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March 18, 2020

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

RE: Submission of Proposed Rules Recommendation – Rules 3.01 to 3.03, Texas Rules of Disciplinary Procedure

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 changes relating to Rules 3.01, 3.02, and 3.03 of the Texas Rules of Disciplinary Procedure, pertaining to the assignment of judges and related procedures when a respondent in a disciplinary complaint elects to proceed in district court. The Committee published the proposed rule changes in the *Texas Bar Journal* and the *Texas Register*. The Committee solicited and considered public comments and held a public hearing on the proposed rule changes. At its March 2020 meeting, the Committee voted to recommend the proposed rule changes to the Board of Directors (with amendments).

Included in this submission packet, you will find the proposed rule changes recommended by the Committee, as well as 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.

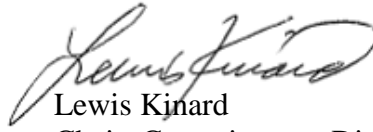
Thank you for your attention to this matter. Should the Board require any other information, please do not hesitate to contact me.

Committee on Disciplinary Rules and Referenda  
P.O. Box 12487, Austin, TX 78711

[cdr@texasbar.com](mailto:cdr@texasbar.com)

[www.texasbar.com/cdr](http://www.texasbar.com/cdr)

Sincerely,

A handwritten signature in black ink, appearing to read "Lewis Kinard", written in a cursive style.

Lewis Kinard  
Chair, Committee on Disciplinary Rules and  
Referenda

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

# Committee on Disciplinary Rules and Referenda

## Overview of Proposed Rule Changes

### Texas Rules of Disciplinary Procedure

#### Rule 3.01. Disciplinary Petition

#### Rule 3.02. Assignment of Judge

#### Rule 3.03. Filing, Service and Venue

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda related to the proposed changes to Rules 3.01, 3.02, and 3.03 of the Texas Rules of Disciplinary Procedure (TRDP), pertaining to the assignment of judges and related procedures when a respondent in a disciplinary complaint elects to proceed in district court. As recommended by the Committee, the proposed rule changes would transfer judicial assignment duties from the Supreme Court of Texas to the Presiding Judges of the administrative judicial regions, relax geographic restrictions on assignments in order to lessen travel burdens on judges, and add clarity to the general procedures involved.

### Actions by the Committee

- **Initiation** – In response to a request from the Supreme Court, the Committee voted to initiate the rule proposal process at its July 23, 2019, meeting.
- **Publication** – The proposed rule changes were published in the November 29, 2019, issue of the *Texas Register* and the December 2019 issue of the *Texas Bar Journal*. The proposed rule changes were concurrently posted on the Committee's website.
- **Additional Outreach** – On December 2, 2019, and January 9, 2020, email notifications regarding the proposed rule changes were 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 January 10, 2020, an additional email regarding the proposed rule changes was sent to Committee email subscribers.
- **Public Comments** – The Committee accepted public comments through January 31, 2020. The Committee received nine public comments.
- **Public Hearing** – The Committee held a public hearing on the proposed rule changes on January 16, 2020, at the Texas Law Center.
- **Recommendation** – The Committee voted at its March 4, 2020, meeting to recommend the proposed rule changes to the Board of Directors (with amendments to the originally published proposal).

### Overview and Rationale

By a letter from Chief Justice Nathan Hecht dated June 3, 2019,<sup>1</sup> the Supreme Court requested that the Committee initiate the rule proposal process on Rule 3.02, TRDP. As noted in

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<sup>1</sup> Chief Justice Hecht's letter dated June 3, 2019, is included at page 12 of this packet.

the request letter, when a respondent in a disciplinary complaint elects to proceed in district court,<sup>2</sup> current Rule 3.02 requires the Court to appoint “an active district judge who does not reside in the Administrative Judicial District in which the Respondent resides” to preside over the case. Chief Justice Hecht’s letter explained:

As a result, an assigned judge may be required to travel a substantial distance to preside over a disciplinary proceeding. This is burdensome and impedes the efficient resolution of cases. The Court asks the Committee to consider whether requiring the appointed judge to reside in a different county than the respondent or whether recusal or disqualification alone would satisfy the purpose of the rule.

As part of its review of the subject, the Committee sought feedback from the Office of the Chief Disciplinary Counsel (CDC).<sup>3</sup> In response, the CDC submitted recommendations regarding the subject.<sup>4</sup>

The CDC recommended that the Supreme Court continue to handle judicial assignments in disciplinary cases, but that Rule 3.02 be amended to provide the Court more geographic flexibility in assignments. Alternatively, the CDC suggested considering amendments to Rule 3.02 that would require the Presiding Judges of the administrative judicial regions to handle the assignment of judges in disciplinary cases.

The CDC response noted that “[a]lthough not expressly stated, being involved in the appointment and recusal process may also be unduly burdensome on the Court itself.” Regarding the latter approach, the CDC response also noted that “[t]he Presiding Judges are more familiar with the judges in their Administrative Judicial Regions, including a judge’s trial schedule, caseload, experience, temperament, and desire to handle disciplinary cases, which would inform their assignment of the most appropriate judge for a disciplinary case.” Under this approach, the CDC similarly recommended amending the current geographic restrictions for judicial assignments to avoid undue travel burdens.

The CDC offered additional suggestions to bring “clarity and concision” to current Rule 3.02. As one example, current Rule 3.02 refers to “Administrative Judicial District,” which is not defined in the TRDP and is confusing, given that the State is divided into “administrative judicial regions.” The CDC suggested correcting this language in Rule 3.02.

In late 2019, the Committee published proposed changes to Rules 3.01, 3.02, and 3.03, TRDP, which would transfer assignment duties to the Presiding Judges of the administrative judicial regions and add clarity to the procedures involved. Notably, the published version of the proposed rule changes<sup>5</sup> provided that “the Presiding Judge of the administrative judicial region covering the county of appropriate venue” would assign “an active district judge from within the

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<sup>2</sup> A respondent can elect whether to have a complaint heard by an evidentiary panel of a district grievance committee or by a district court. *See* Rule 2.15, TRDP.

<sup>3</sup> Committee Member Claude Ducloux’ June 7, 2019, letter is included at page 14 of this packet.

<sup>4</sup> The CDC’s response to Mr. Ducloux’ letter is included at page 16 of this packet.

<sup>5</sup> The proposed rule changes, as published in the December 2019 *Texas Bar Journal*, are included at page 20 of this packet.

administrative judicial region whose district does not include the county of appropriate venue to preside in the case.”<sup>6</sup> Under the published proposal, the same geographic restriction would apply if a replacement judge is assigned during a case. The proposal also included procedures for when an active district judge becomes a retired, senior, or former judge, as well as for when a case is transferred after a successful challenge to venue.

The Committee received nine public comments on the proposed rule changes.<sup>7</sup> Two lawyers expressed support for the proposed rule changes, with one writing, “The proposed changes appear to be appropriate and fair to all parties.” Among the comments opposing the proposed changes, Justice Tracy Christopher (14th Court of Appeals, Houston), wrote, “As a trial judge I had to go to other counties to try these cases and did not find it burdensome. I think it is a good idea for the trial judge to have very little knowledge of the attorney.”<sup>8</sup> Justice Christopher also suggested surveying the judges who have handled these appointments to determine the extent of the burden. Another lawyer opposed having a “local administrative judge appoint a judge to hear a grievance” because the “administrative judge is almost always going to know the accused lawyer, and the pressure, both overt and subconscious, to appoint a judge who would rule favorably for that lawyer would be tremendous.”<sup>9</sup> Another lawyer expressed similar concerns, writing, “It is better to maintain the checks & balances of having someone available to serve as a disciplinary judge from a different region of the state, altogether.”<sup>10</sup> The same lawyer wrote, “[T]he judge for a disciplinary matter should remain selected by the democratically elected Supreme Court of Texas instead of by the less visible & seemingly less politically accountable local administrative judicial region.”

