October 16, 2019

Mr. Jerry C. Alexander, Chair
State Bar of Texas Board of Directors
Passman & Jones
[redacted]

RE: Submission of Proposed Rule Recommendation – Rule 1.01, Texas Disciplinary Rules of Professional Conduct

Dear Mr. Alexander:

Pursuant to section 81.0875 of the Texas Government Code, the Committee on Disciplinary Rules and Referenda initiated a rule change proposal relating to Rule 1.01 (Competent and Diligent Representation) of the Texas Disciplinary Rules of Professional Conduct. The Committee published the rule proposal in the *Texas Bar Journal* and the *Texas Register*. The Committee solicited and considered public comments and held a public hearing on the rule proposal. At its May 2019 meeting, the Committee voted to recommend the rule change proposal to the Board of Directors.

Included in this submission packet, you will find the rule change proposal, proposed comments to the proposed rule, and other supporting materials. Section 81.0877 of the Government Code provides that the Board of Directors is to vote on each proposed disciplinary rule recommended by the Committee not later than the 120th day after the date the rule is received from the Committee. The Board can vote for or against a proposed rule or return a proposed rule to the Committee for additional consideration.

As a reminder, if a majority of the Board of Directors approves a proposed rule, the Board shall petition the Supreme Court of Texas to order a referendum on the proposed rule as provided by section 81.0878 of the Government Code.

As you know, the Board voted at its April 2019 meeting to approve rule change proposals recommended by the Committee pertaining to confidentiality of information and clients with diminished capacity, and to hold the proposals for submission to the Supreme Court at a later date with other rule proposals as deemed appropriate by the Board.

Thank you for your attention to this matter. Should the Board require any other information, please do not hesitate to contact me. Please confirm receipt of this report at your earliest convenience.

Sincerely,

Lewis Kinard
Chair, Committee on Disciplinary Rules and Referenda

cc: Randall O. Sorrels
Trey Apffel
Larry P. McDougal
Joe K. Longley
Ross Fischer
John Sirman
Seana Willing

Committee on Disciplinary Rules and Referenda
Overview of Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct

Rule 1.01. Competent and Diligent Representation

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda related to the proposed changes to Rule 1.01, Texas Disciplinary Rules of Professional Conduct (TDRPC).

Previous Actions by the Committee

- **Initiation** – The Committee voted to initiate the rule proposal process at its December 5, 2018, meeting.
- **Publication** – The proposed rule changes were published in the March 2019 issue of the *Texas Bar Journal* and the March 1, 2019, issue of the *Texas Register*. The proposed rule changes were concurrently posted on the Committee's website.
- **Additional Outreach** – On March 1, 2019, an email notification regarding the proposed rule changes was sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices), Committee email subscribers, and other potentially interested parties. On April 1, 2019, an additional email concerning the proposed rule changes was sent to the same groups. Additional notifications regarding the proposed rule changes were emailed to Committee subscribers on March 21, April 15, and April 26, 2019.
- **Public Comments** – The Committee extended the public comment period to two months (through May 1, 2019). The Committee received 41 written public comments (from 40 individuals).
- **Public Hearing** – The Committee held a public hearing on the rule proposal on April 18, 2019, at the Texas Law Center.
- **Recommendation** – The Committee voted at its May 8, 2019, meeting to recommend the rule proposal to the Board of Directors.

Overview and Rationale

As background, in September 2018, the Supreme Court of Texas requested that the Committee study and make recommendations to the Court regarding a proposed amendment to Comment 8, Rule 1.01, TDRPC, relating to a lawyer's technological competencies. In February 2019, the Committee recommended adoption of the proposed amendment and the Court entered an order amending the comment as follows (new language underlined):

> 8. Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law<u>, including the benefits and risks associated with relevant technology.</u> To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in

> continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances. Isolated instances of faulty conduct or decision should be identified for purposes of additional study or instruction.

During the Committee's examination of Texas Rule 1.01, the Committee determined that changes were also necessary to the rule itself. Texas Rule 1.01, which is entitled "Competent and Diligent Representation," consolidates issues that are addressed in two separate provisions of the American Bar Association (ABA) Model Rules of Professional Conduct: Model Rule 1.1 (Competence) and Model Rule 1.3 (Diligence). However, unlike the parallel provisions in the Model Rules, Texas Rule 1.01 contains no clear statement that a lawyer has a duty to act competently and a duty to act diligently. The proposed changes to Texas Rule 1.01 would bring it generally in line with the Model Rules and the professional conduct rules of the vast majority of other states.

The Committee received a variety of comments related to the proposed changes. Some comments expressed clear support for the proposed changes. Other comments opposed and/or expressed concerns about the proposed changes, including arguments that: the proposed changes are unnecessary; the proposed language would render the current language superfluous and/or create inconsistencies within the rule; the proposed language is too vague or subjective and would lead to an increase in grievances against attorneys; and the proposed language would have a chilling effect on attorneys seeking to provide pro bono services.

The Committee carefully considered the public comments received, and, ultimately, voted to recommend the proposal to the Board based on the belief that the changes would appropriately set a standard that is in line with both the Model Rules and the disciplinary rules of the vast majority of other states: that a lawyer has a duty to provide competent representation and to act with reasonable diligence and promptness in representing a client.

Included on the pages that follow are the proposed rule changes, proposed comments to the proposed rule, public comments received, and corresponding ABA Model Rules.

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct

Rule 1.01. Competent and Diligent Representation

Proposed Rule (Redline Version)

Rule 1.01. Competent and Diligent Representation

(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall act with reasonable diligence and promptness in representing a client.

(c)~~(a)~~ A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(d)~~(b)~~ In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(e)~~(c)~~ As used in this Rule, “neglect” signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

Proposed Rule (Clean Version)

Rule 1.01. Competent and Diligent Representation

(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall act with reasonable diligence and promptness in representing a client.

(c) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(d) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(e) As used in this Rule, “neglect” signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

TO: **Committee on Disciplinary Rules and Referenda**
FROM: **Subcommittee on Disciplinary Rules and Referenda (Vincent R. Johnson, Claude Ducloux and Amy Bresnen)**
Date: **December 4, 2018 (Updated August 2019)**
Re: **Proposed Comment to Texas Rule 1.01 Competent and Diligent Representation**

If the CDRR approves our proposed changes to Texas Rule 1.01 (which recommend the addition of clear rules on competence and diligence, in addition to a reference in the Comments to the duty to keep up with technology), the Comment to Texas Rule 1.01 could be replaced with language from the Comment to Model Rule 1.01 (Competence) and Model Rule (1.03 Diligence). The only changes that are needed involve (a) revisions to the cross-references, (b) the deletion of Model Rule 1.03 Cmt. 4, which substantially appears now in Comment 6 to Texas Rule 1.02, and (c) the addition of a few new subheadings ("Diligence and Workload" and "Procrastination and Neglect").

Update: A cross-reference was revised in proposed Comment 5, and a reference to Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement was removed from proposed Comment 12.

Proposed Comment to Proposed Texas Rule 1.01 Based on the Comments to Model Rule 1.01 (Competence) and Model Rule 1.03 (Diligence) – Changes are Redlined

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.012.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.02(bc).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.02 (allocation of authority), 1.034 (communication with client), 1.045(fe) (fee sharing), 1.056 (confidentiality), and 5.05(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.02. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining *Competence*

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Diligence and Workload

[91] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.02. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[102] A lawyer's work load must be controlled so that each matter can be handled competently.

Procrastination and Neglect

[113] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

~~[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.~~

[12~~5~~] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. ~~Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).~~

Clean Version of Proposed Comment to Proposed Texas Rule 1.01

Comment

Legal Knowledge *and Skill*

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.01.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.02(b).

Retaining or Contracting *With Other Lawyers*

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.02 (allocation of authority), 1.03 (communication with client), 1.04(f) (fee sharing), 1.05 (confidentiality), and 5.05 (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.02. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining *Competence*

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Diligence and Workload

[9] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and

dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.02. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[10] A lawyer's work load must be controlled so that each matter can be handled competently.

Procrastination and Neglect

[11] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[12] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

Committee on Disciplinary Rules and Referenda
Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.01. Competent and Diligent Representation

Public Comments Received

Through May 1, 2019

From: [redacted]
To: cdrr
Subject: CDRR Comment: Rule 1.01 Proposed changes
Date: Friday, March 01, 2019 4:06:23 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Douglas
Last Name	Mclallen
Email	[redacted]
Member	Yes
Barcard	00788025

Feedback

Subject	Rule 1.01 Proposed changes

Comments

This looks like a solution looking for a problem. Moreover, "reasonable diligence and promptness" is vague and subject to abuse.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comment on Rule 1.01
Date: Friday, March 01, 2019 4:15:09 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Lena
Last Name	Roberts
Email	[redacted]
Member	Yes
Barcard	24041763

Feedback

Subject	Comment on Rule 1.01

Comments

I like the change, and hopefully the new rules will be enforced. I've seen too many bad lawyers hurt too many good people and get away with it!

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Changes to Disciplinary Rule 1.01
Date: Friday, March 01, 2019 4:19:25 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Aaron
Last Name	Martinez
Email	[redacted]
Member	Yes
Barcard	24068629

Feedback

Subject	Proposed Changes to Disciplinary Rule 1.01

Comments

I believe the proposed changes are largely unnecessary. The rule as is already requires a lawyer not to take on matters he or she know he or she is not competent to undertake, and to not neglect clients. Adding this extra layer would only make it easier for disgruntled clients to make frivolous disciplinary complaints against lawyers for not possessing the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," even though they may have no idea what that means and are just unhappy with their results. Disgruntled clients could also use the proposed promptness subpart to again, make our lives miserable with disciplinary complaints, but there is more here. They could use it to try to force lawyers into unnecessary reporting requirements, or argue in malpractice cases that the lawyer "failed to adequately report" or something similar. Perhaps if these were more aspirational than mandatory, they would be fine. Or perhaps simply a definition of what competent representation is would work. But as-is, they are superfluous and have the potential to create more problems than they are worth. Let's not go there in my opinion.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Rule 1.01. Competent and Diligent Representation
Date: Friday, March 01, 2019 4:20:55 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Richard
Last Name	Schell
Email	[redacted]
Member	Yes
Barcard	17736780

Feedback

Subject	Rule 1.01. Competent and Diligent Representation

Comments

The use of the word "signifies" in section (e) makes no sense. If anything, inattention signifies neglect, not the other way around.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed changes to Rule 1.01. Competent and Diligent Representation
Date: Friday, March 01, 2019 4:23:41 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Michael
Last Name	Farmer
Email	[redacted]
Member	Yes
Barcard	06823100

Feedback

Subject	Proposed changes to Rule 1.01. Competent and Diligent Representation

Comments

Proposed additions 1.01 (a) and (b) are unnecessary because they are implicit in our duty as an attorney. Also, new (b) is just a restatement of old (b). No change is required.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Change to 1.01--add professionalism/civility
Date: Friday, March 01, 2019 4:24:41 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Jessica
Last Name	Wortham
Email	[redacted]
Member	Yes
Barcard	24081488

Feedback

Subject	Proposed Change to 1.01--add professionalism/civility

Comments

May we please amend 1.01(b) to say: "(b) A lawyer shall act with reasonable diligence and promptness while maintaining professionalism and civility towards others while representing a client." As a young female attorney, I have witnessed countless attorneys behave unprofessionally in the courtroom on "behalf of a client." They bully others, harass, threaten, and attempt to intimidate others in order to get a better deal for their client. There is no need to throw away basic manners and civility in the name of employment. It gives our profession a bad name.

From: [redacted]
To: cdrr
Subject: Re: Seeking Comments on Proposed Changes to Rule 1.01
Date: Friday, March 01, 2019 4:30:06 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

I have no changes or suggestions to proposed Rule 1.01 changes.
Sincerely,

Law Office of Stephen P. Krupp, PLLC
Cell: [redacted]
Office: 573.317.4336
Sent from my iPhone
****

****

On Mar 1, 2019, at 3:58 PM, State Bar of Texas - CDRR <cdrr@texasbar.com> wrote:

State Bar of Texas

Proposed Changes to Rule 1.01

Public Comments Sought

Rule 1.01. Competent and Diligent Representation

The Committee on Disciplinary Rules and Referenda (CDRR) has published proposed changes to Rule 1.01 (Competent and Diligent Representation). The proposed changes were also published in the (March) Texas Bar Journal and the (March 1) Texas Register. A public hearing on the proposed rule will be held at 10:30 a.m. on April 18, 2019, at the Texas Law Center in Austin.

The Committee will accept comments concerning the proposed rule changes through May 1, 2019. Comments can be submitted here.

The CDRR is responsible for overseeing the initial process for proposing a change or addition to the disciplinary rules (Gov't Code § 81.0873). For more information, go to texasbar.com/CDRR.

To subscribe to email updates, including notices of public hearings and published rules for comment,

click here.
Sincerely,
Committee on Disciplinary Rules and Referenda

Committee on Disciplinary Rules and Referenda
State Bar of Texas | 1414 Colorado | Austin, Texas 78701 | 800.204.2222
Unsubscribe

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comments on published proposed changes to Rule 1.01 (Competent and Diligent Representation)
Date: Friday, March 01, 2019 4:37:42 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Shenila
Last Name	Momin
Email	[redacted]
Member	Yes
Barcard	24003788

Feedback

Subject	Comments on published proposed changes to Rule 1.01 (Competent and Diligent Representation)

Comments

The addition of the following paragraph: (b) A lawyer shall act with reasonable diligence and promptness in representing a client. This addition will cause undue burden on attorneys where clients have certain expectations on the term promptness. How would "promptness" be defined? Missing deadlines? Causing harm? Additionally, the legal field is vast where this term would mean something different in different fields of practice. i.e. immigration law? commercial law?

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Changes to Rule 1.01
Date: Friday, March 01, 2019 4:47:58 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	christopher
Last Name	below
Email	[redacted]
Member	Yes
Barcard	24045477

Feedback

Subject	Proposed Changes to Rule 1.01

Comments

I am a solo practitioner with a general law practice. I have some concerns about the language in the proposed Rule 1.01 that reads as follows: (a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Would proposed change in the rule preclude a young, less experienced solo attorney, from taking the representation of a client? I know many young attorney's sign cases up and bring in more experienced senior attorney's to also represent the client allowing the young attorney to learn from the senior attorney. In my opinion this is a practice that makes for better attorneys for the benefit of all clients. How can a young attorney, with limited experience, satisfy the requirement of legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Allowing an exception under my example would satisfy this requirement and add to the improvement for better attorneys. If I am way off in this, please disregard my comment. Reading the proposed change made me think of when I was a young attorney getting my feet wet.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed changes to Rule 1.01
Date: Friday, March 01, 2019 5:08:01 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Sim
Last Name	Israeloff
Email	[redacted]
Member	Yes
Barcard	10435380

Feedback

Subject	Proposed changes to Rule 1.01

Comments

I am strongly opposed to the proposed changes to Rule 1.01. The proposed amendments are laudatory and aspirational for being a good lawyer, but they are not needed and will create unintended consequences. I am not aware of a problem with the current rule. The changes appear to be a solution in search of a problem. Adding new obligations in the rule will have the undesirable effect of adding fuel to malpractice claims against lawyers. Under the new rules a plaintiff suing a lawyer will add every element of the new rules to the list of failures by the lawyer defendant. While the disciplinary rules state that they do not create common law standards of care for civil lawsuit purposes, that's exactly how they are used in practice. Plaintiff experts in legal malpractice cases routinely refer to the DRs as setting out the standard of care for attorneys. The new rules will permit more claims against attorneys. The listing of specific elements that constitute competent representation, including legal knowledge, skill, thoroughness and preparation, adds four areas for future dispute, debate and litigation both as to grievances and as to legal malpractice claims. What is "knowledge" and how much do you need, etc. Every word is vague and undefined and will lead to confusion and disagreement. It is better to simply leave the current rule and its reference to not taking a case that is "beyond the lawyer's competence" and whatever gloss or precedent has developed over those words up to this time, rather than attempting to redefine, with vague terms that will invite mischief and litigation, what it means to bring competent and diligent representation.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Rule 1.01 Proposed Change
Date: Friday, March 01, 2019 5:21:03 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	David
Last Name	Aronofsky
Email	[redacted]
Member	Yes
Barcard	01355500

Feedback

Subject	Rule 1.01 Proposed Change

Comments

This is a very good change linguistically because it codifies what most experienced attorneys already know are the intent and spirit of Tule 1.01

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Changes to Rule 1.01, Disciplinary Rules
Date: Friday, March 01, 2019 5:29:49 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Elliott
Last Name	Klein
Email	[redacted]
Member	Yes
Barcard	11557300

Feedback

Subject	Proposed Changes to Rule 1.01, Disciplinary Rules

Comments

Dear Sirs; I feel the proposed changes adds nothing significant to the current rule. Any argument that it has value is equivalent to counting counting angels on a pinhead. Elliott Klein

From: [redacted]
To: cdrr
Subject: CDRR Comment: Unnecessary changes
Date: Friday, March 01, 2019 5:30:50 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Brian
Last Name	Miller
Email	[redacted]
Member	Yes
Barcard	24004607

Feedback

Subject	Unnecessary changes

Comments

Part (c) of the proposed amended rule is inconsistent with Part (a). Part (c), which is in the existing rule, already states a competency requirement and provides two exceptions. Part (a) appears to impose a competency requirement without exceptions. The two exceptions, however, are important to providing access to justice. The first exception helps ensure that we have an ample number of lawyers, in appropriate price ranges and distributed through various communities, to provide legal assistance to clients. The second exception helps ensure the availability of emergency legal assistance. In addition, Part (d) of the proposed amended rule is inconsistent with Part (b). One provision imposes a conscious-disregard standard while the other imposes a simple-negligence standard. Unless the conscious-disregard standard has proven unworkable, we should stay with that standard for attorney disciplinary proceedings. At the very least, a simple-negligence standard should incorporate the concepts of duty and causation that we see in malpractice suits, so that we prevent harmless and fixable mistakes from being the basis of disciplinary proceedings.

From: [redacted]
To: cdrr
Subject: CDRR Comment: CDDr 1.01 proposed changes
Date: Friday, March 01, 2019 5:33:21 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Eric
Last Name	Bayne
Email	[redacted]
Member	Yes
Barcard	00792947

Feedback

Subject	CDDr 1.01 proposed changes

Comments

I'm all for competent representation. I think the affirmative duty in proposed 1.01(a) subsumes the remainder of the rule. I'd delete the surplusage and make proposed 1.01(a) simply Rule 1.01.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rule Change TDRPC 1.01
Date: Friday, March 01, 2019 5:41:37 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Dane
Last Name	OBrien
Email	[redacted]
Member	Yes
Barcard	24090302

Feedback

Subject	Proposed Rule Change TDRPC 1.01

Comments

Our client base like any other has a right to expect competant and diligent service in all things that we do. This concept is even more crucial in our profession because of the huge impacts potentially from anything less. Attorneys charge a premium and our clients should expect our service to be more than appropiate and of value... this is often not the case and often attorneys accept cases they are not competant to accept or fail to put in the work and attention it requires. While I appreciate the committees desire to update a rule badly in need of it, but fail to see how this updated verbage (merely rearraging vague words and phrases) adds any more clarity to what was already a vague and ill defined area already. In fact, the new version serves to remove almost everything that help to explain all the vague terms in the rule to provide some small clarity. I understand that as professionals there is a desire to protect our members, but to do by writing rules that would be almost impossible to prove liability under seems a poor way to go about it in the long run. One must simply imagine (or apply one of any number of outstanding complaints that currently exist) a scenario where this rule is violated sufficiently that it could be shown... would a wronged client ever reaaonably be able to define and reach this threshold under this rewrite... I think it unlikely except either in the RICHEST or most blatant/aggregious of circumstances. I think as a tool thet seeks to manage member conduct and protect clients from predatory practitioners it is a fail.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Changes to rule 1.01
Date: Friday, March 01, 2019 5:41:38 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Gail
Last Name	Deml
Email	[redacted]
Member	Yes
Barcard	16286950

Feedback

Subject	Changes to rule 1.01

Comments

The following proposed provision is ambiguous on its face: (e)(c) As used in this Rule, “neglect” signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients. "Conscious disregard" is more than mere "inattentiveness." By putting both terms together in the same sentence, it is inherently ambiguous. Why not just say: "neglect" is more than mere inattentiveness and involves a conscious disregard for the responsibilities owed to a client or clients. -- OR -- "neglect" involves a conscious disregard for the responsibilities owed to a client or clients.

From: [redacted]
To: cdrr
Subject: Re: Seeking Comments on Proposed Changes to Rule 1.01
Date: Friday, March 01, 2019 5:43:57 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

I resigned from the ABA for the same reason! Burl Jacks

Sent from my iPad

On Mar 1, 2019, at 4:03 PM, State Bar of Texas - CDRR <cdrr@texasbar.com> wrote:

State Bar of Texas

Proposed Changes to Rule 1.01

Public Comments Sought

Rule 1.01. Competent and Diligent Representation

The Committee on Disciplinary Rules and Referenda (CDRR) has published proposed changes to Rule 1.01 (Competent and Diligent Representation). The proposed changes were also published in the (March) Texas Bar Journal and the (March 1) Texas Register. A public hearing on the proposed rule will be held at 10:30 a.m. on April 18, 2019, at the Texas Law Center in Austin.

The Committee will accept comments concerning the proposed rule changes through May 1, 2019. Comments can be submitted here.

The CDRR is responsible for overseeing the initial process for proposing a change or addition to the disciplinary rules (Gov't Code § 81.0873). For more information, go to texasbar.com/CDRR.

To subscribe to email updates, including notices of public hearings and published rules for comment, click here.

Sincerely,

Committee on Disciplinary Rules and Referenda

Committee on Disciplinary Rules and Referenda

State Bar of Texas | 1414 Colorado | Austin, Texas 78701 | 800.204.2222

Unsubscribe

From: [redacted]
To: cdrr
Subject: Re: Seeking Comments on Proposed Changes to Rule 1.01
Date: Friday, March 01, 2019 6:24:31 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Why is there a movement to change this rule? That information would be helpful. It appears that the proposed changes are already covered in other rules. More information in these areas would be helpful.

_____
Peter A. Schulte
Schulte & Apgar, PLLC
4131 N Central Exwy Ste 680
Dallas, Texas 75204
Ofc: 214.521.2200
Fax: 214.276.1661
[redacted]
www.PeteSchulte.com

Sent from my iPhone... Please pardon any grammatical and/or spelling mistakes...

On Mar 1, 2019, at 15:58, State Bar of Texas - CDRR <cdrr@texasbar.com> wrote:

State Bar of Texas

Proposed Changes to Rule 1.01

Public Comments Sought

Rule 1.01. Competent and Diligent Representation

The Committee on Disciplinary Rules and Referenda (CDRR) has published proposed changes to Rule 1.01 (Competent and Diligent Representation). The proposed changes were also published in the (March) Texas Bar Journal and the (March 1) Texas Register. A public hearing on the proposed rule will be held at 10:30 a.m. on April 18, 2019, at the Texas Law Center in Austin.

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click here.
Sincerely,
Committee on Disciplinary Rules and Referenda

Committee on Disciplinary Rules and Referenda
State Bar of Texas | 1414 Colorado | Austin, Texas 78701 | 800.204.2222
Unsubscribe

From: [redacted]
To: cdrr
Subject: CDRR Comment: Public Comment on Proposed change to Rule 1.01
Date: Saturday, March 02, 2019 9:45:47 AM

**** State Bar of Texas*** **External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	BRENT
Last Name	MORGAN
Email	[redacted]
Member	Yes
Barcard	24051084

Feedback

Subject	Public Comment on Proposed change to Rule 1.01

Comments

The proposed rule change to 1.01 is inappropriate and clearly written by someone who has never represented indigent, career-criminal defendants or those with unrealistic expectations of what an attorney does. If this is made a rule, I will expect to get those of my court-appointed clients and divorce clients who believe adultery=I get everything will be filing a grievance and citing this rule. For example, if I have a jury returns a verdict of "guilty" on a client, I will expect to get a grievance now because I didn't have the "skill" to get a "not guilty". If my client is not award custody of their minor child, then I will get a grievance because my "skills" were not sufficient to garner custody. I cannot tell you the number of people who come in my office to complain about how "bad" their previous attorney was when really it was the facts of the case. Whether these grievances have merit or not is beside the point. I will have to waste precious time in answering these grievances and having to explain every decision I have ever made in every case. Do NOT add such a vague, unnecessary addition to the Rules of Professional Conduct.

From: [redacted]
To: cdrr
Subject: Re: Seeking Comments on Proposed Changes to Rule 1.01
Date: Saturday, March 02, 2019 10:51:38 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Where can I find the Committee rationale for the proposed changes?
Thanks,
Danny Hardesty
Tx. Bar No. 08957400

On Fri, Mar 1, 2019 at 4:04 PM State Bar of Texas - CDRR <cdrr@texasbar.com> wrote:

State Bar of Texas

Proposed Changes to Rule 1.01

Public Comments Sought

Rule 1.01. Competent and Diligent Representation

The Committee on Disciplinary Rules and Referenda (CDRR) has published proposed changes to Rule 1.01 (Competent and Diligent Representation). The proposed changes were also published in the (March) Texas Bar Journal and the (March 1) Texas Register. A public hearing on the proposed rule will be held at 10:30 a.m. on April 18, 2019, at the Texas Law Center in Austin.

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Sincerely,
Committee on Disciplinary Rules and Referenda

Committee on Disciplinary Rules and Referenda
State Bar of Texas | 1414 Colorado | Austin, Texas 78701 | 800.204.2222
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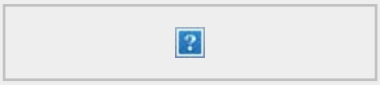

From: [redacted]
To: cdrr
Subject: RE: [EXTERNAL] Seeking Comments on Proposed Changes to Rule 1.01
Date: Saturday, March 02, 2019 5:17:27 PM

Approved.

From: State Bar of Texas - CDRR [mailto:cdrr@texasbar.com]
Sent: Friday, March 01, 2019 3:59 PM
To: Gills, Kirk B. [redacted]
Subject: [EXTERNAL] Seeking Comments on Proposed Changes to Rule 1.01

State Bar of Texas

Proposed Changes to Rule 1.01

Public Comments Sought

Rule 1.01. Competent and Diligent Representation

The Committee on Disciplinary Rules and Referenda (CDRR) has published proposed changes to Rule 1.01 (Competent and Diligent Representation). The proposed changes were also published in the (March) Texas Bar Journal and the (March 1) Texas Register. A public hearing on the proposed rule will be held at 10:30 a.m. on April 18, 2019, at the Texas Law Center in Austin.

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click here.

Sincerely,
Committee on Disciplinary Rules and Referenda

Committee on Disciplinary Rules and Referenda

State Bar of Texas | 1414 Colorado | Austin, Texas 78701 | 800.204.2222
Unsubscribe

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed changes to Rule 1.01
Date: Sunday, March 03, 2019 1:54:07 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	James
Last Name	Drummond
Email	[redacted]
Member	Yes
Barcard	24081380

Feedback

Subject	Proposed changes to Rule 1.01

Comments

The proposed changes should be adopted. The changes have been implicit heretofore, but making them explicit helps the public know what is expected and what they are entitled to in the matter of Representation.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed rules changes - Disciplinary Rule 1.01
Date: Sunday, March 03, 2019 3:32:30 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Matt
Last Name	McKool
Email	[redacted]
Member	Yes
Barcard	13731600

Feedback

Subject	Proposed rules changes - Disciplinary Rule 1.01

Comments

I do not see the need for these changes. The existing rule includes the same requirements as the existing rule: diligence, promptness, knowledge, skill, thoroughness, and preparation are part of the rule already. (e.g. neglect and fail to carry out obligations completely) neglect is also defined. Neglect is also defined and would include the same elements. In addition, these terms (diligence, promptness, knowledge, skill, thoroughness, and preparation) are vague and subject to overly broad subjective connotations whereupon reasonable minds may differ. This would subject attorneys to a myriad of specious and questionable complaints. Many clients feel wrongs when the attorney fails to follow the client's perceived obligations or act with urgency as to every detail. Also many client's often blame the attorney for any setback or loss. These changes would invariably provide an ambiguous standard resulting in a global catch-all basis for all complaints (founded and unfounded) and lead to a surge of unfounded complaints.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Regarding Proposed Changes to Rule 1.01
Date: Sunday, March 03, 2019 3:38:46 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Melissa
Last Name	Wheeler
Email	[redacted]
Member	Yes
Barcard	24104437

Feedback

Subject	Regarding Proposed Changes to Rule 1.01

Comments

I am support of the proposed rule. I hope that whatever version of the rule results from these meetings includes proposed section (b), which provides "a lawyer shall act with reasonable diligence and promptness in representing a client." The reasonability standard proposed here is important to me because of the volume of my cases — each client, of course, deserves competent and zealous representation, but the reality is that sometimes I have to prioritize one case over another for a short time while due dates approach.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rule 1.01
Date: Monday, March 04, 2019 10:37:16 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Roger
Last Name	Hughes
Email	[redacted]
Member	Yes
Barcard	10229500

Feedback

Subject	Proposed Rule 1.01

Comments

I do not understand the need for this change. I am unaware of a similar change to ABA model code. Further, I question the wisdom of making 'competence' grounds for discipline. This opens the door to mere professional negligence as grounds for discipline. The proposed duty to provide 'competent representation' goes beyond just having the skills, etc., to do the job -- it will extend the wisdom of decisions. No one defends incompetence, but do we want the grievance procedure to be mired in claims over nothing more than negligence in judgment? The other rules have fairly precise or objective standards to know when a violation occurs. Trying to determine when representation is competent is a vague standard for imposing sanctions. Finally, this change will be allow arguments that the Rules apply to determine negligence in civil malpractice cases, which so far has not been the law.

