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**POLICE LEGAL ADVISORS' SESSION**

Legal Considerations For Departments When Police  
Officers Get Criminally Charged Or Indicted

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1. **COMMON SCENARIOS WHERE OFFICERS CHARGED**
  - A. OFF-DUTY DWI ARREST
    - 1) Typically on days off
  - B. OFF-DUTY FAMILY VIOLENCE
    - 1) Commonly marital disputes
  - C. OFF-DUTY CRIMINAL CONDUCT
  - D. ON-DUTY OFFICER INVOLVED SHOOTING [OIS]
    - 1) Typically for policy considerations
2. **IMMEDIATELY RELEVANT CONSIDERATIONS FOR ADMINISTRATIVE AND FOR LEGAL ADVISOR**
  - A. Nature of the Charges
  - B. Duty Station - Impact on Officer's Ability to Fulfill Job Functions
  - C. Legal Infrastructure: Civil Service – Labor Agreement – At Will
  - D. Liability Assessment as to Officer
  - E. Liability Assessment to City and Officer from Third Party Claims§
3. **LEGAL CONSEQUENCES OF CRIMINAL CHARGES**
  - A. Negative impact on the employment status of the officer.
  - B. Potential liability exposure for any adverse employment action.

- C. Creation of potential disclosure obligations in any criminal proceedings in which the officer is a witness.
  - D. Creation of potential liability exposure for the officer and the employer for civil rights violations against third persons.
  - E. Creation of defense and insurance coverage issues for the employer in response to litigation against the officer.
- 4. ISSUES WHILE CRIMINAL CHARGES ARE PENDING AND REMAIN UNRESOLVED**
- A. Employment status in an at-will employment setting.
  - B. Employment status in a civil service context – Section 143.056, TLGC.
  - C. Unemployment coverage while on admin leave without pay.
  - D. TCOLE Reporting obligations.
  - E. Other considerations.
- 5. EMPLOYMENT STATUS: LEAVE WITHOUT PAY; UNEMPLOYMENT BENEFITS**

#### [Title 4. Employment Services and Unemployment](#)

##### [Subtitle A. Texas Unemployment Compensation Act](#)

##### [Chapter 201. Unemployment Compensation Act—General Provisions](#)

##### [Subchapter B. General Definitions](#)

##### [§ 201.011. General Definitions](#)

(2) “Benefit” means the money payable under this subtitle to an individual because of the individual's unemployment.

(3) “Benefit amount” means benefits an individual is entitled to receive for one benefit period of total unemployment.

##### [§ 201.012. Definition of Misconduct](#)

(a) “Misconduct” means mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and the safety of employees.

(b) The term “misconduct” does not include an act in response to an unconscionable act of an employer or superior.

##### [Subchapter C. Definition of Employer](#)

##### [§ 201.021. General Definition of Employer](#)

(a) In this subtitle, “employer” means an employing unit that:

(1) paid wages of \$1,500 or more during a calendar quarter in the current or preceding calendar year; or

(2) employed at least one individual in employment for a portion of at least one day during 20 or more different calendar weeks of the current or preceding calendar year.

#### § 201.026. State; Political Subdivision

In this subtitle, “employer” also means a state, a political subdivision of a state, or an instrumentality of a state or political subdivision of a state that is wholly owned by one or more states or political subdivisions of one or more states.

### Subchapter D. Definition of Employment

#### § 201.041. General Definition of Employment

In this subtitle, “employment” means a service, including service in interstate commerce, performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the commission that the individual's performance of the service has been and will continue to be free from control or direction under the contract and in fact.

### Subchapter E. Exceptions to Employment

#### Subchapter F. Definition of Wages

##### § 201.081. General Definition of Wages

##### § 201.082. Exceptions to Wages

### Subchapter G. Total and Partial Unemployment

#### § 201.091. Total and Partial Unemployment

(a) An individual is totally unemployed in a benefit period during which the individual does not perform services for wages in excess of the greater of:

- (1) \$5; or
- (2) 25 percent of the benefit amount.

(b) An individual is partially unemployed in a benefit period of less than full-time work if the individual's wages payable for that benefit period are less than the sum of:

- (1) the benefit amount the individual would be entitled to receive if the individual was totally unemployed; and
- (2) the greater of:
  - (A) \$5; or
  - (B) 25 percent of the benefit amount.