Presiding Judge David Evans (Eighth Administrative Judicial Region) provided a draft of suggested revisions to the originally published proposal,<sup>11</sup> which was circulated and approved by all 11 of the regional Presiding Judges. Judge Evans’ suggested revisions remove proposed language restricting assignment to an active district judge from within the administrative judicial region. Instead, under Judge Evans’ proposed revisions, the general geographic limitation for assignments would simply be that the active district judge’s district not include the county of appropriate venue. (The assignment of a judge from another region would be governed by Chapter 74, Government Code.) Under the revisions, the same geographic restriction would apply when a replacement judge is assigned.

The Committee carefully considered the public comments received. At its March 4, 2020, meeting, the Committee voted to amend the proposed rules to incorporate the revisions suggested by Judge Evans and to recommend the proposed rule changes, as amended, to the Board of Directors.<sup>12</sup> The Committee believes the proposed rule changes will reduce travel burdens when judges are assigned to disciplinary cases and add clarity to the general procedures involved. The Committee considers the Presiding Judges well suited to make determinations about judicial

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<sup>6</sup> Rule 3.03, TRDP, addresses venue when a respondent elects to proceed in district court.

<sup>7</sup> The public comments are included beginning at page 23 of this packet.

<sup>8</sup> See public comment from the Hon. Tracy Christopher at page 25 of this packet.

<sup>9</sup> See public comment from Jay Brandon at page 30 of this packet.

<sup>10</sup> See public comment from Rich Robins at page 31 of this packet.

<sup>11</sup> The proposed revisions from Presiding Judge David Evans are included at page 32 of this packet.

<sup>12</sup> The final recommended version of the proposed rule changes (including amendments) is included at page 7 of this packet.

assignments due to their familiarity with the district judges and their dockets, and believes the proposed rule changes will reduce work for the Supreme Court.

# Committee on Disciplinary Rules and Referenda Proposed Rule Changes

## Texas Rules of Disciplinary Procedure

### Rule 3.01. Disciplinary Petition

### Rule 3.02. Assignment of Judge

### Rule 3.03. Filing, Service and Venue (Recommended Version)

#### Proposed Rules (Redline Version)

**3.01. Disciplinary Petition:** If the Respondent timely elects to have the Complaint heard by a district court, with or without a jury, in accordance with Rule 2.15, the Chief Disciplinary Counsel shall, not more than sixty days after receipt of Respondent's election to proceed in district court, notify the ~~Supreme Court of Texas~~ Presiding Judge of the administrative judicial region covering the county of appropriate venue of the Respondent's election by transmitting a copy of the Disciplinary Petition in the name of the Commission to the ~~Clerk of the Supreme Court of Texas~~ Presiding Judge. The petition must contain:

- A. Notice that the action is brought by the Commission for Lawyer Discipline, a committee of the State Bar.
- B. The name of the Respondent and the fact that he or she is an attorney licensed to practice law in the State of Texas.
- C. A request for assignment of an active district judge to preside in the case.
- ~~C~~D. Allegations necessary to establish proper venue.
- ~~D~~E. A description of the acts and conduct that gave rise to the alleged Professional Misconduct in detail sufficient to give fair notice to Respondent of the claims made, which factual allegations may be grouped in one or more counts based upon one or more Complaints.
- ~~E~~F. A listing of the specific rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking Sanctions.
- ~~F~~G. A demand for judgment that the Respondent be disciplined as warranted by the facts and for any other appropriate relief.



GH. Any other matter that is required or may be permitted by law or by these rules.

3.02. Assignment of Judge:

A. Assignment Generally: Upon receipt of a Disciplinary Petition, the ~~Clerk of the Supreme Court of Texas shall promptly bring the Petition to the attention of the Supreme Court. The Supreme Court Presiding Judge shall promptly appoint~~ assign an active district judge ~~who does not reside in the Administrative Judicial District in which the Respondent resides~~ whose district does not include the county of appropriate venue to preside in the case. An assignment of a judge from another region shall be under Chapter 74, Government Code. The Presiding Judge and the Clerk of the Supreme Court shall transmit a copy of the Supreme Court's appointing Presiding Judge's assignment order to the Chief Disciplinary Counsel. Should the judge so appointed assigned be unable to fulfill the appointment assignment, he or she shall immediately notify the Clerk of the Supreme Court Presiding Judge, and the Supreme Court Presiding Judge shall appoint assign a replacement judge whose district does not include the county of appropriate venue. The A judge appointed assigned under this Rule shall be subject to objection, recusal or disqualification as provided by law the Texas Rules of Civil Procedure and the laws of this state. The objection, motion seeking recusal or motion to disqualify must be filed by either party not later than sixty days from the date the Respondent is served with the Supreme Court's order appointing the judge within the time provided by Rule 18a, Texas Rules of Civil Procedure. In the event of objection, recusal or disqualification, the Supreme Court Presiding Judge shall appoint assign a replacement judge within thirty days whose district does not include the county of appropriate venue. If an active district judge assigned to a disciplinary case becomes a retired, senior, or former judge, he or she may be assigned by the Presiding Judge to continue to preside in the case, provided the judge has been placed on a visiting judge list. If the Presiding Judge decides not to assign the retired, senior, or former judge to continue to preside in the case, the Presiding Judge shall assign an active district judge whose district does not include the county of appropriate venue. A visiting judge may only be assigned if he or she was originally assigned to preside in the case while an active judge. Any judge assigned under this Rule is not subject to objection under Chapter 74, Government Code.

B. Transfer of Case: If the county of alleged venue is successfully challenged, the case shall be transferred to the county of proper venue. If the case is transferred to a county in the assigned judge's district, the judge must recuse himself or herself, unless the parties waive the recusal on the record. In the event of recusal, the Presiding Judge of the administrative judicial region shall assign a replacement judge whose district does not include the county of appropriate venue. If the case is transferred to a county outside the administrative judicial region of the Presiding Judge who made the assignment, the Presiding Judge of the administrative judicial

region where the case is transferred shall oversee assignment for the case and the previously assigned judge shall continue to preside in the case unless he or she makes a good cause objection to continued assignment, in which case the Presiding Judge shall assign a replacement judge whose district does not include the county of appropriate venue.

**3.03. Filing, Service and Venue:** After the trial judge has been ~~appointed~~ assigned, the Chief Disciplinary Counsel shall promptly file the Disciplinary Petition and a copy of the ~~Supreme Court's appointing Order~~ Presiding Judge's assignment order with the district clerk of the county of alleged venue. The Respondent shall then be served as in civil cases generally with a copy of the Disciplinary Petition and a copy of the ~~Supreme Court's appointing Order~~ Presiding Judge's assignment order. In a Disciplinary Action, venue shall be in the county of Respondent's principal place of practice; or if the Respondent does not maintain a place of practice within the State of Texas, in the county of Respondent's residence; or if the Respondent maintains neither a residence nor a place of practice within the State of Texas, then in the county where the alleged Professional Misconduct occurred, in whole or in part. In all other instances, venue is in Travis County, Texas.

### **Proposed Rules (Clean Version)**

**3.01. Disciplinary Petition:** If the Respondent timely elects to have the Complaint heard by a district court, with or without a jury, in accordance with Rule 2.15, the Chief Disciplinary Counsel shall, not more than sixty days after receipt of Respondent's election to proceed in district court, notify the Presiding Judge of the administrative judicial region covering the county of appropriate venue of the Respondent's election by transmitting a copy of the Disciplinary Petition in the name of the Commission to the Presiding Judge. The petition must contain:

- A. Notice that the action is brought by the Commission for Lawyer Discipline, a committee of the State Bar.
- B. The name of the Respondent and the fact that he or she is an attorney licensed to practice law in the State of Texas.
- C. A request for assignment of an active district judge to preside in the case.
- D. Allegations necessary to establish proper venue.
- E. A description of the acts and conduct that gave rise to the alleged Professional Misconduct in detail sufficient to give fair notice to Respondent of the claims made, which factual allegations may be grouped in one or more counts based upon one or more Complaints.
- F. A listing of the specific rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking

Sanctions.