Rule 1.01. Competent and Diligent Representation

(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall act with reasonable diligence and promptness in representing a client.

(c)(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the ~~lawyer's~~ competence of the lawyer, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(d)~~(b)~~ In representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer; or (2) frequently fail to carry out completely the obligations ~~that~~ the lawyer owes to a client~~ or clients~~. ~~(e)~~(c) As used in this ~~Rule~~ subsection, "neglect" ~~signifies~~ means inattentiveness involving a conscious disregard for the responsibilities owed to a client~~ or clients~~.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Changes to Rule 1.01
Date: Monday, March 04, 2019 4:44:52 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Toysha
Last Name	Jones Martin
Email	[redacted]
Member	Yes
Barcard	24004726

Feedback

Subject	Proposed Changes to Rule 1.01

Comments

Where can I find additional information regarding the basis for the proposed changes? What does the committee hope to capture by adding the additional language? Is this intended to address competencies such as understanding of technology?

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Changes to Rule 1.01
Date: Tuesday, March 05, 2019 11:48:00 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Phillip
Last Name	Herr
Email	[redacted]
Member	Yes
Barcard	24038956

Feedback

Subject	Proposed Changes to Rule 1.01

Comments

Dear Sir or Madam, I disagree with this revision by the committee. The mandatory language of " (a)...shall provide competent representation to a client. and (b) A lawyer shall act with reasonable diligence and promptness in representing a client." This language would make it easier to sue lawyers for malpractice. The previous language has been used for probably 15 years. I do not see a reason to change it. This proposal would make it easier for the public to sue lawyers. By including this added "shall" language in the Texas Disciplinary Rules of Professional Conduct, it (i) makes it easier for the public to sue lawyers; and (ii) creates another standard of care for lawyers to follow by. Sincerely, Phillip M. Herr

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comment on Propose amendment to Rule 1.01
Date: Thursday, March 07, 2019 3:15:36 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Frederick
Last Name	Moss
Email	[redacted]
Member	Yes
Barcard	14583400

Feedback

Subject	Comment on Propose amendment to Rule 1.01

Comments

Now that the Tx Sup Ct has added technological competence to comment 8, I have no issues with the proposed rule amendment. It puts Texas in line with the Model Rules and most other states. With multi-jurisdictional practice common today, states should strive for uniformity. Also, it is good to move the definition of "competence" from the comment to the rule, as it is not in the "Terminology" section. However, I suggest that the final subsection's definition of "neglect" is confusing and self-contradictory. One cannot be both "inattentive" to (unaware of) a responsibility and consciously disregard it at the same time. The words "inattentiveness involving" should be deleted.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comments on changes to Rule 1.01 - Competent and Diligent Representation
Date: Friday, March 08, 2019 12:39:19 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	jerry
Last Name	suva
Email	[redacted]
Member	Yes
Barcard	24060690

Feedback

Subject	Comments on changes to Rule 1.01 - Competent and Diligent Representation

Comments

Hello, I reviewed the proposed additions to Rule 1.01. I find these to be largely redundant with previous section (b), which says that a lawyer will not neglect a legal matter or frequently fail to carry out completely the obligations owed. The only new aspect of the amendments appears to be a strict scrutiny as-applied to the diligence and promptness. It smells like a colorable ethics complaint could now be made by not returning an overlooked e-mail, or only after returning from spring break. Thank you, Jerry Suva

From: [redacted]
To: cdrr
Subject: CDRR Comment: proposed rule 1.01
Date: Monday, March 11, 2019 10:54:44 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Mark
Last Name	White
Email	[redacted]
Member	Yes
Barcard	21317900

Feedback

Subject	proposed rule 1.01

Comments

I'm pretty concerned that section (a) of this new rule will be difficult to manage. The ability to file a grievance over lack of knowledge, skill, thoroughness and preparation could turn the grievance system into a malpractice forum. I'm wondering whether a comment has been drafted for this rule to give us further guidance. Could someone let me know please? mdw

From: [redacted]
To: cdrr
Subject: CDRR Comment: proposed changes to Rule 1.01
Date: Friday, March 15, 2019 12:45:57 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Tom
Last Name	Gray
Email	[redacted]
Member	Yes
Barcard	08329400

Feedback

Subject	proposed changes to Rule 1.01

Comments

I am sure that you have considered that the uncertainties wrought by an unnecessary change can have unintended consequences. That is what I fear here. There are intense pressures being applied for lawyers to do more pro bono services, including providing limited scope representation. I fear that this change will have a chilling effect on lawyers efforts to expand the scope of their assistance. I also see where an attorney might elect to not take on matters where the level of representation is geared to what the client can afford. If I have to demonstrate that I have rendered the same level of "legal knowledge, skill, thoroughness and preparation" regardless of the level of payment, then I simply avoid representing anyone that cannot pay for full services. Moreover, I fail to see what the change adds to what is already required. How is (b) fundamentally different that what is now (b)(1) (which becomes (d)(1). It seems to simply restate it as a positive. Maybe it changes the burden of persuasion in a disciplinary action? And the new (b) seems to be inconsistent with the new (d)(2), previously (b)(2). The old provision allowed for some forgivable sins, but the new provision seems to impose absolute liability. Is that type of internal conflict within the code really helpful to the public or the profession? I am sure that if I was privy to all the committees discussion about the need for this modification I would understand it better but I am looking at it from trying to apply it without that insight and knowledge, as would any attorney in practice. In summary, I do not see the need for the change, I do not see what it is supposed to accomplish, and I fear that it will have the unintended consequence of driving attorneys away from preforming marginal or pro bono services. Respectfully, Tom Gray

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed change to DR 1.01
Date: Monday, April 01, 2019 10:52:49 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Robert
Last Name	Kisselburgh
Email	[redacted]
Member	Yes
Barcard	11538750

Feedback

Subject	Proposed change to DR 1.01

Comments

I believe the proposed changes are unnecessary. The current 1.01a and 1.01b cover competence in handling a matter and not neglecting a case. The proposed changes do nothing other than adding vagueness to attorneys practicing law. The legal practice is not a cookie-cutter operation where every case can be handled the same and if a lawyer is really neglecting a case and not pursuing it on his/her client's behalf, DR 1.01b addresses that issue.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Rule 1.01
Date: Monday, April 01, 2019 11:03:25 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	James
Last Name	Nickell
Email	[redacted]
Member	Yes
Barcard	15012800

Feedback

Subject	Rule 1.01

Comments

The proposed changes do nothing other than establish a couple of subjective standards with which second guess an attorney's efforts on behalf of his/her client.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comments on 6.05 & 1.01
Date: Monday, April 01, 2019 11:16:03 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Richard
Last Name	Stucky
Email	[redacted]
Member	Yes
Barcard	24041986

Feedback

Subject	Comments on 6.05 & 1.01

Comments

I think the change to 6.05 is overbroad. I understand the intent, but a conflict is a conflict. The way I read the proposed change is that it takes the client out of the conflict decision making, and lawyers are making the decision for them. Change to 1.01 - I believe the change is too vague and unnecessary. "competent" and acting with "reasonable diligence and promptness" is vague/overbroad and not defined.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rule 1.01
Date: Monday, April 01, 2019 1:19:47 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Arnold
Last Name	Hayden
Email	[redacted]
Member	Yes
Barcard	24065390

Feedback

Subject	Proposed Rule 1.01

Comments

Changes to Rule 1.01 will wreck havoc on criminal defense attorneys, giving grounds for a grievance for every frivolous ineffectiveness of counsel claim faced, but without the protection of a harmless error rule. Rule 1.01(b) essentially moves the standard from "neglect" to "reasonable diligence" without defining the standard of reasonableness being used. Rule 1.01(a) gets rid of the intent element of Rule 1.01(c), creating a strict liability situation on what is required to be competent without taking into consideration circumstances which are not known or situations where your client is not being forthright. Any mistake or strategic decision will now be subject to a grievance, without any consideration as to whether the grieved behavior would have changed the outcome of the case. If this rule were to pass, the cost of indigent defense in the state of Texas will skyrocket.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed addition to Rule 1.01
Date: Tuesday, April 02, 2019 1:12:40 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Dana
Last Name	Timaeus
Email	[redacted]
Member	Yes
Barcard	20039900

Feedback

Subject	Proposed addition to Rule 1.01

Comments

When I started practicing law, the wisdom of the profession required that lawyers know how to handle their clients' cases or associate additional or other counsel with requisite skill and knowledge or pledge to work and learn the law, facts and skills necessary to do the job acceptably. No lawyer passes the bar and has an immediate stock of adequate skill and knowledge. No lawyer gets a full explanation of a potential client's situation from the first conversation. Even if you add comments that soften the harshness of your proposed language, the plain language of the proposed rule will be used as a weapon against lawyers who lose contested matters and almost every contested matter has a high probability of producing a losing party. Please be careful, also, with any wording that discourages lawyers from taking on difficult, novel, and charity cases. It appears that you want to create an easier burden for clients that complain about the representation that they receive and an easier standard by which to prove misconduct. Your proposed language goes deeper and creates unnecessary risks for new lawyers and any lawyer who has to research the law applicable to the client's situation.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Amendment to TDRPC 1.01
Date: Friday, April 05, 2019 5:39:14 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Frederick
Last Name	Moss
Email	[redacted]
Member	Yes
Barcard	14583400

Feedback

Subject	Proposed Amendment to TDRPC 1.01

Comments

Adding ABA Rule 1.1 and 1.3 verbatim on top of current 1.01 language is harmless and puts our rule, arguably, in line with the ABA, which is good. However, the main objection from the opponents of change (i.e., most lawyers), will be "If it ain't broke, don't fix it" refrain. What is the need to fix current Rule 1.01?? The ABA language renders most of the current rule's language surplusage. The current language adds nothing. I would delete all of the language of the current rule, especially the "frequently fails" subsection which is a huge loophole for lawyers. But, perhaps keeping the current language will encourage voting for it at the referendum.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Change to Rule 1.01 Competent and Diligent Representation
Date: Thursday, April 18, 2019 6:23:28 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	DEBRA
Last Name	EDMONDSON
Email	[redacted]
Member	Yes
Barcard	24045824

Feedback

Subject	Proposed Change to Rule 1.01 Competent and Diligent Representation

Comments

I am concerned about adding the phrase "A lawyer shall act with reasonable diligence and promptness. The phrase "and promptness" is vague but implies that "something better get done quickly." How quickly is left to the interpretation of the reader/examiner. While a lawyer should always act with diligence, every case is different. Promptness adds a new layer to the equation and one that is likely to cause real problems for the attorney. How prompt is prompt ? If I call the opposing counsel and they don't immediately call me back, am i obligated to call them every day until I get a response? What about the non-responsive client who suddenly gets you the information that you have been asking about for a month and now there are other deadlines looming that did not exist but that client (since he got you the information) now wants instant results? Diligence implies all the right things that a lawyer needs to do in representing his/her client and addressing their issues. Promptness is already implied in "diligence" and adding the phrase "with promptness" is unnecessary and sets up other potential issues that given the many variances in every situation, an attorney should not have to deal with.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Changes to Disciplinary Rule 1.01
Date: Friday, April 26, 2019 11:06:48 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Larry
Last Name	Gollaher
Email	[redacted]
Member	Yes
Barcard	08110000

Feedback

Subject	Changes to Disciplinary Rule 1.01

Comments

Please note me as being in favor of the proposed change.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Opposition to the proposed changes to TDRPC 1.01
Date: Wednesday, May 1, 2019 11:35:59 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Rich
Last Name	Robins
Email	[redacted]
Member	Yes
Barcard	00789589

Feedback

Subject	Opposition to the proposed changes to TDRPC 1.01

Comments

The proposed changes to TDRPC 1.01 (Competent & Diligent Representation) warrant our OPPOSITION. They are disconcertingly subject to interpretation in ways that would hinder the practice of law for bar members, and make it tougher for laypersons to find lawyers who would be willing to try to achieve such folks' worthwhile yet challenging goals. The risks for lawyers increasingly outweigh the reward if these rules are adopted. After all, the proposed rules changes are ALSO alarmingly empowering to anyone at the Texas Bar who either does not want to learn what the relevant legal nuances are in a particular area of the law before rushing to judgment, or who predatorily chooses to ignore such nuances out of a desire to pursue "intimidation lawsuits" against bar members who happen to be critics of the Bar's improprieties. Might you remember how former membership director (and Texas Supreme Court clerk) Kathy Holder embezzled over half a million dollars of our Bar dues for nearly a decade before someone finally turned her in? The Bar was not at all eager to let this be known during the recent Sunset Review process at the state legislature. Notice how its submitted documents to the Commission did not mention her embezzlement, etc.? The Texas Bar didn't even notify the membership of the Sunset Review Commission's public hearing before it actually happened, either. Such scandals are just the tip of the iceberg. Where does the Bar's annual $54 million dollar budget actually go? Don't ask or probe, unless you want some antagonistic former client to potentially become unduly empowered by the Bar later to use the ethics rules as a weapon against you (while the Bar clique delights in seeing you squirm and being distracted from further policing the Bar). The proposed rule changes to 1.01 empower malicious "disciplinarians" at the Bar to conveniently claim that the accused attorney member somehow didn't comply with whatever that disciplinary official claims is sufficiently competent & sufficiently diligent in the practice of law. These matters are for the courts' finders of fact to decide, so that perjury rules finally apply against the accusers along with anti-SLAPP / Texas Citizens Participations Act protections (that the Texas Bar seeks to evade, revealingly enough) against frivolous legal actions. The Texas Bar does not offer redress for members falsely accused or clumsily dealt with by corrupted bar officials seeking to make (highly lucrative) work for themselves and to silence critics of how the Texas Bar spends its lofty revenues. There are several reasons to distrust the Texas Bar due to its various conflicts of interest and lack of adequate checks & balances existing for the benefit of (compulsory) members. They are documented in part at http://www.TexasBarSunset.com . Why don't more of us raise such issues? Because we have let the Texas Bar become too powerful, making too many of us look like cowards. If we want self-rule instead of further bureaucratic self-enrichment at society's expense, we would do well to oppose the proposed rule changes to TDRPC 1.01 and let the courts decide based on malpractice, contract, fiduciary and deceptive trade practices act legal principles (etc.).

Committee on Disciplinary Rules and Referenda

Transcript of April 18, 2019, Public Hearing
Proposed Rule 1.01. Competent and Diligent Representation
Texas Disciplinary Rules of Professional Conduct

The following is a transcript of the public hearing on proposed Rule 1.01, Texas Disciplinary Rules of Professional Conduct, held by the Committee on Disciplinary Rules and Referenda (CDRR) on April 18, 2019, at the Texas Law Center. Video of the full CDRR meeting, including public hearings, is available at texasbar.com/cdrr.

Lewis Kinard:	01:16	Thanks for coming. Uh, we do have a hearing process so, uh, if you haven't signed up to speak, there are blue cards in the back, I would like you to do that and turn them into Brad over here. Brad Johnson, our staff counsel support. We put a three minute timer on you. If you get a yellow light that means you have about 60 seconds to wrap up. The Committee can- will um, if we need to maybe keep you there a little longer asking questions for clarification, so, um, you are not automatically off the hook at three minutes.
Lewis Kinard:	01:48	Uh, today the first public hearing is on proposed Rule 1.01, competent diligent representation. It was published in the, uh, Texas Register and Bar Journal. And, uh, has anyone signed up for that topic?
Brad Johnson:	02:07	I don't believe that anyone has, um, Madeleine, were you planning to speak on 6.05, or on what?
Madeleine Connor:	02:13	I've never ... On the ... On the conflicts. The six-
Lewis Kinard:	02:16	[crosstalk 00:02:16] Yeah, 6.05.
Brad Johnson:	02:17	Then unless anyone here plans to sign up for 1.01, we haven't, we don't have any blue cards yet, so is there anyone that does want to speak on that?
Lewis Kinard:	02:29	Alright, public comments are still open for a while. I don't remember the cut off on that one.
Brad Johnson:	02:33	Uh, May 1st, would be-
Lewis Kinard:	02:34	May 1st. So online, um, options at, uh, texasbar.com/cdrr you can find the opportunity t- to participate, uh, link there. Uh, and so we will move into the, the other, uh, open public hearing on

proposed Rule 6.05 conflict of interest exceptions for non-profit and limited pro bono legal services.

Lewis Kinard: 02:59 Uh, and just really quickly before, uh, we call our first speaker on that, I definitely want to thank everybody who has been helpful in, uh, encouraging public participation, from from the Bar and the public. This is something that is important. The Committee considers all of the comments. Uh, the staff keeps us pretty well papered with them, so we, we get to read through them all, uh, and they do matter. Uh, we'll will talk a little bit more later on, on a specific example on how the comments have mattered a lot, so um, please keep encouraging your friends and family and neighbors, and all the other people who follow the Bar activities very closely, uh, to participate and weigh in, uh, and comment so that we understand kind of where the sentiments are and concerns, and making sure we haven't missed something.

American Bar Association
Model Rules of Professional Conduct (2019)

Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(Comment omitted)

Rule 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

(Comment omitted)

October 16, 2019

Mr. Jerry C. Alexander, Chair
State Bar of Texas Board of Directors
Passman & Jones
[redacted]

RE: Submission of Proposed Rule Recommendation – Rule 6.05, Texas Disciplinary Rules of Professional Conduct

Dear Mr. Alexander:

Pursuant to section 81.0875 of the Texas Government Code, the Committee on Disciplinary Rules and Referenda initiated the rule proposal process for proposed Rule 6.05 (Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services) of the Texas Disciplinary Rules of Professional Conduct. The Committee published the proposed rule in the *Texas Bar Journal* and the *Texas Register*. The Committee solicited and considered public comments and held two public hearings on the proposed rule. At its July 2019 meeting, the Committee voted to recommend the proposed rule to the Board of Directors.

Included in this submission packet, you will find the proposed rule, proposed comments to the proposed rule, and other supporting materials. Section 81.0877 of the Government Code provides that the Board of Directors is to vote on each proposed disciplinary rule recommended by the Committee not later than the 120th day after the date the rule is received from the Committee. The Board can vote for or against a proposed rule or return a proposed rule to the Committee for additional consideration.

As a reminder, if a majority of the Board of Directors approves a proposed rule, the Board shall petition the Supreme Court of Texas to order a referendum on the proposed rule as provided by section 81.0878 of the Government Code.

As you know, the Board voted at its April 2019 meeting to approve rule change proposals recommended by the Committee pertaining to confidentiality of information and clients with diminished capacity, and to hold the proposals for submission to the Supreme Court at a later date with other rule proposals as deemed appropriate by the Board.

Thank you for your attention to this matter. Should the Board require any other information, please do not hesitate to contact me. Please confirm receipt of this report at your earliest convenience.

Sincerely,

Lewis Kinard
Chair, Committee on Disciplinary Rules and Referenda

cc: Randall O. Sorrels
Trey Apffel
Larry P. McDougal
Joe K. Longley
Ross Fischer
John Sirman
Seana Willing

Committee on Disciplinary Rules and Referenda
Overview of Proposed Rule

Texas Disciplinary Rules of Professional Conduct

Rule 6.05. Conflict of Interest Exceptions for Nonprofit And Limited Pro Bono Legal Services

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda (Committee) related to proposed Rule 6.05, Texas Disciplinary Rules of Professional Conduct (TDRPC).

Previous Actions by the Committee

- **Initiation** – The Committee voted to initiate the rule proposal process at its February 6, 2019, meeting.
- **Publication** – The proposed rule was published in the April 2019 issue of the *Texas Bar Journal* and the March 29, 2019, issue of the *Texas Register*. The proposed rule was concurrently posted on the Committee's website.
- **Additional Outreach** – On April 1, 2019, an email notification regarding the proposed rule was sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices), Committee email subscribers, and other potentially interested parties. On May 24, 2019, an additional email concerning the proposed rule was sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices) and Committee email subscribers. Additional notifications regarding the proposed rule were emailed to Committee subscribers on March 21, April 15, April 26, June 4, and June 25, 2019.
- **Public Comments** – The Committee extended the public comment period to three months (through July 1, 2019). The Committee received 11 written public comments and two individuals provided comments at a public hearing. Additionally, the Executive Director of the Texas Access to Justice Commission spoke in support of the proposed rule at the Committee's January 9, 2019, meeting.
- **Public Hearing** – The Committee held public hearings on the proposed rule on April 18, 2019, and June 6, 2019, at the Texas Law Center.
- **Recommendation** – The Committee voted at its July 23, 2019, meeting to recommend the proposed rule to the Board of Directors.

Overview and Rationale

In December 2014, the State Bar of Texas Disciplinary Rules of Professional Conduct Committee (DRPCC), a predecessor to this Committee, recommended adoption of proposed Rule 6.05, TDRPC, which is intended to facilitate the provision of limited pro bono legal services by providing narrow exceptions to certain conflict of interest rules. The 2014 recommendation replaced a similar recommendation in 2010 by DRPCC. Subsequently, in response to concerns

expressed by members of the State Bar Board of Directors Discipline and Client Attorney Assistance Committee (DCAAP) at the time, DRPCC amended its then-proposed comments to the proposed rule. In May 2016, DRPCC issued a supplemental report[1] recommending adoption of the rule.

Carrying forward DRPCC's objective of improving the Disciplinary Rules to better facilitate the provision of limited pro bono legal services to those in need, this Committee recommends adoption of proposed Rule 6.05. While the proposed rule is the same as that recommended by DRPCC in 2014 and 2016, the Committee has made additional changes to the proposed comments in an attempt to more fully explain the purpose and limitations of the proposed rule.

Proposed Rule 6.05 is generally based on Rule 6.5 of the American Bar Association (ABA) Model Rules of Professional Conduct, which was adopted in 2002 in response to concerns that application of conflict of interest rules may deter lawyers from providing pro bono legal services.[2] With the exception of Texas and Kansas, every other state, as well as the District of Columbia, has either adopted Model Rule 6.5 or a variation of Model Rule 6.5.

As noted in Comment 1 to Model Rule 6.5, short-term limited legal service programs are "normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation."

To facilitate the provision of free legal services to the public, proposed Rule 6.05 would create narrow exceptions to certain conflict of interest rules for limited pro bono legal services. These exceptions are justified because the limited and short-term nature of the legal services rendered in such programs reduces the risk that conflicts of interest will arise between clients represented through the program and other clients of the lawyer or the lawyer's firm. Other than the limited exceptions set forth in the proposed rule, a lawyer would remain subject to all applicable conflict of interest rules.

Paragraph (a)

The conflict of interest provisions of Rules 1.06, 1.07, and 1.09, TDRPC, are broad and are generally imputed to all other lawyers in a firm. Therefore, a lawyer is effectively required to perform a thorough conflict screening before engaging in a lawyer-client relationship. Because the type of limited pro bono legal services addressed by the proposed rule are often performed in the field (such as at natural disaster sites or weekend legal clinics), a lawyer participating in such a program may often be unable to perform a proper conflict check. Under paragraph (a) of proposed

[1] The May 25, 2016, DRPCC Supplemental Report is attached under the tab "Prior Committee Reports." That report includes DRPCC's December 12, 2014, report recommending adoption of the rule, as well as a 2010 report by DRPCC regarding a prior variation of the proposal. Neither proposal was included as part of the 2011 referendum on proposed amendments to the TDRPC.

[2] *See* Rachel Brill & Rochelle Sparko, *Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest*, 16 Geo. J. Legal Ethics 553 (2003).

Rule 6.05, a lawyer would only be prohibited by Rules 1.06, 1.07, and 1.09 from providing limited pro bono legal services if the lawyer actually knows of a prohibitive conflict at the time of the representation. If a lawyer is aware of such a conflict, the lawyer would remain prohibited from such representation.

Paragraph (b)

Paragraph (b) of proposed Rule 6.05 addresses the imputation of conflicts through a lawyer providing limited pro bono legal services. It provides that certain conflicts will not be imputed to other lawyers in a firm with the volunteer lawyer so long as the volunteer lawyer takes proper steps to protect the confidential information from access by the other lawyers in the firm. The volunteer lawyer, however, would remain subject to those conflict rules as to the representation of other clients. Paragraph (b) is designed to be stricter than Model Rule 6.5, which by contrast does not impose such safeguarding requirements in order to avoid the imputation of conflicts.

Paragraph (c)

Paragraph (c) of proposed Rule 6.05 goes beyond the scope of Model Rule 6.5 and addresses the possession of applicant eligibility information by limited pro bono legal service programs. The provision provides a limited exception to conflict provisions contained in Rules 1.06, 1.07, and 1.09 that apply when an applicant provides such information but no legal services are provided. The exception is designed to avoid the mere possession of eligibility information by the legal services organization from being used to disqualify legal services staff and pro bono lawyers from representing other clients. As described in the 2014 DRPCC Report, "disingenuous parties too often apply for legal aid knowing they are ineligible solely to prevent their adversaries from accessing free legal services from the organization."[3]

The exception in paragraph (c) would only be available in two situations. The first is where none of the eligibility information is material to an issue in the legal matter. The second is where the applicant's provision of eligibility information was conditioned on the applicant's informed consent that providing this information would not by itself prohibit a representation of another client adverse to the applicant.

Paragraph (d)

Paragraph (d) of proposed Rule 6.05 carefully defines "limited pro bono legal services" so as to appropriately limit the volunteer services that qualify for the narrow conflict exceptions contained in the proposed rule. To qualify, the legal services must be provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, or nonprofit legal services program. The services must also be short-term and provided without any expectation of extended representation or of receiving legal fees. The strict definition is designed to ensure that the pro bono services offered are so limited in time and scope that there is little risk that conflicts will arise between clients represented through the program and other clients of the lawyer or the lawyer's firm.

[3] December 12, 2014, DRPCC Report, Page 4 (attached under the tab "Prior Committee Reports").

Paragraph (e)

Paragraph (e) of proposed Rule 6.05 is intended to clarify that lawyers are not deemed to be part of the same firm simply because they volunteer through the same pro bono program.

Public Comments

The Committee received a variety of comments related to the proposed rule. Several comments expressed clear support for the proposed rule, while others opposed its adoption.

Of the comments supporting the proposed rule, some discussed the significant need for pro bono legal services for underserved communities and those who cannot afford to pay for legal services. While supporting the proposed rule, one comment suggested expanding the proposal to specifically address pro bono legal services to indigent persons involved in international proceedings. Another comment supporting the proposal expressed concerns that paragraph (c) of the proposed rule could lead to confusion since it is not part of the corresponding ABA Model Rule. While still favoring adoption of the proposal, the author of that comment also discussed the possibility that the proposed law firm of the pro bono lawyer could represent a client against the pro bono client; however, the author noted the chances this could happen are *de minimis* and the ABA and other states with similar rules did not consider this a serious risk. Further, as previously discussed, proposed paragraph (b) provides that a conflict would continue to be imputed to other lawyers in the pro bono lawyer's firm if the pro bono lawyer either (1) discloses confidential information of the pro bono client to lawyers in the firm, or (2) maintains such information in a manner that would render it accessible to lawyers in the firm.

