



*2022 Myth Busters  
Family Law Section of the  
Collin County Bar Association*

-

*Presented By: Jeanne M. Huey*

*October 27, 2022*

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COUNSELORS

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*Clients  
with  
Diminished  
Capacity  
(Rule 1.16)*

Question #1:

Am I **required** under the disciplinary rules to take action to have a guardian appointed or seek other protective orders if I **reasonably believe that my client's capacity to make adequately considered decisions in connection with a representation is diminished?**

YES or NO

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*Answer:*

**NO**

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### **Rule 1.16(b)**

You **may** take “reasonably necessary protective action” only if

1. there is a risk of substantial physical, financial, or other harm unless action is taken, **and**
2. the client cannot adequately act in their own interest.

Absent 1 and 2, in this circumstance you **shall**, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (1.16(a))

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*What is  
“reasonably  
necessary  
protective  
action” under  
part (b)?*

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Such action may include, but is not limited to:

- consulting with individuals or entities that have the ability to take action to protect the client;
- seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator;
- submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client; and
- disclosing the client’s confidential information to the extent you reasonably believe is necessary to protect the client’s interests.

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## *Clients with Diminished Capacity (Rule 1.16)*

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### Question #2:

Under the new Rule, if I believe the client's capacity to make decisions in connection with a representation is diminished, but I don't believe I need to take "protective action", I can have a family member participate in attorney-client discussions to assist my client.

TRUE or FALSE

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*Answer:*

**TRUE**

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### **Comment 4 to Rule 1.16**

The client may wish to have family members or other persons, including a previously designated trusted person, participate in discussions with the lawyer

You must still keep the client's interests foremost and only look to the client, not the family members or other persons, to make decisions on the client's behalf.

As part of the client in-take process, lawyers may wish to give new clients the opportunity to designate trusted persons who may be contacted by a lawyer if special needs arise.

Any such procedure should provide sufficient information for the client to understand and confer with the lawyer about the designation of a trusted person.

In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

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*My client and I can contract for whatever we can agree on – right?*

Family law clients are not necessarily sophisticated consumers of legal services

Usually it is a one-time representation

They may have never dealt with contracts for legal services before

The fee agreement will be interpreted by any Court against the drafter i.e. the lawyer

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*Fee  
Agreements:  
Just Another  
Contract?*

Question #3:

My fee agreement can require the client to pay for my time if I have to file a motion to withdraw or have a hearing on it.

TRUE or FALSE?

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*Answer:*

***FALSE***

### WHY?

You cannot charge the client for preparing and prosecuting a motion to withdraw.

You cannot charge the client for time spent gathering the file or anything else associated with ending the representation.

Once you decide to withdraw you are likely adverse to the client—so tread carefully.

From **LEE V. DANIELS, 264 S.W. 3d 273, (Tex. App.—San Antonio 2008):**

*No lawyer could form a reasonable belief that time spent adversarial to the client and in pursuit of the lawyer's own interests is the rendering of "legal services" for the client. Thus, no lawyer could form a reasonable belief that fees incident to such time spent were reasonable.*

*Fee  
Agreements:  
Just Another  
Contract?*

Question #4:

Attorney-client fee agreements are privileged.

