



*Chairman. Commissioner.
Prosecutor. Judge. Director.
Professor.*

Over 20 years of practicing law, Ross Fischer has earned a wide array of appellations. Along the way, he has developed an expertise in the areas of professional ethics, public law, & campaign finance.

Ross's experience includes service in numerous capacities:

- General Counsel to the State Bar of Texas, the nation's second largest bar association.
- Chairman of the Texas Ethics Commission, which regulates the political process, including campaign finance, candidates, officeholders, and lobbyists.
- Chairman of the Legislative and Campaign Section of the State Bar of Texas.
- Clinical professor at the University of Texas School of Law.
- Appointed by the Texas Speaker of the House to serve on the Select Interim Committee to Study Ethics laws.
- Elected to the Board of Directors of the nation's largest electric distribution cooperative.
- Assistant Chief Disciplinary Counsel for the State Bar of Texas.
- The elected Kendall County Attorney, where he served as both the civil advisor and the misdemeanor prosecutor for one of the fastest growing counties in Texas.
- A municipal judge.

Ross provides legal counsel to elected officials, candidates, trade associations, corporations, political committees, and public entities. Given his expertise in the area of professional ethics, he is often called upon to conduct investigations on behalf of organizational clients.

Ross works on specialized litigation, including the Public Information Act, mandamus actions involving public officials, and election-related matters. Ross has successfully represented clients before both the Texas Supreme Court and the Texas Court of Criminal Appeals.

Ross is a graduate of St. Edward's University and the University of Texas School of Law, both in Austin.

Navigating Conflicts of Interest for Lobbyists & Lawyers

Ross Fischer

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Today's goals

- Understand the conflict-of-interest provisions in the lobby law.
- Compare the lobby law with the conflict-of-interest provisions governing lawyers in the TDRPC.
- Review “former client” restrictions applicable to attorneys.
- Discuss proposed revisions to TDRPC’s “former client” conflict rule.

Lobby Law Conflicts

- **Sec. 305.028. Prohibited Conflicts of Interest**
- (1) "Client" means a person or entity for which the registrant is registered or is required to be registered.
- (2) "Matter" means the subject matters for which a registrant has been reimbursed, retained, or employed by a client to communicate directly with a member of the legislative or executive branch.
- (3) "Person associated with the registrant" or "other associated person" means a partner or other person professionally associated with the registrant through a common business entity, other than a client, that reimburses, retains, or employs the registrant.

Lobby Law Conflicts

- A registrant **may not** represent a client if representation would:
- Involve a **substantially related matter** in which that client's interests are **materially and directly adverse** to the interests of:
 - Another client of the registrant;
 - The registrant's employer; or
 - Another client of a person associated with the registrant; or
- **Reasonably appears to be adversely limited by:**
 - The registrant's **responsibilities to another client**; or
 - The registrant's own business interests.

Lobby Law Conflicts

- A registrant **may** represent a conflicted client if:
- The **registrant reasonably believes the representation of each client will not be materially affected**;
- Within 2 business days, the **registrant provides written notice**, in the manner required by the commission, to each affected client; and
- Within 10 days, the registrant files with the commission a **statement** that indicates that there is a conflict, states the name of each affected client, and confirms that each affected client has been notified.

Lobby Law Conflicts

Exceptions

- A registrant **may represent** a conflicted client *without regard* to whether the registrant reasonably believes the representation of each client will be materially affected if:
 - The registrant provides the **written notice to each affected client** and **files the required statement** with the TEC; and
 - After the registrant has provided the written notice, **each affected client consents** to the conflict and grants the registrant permission to continue the representation.
- If a registrant would be prohibited by this section from engaging in particular conduct, an the registrant's employer/partner/associate may not engage in that conduct.

Lobby Law Conflicts

- If a registrant violates the conflicts law, or if multiple representation properly accepted becomes improper under this section, the registrant shall promptly withdraw from one or more representations to the extent necessary to cure the conflict.
- In each lobby activity report, a registrant shall swear that he or she has complied with this section.
- If the TEC determines a violation of this section has occurred, after notice and hearing, it:
 - **Shall** impose a civil penalty in an amount not to exceed \$2,000; and
 - **May** rescind the person's registration and prohibit the person from registering with the commission for up to two year.

What's the Matter?

- What is a “matter”?
- Is it the entire representation?
- Is it a specific bill? An amendment? A single provision within a bill?
- A bill and its corresponding appropriation?

Texas Disciplinary Rules of Professional Conduct

Contains rules governing conflicts among existing clients, with former clients, and when lawyer acts as intermediary.

Conflicts of Interest

- **Rule 1.06.** A lawyer shall not represent a person if representation of that person:
 - Involves a **substantially related matter** in which that person's interests are **materially & directly adverse** to those of another client; or
 - Reasonably appear to be adversely limited by the lawyer's responsibilities to another client, a third party, or the lawyer's own interests.

Conflicts of Interest

- Unless...
 - The lawyer reasonably believes that the representation of each client will not be materially affected; **AND**
 - Each potentially affected client consents after full disclosure of the existence, nature, implications & possible adverse consequences of the common representation.

Differences

- Lobby law allows for conflicted representation if both clients consent.
- Under TDRPC, consent will not cure representation that is reasonably likely to harm one client.
- Lobby law requires consent to be written and a statement filed with the tribunal (TEC)
- TDRPC does not require that the client consent *in writing*.

Conflicts with former clients

The disciplinary rules govern conflicts with former clients, whereas the lobby law does not.

Therefore, non-lawyer lobbyists enjoy an advantage with regard to advocating against former clients.

Conflicts: Former Clients

- **Rule 1.09.** Without prior consent, a lawyer who has represented a client in a matter shall not represent another in a matter adverse to the client matter:
 - If the representation is likely to involve a violation of confidentiality; OR
 - If it is the same or a substantially related matter.

Proposed changes to TDRPC 1.09

Proposed changes to the “former client” disciplinary rule are currently up for consideration...

Proposed Rule 1.09 (Former Clients)

- A lawyer shall not thereafter represent a person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client **consents in writing**.
- The prohibition extends to a client of lawyer's previous firm, if lawyer has confidential information about the former client.
- A lawyer who has formerly represented a client in a matter shall not **use information relating to the representation to the disadvantage of the former client** (unless info is reasonably known) or **reveal confidential information** relating to the representation of the former client.

Proposed Rule 1.09 (Former Clients)

Public comment period ended in early April.

Committee on Disciplinary Rules and Referenda has until early June to decide to whether to refer to the Bar Board of Directors.

If sent to the Bar Board, Board votes whether to approve rule change and ask Supreme Court to call a referendum on the change.

Tips for addressing conflicts

- Define “matter” in initial engagement.
- Consider limiting by specific undertaking:
 - Specific bill or amendment
 - Specific appropriation
 - Specific agency determination or rule
- Consider limiting by time period:
 - Regulator legislative session
 - Special session
 - Interim study



The End

Questions?

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