(c) For purposes of this subtitle, an individual is considered unemployed if the individual is:

- (1) totally unemployed as defined by Subsection (a); or
- (2) partially unemployed as defined by Subsection (b).

(d) Notwithstanding Subsection (b), an individual is not partially unemployed for purposes of this subtitle for a benefit period in which the individual's working hours are reduced by the individual's employer

as a result of misconduct connected with the work on the part of the individual. Such limitation will be effective for a maximum of four weeks from the effective date of such a reduction in hours.

(e) For purposes of this subtitle, an individual is not considered unemployed and is not eligible to receive benefits for any benefit period during which the individual works the individual's customary full-time hours, regardless of the amount of wages the individual earns during the benefit period.

## Chapter 207. Benefits

### Subchapter A. Payment of Benefits

#### § 207.001. Payment of Benefits

Benefits are paid through the commission in accordance with rules adopted by the commission and are due and payable under this subtitle only to the extent provided by this subtitle.

#### § 207.002. Benefits for Total Unemployment

(a) An eligible individual who is totally unemployed in a benefit period is entitled to benefits for the benefit period at the rate of 1/25 of the wages received by the individual from employment by employers during that quarter in the individual's base period in which wages were highest. For purposes of this subsection, the wages received by the individual from employment by employers during the individual's base period include wages ordered to be paid to the individual by a final order of the commission under Chapter 61 that:

#### § 207.003. Benefits for Partial Unemployment

(a) An eligible individual who is partially unemployed in a benefit period is entitled to partial benefits for that benefit period.

(b) The amount of a partial benefit is computed by:

- (1) adding the individual's benefit amount and the greater of \$5 or 25 percent of the benefit amount; and
- (2) subtracting the amount of the wages earned by the individual during the benefit period from the amount computed under Subdivision (1).

#### § 207.008. Suitable Work

(a) In determining whether work is suitable for an individual, the commission shall consider:

- (1) the degree of risk involved to the individual's health, safety, and morals at the place of performance of the work;
- (2) the individual's physical fitness and previous training;
- (3) the individual's experience and previous earnings;
- (4) the individual's length of unemployment and prospects for securing local work in the individual's customary occupation; and
- (5) the distance of the work from the individual's residence.

### Subchapter B. Benefit Eligibility

#### § 207.021. Benefit Eligibility Conditions

(a) Except as provided by Chapter 215, an unemployed individual is eligible to receive benefits for a benefit period if the individual:

- (1) has registered for work at an employment office and has continued to report to the employment office as required by rules adopted by the commission;
- (2) has made a claim for benefits under [Section 208.001](#);
- (3) is able to work;
- (4) is available for work;
- (5) is actively seeking work in accordance with rules adopted by the commission;
- (6) for the individual's base period, has benefit wage credits:
  - (A) in at least two calendar quarters; and
  - (B) in an amount not less than 37 times the individual's benefit amount;
- (7) after the beginning date of the individual's most recent prior benefit year, if applicable, earned wages in an amount equal to not less than six times the individual's benefit amount;
- (8) has been totally or partially unemployed for a waiting period of at least seven consecutive days; and
- (9) participates in reemployment services, such as a job search assistance service, if the individual has been determined, according to a profiling system established by the commission, to be likely to exhaust eligibility for regular benefits and to need those services to obtain new employment, unless:
  - (A) the individual has completed participation in such a service; or
  - (B) there is reasonable cause, as determined by the commission, for the individual's failure to participate in those services.

Caselaw:

See [Texas Employment Commission v. Briones \(Civ.App. 1980\) 601 S.W.2d 818](#) (holiday pay constitutes “wages” for purposes of determining whether claimants, who received holiday pay while employer’s plan was shut down for two weeks, were partially unemployed under provisions of the UCA).

See also [Texas Workforce Commission v. Wichita County, 548 S.W.3d 489 \(Tex., 2018\)](#) (holding, inter alia, that an individual is “considered unemployed” if the statutory criteria is satisfied, even if the employment relationship is not severed or terminated).

### Subchapter C. Exceptions to and Disqualification for Benefits

#### § 207.044. Discharge for Misconduct

- (a) An individual is disqualified for benefits if the individual was discharged for misconduct connected with the individual's last work.
- (b) Disqualification under this section continues until the individual has returned to employment and:
  - (1) worked for six weeks; or
  - (2) earned wages equal to six times the individual's benefit amount.

