

## Texas Ethics Alert – 2018 In Review

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January 16, 2019

The Texas Professional Ethics Committee was hard at work this year, issuing several important opinions for Texas attorneys, including opinions regarding the ethical issues involved in on-line discussions groups and cloud storage, conflicting duties to insurers and insureds, departing lawyers, client trust accounts, and the practice of conflicting out potential expert witnesses. For more information on these opinions, please contact [Kelli Hinson](#).

**Opinion 669** – The Committee concluded that a defense attorney hired by an insurance company to defend one of the company's insureds cannot inform the insurance company that the client is failing to cooperate in the defense of the lawsuit. The Committee concluded that the client's non-cooperation was, at the very least, non-privileged but confidential client information, which cannot be disclosed to third parties without the client's consent.

**Opinion 670** – The Committee concluded that a lawyer departing a firm may, at his own expense, copy and take with him any client files created by him or to which he had access while personally representing the client at the former firm—even if the lawyer will not be representing the client at the new firm. The departing lawyer must take care, however, to maintain the confidentiality of those documents at his new firm and must not, for example, store the documents in an area accessible by others or on a computer system to which other members of the new firm have access.

**Opinion 671** – The Committee concluded that an attorney (either directly or through an agent) may not anonymously contact an anonymous online individual in order to obtain jurisdictional or identifying information sufficient for obtaining a deposition pursuant to Rule 202. The Committee followed the lead of several other ethics committees in finding that failing to identify oneself in the course of an on-line investigation may constitute misrepresentation, dishonesty, deceit, or the omission of a material fact and is not permitted under the ethical rules.

**Opinion 672** – The Committee addressed the issue of whether a written communication from a lawyer to employees in a particular position constitutes direct mail solicitation if the communication does not directly offer to represent the recipients of the communication but suggests to the recipients that they have claims because they are similarly situated to the plaintiffs in a pending lawsuit. The concluded that if the communication is made with the intent to seek professional employment, and none of the Rule 7.05(f) exceptions apply, the communication must comply with the advertising rules in Rule 7.05(d).

**Opinion 673** – The Committee concluded that a lawyer's use of on-line discussion groups or informal consultations with lawyers not in his firm is permissible under the ethics rules, provided that no confidential information about the

client is revealed. The lawyer should take care that the “hypothetical question” is not so specific that others can infer the identity of the client.

**Opinion 674** – The Committee concluded that a lawyer operating under a non-profit 501(c)(3) organization may not solicit prospective clients who have not sought the lawyer’s advice if the services would generate pecuniary gain for the lawyer and the prospective client is not a member of the 501(c)(3) organization to which the lawyer belongs.

**Opinion 675** – The Committee concluded that the ethics rules permit a mediator to prepare and provide a proposed written agreement memorializing the terms of the agreement reached by the parties at mediation and may include terms that were not discussed or agreed upon during the mediation. The mediator should take care to make sure all parties understand the proposal is not binding and that she is not providing legal advice on the advisability of signing the agreement.

**Opinion 676** – The Committee concluded it is a violation of the ethics rules to retain a “consulting expert” purely for the purpose of disqualifying that expert from testifying for the other side.

**Opinion 677** – The Committee concluded that the law partner of a part-time municipal judge may not represent a defendant in a case pending before other judges in that court unless the lawyer reasonably believes the representation will not be materially affected by his relationship with the part-time judge and the client consents in writing.

**Opinion 678** – The Committee concluded there was no per se restriction against an attorney serving as both the executor of an estate and as legal counsel for the executor. But the lawyer should evaluate whether the dual role would present a conflict of interest under Rule 1.06.

**Opinion 679** – The Committee considered the circumstances under which a lawyer may re-negotiate a flat-fee representation after the representation has begun because the matter becomes more complicated or time consuming than expected. The Committee concluded a lawyer may renegotiate his fee during the course of a representation, but only if the lawyer can prove the modification of the fee agreement is “fair under the circumstances.”

**Opinion 680** – The Committee concluded that a lawyer may, consistent with the ethics rules, use a cloud-based electronic data storage system or cloud-based software document preparation system to store client confidential information or prepare legal documents. However, the lawyer must take care to understand the privacy and other features of the cloud-based system and take reasonable precautions to protect the clients’ confidential information.

**Opinion 681** – The Committee considered the thorny issue of a lawyer’s duties to disburse or safeguard funds held in the lawyer’s trust account when those funds are subject to conflicting claims, for example, when there are third-party claims to the proceeds of a client’s settlement and the client instructs the lawyer not to honor those claims. The Committee performed a detailed analysis of Rule 1.14 regarding safeguarding client property and provided a very helpful roadmap on how to balance the duties owed to the client and to third parties.

**Opinion 682** – The Committee considered the circumstances under which a lawyer—or another lawyer in the first lawyer’s firm—may represent a client in a lawsuit in which the first lawyer is a fact witness and is likely to testify at trial. The Committee discussed various circumstances under which such a representation may or may not be appropriate under Rule 3.08 and the conflict rules.