G. A demand for judgment that the Respondent be disciplined as warranted by the facts and for any other appropriate relief.

H. Any other matter that is required or may be permitted by law or by these rules.

**3.02. Assignment of Judge:**

A. **Assignment Generally:** Upon receipt of a Disciplinary Petition, the Presiding Judge shall assign an active district judge whose district does not include the county of appropriate venue to preside in the case. An assignment of a judge from another region shall be under Chapter 74, Government Code. The Presiding Judge shall transmit a copy of the Presiding Judge's assignment order to the Chief Disciplinary Counsel. Should the judge so assigned be unable to fulfill the assignment, he or she shall immediately notify the Presiding Judge, and the Presiding Judge shall assign a replacement judge whose district does not include the county of appropriate venue. A judge assigned under this Rule shall be subject to recusal or disqualification as provided by the Texas Rules of Civil Procedure and the laws of this state. The motion seeking recusal or motion to disqualify must be filed by either party within the time provided by Rule 18a, Texas Rules of Civil Procedure. In the event of recusal or disqualification, the Presiding Judge shall assign a replacement judge whose district does not include the county of appropriate venue. If an active district judge assigned to a disciplinary case becomes a retired, senior, or former judge, he or she may be assigned by the Presiding Judge to continue to preside in the case, provided the judge has been placed on a visiting judge list. If the Presiding Judge decides not to assign the retired, senior, or former judge to continue to preside in the case, the Presiding Judge shall assign an active district judge whose district does not include the county of appropriate venue. A visiting judge may only be assigned if he or she was originally assigned to preside in the case while an active judge. Any judge assigned under this Rule is not subject to objection under Chapter 74, Government Code.

B. **Transfer of Case:** If the county of alleged venue is successfully challenged, the case shall be transferred to the county of proper venue. If the case is transferred to a county in the assigned judge's district, the judge must recuse himself or herself, unless the parties waive the recusal on the record. In the event of recusal, the Presiding Judge of the administrative judicial region shall assign a replacement judge whose district does not include the county of appropriate venue. If the case is transferred to a county outside the administrative judicial region of the Presiding Judge who made the assignment, the Presiding Judge of the administrative judicial region where the case is transferred shall oversee assignment for the case and the previously assigned judge shall continue to preside in the case unless he or she makes a good cause objection to continued assignment, in which case the

Presiding Judge shall assign a replacement judge whose district does not include the county of appropriate venue.

**3.03. Filing, Service and Venue:** After the trial judge has been assigned, the Chief Disciplinary Counsel shall promptly file the Disciplinary Petition and a copy of the Presiding Judge's assignment order with the district clerk of the county of alleged venue. The Respondent shall then be served as in civil cases generally with a copy of the Disciplinary Petition and a copy of the Presiding Judge's assignment order. In a Disciplinary Action, venue shall be in the county of Respondent's principal place of practice; or if the Respondent does not maintain a place of practice within the State of Texas, in the county of Respondent's residence; or if the Respondent maintains neither a residence nor a place of practice within the State of Texas, then in the county where the alleged Professional Misconduct occurred, in whole or in part. In all other instances, venue is in Travis County, Texas.



## The Supreme Court of Texas

CHIEF JUSTICE  
NATHAN L. HECHT

201 West 14th Street Post Office Box 12248 Austin TX 78711  
Telephone: 512/463-1312 Facsimile: 512/463-1365

CLERK  
BLAKE A. HAWTHORNE

JUSTICES  
PAUL W. GREEN  
EVA M. GUZMAN  
DEBRA H. LEHRMANN  
JEFFREY S. BOYD  
JOHN P. DEVINE  
JEFFREY V. BROWN  
JAMES D. BLACKLOCK  
J. BRETT BUSBY

GENERAL COUNSEL  
NINA HESS HSU

EXECUTIVE ASSISTANT  
NADINE SCHNEIDER

PUBLIC INFORMATION OFFICER  
OSLER McCARTHY

June 3, 2019

Mr. Lewis Kinard, Chair  
Committee on Disciplinary Rules and Referenda  
American Heart Association  
[REDACTED]

Re: Request to initiate rule-making & to draft comment language

Dear Lewis:

Pursuant to Section 81.0875(c) of the Government Code, the Supreme Court requests that the Committee on Disciplinary Rules and Referenda initiate the rule-proposal process on Rule 3.02, Texas Rules of Disciplinary Procedure.

When a respondent in a disciplinary proceeding elects to proceed in district court, Rule 3.02 requires the Court to appoint "an active district judge who does not reside in the Administrative Judicial District in which the Respondent resides" to preside over the case. Rule 3.03 sets the venue for a disciplinary trial in district court in "the county of Respondent's principal place of practice," "the county of Respondent's residence," "the county where the alleged Professional Misconduct occurred," or Travis County.

As a result, an assigned judge may be required to travel a substantial distance to preside over a disciplinary proceeding. This is burdensome and impedes the efficient resolution of cases. The Court asks the Committee to consider whether requiring the appointed judge to reside in a different county than the respondent or whether recusal or disqualification alone would satisfy the purpose of the rule.

In addition, the Court asks the Committee to study and make recommendations on a comment to Rule 3.06, Texas Disciplinary Rules of Professional Conduct, to address lawyer-access to juror social media activity.

In 2014, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 466, which addresses three categories of lawyer-review of a juror's electronic social media (ESM) presence:

1. passive lawyer review of a juror's website or ESM that is available without making an access request, so that the juror is unaware that a website or ESM has been reviewed;
2. active lawyer review where the lawyer requests access to the juror's ESM; and
3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer.

The standing committee concluded that category 2 violates ABA Model Rule 3.5(b)'s prohibition of lawyer communications with a juror or potential juror—the equivalent to TDRPC 3.06(b)—but that categories 1 and 3 do not.

The Court solicited the recommendations of the Supreme Court Advisory Committee, which considered the matter on December 1–2, 2017 and September 28, 2018. The committee disagreed with the ABA position in part and drafted comment language for the Court's consideration. Transcripts of and materials for those meetings are available on the Texas Judicial Branch website at <https://www.txcourts.gov/scac/meetings/2011-2020/>.

The Court asks your Committee for its independent recommendations. The Committee should consider the positions of the ABA standing committee, the Supreme Court Advisory Committee, and other states. The Committee should draft comment language reflecting its recommendations for the Court's consideration.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

A handwritten signature in black ink, appearing to read "Nathan L. Hecht", with a stylized flourish at the end.

Nathan L. Hecht  
Chief Justice

Law Offices of  
**Claude E. Ducloux**  
ATTORNEY AT LAW  
3700 NORTH CAPITAL OF TEXAS HIGHWAY, SUITE 300  
AUSTIN, TEXAS 78746

Board Certified  
Civil Trial Law  
Civil Appellate Law  
Texas Board of Legal Specialization

TELEPHONE/TELECOPIER  
(512) 716-8580

EMAIL  


June 7, 2019

*Via Email: [Seana.willing@texasbar.com](mailto:Seana.willing@texasbar.com)*

Seana Willing  
Chief Disciplinary Counsel  
State Bar of Texas  
P.O. Box 12487  
Austin, Texas 78711-2487

RE: Supreme Court request for modification of Rule of Disciplinary Procedure 3.02

Dear Seana:

As you know from your attendance at our CDRR meeting today, we have been charged by Chief Justice Hecht to investigate and suggest changes to Texas Rule of Disciplinary Procedure 3.02 which requires the appointment of a District Judge completely outside the Administrative Judicial District to preside over Disciplinary Trials in District Court. Although intended to assure a neutral jurist, it has proven to be often disruptive to that assigned Judge's own docket back home.

