Insurance Agent Liability in Texas

By Martin S. Schexnayder

Illustration by Gilberto Sauceda

Over the years, much attention has been given by Texas courts to defining the duties and liabilities of insurance companies. Not as well-examined, but equally important, are the duties and liabilities of insurance agents. As the intermediary between the insurer and insured, agents are integral to every insurance transaction, and the proper performance of their duties is often the lynchpin to any insurance dispute. Therefore, this article discusses insurance agent liability in Texas as it has been defined and discussed by Texas courts over the years.

"Agent" Defined

To understand how courts have addressed insurance agent liability in Texas, it is first important to understand what an agent is. The Texas Insurance Code expressly states who is an agent.[1] According to that statute, an agent is any person who (1) solicits insurance on behalf of an insurance company; (2) transmits an application or policy to or from an insurance company; (3) receives or delivers a policy on behalf of an insurance company; (4) examines or inspects any risk; (5) receives, collects, or transmits an insurance premium; or (6) adjusts a loss on behalf of an insurance company.[2] It is unlawful for a person to do any of these things without the appropriate license.[3]

Although some jurisdictions make a distinction between insurance "agents," who represent a single insurer, and insurance "brokers," who sell policies from different insurers, this distinction is not made in the Texas Insurance Code.[4] Insurance agents, other than those engaged in life, health, or accident, are categorized as either "local recording agents" or "solicitors."[5] A local recording agent may solicit business and write, sign, execute, and deliver policies of insurance, and bind insurance companies on insurance risks.[6] A solicitor works for and offices with a local recording agent, and may bind insurance risks only with the express prior approval of the local recording agent for whom he or she works.[7]

Generally speaking, an insurance agent is considered the agent of the insured.[8] However, in most, if not all, insurance transactions, an insurance agent represents both the insured and the insurer.[9] This dual role not only obligates the agent to perform certain ministerial duties for the parties, such as collecting the premium from the insured, delivering the policy for the carrier, and procuring insurance for the insured from the carrier,[10] but it also gives rise to common law and statutory duties on the part of the agent to both parties to the transaction. Those duties, and the liability that those duties present to agents, are discussed below.

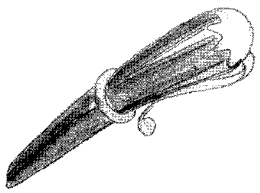
Liability To the Insured

Negligence

According to one Texas court, an agent owes the insured "the greatest possible duty."[11] The agent "is the one the insured looks to and relies upon":

> Most people do not know what company they are insured with. The insured looks to the agent he deals with to get the coverage he seeks, with a sound company who can and will properly and promptly pay claims when they are due. It is his duty to keep his clients fully informed so that they can remain safely insured at all times.[12]

Perhaps the most central and inviolable duty an agent owes the insured in Texas is the duty to use reasonable diligence in attempting to place the requested insurance and to inform the client promptly if unable to do so.[13] In one case, an

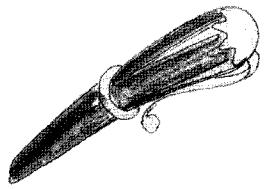


agent was liable to an insured for the uncovered fire damage loss to the insured's house when the agent, after agreeing to have a builder's risk policy on the house, failed to notify the customer that he had not procured such a policy.[14] In another case, an agent was held liable for fire damage after his customer requested a new policy to replace one cancelled by the insurer, and the agent neither procured such a replacement policy nor alerted the customer to this failure by returning the unearned portion of the premium for the original policy.[15]

Failure to procure the requested insurance may give rise to liability in contract as well as tort. In *Turner-Bass Assoc. v. Williamson*, an agent was sued for breach of contract for failing to secure workers' compensation insurance which provided coverage for the client's out of state workers.[16] On appeal, the agent argued that the submission of the breach of contract issue was erroneous because it effectively made the agent the insurer of the insured rather than his insurance agent.[17] However, the court ignored this argument, focusing instead on the sufficiency of the evidence arguments, and finding that "[t]he continuation of an ongoing business relationship and the commissions on policies issued can serve as consideration for an agreement to provide insurance."[18]