#### § 207.045. Voluntarily Leaving Work

(a) An individual is disqualified for benefits if the individual left the individual's last work voluntarily without good cause connected with the individual's work.

§ 207.046. Involuntary Separation

(a) An individual is not disqualified for benefits under this subchapter if:

(1) the work-related reason for the individual's separation from employment was urgent, compelling, and necessary so as to make the separation involuntary;

(2) the individual leaves the workplace to protect the individual from family violence or stalking or the individual or a member of the individual's immediate family from violence related to a sexual assault as evidenced by:

(A) an active or recently issued protective order documenting sexual assault of the individual or a member of the individual's immediate family or family violence against, or the stalking of, the individual or the potential for family violence against, or the stalking of, the individual;

(B) a police record documenting sexual assault of the individual or a member of the individual's immediate family or family violence against, or the stalking of, the individual;

(C) a physician's statement or other medical documentation that describes the sexual assault of the individual or a member of the individual's immediate family or family violence against the individual that: ....

**6. TEXAS OCCUPATIONS CODE [TOC]: GENERAL PROVISIONS**

Chapter 53. Consequences of Criminal Conviction

Subchapter A. General Provisions

- § 53.001. Applicability of Certain Definitions
- § 53.002. Applicability of Chapter
- § 53.003. Legislative Intent; Liberal Construction of Subchapter

Subchapter B. Ineligibility for License

- § 53.021. Authority to Revoke, Suspend, or Deny License
- § 53.0211. Licensing of Certain Applicants with Prior Criminal Convictions
- § 53.022. Factors in Determining Whether Conviction Directly Relates to Occupation
- § 53.023. Additional Factors for Licensing Authority to Consider After Determining Conviction Directly Relates to Occupation

**7. TEXAS OCCUPATIONS CODE [TOC]: LAW ENFORCEMENT OFFICERS; RELEVANT PROVISIONS**

Title 10. Occupations Related to Law Enforcement and Security

Chapter 1701. Law Enforcement Officers

Subchapter D. Powers and Duties of Commission

- [§ 1701.1524. Rules Relating to Consequences of Criminal Conviction or Deferred Adjudication](#)

**8. TEXAS ADMINISTRATIVE CODE: TEXAS COMMISSION ON LAW ENFORCEMENT (TCOLE); RULES AND REGULATIONS**

[Title 37. Public Safety and Corrections](#)

[Part 7. Texas Commission on Law Enforcement](#)

[Chapter 211. Administration](#)

[§ 211.1. Definitions](#)

(18) Convicted--Has been adjudged guilty of or has had a judgment of guilt entered in a criminal case that has not been set aside on appeal, regardless of whether:

(A) the sentence is subsequently probated and the person is discharged from probation;

(B) the charging instrument is dismissed and the person is released from all penalties and disabilities resulting from the offense; or

(C) the person is pardoned unless the pardon is expressly granted for subsequent proof of innocence.

(48) Placed on probation--Has received an adjudicated or deferred adjudication probation for a criminal offense.

[§ 211.27. Reporting Responsibilities of Individuals](#)

(a) Within thirty days, a licensee or person meeting the requirements of a licensee shall report to the commission:

(4) an arrest, charge, or indictment for a criminal offense above the grade of Class C misdemeanor, or for any Class C misdemeanor involving the duties and responsibilities of office or family violence, including the name of the arresting agency, the style, court, and cause number of the charge or indictment, if any;

(5) the final disposition of the criminal action; and

(6) receipt of a dishonorable or other discharge based on misconduct which bars future military service.

[§ 211.28. Responsibility of a Law Enforcement Agency to Report an Arrest](#)

(a) When an agency receives information that it has arrested or charged an individual that is required to report under § 211.27 of this title for any offense above a Class C misdemeanor, or for any Class C misdemeanor involving the duties and responsibilities of office or family violence, the chief administrator or their designee must report such arrest to the commission in the format currently prescribed by the commission within 30 business days of notice of the arrest, including the:

(1) name, date of birth and PID of licensee (if available);

- (2) name, address, and telephone number of the arresting agency;
- (3) date and nature of the arrest;
- (4) arresting agency incident, booking, or arrest number; and
- (5) name, address, and telephone number of the court in which such charges are filed or such arrest is filed.