Here is the rule (with emphasis supplied by me):

3.02. Assignment of Judge: Upon receipt of a Disciplinary Petition, the Clerk of the Supreme Court of Texas shall promptly bring the Petition to the attention of the Supreme Court. The Supreme Court shall promptly **appoint an active district judge who does not reside in the Administrative Judicial District in which the Respondent resides** to preside in the case and the Clerk of the Supreme Court shall transmit a copy of the Supreme Court's appointing order to the Chief Disciplinary Counsel. Should the judge so appointed be unable to fulfill the appointment, he or she shall immediately notify the Clerk of the Supreme Court, and the Supreme Court shall appoint a replacement judge. **The judge appointed shall be subject to objection, recusal or disqualification as provided by law.** The objection, motion seeking recusal or motion to disqualify must be filed by either party not later than sixty days from the date the Respondent is served with the Supreme Court's order appointing the judge. In the event of objection, recusal or disqualification, the Supreme Court shall appoint a replacement judge within thirty days.

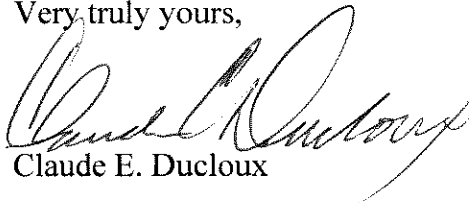
I pointed out the right to seek recusal, which is already in the present rule. I believe that Justice Hecht thinks, since we already give both parties the right to recuse, why do we need a special appointment?

It appears that our options in reviewing and recommending change might be:

- A. simply to remove the cumbersome appointment from the different administrative law district, and allow the Presiding Judge within that district to appoint counsel, as happens in other recusal matters; or
- B. remove the cumbersome appointment language altogether, and allow the judge of the district where the case is filed to make the determination if he/she wants to self-recuse; and also retain the right of the parties to object;
- C. leave it as is.

Please review this for our CDRR committee and advise us; and I am happy to meet with you to discuss.

Very truly yours,



Claude E. Ducloux

CED/cli

[c:\ced\cdrr\seana willing-rule302\_tr]



On June 3, 2019, the Texas Supreme Court asked the Committee on Disciplinary Rules and Referenda (CDRR) to consider, among other things, an amendment to TDRP 3.02, which currently states:

**3.02. Assignment of Judge:** Upon receipt of a Disciplinary Petition, the Clerk of the Supreme Court of Texas shall promptly bring the Petition to the attention of the Supreme Court. The Supreme Court shall promptly appoint an active district judge who does not reside in the Administrative Judicial District in which the Respondent resides to preside in the case and the Clerk of the Supreme Court shall transmit a copy of the Supreme Court's appointing order to the Chief Disciplinary Counsel. Should the judge so appointed be unable to fulfill the appointment, he or she shall immediately notify the Clerk of the Supreme Court, and the Supreme Court shall appoint a replacement judge. The judge appointed shall be subject to objection, recusal or disqualification as provided by law. The objection, motion seeking recusal or motion to disqualify must be filed by either party not later than sixty days from the date the Respondent is served with the Supreme Court's order appointing the judge. In the event of objection, recusal or disqualification, the Supreme Court shall appoint a replacement judge within thirty days.

In asking the CDRR "to consider whether requiring the appointed judge to reside in a different county than the respondent or whether recusal or disqualification alone would satisfy the purpose of the rule," the Court noted that the current procedure can be burdensome for the assigned judge both in terms of the requirement to travel long distances to preside over a disciplinary proceeding and because the assigned judge's own trial docket may suffer as a result of the judge's obligation to preside over a disciplinary case in another part of the State.

Following receipt of the Court's request, a subcommittee of the CDRR asked the Chief Disciplinary Counsel's Office (CDC) to assist them in analyzing the question and preparing an appropriate response. According to the subcommittee, the gist of the Court's inquiry was "since we already give both parties the right to recuse, why do we need a special appointment?"

Based on this interpretation of the request, the subcommittee members laid out three possible approaches for consideration:

- A. "remove the cumbersome appointment from the different administrative law district, and allow the Presiding Judge within that district to appoint counsel, as happens in other recusal matters; or
- B. remove the cumbersome appointment language altogether, and allow the judge of the district where the case is filed to make the determination if he/she wants to self-recuse; and also retain the right of the parties to object;
- C. leave it as is."

The CDC agrees that the current procedure's appointment language is cumbersome and can, in some circumstances, be unduly burdensome on the assigned judge. Although not expressly stated, being involved in the appointment and recusal process may also be unduly burdensome on the Court itself. Additionally, the request to consider amendments to Rule 3.02 is timely as, in our opinion, the rule lacks clarity in other respects as set forth below. In light of this, the CDC would respectfully offer a different approach to the appointment and recusal process as well as suggestions to bring clarity, certainty, and consistency to the entire process.

The CDC's recommendations are as follows:

1. **Leave the assignment of the judge with the Supreme Court, but allow the Court more flexibility by limiting the restriction to an active judge who does not reside in the judicial district in which the respondent attorney resides or maintains his/her principal place of practice.**
  - a. Having the assignment of judges to preside over disciplinary cases handled by the Supreme Court seems most appropriate given the Court's inherent authority to regulate the practice of law and establish disciplinary and disability procedures. Orders from the Court are more formal, more official, less controversial and less likely to be subject to challenge.
  - b. By allowing the Court to assign a judge who resides outside the judicial district but within the Administrative Judicial Region, there is less likelihood that the assigned judge will feel as burdened by having to travel long distances.<sup>1</sup>
  - c. This procedure also reduces (even if it does not eliminate) concerns that the assigned judge and the respondent attorney have a business, social, or political relationship or a history (positive or negative) based on the respondent's appearances before that judge, all of which could raise questions about the judge's impartiality or independence.<sup>2</sup> It also reduces, if not eliminates, the chances that the assigned judge might be a fact witness in the case.
  - d. Allowing a local judge in the respondent attorney's judicial district or county to preside over the disciplinary case brings with it a host of concerns about the fairness of the process and may result in more recusals, costs and delays.
  - e. Recusal is a remedy that is rarely available to parties in most cases unless the judge voluntarily recuses. For example, concerns that the respondent attorney may be a financial contributor to the judge's re-election campaign (or has endorsed the judge's candidacy or hosted a campaign fundraiser for the judge) would not be addressed by recusal since Texas recusal jurisprudence has not changed in favor of recusal for giving financial support to a judge's candidacy even in the wake of *Caperton v. Massey*.<sup>3</sup>

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<sup>1</sup> It should also be noted that, in practice, most preliminary hearings, conferences, and pretrial matters are conducted by telephone and, in some instances, CDC staff will travel to the assigned judge's own courtroom, which is far more convenient for the judge and the parties. Typically, the appointed judge only needs to travel to the respondent attorney's county for the actual trial itself.

<sup>2</sup> One advantage to the current procedure of assigning a judge from outside the Administrative Judicial Region is that it all but eliminates these concerns and levels the playing field for both parties.

<sup>3</sup> *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Following this decision, the Chief Justice of the Texas Supreme Court tasked the Court's Rules Advisory Committee to look at recusal practices in Texas and to examine whether TRCP 18a and 18b should be amended to address the issues raised by *Caperton*. After many meetings, and subsequent amendments to recusal procedures, the Committee declined to make any changes to the rule to address recusal if a party or attorney has provided financial support to the judge's candidacy.

- f. Additionally, recusal is rarely a viable remedy for addressing relationships (positive or negative) between the assigned judge and counsel for the parties. Ultimately, it appears unrealistic to suggest that filing a recusal motion could resolve most conflicts arising from having a local judge preside over a disciplinary case.
- g. Another consideration worth noting is that the number of elections to district court and, as a result, the number of assignments of judges to preside over disciplinary cases has dropped significantly since the Supreme Court's June 1, 2018 amendments to the Disciplinary Rules of Procedure as a result of the recent Sunset Review process. Among these changes was the implementation of investigatory hearings, which allow more cases to be resolved by agreement before a respondent must elect to go before a trial court or an evidentiary panel for final disposition of a disciplinary case. This downward trend in litigation is apparent when you compare the number of judicial assignments the Court made in 2017 (32), 2018 (31) and by June 26, 2019 (8).