An agent will not, however, always be liable for failing to procure insurance. The Texas Supreme Court has clarified that an agent will only be liable for failing to procure insurance when there is evidence that the agent has induced a client to rely on his or her performance of the undertaking to procure insurance, and the client reasonably, and to the client's detriment, assumed that he or she was insured against the risk which caused the loss.[19] Accordingly, an agent cannot be negligent for failing to obtain a specific type of insurance that he or she was never requested to obtain.[20] In *Moore v. Whitney-Vaky Ins. Agency*, for example, the court held that an agent who was charged with obtaining insurance for an apartment complex owner could not be negligent for failing to acquire insurance to cover an employment-related claim where such coverage was never discussed nor requested.[21] Likewise, a court held that an agent could not be liable for failing to offer higher policy limits to an insured where there was no evidence that the insured sought advice from the agent as to how much coverage should be obtained.[22]

Further, an insured is not completely without responsibility in the



insurance transaction. An agent, for example, has no duty to explain the terms or coverages of a policy to the insured,[23] and the insured has a duty to read and be familiar with the terms of his or her own insurance policy, and is bound to the terms of the policy whether he or she reads it or not.[24]

An agent... has no duty to explain the terms or coverages of a policy to the insured, and the insured has a duty to read and be familiar with the terms of his or her own insurance policy, and is bound to the terms of the policy whether he or she reads it or not.

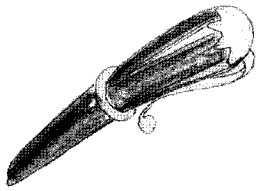
Other duties owed by an agent to the insured will be defined by the particular facts and circumstances of the relationship between the agent and insured. For example, courts will look at the past practices between agent and insured to determine whether a duty arises in a particular case. In *McCall v. Marshall*, the Texas Supreme Court declined to impose a legal duty on the part of an insurance agent to extend the insurance protection of his customer "merely because the agent has knowledge of the need for additional insurance of that customer, *especially in the absence of evidence of prior dealings where the agent customarily has taken care of his customer's needs without consulting him.*"[25] Similarly, the court in *Trinity Universal Ins. Co. v. Burnette* held that an agent owes his clients the duty to either renew his clients' policy, replace the policy with that of another company, or notify the clients of nonrenewal so that they could obtain insurance elsewhere, based on the uncontroverted evidence that the agent had a practice of *always* renewing policies for his clients or notified them when the policies were nonrenewed.[26]

Other cases demonstrate a tendency by Texas courts to narrowly construe the duties owed by an insurance agent to the insured. In *Kitching v. Zamora*, the Supreme Court held that an agent has a duty of "reasonably attempting to keep [his] customer informed" of the expiration date of a policy, but appeared to limit such duty to those cases in which the agent receives commissions from the premium payments and receives information pertaining to the expiration date that was intended for the customer.[27] This holding was "logically extended" by the Amarillo court of appeals to include a duty to keep a mortgagee reasonably informed of the policy expiration date, but only when past "servicing of the policy includes notification to the insured of the expiration and non-renewal of the policy."[28]

Liability Under the Texas Insurance Code and DTPA

Agents are included in the Texas Insurance Code as within the class of "persons" engaged in the business of insurance.[29] Accordingly, insurance agents are subject to liability for the myriad of prohibited practices under that statute.[30] The Texas Insurance Code, for example, makes actionable any misrepresentation of an insurance policy through misrepresentation of material fact or failing to state a material fact that is necessary to make other statements made not misleading, among other things.[31] Accordingly, insurance agents have been found liable under the Texas Insurance Code when it was determined that they misrepresented the existence or availability of coverage.[32]

Likewise, insurance agents are subject to liability for violations of the Texas Deceptive Trade Practices – Consumer Protection Act, which is expressly incorporated into the Texas Insurance Code.[33] The DTPA contains a laundry list of false, misleading, or deceptive acts that could potentially be applicable to insurance policy transactions, such as Section 17.46(b)(12) ("representing that an agreement confers or involves rights, remedies, or obligations which it does not have") or Section 17.46(b)(23) ("failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed").[34]