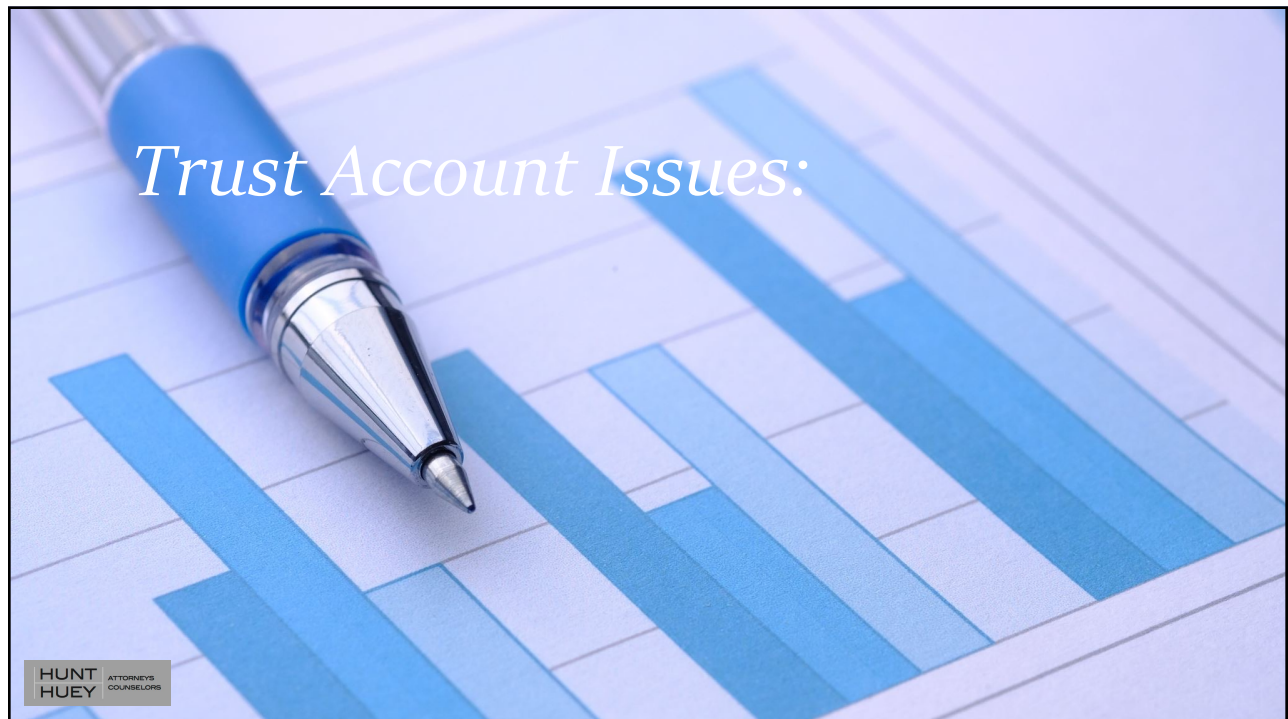
TRUE or FALSE?

## Answer: **FALSE**

- Fee agreements are generally discoverable and not protected by the attorney-client privilege if a party seeks attorneys' fees. (*Jim Walter Homes, Inc. v. Foster*, 593 S.W.2d 749, 752 (Tex. Civ. App.—Eastland 1979, no writ).
- “[T]he attorney client privilege does not encompass such nonconfidential matters as the terms and conditions of an attorney’s employment, the purpose for which an attorney has been engaged, or any of the other external trappings of the relationship between the parties.” (*Duval Cnty. Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 634 (Tex. App.—Amarillo 1983, writ ref’d n.r.e.).



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## Client Trust Accounts

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Question #5:

I can transfer money from a client trust account only after (1) the invoice is sent and received by the client and (2) I have notified the client that I am making the transfer.

TRUE or FALSE?

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INVOICE

Your Company Name

Your Business Address

City

Country

Postal

INVOICE #	DATE	INVOICE DUE DATE	AMOUNT
123456	12/31/20	12/31/20	\$0000

ITEMS	DESCRIPTION	QUANTITY	PRICE	AMOUNT
Item 1	Description	3	\$00.00	\$0000.00
Item 2	Description	2	\$00.00	\$0000.00
Item 3	Description	3	\$00.00	\$0000.00
Item 4	Description	1	\$00.00	\$0000.00
Item 5	Description	1	\$00.00	\$0000.00
Item 6	Description	1	\$00.00	\$0000.00
Item 7	Description	1	\$00.00	\$0000.00
Item 8	Description	1	\$00.00	\$0000.00

NOTES:

Sub-Total

Tax Rate

Tax

TOTAL

\$0000

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Agiled

## Answer:

# FALSE

It is a three step process: Clients must have a chance to review the invoice and only in the absence of a dispute (after the client has a reasonable time to review) may the lawyer withdraw funds from the Trust Account.

