

Professor Schuwerk appeared in a Texas Lawyer article concerning the Texas Supreme Court's recently proposed changes in the state's disciplinary rules for lawyers.

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Proposed Disciplinary Rule Changes Target Conflicts, *Scienter*, Sex

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For the first time in almost 20 years, the Texas Supreme Court has proposed comprehensive changes in the state's disciplinary rules for lawyers, including major amendments to conflicts rules and a new rule prohibiting lawyers from having sex with clients.

On Oct. 20, a unanimous Supreme Court signed the order for Miscellaneous Docket No. 09-9175, beginning the process for public comment and ultimately — if the State Bar of Texas board of directors agrees — a referendum on the proposed amendments to the Texas Disciplinary Rules of Professional Conduct.

According to the Supreme Court's order, the court adopted the current disciplinary rules in 1990 and appointed a task force in 2003 to study the current rules and recommend changes. The State Bar's standing committee on the disciplinary rules also examined the rules and made recommendations to the court.

Lillian Hardwick, chairwoman of the State Bar rules committee, says, "What we have done overall is to provide protection for the public while giving lawyers better guidance but not over-directing lawyers."

Kennon Peterson, the Supreme Court's rules attorney, says the proposed amendments are the product of "extensive debate and careful consideration" by the high court, the court's appointed task force and the State Bar rules committee. [*See the proposed rules.*]

But those involved in rewriting rules did not always agree about how the rules should read.

Robert Schuwerk, a University of Houston Law Center professor who serves on the task force and on the State Bar Committee, says there were "tons of disagreements" between the two panels as they went about the task of revising the rules. As a general matter, the task force was under the impression that unless there was a good reason not to do so, Texas should move its rules closer to the American Bar Association's model rules, Schuwerk says. The State Bar rules committee took the position that it should not consider the ABA rules better simply because they came from the ABA, says Schuwerk, who chaired the committee from 1994 until 2004.

"We had sort of an independent streak," he says.

Tom Watkins, the task force's chairman and a partner in Brown McCarroll in Austin, says there also were many disagreements among members of the task force.

Texas Supreme Court Justice Phil Johnson, the court's liaison for the disciplinary rules revision, says that, at the court's request, representatives of the task force and the State Bar rules committee met as a conference committee to try to work out some agreements.

Hardwick, a Houston solo who is a consultant and expert witness in matters involving attorney and judicial ethics, says the conference committee had five meetings with Johnson in late 2007 and early 2008. She headed the State Bar rules committee delegation on the conference committee.

Watkins, who led task force delegates on the conference committee, says, "Where we could not agree about what we ought to do, we passed on each version [of the rule] to the Supreme Court."

Johnson says the court began working its way through the rules shortly after the first of this year.

"We actually looked at each rule and made our independent decision on the rule," he says.

One controversial issue that did not make it into the Supreme Court's order proposing the rule changes involves "screening" of lawyers for conflicts when they move laterally between firms. Schuwerk says screening keeps a lawyer away from involvement in any matter in which he has a

conflict and from any discussion of that matter. Screening also keeps other lawyers from knowing what the conflicted lawyer knows about the matter, he says.

"Although the rules committee recommended a screening option, the Supreme Court ultimately decided not to have it," Schuwerk says.

That may disappoint some attorneys. Roland Johnson, the State Bar's president and a shareholder in Harris, Finley & Bogle in Fort Worth, says a screening rule is one of the issues that lawyers talk to him about the most when he travels around the state.

While the Supreme Court did not include a screening rule, the court did include a new rule that addresses prohibited sexual relations for lawyers among the proposals. Rule 1.13(a) provides, "A lawyer shall not condition the representation of a client or prospective client, or the quality of such representation, on having any person engage in sex with the lawyer."

Under Rule 1.13(c), a lawyer is prohibited from having sexual relations with a client, unless the lawyer and client are married or are engaged in an ongoing sexual relationship that began prior to the representation.

The State Bar board of directors has balked at approving such a rule in the past. Linda Eads, immediate past president of the State Bar rules committee and an associate professor at Southern Methodist University Dedman School of Law, says the committee proposed a rule to prohibit sexual activity between lawyers and their clients to the Bar board of directors in 2001. "They rejected it," Eads says.