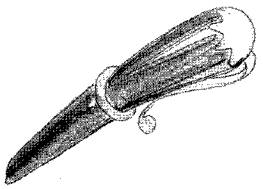
However, not every omission on the part of an agent gives rise to DTPA or Insurance Code liability. In the absence of some specific misrepresentation by the agent about the insurance, a policyholder's mistaken belief about the scope or availability of coverage is not generally actionable under the DTPA or Insurance Code.[35] Further, an agent cannot be liable for misrepresentation under the DTPA or Texas Insurance Code based on an insured's mistaken belief that it is obtaining coverage under certain contingencies, which are not in fact covered by the policy.[36] General claims of the adequacy or sufficiency of coverage, for instance, are not generally actionable under the DTPA.[37] Further, a post-loss assurance of coverage cannot be actionable as a misrepresentation because the client did not rely on such assurance in deciding to purchase the insurance.[38] Lastly, an agent's failure to disclose certain aspects of a policy does not give rise to liability under Section 17.46(b)(23) of the DTPA unless there is evidence that such failure to disclose was done with the intention of inducing the insured to purchase the policy.[39]

Additionally, it must be noted that, in 1995, the DTPA was amended to exclude claims for damages "based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion or similar professional skill."[40] In many insurance agent malpractice cases, the issue is whether the agent properly exercised his or her professional judgment in obtaining the coverage best suited for the insured, and this provision may therefore be applicable. However, the extent to which this provision is applicable to insurance agents has not yet been decided.[41] Further, it is also important to point out that there are four significant exceptions to the exemption which could still be applicable in claims against insurance agents: (1) an express misrepresentation of material fact that cannot be characterized as advice, judgment, or opinion; (2) a failure to disclose information in violation of Section 17.46(b)(23); (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion; or (4) a breach of express warranty that cannot be characterized as advice, judgment, or opinion.[42]

Liability To the Insurer

Actual and Apparent Authority

As one Texas court has observed, the Texas Insurance Code effectively "remove[s] all questions of the local agent's actual or apparent authority from the field of cavil or dispute."[43] This is because the Texas Insurance Code vests insurance agents with authority to act on behalf of the insurer.[44] Consistent with this statutory authority, an insurer is generally liable for any misconduct by an agent that is within the actual or apparent scope of the agent's authority.[45] In determining the insurer's vicarious liability, the proper inquiry is not whether the principal authorized the specific wrongful act; rather, the proper inquiry is whether the agent was acting within the scope of the agency relationship at the time of committing the act.[46] Because, by statute, local recording agents are statutorily imbued with authority to solicit business and bind insurers, Texas courts have held that such agents' misrepresentations regarding coverage of the policies they are soliciting are considered those of the insurer as well.[47] Indeed, the agent's lack of actual authority to make the representation is not a defense if the agent is acting within the apparent scope of his authority



at the time of the statement.[48] Notwithstanding the foregoing, however, it has been suggested that an insurer should not be held accountable for all of an agent's actions if those actions, or the representations of the agent, were implausible or patently absurd.[49]

Duties to the Insurer

Like any agent, an insurance agent owes his or her principal, the insurance company, a duty of good faith and fair dealing in every transaction made on the insurance company's behalf.[50] An insurance agent is liable when he or she breaches the fiduciary duty owed the insurer under an agency contract.[51] The agent owes his or her principal "loyalty and good faith, integrity of the strictest kind, fair, honest dealing, and the duty not to conceal matters which might influence his actions to his principal's prejudice."[52]

An agent's liability can be founded in misrepresentations made to the insurer.[53] For example, an agent was held liable to an insurance company for making false representations on an insurance application that induced the insurer to accept or bind a policy.[54] When an agent makes a false representation to an insurer regarding the status of a policy and the insurer relies upon that representation to its injury, the agent is estopped from denying its liability to the insurer for the loss sustained by the insurer under the policy when the insurer has paid money in satisfaction of a claim under the policy.[55] In such circumstances, an agent can be liable for actual or exemplary damages as a result of binding its principal, an insurer, to a policy with misrepresentations.[56] For example, an insurer can also bring a claim against its agent for an amount paid to satisfy a claim on an insurance policy because the agent failed to follow the insurer's instructions.[57]

Liability of the Insurer to the Agent

Liability between the agent and insurer is, however, a two-way street. In a recent decision, the Texas Supreme Court held that an agent has standing to sue an insurer for damages incurred by the agent as a result of alleged unfair and deceptive practices and other wrongful conduct by the insurer.[58] In so holding, the Texas Supreme Court determined that agents, like insureds, have standing to sue insurers under certain provisions of the Texas Insurance Code and DTPA.[59] Accordingly, for those agents who are being held vicariously liable for the alleged wrongful acts of their principals, the insurers, there is recourse available.