§ 211.29. Responsibilities of Agency Chief Administrators

- (a) An agency chief administrator is responsible for making any and all reports and submitting any and all documents required of that agency by the commission.
- (b) An individual who is appointed or elected to the position of the chief administrator of a law enforcement agency shall notify the Commission of the date of appointment and title, through a form prescribed by the Commission within 30 days of such appointment.
- (c) An agency chief administrator must comply with the appointment and retention requirements under Texas Occupations Code, Chapter 1701.

§ 211.30. Chief Administrator Responsibilities for Class a and B Waivers

- (a) A chief administrator may request the executive director that an individual be considered for a waiver of either the enrollment or initial licensure requirements regarding an otherwise disqualifying Class A or B misdemeanor conviction or deferred adjudication. An individual is eligible for one waiver request. This request must be submitted at least 45 days prior to a regularly scheduled commission meeting.
- (b) A chief administrator is eligible to apply for a waiver five years after the date of conviction or placement on community supervision.
- (c) The request must include:
  - (1) a complete description of the following mitigating factors:  
[see Regs]

Chapter 217. Enrollment, Licensing, Appointment, and Separation

§ 217.1. Minimum Standards for Enrollment and Initial Licensure

- (a) In order for an individual to enroll in any basic licensing course the provider must have on file documentation, acceptable to the Commission, that the individual meets eligibility for licensure.
- (b) The commission shall issue a license to an applicant who meets the following standards:
  - (1) minimum age requirement:  
....
  - (2) minimum educational requirements:  
....
  - (3) is fingerprinted and is subjected to a search of local, state and U.S. national records and fingerprint files to disclose any criminal record;



(4) has never been on court-ordered community supervision or probation for any criminal offense above the grade of Class B misdemeanor or a Class B misdemeanor within the last ten years from the date of the court order;

(5) is not currently charged with any criminal offense for which conviction would be a bar to licensure;

(6) has never been convicted of an offense above the grade of a Class B misdemeanor or a Class B misdemeanor within the last ten years;

(7) has never been convicted or placed on community supervision in any court of an offense involving family violence as defined under Chapter 71, Texas Family Code;

### Chapter 223. Enforcement

- § 223.2. Administrative Penalties

(a) In addition to any other action or penalty authorized by law, the commission may impose an administrative penalty against a law enforcement agency or governmental entity, including a school district, for violations of commission statutes or rules.

(b) In determining total penalty amounts, the commission shall consider:

....

(c) The following is a nonexclusive list of the per day per violation base penalty amounts for:

(3) Appointing as a peace officer or jailer a person disqualified because of criminal history, \$1,000;

(4) Appointing a person who does not meet minimum licensing or appointment standards as a peace officer or jailer, \$750;

(5) Appointing or continued appointment of a person as a peace officer or jailer with a revoked, suspended, or cancelled license or who is otherwise ineligible for appointment or licensure, \$1,000;

(6) Failing to timely submit any required appointment documents, \$350;

(8) Failing to timely submit or deliver an F-5 Report of Separation, \$350;

(10) Failing to timely report to the commission the reason(s) a license holder(s) appointed by the law enforcement agency or governmental entity are not in compliance with continuing education standards, \$250;

(11) Failing to timely comply with substantive provisions of any order(s) issued under commission statutes or rules, \$750;

(13) Failing to timely comply with required audit procedures, \$350;

(14) Failing to timely submit or maintain any document(s) as required by commission statutes or rules, \$250;

(15) Other noncompliance with commission statutes or rules not involving fraud, deceit, misrepresentation, intentional disregard of

governing law, or actual or potential harm to the public or integrity of the regulated community as a whole, \$200.

(d) In determining the total penalty amount, the commission may consider the following aggravating factors: ....

**9. DISCLOSURE OBLIGATIONS: FEDERAL LAW; BRADY AND MICHAEL MORTON.**

- A. [Brady v. Maryland issue. 373 U.S. 83, 87 \(1963\)](#)(holding that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution).
- B. Prosecution must disclose evidence useful for defendant, including evidence useful for impeachment purposes. [Andrews v. Collins, 21 F.3d 612 C.A.5 \(Tex.\)1994, certiorari denied 513 U.S. 1114.](#)
- C. To establish reversible error under Brady and its state law equivalent, an appellant must meet a three-prong test: (1) that the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) that the withheld evidence is favorable to him; and (3) that the evidence is material in that there is a reasonable probability that had the evidence been disclosed, the trial's outcome would have been different. [Hallman v.State \(App. 2 Dist. 2020\) 2020 WL 2201908](#)
- D. [TX Crim PRO T. 1, Trial and Its Incidents, Ch. Thirty-Nine, Refs & Annos](#)

[Art. 39.13. Impeachment](#)

Nothing contained in the preceding Articles shall be construed as prohibiting the use of any such evidence for impeachment purposes under the rules of evidence heretofore existing at common law.