## 2. Bring clarity and concision to Rule 3.02.

- a. **What is meant by the provision that “the judge appointed shall be subject to objection, recusal or disqualification as provided by law.”**
  - i. **Objections:** Generally, objections to assigned judges are governed by Sec. 74.053 of the Texas Government Code, whereas recusal and disqualification are governed by TRCP 18a and 18b.
  - ii. Sec. 74.053 conflicts with Rule 3.02 in several respects:
    1. Under Sec. 74.053, the objection must be filed not later than 7 days after notice of the assignment whereas Rule 3.02 requires the objection to be filed not later than 60 days from the date respondent is served with the Supreme Court's appointment order.
    2. Under Sec. 74.053, active judges assigned under this chapter are not subject to objection, yet Rule 3.02 states that the assigned judge is subject to objection.<sup>4</sup>
  - iii. **Where do objections and motions to recuse or disqualify get filed?** Rule 3.02 does not specify that the objection or recusal motion must be filed with the Supreme Court even though it is the Court that must appoint a replacement judge. However, in practice, recusals have been handled differently in each CDC region, with some being filed with and handled by the Supreme Court and others being referred to the Presiding Judge of the Administrative Judicial Region and thereafter handled pursuant to the procedures laid out in TRCP 18a.

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<sup>4</sup> All of the Supreme Court's orders appointing judges to preside over disciplinary proceedings expressly include language that the appointment is made pursuant to Sec. 74.053.

- iv. Rule 18a conflicts with Rule 3.02 in that it imposes certain duties and deadlines on the respondent judge, district clerk, and Presiding Judge that are inconsistent with Rule 3.02. Rule 18a also includes procedures and remedies not addressed by Rule 3.02, such as imposing a discovery stay and allowing for the award of attorney fees as sanctions for frivolous or dilatory motions.

**b. What is meant by “Administrative Judicial District”?**

- i. Rule 3.02 refers to “Administrative Judicial District,” which is not defined in the TDRP. This brings confusion given that the State is divided into “judicial districts” within “Administrative Judicial Regions.” Years ago, Rule 18a included a reference to “Administrative Judicial Districts,” but the Supreme Court has since amended that rule to include the correct term, “Administrative Judicial Region.” This apparently erroneous reference to “Administrative Judicial District” is confusing and should be corrected if it is to remain in Rule 3.02.

**3. Alternatively, consider amending Rule 3.02 to require the Presiding Judges of the Administrative Judicial Regions to handle the assignment of judges in disciplinary cases.<sup>5</sup>**

- a. The Presiding Judges are more familiar with the judges in their Administrative Judicial Regions, including a judge’s trial schedule, caseload, experience, temperament, and desire to handle disciplinary cases, which would inform their assignment of the most appropriate judge for a disciplinary case.
- b. If the geographic restriction were opened to allow the Presiding Judge to assign a judge who resides outside the respondent’s county or judicial district, but within the Administrative Judicial Region, the assigned judge could be selected from an area that did not create an undue travel burden on him/her.
- c. The Presiding Judges are very familiar with how to handle recusal and disqualification motions and are more likely to handle these matters quickly and efficiently, especially if the motions are untimely and/or without merit or filed to cause delay.
- d. This would bring consistency and certainty to the assignment process and to the handling of motions to recuse or disqualify.<sup>6</sup>

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<sup>5</sup> We would suggest reaching out to the Presiding Judges and asking them to weigh in on this suggested rule change to learn what logistical and/or financial challenges they may face should they be required to take over the assignment of judges in disciplinary cases.

<sup>6</sup> If the requirement to appoint only active district judges remains in Rule 3.02, the CDC would recommend deleting the references to a party’s right to make an objection to the assignment. However, if the CDRR were considering shifting the authority to appoint judges in disciplinary cases to the Presiding Judges of the Administrative Judicial Regions, the question of whether senior, retired, or former judges would be eligible to preside over these cases should be examined, along with the additional costs, if any, that might be incurred by the Administrative Judicial Regions to compensate these judges. In that instance, the judges would be subject to objection under Sec. 74.053.

# Committee on Disciplinary Rules and Referenda Proposed Rule Changes

## Texas Rules of Disciplinary Procedure

### Rule 3.01. Disciplinary Petition

### Rule 3.02. Assignment of Judge

### Rule 3.03. Filing, Service and Venue

*The Committee on Disciplinary Rules and Referenda, or CDRR, was created by Government Code section 81.0872 and is responsible for overseeing the initial process for proposing a disciplinary rule. Pursuant to Government Code section 81.0876, the Committee publishes the following proposed rules. The Committee will accept comments concerning the proposed rules through January 31, 2020. Comments can be submitted at [texasbar.com/CDRR](http://texasbar.com/CDRR). A public hearing on the proposed rules will be held at 10:30 a.m. on January 16, 2020, in Room 101 of the Texas Law Center (1414 Colorado St., Austin, Texas, 78701).*

#### Proposed Rules (Redline Version)

**3.01. Disciplinary Petition:** If the Respondent timely elects to have the Complaint heard by a district court, with or without a jury, in accordance with Rule 2.15, the Chief Disciplinary Counsel shall, not more than sixty days after receipt of Respondent's election to proceed in district court, notify the ~~Supreme Court of Texas Presiding Judge of the administrative judicial region covering the county of appropriate venue~~ of the Respondent's election by transmitting a copy of the Disciplinary Petition in the name of the Commission to the ~~Clerk of the Supreme Court of Texas Presiding Judge~~. The petition must contain:

- A. Notice that the action is brought by the Commission for Lawyer Discipline, a committee of the State Bar.
- B. The name of the Respondent and the fact that he or she is an attorney licensed to practice law in the State of Texas.
- ~~C. A request for assignment of an active district judge from within the administrative judicial region whose district does not include the county of appropriate venue to preside in the case.~~
- ~~D. Allegations necessary to establish proper venue.~~
- ~~E. A description of the acts and conduct that gave rise to the alleged Professional Misconduct in detail sufficient to give fair notice to Respondent of the claims made, which factual allegations may be grouped in one or more counts based upon one or more Complaints.~~
- ~~F. A listing of the specific rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking Sanctions.~~

~~FG. A demand for judgment that the Respondent be disciplined as warranted by the facts and for any other appropriate relief.~~

~~GH. Any other matter that is required or may be permitted by law or by these rules.~~

#### 3.02. Assignment of Judge:

~~A. Assignment Generally: Upon receipt of a Disciplinary Petition, the Clerk of the Supreme Court of Texas shall promptly bring the Petition to the attention of the Supreme Court. The Supreme Court Presiding Judge shall promptly appoint assign an active district judge who does not reside in the Administrative Judicial District in which the Respondent resides from within the administrative judicial region whose district does not include the county of appropriate venue to preside in the case. The Presiding Judge and the Clerk of the Supreme Court shall transmit a copy of the Supreme Court's appointing Presiding Judge's assignment order to the Chief Disciplinary Counsel. Should the judge so appointed assigned be unable to fulfill the appointment assignment, he or she shall immediately notify the Clerk of the Supreme Court Presiding Judge, and the Supreme Court Presiding Judge shall appoint assign a replacement judge pursuant to the same geographic limitations. The A judge appointed assigned under this Rule shall be subject to objection, recusal or disqualification as provided by law the Texas Rules of Civil Procedure and the laws of this state. The objection, motion seeking recusal or motion to disqualify must be filed by either party not later than sixty days from the date the Respondent is served with the Supreme Court's order appointing the judge within the time provided by Rule 18a, Texas Rules of Civil Procedure. In the event of objection, recusal or disqualification, the~~



~~Supreme Court~~ Presiding Judge shall ~~appoint~~ assign a replacement judge, ~~within thirty days~~ who shall be subject to the same geographic limitations. If an active district judge assigned to a disciplinary case becomes a retired, senior, or former judge, he or she may be assigned by the Presiding Judge to continue to preside in the case, provided the judge has been placed on a visiting judge list, and the geographic limitations for the original assignment no longer apply to the judge. If the Presiding Judge decides not to assign the retired, senior, or former judge to continue to preside in the case, the Presiding Judge shall assign an active district judge subject to the geographic limitations for the original assignment. A visiting judge may only be assigned if he or she was originally assigned to preside in the case while an active judge. Any judge assigned under this Rule is not subject to objection under Chapter 74, Government Code.

