

# CHAPTER 1

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### CITE FORM

For convenience in this volume, the following shortened citation forms are used:

- Texas Disciplinary Rules of Professional Conduct: cited as “TDRPC” or “the Texas Rules”;
- American Bar Association’s Model Rules of Professional Conduct: cited as “the ABA Model Rules”;
- Texas Lawyer’s Creed—A Mandate for Professionalism: cited as “the Texas Lawyer’s Creed,” “the Creed,” or “TLC”;
- Texas Rules of Disciplinary Procedure: cited as “TRDP”;
- Texas Rules of Civil Procedure: cited as “TRCP”;
- Restatement (Third) of the Law Governing Lawyers: cited as “the Restatement.”

Unless otherwise specified, all statutory citations are to Texas statutes or codes.

**§ 1.01 Introduction and Scope.** This book is designed as a practical, day-to-day guide for the Texas lawyer or judge who confronts an issue of legal malpractice, lawyer liability, or legal ethics or who becomes involved in a disciplinary proceeding.

During the last twenty-five years, the liability and disciplinary risks for Texas lawyers have remained high.

- One survey by the State Bar of Texas found that 48 percent of lawyers or firms responding had been the subject of a malpractice claim.
- Another study indicated that the average lawyer can expect three legal malpractice claims during his or her career.
- For a recent five-year period, the Texas Commission for Lawyer Discipline reported that 41,691 “initial writings” were filed against Texas lawyers, with 14,064 of those being classified as disciplinary complaints.

During this same period, lawyers have seen major changes in the disciplinary and procedural rules governing their conduct.

- In 1989, the Texas Supreme Court and the Texas Court of Criminal Appeals, by joint order, adopted the Texas Lawyer’s Creed—A Mandate for Professionalism, expressly authorizing enforcement when necessary through courts’ “inherent powers and rules already in existence.” Federal courts, state courts and bar associations in Bexar, Dallas, Harris and Travis counties adopted their own, sometimes inconsistent professionalism creeds.
- In 1990, the new Texas Disciplinary Rules of Professional Conduct were adopted, replacing the Code of Professional Responsibility, which had been in effect since 1971. The Supreme Court amended the Rules and Comments, or otherwise altered their effective dates, by orders dated 10/23/91; 6/15/94; 11/4/94; 11/15/94; 11/28/94; 2/23/95; and 3/31/95. The State Bar Board of Directors also adopted amendments to the Comments and to the Rules on 9/16/94 and 1/20/95.

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- The 1995 amendments to the Texas Disciplinary Rules of Professional Conduct included a wholesale revision to Part VII, which concerns advertising and solicitation. A constitutional challenge first postponed the effective date of those amendments, eventually invalidating three of the rules. The State Bar also created the new Advertising Review committee, which issues advisory opinions and publishes interpretive comments.
- In 1991, a State Bar of Texas referendum approved the new Texas Rules of Disciplinary Procedure, some of which became effective on 2/26/91, and most of which became effective on 5/01/92. The Texas Supreme Court amended these rules, or otherwise altered their effective dates on 2/26/91; 6/23/92; 12/23/93; 6/15/94; 9/12/92; 11/04/94; 11/28/94; 3/31/95; and 1/1/04.
- In 2001 and again in 2003, the Texas Legislature adopted changes to the State Bar Act that required changes to the Texas Rules of Disciplinary Procedure. Accordingly, in 2003, the Texas Rules of Disciplinary Procedure were redrafted to conform to the statutory requirements. At present, then, Texas has in effect two sets of rules of disciplinary procedure: (1) a set that applies to grievances filed before 1/1/04, and (2) a set that applies to grievances filed on or after 1/1/04.
- In 2005, the Texas Supreme Court amended the fee-division rules (Rule 1.04(f)-(h), effective March 1, 2005) and the advertising rules (Rules 7.01-7.07, effective June 1, 2005).
- Following a State Bar referendum vote in 2021, the Texas Supreme Court amended rules (Rules 1.02, 1.05, and 8.03, effective March 1, 2005) and the advertising rules (Rules 7.01-7.06, effective July 1, 2021). The Texas Supreme Court also added Rules 1.16 (Clients with Diminished Capacity) and 6.05 (Conflict of Interest Exceptions for Limited Pro Bono Services), effective July 1, 2021.
- While Texas state appellate courts have rendered dozens of decisions addressing disqualification of lawyers for various conflicts of interest since the adoption of the Texas Disciplinary Rules of Professional Conduct, the U.S. Fifth Circuit Court of Appeals made clear that in federal court those rules are not controlling and that different standards apply.