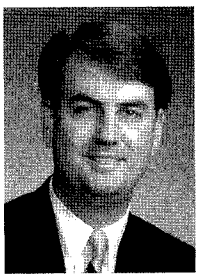
Conclusion

As the middlemen in insurance transactions, insurance agents in Texas are in the precarious position of owing duties to both insurers and insureds and can be exposed to liability from both sides. Accordingly, it is important to define the relationships between the agent and his or her principals for purposes of determining the exact scope of that liability. As the foregoing authorities illustrate, undertaking that task has been an evolving and complex process for Texas courts.

Notes

1. TEX. INS. CODE ANN. art. 21.02 (Vernon Supp. 1998).
2. *Id.*
3. *Id.* art. 21.01.
4. McKillop v. Employers Fire Ins. Co, 932 S.W.2d 268, 270 n. 2 (Tex.App. — Amarillo 1996, writ denied) (*citing* May v. United Servs. Ass'n of Am., 844 S.W.2d 666, 669 n. 8 (Tex. 1992)).
5. *Id;* TEX. INS. CODE ANN., art. 21.14 § (1).
6. *Id.* § (2)(a)(1).
7. *Id.* § (2)(a)(2).
8. Duzich v. Marine Office of America Corp., 980 S.W.2d 857, 865 (Tex.App. — Corpus Christi 1998, pet. denied); Turner-Bass Assoc. v. Williamson, 932 SW2d 219, 222-23 (Tex.App. — Tyler 1996, writ denied) (where policy issued at request of insured, agent receives consideration and is agent for insured, even though paid with commissions from insurer) (*citing* Continental Cas. Co. v. Bock, 340 S.W.2d 527, 532 (Tex.Civ.App. — Houston 1960, writ ref'd n.r.e.); but *see* TEX. INS. CODE ANN. 21.04 (a person who solicits an application for insurance shall, in any controversy between the insured and the insurance company, be regarded as the agent for the company, and not the agent of the insured).
9. *See,* e.g., McKillop v. Employers Fire Ins. Co, 932 S.W.2d at 270 ("an insurance agent can act as agent for both the insured and insurer") (*citing* Merbitz v. Great Nat'l Life Ins. Co., 599 S.W.2d 655, 658 (Tex.Civ.App. — Texarkana 1980, writ ref'd n.r.e.).
10. *Id.*