Of the comments opposing the proposal, some described the proposed rule as overbroad or expressed concerns about the protection of confidential information. Two comments expressed concerns that it would be very difficult for a person to either prove or disprove an alleged violation under the proposed rule. One of those comments also discussed concerns about possible exploitation of the proposed rule by lawyers employed by nonprofit entities. Some comments generally expressed the idea that pro bono representations should remain subject to all applicable conflict rules.

One comment suggested expanding the definition of "limited pro bono legal services" in proposed paragraph (d) to extend to community service programs.

The Committee carefully considered all of the public comments. While recognizing the concerns expressed in some of the comments, the Committee believes the proposed rule takes appropriate steps to limit the possibility that a conflict will arise through a pro bono representation and to ensure that confidential information is not impermissibly disclosed or utilized. The Committee believes the narrow exceptions contained in the proposed rule are justified given the short-term and limited nature of the pro bono services described by the proposal. The Committee also believes the proposed rule appropriately defines the type of limited pro bono legal services covered.

Additional Documents

Included on the pages that follow are the proposed rule, proposed comments to the proposed rule, public comments received, the corresponding ABA Model Rule, and previous reports from DRPCC recommending the proposed rule.

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct

Rule 6.05. Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services

Proposed Rule (Redline Version)

Rule 6.05. Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services

(a) The conflicts of interest limitations on representation in Rules 1.06, 1.07, and 1.09 do not prohibit a lawyer from providing, or offering to provide, limited pro bono legal services unless the lawyer knows, at the time the services are provided, that the lawyer would be prohibited by those limitations from providing the services.

(b) Lawyers in a firm with a lawyer providing, or offering to provide, limited pro bono legal services shall not be prohibited by the imputation provisions of Rules 1.06, 1.07, and 1.09 from representing a client if that lawyer does not:

(1) disclose confidential information of the pro bono client to the lawyers in the firm; or

(2) maintain such information in a manner that would render it accessible to the lawyers in the firm.

(c) The eligibility information that an applicant is required to provide when applying for free legal services or limited pro bono legal services from a program described in subparagraph (d)(1) by itself will not create a conflict of interest if:

(1) the eligibility information is not material to the legal matter; or

(2) the applicant's provision of the eligibility information was conditioned on the applicant's informed consent that providing this information would not by itself prohibit a representation of another client adverse to the applicant.

(d) As used in this Rule, "limited pro bono legal services" means legal services that are:

(1) provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, or nonprofit legal services program;

(2) short-term services such as legal advice or other brief assistance with pro se documents or transactions, provided either in person or by phone, hotline, internet, or video conferencing; and

(3) provided without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter.

(e) As used in this Rule, a lawyer is not "in a firm" with other lawyers solely because the lawyer provides limited pro bono legal services with the other lawyers.

Proposed Rule (Clean Version)

Rule 6.05. Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services

(a) The conflicts of interest limitations on representation in Rules 1.06, 1.07, and 1.09 do not prohibit a lawyer from providing, or offering to provide, limited pro bono legal services unless the lawyer knows, at the time the services are provided, that the lawyer would be prohibited by those limitations from providing the services.

(b) Lawyers in a firm with a lawyer providing, or offering to provide, limited pro bono legal services shall not be prohibited by the imputation provisions of Rules 1.06, 1.07, and 1.09 from representing a client if that lawyer does not:

(1) disclose confidential information of the pro bono client to the lawyers in the firm; or

(2) maintain such information in a manner that would render it accessible to the lawyers in the firm.

(c) The eligibility information that an applicant is required to provide when applying for free legal services or limited pro bono legal services from a program described in subparagraph (d)(1) by itself will not create a conflict of interest if:

(1) the eligibility information is not material to the legal matter; or

(2) the applicant's provision of the eligibility information was conditioned on the applicant's informed consent that providing this information would not by itself prohibit a representation of another client adverse to the applicant.

(d) As used in this Rule, "limited pro bono legal services" means legal services that are:

(1) provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, or nonprofit legal services program;

(2) short-term services such as legal advice or other brief assistance with pro se documents or transactions, provided either in person or by phone, hotline, internet, or video conferencing; and

(3) provided without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter.

(e) As used in this Rule, a lawyer is not "in a firm" with other lawyers solely because the lawyer provides limited pro bono legal services with the other lawyers.

Proposed Comments to Proposed Rule 6.05
Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services
Texas Disciplinary Rules of Professional Conduct

1. Nonprofit legal services organizations, courts, law schools, and bar associations have programs through which lawyers provide short-term limited legal services typically to help low-income persons address their legal problems without further representation by the lawyers. In these programs, such as legal-advice hotlines, advice-only clinics, disaster legal services, or programs providing guidance to self-represented litigants, a client-lawyer relationship is established, but there is no expectation that the relationship will continue beyond the limited consultation and there is no expectation that the lawyer will receive any compensation from the client for the services. These programs are normally operated under circumstances in which it is not feasible for a lawyer to check for conflicts of interest as is normally required before undertaking a representation.

2. Application of the conflict of interest rules has deterred lawyers from participating in these programs, preventing persons of limited means from obtaining much needed legal services. To facilitate the provision of free legal services to the public, this Rule creates narrow exceptions to the conflict of interest rules for limited pro bono legal services. These exceptions are justified because the limited and short-term nature of the legal services rendered in such programs reduces the risk that conflicts of interest will arise between clients represented through the program and other clients of the lawyer or the lawyer's firm. Other than the limited exceptions set forth in this Rule, a lawyer remains subject to all applicable conflict of interest rules.

Scope of Representation

3. A lawyer who provides services pursuant to this Rule should secure the client's consent to the limited scope of the representation after explaining to the client what that means in the particular circumstance. See Rule 1.02(b). If a short-term limited representation would not be fully sufficient under the circumstances, the lawyer may offer advice to the client but should also advise the client of the need for further assistance of counsel. See Rule 1.03(b).

Conflicts and the Lawyer Providing Limited Pro Bono Legal Services

4. Paragraph (a) exempts compliance with Rules 1.06, 1.07, and 1.09 for a lawyer providing limited pro bono legal services unless the lawyer actually knows that the representation presents a conflict of interest for the lawyer or for another lawyer in the lawyer's firm. A lawyer providing limited pro bono legal services is not obligated to perform a conflicts check before undertaking the limited representation. If, after commencing a representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis or the lawyer charges a fee for the legal assistance, the exceptions provided by this Rule no longer apply.

Imputation of Conflicts

5. Paragraph (b) provides that a conflict of interest arising from a lawyer's representation covered by this Rule will not be imputed to the lawyers in the pro bono lawyer's firm if the pro bono lawyer complies with subparagraphs (b)(1) and (2).

6. To prevent a conflict of interest arising from limited pro bono legal services from being imputed to the other lawyers in the firm, subparagraph (b)(1) requires that the pro bono lawyer not disclose to any lawyer in the firm any confidential information related to the pro bono representation.

7. Subparagraph (b)(2) covers the retention of documents or other memorialization of confidential information, such as the pro bono lawyer's notes, whether in paper or electronic form. To prevent imputation, a pro bono lawyer who retains confidential information is required by subparagraph (b)(2) to segregate and store it in such a way that no other lawyer in the pro bono lawyer's firm can access it, either physically or electronically.

Eligibility Information

8. Paragraph (c) recognizes the unusual and uniquely sensitive personal information that applicants for free legal assistance may be required to provide. Organizations that receive funding to provide free legal assistance to low-income clients are generally required, as a condition of their funding, to screen the applicants for eligibility and to document eligibility for services paid for by those funding sources. Unlike other lawyers, law firms, and legal departments, these organizations ask for confidential information to determine an applicant's eligibility for free legal assistance and are required to maintain records of such eligibility determinations for potential audit by their funding sources. Required eligibility information typically includes income, asset values, marital status, citizenship or immigration status, and other facts the applicant may consider sensitive. Paragraph (c) provides a limited exception to the conflict of interest provisions contained in Rules 1.06, 1.07, and 1.09 that apply when an applicant provides such information but no legal services are provided. This exception is available only in the two situations described in subparagraphs (c)(1) and (c)(2).

9. The first situation where the paragraph (c) exception is available is where none of the eligibility information is material to an issue in the legal matter. Alternatively, under subparagraph (c)(2), if the applicant provided confidential information after giving informed consent that the eligibility information would not prohibit the persons or entities identified in the consent from representing any other present or future client, then the eligibility information alone will not prohibit the representation. The lawyer should document the receipt of such informed consent, though a formal writing is not required. What constitutes informed consent is discussed in the comments to Rule 1.06.

10. Rule 1.05 continues to apply to the use or disclosure of all confidential information provided during an intake interview. Similarly, Rule 1.09 continues to apply to the representation of a person in a matter adverse to the applicant. Notably, Rule 1.05(c)(2) permits a lawyer to use or disclose information provided during an intake interview if the applicant consents after

consultation to such use or disclosure, and Rule 1.09(a) excludes from its restrictions the representation of a person adverse to the applicant in the same or a substantially related matter if the applicant consents to such a representation.

Limited Pro Bono Legal Service Programs

11. This Rule applies only to services offered through a program that meets one of the descriptions in subparagraph (d)(1), regardless of the nature and amount of support provided. Some programs may be jointly sponsored by more than one of the listed sponsor types.

12. The second element of "limited pro bono legal services," set forth in subparagraph (d)(2), is designed to ensure that the services offered are so limited in time and scope that there is little risk that conflicts will arise between clients represented through the program and other clients of the lawyer or the lawyer's firm.

13. The third element of the definition, set forth in subparagraph (d)(3), is that the services are offered and provided without any expectation of either extended representation or the collection of legal fees in the matter. Before agreeing to proceed in the representation beyond "limited pro bono legal services," the lawyer should evaluate the potential conflicts of interest that may arise from the representation as with any other representation. Likewise, the exceptions in paragraphs (a) and (b) do not apply if the lawyer expects to collect any legal fees in the limited assistance matter.

Firm

14. Lawyers are not deemed to be part of the same firm simply because they volunteer through the same pro bono program. Nor will the personal prohibition of a lawyer participating in a pro bono program be imputed to other lawyers participating in the program solely by reason of that volunteer connection.

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 6.05. Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services

Public Comments Received

Through July 1, 2019

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comments on Rule 6.05
Date: Monday, April 01, 2019 11:01:23 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Curtis
Last Name	Doebbler
Email	[redacted]
Member	Yes
Barcard	24105187

Feedback

Subject	Comments on Rule 6.05

Comments

There is a significant need for legal services to be provided to those who cannot afford to pay for legal services. Moreover, it is the duty of every lawyer, if they are able, to contribute to the representation of individuals who cannot afford to pay for legal services. In this regard, any effort that is made to facilitate the rendering of legal services pro bono publica must be welcomed. The proposed Rule 6.05 of the Texas Disciplinary Rules of Professional Conduct on “Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services” eases the conflicts restrictions placed on lawyers acting pro bono publica. The rule should therefore be welcomed. While still requiring respect for the confidentiality of client information, proposed Rule 6.05 makes it less burdensome for lawyers to become involved in pro bono legal services. It is hoped that Rule 6.05 might also add a paragraph on the pro bono legal services to indigent persons involved in international litigation who have been injured by actions that constitute, or, are alleged to constitute, violations of international law, especially international human rights law. A proposed addition to the Proposed Rule 6.05 might read in a new paragraph (b)(3) as follows (repeating paragraphs 1 and 2 and adding a new paragraph 3): (1) disclose confidential information of the pro bono client to the lawyers in the firm; or (2) maintain such information in a manner that would render it accessible to the lawyers in the firm; and, (3) when a lawyer abides by paragraphs (1) and (2) and is rendering services before an international court, tribunal, commission, committee, or any other entity with the authority to decide matters relating to an individual’s or group of individuals’ rights under international law this Rule shall also be applicable. Such an addition would clarify that pro bono services may be rendered in cases involving individuals or groups in international proceedings. It would also clarify that in such cases the same more relaxed rules of conflicts apply to the provision of legal services in international forums.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comments on 6.05 & 1.01
Date: Monday, April 01, 2019 11:16:03 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Richard
Last Name	Stucky
Email	[redacted]
Member	Yes
Barcard	24041986

Feedback

Subject	Comments on 6.05 & 1.01

Comments

I think the change to 6.05 is overbroad. I understand the intent, but a conflict is a conflict. The way I read the proposed change is that it takes the client out of the conflict decision making, and lawyers are making the decision for them. Change to 1.01 - I believe the change is too vague and unnecessary. "competent" and acting with "reasonable diligence and promptness" is vague/overbroad and not defined.

From: [redacted]
To: cdrr
Subject: CDRR Comment: New Disciplinary Rules
Date: Monday, April 01, 2019 1:28:33 PM

**** State Bar of Texas*** **External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Gary
Last Name	Warren
Email	[redacted]
Member	Yes
Barcard	00785181

Feedback

Subject	New Disciplinary Rules

Comments

The rule sucks, the State Bar sucks even more.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rule 6.05
Date: Monday, April 01, 2019 1:54:54 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	James
Last Name	Tirey
Email	[redacted]
Member	Yes
Barcard	24000501

Feedback

Subject	Proposed Rule 6.05

Comments

Although the idea in expanding an attorney's ability to do pro bono work and provide "limited legal services" without the specter of creating a conflict that would prevent future paid work by the attorney is admirable, this proposed rule is misguided. It is highly possible that, in order to competently provide "limited legal services," the attorney is going to come into the possession of sensitive, confidential information that could work to the client's prejudice in the event that the attorney ends up employed adversely to the client's interest. It also encourages sloppy compliance with the disciplinary rules regarding conflicts. Please do not enact this Rule.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed 6.05 (Conflict of Interest, etc.)
Date: Monday, April 01, 2019 3:28:22 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Lisa
Last Name	Palmer
Email	[redacted]
Member	Yes
Barcard	15432350

Feedback

Subject	Proposed 6.05 (Conflict of Interest, etc.)

Comments

The proposed rule says (d) As used in this Rule, “limited pro bono legal services” means legal services that are: (1) provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, or nonprofit legal services program; I suggest that another exception should be made for community service projects/programs. Some attorneys provide assistance (for instance to the elderly, veterans, etc.) through organizations that are not connected to any of the types of organizations mentioned in the proposed rule. Thanks, Lisa McNair Palmer

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comments on Proposed Disciplinary Rule 6.05
Date: Monday, April 01, 2019 3:35:09 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Don
Last Name	Morehart
Email	[redacted]
Member	Yes
Barcard	14423700

Feedback

Subject	Comments on Proposed Disciplinary Rule 6.05

Comments

Even clients receiving pro bono services are entitled to conflict-free representation. the indigent client should not have to deal with a lawyer from their present or "former" lawyer's firm at some future time in an adverse environment just because the indigent person couldn't pay for the pro bono services provided. There is no way that the pro bono lawyer could ever establish by credible evidence that the "lawyer [did] not: (1) disclose confidential information of the pro bono client to the lawyers in the firm," and the client / former client will never believe that the Chinese Fire Wall was truly reliable. This is a stupid rule which will lead to an excuse for unethical conduct and to clients (former clients) getting abused without recourse.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comment for Proposed Rule 6.05.
Date: Tuesday, April 02, 2019 12:40:15 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	David
Last Name	Coker
Email	[redacted]
Member	Yes
Barcard	24045080

Feedback

Subject	Comment for Proposed Rule 6.05.

Comments

Re: Proposed Rule 6.05 (Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services). I believe that special attention should be given to possible exploitation of the "pro bono" exemption being proposed by attorneys working under the "umbrella" of a not-for-profit entity. I am primarily concerned by this rule potentially being exploited by attorneys employed by "not for profit" legal organizations. While the organization itself may be not for profit, this does not prevent the organization from compensating staff attorneys, as well as providing valuable public relations exposure from pro bono representation that may result in windfall judgments. Case in point: Certain "not-for-profit" legal organizations actively seek windfall judgments/settlements, oftentimes by bringing suits against employers on behalf of employees under the FLSA, with the proceeds being directed towards special interests, special interest groups, political partisanship, and across the board increases in staff salaries, end-of-year bonuses, or future job opportunities. So "technically" an attorney could be found to be in compliance with the Rule because his or her firm is a not-for-profit, but the attorney knows that any large judgments will be reflected in year end bonuses and potential salary increases, thus the attorney achieves personal financial gain in the form of salary increase or EoY bonus payout, while the not-for-profit shows no financial gain on the not-for-profit organization's balance sheet. In short: Allowing for the exemption to apply to any attorney working under a perceived "umbrella" of a not-for-profit entity, simply presents too much opportunity for exploitation. This exploitation is made all the worse given the difficulty in proving a violation, and the nigh impossible computation of damages that may result from a violation. I apologize in advance for any grammatical errors or poor verbiage. Thank you for your time and consideration. Dave Coker [redacted]

From: M.J. "Jack" Borchers
To: cdrr
Subject: RE: Seeking Comments on Proposed Disciplinary Rule 6.05
Date: Tuesday, April 02, 2019 10:12:18 AM

Disagree. No comment necessary.

From: State Bar of Texas - CDRR [mailto:cdrr@texasbar.com]
Sent: Monday, April 01, 2019 10:26 AM
To: [redacted]
Subject: Seeking Comments on Proposed Disciplinary Rule 6.05

Proposed Disciplinary Rule 6.05

Public Comments Sought

Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services

The Committee on Disciplinary Rules and Referenda (CDRR) has published proposed Rule 6.05 (Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services) in the (April) Texas Bar Journal and the (March 29) Texas Register. A public hearing on the proposed rule will be held at 10:30 a.m. on April 18, 2019, at the Texas Law Center in Austin.

The Committee will accept comments concerning proposed Rule 6.05 through July 1, 2019.

The Committee also published proposed changes to Rule 1.01 (Competent and Diligent Representation) in the (March) Texas Bar Journal and the (March 1) Texas Register. A public hearing on the proposed rule will be held at 10:30 a.m. on April 18, 2019, at the Texas Law Center in Austin.

The Committee will accept comments concerning the proposed changes to Rule 1.01 through May 1, 2019.

Comments on each proposed rule can be submitted here.

The CDRR is responsible for overseeing the initial process for proposing a change or addition to the disciplinary rules (Gov't Code § 81.0873). For more information, go to texasbar.com/CDRR.

To subscribe to email updates, including notices of public hearings and published rules for comment, click here.

Sincerely,
Committee on Disciplinary Rules and Referenda

Committee on Disciplinary Rules and Referenda

State Bar of Texas | 1414 Colorado | Austin, Texas 78701 | 800.204.2222

April 4, 2019

Proposed Rule (Clean Version)

with suggested edits by Harry Tindall

Rule 6.05. Conflict of Interest Exception for Nonprofit and Limited Pro Bono Legal Service

(a) In this Rule, a lawyer is not in a firm with another lawyer solely because the lawyer provides limited pro bono legal services with another lawyer.

(b) In this Rule, "limited pro bono legal service" means legal service that is:

(1) provided through a pro bono or assisted pro se program sponsored by:

(i) an accredited law school;

(ii) a bar association;

(iii) a court; or

(iv) nonprofit legal service program;

(2) short-term service such as legal advice or other brief assistance with pro se documents or transactions, provided either in person or by telephone, hotline, internet, or video conferencing; and

(3) provided without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter.

(c) The conflict of interest limitation on representation in Rules 1.06, 1.07, and 1.09 do not apply to a lawyer providing, or offering to provide, limited pro bono legal service unless the lawyer knows, at the

time the service is provided, that the lawyer would be prohibited by the conflict of interest limitation.

(d) A lawyer in a firm with another lawyer providing, or offering to provide, limited pro bono legal service is not prohibited by the imputation provision of Rules 1.06, 1.07, or 1.09 from representing a client if that lawyer does not:

(1) disclose confidential information of the pro bono client to another lawyer in the firm; or

(2) maintain such information in a manner that would render it accessible to another lawyer in the firm.

(e) The eligibility information that an applicant is required to provide when applying for free legal service or limited pro bono legal service from a program described in subparagraph (b)(1) is not a conflict of interest if:

(1) the eligibility information is not material to the legal matter; or

(2) the provision of the eligibility information was conditioned on the applicant's informed consent that providing this information would not prohibit a representation of another client adverse to the applicant.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Propose TDRPC 6.05
Date: Monday, April 08, 2019 5:28:03 PM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Frederick
Last Name	Moss
Email	[redacted]
Member	Yes
Barcard	14583400

Feedback

Subject	Propose TDRPC 6.05

Comments

I support the adoption of Rule 6.05 proposed by the CDRR -- with one qualification. The ABA and most states have such a rule in order to promote increased pro bono work by lawyers, a worthy cause. The only substantive objection I've heard to this proposal is that it may allow the law firm of the pro bono lawyer to represent a client against the pro bono client in the same matter on which the pro bono lawyer advised the pro bono client. The ABA and all the other states did not consider this a serious risk; the chances that this could happen are de minimus and should not stand in the way of adoption. My only concern is that subsection (c), which only tangentially deals with pro bono representation on a one-time basis and has no counterpart in the ABA rules or in any state as far as I know, might confuse the bar and cause it to be defeated in a referendum. As important as (c) is to legal services offices, I think serious consideration ought to be given to deleting (c) from the proposal and adding it as a new subsection in Rule 1.09, where it belongs.

AUSTIN BAR ASSOCIATION
816 CONGRESS AVENUE · SUITE 700 · AUSTIN, TX 78701-2665
TEL 512.472.0279 · FAX 512.473.2720 · AUSTINBAR.ORG

April 16, 2019

State Bar of Texas
Committee on Disciplinary Rules and Referenda
Texas Law Center
1414 Colorado Street
Austin, Texas 78701
CDRR@texasbar.com

Dear Chair and Committee Members:

I am a writing regarding the proposed rule changes regarding Rule 6.05 Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services.

The Austin Bar Association's Pro Bono Committee considered the proposed changes during a duly noticed committee meeting on April 15, 2019 and voted unanimously to support their adoption.

One of the main reasons for convening the Austin Bar Association's Pro Bono Committee is that the need for legal services in underserved communities is so great. Legal aid organizations can only do so much alone, they depend on the private attorneys that make up the majority of bar association members. Rigid conflict rules can create a barrier to entry for some private attorneys interested in rendering pro bono legal services. Proposed Rule 6.05 works to remove one of those barriers. It is also a model rule that has been adopted nationwide. We are aware of no reason it would not work well in Texas.

For those reasons, the Austin Bar Association's Pro Bono Committee recommends that the Committee on Disciplinary Rules and Referenda approve the proposed rule change.

Should you have any questions, do not hesitate to call me on my direct line at [redacted].

Sincerely,

Austin Kaplan
Chairperson, Austin Bar Association Pro Bono Committee

Committee on Disciplinary Rules and Referenda

Transcript of April 18, 2019, Public Hearing
Proposed Rule 1.06. Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services
Texas Disciplinary Rules of Professional Conduct

The following is a transcript of the public hearing on proposed Rule 6.05, Texas Disciplinary Rules of Professional Conduct, held by the Committee on Disciplinary Rules and Referenda (CDRR) on April 18, 2019, at the Texas Law Center. Video of the full CDRR meeting, including public hearings, is available at texasbar.com/cdrr.

Lewis Kinard:	02:59	Uh, and just really quickly before, uh, we call our first speaker on that, I definitely want to thank everybody who has been helpful in, uh, encouraging public participation, from from the Bar and the public. This is something that is important. The committee considers all of the comments. Uh, the staff keeps us pretty well papered with them, so we, we get to read through them all, uh, and they do matter. Uh, we'll will talk a little bit more later on, on a specific example on how the comments have mattered a lot, so um, please keep encouraging your friends and family and neighbors, and all the other people who follow the Bar activities very closely, uh, to participate and weigh in, uh, and comment so that we understand kind of where the sentiments are and concerns, and making sure we haven't missed something.
Lewis Kinard:	03:50	Okay. Uh, Brad, let's start with, uh, speakers on 6.05.
Brad Johnson:	03:54	Yes sir, we have two that have signed up for Rule 6.05. And if anyone else does want to, please just bring the blue card over. Um, first we have Madeleine Connor and she has indicated that she is speaking on behalf of the Austin Bar Association Pro Bono Committee.
Lewis Kinard:	04:14	And if you're on the phone, if you don't mind muting your phone if you can please.
Madeleine Connor:	04:20	Hi. Good morning.
Lewis Kinard:	04:22	[crosstalk 00:04:22] Hi, thank you.
Madeleine Connor:	04:23	Thank you. Um, I just wanted to be here if there were any questions. Also, uh, um, our chair of our committee at the

Austin Bar Association Pro Bono Committee, uh, Mr. Austin Kaplan did submit a letter. Uh, I think Mr. Johnson, yes-

Brad Johnson: 04:40 Yeah, I remember [crosstalk 00:04:41]

Madeleine Connor: 04:41 ... has distributed it, but I do have some copies if anybody else is interested. Um, we were asked by, uh, some uh, uh, a staff employee that works, um, here. Uh, to, to ... If we were interested in commenting on it. We all agreed we were and we think it would be a good thing, uh, to amend the rules to include this. Um, the, the vote was unanimous to support the rule change or the um, the um, the new rule.

Madeleine Connor: 05:12 And um, I did kind of give my own, um, situation when I was ... I currently work at the Texas Veterans Commission on the General Counsel. Before that I was at the AG's office and the General Litigation Division for eight years and I had always made it, you know, part of my life to contribute, and, you know, the, the cost of, uh, retaining a lawyer, just ridiculous. I mean, even, you know, upper middle class people have difficulty with that.

Madeleine Connor: 05:42 So, I kinda made it, you know a, a part of my life to, to always try to help and be involved in either VLS cases or some, some private cases that I was involved with, where, for example, one, um, one client, um, missed the cut off by a dollar an hour. He had gone to VLS to try to get some help. The, um, of Travis County and try to get some help, but he, his income was one dollar an hour over their, you know, it exceeded that, so.

Madeleine Connor: 06:19 And of course, you know, very limited income. Uh, worked part time at um, at Home Depot, and had a child. So, I represented him actually twice. Um, and the first time I represented him was when I was at the AG's office, um completely pro bono, not low bono or anything like that. Um, I was an assistance attorney general, doing the civil rights and the employment, um, mostly, was my docket. But, you know, I wanted to give back.

Madeleine Connor: 06:47 So, um, I represented him. He had a very, uh, wealthy and powerful ex-spouse on the other side with, you know, high-powered lawyers and it was just me and him, and you know, my little v- v- very limited resources. Um, but I think it was about eight months into the litigation. Um, his ex-spouse got a new lawyer and he immediately filed a motion to, um, recuse or disqualify me because I worked at the AG's office, and um, therefore there was a conflict.

Madeleine Connor:	07:25	And, so, I don't know if I should ... Do I stop?
Lewis Kinard:	07:30	Uh, thanks so much. Does it have to beep so loudly?
Madeleine Connor:	07:33	(laughs) But anyway, the end of that story was, is they did have to do a conflicts check and it was very disruptive to the agency, and I, we didn't even know any of those people. They're in a different building, you know, the child support division, and it was just a kind of a, a tactic that I didn't think was really fair, and so after that point, I was not allowed to take any more pro bono cases, you know, that ...
Madeleine Connor:	07:59	Well, there wasn't a conflict, so ...
Lewis Kinard:	08:02	Mm-hmm (affirmative)-
Madeleine Connor:	08:02	So anyway, that was it.
Lewis Kinard:	08:04	So w- w- we may have some questions, and when you said VLS, is that the, the volunteer lawyer service here in Austin?
Madeleine Connor:	08:10	Yes. In Travis County, yes. Yeah.
Lewis Kinard:	08:12	[crosstalk 00:08:12] Okay. Any questions for the speaker?
Claude Ducloux:	08:16	L- Let me just say that I appreciate, tell Mr. Kaplan I appreciate his letter. We got that, a- and I want to make clear to anybody who's listening here today, that the provisions of this rule don't just give you a magic shield against conflicts of interest. It says, "Look, if you have this limitation, if you truly know there's a conflict, you're still bound by the rules."
Claude Ducloux:	08:33	This just t- t- to go, like I go on Monday nights, you meet somebody, try to give them help in a lawyer tenant situation, not know if, perhaps their t- l- their landlord is somebody that maybe your firm represents.
Madeleine Connor:	08:45	Mm-hmm (affirmative)-
Claude Ducloux:	08:45	So, i- i- it's not an exculpation, it's not a f- get out of jail free card, it's really for those limited services, and if you know about a conflict, you are still bound by the tenets of the disciplinary rules.
Madeleine Connor:	08:56	Right. Okay.
Lewis Kinard:	08:59	Any questions on the phone? Alright, thanks so much.

