day-to-day details of the defense and not subject entirely to the insurer's control.[49] Second, the Court reiterated that the lawyer's undivided loyalty to the insured is paramount: "because the lawyer owes unqualified loyalty to the insured, the lawyer must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions."[50]

It is important to remember that in both of these seminal cases the courts looked to language found within the insurance policy to help guide their decisions as to the duties of the parties. As a lawyer involved in these situations, it is important to thoroughly understand your obligations under the policy and determine any coverage issues up front. Further, to avoid creating potential conflicts, be careful when taking actions that would reduce or defeat your client's coverage under the policy. Finally, when all else fails, maintain communication with both the insurer and insured and when necessary make sure to obtain the proper consent from the parties. The bottom line is this: In Texas, unlike other states, the insurance carrier is <u>not</u> a client of insurance defense counsel.

***Lawyers as Witnesses***

Another particular concern that can arise in multiparty litigation is placing yourself in a situation where you become a witness. Certain situations can drastically change your role and subject you to grounds for disqualification. TDRPC Rule 3.08 forbids a lawyer from accepting or maintaining representation of a client if a case where the lawyer knows or believes that "the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client."[51] This restriction applies to the lawyer regardless of whether the potential testimony is constructive or adverse to his client's interests, the lawyer simply cannot play this kind of dual role in the litigation.[52]

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[49] Id. at 627.
[50] Id. at 628.
[51] TDRPC Rule 3.08(a).
[52] TDRPC Rule 3.08, cmts. 1-2.

In multiparty construction litigation, there are a few rather simple actions you can take to avoid becoming a witness in the case. First, prior to litigation, be mindful of your actions during client meetings. If, for example, you become involved in project meetings where the client is discussing proposed repairs to a project with the owner, be mindful of making suggestions about those repairs on the project. Though all parties may find your ideas very helpful in the situation, you have also subjected yourself to becoming a potential fact witness in the case, if litigation ensues. Another easily avoidable situation is to avoid being the only person to interview a witness. If the witness subsequently contradicts herself and it becomes necessary to impeach the witness, then you have placed yourself in a situation where you must take the stand on behalf of your client.

Avoiding situations where you subject yourself to being a witness can pay dividends for your client. On the other hand, the consequences of these situations not only include the obvious ethical concerns of playing the dual role, but these situations also hold the potential to expose your client to satellite litigation. It is not uncommon for opposing counsel to practice "gamesmanship," by moving to disqualify you, even if the need for your testimony as a witness is minor or rather immaterial to the case.

***Conclusion***

In multiparty construction defect, litigation the interactions between the parties can bring with it a myriad of ethical concerns. Conflicts of interests can bog down and complicate even the simplest of cases. A stronger understanding of the ethical duties required helps avoid such traps. Lawyers should use the duty of loyalty owed to the client as a lens through which to view each of their actions. Finally, clear communication with your clients is paramount to successful representation. By communicating to your client and obtaining the proper consent, you can maintain productive representation of your client and ensure that you are able to successfully navigate the maze of multiparty litigation.