[Art. 39.14. Discovery](#)

(h) Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

**10. COUNTERVAILING CONSIDERATIONS TO DISCLOSURE**

- A. See Tex. Atty. Gen. Op. KP – 0213 (2018) for a fairly thorough explanation of countervailing considerations. [Tex. Atty. Gen. Op. KP-0213.](#)
- B. Key principles addressed here are:
  - 1) A court would likely conclude that the knowledge of an assistant criminal district attorney is imputed to the prosecutor as “the State” for purposes of Article 39.14 of the Code of Criminal Procedure regardless of the internal division affiliation with the Office.
  - 2) To the extent information provided to an assistant criminal district attorney acting in a civil capacity constitutes an item described by §39.14(a) but is protected by the attorney-client privilege, the plain language of subsection (a) would exempt its disclosure to the defendant.

However, a court would likely conclude that any exculpatory information meeting the requirements of §39.14(h) obtained by such an attorney must be disclosed to the defendant, notwithstanding any attorney-client or other evidentiary privilege.

- 3) To the extent that information obtained by an assistant criminal district attorney acting in a civil capacity is confidential under section 261.201 of the Family Code, any duty of disclosure in §39.14(a) of the Code of Criminal Procedure would not be triggered except pursuant to court order obtained under §261.201(b) or (c). A court would likely conclude that any exculpatory information obtained by an assistant criminal district attorney that meets the requirements of §39.14(h) but that is made confidential by §261.201, TFC shall be disclosed only pursuant to court order obtained under §261.201 (b) or (c).
- C. Consequently, it is highly likely that the content of a police officer “g” file privilege under §143.089(g), TLGC would have to be evaluated for disclosure purposes in any criminal prosecution in which the officer is a potential witness or person with knowledge of relevant facts.
- D. Disclosure of Garrity Statements is probably also included within the scope of the disclosure obligations. [Garrity v. State of N.J., 385 U.S. 493 \(U.S. 1967\)](#).
- E. Safest approach, when in doubt, is to request in camera review of any arguably Brady encompassed content.

## 11. DISCIPLINARY CONSIDERATIONS: AT WILL

- A. Under Personnel Policy Manual or Policy Department Policy. Consult specifics of each municipality.

## 12. DISCIPLINARY CONSIDERATIONS: CIVIL SERVICE

### [Title 5. Matters Affecting Public Officers and Employees](#)

#### [Subchapter D. Disciplinary Actions](#)

#### [§ 143.056. Procedures After Felony Indictment or Misdemeanor Complaint](#)

(a) If a fire fighter or police officer is indicted for a felony or officially charged with the commission of a Class A or B misdemeanor, the department head may temporarily suspend the person with or without pay for a period not to exceed 30 days after the date of final disposition of the specified felony indictment or misdemeanor complaint.

*[Note: “May” but need not; however consider reporting TCOLE reporting requirements]*

(b) The department head shall notify the suspended fire fighter or police officer in writing that the person is being temporarily suspended for a specific period with or without pay and that the temporary suspension is not intended to reflect an opinion on the merits of the indictment or complaint.

*[Note: The temporary suspension is not “civil service discipline” and therefore not in and off itself appealable; but not appeal provisions below]*

(c) If the action directly related to the felony indictment or misdemeanor complaint occurred or was discovered on or after the 180th day before the date of the indictment

or complaint, the department head may, within 30 days after the date of final disposition of the indictment or complaint, bring a charge against the fire fighter or police officer for a violation of civil service rules.

*[Note: Temporary suspension order should also include an order to immediately report disposition of criminal charges so that 30 day deadline is not missed; no discovery rule applies to this deadline]*

(d) A fire fighter or police officer indicted for a felony or officially charged with the commission of a Class A or B misdemeanor who has also been charged by the department head with civil service violations directly related to the indictment or complaint may delay the civil service hearing for not more than 30 days after the date of the final disposition of the indictment or complaint.