Madeleine Connor:	09:05	[crosstalk 00:09:05] Thank you so very much. Thank you.
Brad Johnson:	09:07	Next we have Becky Moseley, who has indicated she's speaking on behalf of the Texas Access to Justice Commission, as well as on her own behalf as an attorney.
Lewis Kinard:	09:23	Good morning.
Becky Moseley:	09:23	Good morning, and thank you guys for, uh, having this opportunity to come talk about this important issue. Um, I'm Becky Moseley. I am a staff attorney, uh, here in this building, but with the Texas Access to Justice Commission.
Becky Moseley:	09:38	I'm also here on behalf of Trish McAllister, who is the executive director of the Texas Access to Justice Commission, and she is the former executive director of VLS, the Volunteer Legal Services in Austin, um, and then I myself am a former staff attorney at Legal Aid of Northwest Texas, and um, both Trish and I, uh, in our prior jobs, have a lot of experience with, um, pro bono clinics, um, and the important role that those pro bono clinics play.
Becky Moseley:	10:14	Uh, the need for civil legal services in Texas is great. While one in five Texans financially qualify for free legal services, only about 1 in 10 applicants for those services are able to receive extended services through a legal aid organization.
Becky Moseley:	10:33	For so many people, what legal lid and pro bono attorneys are able to provide is brief service, advice, sometimes the only thing that a- person who's eligible for legal services is gonna get, is an attorney consultation, and that is so important.
Becky Moseley:	10:53	Um, we depend on pro bono attorneys at Legal Aid and now at the Access to Justice Commission, we encourage their participation and their service. Um, and the Texas Bar, as you know, has a aspirational goal of 50 hours of service for attorneys.
Becky Moseley:	11:09	What this rule does, is it prov- it uh, takes care of a barrier that we hear from private attorneys. "Oh no, we can't take this ... We can't participate pro bono because we might have a- an imputed conflict with the firm. Um, like has been said, if, if a pro bono attorney knows there's a conflict, they're prevented from, um, providing even a brief advice, a brief consultation.
Becky Moseley:	11:37	But this rule would make it so, um, those conflict rules a- are not going to prohibit an attorney from offering this crucial

service, um, i- if they don't know about a conflict. Um, it also l- lets these attorneys from firms, especially, provide this brief service, provide um, brief advice and consultation without worrying about imputing the conflict to this indigent client to the rest of the firm. Uh, and that's very important, especially because we see Legal Aid and VLS, some firms, uh, discourage um, having a lot of um, participation pro bono, because of imputation rules.

Becky Moseley: 12:26 One thing that hasn't been mentioned that I'll mention briefly is subsection C of the proposed rule 6.05, which just says that, um, the, just p- giving the eligibility information, to screen for eligibility for legal aid, doesn't necessarily create a conflict. Now it could, if that eligibility information or income information is, is relevant or material to a legal matter.

Becky Moseley: 12:52 Um but the, it doesn't necessarily create that conflict, and we see some, not a ton, but some uh, abuse or attempted abuse of these rules to game the system. Meaning, one spouse has a lot of money and they know they're not gonna be eligible for legal aid, but they apply anyways and give their eligibility information with the hopes of conflicting out the other spouse. Um, especially in abusive situations where there's already manipulation in the relationship, that can happen.

Becky Moseley: 13:26 And so this just clarifies, uh subsection C would clarify that just getting that income information doesn't, itself necessarily create a conflict. I think my time is about up. Oh, it's more than up. It's counting up now.

Lewis Kinard: 13:40 Yeah.

Becky Moseley: 13:40 The counter's counting up now.

Lewis Kinard: 13:41 (laughs)

Becky Moseley: 13:43 But I'd be happy to answer any questions about the rule. Um, i- there's one other thing that I want to try to sneak under [inaudible 00:13:53] I'm gonna mention. I- I was able to read the comments um, that have already been submitted on the rule. I do think some of the comments have a, um, a misperception about uh, subsection B.

Becky Moseley: 14:05 I- the lawyer who provides pro bono advice is gonna be conflicted out in the future from representing someone against that indigent client, but the, the imputation rules might not apply. So I think there's some misunderstanding in the

		comments that think that an attorney who provides brief services or advice to an indigent client could then represent a paying client against that indigent client, um but the rule does not create that problem. It's just the imputation that would not apply.
Lewis Kinard:	14:39	Very good, thank you. Any questions for our speaker? Anybody on the phone? Great, thanks so much for coming.
Becky Moseley:	14:47	Thank you guys.
Brad Johnson:	14:51	That, unless anyone wants to sign up for, for these, for this item, then, then that is it.
Lewis Kinard:	14:57	That's it. When do, uh-
Brad Johnson:	14:58	One more for the next agenda item. One- one more, that's it.
Lewis Kinard:	15:00	[crosstalk 00:15:00] Alright. When do public comments close on 6.05?
Brad Johnson:	15:03	That will be, let me double check, I believe it's July 1st.
Lewis Kinard:	15:06	I was gonna say, it was a little longer I knew.
Brad Johnson:	15:07	Yeah.
Claude Ducloux:	15:08	[inaudible 00:15:08] …sometime.
Lewis Kinard:	15:10	Yep.
Brad Johnson:	15:11	That's correct, for the proposal 6.05, public comments will be accepted th- through July 1st.
Lewis Kinard:	15:17	Alright good. So yes, please uh, if you haven't already, and, and you're listening on the phone you would like to comment, uh, uh go to that texasbar.com/cdrr and um, submit your comments. Uh, we appreciate the Bar Association's uh, weighing in too, 'cause it's, I think, and important perspective to take.

LEWIS KINARD: Welcome to the Committee on disciplinary rules and referenda. We have two public hearings today, followed by our committee meeting and - which is open, as well. So, calling this to order and - not really have a lot of comments to add today in terms of anything special going on. And we'll get to some special new business later on in our agenda. But today, if you have not - if you plan to speak and haven't signed in, please fill out one of the cards and give it to Cory. And he'll organize you for us. Our first public hearing topic would be the proposed rule 6.05, conflict of interest exceptions for nonprofit and limited pro bono legal services. The second one will be on one of the first of our - I think we're going to have more than one - on the new, revised, proposed lawyer advertising rules. And you're welcome to speak on both or take your turn and speak twice if you want. So I guess - Professor Johnson, have we got you yet?

CORY SQUIRES: Do you want to do the roll call?

LEWIS KINARD: We can do that at the beginning in the meeting part. Yeah. All right. With that, let's go on to our topics. Anybody who has come to speak on either of the rules, we'll start with 6.05. Interested parties first. Pro bono - Limited pro bono assistance exceptions to the conflicts - imputed conflicts rules. And I don't see anybody running for the microphone. So anybody signed up for the advertising rules?

[End of Public Hearing on Proposed Rule 6.05, Texas Disciplinary Rules of Professional Conduct]

American Bar Association
Model Rules of Professional Conduct (2019)

Rule 6.5: Nonprofit & Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

> **(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and**
>
> **(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.**

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

(Comment omitted)

SUPPLEMENTAL REPORT BY THE STATE BAR OF TEXAS COMMITTEE ON THE DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

RULE PROVIDING EXCEPTIONS TO CONFLICTS OF INTEREST RULES FOR NONPROFIT AND LIMITED PRO BONO LEGAL SERVICES
MAY 25, 2016

In December 2014, the State Bar of Texas Disciplinary Rules of Professional Conduct Committee (Committee) recommended the adoption of a Rule that addresses conflicts of interest arising from lawyers' provision of pro bono legal services.[1] Generally, the Rule would facilitate the provision of pro bono legal services by (1) permitting a lawyer to accept a pro bono representation unless the lawyer knows of a conflict of interest that prohibits acceptance; (2) preventing the imputation of a conflict of interest that arises from a lawyer's provision of pro bono legal services, if the lawyer adequately protects the pro bono client's confidential information; and (3) preventing eligibility information collected by limited pro bono legal services programs from creating conflicts of interest in certain circumstances. The Committee's recommendation was referred to the State Bar of Texas Board Discipline and Client Attorney Assistance Program Committee (DCAAP) for consideration. Members of the Committee and DCAAP spoke about the recommendation in April 2015. DCAAP members then expressed concern about the Rule's permitting a lawyer in a firm with a lawyer who provided limited pro bono legal services to represent a party averse to the pro bono client in the same matter that the client discussed with the service provider.

In its next several meetings, Committee members discussed this concern. Committee members also discussed the proposed Rule with other interested groups, including the State Bar of Texas Pro Bono Working Group and the Texas Access to Justice Commission. While recognizing that the contemplated representation might be perceived as inappropriate, the Committee concluded that the proposed Rule should not be amended. Specifically, it concluded that the risk that an actual conflict of interest would arise is slight given the restricted scope of limited pro bono legal services, that the Rule adequately protects against this risk, and that the Rule's imputation provision is necessary to facilitate the provision of limited pro bono legal services. This conclusion was supported by other groups' endorsements of the Rule as drafted.[2] However, the Committee believed that it should better explain the imputation provision and therefore amended Comment 5 to the proposed Rule so that it reads as follows:

> Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that a conflict of interest arising from a lawyer's representation covered by this Rule will not be imputed to the lawyers in the pro bono lawyer's firm if the pro bono lawyer complies with subparagraphs

[1] See Report, attached as Exhibit 1.

[2] See Letter of Support from the Pro Bono Working Group, attached as Exhibit 2; Resolution of the Texas Access to Justice Commission, attached as Exhibit 3.

(b)(1) and (2). Therefore, by virtue of paragraph (b), a lawyer's provision of limited pro bono legal services does not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests averse to a client receiving the services.

With this amendment, the Committee again recommends the addition of its proposed Rule providing exceptions to conflicts of interest rules for nonprofit and limited pro bono legal services.

EXHIBIT 1

REPORT BY THE STATE BAR OF TEXAS COMMITTEE ON THE DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

RULE PROVIDING EXCEPTIONS TO CONFLICTS OF INTEREST RULES FOR NONPROFIT AND LIMITED PRO BONO LEGAL SERVICES
DECEMBER 12, 2014

The State Bar of Texas Committee on the Disciplinary Rules of Professional Conduct (Committee) submits this report to the State Bar President and Board of Directors. The Committee recommends the addition of a Rule that addresses conflicts of interests that arise from lawyers' provision of pro bono legal services. It further recommends that the Rule, if adopted, be added to Part VI of the Rules, which concerns public service. This recommendation replaces the Committee's 2010 recommendation that proposed Rule 6.05, which also addressed these conflicts of interest, be adopted.[1]

Overview

The Committee's proposed Rule was inspired by Model Rule 6.5.[2] The Model Rule was added in response to concern that strict application of conflict of interest rules may deter lawyers from volunteering to provide pro bono legal services.[3] Sharing this concern, the Committee endeavored to draft a similar rule.

To begin, the Committee requested that the Supreme Court ask people in Texas who are involved in providing equal access to justice and pro bono legal services to review Model Rule 6.5 to determine whether the Rule (1) is consistent with procedures already governing voluntary pro bono representation; (2) conflicts with how voluntary pro bono plans are administered in Texas; and (3) sufficiently addresses the conflict of interest problems pro bono representation presents or, on the other hand, provides too great an exception to general conflict of interest requirements. Subsequently, such people were added to, or identified on, the Committee, and it undertook a review of Model Rule 6.5.

The Committee found that the Model Rule's first provision, which generally permits a lawyer to accept a pro bono representation unless the lawyer knows of a conflict of interest that prohibits acceptance, was well considered and should be included in a Texas rule without substantive changes. However, the Committee found that the Model Rule's second provision, which generally prevents the imputation of

[1] See Report by the State Bar of Texas Committee on Texas Disciplinary Rule of Professional Conduct Rule 6.05 (New Rule), attached as Exhibit A. Please note that proposed Rule 6.05 was not part of the 2011 referendum on proposed amendments to the Disciplinary Rules.

[2] A comparison of the Committee's Rule and its Model Rule analogue, Rule 6.5, appears in Exhibit B.

[3] For a discussion of the conflict of interest problems involved with voluntary lawyer programs, see, Rachel Brill and Rochelle Sparko, Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest, 16 GEORGETOWN JOURNAL OF LEGAL ETHICS 553 (2003).

conflicts of interest that arise from a lawyer's provision of pro bono legal services, to be too broad. It therefore concluded that a similar Texas rule should prevent imputation only when specified conditions are satisfied, balancing (1) concerns of affiliated lawyers' that they will be prohibited from accepting future representations by conflicts created by pro bono work undertaken by one of them and (2) interests of pro bono clients in the confidentiality of information they disclose. The Committee further found that Model Rule 6.5 did not address unique problems caused by nonprofit legal services organizations' collection and possession of eligibility information applicants for services must provide. Finally, the Committee found that the Model Rule did not sufficiently define the kinds of services such a rule should target or clearly indicate that lawyers working in the same pro bono program were not necessarily working in the same firm. Each of these findings is reflected in the Committee's proposed Rule.

The Committee is comfortable that the modifications suggested by its recommended Rule advance the purposes underlying the Model Rule while protecting the interests of people who may need to use voluntary pro bono legal services. Notably, other states have adopted variations of Model Rule 6.5 more suited to their particular needs.[4]

Paragraph (a)

Paragraph (a) in Model Rule 6.5 combines a broad (and, in the Committee's opinion, incomplete) definition of the targeted services with an exemption from Model Rules concerning conflicts of interest. For clarity, the Committee has defined the targeted services separately, in paragraph (d).

The limitations on representation in Texas Rules 1.06, 1.07, and 1.09 effectively require lawyers to perform conflict checks so as not to accept a representation that conflicts with the interests of a current or former client, in reference to a client of both an individual lawyer and of lawyers in the same firm with that lawyer. Lawyers who perform the specific type of pro bono legal services defined in this Rule will often do so in the field, such as at sites established to help victims of natural disasters or at a weekend legal clinic. These lawyers will not have the luxury of time or access to the records needed to perform conflict checks. In such situations, these lawyers are prohibited by the proposed Rule from providing the limited pro bono representation only if they actually know of prohibiting conflicts when the representation presents itself, without performing a conflict check.

[4] See, e.g., New York Rule 6.5, Participation in Limited Pro Bono Legal Services Programs; New Hampshire Rule 6.5, Nonprofit and Court-Annexed Limited Legal Services Programs.

Paragraph (b)

Paragraph (b) provides a way for a lawyer who supplies limited pro bono legal services contemplated by this Rule to prevent the imputation of conflicts associated with that representation to other lawyers in the lawyer's firm. The lawyer simply has to make sure that confidential information of the pro bono client is not accessible to the other lawyers. Thus, the lawyer who volunteers at a covered program can take steps to avoid tainting the other lawyers at the lawyer's firm with confidential information the lawyer learns in the representation. Depending on the circumstances, a lawyer may shield them from exposure to potential conflicting information simply by not taking the information back to the lawyer's office or by not storing it in the lawyer's client files or database of the lawyer's firm, legal department, or agency.

A lawyer who provides limited pro bono services will be prohibited from representing other clients due to confidential information learned from the pro bono client, but this prohibition will not be imputed to other lawyers in the same firm unless the confidential information is effectively shared with them. If the pro bono lawyer, for example, places the pro bono client's confidential information into the firm database, it is effectively shared with the rest of the firm. This exception is a major difference between fee-based representation and pro bono representation. In the former, the knowledge of confidential client information by one lawyer is imputed to all lawyers in the firm, whether or not they actually have that knowledge.

Paragraph (c)

Paragraph (c) extends the scope of the proposed Rule beyond that of its Model Rule analogue to deal with the possession of eligibility information by legal services organizations. Its goal is to provide a means for preventing the possession of eligibility information from being used to disqualify legal services staff and pro bono lawyers from representing other clients.

People who seek pro bono legal services typically need to establish their eligibility for such services. Eligibility is generally based on financial, immigration, and residence criteria determined by funders such as the Texas Access to Justice Foundation, which administers funds from the Interest on Lawyers Trust Accounts program and other sources. This information exceeds, in its sensitivity, the kind of information a prospective client will usually share with a lawyer when seeking representation.

Merely gathering such information can, under a strict reading of the Rules, create a potential conflict of interest involving the applicant and other parties to the same or a substantially related legal matter. This conflict is imputed to every lawyer in the legal services organization. Indeed, even if an applicant is determined to be ineligible and is turned away before any legal services are provided, and the eligibility information is segregated or stored in a way that makes it inaccessible to the legal staff of the organization and its volunteer lawyers, the organization has no way of avoiding the

potential conflict of interest the information creates. Moreover, disingenuous parties too often apply for legal aid knowing they are ineligible solely to prevent their adversaries from accessing free legal services from the organization. These bad faith applications create false conflicts and block access to legal services for the second applicant because, in most of these cases, no alternative sources of free legal assistance are available.

Paragraph (c) provides that such eligibility information will not create a conflict of interest in certain situations. Subparagraphs (1) and (2) provide clear means for determining when the eligibility information does not pose a basis for a conflict. The first provides that, if the information is not material to the legal matter, then that information will not create a conflict. The second, an advance waiver to using confidential eligibility information as a basis for disqualification, is a new concept to the Texas Rules. The Committee's inspiration for this inclusion came from the following comment to the Model Rule concerning prospective clients:

> A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

As significant is that the Professional Ethics Committee (PEC) endorsed such advance waivers in its Opinion 608, which considered conflicts of a lawyer working for a legal services organization. The PEC concluded as follows:

> A lawyer for a legal services organization is permitted under the Texas Disciplinary Rules of Professional Conduct to represent a client in a child custody matter against an adverse party who had unsuccessfully applied for services of the legal services organization in the same matter, provided that the unsuccessful applicant had consented in writing, after appropriate disclosure by the organization of the relevant circumstances, that the provision of limited information requested by the organization to determine financial eligibility in the intake screening process would not by itself result in restricting the legal services organization or its lawyers from providing services to other persons who might be adverse to the unsuccessful applicant.

The PEC, in the absence of specifically relevant Texas Rules, fashioned its guidance out of a painstaking analysis of the current conflicts Rules. While certainly helpful in providing this guidance for legal services organizations, Opinion 608, like all ethics opinions, addressed only the factual scenarios presented. The Committee's proposed Rule, incorporating the scenarios addressed in Opinion 608, also provides

guidance for potential conflict scenarios with pro bono representation not dealt with in that opinion.

Paragraph (d)

Paragraph (d) supplies the definition of "limited pro bono legal services" for the Rule. It is designed to make clear the circumstances under which the narrow conflict of interest exceptions provided by this Rule apply: those where a lawyer offering limited pro bono legal services does not have the opportunity to perform a standard check for conflicts. If the lawyer takes on any other type of pro bono representation, then it does not qualify for the exemptions provided by this Rule. For example, a lawyer who attends a bar association legal aid clinic, agrees to help a client obtain a divorce, and assists that client over a multi-week or multi-month time period, has time to check for potential conflicts of interest and therefore is not providing "limited pro bono legal services" contemplated by this Rule. The legal services must be completed prior to the lawyer having such an opportunity or they will not qualify as "short-term services."

Additionally, to avoid creating an unintended opening for fee-based legal service providers, the Committee has made clear in the Rule that this Rule's exception applies only when the services are provided without any expectation of either extended representation or legal fees from the client.

Paragraph (e)

Paragraph (e) clarifies that volunteer lawyers merely working through the same legal services program at the same time as the lawyer providing the services are not deemed to be in a firm for the purposes of this Rule. This means, for example, that a group of lawyers who are not otherwise practicing law together as a firm may assemble at a location, such as natural disaster shelter, and confer with each other as necessary. Nor will the personal prohibition of a lawyer participating in the program be imputed to other lawyers solely because they are participating in the same program, unless there is another basis for barring representation, such as when lawyers in the same program are also in the same firm.

EXHIBIT A

REPORT BY
THE STATE BAR OF TEXAS COMMITTEE ON
TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT
RULE 6.05 (NEW RULE)

The State Bar of Texas Committee on the Texas Disciplinary Rules of Professional Conduct (Committee) submits this report to the Texas Supreme Court, to Roland Johnson, Texas State Bar President, and to the Board of Directors of the State Bar. This report addresses a new proposed Rule 6.05, to be added to those Rules that deal with public service and are currently located in Part VI. This recommendation supplements the Committee's prior recommendations regarding other Rules in current Part VI.[1]

The Committee's Rule 6.05 as compared with ABA Rule 6.5 appears in **Attachment A**. The current Texas Rules has no equivalent of Rule 6.05, nor did the Court-appointed Task Force make a recommendation regarding Rule 6.05.

Overview

When the Committee submitted its initial report on the Rules regarding the duties and responsibilities of a lawyer engaged in public service legal work, it believed that ABA Rule 6.5 seemed to be an excellent idea. The ABA Rule was added in response to the concern that strict application of the conflict of interest rules may deter lawyers from serving as volunteers in programs that provide legal services pro bono. However, ABA Rule 6.5 provides a very broad exception to conflict of interest prohibitions that are at the core of the fiduciary duty a lawyer owes a client and that are imputed to other lawyers with whom the lawyer practices.[2]

Before adopting this Rule, the Committee concluded that those in Texas knowledgeable about the process of providing equal access to justice and with providing legal services pro bono should look at this ABA Rule initially and decide whether the ABA Rule (1) matches any procedures already governing voluntary pro bono representation; (2) poses any problems with how voluntary pro bono plans are being administered in Texas; and (3) sufficiently addresses the conflict

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[1] In its original report, the Committee made the following recommendations regarding the Rules in current Part VI:

1. Move current Texas Rule 1.13 to make it 6.02 and then amend it in order to make it substantially identical to ABA 6.3
2. Adopt ABA 6.4 (making it Texas 6.03) with only one change
3. Not adopt ABA 6.1
4. Keep current Texas Rule 6.01, which is identical to ABA Rule 6.2

[2] For a discussion of the conflict of interest problems involved with voluntary lawyer programs, see, Rachel Brill and Rochelle Sparko, Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest, 16 GEORGETOWN JOURNAL OF LEGAL ETHICS 553 (2003).

of interest problems in pro bono representation, or on the other hand, provides too great an exception to general conflict of interest requirements.

Therefore, the Committee recommended that the Supreme Court send ABA Rule 6.5 to those in Texas who are most involved in providing equal access to justice. After that time, the Committee became equipped to consider the issues with ABA Rule 6.5 and is comfortable that the modifications afforded by its recommended Rule 6.05 advance the purposes underlying the Model Rule while protecting the interests of members of the public who may need to use voluntary pro bono legal services.

Working with the goals of Rule 6.05 and the approach taken by the ABA posed three major problems. First, the Committee recognized—through the pro bono experiences of many of its members—that an individual lawyer may be deterred from providing free legal services even at a help desk or disaster relief center by pressure from affiliated lawyers who may fear that they will be prohibited from taking a future fee-based representation due to conflicts created by the one lawyer's pro bono work out of the office. Second, the relaxation of the prohibitions on representation in the various conflicts Rules (e.g., Rules 1.06, 1.07, 1.09, and the new 1.17), on both the lawyer providing the pro bono representation and affiliated lawyers, would need to be carefully crafted so as to provide protection to the pro bono clients consistent with that provided to fee-paying clients. Third, although the Committee immediately recognized problems with the ABA formulation, virtually every state that has adopted a pro bono legal services Rule has tracked the ABA language, providing no guidance for deviation. New York has substantially amended ABA Rule 6.5, and the Committee was guided by its innovation (due to New York using the Model Rule numbering and format, strict adherence to New York's language was not possible and, for other reasons, was not desirable).

The Committee concluded that it could address all three problems by following the general approach of the ABA in making this an unconventional disciplinary Rule. That is, by its language, the Rule neither prohibits nor requires specific behavior but instead provides a narrow exception to certain provisions of indicated conflicts Rules. Also, the Committee believed it could curtail abuse of the lifting of some of the representation prohibitions in the indicated conflicts Rules with a careful definition of kind of services targeted, which is not fully developed in the ABA Rule. Finally, the Committee has provided protection for the pro bono client that is simply missing in the ABA Rule.

Paragraph (a)

Paragraph (a) in ABA Rule 6.5 combines a broad (and, in the Committee's opinion, incomplete) definition of the targeted services with an exemption from Model Rules 1.6 1.9(a), and 1.10. For clarity, the Committee has defined the targeted services separately, in paragraph (d). As the ABA Model Rules place

aspects of the conflicts Rules in different places than do the Texas Rules (for example, the ABA addresses imputation to affiliated lawyers in its Rule 1.10, while the Texas Rules do so within each Rule, when it applies), the references in ABA Rule 6.5 are simply unworkable for Texas. Moreover, the equivalent Texas Rule numbers may not simply be substituted, as exemptions are provided only for limited portions of the indicated conflicts Rules.

In paragraph (a), a majority of the Committee voted to deviate from strict disciplinary Rule format (e.g., "a lawyer shall" or "a lawyer shall not") mainly to exert a visual appeal to lawyers to provide pro bono legal services. Those opting for this format believed that lawyers would be discouraged by strictly prohibiting or mandatory language. The Committee considered making this a purely permissive "Rule" with "may" (as in proposed new Rule 6.02, "A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer."), but decided that its proposal was more clearly an exception.

The limitations on representation in Rules 1.06, 1.07, 1.09, and proposed 1.17 effectively require lawyers to perform conflicts checks so as not to take on a representation that conflicts with a representation of a current or former client, both of the individual lawyer or lawyers affiliated with that lawyer. Lawyers who perform pro bono legal services as defined in this Rule will often do so in "the field," such as at impromptu sites established to help victims of natural disasters or at a weekend legal clinic. These lawyers will not have the luxury of time or access to the requisite records to perform conflicts checks. Thus, the lawyers are prohibited from taking the pro bono representation only if they actually know at the time of prohibiting conflicts, without performing a conflicts check. A comment will explain that, if they have simply forgotten and, in the fullness of time, might have recalled a conflict, they may use the exemption provided by this Rule.

A comment will also explain that, if, in the brief amount of time a lawyer will spend on the services defined in this Rule, the lawyer learns of a conflict that prohibits the lawyer's personal representation of the pro bono client, then the lawyer must take the same steps as Rule 1.06, 1.07, and 1.09 provide for a fee-paying client. New York, one of the few states to vary from the ABA Model Rule 1.6, has this as a specific provision.[3]

[3] New York's rule provides as follows: "(e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation."

Paragraph (b)

Paragraph (b) provides a way for the lawyer who supplies limited pro bono legal services contemplated by this Rule to prevent the imputation of conflicts associated with that representation to affiliated lawyers. The lawyer simply has to make sure that confidential information of the pro bono client (or the prospective pro bono client, if the representation does not occur) is not accessible to affiliated lawyers. Thus, the lawyer who volunteers at a covered program should intend at the outset to take steps to avoid tainting affiliated lawyers with confidential information the lawyer learns in the representation. Depending on the circumstances, a lawyer may shield affiliated lawyers from exposure to potential conflicting information simply by not storing confidential information from the limited assistance client in the lawyer's client files or database of the lawyer's firm, legal department, or agency.

While the lawyer who provides the limited pro bono services will be prohibited from representing other clients due to confidential information learned from the pro bono client to the same extent as if the pro bono client were a fee-paying client, this prohibition will not be imputed to affiliated lawyers unless the confidential information is effectively shared with them. If the pro bono lawyer, for example, places the pro bono client's confidential information into the firm database, it is effectively shared with affiliated lawyers. This is a major difference between fee-based representation and pro bono representation. In the former, the knowledge of confidential client information by one lawyer is imputed to affiliated lawyers, whether or not they actually have that knowledge.

Paragraph (c)

People who seek pro bono legal services typically need to establish their eligibility for such services. Eligibility is generally based on financial, immigration, and residence criteria as determined by funders such as the Texas Access to Justice Foundation, which administers funds from the Interest on Lawyers Trust Accounts program and other sources, and such criteria are mandatory conditions under which the sponsoring organization may use grant funds to provide free legal assistance through its staff and volunteers. This information exceeds, in its sensitivity, the kind of information a prospective client will usually share with a lawyer under Rule 1.17. Applicants for free legal assistance must be determined eligible before even receiving the assistance. Accordingly, greater protection is afforded the eligibility information of the pro bono client than the information of the non-pro bono prospective client, in that Rule 1.17 permits a lawyer to condition a discussion with a prospective client on a waiver as to the use of confidential information imparted in that discussion. Such a waiver prevents a prospective client from unilaterally creating a prohibition on a lawyer or law firm's representation of an opposing party simply by sharing confidential information. No waiver is possible with the prospective pro bono client because of the nature of the information and the different goals of the pro bono client (who needs to

obtain limited legal services in often emergency situations) and the fee-paying client (who may simply be assessing a number of lawyers for the most desirable, given the issues and circumstances).