(Comment 2 to Rule 1.14)

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*Hey Facebook Group – I Have a Case Where...”*

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*Rule 1.05:  
Confidentiality*

Question #6:

You encounter a unique situation that you would like to ask other lawyers about. Can you post a “scenario” asking other lawyers about your case without using client names or court information without violating Rule 1.05 (confidentiality)?

YES or NO?

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*Answer:*

**YES,  
BUT...**

*Texas Ethics  
Opinion 673*

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- Careful thought is required
- What we can and cannot say without revealing client confidences is actually very limited
- Questions about a statute or the law itself are safer
- Usually those are not the kinds of questions we want to discuss--so be cautious!
- The lawyers with the most expertise are also those most likely to be our opponents

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## *Preamble to the Rules:*

*As a representative  
of clients, a lawyer  
performs various  
functions:*

**Advisor  
Advocate  
Negotiator**

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**1. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.**



**2. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.**



**3. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.**

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## Advocating with Zeal...

### Question #7:

I just learned that my client changed the date on an email that I offered into evidence to make it look like it was sent after instead of before an important event in the case. When I find out what he has done, my client orders me not to tell the Judge or opposing counsel. Can I follow my client's orders?

YES or NO?

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ANSWER:

**NO**

*Duty of Candor to  
the Tribunal  
(Rule 3.03)*

### RULE 3.03

**(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.**

### COMMENT 8

When a lawyer learns that the lawyer's services have been improperly utilized in a civil case to place false testimony or other material into evidence:

- the lawyer must disclose the existence of the deception to the court or to the other party, if necessary rectify the deception. See paragraph (b) and Rule 1.05(h). See also Rule 1.05(g).
- Such a disclosure can result in grave consequences to the client, including loss of the case and perhaps a prosecution for perjury.
- The alternative is that the lawyer would be aiding in the deception of the tribunal or jury, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.02(c).
- Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

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## *During Discovery...*

Question #8:

My client lied to the opposing counsel during her deposition. Do I have a duty to correct the lie?

YES or NO?



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## *Answer:*

# *NO*

**Texas Ethics Opinion 692  
(Oct. 2021)**

A lawyer does not have a duty to correct intentionally false statements made by the client while being cross-examined by the opposing party's counsel during a deposition. BUT:

-the lawyer should urge the client to correct the false statements, including by explaining the potential civil and criminal ramifications of false testimony.

-If the client refuses, the lawyer may (but is not required to) withdraw from the client representation if permitted by the Rules.

-If the lawyer does not withdraw, the lawyer is not required to disclose the true facts

-The lawyer may not use the false deposition testimony in any way to advance the client's case.



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## QUESTION #9 METADATA

Scenario: Lawyer 1 sends a proposed settlement agreement to opposing counsel (OP). She asks for him to send revisions in a red-line word document for ease of review. Two days later OP sends Lawyer 1 his revisions in a Word document. Lawyer 1 then "mines" the document for metadata and finds privileged comments between OP and his client within the metadata.



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*TRUE OR FALSE?*

**NEITHER LAWYER 1  
NOR OPPOSING  
COUNSEL VIOLATED  
ANY DISCIPLINARY  
RULE**



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# FALSE

## OPPOSING COUNSEL VIOLATED THE DISCIPLINARY RULES.

The Rules require lawyers to take **reasonable measures** to avoid the transmission of confidential information embedded in electronic documents, including the employment of reasonably available technical means to remove such metadata before sending such documents to persons other than the lawyer's client.

The Texas Rules do not prescribe a specific course of conduct for a lawyer who receives confidential information like this from another lawyer outside of the discovery process that the receiving lawyer believes was inadvertently transmitted.

*Texas Ethics Opinion 665*  
*TDRPC 1.05*



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# WARNING

Texas lawyers who are admitted to practice or who are appearing *pro hoc vice* in another state or in Federal Court in the 5<sup>th</sup> Circuit (who follows the ABA Model Rules) should know that nearly every other state has adopted some version of ABA Model Rule 4.4(b) which requires a lawyer who inadvertently receives such information to act by promptly notifying the sender.

*ABA MODEL RULE 4.4(b)*



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QUESTION # 10  
TRUE OR FALSE:

*The Americans with Disabilities Act requires that my law firm's lobby be wheelchair accessible*

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*TRUE*

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