- B. Transfer of Case: If the county of alleged venue is successfully challenged, the case shall be transferred to the county of proper venue. If the case is transferred to a county in the assigned judge's district, the judge must recuse himself or herself, unless the parties waive the recusal on the record. In the event of recusal, the Presiding Judge of the administrative judicial region shall assign a replacement judge from within the administrative judicial region whose district does not include the county of appropriate venue. If the case is transferred to a county outside the administrative judicial region of the Presiding Judge who made the assignment, the Presiding Judge of the administrative judicial region where the case is transferred shall oversee assignment for the case and the previously assigned judge shall continue to preside in the case unless he or she makes a good cause objection to continued assignment, in which case the Presiding Judge shall assign a replacement judge from within the administrative judicial region whose district does not include the county of appropriate venue.

**3.03. Filing, Service and Venue:** After the trial judge has been ~~appointed~~ assigned, the Chief Disciplinary Counsel shall promptly file the Disciplinary Petition and a copy of the ~~Supreme Court's appointing Order~~ Presiding Judge's assignment order with the district clerk of the county of alleged venue. The Respondent shall then be served as in civil cases generally with a copy of the Disciplinary Petition and a copy of the ~~Supreme Court's appointing Order~~ Presiding Judge's assignment order. In a Disciplinary Action, venue shall be in the county of Respondent's principal place of practice; or if the Respondent does not maintain a place of practice within the State of Texas, in the county of Respondent's residence; or if the Respondent maintains neither a residence nor a place of practice within the State of Texas, then in the county where the alleged Professional Misconduct occurred, in whole or in part. In all other instances, venue is in Travis County, Texas.

## Proposed Rules (Clean Version)

**3.01. Disciplinary Petition:** If the Respondent timely elects to have the Complaint heard by a district court, with or without a jury, in accordance with Rule 2.15, the Chief Disciplinary Counsel shall, not more than sixty days after receipt of Respondent's election to proceed in district court, notify the Presiding Judge of the administrative judicial region covering the county of appropriate venue of the Respondent's election by transmitting a copy of the Disciplinary Petition in the name of the Commission to the Presiding Judge. The petition must contain:

- A. Notice that the action is brought by the Commission for Lawyer Discipline, a committee of the State Bar.
- B. The name of the Respondent and the fact that he or she is an attorney licensed to practice law in the State of Texas.
- C. A request for assignment of an active district judge from within the administrative judicial region whose district does not include the county of appropriate venue to preside in the case.
- D. Allegations necessary to establish proper venue.
- E. A description of the acts and conduct that gave rise to the alleged Professional Misconduct in detail sufficient to give fair notice to Respondent of the claims made, which factual allegations may be grouped in one or more counts based upon one or more Complaints.
- F. A listing of the specific rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking Sanctions.
- G. A demand for judgment that the Respondent be disciplined as warranted by the facts and for any other appropriate relief.
- H. Any other matter that is required or may be permitted by law or by these rules.

## **3.02. Assignment of Judge:**

- A. Assignment Generally: Upon receipt of a Disciplinary Petition, the Presiding Judge shall assign an active district judge from within the administrative judicial region whose district does not include the county of appropriate venue to preside in the case. The Presiding Judge shall transmit a copy of the Presiding Judge's assignment order to the Chief Disciplinary Counsel. Should the judge so assigned be unable to fulfill the assignment, he or she shall immediately notify the Presiding Judge, and the Presiding Judge shall assign a replacement judge pursuant to the same geographic limitations. A judge assigned under this Rule shall be subject to recusal or disqualification as provided by the Texas Rules of Civil Procedure and the laws of this state. The motion seeking recusal or motion to disqualify must be filed by either party within the time provided by Rule 18a, Texas Rules of

Civil Procedure. In the event of recusal or disqualification, the Presiding Judge shall assign a replacement judge, who shall be subject to the same geographic limitations. If an active district judge assigned to a disciplinary case becomes a retired, senior, or former judge, he or she may be assigned by the Presiding Judge to continue to preside in the case, provided the judge has been placed on a visiting judge list, and the geographic limitations for the original assignment no longer apply to the judge. If the Presiding Judge decides not to assign the retired, senior, or former judge to continue to preside in the case, the Presiding Judge shall assign an active district judge subject to the geographic limitations for the original assignment. A visiting judge may only be assigned if he or she was originally assigned to preside in the case while an active judge. Any judge assigned under this Rule is not subject to objection under Chapter 74, Government Code.

- B. **Transfer of Case:** If the county of alleged venue is successfully challenged, the case shall be transferred to the county of proper venue. If the case is transferred to a county in the assigned judge's district, the judge must recuse himself or herself, unless the parties waive the recusal on the record. In the event of recusal, the Presiding Judge of the administrative judicial region shall assign a replacement judge from within the administrative judicial region whose district does not

include the county of appropriate venue. If the case is transferred to a county outside the administrative judicial region of the Presiding Judge who made the assignment, the Presiding Judge of the administrative judicial region where the case is transferred shall oversee assignment for the case and the previously assigned judge shall continue to preside in the case unless he or she makes a good cause objection to continued assignment, in which case the Presiding Judge shall assign a replacement judge from within the administrative judicial region whose district does not include the county of appropriate venue.

**3.03. Filing, Service and Venue:** After the trial judge has been assigned, the Chief Disciplinary Counsel shall promptly file the Disciplinary Petition and a copy of the Presiding Judge's assignment order with the district clerk of the county of alleged venue. The Respondent shall then be served as in civil cases generally with a copy of the Disciplinary Petition and a copy of the Presiding Judge's assignment order. In a Disciplinary Action, venue shall be in the county of Respondent's principal place of practice; or if the Respondent does not maintain a place of practice within the State of Texas, in the county of Respondent's residence; or if the Respondent maintains neither a residence nor a place of practice within the State of Texas, then in the county where the alleged Professional Misconduct occurred, in whole or in part. In all other instances, venue is in Travis County, Texas. **TBJ**

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# **Committee on Disciplinary Rules and Referenda Proposed Rule Changes**

## **Texas Rules of Disciplinary Procedure**

**Rule 3.01. Disciplinary Petition**

**Rule 3.02. Assignment of Judge**

**Rule 3.03. Filing, Service and Venue**

**Public Comments Received**

**Through January 31, 2020**



**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Wording is confusing  
**Date:** Monday, December 2, 2019 8:57:37 AM

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

#### Contact

<b>First Name</b>	R J
<b>Last Name</b>	Parham
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	00792737

#### Feedback

<b>Subject</b>	Wording is confusing
----------------	----------------------

#### Comments

CURRENT WORDING: shall promptly assign an active district judge from within the administrative judicial region whose district does not include the county of appropriate venue to preside in the case  
Suggested rewrite: shall promptly assign an active district judge to preside in the case. The assigned district judge may not serve in the judicial district which includes the county of appropriate venue, but must serve in a judicial district is within the administrative judicial region.