11. Trinity Universal Ins. Co. v. Burnette, 560 S.W.2d 440, 442 (Tex.Civ.App. — Beaumont 1977, no writ) (*quoting* Cateora v. British Atlantic Ass'n Ltd., 282 F.Supp. 167, 174 (S.D. Tex. 1968)).
12. *Id.*
13. May v. United Services Ass'n of America, 844 S.W.2d 666, 669 (Tex. 1992); Frazer v. Tex. Farm Bureau, 4 S.W.2d3d 819, 822 (Tex.App. — Houston [1st Dist.] 1999, no pet.).
14. Burroughs v. Bunch, 210 S.W.2d 211, 214 (Tex.Civ.App. — El Paso 1948, writ ref'd).
15. Scott v. Connor, 403 S.W.2d 453, 458 (Tex.Civ.App. — Beaumont 1966, no writ).
16. 932 S.W.2d at 222.
17. *Id.* at 222, n. 3.
18. *Id.* at 222-23.
19. May v. United Services, 844 S.W.2d at 669 (distinguishing *Burroughs* and *Scott, supra*).
20. Moore v. Whitney-Vaky Ins. Agency, 966 S.W.2d 690, 691-92 (Tex.App. — San Antonio 1998, no writ); *see also* May, 844 S.W.2d at 672-73 (while agent "could have done a better job" of ascertaining customer's true wishes, where he obtained insurance requested, he was not negligent for failing to inquire further).
21. 966 S.W.2d at 691-92 (but recognizing that such a duty might arise if there is proof of a "special relationship" between the agent and the insured).
22. Pickens v. Tex. Farm Bureau Ins. Cos., 836 S.W.2d 803, 805-06 (Tex.App. — Amarillo 1992, no writ).
23. Heritage Manor of Blaylock Properties, Inc. v. Petersson, 677 S.W.2d 689, 691 (Tex.App. — Dallas 1984, writ ref'd n.r.e); but *see* McNeill v. McDavid Ins. Agency, 594 S.W.2d 198, 203 (Tex.App. — Fort Worth 1980, no writ) (agent for applicant has duty to explain terms of and coverages included in application).
24. Burton v. State Farm Mutual Auto. Ins. Co., 869 F.Supp. 480, 486 (S.D. Tex. 1994); American Guarantee & Liability Ins. Co. v. Shel-Ray Underwriters, Inc., 844 F.Supp. 325, 332 (S.D. Tex. 1993).
25. 398 S.W.2d 106,109 (1965) (italics added).
26. *Id.* at 442-43.
27. *Id.*, 695 S.W.2d at 554.
28. Horn v. Hedgecoke Ins. Agency, 836 S.W.2d 296, 299 (Tex.App. — Amarillo 1992, writ denied).
29. TEX. INS. CODE ANN. Art. 21.21§ 2(a). Pursuant to that section, "person" means any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, *including agents*, brokers, adjusters and life insurance counselors. (italics added).
30. *See,* e.g., Liberty Mutual Insurance Company v. Garrison Contractors, Inc., 966 S.W.2d 482 (Tex. 1998) (holding that all insurance agents, even those wholly employed by the insurance company, are included within the definition of "person" in the Insurance Code).
31. TEX. INS. CODE ANN. art. 21.21, §§ 4(11), 16(a).
32. *See,* e.g., Rainey-Mapes v. Queen Charters, Inc., 729 S.W.2d 907, 913-14 (Tex. App. — San Antonio 1987, writ dism'd by agr.) (agent was held liable under Texas Insurance Code for assuring a shipowner that policy covered a contemplated voyage when in fact the policy contained an exclusion clause encompassing the projected route); Hope v. Allstate Ins. Co., 719 S.W.2d 634, 636-37 (Tex.App. — Fort Worth 1986, writ ref'd n.r.e.) (agent liable for misrepresentation for assuring clients that "we got you covered" when requested coverage was not in place at time of loss).
33. TEX. INS. CODE ANN. Art. 21.21 § 16(a).
34. TEX. BUS. & COM. CODE §§ 17.46(b)(12), (23).
35. Frazer v. Texas Farm Bureau, 4 S.W.3d at 823; Sledge v. Mullin, 927 S.W.2d 89, 90 (Tex.App. — Fort Worth 1996, no writ).
36. Moore v. Whitney-Vaky Ins. Agency, 966 S.W.2d at 690; Sledge v. Mullin, 927 S.W.2d at 90; State Farm County Mut. Ins. Co. of Tex. v. Moran, 809 S.W.2d 613 (Tex.App. — Corpus Christi 1991, writ denied); Employers Cas. Co. v. Fambro, 694 S.W.2d 449, 452 (Tex. App. — Eastland 1985, writ ref'd n.r.e.).
37. State Farm v. Moran, 809 S.W.2d at 620-21 (representation that auto policy provided "full coverage" not specific enough to violate DTPA).
38. Royal Globe v. Bar Consultants, Inc., 577 S.W.2d 688 (Tex. 1979).
39. Colonial County Mutual Ins. Co. v. Valdez, 30 S.W.3d 514, 517-18 (Tex. App. — Corpus Christi 2000, no pet.).
40. TEX. BUS. & COM. CODE § 17.49(c).
41. *See* Frazer v. Texas Farm Bureau, 4 S.W.2d at 823 (declining to address whether 17.49(c) applied because the claims against the agent did not rise to the level of DTPA violations in the first place).
42. TEX. BUS. & COM. CODE § 17.49(c)(1)-(4).
43. Shaller v. Commercial Standard Ins. Co., 158 Tex. 143, 309 S.W.2d 59, 63 (1958).
44. TEX. INS. CODE ANN. art. 21.01.
45. Celtic Life Ins. Co. v. Coats, 885 S.W.2d 96, 98 (Tex. 1994); Lexington Ins. Co. v. Buckingham Gate, Ltd., 993 S.W.2d 185, 198 (Tex.App. — Corpus Christi 1999, pet. denied).
46. Celtic Life, 885 S.W.2d at 99; Lexington Ins. Co., 993 S.W.2d at 198.
47. Lexington Ins. Co., 993 S.W.2d at 198; Royal Globe Ins. Co. v. Bar Consultants, Inc., 577 S.W.2d at 694.
48. *Id.*
49. Celtic Life, 885 S.W.2d at 100 (Enoch, J., concurring).
50. American Indem. Co. v. Baumgart, 840 S.W.2d 634, 639 (Tex.App. — Corpus Christi 1992, no writ).
51. *Id.*, 840 S.W.2d at 639; Hartford Casualty Ins. Co. v. Walker Co. Agency, 808 S.W.2d 681, 688 (Tex.App. — Corpus Christi 1991, no writ).
52. *Id.*
53. Hartford Casualty, 808 S.W.2d at 688.
54. American Indem. *Co.*, 840 S.W.2d at 640.
55. Hartford Casualty, 808 S.W.2d at 688.
56. *Id.*
57. *Id.* at 689.
58. Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000).
59. *Id.* at 382-87.