In short, rules, creeds and codes have proliferated, changed and become increasingly hazardous to the professional health and wealth of Texas lawyers.

During the same period, major changes occurred in the substantive law of legal malpractice in Texas, including: abolition of the “subjective good faith” defense; application of a “discovery rule” and various tolling doctrines to statute of limitations issues; judicial imposition of liability under the Deceptive Trade Practices Act followed by legislative curtailment of the Act’s application to lawyers; recognition of a fee-forfeiture remedy for breach of fiduciary duty; application of negligent-misrepresentation liability for lawyers to nonclients; development of a large body of disqualification case law, including for migratory employees; reinforcement of the traditional privity protection of lawyers; recognition of legal malpractice subrogation claims by excess insurance carriers against defense counsel; creation of limited liability partnerships; court revision of sanctions practice followed by legislative enactment of a statutory remedy for frivolous pleadings; and restrictions on the assignability of legal malpractice claims.

Some of these developments in substantive law have helped lawyers. Others have increased the risks of practicing law.

As a result of these many changes, Texas lawyers face a web of overlapping and sometimes confusing restraints upon their conduct. Failure to comply can produce a range of unpleasant results, including liability for damages, fee forfeiture, litigation costs, and insurance deductibles; time away from practice defending claims or disciplinary complaints; increased malpractice insurance premiums; damage to professional reputation; loss of clients; and disciplinary actions and sanctions, up to and including suspension or disbarment.

The purpose of this volume is to provide an easy-to-use handbook and a quick guide to the risks and rules of legal malpractice and to the disciplinary standards and procedures applicable to Texas lawyers. Accordingly, the focus of this volume is almost exclusively on Texas cases, rules and codes, though pertinent federal rules and statutes also are noted, and the coverage includes decisions by federal district courts of Texas and by the U.S. Fifth Circuit Court of Appeals.

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### § 1.02 How To Use This Volume

Because the intended use of this volume is as a quick reference for the busy practitioner or judge, interpretive commentary on pertinent decisional law has been kept to a minimum. Whenever possible, the discussion presents the controlling principles in the courts' own words, by direct quotations, or through brief paraphrasing. The goal has been to provide immediate access to controlling cases and rules. The text also contains "Practice Tips," "Cautions," and "Notes" to provide practical solutions and draw attention to special problems that may not be obvious from an initial review of the case law or rule.

**§ 1.02 How To Use This Volume.** This volume is organized into four substantive chapters tracing the following areas:

**Chapter 3: Legal Malpractice in Texas.** This chapter discusses the Texas law of legal malpractice and lawyer liability, including the causes of action asserted by clients and nonclients, standards of care, defense and damages.

**Chapter 4: Disciplinary Rules for Lawyers—The Texas Disciplinary Rules of Professional Conduct.** This chapter provides a guide to the provisions of the Texas Disciplinary Rules of Professional Conduct that lawyers are most likely to encounter in day-to-day practice.

**Chapter 5: Texas Rules of Disciplinary Procedure.** While Chapter 4 presents the standard of conduct governing Texas lawyers for disciplinary purposes, this chapter provides a guide to the procedures that govern lawyer discipline in Texas.

**Chapter 6: Texas Lawyer's Creed.** This chapter discusses the obligations arising under the "Texas Lawyer's Creed—A Mandate for Professionalism" adopted by the Texas Supreme Court and the Texas Court of Criminal Appeals and analyzes the available measures to enforce the Creed.

Following these chapters, the Appendices present the complete text of the most important rules, codes and statutes:

<b>Appendix A</b>	Texas Disciplinary Rules of Professional Conduct
<b>Appendix B</b>	Texas Rules of Disciplinary Procedure
<b>Appendix C</b>	Texas Lawyer's Creed—A Mandate for Professionalism
<b>Appendix D</b>	Board of Disciplinary Appeals, Internal Procedural Rules
<b>Appendix E</b>	State Bar of Texas Pro Bono Policy

The volume also contains a complete table of contents to all sections, and each page has a section heading at the top of the page.

Chapter 2 provides a reference table to the sources of a lawyer's duties and liabilities, organized roughly by chronology along the span of a typical lawyer-client relationship and cross-referenced to the appropriate rules and the corresponding sections within this volume that discuss each.

Additionally, an Index appears at the end of the volume that lists the section and page citations for all major topics.

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