Paragraph (c), then absolutely prevents the lawyer from using the pro bono client's eligibility information to the disadvantage of the individual, whether or not the individual becomes a pro bono client. In reality, the lawyer who provides the pro bono services may never have access to such information. However, a lawyer in an impromptu setting may need to make eligibility determinations on the spot in accordance with the eligibility guidelines of the funding source sponsoring the event. A comment will explain that the mere receipt of such information by the lawyer, when the prospective client is rejected and not helped, will not create a conflict of interest for the lawyer regarding a different representation in the same or a substantially related matter.

Rules 1.05 and 1.17 continue to apply to protect any confidential information provided during the eligibility interview and limit the lawyer's ability to undertake a representation based on information other than that required to establish eligibility or where the same information is material to an issue in the representation. Once the lawyer has agreed to provide legal services, then all of the disciplinary Rules apply to the relationship except as expressly stated in this Rule.

Paragraph (d)

Paragraph (d) supplies the definition of "limited pro bono legal services" for the Rule. It is designed to make clear the circumstances under which the narrow exceptions provided by this Rule apply: those where a lawyer does not have the opportunity to perform a standard check for conflicts. If the lawyer takes on any other type of pro bono representation, then it does not qualify for the exemptions provided by this Rule. For example, a lawyer who attends a bar association legal aid clinic, agrees to help a client obtain a divorce, and assists that client with the various steps over a multi-week or multi-month time period, has plenty of time to return to the office and check for potential conflicts of interest and therefore exceeds the "limited pro bono legal services" contemplated by this Rule. The legal services must be completed prior to the lawyer having such an opportunity or they will not qualify as "short-term services."

Additionally, in order to avoid creating an unintended opening for fee-based legal service providers, the Committee has made clear in the Rule that this Rule's exception applies only when the services are provided without any expectation of either extended representation or legal fees from the client.

New York's version of ABA Rule 6.5 contains a separate definition of the services to be affected by its Rule. The committee in New York formed to recommend changes to its Rules based on the 2003 Model Rules (previously,

New York still had the ABA Model *Code*, not even the 1983 Model Rules) essentially suggested the ABA version. New York's court, however, added three provisions, a separate definition being one of them.[4]

Paragraph (e)

Paragraph (e) clarifies that "affiliated" in reference to other lawyers than the lawyer providing the pro bono legal services does not include other volunteer lawyers merely working through the same legal services program at the same time as the lawyer providing the services. Thus, the lawyer providing the services does not have to be concerned about safeguarding confidential client information of the pro bono legal services clients or applicants. This means, for example, that a group of lawyers who are otherwise unaffiliated may assemble at a location, such as natural disaster shelter, and confer with each other as necessary. Nor will the personal prohibition of a lawyer participating in the program be imputed to other lawyers solely because they are participating in the same program, unless there is another basis for barring representation, such as when lawyers in the same program are also in the same firm.

[4] New York's definition is as follows: "(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance."

ATTACHMENT A:
RULE 6.05—ABA & COMMITTEE PROPOSED

ABA Version	Proposed Committee Version
Rule 6.5 Nonprofit and Court-annexed Limited Legal Services Programs (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter: (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.	**Rule 6.05 Pro Bono Legal Service Programs** (a) The conflicts of interest limitations on representation in Rules 1.06, 1.07, 1.09, and 1.17 do not prohibit a lawyer from providing limited pro bono legal services unless the lawyer knows at the time the services are provided that the lawyer would be prohibited by those limitations from providing the services. (b) If the lawyer providing limited pro bono legal services maintains any confidential information of the limited assistance client or prospective client in a manner that would render that information inaccessible by lawyers affiliated with that lawyer, conflicts of interest in Rules 1.06, 1.07, 1.09, and 1.17 shall not be imputed to those affiliated lawyers. (c) A lawyer who receives confidential information provided by an applicant or prospective client required for a determination of eligibility for limited pro bono legal services or for free legal services from a program sponsored by a court, bar association, accredited law school, or an organization funded by the IOLTA program, shall not use that information to the disadvantage of the applicant or prospective client, except as required by Rule 1.05. (d) As used in this rule, “limited pro bono legal services” means legal services that are: (1) provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, nonprofit legal services program, or nonprofit organization funded

ATTACHMENT A:
RULE 6.05—ABA & COMMITTEE PROPOSED

ABA Version	Proposed Committee Version
	through the Interest on Lawyers Trust Account (IOLTA) program; (2) short-term services such as legal advice or other brief assistance with pro se documents or transactions, provided either in person or by phone, hotline, internet, or video conferencing; and (3) provided without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter. (e) As used in this rule, "affiliated" does not include mere association through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, nonprofit legal services program, or nonprofit organization funded through the Interest on Lawyers Trust Account (IOLTA) program.

EXHIBIT B

Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services

Texas Rule Language	Proposed Comments to Texas Rule	ABA Rule Language	Comments to ABA Rule
	[1] Nonprofit legal services organizations, courts, law schools, and bar associations have programs through which lawyers provide short-term limited legal services typically to help low-income persons address their legal problems without further representation by the lawyers. In these programs, such as legal-advice hotlines, advice-only clinics, disaster legal services, or programs providing guidance to self-represented litigants, a client-lawyer relationship is established, but there is no expectation that the relationship will continue beyond the limited consultation and there is no expectation that the lawyer will receive any compensation from the client for the services. These programs are normally operated under circumstances in which it is not feas ble for a lawyer to check for conflicts of interest as is normally required before undertaking a representation. [2] Application of the conflict-of-interest rules is deterring lawyers from participating in these programs, preventing persons of limited means from obtaining much needed legal services. To facilitate the provision of free legal services to the public, this Rule creates narrow exceptions to the conflict-of-interest rules for limited pro bono legal services. These exceptions are justified because the limited and short-term nature of the legal services rendered in such programs reduces the risk that conflicts will arise between clients represented through the program and other clients of the lawyer or the lawyer's firm. [3] A lawyer who provides services pursuant to this Rule should secure the client's consent to the limited scope of the representation after explaining to the client what that means in the particular circumstance. See Rule 1.02(b). If a short-term limited representation would not be fully sufficient under the circumstances, the lawyer may offer advice to the client but should also advise the client of the need for further assistance of counsel. See Rule 1.03(b).		[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services -- such as advice or the completion of legal forms -- that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feas ble for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10. [2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

Texas Rule Language	Proposed Comments to Texas Rule	ABA Rule Language	Comments to ABA Rule
(a) The conflicts of interest limitations on representation in Rules 1.06, 1.07, and 1.09 do not prohibit a lawyer from providing, or offering to provide, limited pro bono legal services unless the lawyer knows, at the time the services are provided, that the lawyer would be prohibited by those limitations from providing the services.	Paragraph a [4] Paragraph (a) exempts compliance with Rules 1.06, 1.07, and 1.09 for a lawyer providing limited pro bono legal services unless the lawyer actually knows that the representation presents a conflict of interest for the lawyer or for another lawyer in the lawyer's firm. A lawyer providing limited pro bono legal services is not obligated to perform a conflicts check before undertaking the limited representation. If, after commencing a representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis or the lawyer charges a fee for the legal assistance, the exceptions provided by this Rule no longer apply.	(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter: (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.	[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter. [5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Texas Rule Language	Proposed Comments to Texas Rule	ABA Rule Language	Comments to ABA Rule
(b) Lawyers in a firm with a lawyer providing, or offering to provide, limited pro bono legal services shall not be prohibited by the imputation provisions of Rules 1.06, 1.07, and 1.09 from representing a client if that lawyer does not: (1) disclose confidential information of the pro bono client to the lawyers in the firm; or (2) maintain such information in a manner that would render it access ble to the lawyers in the firm.	Paragraph b [5] Paragraph (b) provides that a conflict of interest arising from a lawyer's representation covered by this Rule will not be imputed to the lawyers in the pro bono lawyer's firm if the pro bono lawyer complies with subparagraphs (b)(1) or (2). [6] To prevent a conflict of interest arising from limited pro bono legal services from being imputed to the other lawyers in the firm, subparagraph (b)(1) requires that the pro bono lawyer not disclose to any lawyer in the firm any confidential information related to the pro bono representation. [7] Subparagraph (b)(2) covers the retention of documents or other memorialization of confidential information, such as the pro bono lawyer's notes, whether in paper or electronic form. To prevent imputation, a pro bono lawyer who retains confidential information is required by subparagraph (b)(2) to segregate and store it in such a way that no other lawyer in the pro bono lawyer's firm can access it, either physically or electronically.	(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.	[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices.

Texas Rule Language	Proposed Comments to Texas Rule	ABA Rule Language	Comments to ABA Rule
(c) The eligibility information that an applicant is required to provide when applying for free legal services or limited pro bono legal services from a program described in subparagraph (d)(1) by itself will not create a conflict of interest if: (1) the eligibility information is not material to the legal matter, or (2) the applicant's provision of the eligibility information was conditioned on the applicant's informed consent that providing this information would not by itself prohibit a representation of another client adverse to the applicant.	Paragraph c [8] Paragraph (c) recognizes the unusual and uniquely sensitive personal information that applicants for free legal assistance may be required to provide. Organizations that receive funding to provide free legal assistance to low-income clients are generally required, as a condition of their funding, to screen the applicants for eligibility and to document eligibility for services paid for by those funding sources. Unlike other lawyers, law firms, and legal departments, these organizations ask for confidential information to determine an applicant's eligibility for free legal assistance and are required to maintain records of such eligibility determinations for potential audit by their funding sources. Required eligibility information typically includes income, asset values, marital status, citizenship or immigration status, and other facts the applicant may consider sensitive. Paragraph (c) provides a limited exception to the normal conflict of interest rules that apply to potential clients when an applicant provides this information. This exception is available only in the two situations described in subparagraphs (c)(1) and (c)(2). [9] The first situation where the paragraph (c) exception is available is where none of the eligibility information is material to an issue in the legal matter. Alternatively, under subparagraph (c)(2), if the applicant provided confidential information after giving informed consent that the elig bility information would not proh bit the persons or entities identified in the consent from representing any other present or future client, then the eligibility information alone will not proh bit the representation. The lawyer should document the receipt of such informed consent, though a formal writing is not required. What constitutes informed consent is discussed in the comments to Rule 1.06. [10] Rule 1.05 continues to apply to the use or disclosure of all confidential information provided during an intake interview. Similarly, Rule 1.09 continues to apply to the representation of a person in a matter adverse to the applicant. Notably, Rule 1.05(c)(2) permits a lawyer to use or disclose information provided during an intake interview if the applicant consents after consultation to such use or disclosure, and Rule 1.09(a)(3) permits a lawyer to represent a person adverse to the applicant in the same or a substantially related matter if the applicant consents to such a representation.		

Texas Rule Language	Proposed Comments to Texas Rule	ABA Rule Language	Comments to ABA Rule
(d) As used in this Rule, "limited pro bono legal services" means legal services that are: (1) provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, or nonprofit legal services program; (2) short-term services such as legal advice or other brief assistance with pro se documents or transactions, provided either in person or by phone, hotline, internet, or video conferencing; and (3) provided without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter.	Paragraph d [12] This Rule applies only to services offered through a program that meets one of the descriptions in subparagraph (d)(1), regardless of the nature and amount of support provided. Some programs may be jointly sponsored by more than one of the listed sponsor types. [13] The second element of "limited pro bono legal services," set forth in subparagraph (d)(2) is designed to ensure that the services offered are so limited in time and scope that there is little risk that conflicts will arise between clients represented through the program and other clients of the lawyer or the lawyer's firm. [14] The third element of the definition, set forth in subparagraph (d)(3), is that the services are offered and provided without any expectation of either extended representation or the collection of legal fees in the matter. Before agreeing to proceed in the representation beyond "limited pro bono legal services," the lawyer should evaluate the potential conflicts of interest that may arise from the representation as with any other representation. Likewise, the exceptions in paragraphs (a) and (b) do not apply if the lawyer expects to collect any legal fees in the limited assistance matter.		

Texas Rule Language	Proposed Comments to Texas Rule	ABA Rule Language	Comments to ABA Rule
(e) As used in this Rule, a lawyer is not "in a firm" with other lawyers solely because the lawyer provides limited pro bono legal services with the other lawyers.	Paragraph e [15] Lawyers are not deemed to be part of the same firm simply because they volunteer through the same pro bono program. Nor will the personal prohibition of a lawyer participating in a pro bono program be imputed to other lawyers participating in the program solely by reason of that volunteer connection.		[4] Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

EXHIBIT 2

STATE BAR OF TEXAS

November 30, 2015

Board of Directors
State Bar of Texas
1414 Colorado
Austin, Texas 78701

RE: Proposed Disciplinary Rule of Professional Conduct 6.05

Dear Directors,

On behalf of the State Bar's Pro Bono Workgroup, we write in support of the State Bar of Texas Committee on the Disciplinary Rules of Professional Conduct's (Committee) proposed Rule 6.05 addressing conflicts of interest during the provision of limited pro bono legal services.

As you may know, the Pro Bono Workgroup was formed in 2013 with the mission of enhancing the culture of pro bono service in Texas. The adoption of a rule that addresses conflicts of interest during the provision of limited pro bono legal services is a priority for our Workgroup. The issue of conflicts in settings such as legal advice clinics is a barrier to pro bono service that is repeatedly raised both by lawyers and legal aid providers alike. We believe that adopting a rule clarifying the issue of conflicts in these limited settings will increase the number of lawyers who are willing and able to provide pro bono legal services, and increase the numbers of low-income Texans who receive the legal assistance they need.

The Pro Bono Workgroup supports the Committee's proposed rule 6.05 because it does a good job of balancing the important issue of conflicts of interest with the realities of providing limited pro bono legal services at a pro bono clinic or similar setting. Additionally, the Committee's proposed rule clarifies and improves upon Model Rule 6.5 in important ways that we believe will make the rule successful in Texas.

Removing barriers to pro bono service is a critical issue if we intend to make strides in addressing the "justice gap" in our state. Adopting proposed rule 6.05 will remove a significant barrier preventing many attorneys from participating in pro bono efforts. Therefore, we strongly support the Committee's proposed Rule 6.05, and respectfully request that the Board takes the necessary steps for adopting the rule without delay.

Sincerely,

Terry Tottenham
Former SBOT President
Co-chair Pro Bono Workgroup

Roland K. Johnson
Former SBOT President
Co-chair Pro Bono Workgroup

EXHIBIT 3

RESOLUTION SUPPORTING PROPOSED RULE 6.05 TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

WHEREAS, the Texas Access to Justice Commission embraces the principles that our nation promises justice for all, not just for those who can afford to pay for it.

WHEREAS, the most recent U.S. Census reports that more than 5.8 million Texans qualify for civil legal aid.

WHEREAS, the Preamble to the Texas Disciplinary Rules of Professional Conduct states that "...a lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.", and that "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees is a moral obligation of each lawyer as well as the profession generally."

WHEREAS, civil legal aid providers and pro bono attorneys work tirelessly to provide free legal services to as many Texans as possible and whose services are invaluable to communities across the State.

WHEREAS, attorneys who are willing to volunteer their time to provide pro bono legal assistance to low-income Texans but do not do so because of a concern that they will be unable to meet the requirements of the conflict of interest rule in certain limited settings like a legal advice clinic.

WHEREAS, ABA Model Rule 6.5 was developed in response to the concern that strict application of the conflicts of interest rules may deter attorneys from volunteering to provide pro bono legal services.

WHEREAS, the State Bar of Texas Committee on the Disciplinary Rules of Professional Conduct shares the ABA's concern and has promulgated Texas Disciplinary Rule of Professional Conduct 6.05, a modified version of Model Rule 6.5, to address this concern.

THEREFORE, BE IT RESOLVED that the Texas Access to Justice Commission supports proposed Rule 6.05 to the Texas Disciplinary Rules of Professional Conduct which will increase access to justice for many Texans.

SIGNED this 4th day of February, 2016.

Harry M. Reasoner
Chair

January 9, 2020

Mr. Jerry C. Alexander, Chair
State Bar of Texas Board of Directors
Passman and Jones
[redacted]

RE: Submission of Proposed Rule Recommendation – Part VII, Texas Disciplinary Rules of Professional Conduct (Lawyer Advertising and Solicitation Rules)

Dear Mr. Alexander:

Pursuant to section 81.0875 of the Texas Government Code, the Committee on Disciplinary Rules and Referenda initiated a rule change proposal relating to Part VII of the Texas Disciplinary Rules of Professional Conduct, which consists of the lawyer advertising and solicitation rules.

In late 2018, the Committee initially published proposed changes to the advertising and solicitation rules in the *Texas Bar Journal* and the *Texas Register*, and in January 2019, the Committee held a public hearing on the proposal. The Committee considered more than 140 public comments on the initial proposal.

Based on the large volume of feedback and the Committee's significant changes to the proposal, the Committee voted at its April 2019 meeting not to recommend the original proposal to the Board of Directors and instead to reinitiate the rule proposal process for a revised proposal.

The Committee published a revised proposal on the advertising and solicitation rules in the May 31, 2019, issue of the *Texas Register* and the June 2019 issue of the *Texas Bar Journal*. The Committee solicited and considered public comments and held two public hearings on the revised proposal. In response to public comments and after significant deliberation, the Committee made additional amendments to the proposal. At its September 2019 meeting, the Committee voted to recommend the rule change proposal to the Board of Directors.

Included in this submission packet, you will find an overview of the rule proposal, the recommended proposal, proposed comments to the proposed rules, and the Board's June 2018 resolution regarding the advertising rules. Additionally, a supplement is available at the following

link, which includes the original and revised published versions of the proposal, public comments received on each published version of the proposal, and other supporting materials: www.texasbar.com/cdrradrulesjan2020supplement.

Section 81.0877 of the Government Code provides that the Board of Directors is to vote on each proposed disciplinary rule recommended by the Committee not later than the 120th day after the date the rule is received from the Committee. The Board can vote for or against a proposed rule or return a proposed rule to the Committee for additional consideration.

As a reminder, if a majority of the Board of Directors approves a proposed rule, the Board shall petition the Supreme Court of Texas to order a referendum on the proposed rule as provided by section 81.0878 of the Government Code.

Thank you for your attention to this matter. Should the Board require any other information, please do not hesitate to contact me.

Sincerely,

Lewis Kinard
Chair, Committee on Disciplinary Rules and Referenda

cc: Randall O. Sorrels
Larry P. McDougal
Joe K. Longley
Trey Apffel
John Sirman
Seana Willing
Ross Fischer

Committee on Disciplinary Rules and Referenda
Overview of Rule Proposal

Texas Disciplinary Rules of Professional Conduct

Part VII. Information about Legal Services

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda (Committee) related to proposed changes to Part VII of the Texas Disciplinary Rules of Professional Conduct (TDRPC), which consists of the lawyer advertising and solicitation rules.

Actions by the Committee

Original Proposal

- **Initiation** – The Committee voted to initiate the rule proposal process at its September 4, 2018, meeting.
- **Publication** – The original proposal was published in the December 2018 issue of the *Texas Bar Journal* and the November 30, 2018, issue of the *Texas Register*. The proposed rule was also posted on the Committee's website. Information about the public hearing and the submission of public comments was included in the publications and on the Committee's website.
- **Additional Outreach** – On January 14, 2019, an email notification regarding the proposal was sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices). On January 31, 2019, an email notification regarding the proposal was sent to other potentially interested parties. On February 20, 2019, an additional email notification regarding the proposal was sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices) and Committee email subscribers.
- **Public Comments** – The Committee extended the public comment period to three months (through March 1, 2019). The Committee received 134 written public comments and nine individuals provided comments at the public hearing. A significant number of public comments related to the proposal to allow non-misleading trade names, and a large majority of those comments opposed permitting trade names. (Sixty public comments expressed opposition to allowing trade names, while 12 public comments expressed support for allowing trade names in at least some circumstances. Four public comments otherwise discussed the subject of trade names but did not express a clear preference.) A significant number of public comments also focused on proposed changes regarding statements of specialization and certification by the Texas Board of Legal Specialization (TBLS).
- **Public Hearing** – The Committee held a public hearing on the proposal on January 9, 2019, at the Texas Law Center.
- **Trade Name Poll** – An online poll on trade names indicated a significant divide on the subject among participants. (It is important to note the poll was not scientific.)

- **Decision to Initiate for Revised Proposal** – Based on the large volume of feedback and the Committee's significant changes to the proposal, the Committee voted at its April 18, 2019, meeting not to recommend the original proposal to the Board of Directors and instead to reinitiate the rule proposal process for a revised proposal.

Revised Proposal

- **Initiation** – The Committee voted to initiate the rule proposal process for a revised proposal at its April 18, 2019, meeting.
- **Publication** – The revised proposal was published in the June 2019 issue of the *Texas Bar Journal* and the May 31, 2019, issue of the *Texas Register*. On May 24, 2019, the revised proposal was posted on the Committee's website. Information about the public hearings and the submission of public comments was included in the publications and on the Committee's website.
- **Additional Outreach** – On May 24, 2019, an email notification regarding the revised proposal was sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices) and CDRR email subscribers. On July 17, 2019, an additional email notification regarding the revised proposal was sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices), CDRR email subscribers, and other potentially interested parties. Additional email notifications regarding the revised proposal were sent to CDRR email subscribers on June 4, June 25, July 19, August 1, and August 29, 2019.
- **Public Comments** – The Committee extended the public comment period to more than two months (through August 6, 2019). The Committee received 21 written public comments and three individuals provided comments at the public hearings. Eleven public comments related to the revised proposal to generally maintain the existing prohibition on trade names. (Two public comments expressed opposition to allowing trade names, while seven public comments expressed support for allowing trade names in at least some circumstances. Two public comments otherwise discussed the subject of trade names but did not express a clear preference.)
- **Public Hearings** – The Committee held public hearings on the proposal on June 6 and July 23, 2019, at the Texas Law Center.
- **Recommendation** – The Committee voted at its September 3, 2019, meeting to recommend the rule proposal to the Board of Directors with certain amendments.

Overview and Rationale

In June 2018, the Board of Directors adopted a resolution approving the submission of a report by the Advertising Review Committee to the Committee and requesting initiation of the rule proposal process for the lawyer advertising rules.

In September 2018, the Committee initiated the rule proposal process for the lawyer advertising and solicitation rules. The Committee originally published proposed changes to the lawyer advertising and solicitation rules in the December 2018 issue of the *Texas Bar Journal* and the November 30, 2018, issue of the *Texas Register*. The proposed changes focused on simplifying and modernizing the advertising and solicitation rules. Among the many changes proposed was

the inclusion of language that, if adopted, would permit a lawyer to practice under a non-misleading trade name.

The Committee reviewed and considered a large volume of feedback related to the proposed rules. The issue of trade names was the overwhelming focus of the public feedback. Of the 134 written public comments and nine individuals providing feedback at the public hearing, 60 comments expressed opposition to allowing trade names, while 12 comments expressed support for allowing trade names in at least some circumstances. Four public comments otherwise discussed the subject of trade names but did not express a clear preference. An online poll on trade names was also conducted, which indicated a significant divide on the subject.

A significant number of public comments also focused on issues related to the communication of practice areas and claims of specialization, including certification by TBLS. In particular, the Chair and the Executive Director of TBLS submitted comments expressing that TBLS opposed elimination of current Rule 7.04(d)(2), which prohibits a lawyer from advertising certification by an organization as a specialist unless the lawyer is certified by TBLS or an organization accredited by TBLS.

The Committee responded to public input by making a number of amendments to the proposal. Based on the significant changes and in an effort to solicit additional public feedback, the Committee voted at its April 2019 meeting to reinitiate the rule proposal process for a revised proposal on the lawyer advertising and solicitation rules. The Committee published the revised proposal in the June 2019 issue of the *Texas Bar Journal* and the May 31, 2019, issue of the *Texas Register*.

Among the many changes in the revised proposal was inclusion of language that would generally continue the current prohibition on the use of lawyer trade names. In addition, the Committee responded to the concerns expressed by TBLS by preserving the current restriction that a lawyer is only permitted to advertise certification by an organization as a specialist if the certification is awarded by TBLS or an organization accredited by TBLS. (The revised language regarding certification is included in proposed Rule 7.02(b) and was approved by TBLS prior to publication of the revised proposal.)

The Committee received 21 written public comments on the revised proposal and three individuals provided comments at the public hearings on the revised proposal. The public comments related to a variety of issues, with 11 comments pertaining to the issue of trade names. Of those, two public comments expressed opposition to allowing trade names, while seven public comments expressed support for allowing trade names in at least some circumstances. A couple of public comments otherwise discussed the subject of trade names but did not express a clear preference.

In response to the additional public feedback and after significant deliberation, the Committee made additional amendments to the proposal. In September 2019, the Committee voted to recommend the proposal to the Board of Directors.

The recommended version of the proposal would largely overhaul Part VII to simplify and modernize the advertising and solicitation rules.

Notably, the recommended proposal: (1) continues to prohibit false or misleading communications about the qualifications or services of a lawyer of law firm (see proposed Rule 7.01); (2) defines the terms "advertisement" and "solicitation communication" (see proposed Rule 7.01); (3) simplifies disclaimer requirements (see proposed Rules 7.01, 7.02, and 7.03); (4) continues to permit statements by a lawyer claiming certification by an organization as a specialist only if the certification is awarded by TBLS or an organization accredited by TBLS (see proposed Rule 7.02); (5) continues to prohibit solicitation through in-person contact or through telephone, social media, or other electronic communications that are live or electronically interactive, with certain limited exceptions (see proposed Rule 7.03); (6) exempts communications directed to other lawyers or experienced users of the type of legal services involved for business matters from certain solicitation restrictions and from filing requirements (see proposed Rules 7.03 and 7.05); (7) exempts certain nominal gifts from the prohibition on giving anything of value to a person who makes a referral (see proposed Rule 7.03); (8) permits certain non-exclusive reciprocal referral agreements (see proposed Rule 7.03); (9) continues to allow attorneys to seek pre-approval of advertisements and solicitation communications (see proposed Rule 7.04); (10) exempts most parts of websites from filing requirements (see proposed Rule 7.05); and (11) expands the list of communications that are exempt from filing requirements (see proposed Rule 7.05).

The recommended proposal also maintains the current prohibition that a lawyer in private practice shall not practice under a trade name (see proposed Rule 7.07). In making the recommendation, the Committee discussed possible future examination of the trade name issue and left open the door for a future separate proposal focused specifically on the subject of trade names. To facilitate future modification or even elimination of the trade name prohibition, this proposed version moves the existing language into a separately numbered rule (7.07).

Additional Documents

Included on the pages that follow are the recommended proposal, proposed comments to the proposed rules, and the Board's July 2018 resolution regarding the advertising rules. Additionally, a supplement is available at the following link, which includes the original and revised published versions of the proposal, public comments received on each published version of the proposal, and other materials: www.texasbar.com/cdrradrulesjan2020supplement.

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct

VII. INFORMATION ABOUT LEGAL SERVICES (Recommended Version)

Proposed Rules (Clean Version)

Rule 7.01 Communications Concerning a Lawyer's Services

(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or services of a lawyer or law firm. Information about legal services must be truthful and nondeceptive. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. A statement is misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation, or if the statement is substantially likely to create unjustified expectations about the results the lawyer can achieve.

(b) This Rule governs all communications about a lawyer's services, including advertisements and solicitation communications. For purposes of Rules 7.01 to 7.07:

> (1) An "advertisement" is a communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to members of the public in general, which offers or promotes legal services under circumstances where the lawyer neither knows nor reasonably should know that the recipients need legal services in particular matters.
>
> (2) A "solicitation communication" is a communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to a specific person who has not sought the lawyer's advice or services, which reasonably can be understood as offering to provide legal services that the lawyer knows or reasonably should know the person needs in a particular matter.

(c) A law firm name may include the names of current members of the firm and of deceased or retired members of the firm, or of a predecessor firm, if there has been a succession in the firm identity. The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. A law firm with an office in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(d) A statement or disclaimer required by these Rules shall be sufficiently clear that it can reasonably be understood by an ordinary person and made in each language used in the communication. A statement that a language is spoken or understood does not require a statement or disclaimer in that language.