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Resolutions To Be Considered

The following resolutions will be considered for adoption by the State Bar Resolutions Committee at the annual meeting in Austin. Resolutions adopted by the committee will be considered by those attending the general session. If adopted by that body, the resolution expresses only the majority opinion of those attending the general session, not the State Bar membership.

Proposed Resolution of the
SEXUAL ORIENTATION AND GENDER IDENTIFICATION ISSUES (SOGII) SECTION

WHEREAS, the current employment policy of the State Bar of Texas does not protect State Bar employees from employment discrimination based on sexual orientation or gender identification;

AND WHEREAS, the State Bar of Texas is an administrative agency within the judicial department of government subject to the supervision of the Supreme Court of Texas;

AND WHEREAS, the Supreme Court of Texas and the lawyers of Texas have adopted Texas Disciplinary Rule of Professional Conduct 5.08(a), which prohibits a lawyer, in connection with an adjudicatory proceeding, from willfully manifesting bias or prejudice based on sexual orientation towards a person;

AND WHEREAS, the Supreme Court of Texas has adopted Canon 3(B)(6), (7) of the Code of Judicial Conduct, which not only prohibits a judge, in the performance of judicial duties, from manifesting bias or prejudice based on sexual orientation, but also requires a judge to require lawyers in proceedings before the court to refrain from manifesting bias or prejudice based on sexual orientation against parties, witnesses, counsel, or others;

AND WHEREAS, the City of Austin has adopted City Code section 7-3-4, which states it is an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's sexual orientation;

AND WHEREAS, there exists no objective reason for the State Bar of Texas to discriminate in the area of employment on the basis of sexual orientation and gender identification;

NOW THEREFORE, be it resolved by the General Assembly of the State Bar of Texas that the Board of Directors should amend its *Policy Manual* to prohibit the State Bar of Texas from discriminating in the area of employment on the basis of sexual orientation and gender identification.

Proposed Resolution of the
WOMEN AND THE LAW SECTION AND THE WOMEN AND THE PROFESSION COMMITTEE

WHEREAS, the relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence; and

WHEREAS, the relationship is almost always unequal, so that a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage; and

WHEREAS, such a relationship also presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment; and

WHEREAS, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege; and

WHEREAS, the significant danger of harm to client interests and the client's own emotional involvement renders it unlikely that the client could give adequate informed consent; and

WHEREAS, complaints of lawyer sexual misconduct suggest that lawyers do not perceive that such conduct is prohibited by the existing rules; and

WHEREAS, a specific rule regulating lawyer-client sexual conduct has the advantage not only of alerting lawyers more effectively to the dangers of sexual relationships with clients, but also of alerting clients

that the lawyer may have violated ethical obligations in engaging in such conduct; and

WHEREAS, the American Bar Association's Ethics 2000 Commission on the Evaluation of the Rule of Professional Conduct has proposed a specific rule regulating lawyer-client sexual conduct; and

WHEREAS, a significant number of jurisdictions have adopted specific rules, comments or ethics opinions regulating sexual relations between lawyer and client; and

WHEREAS, other learned professions prohibit sexual relationships with clients or patients as unprofessional conduct; and