*[Note: This presumes that disciplinary charges have been filed while criminal charges are pending. Nothing prohibits this but stay is mandatory otherwise.]*

(e) If the department head temporarily suspends a fire fighter or police officer under this section and the fire fighter or police officer is not found guilty of the indictment or complaint in a court of competent jurisdiction, the fire fighter or police officer may appeal to the commission or to a hearing examiner for recovery of back pay. The commission or hearing examiner may award all or part of the back pay or reject the appeal.

*[Note: language requires “is not found guilty” rather than “final disposition of the indictment or complaint”. So is appeal for backpay limited? Also note, what is deadline to appeal? Also note, what is the standard of review and who carries the burden of proof or persuasion.]*

(f) Acquittal or dismissal of an indictment or a complaint does not mean that a fire fighter or police officer has not violated civil service rules and does not negate the charges that may have been or may be brought against the fire fighter or police officer by the department head.

*[Note: Most officers and their counsel and CSCs and IHE’s think that beating the criminal charge forecloses administrative discipline.]*

(g) Conviction of a felony is cause for dismissal, and conviction of a Class A or B misdemeanor may be cause for disciplinary action or indefinite suspension.

*[Note: With a felony conviction, is the removal of the officer automatic or does it require a summary proceeding to be adjudicated as a matter of law? What happens if the felony conviction is appealed? And of what use if the discretionary “may” provision for a Class A or B misdemeanor conviction?]*

(h) The department head may order an indefinite suspension based on an act classified as a felony or a Class A or B misdemeanor after the 180-day period following the date of the discovery of the act by the department if the department head considers delay to be necessary to protect a criminal investigation of the person's conduct. If the department head intends to order an indefinite suspension after the 180-day period, the department head must file with the attorney general a statement describing the criminal investigation and its objectives within 180 days after the date the act complained of occurred.

*[Note: It is a bit awkward to have the department head send the AG a notice like this claiming that he/she intends to order an indefinite suspension of an*

*officer when often the underlying criminal and IA investigation is incomplete and the department head does not have the necessary information to fully ascertain whether an indefinite suspension is in fact justified.]*

### 13. CONFLICTS FOR LEGAL COUNSEL

- A. What position or role does legal counsel have in this process?
- B. What aspects of the foregoing legal consequences can legal counsel provide legal counsel in?
- C. What are the applicable provisions governing the lawyers?

#### Section 9. Texas Disciplinary Rules of Professional Conduct

##### I. Client-Lawyer Relationship

###### Rule 1.05. Confidentiality of Information

(a) “Confidential information” includes both “privileged information” and “unprivileged client information.” “Privileged information” refers to the information of a client protected by the lawyer-client privilege of [Rule 503 of the Texas Rules of Evidence](#) or of [Rule 503 of the Texas Rules of Criminal Evidence](#) or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. “Unprivileged client information” means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

....

###### Rule 1.06. Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications,

and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, 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.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

[Note: Firm-wide disqualification; knowledge imputed; see proposed new Rules]

[Rule 1.07. Conflict of Interest: Intermediary](#)

[Rule 1.08. Conflict of Interest: Prohibited Transactions](#)

[Rule 1.09. Conflict of Interest: Former Client](#)

(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:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of [Rule 1.05](#); or

(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by [Rule 1.10](#), when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of [Rule 1.05](#).

[Rule 1.10. Successive Government and Private Employment](#) 

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.

(b) No lawyer in a firm with which a lawyer subject to paragraph (a) is associated may knowingly undertake or continue representation in such a matter unless:

(1) The lawyer subject to paragraph (a) is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is given with reasonable promptness to the appropriate government agency.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows or should know is confidential government information about a person or other legal entity acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person or legal entity.

...

#### **14. PROPOSED DR RULE CHANGES**

Please be aware that the Committee on Disciplinary Rules and Referenda (CDRR) as published proposed DR changes.

The proposed draft includes two proposed rules, numbered 1.09 to 1.10. Together, those two proposed rules would replace one rule, namely current Rule 1.09. Current Rules 1.10-1.16 would remain in effect and would be renumbered as Rules 1.11-1.17. For purposes of this presentation, a proposed provision imposing a duty to disclose on municipal prosecutors is of particular interest.

A copy of the proposed rule changes is contained in the Texas Bar Journal, March 2022 Edition.

-END-