(e) A lawyer shall not state or imply that the lawyer can achieve results by violence or means that violate these Rules or other law.

(f) A lawyer may state or imply that the lawyer practices in a partnership or other business entity only when that is accurate.

(g) If a lawyer who advertises the amount of a verdict secured on behalf of a client knows that the verdict was later reduced or reversed, or that the case was settled for a lesser amount, the lawyer must state in each advertisement of the verdict, with equal or greater prominence, the amount of money that was ultimately received by the client.

Rule 7.02 Advertisements

(a) An advertisement of legal services shall publish the name of a lawyer who is responsible for the content of the advertisement and identify the lawyer's primary practice location.

(b) A lawyer who advertises may communicate that the lawyer does or does not practice in particular fields of law, but shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:

> (1) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, "Board Certified, area of specialization -- Texas Board of Legal Specialization;" and
>
> (2) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence in a field of practice, may include a factually accurate, non-misleading statement of such membership or certification, but only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of published criteria which the Texas Board of Legal Specialization has established as required for such certification.

(c) If an advertisement by a lawyer discloses a willingness to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay for other expenses, such as the costs of litigation.

(d) A lawyer who advertises a specific fee or range of fees for an identified service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period. However, a lawyer is not bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication, unless the lawyer has expressly promised to do so.

Rule 7.03 Solicitation and Other Prohibited Communications

(a) The following definitions apply to this Rule:

> (1) "Regulated telephone, social media, or other electronic contact" means telephone, social media, or electronic communication initiated by a lawyer, or by a person acting on behalf of a lawyer, that involves communication in a live or electronically interactive manner.

(2) A lawyer "solicits" employment by making a "solicitation communication," as that term is defined in Rule 7.01(b)(2).

(b) A lawyer shall not solicit through in-person contact, or through regulated telephone, social media, or other electronic contact, professional employment from a non-client, unless the target of the solicitation is:

(1) another lawyer;

(2) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

(3) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.

(c) A lawyer shall not send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a communication that involves coercion, duress, overreaching, intimidation, or undue influence.

(d) A lawyer shall not send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a solicitation communication to a prospective client, if:

(1) the communication is misleadingly designed to resemble a legal pleading or other legal document; or

(2) the communication is not plainly marked or clearly designated an "ADVERTISEMENT" unless the target of the communication is:

(i) another lawyer;

(ii) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

(iii) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.

(e) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting or referring prospective clients for professional employment, except nominal gifts given as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(1) This Rule does not prohibit a lawyer from paying reasonable fees for advertising and public relations services or the usual charges of a lawyer referral service that meets the requirements of Texas law.

(2) A lawyer may refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive;

(ii) clients are informed of the existence and nature of the agreement; and

(iii) the lawyer exercises independent professional judgment in making referrals.

(f) A lawyer shall not, for the purpose of securing employment, pay, give, advance, or offer to pay, give, or advance anything of value to a prospective client, other than actual litigation expenses and other financial assistance permitted by Rule 1.08(d), or ordinary social hospitality of nominal value.

(g) This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

Rule 7.04 Filing Requirements for Advertisements and Solicitation Communications

(a) Except as exempt under Rule 7.05, a lawyer shall file with the Advertising Review Committee, State Bar of Texas, no later than ten (10) days after the date of dissemination of an advertisement of legal services, or ten (10) days after the date of a solicitation communication sent by any means:

(1) a copy of the advertisement or solicitation communication (including packaging if applicable) in the form in which it appeared or will appear upon dissemination;

(2) a completed lawyer advertising and solicitation communication application; and

(3) payment to the State Bar of Texas of a fee authorized by the Board of Directors.

(b) If requested by the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in an advertisement or solicitation communication.

(c) A lawyer who desires to secure pre-approval of an advertisement or solicitation communication may submit to the Advertising Review Committee, not fewer than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a), except that in the case of an advertisement or solicitation communication that has not yet been produced, the documentation will consist of a proposed text, production script, or other description, including details about the illustrations, actions, events, scenes, and background sounds that will be depicted. A finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding or action, but a finding of compliance is binding in favor of the submitting lawyer as to all materials submitted for pre-approval if the lawyer fairly and accurately described the advertisement or solicitation communication that was later produced. A finding of compliance is admissible evidence if offered by a party.

Rule 7.05 Communications Exempt from Filing Requirements

The following communications are exempt from the filing requirements of Rule 7.04 unless they fail to comply with Rules 7.01, 7.02, and 7.03:

(a) any communication of a bona fide nonprofit legal aid organization that is used to educate members of the public about the law or to promote the availability of free or reduced-fee legal services;

(b) information and links posted on a law firm website, except the contents of the website homepage, unless that information is otherwise exempt from filing;

(c) a listing or entry in a regularly published law list;

(d) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or law firm, or a business card;

(e) a professional newsletter in any media that it is sent, delivered, or transmitted only to:

(1) existing or former clients;

(2) other lawyers or professionals;

(3) persons known by the lawyer to be experienced users of the type of legal services involved for business matters;

(4) members of a nonprofit organization which has requested that members receive the newsletter; or

(5) persons who have asked to receive the newsletter;

(f) a solicitation communication directed by a lawyer to:

(1) another lawyer;

(2) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

(3) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters;

(g) a communication on a professional social media website to the extent that it contains only resume-type information;

(h) an advertisement that:

(1) identifies a lawyer or a firm as a contributor or sponsor of a charitable, community, or public interest program, activity, or event; and

(2) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, contact information, and the fact of the contribution or sponsorship;

(i) communications that contain only the following types of information:

(1) the name of the law firm and any lawyer in the law firm, office addresses, electronic addresses, social media names and addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession, such as “attorney,” “lawyer,” “law office,” or “firm;”

(2) the areas of law in which lawyers in the firm practice, concentrate, specialize, or intend to practice;

(3) the admission of a lawyer in the law firm to the State Bar of Texas or the bar of any court or jurisdiction;

(4) the educational background of the lawyer;

(5) technical and professional licenses granted by this state and other recognized licensing authorities;

(6) foreign language abilities;

(7) areas of law in which a lawyer is certified by the Texas Board of Legal Specialization or by an organization that is accredited by the Texas Board of Legal Specialization;

(8) identification of prepaid or group legal service plans in which the lawyer participates;

(9) the acceptance or nonacceptance of credit cards;

(10) fees charged for an initial consultation or routine legal services;

(11) identification of a lawyer or a law firm as a contributor or sponsor of a charitable, community, or public interest program, activity or event;

(12) any disclosure or statement required by these Rules; and

(13) any other information specified in orders promulgated by the Supreme Court of Texas.

Rule 7.06 Prohibited Employment

(a) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by Rules 7.01 through 7.03, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by another person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.

(b) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by Rules 7.01 through 7.03, 8.04(a)(2), or 8.04(a)(9), engaged in by another person or entity that is a shareholder, partner, or member of, an associate in, or of counsel to that lawyer's firm; or by any other person whom the foregoing persons or entities ordered, encouraged, or knowingly permitted to engage in such conduct.

(c) A lawyer who has not violated paragraph (a) or (b) in accepting employment in a matter shall not continue employment in that matter once the lawyer knows or reasonably should know that the person procuring the lawyer's employment in the matter engaged in, or ordered, encouraged, or knowingly permitted another to engage in, conduct prohibited by Rules 7.01 through 7.03, 8.04(a)(2), or 8.04(a)(9) in connection with the matter unless nothing of value is given thereafter in return for that employment.

Rule 7.07 Trade Names

A lawyer in private practice shall not practice under a trade name.

Proposed Rules (Redline Version)

Rule 7.01. Communications Concerning a Lawyer's Services ~~Firm Names and Letterhead~~

(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or services of a lawyer or law firm. Information about legal services must be truthful and nondeceptive. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. A statement is misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation, or if the statement is substantially likely to create unjustified expectations about the results the lawyer can achieve. ~~A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the names of a professional corporation, professional association, limited liability partnership, or professional limited liability company may contain "P.C.," "L.L.P.," "P.L.L.C.," or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Nothing herein shall prohibit a married woman from practicing under her maiden name.~~

(b) This Rule governs all communications about a lawyer's services, including advertisements and solicitation communications. For purposes of Rules 7.01 to 7.07:

> (1) An "advertisement" is a communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to members of the public in general, which offers or promotes legal services under circumstances where the lawyer neither knows nor reasonably should know that the recipients need legal services in particular matters.
>
> (2) A "solicitation communication" is a communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to a specific person who has not sought the lawyer's advice or services, which reasonably can be understood as offering to provide legal services that the lawyer knows or reasonably should know the person needs in a particular matter.

~~A firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~

(c) A law firm name may include the names of current members of the firm and of deceased or retired members of the firm, or of a predecessor firm, if there has been a succession in the firm identity. The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. A law firm with an office in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located. ~~The name of a lawyer occupying a judicial, legislative, or public executive or administrative position shall not be used in the name of a firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~

(d) A statement or disclaimer required by these Rules shall be sufficiently clear that it can reasonably be understood by an ordinary person and made in each language used in the communication. A statement

that a language is spoken or understood does not require a statement or disclaimer in that language. ~~A lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.~~

(e) A lawyer shall not state or imply that the lawyer can achieve results by violence or means that violate these Rules or other law. ~~A lawyer shall not advertise in the public media or seek professional employment by any communication under a trade or fictitious name, except that a lawyer who practices under a firm name as authorized by paragraph (a) of this Rule may use that name in such advertisement or communication but only if that name is the firm name that appears on the lawyer's letterhead, business cards, office sign, fee contracts, and with the lawyer's signature on pleadings and other legal documents.~~

(f) A lawyer may state or imply that the lawyer practices in a partnership or other business entity only when that is accurate. ~~A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.02(a).~~

(g) If a lawyer who advertises the amount of a verdict secured on behalf of a client knows that the verdict was later reduced or reversed, or that the case was settled for a lesser amount, the lawyer must state in each advertisement of the verdict, with equal or greater prominence, the amount of money that was ultimately received by the client.

Rule 7.02. Advertisements ~~Communications Concerning a Lawyer's Services~~

(a) An advertisement of legal services shall publish the name of a lawyer who is responsible for the content of the advertisement and identify the lawyer's primary practice location. ~~A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it:~~

~~(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;~~

~~(2) contains any reference in a public media advertisement to past successes or results obtained unless~~

~~(i) the communicating lawyer or member of the law firm served as lead counsel in the matter giving rise to the recovery, or was primarily responsible for the settlement or verdict.~~

~~(ii) the amount involved was actually received by the client,~~

~~(iii) the reference is accompanied by adequate information regarding the nature of the case or matter, and the damages or injuries sustained by the client, and~~

~~(iv) if the gross amount received is stated, the attorney's fees and litigation expenses withheld from the amount are stated as well;~~

~~(3) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;~~

~~(4) compares the lawyer's services with other lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data;~~

~~(5) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official;~~

~~(6) designates one or more specific areas of practice in an advertisement in the public media or in a solicitation communication unless the advertising or soliciting lawyer is competent to handle legal matters in each such area of practice; or~~

~~(7) uses an actor or model to portray a client of the lawyer or law firm.~~

(b) A lawyer who advertises may communicate that the lawyer does or does not practice in particular fields of law, but shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:

(1) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, "Board Certified, area of specialization -- Texas Board of Legal Specialization;" and

(2) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence in a field of practice, may include a factually accurate, non-misleading statement of such membership or certification, but only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of published criteria which the Texas Board of Legal Specialization has established as required for such certification.

~~Rule 7.02(a)(6) does not require that a lawyer be certified by the Texas Board of Legal Specialization at the time of advertising in a specific area of practice, but such certification shall conclusively establish that such lawyer satisfies the requirements of Rule 7.02(a)(6) with respect to the area(s) of practice in which such lawyer is certified.~~

(c) If an advertisement by a lawyer discloses a willingness to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay for other expenses, such as the costs of litigation. ~~A lawyer shall not advertise in the public media or state in a solicitation communication that the lawyer is a specialist except as permitted under Rule 7.04.~~

(d) A lawyer who advertises a specific fee or range of fees for an identified service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period. However, a lawyer is not bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication, unless the lawyer has expressly promised to do so. ~~Any statement or disclaimer required by these rules shall be made in each language used in the advertisement or solicitation communication with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.~~

Rule 7.03. Solicitation and Other Prohibited Communications ~~Prohibited Solicitations and Payments~~

(a) The following definitions apply to this Rule:

(1) “Regulated telephone, social media, or other electronic contact” means telephone, social media, or electronic communication initiated by a lawyer, or by a person acting on behalf of a lawyer, that involves communication in a live or electronically interactive manner.

(2) A lawyer “solicits” employment by making a “solicitation communication,” as that term is defined in Rule 7.01(b)(2).

~~A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f) seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization's members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in person or telephone or other electronic contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:~~

~~(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;~~

~~(2) the communication contains information prohibited by Rule 7.02(a); or~~

~~(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.~~

(b) A lawyer shall not solicit through in-person contact, or through regulated telephone, social media, or other electronic contact, professional employment from a non-client, unless the target of the solicitation is:

(1) another lawyer;

(2) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

(3) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.

~~A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm, except that a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.~~

(c) A lawyer shall not send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a communication that involves coercion, duress, overreaching, intimidation, or undue influence. ~~A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by Rule 1.04(f) or by paragraph (b) of this Rule.~~

(d) A lawyer shall not send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a solicitation communication to a prospective client, if:

(1) the communication is misleadingly designed to resemble a legal pleading or other legal document; or

(2) the communication is not plainly marked or clearly designated an "ADVERTISEMENT" unless the target of the communication is:

(i) another lawyer;

(ii) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

(iii) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.

~~A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a), (b), or (c).~~

(e) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting or referring prospective clients for professional employment, except nominal gifts given as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(1) This Rule does not prohibit a lawyer from paying reasonable fees for advertising and public relations services or the usual charges of a lawyer referral service that meets the requirements of Texas law.

(2) A lawyer may refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive;

(ii) clients are informed of the existence and nature of the agreement; and

(iii) the lawyer exercises independent professional judgment in making referrals.

~~A lawyer shall not participate with or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.~~

(f) A lawyer shall not, for the purpose of securing employment, pay, give, advance, or offer to pay, give, or advance anything of value to a prospective client, other than actual litigation expenses and other financial assistance permitted by Rule 1.08(d), or ordinary social hospitality of nominal value. ~~As used in paragraph (a), "regulated telephone or other electronic contact" means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.~~

(g) This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

Rule 7.04. Filing Requirements for Advertisements and Solicitation Communications ~~Advertisements in the Public Media~~

(a) Except as exempt under Rule 7.05, a lawyer shall file with the Advertising Review Committee, State Bar of Texas, no later than ten (10) days after the date of dissemination of an advertisement of legal services, or ten (10) days after the date of a solicitation communication sent by any means:

(1) a copy of the advertisement or solicitation communication (including packaging if applicable) in the form in which it appeared or will appear upon dissemination;

(2) a completed lawyer advertising and solicitation communication application; and

(3) payment to the State Bar of Texas of a fee authorized by the Board of Directors.

~~A lawyer shall not advertise in the public media by stating that the lawyer is a specialist, except as permitted under Rule 7.04(b) or as follows:~~

~~(1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms. A lawyer engaged in the trademark practice may use the designation "Trademark," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms. A lawyer engaged in patent and trademark practice may hold himself or herself out as specializing in "Intellectual Property Law," "Patent, Trademark, Copyright Law and Unfair Competition," or any of those terms.~~

~~(2) A lawyer may permit his or her name to be listed in lawyer referral service offices that meet the requirements of Occupational Code Title 5, Subtitle B, Chapter 952, according to the areas of law in which the lawyer will accept referrals.~~

~~(3) A lawyer available to practice in a particular area of law or legal service may distribute to other lawyers and publish in legal directories and legal newspapers (whether written or electronic) a listing or an announcement of such availability. The listing shall not contain a false or misleading representation of special competence or experience, but may contain the kind of information that traditionally has been included in such publications.~~

(b) If requested by the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in an advertisement or solicitation communication. ~~A lawyer who advertises in the public media:~~

~~(1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement; and~~

~~(2) shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:~~

~~(i) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each~~

~~such area, "Board Certified, area of specialization — Texas Board of Legal Specialization;" and~~

~~(ii) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence, may include a factually accurate statement of such membership or may include a factually accurate statement, "Certified area of specialization name of certifying organization," but such statements may be made only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar; and~~

~~(3) shall, in the case of infomercial or comparable presentation, state that the presentation is an advertisement;~~

~~(i) both verbally and in writing at its outset, after any commercial interruption, and at its conclusion; and~~

~~(ii) in writing during any portion of the presentation that explains how to contact a lawyer or law firm.~~

(c) A lawyer who desires to secure pre-approval of an advertisement or solicitation communication may submit to the Advertising Review Committee, not fewer than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a), except that in the case of an advertisement or solicitation communication that has not yet been produced, the documentation will consist of a proposed text, production script, or other description, including details about the illustrations, actions, events, scenes, and background sounds that will be depicted. A finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding or action, but a finding of compliance is binding in favor of the submitting lawyer as to all materials submitted for pre-approval if the lawyer fairly and accurately described the advertisement or solicitation communication that was later produced. A finding of compliance is admissible evidence if offered by a party. ~~Separate and apart from any other statements, the statements referred to in paragraph (b) shall be displayed conspicuously, and in language easily understood by an ordinary consumer.~~

~~(d) Subject to the requirements of Rules 7.02 and 7.03 and of paragraphs (a), (b), and (c) of this Rule, a lawyer may, either directly or through a public relations or advertising representative, advertise services in the public media, such as (but not limited to) a telephone directory, legal directory, newspaper or other periodical, outdoor display, radio, television, the Internet, or electronic, or digital media.~~

~~(e) All advertisements in the public media for a lawyer or firm must be reviewed and approved in writing by the lawyer or a lawyer in the firm.~~

~~(f) A copy or recording of each advertisement in the public media and relevant approval referred to in paragraph (e), and a record of when and where the advertisement was used, shall be kept by the lawyer or firm for four years after its last dissemination.~~

(g) In advertisements in the public media, any person who portrays a lawyer whose services or whose firm's services are being advertised, or who narrates an advertisement as if he or she were such a lawyer, shall be one or more of the lawyers whose services are being advertised.

(h) If an advertisement in the public media by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay all or any portion of the court costs and, if a client may be liable for other expenses, this fact must be disclosed. If specific percentage fees or fee ranges of contingent fee work are disclosed in such advertisement, it must also disclose whether the percentage is computed before or after expenses are deducted from the recovery.

(i) A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period; but in no instance is the lawyer bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication.

(j) A lawyer or firm who advertises in the public media must disclose the geographic location, by city or town, of the lawyer's or firm's principal office. A lawyer or firm shall not advertise the existence of any office other than the principal office unless:

(1) that other office is staffed by a lawyer at least three days a week; or

(2) the advertisement states:

(i) the days and times during which a lawyer will be present at that office, or

(ii) that meetings with lawyers will be by appointment only.

(k) A lawyer may not, directly or indirectly, pay all or a part of the cost of an advertisement in the public media for a lawyer not in the same firm unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.

(l) If an advertising lawyer knows or should know at the time of an advertisement in the public media that a case or matter will likely be referred to another lawyer or firm, a statement of such fact shall be conspicuously included in such advertisement.

(m) No motto, slogan or jingle that is false or misleading may be used in any advertisement in the public media.

(n) A lawyer shall not include in any advertisement in the public media the lawyer's association with a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(o) A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:

(1) states that the advertisement is paid for by the cooperating lawyers;

(2) names each of the cooperating lawyers;

~~(3) sets forth conspicuously the special competency requirements required by Rule 7.04(b) of lawyers who advertise in the public media;~~

~~(4) does not state or imply that the lawyers participating in the advertising cooperative or venture possess professional superiority, are able to perform services in a superior manner, or possess special competence in any area of law advertised, except that the advertisement may contain the information permitted by Rule 7.04(b)(2); and~~

~~(5) does not otherwise violate the Texas Disciplinary Rules of Professional Conduct.~~

~~(p) Each lawyer who advertises in the public media as part of an advertising cooperative or venture shall be individually responsible for:~~

~~(1) ensuring that each advertisement does not violate this Rule; and~~

~~(2) complying with the filing requirements of Rule 7.07.~~

~~(q) If these rules require that specific qualifications, disclaimers or disclosures of information accompany communications concerning a lawyer's services, the required qualifications, disclaimers or disclosures must be presented in the same manner as the communication and with equal prominence.~~

~~(r) A lawyer who advertises on the Internet must display the statements and disclosures required by Rule 7.04.~~

Rule 7.05. Communications Exempt from Filing Requirements ~~Prohibited Written, Electronic, Or Digital Solicitations~~

The following communications are exempt from the filing requirements of Rule 7.04 unless they fail to comply with Rules 7.01, 7.02, and 7.03:

(a) any communication of a bona fide nonprofit legal aid organization that is used to educate members of the public about the law or to promote the availability of free or reduced-fee legal services;

(b) information and links posted on a law firm website, except the contents of the website homepage, unless that information is otherwise exempt from filing;

(c) a listing or entry in a regularly published law list;

(d) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or law firm, or a business card;

(e) a professional newsletter in any media that it is sent, delivered, or transmitted only to:

(1) existing or former clients;

(2) other lawyers or professionals;

(3) persons known by the lawyer to be experienced users of the type of legal services involved for business matters;

(4) members of a nonprofit organization which has requested that members receive the newsletter; or

(5) persons who have asked to receive the newsletter;

(f) a solicitation communication directed by a lawyer to:

(1) another lawyer;

(2) a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

(3) a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters;

(g) a communication on a professional social media website to the extent that it contains only resume-type information;

(h) an advertisement that:

(1) identifies a lawyer or a firm as a contributor or sponsor of a charitable, community, or public interest program, activity, or event; and

(2) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, contact information, and the fact of the contribution or sponsorship;

(i) communications that contain only the following types of information:

(1) the name of the law firm and any lawyer in the law firm, office addresses, electronic addresses, social media names and addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession, such as “attorney,” “lawyer,” “law office,” or “firm;”

(2) the areas of law in which lawyers in the firm practice, concentrate, specialize, or intend to practice;

(3) the admission of a lawyer in the law firm to the State Bar of Texas or the bar of any court or jurisdiction;

(4) the educational background of the lawyer;

(5) technical and professional licenses granted by this state and other recognized licensing authorities;

(6) foreign language abilities;

(7) areas of law in which a lawyer is certified by the Texas Board of Legal Specialization or by an organization that is accredited by the Texas Board of Legal Specialization;

(8) identification of prepaid or group legal service plans in which the lawyer participates;

(9) the acceptance or nonacceptance of credit cards;

(10) fees charged for an initial consultation or routine legal services;

(11) identification of a lawyer or a law firm as a contributor or sponsor of a charitable, community, or public interest program, activity or event;

(12) any disclosure or statement required by these Rules; and

(13) any other information specified in orders promulgated by the Supreme Court of Texas.

~~(a) A lawyer shall not send, deliver, or transmit or knowingly permit or knowingly cause another person to send, deliver, or transmit a written, audio, audio visual, digital media, recorded telephone message, or other electronic communication to a prospective client for the purpose of obtaining professional employment on behalf of any lawyer or law firm if:~~

~~(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;~~

~~(2) the communication contains information prohibited by Rule 7.02 or fails to satisfy each of the requirements of Rule 7.04(a) through (c), and (g) through (q) that would be applicable to the communication if it were an advertisement in the public media; or~~

~~(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.~~

~~(b) Except as provided in paragraph (f) of this Rule, a written, electronic, or digital solicitation communication to prospective clients for the purpose of obtaining professional employment:~~

~~(1) shall, in the case of a non-electronically transmitted written communication, be plainly marked "ADVERTISEMENT" on its first page, and on the face of the envelope or other packaging used to transmit the communication. If the written communication is in the form of a self-mailing brochure or pamphlet, the word "ADVERTISEMENT" shall be:~~

~~(i) in a color that contrasts sharply with the background color; and~~

~~(ii) in a size of at least 3/8" vertically or three times the vertical height of the letters used in the body of such communication, whichever is larger~~

~~(2) shall, in the case of an electronic mail message, be plainly marked "ADVERTISEMENT" in the subject portion of the electronic mail and at the beginning of the message's text;~~

~~(3) shall not be made to resemble legal pleadings or other legal documents;~~

~~(4) shall not reveal on the envelope or other packaging or electronic mail subject line used to transmit the communication, or on the outside of a self-mailing brochure or pamphlet, the nature of the legal problem of the prospective client or non-client; and~~

~~(5) shall disclose how the lawyer obtained the information prompting the communication to solicit professional employment if such contact was prompted by a specific occurrence involving the recipient of the communication, or a family member of such person(s).~~

~~(c) Except as provided in paragraph (f) of this Rule, an audio, audio visual, digital media, recorded telephone message, or other electronic communication sent to prospective clients for the purpose of obtaining professional employment:~~

~~(1) shall, in the case of any such communication delivered to the recipient by non-electronic means, plainly and conspicuously state in writing on the outside of any envelope or other packaging used to transmit the communication, that it is an "ADVERTISEMENT."~~

~~(2) shall not reveal on any such envelope or other packaging the nature of the legal problem of the prospective client or non-client;~~

~~(3) shall disclose, either in the communication itself or in accompanying transmittal message, how the lawyer obtained the information prompting such audio, audio visual, digital media, recorded telephone message, or other electronic communication to solicit professional employment, if such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s);~~

~~(4) shall, in the case of a recorded audio presentation or a recorded telephone message, plainly state that it is an advertisement prior to any other words being spoken and again at the presentation's or message's conclusion; and~~

~~(5) shall, in the case of an audio visual or digital media presentation, plainly state that the presentation is an advertisement;~~

~~(i) both verbally and in writing at the outset of the presentation and again at its conclusion; and~~

~~(ii) in writing during any portion of the presentation that explains how to contact a lawyer or law firm.~~

~~(d) All written, audio, audio visual, digital media, recorded telephone message, or other electronic communications made to a prospective client for the purpose of obtaining professional employment of a lawyer or law firm must be reviewed and either signed by or approved in writing by the lawyer or a lawyer in the firm.~~

~~(e) A copy of each written, audio, audio visual, digital media, recorded telephone message, or other electronic solicitation communication, the relevant approval thereof, and a record of the date of each such communication; the name, address, telephone number, or electronic address to which each such communication was sent; and the means by which each such communication was sent shall be kept by the lawyer or firm for four years after its dissemination.~~

~~(f) The provisions of paragraphs (b) and (c) of this Rule do not apply to a written, audio, audiovisual, digital media, recorded telephone message, or other form, of electronic solicitation communication:~~

~~(1) directed to a family member or a person with whom the lawyer had or has an attorney client relationship;~~

~~(2) that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;~~

~~(3) if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or~~

~~(4) that is requested by the prospective client.~~

Rule 7.06. Prohibited Employment

(a) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by ~~any of~~ Rules 7.01 through 7.03~~5~~, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by another ~~any other~~ person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.

(b) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by ~~any of~~ Rules 7.01 through 7.03~~5~~, 8.04(a)(2), or 8.04(a)(9), engaged in by another ~~any other~~ person or entity that is a shareholder, partner, or member of, an associate in, or of counsel to that lawyer's firm; or by any other person whom ~~any of~~ the foregoing persons or entities ordered, encouraged, or knowingly permitted to engage in such conduct.

(c) A lawyer who has not violated paragraph (a) or (b) in accepting employment in a matter shall not continue employment in that matter once the lawyer knows or reasonably should know that the person procuring the lawyer's employment in the matter engaged in, or ordered, encouraged, or knowingly permitted another to engage in, conduct prohibited by ~~any of~~ Rules 7.01 through 7.03~~5~~, 8.04(a)(2), or 8.04(a)(9) in connection with the matter unless nothing of value is given thereafter in return for that employment.

Rule 7.07. Trade Names ~~Filing Requirements for Public Advertisements and Written, Recorded, Electronic, or Other Digital Solicitations~~

A lawyer in private practice shall not practice under a trade name.