WHEREAS, the Texas Disciplinary Rules of Professional Conduct does not specifically address, let alone prohibit, sexual relationships between lawyer and client; now, therefore,

BE IT RESOLVED that the Board of Directors of the State Bar of Texas shall recommend to the Supreme Court of Texas, pursuant to § 81.024 of the State Bar Act, for submission to the membership of the State Bar of Texas, the following amendment to the Texas Disciplinary Rules of Professional Conduct:

> A lawyer shall not engage in a sexual relationship with a client during the period of active representation, unless the lawyer and client are married to each other or already had a consensual sexual relationship before the lawyer-client relationship commenced.
>
> A lawyer shall not condition or threaten to condition representation of a client or the quality of legal services on the agreement of a client or prospective client to engage in a sexual relationship with the lawyer.

Proposed Resolution of the
OPPORTUNITIES FOR MINORITIES IN THE PROFESSION COMMITTEE

WHEREAS, the relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence; and

WHEREAS, the relationship is almost always unequal, so that a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage; and

WHEREAS, such a relationship also presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment; and

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WHEREAS, other learned professions prohibit sexual relationships with clients or patients as unprofessional conduct; and

WHEREAS, the Texas Disciplinary Rules of Professional Conduct does not specifically address, let alone prohibit, sexual relationships between lawyer and client; now, therefore,

BE IT RESOLVED that the Board of Directors of the State Bar of Texas shall recommend to the Supreme Court of Texas, pursuant to § 81.024 of the State Bar Act, for submission to the membership of the State Bar of Texas, the following amendment to the Texas Disciplinary Rules of Professional Conduct:

A lawyer shall not engage in a sexual relationship with a client during the period of active representation, unless the lawyer and client are married to each other or already had a consensual sexual relationship before the lawyer-client relationship commenced.

A lawyer shall not condition or threaten to condition representation of a client or the quality of legal services on the agreement of a client or prospective client to engage in a sexual relationship with the lawyer.

Proposed Resolution of the GENERAL PRACTICE, SOLO, AND SMALL FIRM SECTION

WHEREAS, lawyers advertise in the public media; and

WHEREAS, those advertisements may mislead the public; and

WHEREAS, disclaimers in the advertisements may disparage some attorneys in the eyes of the public; and

WHEREAS, lawyers are encouraged to be truthful in those advertisements;

NOW, THEREFORE, the General Practice, Solo, and Small Firm Section of the State Bar of Texas

RESOLVES to request and hereby does request the

Board of Directors of the State Bar of Texas to urge an amendment to the Texas Disciplinary Rules of Professional Conduct, specifically Rule 7.04 as follows:

1. That public advertisements by lawyers shall not state or imply the lawyer is a specialist except as permitted by Texas Disciplinary Rule of Professional Conduct Rule 7.04 (b); and
2. That the Texas Disciplinary Rule of Professional Conduct Rule 7.04 (c) be deleted in its entirety.

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WHEREAS, the unauthorized practice of law takes many forms; and

WHEREAS, the services rendered by the unauthorized practice of law are defective in many cases, often misguided or incorrect, rendered without the knowledge sufficient to adequately inform and advise the client and, more times than not, at a price that is equal to or more expensive than services by a lawyer; and

WHEREAS, the public is ultimately harmed in many cases by the unauthorized practice of law with little or no legal recourse against the persons and companies rendering the services; and

WHEREAS, the current methods of dealing with and prosecuting the unauthorized practice of law are underfunded, understaffed, uncoordinated and generally unable to effectively deal with this growing problem; and

WHEREAS, the public is often misled by advertising which vilifies and exaggerates the cost of legal services and attorneys;

NOW, THEREFORE, the General Practice, Solo and Small Firm Section of the State Bar of Texas RESOLVES to request and hereby does request the Board of Directors of the State Bar of Texas to:

1. Educate the public through advertising and education about the pitfalls of receiving so-called "simple" or "routine" services from unauthorized persons or software;
2. Resist attempts to create new providers for legal services with less training than an attorney;
3. Expose rackets and programs which can cost the public tens of thousands of dollars in damages, lost property and rights, and excessive fees for ineffective or nonexistent services; and
4. Educate the public about the extensive training and knowledge that attorneys have to undergo and possess to provide legal services.