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Changes to TRDP 3.01, 3.02 and 3.03  
**Date:** Monday, December 2, 2019 1:41:27 PM

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

#### Contact

<b>First Name</b>	Tracy
<b>Last Name</b>	Christopher
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	11150500

#### Feedback

<b>Subject</b>	Changes to TRDP 3.01, 3.02 and 3.03
----------------	-------------------------------------

#### Comments

I am opposed to the change. As a trial judge I had to go to other counties to try these cases and did not find it burdensome. I think its a good idea for the trial judge to have very little knowledge of the attorney. If the trial judge is within the same judicial district, the judge will most likely have knowledge of the attorney. Before we change something due to "undue burden", I suggest that you survey the judges who have actually done these appointments to see the extent of the burden.

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Comments on Proposed Changes to Rules 3.01 to 3.03, TRDP  
**Date:** Monday, December 2, 2019 2:49:56 PM

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

**Contact**

<b>First Name</b>	Sean
<b>Last Name</b>	Martinez
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	13144500

**Feedback**

<b>Subject</b>	Comments on Proposed Changes to Rules 3.01 to 3.03, TRDP
<b>Comments</b>	
The proposed changes appear to be appropriate and fair to all parties.	

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDJR Comment: Appointment of district judges by the regional presiding judge  
**Date:** Monday, December 2, 2019 3:19:31 PM

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

#### Contact

<b>First Name</b>	Donald
<b>Last Name</b>	Dowd
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	06068500

#### Feedback

<b>Subject</b>	Appointment of district judges by the regional presiding judge
----------------	--

#### Comments

Is there a jurisdictional problem for an active district judge who is appointed to hear a disciplinary case outside of his elected jurisdictional district, since "proper venue" for the disciplinary case must lie in another territorial district outside his own?

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Proposed rule changes  
**Date:** Monday, December 2, 2019 3:28:03 PM

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

#### Contact

<b>First Name</b>	Todd
<b>Last Name</b>	Keagle
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	24031529

#### Feedback

<b>Subject</b>	Proposed rule changes
----------------	-----------------------

#### Comments

I fully support these rules. Currently, there are so many unknowns an accused lawyer must navigate when dealing with a grievance. By appointing a District Court Judge, hopefully this will bring more structure and proper guidance to an already stressful situation.

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: 3.0 Filing Service and Venue  
**Date:** Thursday, December 5, 2019 12:20:16 AM

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

**Contact**

<b>First Name</b>	Rogelio Garza
<b>Last Name</b>	Rios, Jr.
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	16935873

**Feedback**

<b>Subject</b>	3.0 Filing Service and Venue
----------------	------------------------------

**Comments**

Service on Respondent shall be by personal service. Not e-file Not certified mail

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: proposed changes to disciplinary procedure  
**Date:** Thursday, December 26, 2019 11:53:01 AM

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

### Contact

<b>First Name</b>	Jay
<b>Last Name</b>	Brandon
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	02880500

### Feedback

<b>Subject</b>	proposed changes to disciplinary procedure
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### Comments

Having the local administrative judge appoint a judge to hear a grievance is a truly terrible idea. The administrative judge is almost always going to know the accused lawyer, and the pressure, both overt and subconscious, to appoint a judge who would rule favorably for that lawyer would be tremendous. For example, I have a grievance pending against a lawyer here, and the administrative judge swore this lawyer in when he assumed public office. The judge is an honorable person, but again the pressure on him, even subconscious, would be very strong. If the judge appointed is from within this administrative region, it's again likely he or she will know the accused lawyer and be subject to the same pressure. This is a really bad proposed change.

**From:** [REDACTED]  
**To:** [cdrr](#)  
**Subject:** CDRR Comment: Rule change proposals for 3.01, 3.02 and 3.03  
**Date:** Friday, January 17, 2020 1:40:14 AM

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

### Contact

<b>First Name</b>	Rich
<b>Last Name</b>	Robins
<b>Email</b>	[REDACTED]
<b>Member</b>	Yes
<b>Barcard</b>	00789589

### Feedback

<b>Subject</b>	Rule change proposals for 3.01, 3.02 and 3.03
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### Comments

Regarding the proposed changes to the following rules, I submit the following commentary: 3.01, the judge for a disciplinary matter should remain selected by the democratically elected Supreme Court of Texas instead of by the less visible & seemingly less politically accountable local administrative judicial region. We live in a democracy, after all. If it's not broken, why fix it? 3.01c) Having the assigned judge be from the same judicial region...albeit from a county in a different district of that region, could still make region-based oppressiveness (a form of "hometowning") possible. It is better to maintain the checks & balances of having someone available to serve as a disciplinary judge from a different region of the state, altogether. Otherwise, for example, who would want to risk suing a polluting refinery if the disciplinary judge would definitely be from that same region to which that refinery donates heavily for political benefit? Texans would suffer from such overly-concentrated power. 3.02 a) Why not remain in unison with the state of Texas' legal protections such as those of Ch. 74 of the Govt. Code? Changing things up and shedding such protections could lead to unforeseen surprises. We don't need unforeseen surprises in our disciplinary system. 3.03: Filing, Service & Venue: Notice of venue for a disciplinary matter should remain generated by the democratically elected Supreme Court of Texas instead of by the seemingly less visible and less politically accountable local administrative judicial region. We live in a democracy, after all. If it's not broken, why fix it? Submitted, Rich Robins, Esq. TexasBarSunset.com



# Committee on Disciplinary Rules and Referenda Proposed Rule Changes

## Texas Rules of Disciplinary Procedure

### Rule 3.01. Disciplinary Petition

### Rule 3.02. Assignment of Judge

### Rule 3.03. Filing, Service and Venue

#### Proposed Rules (Redline Version)

**3.01. Disciplinary Petition:** If the Respondent timely elects to have the Complaint heard by a district court, with or without a jury, in accordance with Rule 2.15, the Chief Disciplinary Counsel shall, not more than sixty days after receipt of Respondent's election to proceed in district court, notify the ~~Supreme Court of Texas~~ Presiding Judge of the administrative judicial region covering the county of appropriate venue of the Respondent's election by transmitting a copy of the Disciplinary Petition in the name of the Commission to the ~~Clerk of the Supreme Court of Texas~~ Presiding Judge. The petition must contain:

- A. Notice that the action is brought by the Commission for Lawyer Discipline, a committee of the State Bar.
- B. The name of the Respondent and the fact that he or she is an attorney licensed to practice law in the State of Texas.
- C. A request for assignment of an active district judge ~~from within the administrative judicial region whose district does not include the county of appropriate venue to~~ preside in the case.
- ~~C~~D. Allegations necessary to establish proper venue.
- ~~D~~E. A description of the acts and conduct that gave rise to the alleged Professional Misconduct in detail sufficient to give fair notice to Respondent of the claims made, which factual allegations may be grouped in one or more counts based upon one or more Complaints.
- ~~E~~F. A listing of the specific rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking Sanctions.
- ~~F~~G. A demand for judgment that the Respondent be disciplined as warranted by the facts and for any other appropriate relief.

GH. Any other matter that is required or may be permitted by law or by these rules.