~~(a) Except as provided in paragraphs (c) and (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, no later than the mailing or sending by any means, including electronic, of a written, audio, audio visual, digital or other electronic solicitation communication:~~

~~(1) a copy of the written, audio, audio visual, digital, or other electronic solicitation communication being sent or to be sent to one or more prospective clients for the purpose of obtaining professional employment, together with a representative sample of the envelopes or other packaging in which the communications are enclosed;~~

~~(2) a completed lawyer advertising and solicitation communication application form; and~~

~~(3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such solicitations.~~

~~(b) Except as provided in paragraph (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, no later than the first dissemination of an advertisement in the public media, a copy of each of the lawyer's advertisements in the public media. The filing shall include:~~

(1) a copy of the advertisement in the form in which it appears or will appear upon dissemination, such as a videotape, audiotape, DVD, CD, a print copy, or a photograph of outdoor advertising;

(2) a production script of the advertisement setting forth all words used and describing in detail the actions, events, scenes, and background sounds used in such advertisement together with a listing of the names and addresses of persons portrayed or heard to speak, if the advertisement is in or will be in a form in which the advertised message is not fully revealed by a print copy or photograph;

(3) a statement of when and where the advertisement has been, is, or will be used;

(4) a completed lawyer advertising and solicitation communication application form; and

(5) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such advertisements.

(c) Except as provided in paragraph (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas no later than its first posting on the internet or other comparable network of computers information concerning the lawyer's or lawyer's firm's website. As used in this Rule, a "website" means a single or multiple page file, posted on a computer server, which describes a lawyer or law firm's practice or qualifications, to which public access is provided through publication of a uniform resource locator (URL). The filing shall include:

(1) the intended initial access page of a website;

(2) a completed lawyer advertising and solicitation communication application form; and

(3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be set for the sole purpose of defraying the expense of enforcing the rules related to such websites,

(d) A lawyer who desires to secure an advance advisory opinion, referred to as a request for pre-approval, concerning compliance of a contemplated solicitation communication or advertisement may submit to the Advertising Review Committee, not less than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a) or (b), or the intended initial access page submitted pursuant to paragraph (c), including the application form and required fee; provided however, it shall not be necessary to submit a videotape or DVD if the videotape or DVD has not then been prepared and the production script submitted reflects in detail and accurately the actions, events, scenes, and background sounds that will be depicted or contained on such videotapes or DVDs, when prepared, as well as the narrative transcript of the verbal and printed portions of such advertisement. If a lawyer submits an advertisement or solicitation communication for pre-approval, a finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding or disciplinary action but a finding of compliance is binding in favor of the submitting lawyer as to all materials actually submitted for pre-approval if the representations, statements, materials, facts and written assurances received in connection therewith are true and are not misleading. The finding of compliance constitutes admissible evidence if offered by a party.

(e) The filing requirements of paragraphs (a), (b), and (c) do not extend to any of the following materials, provided those materials comply with Rule 7.02(a) through (c) and, where applicable, Rule 7.04(a) through (c):

~~(1) an advertisement in the public media that contains only part or all of the following information:~~

> ~~(i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, electronic addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as "attorney", "lawyer", "law office", or "firm;"~~
>
> ~~(ii) the particular areas of law in which the lawyer or firm specializes or possesses special competence;~~
>
> ~~(iii) the particular areas of law in which the lawyer or firm practices or concentrates or to which it limits its practice;~~
>
> ~~(iv) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;~~
>
> ~~(v) technical and professional licenses granted by this state and other recognized licensing authorities;~~
>
> ~~(vi) foreign language ability;~~
>
> ~~(vii) fields of law in which one or more lawyers are certified or designated, provided the statement of this information is in compliance with Rule 7.02(a) through (c).~~
>
> ~~(viii) identification of prepaid or group legal service plans in which the lawyer participates;~~
>
> ~~(ix) the acceptance or nonacceptance of credit cards;~~
>
> ~~(x) any fee for initial consultation and fee schedule;~~
>
> ~~(xi) other publicly available information concerning legal issues, not prepared or paid for by the firm or any of its lawyers, such as news articles, legal articles, editorial opinions, or other legal developments or events, such as proposed or enacted rules, regulations, or legislation;~~
>
> ~~(xii) in the case of a website, links to other websites;~~
>
> ~~(xiii) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;~~
>
> ~~(xiv) any disclosure or statement required by these rules; and~~
>
> ~~(xv) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;~~

~~(2) an advertisement in the public media that:~~

(i) identifies one or more lawyers or a firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event; and

(ii) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, and the fact of the sponsorship or contribution;

(3) a listing or entry in a regularly published law list;

(4) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card;

(5) in the case of communications sent, delivered, or transmitted to, rather than accessed by, intended recipients, a newsletter, whether written, digital, or electronic, provided that it is sent, delivered, or transmitted only to:

(i) existing or former clients;

(ii) other lawyers or professionals; or

(iii) members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for, or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by a lawyer; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization;

(6) a solicitation communication that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;

(7) a solicitation communication if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or

(8) a solicitation communication that is requested by the prospective client.

(f) if requested by the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media or solicitation communication by which the lawyer seeks paid professional employment.

TO: CDRR

FROM: Subcommittee (Vincent R. Johnson, chair; Claude Ducloux; Amy Bresnen)

Date: Updated September 22, 2019

RE: Revised Proposed Comments to Texas Rules 7.01 to 7.07

Proposed Comment to Proposed Texas Rule 7.01

[1] This Rule governs all communications about a lawyer's services, including advertisements and solicitation communications which appear in any media, including social media. Firm names, letterhead, and professional designations are communications concerning a lawyer's services. Whatever means are used to make known a lawyer's services, statements about them must be truthful and not misleading.

Misleading Truthful Statements

[2] Misleading truthful statements are prohibited by this Rule. For example, a truthful statement is misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

Use of Actors

[3] The use of an actor to portray a lawyer in a commercial is misleading if there is a substantial likelihood that a reasonable person will conclude that the actor is the lawyer who is offering to provide legal services. Whether a disclaimer—such as a statement that the depiction is a "dramatization" or shows an "actor portraying a lawyer"—is sufficient to make the use of an actor not misleading depends on a careful assessment of the relevant facts and circumstances, including whether the disclaimer is conspicuous and clear. Similar issues arise with respect to actors portraying clients in commercials. Such a communication is misleading if there is a substantial likelihood that a reasonable person will reach erroneous conclusions based on the dramatization.

Intent to Refer Prospective Clients to Another Firm

[4] A communication offering legal services is misleading if, at the time a lawyer makes the communication, the lawyer knows or reasonably should know, but fails to disclose, that a prospective client responding to the communication is likely to be referred to a lawyer in another firm.

Unjustified Expectations

[5] A communication is misleading if there is a substantial likelihood that it will create unjustified expectations on the part of prospective clients about the results that can be achieved. A communication that truthfully reports results obtained by a lawyer on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific

factual and legal circumstances of each client's case. Depending on the facts and circumstances, the inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to mislead the public.

Required Statements and Disclaimers

[6] A statement or disclaimer required by these Rules must be presented clearly and conspicuously such that it is likely to be noticed and reasonably understood by an ordinary person. In radio, television, and Internet advertisements, verbal statements must be spoken in a manner that their content is easily intelligible, and written statements must appear in a size and font, and for a sufficient length of time, that a viewer can easily see and read the statements.

Unsubstantiated Claims and Comparisons

[7] An unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as to lead a reasonable person to conclude that the comparison or claim can be substantiated.

Public Education Activities

[8] As used in these Rules, the terms "advertisement" and "solicitation communication" do not include statements made by a lawyer that are not substantially motivated by pecuniary gain. Thus, communications which merely inform members of the public about their legal rights and about legal services that are available from public or charitable legal-service organizations, or similar non-profit entities, are permissible, provided they are not misleading. These types of statements may be made in a variety of ways, including community legal education sessions, know-your-rights brochures, public service announcements on television and radio, billboards, information posted on organizational social media sites, and outreach to low-income groups in the community, such as in migrant labor housing camps, domestic violence shelters, disaster resource centers, and dilapidated apartment complexes.

Web Presence

[9] A lawyer or law firm may be designated by a distinctive website address, e-mail address, social media username or comparable professional designation that is not misleading and does not otherwise violate these Rules.

Past Success and Results

[10] A communication about legal services may be misleading because it omits an important fact or tells only part of the truth. A lawyer who knows that an advertised verdict was later reduced or reversed, or that the case was settled for a lesser amount, must disclose those facts with equal or greater prominence to avoid creating unjustified expectations on the part of potential clients. A lawyer may claim credit for a prior judgement or settlement only if the lawyer played a substantial role in obtaining that result. This standard is satisfied if the lawyer served as lead counsel or was primarily responsible for the settlement. In other cases, whether the standard is met depends on the facts. A lawyer who did not play a substantial role in obtaining an advertised judgment or settlement is subject to discipline for misrepresenting the lawyer's experience and, in some cases, for creating unjustified expectations about the results the lawyer can achieve.

Related Rules

[11] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. *See* Rule 8.04(a)(3); *see also* Rule 8.04(a)(5) (prohibiting communications stating or implying an ability to improperly influence a government agency or official).

Proposed Comment to Proposed Texas Rule 7.02

[1] These Rules permit the dissemination of information that is not false or misleading about a lawyer's or law firm's name, address, e-mail address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language abilities; names of references and, with their consent, names of clients regularly represented; and other similar information that might invite the attention of those seeking legal assistance.

Communications about Fields of Practice

[2] Paragraph (b) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied by Rule 7.01 to communications concerning a lawyer's services.

[3] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

Certified Specialist

[4] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by the Texas Board of Legal Specialization or by an organization that applies standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable, if the organization is accredited by the Texas Board of Legal Specialization. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Proposed Comment to Proposed Texas Rule 7.03

Solicitation by Public and Charitable Legal Services Organizations

[1] Rule 7.01 provides that a "'solicitation communication' is a communication substantially motivated by pecuniary gain." Therefore, the ban on solicitation imposed by paragraph (b) of this Rule does not apply to the activities of lawyers working for public or charitable legal services organizations.

Communications Directed to the Public or Requested

[2] A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is made in response to a request for information, including an electronic search for information. The terms "advertisement" and "solicitation communication" are defined in Rule 7.01(b).

The Risk of Overreaching

[3] A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services via in-person or regulated telephone, social media, or other electronic contact. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[4] The potential for overreaching that is inherent in in-person or regulated telephone, social media, or other electronic contact justifies their prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be sent by regular mail or e-mail, or by other means that do not involve communication in a live or electronically interactive manner. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, with minimal risk of overwhelming a person's judgment.

[5] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

Targeted Mail Solicitation

[6] Regular mail or e-mail targeted to a person that offers to provide legal services that the lawyer knows or reasonably should know the person needs in a particular matter is a solicitation communication within the meaning of Rule 7.01(b)(2), but is not prohibited by subsection (b) of this Rule. Unlike in-person and electronically interactive communication by "regulated telephone, social media, or other electronic contact," regular mail and e-mail can easily be ignored, set aside, or reconsidered. There is a diminished likelihood of overreaching because no lawyer is physically present and there is evidence in tangible or electronic form of what was communicated. *See Shapero v. Kentucky B. Ass'n*, 486 U.S. 466 (1988).

Personal, Family, Business, and Professional Relationships

[7] There is a substantially reduced likelihood that a lawyer would engage in overreaching against a former client, a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law, or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations.

Constitutionally Protected Activities

[8] Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

Group and Prepaid Legal Services Plans

[9] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted are functionally similar to and serve the same purpose as advertising permitted by these Rules.

Designation as an Advertisement

[10] For purposes of paragraph (d)(2) of this Rule, a communication is rebuttably presumed to be "plainly marked or clearly designated an 'ADVERTISEMENT'" if: (a) in the case of a letter transmitted in an envelope, both the outside of the envelope and the first page of the letter state the word "ADVERTISEMENT" in bold face all-capital letters that are 3/8" high on a uncluttered background; (b) in the case of an e-mail message, the first word in the subject line is "ADVERTISEMENT" in all capital letters; and (c) in the case of a text message or message on social media, the first word in the message is "ADVERTISEMENT" in all capital letters.

Paying Others to Recommend a Lawyer

[11] This Rule allows a lawyer to pay for advertising and communications, including the usual costs of print directory listings, online directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or

client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[12] This Rule permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement, or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[13] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 5.04(a) (division of fees with nonlawyers) and 5.04(c) (nonlawyer interference with the professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.01 (communications concerning a lawyer's services). To comply with Rule 7.01, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. *See also* Rule 5.03 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.04(a)(1) (duty to avoid violating the Rules through the acts of another).

Charges of and Referrals by a Legal Services Plan or Lawyer Referral Service

[14] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements.

[15] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

Reciprocal Referral Arrangements

[16] A lawyer does not violate paragraph (e) of this Rule by agreeing to refer clients to another lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive, the client is informed of the referral agreement, and the lawyer exercises independent professional judgment in making the referral. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. A lawyer should not enter into a reciprocal referral agreement with another lawyer that includes a division of fees without determining that the agreement complies with Rule 1.04(f).

Meals or Entertainment for Prospective Clients

[17] This Rule does not prohibit a lawyer from paying for a meal or entertainment for a prospective client that has a nominal value or amounts to ordinary social hospitality.

Proposed Comment to Proposed Texas Rule 7.04

[1] The Advertising Review Committee shall report to the appropriate disciplinary authority any lawyer whom, based on filings with the Committee, it reasonably believes disseminated a communication that violates Rules 7.01, 7.02, or 7.03, or otherwise engaged in conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See* Rule 8.03(a).

Multiple Solicitation Communications

[2] Paragraph (a) does not require that a lawyer submit a copy of each written solicitation letter a lawyer sends. If the same form letter is sent to several people, only a representative sample of each form letter, along with a representative sample of the envelopes used to mail the letters, need be filed.

Requests for Additional Information

[3] Paragraph (b) does not empower the Advertising Review Committee to seek information from a lawyer to substantiate statements or representations made or implied in communications about legal services that were not substantially motivated by pecuniary gain.

Proposed Comment to Proposed Texas Rule 7.05

[1] This Rule exempts certain types of communications from the filing requirements of Rule 7.04. Communications that were not prepared to secure paid professional employment do not need to be filed.

Website-Related Filings

[2] While the entire website of a lawyer or law firm must be compliant with Rules 7.01 and 7.02, the only material on the website that may need to be filed pursuant to this Rule is the contents of the homepage. However, even a homepage does not need to be filed if the contents of the homepage are exempt from filing under the provisions of this Rule. Under Rule 7.04(c), a lawyer may voluntarily seek pre-approval of any material that is part of the lawyer’s website.

Proposed Comment to Proposed Texas Rule 7.06

[1] This Rule deals with three different situations: personal disqualification, imputed disqualification, and referral-related payments.

Personal Disqualification

[2] Paragraph (a) addresses situations where the lawyer in question has violated the specified advertising rules or other provisions dealing with serious crimes and barratry. The Rule makes clear that the offending lawyer cannot accept or continue to provide representation. This prohibition also applies if the lawyer ordered, encouraged, or knowingly permitted another to violate the Rules in question.

Imputed Disqualification

[3] Second, paragraph (b) addresses whether other lawyers in a firm can provide representation if a person or entity in the firm has violated the specified advertising rules or other provisions dealing with serious crimes and barratry, or has ordered, encouraged, or knowingly permitted another to engage in such conduct. The Rule clearly indicates that the other lawyers cannot provide representation if they knew or reasonably should have known that the employment was procured by conduct prohibited by the stated Rules. This effectively means that, in such cases, the disqualification that arises from a violation of the advertising rules and other specified provisions is imputed to other members of the firm.

Restriction on Referral-Related Payments

[4] Paragraph (c) deals with situations where a lawyer knows or reasonably should know that a case referred to the lawyer or the lawyer's law firm was procured by violation of the advertising rules or other specified provisions. The Rule makes clear that, even if the lawyer's conduct did not violate paragraph (a) or (b), the lawyer can continue to provide representation only if the lawyer does not pay anything of value, such as a referral fee, to the person making the referral.

Proposed Comment to Proposed Texas Rule 7.07

[1] Texas lawyers have traditionally been prohibited from practicing law under trade names. Rule 7.07 continues the traditional rule.

A Resolution Concerning the Advertising Review Committee Report

Whereas *The Advertising Review Committee is a standing committee of the State Bar of Texas,*

Whereas *The purpose of the committee is to concern itself with attorney advertising issues and attorney compliance with the Lawyer Advertising Rules, Part VII of the Texas Disciplinary Rules of Professional Conduct, and review all public media advertising and written solicitation communications submitted for review as required by 7.07 of the Rules,*

Whereas *The Advertising Review Committee issued a report to the State Bar Board of Directors (Board of Directors) at its April 27, 2018 meeting with proposed amendments to the Texas Disciplinary Rules of Professional Conduct pertaining to lawyer advertising,*

Whereas *Chapter 81, Subchapter E-1 of the State Bar Act establishes a Committee on Disciplinary Rules and Referenda and specifies the disciplinary rule proposal process,*

Whereas *Section 81.0875 (c) of the State Bar Act states that a request to initiate the process for proposing a disciplinary rule may be made by a resolution of the Board of Directors,*

Be It Therefore Resolved *that the State Bar of Texas Board of Directors approves the submission of the Advertising Review Committee report to the Committee on Disciplinary Rules and Referenda and requests initiation of the rule proposal process on the lawyer advertising rules.*

Resolution Adopted *this 20th day of June 2018 by the State Bar Board of Directors in Houston, Texas.*

_____
Tom Vick, President
State Bar of Texas

_____
Joe Longley, President-elect
State Bar of Texas

_____
Rehan Alimohammad, Chair of the Board
State Bar of Texas

witnessed by

_____
Trey Apffel, Executive Director
State Bar of Texas

Executive Summary of the Advertising Review Committee's Report to President Tom Vick

This report is in response to President Vick's letter to Stephen Tatum, Chair, Advertising Review Committee (ARC). In President Vick's letter, he charged that the ARC review make a comprehensive review of the regulatory process, and any rule revisions. In the ARC's analysis, the committee used the current and proposed revisions to the ABA Model Rules, The Virginia Bar Association's revised Rules on Attorney Advertising, the current rules on attorney advertising in the states of New York and Florida, and the current Part VII, TDRPC. The results of the ARC's analysis provides both administrative changes to the review process, and a complete revision of the rules.

The administrative changes:

- **Revised correspondences sent out by staff.**
  The tone and language of these letters were "softened" to a more customer service approach. In keeping within the parameters set forth in the rules, the time frame to submit changes, or at least notify staff that changes are being developed was increased from 10 days to 15 days.
- **Reviews of websites.**
  While an entire website needs to be compliant, only the homepage or initial access page, or the page that contains the navigational instruments for the website, will be filed and reviewed for compliance.
- **Statement of Principal Office City location on a website.**
  Statement of office location can be just on the "contact us" page of a website instead of on the home page.
- **Review of Texas Board of Legal Specialization Certification.**
  At the first mention of Board Certification, full disclosure language needs to be use (Board Certified in _____ law by the Texas Board of Legal Specialization. Afterwards, the entire phrase does not need to be utilized every time board certification is mentioned.
- **New Software.**
  The Information Technology Department of the Bar is currently working with a third party vendor in developing the specifications for new software for the Advertising Review Department. This software will create a "portal" that make the submission and review process faster and timelier.

Proposed Rule Revisions:

- **Streamline the rules from 7 parts down to 5.**
  Combined salient portions of the current rules while eliminating the explanatory portions of rules. Combined current portions of the rules regarding advertising and solicitation communications into one encompassing rule.
- **Specifically included the term "social media" in the rules regarding solicitation communications.**
  While the current rules specify both electronic and digital solicitation communications, that do in theory cover the use of social media, the revised rules integrate into the actual rule the language "social media" into the broad spectrum of the rules.
- **The use of trade names, with specific limitations.**
  Specific limitations on trade names would be that the firm cannot mislead by having a name of a firm that sounds like a governmental agency or offering discount of pro bono services.

STATE BAR OF TEXAS

ADVERTISING REVIEW COMMITTEE

The Advertising Review Committee and Department were created not only to assist in protecting the public from deceptive advertisements and solicitation communications, but also with the added effect to keep these types of potential rule violations from overwhelming the disciplinary counsel's office. In addition, the advertising review department and committee also provides attorneys an independent avenue to have their advertisements and solicitation communications reviewed prior to any potential discipline.

It is through the 1994 State Bar referendum that Texas attorneys considered amending the Disciplinary Rules to include Part VII (the ad rules). 88.46% of the ballots cast voted in favor of Part VII. Thus, in 1995, the Supreme Court of Texas made Part VII TDRPC effective as of October of that year, and the Advertising Review Committee and department was created. The only substantive change to Part VII came as part of the 2004 Bar Referendum and it was codified by the Texas Supreme Court in 2005.

Soon after Part VII, TDRPC became effective, the rules were put under constitutional scrutiny in the US District Court, Eastern District Texas case: Texans Against Censorship, Inc. v. State Bar of Texas, James A McCormack and the District 1A Grievance Committee of the State Bar of Texas (888 F. Supp 1328). The Court not only held the rules to be constitutional, but also upheld the filing and filing fee. The rules and filing procedure survived judicial scrutiny in the First District Appellate case: Joe Alfred Izen Jr., v. Commission for Lawyer Discipline, (322 S.W.3d 308).

Attorneys can submit their advertisements and solicitation communications to the State Bar either prior to dissemination, or concurrent with disseminating the information about their legal services. After filing the advertisement or solicitation communication, if the staff determines that a possible violation occurred, written correspondences from the staff are sent to the lawyer. Included in the written correspondence is the rule that was possibly violated, and instructions on the procedure to either remedy the violation, or permanently stop the advertisement or solicitation communication. Also, a strongly worded caution provides that the attorney could be sent in front of their local grievance panel. Attorney submissions can either be approved, disapproved or sent to Chief Disciplinary Counsel. In the past 5 years, Advertising Review reviewed on average 3495 submissions per year, and over 86% of that number were approved.

With Part VII, TDRPC having not seen a substantive change in over a decade, President Vick charged Stephen Tatum, Chair of the Advertising Review Committee (ARC) to recommend

not only a rules revision, but to review the existing regulatory process utilized in order to streamline its effectiveness. As a guide, the ARC was to review the recent revisions to the Virginia Bar Association's revised rules on Attorney Advertising, the revisions being made to the ABA Model Rules regarding Attorney Advertising. The ARC reviewed all aspects of the review process, and was able to formulate specific procedures that can be implemented based upon the authority of the ARC.

- **Revised correspondences sent out by staff.**
  The correspondences sent out by staff regarding submissions that could violate the rules have not been substantively changed since the inception of the program. Specific letters relating to possible violations of the rules for both pre-approvals and for concurrent submissions were too strongly worded, structured in a way that did not present the recipient much time to respond with changes, presented no appellate process, and referenced local grievance panel, when it should be Chief Disciplinary Counsel. All of these issues have been addressed in the revised letters. The tone and language of these letters were "softened" to a more customer service approach. In keeping within the parameters set forth in the rules, the time frame to submit changes, or at least notify staff that changes are being developed was increased from 10 days to 15 days. In addition, the previous letters indicated that resubmissions needed to be mailed, the revised letters state that changes can be sent electronically as well as mailed. Specific mention of a direct appeal to the ARC has been included in the "request for changes" letters. If an attorney does not respond to the "request for changes" letters, then the Last Chance Notice is sent to the submitting lawyer.

- **Reviews of websites.**
  As websites have become more mainstream, and they can contain numerous pages of information. Reviewing lengthy websites has slowed both staff and submitting attorney's response times. In accordance with the rules, the entire website needs to be compliant, only the homepage or initial access page, or the page that contains the navigational instruments for the website, will be filed and reviewed for compliance. This change in policy is possible under R.7.04(b)(1): which requires that the website must publish or broadcast the name of at least one lawyer who is *responsible for the content* of such advertisement.
  Since the rules hold the submitting attorney accountable for any violations, the onerous of compliance rests with the submitting lawyer. If a website is found not in compliance, staff will notify the submitting lawyer of the potential violation and the proper correspondence will be sent.

- **Statement of Principal Office City location on a website.**
  R. 7.04(j): A lawyer or firm who advertises in the public media must disclose the geographic location, by city or town, of the lawyer's or firms principal office. The ARC's Interpretive Comment 17 on websites, takes the rule further by stating the principal office

city location must be indicated on the home page, or initial access page of a website. While this may have been prudent with the advent of webpages, most consumers would now know to look at the lawyer's or firm's contact page in order to determine where the office is located. In addition, with potential clients being able to access their lawyer via electronic means, and be able to supply their lawyer with pertinent information via cloud resources, the office location, in some instances is not relevant.

- **Review of Texas Board of Legal Specialization Certification.**
  R.7.04(b)(2)(i): a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, *may* state with respect to each such area, "Board Certified, [area of specialization] — Texas Board of Legal Specialization." While there are numerous references to the prohibitions of stating an attorney is a specialist or specializes in an area of law, in reviewing all the parts of Part VII that mention TBLS certification, or a lawyer indicating they have a specialization in an area a law, the rules do not indicate that shall or must state the entire phrase: Board Certified, [area of specialization] — Texas Board of Legal Specialization. While previous interpretations of the rules have been that every time a lawyer indicated such a Board Certification, the entire statement needed to be stated, the rules do not seem to require such a restrictive standard. The creation of the very effective TBLS Certification logo that lawyers can download from TBLS and include in their advertisements and solicitation communications, having lawyers include the entire certification phrase every time board certification is mentioned seems to be redundant. As long as the complete certification disclaimer is utilized on the onset of mentioning or alluding to board certification, the entire phrase does not need to be utilized every time board certification is mentioned.

- **New Software.**
  The Information Technology Department of the Bar is currently working with a third party vendor in developing the specifications for new software for the Advertising Review Department. The creation of an advertising review portal will allow attorneys to submit and pay for their application online. Attorneys will be able to submit requested changes through the portal, and receive notices of approval/disapproval, plus automated updates as the review process. These changes will allow staff to effectively communicate with submitting lawyers and increase turnaround times of files.

It should be noted that through modifications to how the principal office city location and Board Certification is reviewed will significantly reduce the "technical" type violations and improve not only speed of approvals and customer service while in keeping compliance with the rules.

The ARC also initiated the process of revising Part VII, TDRPC. In taking President Vick's directive into account, the committee looked to streamline the rules, while encompassing all electronic avenues to disseminate information about one's legal services (Attachment A). Highlights of the revised rules include:

- **Streamline the rules from seven parts down to 5.**
  In reviewing Part VII, TDRPC, there appears to be a significant amount of explanatory information written in the rules. This was most likely due to the fact that the rules have not been overhauled since the inception of Part VII, and therefore the "how to" part of the rules were needed as guidelines for compliance. Information regarding dissemination of a specialization of a particular practice by the Texas Board of Legal Specialization is covered specifically in R. 7.02, 7.04, 7.07 and referenced in R.7.05. In the revised rules, advertising as a specialist in a particular area of law designated by the Texas Board of Legal Specialization is only mentioned broadly in R. 7.02, and it is optional. Since the revised rules do not come with authoritative comments, it would be within the authoritative comments that specificities as to patent and trademark lawyers, and to organizations accredited by the Texas Board of Legal Specialization would be outlined. The revised rules combined current rules R.7.04 and R.7.05, extracting the salient portions of those two rules and synthesizing them into one revised R.7.02.

- **Specifically included the term "social media" in the rules regarding solicitation communications.**
  While the current rules specify both electronic and digital solicitation communications, that do in theory cover the use of social media, the revised rules integrate into the actual rule the language "social media" into the broad spectrum of attorney communications outlined in R. 7.01. Again, since the revised rules do not come with authoritative comments, it is surmised that social media applications and explanatory, descriptive information will be outlined in the authoritative comments.

- **The use of trade names, with specific limitations.**
  In what could be possibly viewed as the biggest departure from the current rules, the revised rules allow trade names to be utilized as firm names, with very specific prohibitions outlined in the rule. Only the states of New York, Ohio and Texas have the absolute prohibition on trade names, while most states allow for trade names or follow the ABA Model Rule R.7.05. With the merging and acquisitions of firms, not only on a state, regional or nation marketplace, but now Texas firms have become part of global law firms, it stands to reason that the absolute prohibition on trade names is not only antiquated, it is ripe for a challenge. In keeping with President Vick's charge that the ARC look to revise rules with an eye on public protection, the revised trade name rules prohibits trade names to sound like they are either an agent or agency of a branch of government (US Immigration Center), or appear as if the law firm offers discount legal services (Employment Law Clinic).