Eads says the Bar board suggested a rule that would not allow a lawyer to have sex with a client if the lawyer believed the client could not make an informed decision about the relationship. She says the task force favored a rule like the one the Bar board proposed, but the rules committee developed a rule similar to the Supreme Court's proposal.

Peterson says Rule 1.13 is one of five new rules included in the Supreme Court's proposed amendments order. Other new rules address a lawyer's obligations to a client with diminished capacity, Rule 1.14, or to a prospective client, Rule 1.17. There also is a new rule that requires a lawyer who participates in law-reform activities to disclose to the organization involved with that reform whether such reforms may affect the interest of the lawyer's client, Rule 6.03. A fifth new rule contains definitions of terms that appear in the rules, Rule 1.00.

Conflicts of Interest

Schuwerk says that, in terms of practical impact, the most important rule changes the Supreme Court has proposed are those that address conflicts.

For example, the new provisions in Rule 1.06 set out what a lawyer may not do, even with a client's informed consent: represent opposing parties in the same matter before a tribunal; represent a client in a matter if the representation will be materially or adversely limited by the lawyer's personal interests or by representation of another client; and represent two or more clients in a matter if the representation would violate Rule 1.07.

Schuwerk says the current Rule 1.06 is ambiguous in that the rule does not make it clear that "nonwaivable" conflict can occur not only in litigation but also in transactions. While comments to the current rules indicate that some conflicts cannot be waived in transactional matters, the rule did not state the prohibition, Schuwerk says. The proposed amendment to Rule 1.06 "clearly spells that out," he says.

As proposed, Rule 1.06 also makes it clear that if a lawyer is prohibited by the rule from representing a client, no affiliated lawyer who knows or should reasonably know of the prohibition can represent that client, Schuwerk says.

"You could not get around this by dividing the work among lawyers in the same firm," he says.

Proposed revisions to Rule 1.07 address a lawyer's obligations with regard to representing multiple clients in a matter. Schuwerk says the rule, as proposed, provides a check list for lawyers to determine whether to represent two or more clients. For example, Rule 1.07 prohibits a lawyer from representing multiple clients unless the lawyer reasonably believes the clients can agree among themselves to a resolution of any material issue concerning the matter or that each client is capable of understanding what is in that client's best interest and makes an informed decision. The rule also requires the lawyer, prior to taking on a representation, to disclose in writing to the clients all the aspects of the joint representation, including that the lawyer cannot act as an advocate for one of the clients against any of the other clients.

"What it does is give them [lawyers] a safe harbor for disciplinary purposes," Schuwerk says of proposed Rule 1.07.

Schuwerk says that because the proposal requires the lawyer to put in writing the aspects of joint representation, it alerts clients to possible disadvantages.

"This alerts everyone that this is a treacherous situation," Schuwerk says.

Eads says one new provision in the conflicts rules addresses arbitration agreements between lawyers and clients. Rule 1.08 (g)(2) prohibits agreements that require disputes between lawyers and clients to be submitted to binding arbitration unless the client is represented by independent counsel in making the agreement and the lawyer seeking the agreement discloses the scope of issues to be arbitrated and the fact that the client will be waiving a right to a trial before a judge or jury.

"That's a new protection for the client," Eads says.

Peterson says that several proposed rules contain new or revised *scienter* standards, which address an individual's state of mind or intent. She notes, as an example, that the *scienter* standard "should know" has been changed to "reasonably should know" throughout the amended rules.

Hardwick says the change in the *scienter* standard helps clients by deterring lawyers' problematic behavior. A lawyer who gets sanctioned for unintentionally violating rules may in the future provide less zealous representation for the client out of fear that he might be doing something wrong, she says.

"If a lawyer intentionally violates the rules, the lawyer definitely is going to be sanctioned," she says. "We really want to punish the lawyers who intend to do wrong."

Peterson says the Supreme Court has set a 60-day period to receive public comment on the proposed rules. Comments can be e-mailed to Peterson at kennon.peterson@courts.state.tx.us or mailed to her attention at Texas Supreme Court, P.O. Box 12248, Austin 78711. Following the comment period, the Supreme Court will submit the rules to the State Bar board for consideration of a referendum, Peterson says.

Roland Johnson, the Bar's president, says he knows of no reason why the Bar board would not seek a referendum on the proposed disciplinary rules.

"We appreciate all the hard work that's been done by the Supreme Court, the task force and the committee," he says.