3.02. Assignment of Judge:

- A. Assignment Generally: Upon receipt of a Disciplinary Petition, the Clerk of the Supreme Court of Texas shall promptly bring the Petition to the attention of the Supreme Court. The Supreme Court Presiding Judge shall promptly appoint assign an active district judge who does not reside in the Administrative Judicial District in which the Respondent resides ~~from within the administrative judicial region~~ whose district does not include the county of appropriate venue to preside in the case. An assignment of a judge from another region shall be under Chapter 74, Government Code. The Presiding Judge and the Clerk of the Supreme Court shall transmit a copy of the Supreme Court's appointing Presiding Judge's assignment order to the Chief Disciplinary Counsel. Should the judge so appointed assigned be unable to fulfill the appointment assignment, he or she shall immediately notify the Clerk of the Supreme Court Presiding Judge, and the Supreme Court Presiding Judge shall appoint assign a replacement judge ~~pursuant to the same geographic limitations~~ whose district does not include the county of appropriate venue. The A judge appointed assigned under this Rule shall be subject to objection, recusal or disqualification as provided by law the Texas Rules of Civil Procedure and the laws of this state. The objection, motion seeking recusal or motion to disqualify must be filed by either party not later than sixty days from the date the Respondent is served with the Supreme Court's order appointing the judge within the time provided by Rule 18a, Texas Rules of Civil Procedure. In the event of objection, recusal or disqualification, the Supreme Court Presiding Judge shall appoint assign a replacement judge, within thirty days who shall be subject to the same geographic limitations whose district does not include the county of appropriate venue. If an active district judge assigned to a disciplinary case becomes a retired, senior, or former judge, he or she may be assigned by the Presiding Judge to continue to preside in the case, provided the judge has been placed on a visiting judge list, and the geographic limitations for the original assignment no longer apply to the judge. If the Presiding Judge decides not to assign the retired, senior, or former judge to continue to preside in the case, the Presiding Judge shall assign an active district judge subject to the geographic limitations for the original assignment whose district does not include the county of appropriate venue. A visiting judge may only be assigned if he or she was originally assigned to preside in the case while an active judge. Any judge assigned under this Rule is not subject to objection under Chapter 74, Government Code.
- B. Transfer of Case: If the county of alleged venue is successfully challenged, the case shall be transferred to the county of proper venue. If the case is transferred to a county in the assigned judge's district, the judge must recuse himself or herself, unless the parties waive the recusal on the record. In the event of recusal,

the Presiding Judge of the administrative judicial region shall assign a replacement judge ~~from within the administrative judicial region~~ whose district does not include the county of appropriate venue. If the case is transferred to a county outside the administrative judicial region of the Presiding Judge who made the assignment, the Presiding Judge of the administrative judicial region where the case is transferred shall oversee assignment for the case and the previously assigned judge shall continue to preside in the case unless he or she makes a good cause objection to continued assignment, in which case the Presiding Judge shall assign a replacement judge ~~from within the administrative judicial region~~ whose district does not include the county of appropriate venue.

**3.03. Filing, Service and Venue:** After the trial judge has been ~~appointed~~ assigned, the Chief Disciplinary Counsel shall promptly file the Disciplinary Petition and a copy of the ~~Supreme Court's appointing Order~~ Presiding Judge's assignment order with the district clerk of the county of alleged venue. The Respondent shall then be served as in civil cases generally with a copy of the Disciplinary Petition and a copy of the ~~Supreme Court's appointing Order~~ Presiding Judge's assignment order. In a Disciplinary Action, venue shall be in the county of Respondent's principal place of practice; or if the Respondent does not maintain a place of practice within the State of Texas, in the county of Respondent's residence; or if the Respondent maintains neither a residence nor a place of practice within the State of Texas, then in the county where the alleged Professional Misconduct occurred, in whole or in part. In all other instances, venue is in Travis County, Texas.

## Committee on Disciplinary Rules and Referenda

### Public Hearing Transcript

#### Proposed Rules 3.01 (Disciplinary Petition), 3.02 (Assignment of Judge), and 3.03 (Filing, Service and Venue), Texas Rules of Disciplinary Procedure

January 16, 2020 – Texas Law Center

*Audio of the full Committee on Disciplinary Rules and Referenda meeting, including the public hearing, is available at [texasbar.com/CDRR](http://texasbar.com/CDRR).*

LEWIS KINARD: Public hearing and discussion. We're now opening up with proposed Rule 3.01, 3.02, and 3.03 of the Texas Rules of Disciplinary Procedure. And this is [inaudible] relating to the assignment of judges and related procedures when a respondent in a disciplinary complaint elects to proceed in district court. So members of the Committee it's on page 3 to 15 of your packet. And do we have anybody here to speak on that? Nobody is here.

CORY SQUIRES: And Lewis, just for formality's sake, and we're only on audio recording. Do you want to do the roll call?

: [crosstalk]

LEWIS KINARD: Yes, well we will when we start the meeting.

: [crosstalk]

CORY SQUIRES: Correct. Gotcha.

CLAUDE DUCLOUX: This [inaudible] I will make a comment. This is Claude Ducloux for the record. This originated with a request that we look at this rule. It requires the Supreme Court to assign a judge from another administrative district. We rec-, we asked for recommendations from Seana Willing in Chief Disciplinary Counsel's Office. They sent over a, some proposed ideas on this and their preferred one, and this is the, the result of long...

: [laughter]

CLAUDE DUCLOUX: ...Well not that long, but a really good process for coming up with this. We asked for comments from the public and overall they were overwhelmingly positive. There were a couple of people that said, well, it's an administrative [inaudible] one recent comment said one district is very close to it, like the very next county, although it's in a different district, could the judge have authority to go ahead and cross over to the next administrative district to appoint a nearby judge, so that judge would not be in the same administrative district. I don't have a problem with that. If Ms. Willing has a comment on that, but I think as, as drafted it's worthy of sending.

LEWIS KINARD: Very good, thank you. So, and comments can be submitted through the end of this month. The feedback from the Bar and the public is vital to our work. And I really encourage comments, thoughts. You never know whether someone has considered the point you want to make or think should be made and we read them all. So please continue to submit comments. Again, the comment period will [inaudible] on assignment of judges in disciplinary proceedings. That time period closes at the end of this month. The one published in the Bar Journal. [inaudible] We get all these comments in. We'll take this up in February, our February conference call meeting to decide whether to send everything to the [inaudible] at that time or take further action based on those comments and any additional input we get and then send it in March. To get this out the door pretty soon. Okay, well that wraps up the lengthy public hearing...

: [laughter]

LEWIS KINARD: ...And [inaudible] now ready to call the roll and convene our quarterly meeting.

*[End of Public Hearing]*





## **STATE BAR OF TEXAS BOARD OF DIRECTORS**

### **RESOLUTION**

WHEREAS, when an attorney dies or becomes incapacitated, Part XIII of the Texas Rules of Disciplinary Procedure (TRDP) provides for court appointment of a custodian attorney to assist in winding down the attorney's practice. Part XIII also limits the court-appointed custodian attorney's liability and extends the attorney-client privilege to the court-appointed custodian attorney.

WHEREAS, on June 12, 2019, the State Bar of Texas Board of Directors adopted a resolution asking the Supreme Court of Texas to consider adopting a comment to Part XIII to extend the limitation of liability and attorney-client privilege to attorney-designated custodian attorneys, who are acting independently of court supervision, when the attorney-designated custodian attorney is assisting with the cessation of the designating-attorney's practice of law and the designating attorney's clients have been notified. The Board believes this will encourage succession planning, which in turn better protects the interests of clients and mitigates the burden on the courts.

WHEREAS, on September 20, 2019, the Supreme Court asked the Committee on Disciplinary Rules and Referenda to study and make recommendations on a comment to Part XIII, Texas Rules of Disciplinary Procedure.

WHEREAS, in lieu of a comment, the Committee on Disciplinary Rules and Referenda initiated and published proposed Rule 13.04, TRDP, to address the voluntary appointment of custodian attorneys to assist in the final resolution and closure of an attorney's practice.

WHEREAS, the Board believes an additional rule is needed to address the voluntary appointment of custodian attorneys to assist with the temporary cessation of practice due to a disabling circumstance, and to extend the same protections provided under proposed Rule 13.04 to such custodian attorneys.

BE IT RESOLVED, that the Board of Directors requests that the Committee on Disciplinary Rules and Referenda initiate the rule review process on proposed rule 13.05 Voluntary Appointment of a Custodian Attorney to Act During a Disabling Circumstance.

RESOLVED and adopted by the State Bar of Texas Board of Directors this 17<sup>th</sup> day of April, 2020.

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Jerry Alexander, Chair