  This report is submitted on behalf of the Advertising Review Committee whose members include: Stephen Tatum, (Chair), Al Harrison, (Vice Chair), Matthew Blair, Sylvia Ann Cardona, Becky Baskin Ferguson, Alexis Wade Foster, Mike Fuljenz, Jason Honeycutt,

Aurora Martinez Jones, Charles Noteboom, Pat Rafferty, Bennie Elliot Ray, Courtney Stamper.

Special recognition needs to go to the ARC's Board Liaisons: Wendy Burgower and Fidel Rodriguez for the time and talent they have brought to the ARC. These Board Liaisons were the right people at the right time and these changes to policy, procedures and the rules would not be as far reaching as they are without them.

Respectfully submitted,

Stephen Tatum, Chair

ATTACHMENT A

PROPOSED REVISIONS TO

PART VII

TEXAS DISCIPLINARY RULES PROFESSIONAL CONDUCT

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

VII. INFORMATION ABOUT LEGAL SERVICES

Rule 7.01 ~~(B) Firm Names and Letterhead~~ Communications Concerning a Lawyer's Services

~~(a) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the names of a professional corporation, professional association, limited liability partnership, or professional limited liability company may contain "P.C.," "P.A.," "L.L.P.," "P.L.L.C.," or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Nothing herein shall prohibit a married woman from practicing under her maiden name.~~

~~(b) A firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~

~~(c) The name of a lawyer occupying a judicial, legislative, or public executive or administrative position shall not be used in the name of a firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~

~~(d) A lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.~~

~~(e) A lawyer shall not advertise in the public media or seek professional employment by any communication under a trade or fictitious name, except that a lawyer who practices under a firm name as authorized by paragraph (a) of this Rule may use that name in such advertisement or communication but only if that name is the firm name that appears on the lawyer's letterhead, business cards, office sign, fee contracts, and with the lawyer's signature on pleadings and other legal documents.~~

~~(f) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.02(a).~~

~~Rule 7.02 Communications Concerning a Lawyer's Services~~

(a) ~~(a)~~ A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm. This Rule governs all communications about a lawyer's services, including advertisements and solicitation communications. Whatever means are used to disseminate information about a lawyer's services, statements, including trade names must be truthful and non-deceptive.

(b) A lawyer in private practice may practice under a trade name, including in its name of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession

1. provided the trade name does not imply a connection with a public or charitable legal services organization, or governmental agency or entity; or
2. utilizes the name of a non-lawyer, or a lawyer not associated with the firm.

(c) Any statement or disclaimer required by these rules shall be made in each language used in the advertisement or solicitation communication with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.

(d) Shall not create or imply an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law.

~~A communication is false or misleading if it:~~

~~(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;~~

~~(2) contains any reference in a public media advertisement to past successes or results obtained unless~~

~~(i) the communicating lawyer or member of the law firm served as lead counsel in the matter giving rise to the recovery, or was primarily responsible for the settlement or verdict,~~

~~(ii) the amount involved was actually received by the client,~~

~~(iii) the reference is accompanied by adequate information regarding the nature of the case or matter and the damages or injuries sustained by the client, and~~

~~(iv) if the gross amount received is stated, the attorney's fees and litigation expenses withheld from the amount are stated as well;~~

~~(3) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;~~

~~(4) compares the lawyer's services with other lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data;~~

~~(5) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official;~~

~~(6) designates one or more specific areas of practice in an advertisement in the public media or in a solicitation communication unless the advertising or soliciting lawyer is competent to handle legal matters in each such area of practice; or~~

~~(7) uses an actor or model to portray a client of the lawyer or law firm.~~

~~(b) Rule 7.02(a)(6) does not require that a lawyer be certified by the Texas Board of Legal Specialization at the time of advertising in a specific area of practice, but such certification shall conclusively establish that such lawyer satisfies the requirements of Rule 7.02(a)(6) with respect to the area(s) of practice in which such lawyer is certified.~~

~~(c) A lawyer shall not advertise in the public media or state in a solicitation communication that the lawyer is a specialist except as permitted under Rule 7.04.~~

~~(d) Any statement or disclaimer required by these rules shall be made in each language used in the advertisement or solicitation communication with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.~~

Rule 7.0~~3~~2 Advertisements and Solicitation Communications Disseminated in the Public ~~Prohibited Solicitations & Payments~~

(a) ~~(a)~~ A lawyer who advertises in the public media: (1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement; and the lawyers primary practice location; (2) may include a statement that the lawyer has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization.

(b) A lawyer shall not send, deliver, or transmit, or knowingly permit or knowingly cause another person to send, deliver, or transmit, a written, audio, audiovisual, digital media, recorded telephone message, or other electronic communication to a prospective client for the purpose of obtaining professional employment on behalf of any lawyer or law firm if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(2) the communication contains information prohibited by Rule 7.01.

(3) the communication is to resemble legal pleadings or other legal documents

(4) the solicitation communication shall, regardless of the media utilized, be plainly marked "ADVERTISEMENT" unless the recipient:

(a) is a lawyer,

(b) has a familial, personal or prior professional relationship with the lawyer,

(c) has or had an attorney client relationship,

(c) If an advertisement or solicitation communication by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent fee basis, it must state the client will be obligated to pay for other expenses.

(d) A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period; but in no instance is the lawyer bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication.

(e) A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:

(1) states that the advertisement is paid for by the cooperating lawyers;

(2) names each of the cooperating lawyers;

(f) Neither Rule 7.01 nor Rule 7.02 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

~~A lawyer shall not by in person contact, or by regulated telephone or other electronic contact as defined in paragraph (f), seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a~~

prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present attorney client relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization's members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in person or telephone or other electronic contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

(2) the communication contains information prohibited by Rule 7.02(a); or

(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm, except that a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by Rule 1.04(f) or by paragraph (b) of this Rule.

(d) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a), (b), or (c).

(e) A lawyer shall not participate with or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(f) As used in paragraph (a), "regulated telephone or other electronic contact" means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.

Rule 7.04 Advertisements in the Public Media

(a) A lawyer shall not advertise in the public media by stating that the lawyer is a specialist, except as permitted under Rule 7.04(b) or as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms. A lawyer engaged in the trademark practice may use the designation "Trademark," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms. A lawyer engaged in patent and trademark practice may hold himself or herself out as specializing in "Intellectual Property Law," "Patent, Trademark, Copyright

Law and Unfair Competition," or any of those terms.

(2) A lawyer may permit his or her name to be listed in lawyer referral service offices that meet the requirements of Occupational Code Title 5, Subtitle B, Chapter 952, according to the areas of law in which the lawyer will accept referrals.

(3) A lawyer available to practice in a particular area of law or legal service may distribute to other lawyers and publish in legal directories and legal newspapers (whether written or electronic) a listing or an announcement of such availability. The listing shall not contain a false or misleading representation of special competence or experience, but may contain the kind of information that traditionally has been included in such publications.

(b) A lawyer who advertises in the public media:

(1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement.; and

(2) shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:

(i) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, "Board Certified, [area of specialization] — Texas Board of Legal Specialization;" and

(ii) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence, may include a factually accurate statement of such membership or may include a factually accurate statement, "Certified [area of specialization] [name of certifying organization]," but such statements may be made only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar; and

(3) shall, in the case of infomercial or comparable presentation, state that the presentation is an advertisement:

(i) both verbally and in writing at its outset, after any commercial interruption, and at its conclusion; and

(ii) in writing during any portion of the presentation that explains how to contact a lawyer or law firm.

(c) Separate and apart from any other statements, the statements referred to in paragraph (b) Shall be displayed conspicuously and in language easily understood by an ordinary consumer.

(d) Subject to the requirements of Rules 7.02 and 7.03 and of paragraphs (a), (b), and (c) of this Rule, a lawyer may, either directly or through a public relations or advertising representative, advertise services in the public media, such as (but not limited to) a

telephone directory, legal directory, newspaper or other periodical, outdoor display, radio, television, the internet, or electronic or digital media.

(e) All advertisements in the public media for a lawyer or firm must be reviewed and approved in writing by the lawyer or a lawyer in the firm.

(f) A copy or recording of each advertisement in the public media and relevant approval referred to in paragraph (e), and a record of when and where the advertisement was used, shall be kept by the lawyer or firm for four years after its last dissemination.

(g) In advertisements in the public media, any person who portrays a lawyer whose services or whose firm's services are being advertised, or who narrates an advertisement as if he or she were such a lawyer, shall be one or more of the lawyers whose services are being advertised.

(h) If an advertisement in the public media by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay all or any portion of the court costs and, if a client may be liable for other expenses, this fact must be disclosed. If specific percentage fees or fee ranges of contingent fee work are disclosed in such advertisement, it must also disclose whether the percentage is computed before or after expenses are deducted from the recovery.

(i) A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period; but in no instance is the lawyer bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication.

(j) A lawyer or firm who advertises in the public media must disclose the geographic location, by city or town, of the lawyer's or firm's principal office. A lawyer or firm shall not advertise the existence of any office other than the principal office unless:

(1) that other office is staffed by a lawyer at least three days a week; or

(2) the advertisement states:

(i) the days and times during which a lawyer will be present at that office, or

(ii) that meetings with lawyers will be by appointment only.

(k) A lawyer may not, directly or indirectly, pay all or a part of the cost of an advertisement in the public media for a lawyer not in the same firm unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.

(l) If an advertising lawyer knows or should know at the time of an advertisement in the public media that a case or matter will likely be referred to another lawyer or firm, a statement of such fact shall be conspicuously included in such advertisement.

(m) No motto, slogan or jingle that is false or misleading may be used in any advertisement in the public media.

(n) A lawyer shall not include in any advertisement in the public media the lawyer's association with a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(o) A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:

(1) states that the advertisement is paid for by the cooperating lawyers;

(2) names each of the cooperating lawyers

(3) sets forth conspicuously the special competency requirements required by Rule 7.04(b) of lawyers who advertise in the public media;

(4) does not state or imply that the lawyers participating in the advertising cooperative or venture possess professional superiority, are able to perform services in a superior manner, or possess special competence in any area of law advertised, except that the advertisement may contain the information permitted by Rule 7.04(b)(2); and

(5) does not otherwise violate the Texas Disciplinary Rules of Professional Conduct.

(p) Each lawyer who advertises in the public media as part of an advertising cooperative or venture shall be individually responsible for:

(1) ensuring that each advertisement does not violate this Rule; and

(2) complying with the filing requirements of Rule 7.07.

(q) If these rules require that specific qualifications, disclaimers, or disclosures of information accompany communications concerning a lawyer's services, the required qualifications, disclaimers, or disclosures must be presented in the same manner as the communication and with equal prominence.

(r) A lawyer who advertises on the internet must display the statements and disclosures required by Rule 7.04.

Rule 7.05 Prohibited Written, Electronic, Or Digital Solicitations

(a) A lawyer shall not send, deliver, or transmit, or knowingly permit or knowingly cause another person to send, deliver, or transmit, a written, audio, audiovisual, digital media, recorded telephone message, or other electronic communication to a prospective client for the purpose of obtaining professional employment on behalf of any lawyer or law firm if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

(2) the communication contains information prohibited by Rule 7.02 or fails to satisfy each of the requirements of Rule 7.04(a) through (c), and (g) through (q) that would be applicable to the communication if it were an advertisement in the public media; or

(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) Except as provided in paragraph (f) of this Rule, a written, electronic, or digital solicitation communication to prospective clients for the purpose of obtaining professional employment:

(1) shall, in the case of a non-electronically transmitted written communication, be plainly marked "ADVERTISEMENT" on its first page, and on the face of the envelope or other packaging used to transmit the communication. If the written communication is in the form of a self-mailing brochure or pamphlet, the word "ADVERTISEMENT" shall be:

(i) in a color that contrasts sharply with the background color; and

(ii) in a size of at least 3/8" vertically or three times the vertical height of the letters used in the body of such communication, whichever is larger;

(2) shall, in the case of an electronic mail message, be plainly marked

~~"ADVERTISEMENT" in the subject portion of the electronic mail and at the beginning of the message's text;~~

~~(3) shall not be made to resemble legal pleadings or other legal documents;~~

~~(4) shall not reveal on the envelope or other packaging or electronic mail subject line used to transmit the communication, or on the outside of a self mailing brochure or pamphlet, the nature of the legal problem of the prospective client or non-client; and~~

~~(5) shall disclose how the lawyer obtained the information prompting the communication to solicit professional employment if such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s).~~

~~(c) Except as provided in paragraph (f) of this Rule, an audio, audio visual, digital media, recorded telephone message, or other electronic communication sent to prospective clients for the purpose of obtaining professional employment:~~

~~(1) shall, in the case of any such communication delivered to the recipient by non-electronic means, plainly and conspicuously state in writing on the outside of any envelope or other packaging used to transmit the communication, that it is an "ADVERTISEMENT";~~

~~(2) shall not reveal on any such envelope or other packaging the nature of the legal problem of the prospective client or non-client;~~

~~(3) shall disclose, either in the communication itself or in accompanying transmittal message, how the lawyer obtained the information prompting such audio, audiovisual, digital media, recorded telephone message, or other electronic communication to solicit professional employment, if such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s);~~

~~(4) shall, in the case of a recorded audio presentation or a recorded telephone message, plainly state that it is an advertisement prior to any other words being spoken and again at the presentation's or message's conclusion: and~~

~~(5) shall, in the case of an audio visual or digital media presentation, plainly state that the presentation is an advertisement:~~

~~(i) both verbally and in writing at the outset of the presentation and again at its conclusion; and~~

~~(ii) in writing during any portion of the presentation that explains how to contact a lawyer or law firm.~~

~~(d) All written, audio, audio visual, digital media, recorded telephone message, or other electronic communications made to a prospective client for the purpose of obtaining professional employment of a lawyer or law firm must be reviewed and either signed by or approved in writing by the lawyer or a lawyer in the firm.~~

~~(e) A copy of each written, audio, audio visual, digital media, recorded telephone message, or other electronic solicitation communication, the relevant approval thereof, and a record of the date of each such communication; the name, address, telephone number, or electronic address to which each such communication was sent; and the means by which each such communication was sent shall be kept by the lawyer or firm for four years after its dissemination.~~

~~(f) The provisions of paragraphs (b) and (c) of this Rule do not apply to a written, audio, audiovisual, digital media, recorded telephone message, or other form of electronic solicitation communication:~~

~~(1) directed to a family member or a person with whom the lawyer had or has an attorney client relationship;~~

~~(2) that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;~~

~~(3) if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or~~

~~(4) that is requested by the prospective client.~~

Rule 7.03 Employment and Fees

(a) A lawyer shall not seek in person, professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a non-client who has not sought the lawyer's advice or employment.

(b) A lawyer shall not by regulated telephone, social media or other electronic contact as defined by this rule, seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or non-client who has not sought the lawyer's advice regarding employment.

(1) "regulated telephone, social media or other electronic contact" means any social media or electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person(s) contacted communicating in a live, or electronic interactive manner. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.

(c) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients.

(d) Except as otherwise permitted, A lawyer, for the specific purpose of soliciting for professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value as an inducement to the client, other than actual litigation expenses and other financial assistance as permitted, to a prospective client. This does not prohibit a lawyer from paying reasonable fees for advertising and public relations services rendered in accordance with this Rule and shall pay the usual charges of a lawyer referral service that meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(e) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by any of the Rules.

(f) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by any of the Rules.

(g) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a – d).

~~**Rule 7.06 Prohibited Employment**~~

~~(a) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by any other person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.~~

~~(b) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by any other person or entity that is a shareholder, partner, or member of, an associate in, or of counsel to that lawyer's firm; or by any other person whom any of the foregoing persons or entities ordered, encouraged, or knowingly permitted to engage in such conduct.~~

~~(c) A lawyer who has not violated paragraph (a) or (b) in accepting employment in a matter shall not continue employment in that matter once the lawyer knows or reasonably should know that the person procuring the lawyer's employment in the matter engaged in, or ordered, encouraged, or knowingly permitted another to engage in, conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9) in connection with the matter unless nothing of value is given thereafter in return for that employment.~~

Rule 7.0~~7~~4 Filing Requirements for Public Advertisements and Written, Recorded, Electronic, or Other Digital Solicitations

(a) A lawyer shall file with the State Bar staff of the Advertising Review Committee of the State Bar of Texas no later than the dissemination of an advertisement via any media used to disseminate information for the purpose of obtaining professional employment, or a solicitation communication sent by any means, including social media, for the purpose of obtaining professional employment:

(1) a copy of the advertisement or solicitation communication (including packaging if applicable) in the form in which it appears or will appear upon dissemination;

(2) a completed lawyer advertising and solicitation communication application; and

(3) payable to the State Bar of Texas a fee set by the Board of Directors.

(4) a copy of the advertisement or solicitation communication in the form in which it appears or will appear upon dissemination;

(b) If requested by the staff or the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media and/or written solicitation communication by which the lawyer seeks paid professional employment.

~~(a) Except as provided in paragraphs (c) and (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, no later than the mailing or sending by any means, including electronic, of a written, audio, audio visual, digital or other electronic solicitation communication:~~

~~(1) a copy of the written, audio, audio visual, digital, or other electronic solicitation communication being sent or to be sent to one or more prospective clients for the purpose of obtaining professional employment, together with a representative sample of the envelopes or other~~

~~packaging in which the communications are enclosed;~~
~~(2) a completed lawyer advertising and solicitation communication application; and~~
~~(3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such solicitations.~~
~~(b) Except as provided in paragraph (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, no later than the first dissemination of an advertisement in the public media, a copy of each of the lawyer's advertisements in the public media. The filing shall include:~~
~~(1) a copy of the advertisement in the form in which it appears or will appear upon dissemination, such as a videotape, audiotape, DVD, CD, a print copy, or a photograph of outdoor advertising;~~
~~(2) a production script of the advertisement setting forth all words used and describing in detail the actions, events, scenes, and background sounds used in such advertisement together with a listing of the names and addresses of persons portrayed or heard to speak, if the advertisement is in or will be in a form in which the advertised message is not fully revealed by a print copy or photograph;~~
~~(3) a statement of when and where the advertisement has been, is, or will be used;~~
~~(4) a completed lawyer advertising and solicitation communication application form; and~~
~~(5) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such advertisements.~~
~~(c) Except as provided in paragraph (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas no later than its first posting on the internet or other comparable network of computers information concerning the lawyer's or lawyer's firm's website. As used in this Rule, a "website" means a single or multiple page file, posted on a computer server, which describes a lawyer or law firm's practice or qualifications, to which public access is provided through publication of a uniform resource locator (URL). The filing shall include:~~
~~(1) the intended initial access page of a website;~~
~~(2) a completed lawyer advertising and solicitation communication application form and;~~
~~(3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such websites.~~
~~(d) A lawyer who desires to secure an advance advisory opinion, referred to as a request for pre-approval, concerning compliance of a contemplated solicitation communication or advertisement may submit to the Lawyer Advertising Review Committee, not less than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a) or (b) or the intended initial access page submitted pursuant to paragraph (c), including the application form and required fee; provided however, it shall not be necessary to submit a videotape or DVD if the videotape or DVD has not then been prepared and the production script submitted reflects in detail and accurately the actions, events, scenes, and background sounds that will be depicted or contained on such videotapes or DVDs, when prepared, as well as the narrative transcript of the verbal and printed portions of such advertisement. If a lawyer submits an advertisement or solicitation communication for pre-approval, a finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding or disciplinary action, but a finding of compliance is binding in favor of the submitting lawyer as to all materials actually submitted for pre-approval if the representations, statements, materials, facts, and written assurances received in connection therewith are true and are not misleading. The finding of compliance constitutes admissible evidence if offered by a party.~~

Rule 7.05 Exempt Communications

(e) The filing requirements of these rules do not extend to any of the following materials, provided those materials comply with Rule 7.01

(1) an advertisement in the public media that contains only part or all of the following information,

(i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, electronic addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as "attorney," "lawyer," "law office," or "firm";

(ii) the particular areas of law in which the lawyer or firm practices or

(iii) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;

(iv) the educational background of the lawyer or lawyers;

(v) technical and professional licenses granted by this state and other recognized licensing authorities;

(vi) foreign language ability;

(vii) particular areas of law in which one or more lawyers are certified or approved by the Texas Board of Legal Specialization

(viii) identification of prepaid or group legal service plans in which the lawyer participates;

(ix) the acceptance or nonacceptance of credit cards;

(x) any fee for initial consultation and fee schedule;

(xi) in the case of a website, links to other websites;

(xii) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;

(xii) any disclosure or statement required by these rules; and

(xiii) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;

(2) an advertisement in the public media that:

(i) identifies one or more lawyers or a firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event; and

(ii) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, and the fact of the sponsorship or contribution;

(3) a listing or entry in a regularly published law list;

(4) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card;

(5) in the case of communications sent, delivered, or transmitted to, rather than accessed by, intended recipients, a newsletter, whether written, digital, or electronic, provided that it is sent, delivered, or transmitted mailed only to:

(i) existing or former clients;

(ii) other lawyers or professionals; or

(iii) members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for, or educating persons

regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by a lawyer; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization.

(~~e) The filing requirements of paragraphs (a), (b), and (c) do not extend to any of the following materials, provided those materials comply with Rule 7.02(a) through (c) and, where applicable, Rule 7.04(a) through (c):~~

~~(1) an advertisement in the public media that contains only part or all of the following information,~~

~~(i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, electronic addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as "attorney," "lawyer," "law office," or "firm";~~

~~(ii) the particular areas of law in which the lawyer or firm specializes or possesses special competence;~~

~~(iii) the particular areas of law in which the lawyer or firm practices or concentrates or to which it limits its practice;~~

~~(iv) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;~~

~~(v) technical and professional licenses granted by this state and other recognized licensing authorities;~~

~~(vi) foreign language ability;~~

~~(vii) fields of law in which one or more lawyers are certified or designated, provided the statement of this information is in compliance with Rule 7.02(a) through (c);~~

~~(viii) identification of prepaid or group legal service plans in which the lawyer participates;~~

~~(ix) the acceptance or nonacceptance of credit cards;~~

~~(x) any fee for initial consultation and fee schedule;~~

~~(xi) other publicly available information concerning legal issues, not prepared or paid for by the firm or any of its lawyers, such as news articles, legal articles, editorial opinions, or other legal developments or events, such as proposed or enacted rules, regulations, or legislation;~~

~~(xii) in the case of a website, links to other websites;~~

~~(xiii) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;~~

~~(xiv) any disclosure or statement required by these rules; and~~

~~(xv) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;~~

~~(2) an advertisement in the public media that:~~

~~(i) identifies one or more lawyers or a firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event; and~~

~~(ii) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, and the fact of the sponsorship or contribution;~~

~~(3) a listing or entry in a regularly published law list;~~

~~(4) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card;~~

~~(5) in the case of communications sent, delivered, or transmitted to, rather than accessed by, intended~~

~~recipients, a newsletter, whether written, digital, or electronic, provided that it is sent, delivered, or transmitted mailed only to:~~

~~(i) existing or former clients;~~

~~(ii) other lawyers or professionals; or~~

~~(iii) members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for, or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by a lawyer; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization;~~

~~(6) a solicitation communication that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;~~

~~(7) a solicitation communication if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or~~

~~(8) a solicitation communication that is requested by the prospective client.~~

~~(f) If requested by the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media and/or written solicitation communication by which the lawyer seeks paid professional employment.~~

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Proposed Amendments to Part VII – Clean Version

VII. INFORMATION ABOUT LEGAL SERVICES

Rule 7.01 Communications Concerning a Lawyer's Services

(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm. This Rule governs all communications about a lawyer's services, including advertisements and solicitation communications. Whatever means are used to disseminate information about a lawyer's services, statements, including trade names must be truthful and non-deceptive.

(b) A lawyer in private practice may practice under a trade name, including in its name of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession

1. provided the trade name does not imply a connection with a public or charitable legal services organization, or governmental agency or entity; or
2. utilizes the name of a non-lawyer, or a lawyer not associated with the firm.

(c) Any statement or disclaimer required by these rules shall be made in each language used in the advertisement or solicitation communication with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.

(d) Shall not create or imply an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law.

Rule 7.02 Advertisements and Solicitation Communications Disseminated in the Public

(a) A lawyer who advertises in the public media: (1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement; and the lawyers primary practice location; (2) may include a statement that the lawyer has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization.

(b) A lawyer shall not send, deliver, or transmit, or knowingly permit or knowingly cause another person to send, deliver, or transmit, a written, audio, audiovisual, digital media, recorded telephone message, or other electronic communication to a prospective client for the purpose of obtaining professional employment on behalf of any lawyer or law firm if:
(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.
(2) the communication contains information prohibited by Rule 7.01.
(3) the communication is to resemble legal pleadings or other legal documents
(4) the solicitation communication shall, regardless of the media utilized, be plainly marked "ADVERTISEMENT" unless the recipient:

(a) is a lawyer,
(b) has a familial, personal or prior professional relationship with the lawyer,
(c) has or had an attorney client relationship,

(c) If an advertisement or solicitation communication by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent fee basis, it must state the client will be obligated to pay for other expenses.

(d) A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period; but in no instance is the lawyer bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication.

(e) A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:
(1) states that the advertisement is paid for by the cooperating lawyers;
(2) names each of the cooperating lawyers;

(f) Neither Rule 7.01 nor Rule 7.02 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Rule 7.03 Employment and Fees

(a) A lawyer shall not seek in person, professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a non-client who has not sought the lawyer's advice or employment.

(b) A lawyer shall not by regulated telephone, social media or other electronic contact as defined by this rule, seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or non-client who has not sought the lawyer's advice regarding employment.
(1) "regulated telephone, social media or other electronic contact" means any social media or electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person(s) contacted communicating in a live, or electronic interactive manner. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.

(c) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients.

(d) Except as otherwise permitted, A lawyer, for the specific purpose of soliciting for professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value as an inducement to the client, other than actual litigation expenses and other financial assistance as permitted, to a prospective client. This does not prohibit a lawyer from paying reasonable fees for advertising and public relations services rendered in accordance with this Rule and shall pay the usual charges of a lawyer referral service that meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(e) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by any of the Rules.

(f) A lawyer shall not accept or continue employment in a matter when the lawyer knows or

reasonably should know that employment was procured by conduct prohibited by any of the Rules.

(g) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a – d).

Rule 7.04 Filing Requirements for Public Advertisements and Written, Recorded, Electronic, or Other Digital Solicitations

(a) A lawyer shall file with the State Bar staff of the Advertising Review Committee of the State Bar of Texas no later than the dissemination of an advertisement via any media used to disseminate information for the purpose of obtaining professional employment, or a solicitation communication sent by any means, including social media, for the purpose of obtaining professional employment:
   (1) a copy of the advertisement or solicitation communication (including packaging if applicable) in the form in which it appears or will appear upon dissemination;
   (2) a completed lawyer advertising and solicitation communication application; and
   (3) payable to the State Bar of Texas a fee set by the Board of Directors.
   (4) a copy of the advertisement or solicitation communication in the form in which it appears or will appear upon dissemination;

(b) If requested by the staff or the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media and/or written solicitation communication by which the lawyer seeks paid professional employment.

Rule 7.05 Exempt Communications

(e) The filing requirements of these rules do not extend to any of the following materials, provided those materials comply with Rule 7.01

(1) an advertisement in the public media that contains only part or all of the following information,

(i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, electronic addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as “attorney,” “lawyer,” “law office,” or “firm”;

(ii) the particular areas of law in which the lawyer or firm practices or concentrates or to which it limits its practice;

(iii) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;

(iv) the educational background of the lawyer or lawyers;

(v) technical and professional licenses granted by this state and other recognized licensing authorities;

(vi) foreign language ability;

(vii) particular areas of law in which one or more lawyers are certified or approved by the Texas Board of Legal Specialization

(viii) identification of prepaid or group legal service plans in which the lawyer participates;

(ix) the acceptance or non-acceptance of credit cards;

(x) any fee for initial consultation and fee schedule;

(xi) in the case of a website, links to other websites;

(xii) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;

(xii) any disclosure or statement required by these rules; and

(xiii) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;

(2) an advertisement in the public media that:

(i) identifies one or more lawyers or a firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event; and

(ii) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, and the fact of the sponsorship or contribution;

(3) a listing or entry in a regularly published law list;

(4) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card;

(5) in the case of communications sent, delivered, or transmitted to, rather than accessed by, intended recipients, a newsletter, whether written, digital, or electronic, provided that it is sent, delivered, or transmitted mailed only to:

(i) existing or former clients;

(ii) other lawyers or professionals; or

(iii) members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for, or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by a lawyer; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization.