To: Laura Gibson, Board Chair

From: Lewis Kinard, Committee Chair

Date: January 10, 2019

RE: Submission by Committee on Disciplinary Rules and Referenda of Proposed Rules

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Dear Ms. Gibson:

Pursuant to Government Code section 81.0876, the Committee on Disciplinary Rules and Referenda (CDRR) initiated three rule change proposals that were published in the Texas Bar Journal and the Texas Register. The CDRR held a public hearing and solicited and considered public comments on each. Subsequently, at its November 2019 meeting, the CDRR voted to send all three to the Board:

- Rule 1.02 Scope and Objectives of Representation
- Rule 1.05 Confidentiality of Information
- Rule 1.16 Clients with Diminished Capacity

Please find attached the proposed rule changes and recommended comments related to those changes. Per Government Code section 81.0877, 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 CDRR. The Board can vote for or against each rule, or return a rule to the CDRR for additional consideration.

As a reminder, if a majority of the Board of Directors approves a rule, the Board then petitions the Supreme Court to order a referendum on the rule(s) as provided by Section 81.0878.

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

Lewis Kinard, Committee Chair

cc: Joe K. Longley
Trey Apffel
Randy Sorrels
Tom Vick

# Committee on Disciplinary Rules and Referenda
# Proposed Rule Changes

Provided here is the rationale for proposed rule changes being considered by the Committee on Disciplinary Rules and Referenda (CDRR). A Committee poll was conducted in May 2018 to select initial rules for the Committee to review. The Committee submits the following summary to provide context for the proposed rule changes:

- Committee Deliberation – A review of rules began in April 2018. Members were assigned rules to review and present to the Committee for its May 2018 meeting.
- Committee Vote to Initiate – Proposed rules were discussed and initiated on June 11, 2018.
- Publication – Proposed rules were published in the September 1, 2018, issue of the Texas Bar Journal and the August 31, 2018, issue of the Texas Register.
- Comments – The Committee extended the 30 day comment period to 60 days. Comments were collected from September 1, 2018, through November 1, 2018. A total of 16 individuals provided 20 comments. Of those, 60% (12 comments) were related to Rule 1.16, 25% (5 comments) for Rule 1.02, and 15% (3 comments) for Rule 1.05.
- Public Hearing – A public hearing on the proposed rules was held on October 10, 2018, at 10:00 a.m. at the Texas Law Center.

**Rule 1.02(g) Scope and Objectives of Representation and Rule 1.16 Clients with Diminished Capacity**
The Committee voted to recommend deletion of TDRPC Rule 1.02(g), dealing a lawyer's duties to a client who may lack competency. The Committee voted to recommend that this Rule be replaced with a new Rule 1.16, dealing with a lawyer's duties to a client with diminished capacity. Proposed Rule 1.16 is designed to give more guidance to lawyers than current Rule 1.02(g), and to be more detailed in what actions a lawyer is permitted to take when a client's mental capacity is significantly diminished.

The committee received a variety of comments relating to the proposed changes. Among the comments pertaining to proposed Rule 1.16 (and current Rule 1.02(g)) included concerns that the term "diminished capacity" needed to be defined, concerns about the disclosure of confidential client information, concerns about the use of the permissive term "may" in proposed Rule 1.16(b) and (c), concerns about the differing standards for and of action between current Rule 1.02(g) and proposed Rule 1.16, concerns that proposed Rule 1.16(b) should include additional actions a lawyer may take when applicable, concerns that changes should generally follow the ABA Model Rules insofar as possible, and concerns that more explanation of proposed rule changes should be provided.

**Rule 1.05 Confidentiality of Information**
The Committee voted to recommend amending TDRPC Rule 1.05 by adding an additional exception for when a lawyer may divulge client confidential information. To be added as Rule 1.05(c)(9), the exception permits a lawyer to reveal confidential client information to secure legal advice about the lawyer's compliance with the rules of professional conduct.

The committee received comments pertaining to proposed Rule 1.05(c)(9). One comment submitted by five lawyers was generally supportive of the proposed amendment, which is substantially the same as a corresponding provision of the ABA Model Rules. A different person commenting expressed concerns about the duty of confidentiality for the lawyer providing advice under the proposed rule.

Detailed rationale for the proposed changes is provided below, as well as the public comments received by the Committee.

# Rule 1.02(g) Scope and Objectives of Representation and Rule 1.16 Diminished Capacity

**March 11, 2016 Report**

A report issued on March 11, 2016 by the former State Bar of Texas Disciplinary Rules of Professional Conduct Committee makes a strong case for why the current disciplinary rules create confusion about the representation of clients with diminished capacity. That report is attached to this document and should be consulted directly (*see* Attachment A).

**2011 Referendum**

The March 11, 2016 Report states that "[the 2011] Referendum proposed replacing [Texas Disciplinary Rules of Professional Conduct (TDRPC)] Rule 1.02(g) with . . . [a] Rule and Comments, which generally follow[ed] ABA Model Rule 1.14," although the Committee recommended some deviation from Model Rule 1.14.

**Proposed Texas Rule 1.16**

The CDRR recommends deletion of current Texas Disciplinary Rule 1.02(g) and the adoption of a new rule, Rule 1.16, which would read as follows:

Rule 1.16 Clients with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.

**Proposed Comment**

Paragraphs 1 to 8 generally correspond to the first eight paragraphs of the Comment for Model Rules of Professional Conduct Rule 1.14,[1] although the order is somewhat different. Paragraphs 9 and 10 are quoted from the Comments 9 and 10 to the current version of Model Rules of Professional Conduct R. 1.14.

If Proposed Rule 1.16 is adopted, the CDRR recommends the following as Comments to the rule:

1. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. However, maintaining the ordinary client-lawyer relationship may not be possible when the client suffers from a mental impairment, is a minor, or for some other reason has a diminished capacity to make adequately considered decisions regarding representation. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often can understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, some people of advanced age are capable of handling routine financial matters but need special legal protection concerning major transactions. Also, some children are regarded as having opinions entitled to weight in legal proceedings concerning their custody.

2. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the lawyer's knowledge of the client's long-term commitments and values.

3. The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the client has a guardian or other legal representative, the lawyer should, as far as possible, accord the client the normal status of a client, particularly in maintaining communication. If a guardian or other legal representative has been appointed for the client, however, the law may require the client's lawyer to look to the representative for decisions on the client's behalf. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

4. The client may wish to have family members or other persons participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

Taking Protective Action

5. Paragraph (b) contains a non-exhaustive list of actions a lawyer may take in certain circumstances to protect a client who does not have a guardian or other legal representative. Such actions could include consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as existing durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the client's wishes and values to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.

6. A client with diminished capacity also may cause or threaten physical, financial, or other harm to third parties. In such situations, the client's lawyer should consult applicable law to determine the appropriate response.

7. When a legal representative has not been appointed, the lawyer should consider whether an appointment is reasonably necessary to protect the client's interests. Thus, for example, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, applicable law provides for the appointment of legal representatives in certain circumstances. For example, the Texas Family Code prescribes when a guardian ad litem, attorney ad litem, or amicus attorney should be appointed in a suit affecting the parent-child relationship, and the Texas Probate Code prescribes when a guardian should be appointed for an incapacitated person. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the lawyer's professional judgment. In considering alternatives, the lawyer should be aware of any law that requires the lawyer to advocate on the client's behalf for the action that imposes the least restriction.

Disclosure of the Client's Condition

8. Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. As with any client-lawyer relationship, information relating to the representation of a client is confidential under Rule 1.05. However, when the lawyer is taking protective action, paragraph (b) of this Rule permits the lawyer to make necessary disclosures. Given the risks to the client of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

[1] The Comment to Model Rules of Professional Conduct R. 1.14 (2018) is shown below:

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

**ATTACHMENT A: MARCH 11, 2016 REPORT**

**Rule 1.02(g)—"Diminished Capacity"**

**State Bar Texas Disciplinary Rules of Professional Conduct Committee**

March 11, 2016

I. Current Rule Concerning Clients with Diminished Capacity and Related Comments

Comment 5 to Texas Disciplinary Rule of Professional Conduct 1.03 suggests that a lawyer representing a disabled client attempt to maintain a normal attorney-client relationship.[2] However, Rule 1.02(g) requires that, in some instances, a lawyer profoundly alter this relationship by, among other things, seeking a guardianship for a client the lawyer believes is disabled. Rule 1.02(g) reads as follows (with emphasis added):

> (g) A lawyer **shall** take reasonable action to secure the **appointment of a guardian** or other legal representative for, or **seek other protective orders** with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

Comments 12 and 13 to the Rule, which are quoted below, elaborate on this requirement.

> 12. The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally effective appointment of the lawyer to represent a person. Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for purposes of the rule.

[2] See Texas Disciplinary Rule of Professional Conduct [hereinafter Rule] 1.03, Comment 5 ("In addition to communicating with any legal representative, a lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence… The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect.").

13. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests. See Rule 1.05(c)(4), d(1) and (d)(2)(i) in regard to the lawyer's right to reveal to the court the facts reasonably necessary to secure the guardianship or other protective order.[3]

## II. Issues Raised by the Current Rule

### 1. Rule 1.02(g) is often disregarded.

Initiating a usually public proceeding to appoint a guardian or to obtain a protective order is a drastic action potentially more damaging to the client than the disability the lawyer is trying to address, even if the action is in the client's best interests. For this reason, we believe Rule 1.02(g) is often ignored, replaced by an informal and tacit system of work-arounds. Unfortunately, these work-arounds leave the lawyer potentially exposed to discipline, because the requirements of Rule 1.02(g) are not being followed.

### 2. Rule 1.02(g) is too vague.

When the Rule is not ignored, lawyers often do not know what "other protective orders" should be sought to discharge their professional responsibilities. Moreover, the "protective orders" language appears to limit the lawyer to taking only formal legal action, when informal action may provide adequate protection.

[3] Rule 1.05(c)(4) provides: "A lawyer may reveal confidential information:[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law." 1.05(d) states as follows: "A lawyer may also reveal unprivileged client information: (1) When impliedly authorized to do so in order to carry out the representation. (2) When the lawyer has reason to believe it is necessary to do so in order to: (i) carry out the representation effectively." Comment 17 to Rule 1.05 states as follows: "In some situations, Rule 1.02(g) requires a lawyer representing a client under a disability to seek the appointment of a legal representative for the client or to seek other orders for the protection of the client. The client may or may not, in a particular matter, effectively consent to the lawyer's revealing to the court confidential information and facts reasonably necessary to secure the desired appointment or order. Nevertheless, the lawyer is authorized by paragraph (c)(4) to reveal such information in order to comply with Rule 1.02(g). See also paragraph 5, Comment to Rule 1.03, which states as follows: "In addition to communicating with any legal representative, a lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence… The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect."

3. The concerns addressed by Rule 1.02(g) may be better addressed by consultation prohibited by Rule 1.05.

A lawyer often will be able to address concerns about a client's capacity less obtrusively by consulting with friends or family members about the client's behavior and mental acuity, but such consultation may violate Rule 1.05, which generally prohibits lawyers' revelation of confidential information. The comments to Rules 1.02 and 1.05 appear to limit the lawyer to consulting with the client, the client's "legal representative," and a court. See footnote 2.

4. Compliance with Rule 1.02(g) requires lawyers to parse several Rules and Comments.

A lawyer who consults the Rules for guidance on the lawyer's responsibilities regarding a client who may have diminished capacity faces a challenge. The relevant information must be gathered from Rule 1.02(g) and comments to Rules 1.02, 1.03, and 1.05. One or more of these requirements or guidelines therefore may be missed in the search. All of the ethical guidance should be in one distinct rule.

5. Rule 1.02(g) Can Be Used as a Threat of Grievance

Rule 1.02(g) can be used to threaten the lawyer by a person who is not interested in the well-being of the client.

## III. Proposed Replacement for Rule 1.02(g)

The Texas Supreme Court in the last Referendum proposed replacing Rule 1.02(g) with the following Rule and Comments, which generally follow ABA Model Rule 1.14[4]:

**Rule 1.** Clients with Diminished Capacity**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own

[4]The Committee had referred to this as Rule 1.14, and this was the number the Court assigned it for the February 2011 Referendum, with other Rules having been renumbered accordingly.

interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests, unless otherwise prohibited by law.

**Comment:**

1. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. But maintaining the ordinary client-lawyer relationship may not be possible when the client suffers from a mental impairment, is a minor, or has a diminished capacity for some other reason to make adequately considered decisions regarding representation. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often can understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, some people of advanced age are capable of handling routine financial matters but need special legal protection concerning major transactions. Also, some children are regarded as having opinions entitled to weight in legal proceedings concerning their custody.

2. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the lawyer's knowledge of the client's long-term commitments and values.

3. The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the client has a guardian or other legal representative, the lawyer should, as far as possible, accord the client the normal status of a client, particularly in maintaining communication. If a guardian or other legal representative has been appointed for the client, however, the law may require the client's lawyer to look to the representative for decisions on the client's behalf. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

4. The client may wish to have family members or other persons participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

**Taking Protective Action**

5. Paragraph (b) contains a non-exhaustive list of actions a lawyer may take in certain circumstances to protect a client who does not have a guardian or other legal representative. Such actions could include consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as existing durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the client's wishes and values to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.

6. A client with diminished capacity also may cause or threaten physical, financial, or other harm to third parties. In such situations, the client's lawyer should consult applicable law to determine the appropriate response.

7. When a legal representative has not been appointed, the lawyer should consider whether an appointment is reasonably necessary to protect the client's interests. Thus, for example, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, applicable law provides for the appointment of certain legal representatives in certain circumstances. For example, the Texas Family Code prescribes when a guardian ad litem, attorney ad litem, or amicus attorney should be appointed in a suit affecting the parent-child relationship, and the Texas Estates Code prescribes when a guardian should be appointed for an incapacitated person. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the lawyer's professional judgment; but, in considering alternatives, the lawyer should be aware of any law that requires the lawyer to advocate on the client's behalf for the action that imposes the least restriction.

**Disclosure of the Client's Condition**

8. Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. As with any client-lawyer relationship, information relating to the representation of a client is confidential under Rule 1.05. But when the lawyer is taking protective action, paragraph (b) of this Rule permits the lawyer to make necessary disclosures. Given the risks to the client of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the

lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client.

Notably, paragraph (b) permits a lawyer to take legally restrictive action (like getting a guardian or conservator for the client) or to utilize less intrusive means (like talking to family members) to address a client's disability. Additionally, paragraph (c) provides an exception to the confidentiality Rule if the lawyer takes any action – legally restrictive or less intrusive – limiting the disclosure of such information to that reasonably necessary to protect the client's interests. As paragraph (b) authorizes legally restrictive measures to the same extent it does less intrusive methods, then the lawyer could disclose whatever information is necessary to achieve the method the lawyer selects. We believe that this proposed Rule adequately addresses the issues noted above and therefore endorse its promulgation. [5]

[5] The Committee recommended further deviation from ABA Rule 1.14 (see attached comparison table).

# Rule 1.05 Confidentiality of Information

**Model Rules**

"In 2002, a new exception–Rule 1.6(b)(4)–was added [to the ABA Model Rules], permitting disclosure [of confidential information] 'to secure legal advice about the lawyer's compliance with these Rules.' (This provision was originally numbered 1.6(b)(2), but renumbered when other paragraphs of Rule 1.6 were added in 2003.)"[1] Model Rule 1.6 now provides:

> RULE 1.6: CONFIDENTIALITY OF INFORMATION
> . . . . (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (4) to secure legal advice about the lawyer's compliance with these Rules; . . . .

Comment 9 to ABA Model Rule 1.6 states:

> A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

**Proposed Texas Rule**

Texas Disciplinary Rule 1.05(c) should be amended to add a ninth subsection (shown below with underscoring and bold):

> (c) A lawyer may reveal confidential information:
> (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
> (2) When the client consents after consultation.
> (3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.
> (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.
> (5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
> (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.
> (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
> (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

[1] *Confidentiality of Information*, Ann. Mod. Rules Prof. Cond. § 1.6 (8th ed., Westlaw 2018).

**(9) To secure legal advice about the lawyer's compliance with these Rules.**

**Discussion**

The proposed amendment should be adopted because "[a]llowing disclosure under such circumstances will not harm clients, as the lawyer to whom the disclosure is made will be under the same duty of confidentiality as the lawyer making the disclosure."[2] Permitting a "lawyer to share confidential information to obtain legal advice from another lawyer about compliance with the ethics rules expressly confirms what has long been understood informally as permissible, and is a welcome addition that encourages lawyers to seek counsel from colleagues about ethical obligations."[3] The amendment is desirable because "in many cases . . . the consulting lawyer may have a professional responsibility to seek the advice of an ethics expert under the Rule 1.1 competency requirement."[4]

**2011 Ethics Referendum**

Had the 2011 Texas Referendum been successful, it would have added language to the Texas Rules similar to this proposal ("when the lawyer seeks legal advice about the lawyer's compliance with these Rules").[5]

**Proposed Comment Change**

If the proposed change is enacted, the Comment to TDRPC 1.05 should revised by adding after Comment 22 (currently the final Comment to Rule 1.05) the following heading and numbered paragraph:

> Permitted Disclosure or Use When the Lawyer Seeks Legal Advice
>
> 23. A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's responsibility to comply with these Rules. In most situations, disclosing or using confidential information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure or use is not impliedly authorized, subparagraph (c)(9) allows such disclosure or use because of the importance of a lawyer's compliance with these Rules.

The proposed Comment is substantially identical to Model Rules of Professional Conduct Rule 1.6 cmt. 9 (2018).

[2] Professor John M. Burman, *The Disclosure of Confidential Information Under the New Wyoming Rules of Professional Conduct,* 29 WYO. LAW. 42, 44 (December 2006).
[3] Gregory C. Sisk, *Change and Continuity in Attorney-Client Confidentiality: The New Iowa Rules of Professional Conduct*, 55 DRAKE L. REV. 347, 355 (2007).
[4] M.H. Hoeflich & Bill Skepnek, *Reflections of an Ethics Expert and A Lawyer Who Retains Him*, 44 HOFSTRA L. REV. 353, 357 (2015).
[5] 2011 Texas Referendum, proposed language for Disciplinary Rule 1.5(c)(4).

# Proposed Rule 1.02(g) and Rule 1.16 Redlined

**Rule 1.02 Scope and Objectives of Representation**

(a) Subject to paragraphs (b), (c), (d), ~~and~~ (e), and (f), ~~and (g),~~ a lawyer shall abide by a client's decisions:

(1) concerning the objectives and general methods of representation;

(2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;

(3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

~~(g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.~~

Comment:

~~**Client Under a Disability**~~

~~12. Paragraph (a) assumes that the lawyer is legally authorized to represent the client. The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally~~

~~effective appointment of the lawyer to represent a person. Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for the purpose of this rule.~~

~~13. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests. See Rule 1.05(c)(4), d(1) and (d)(2)(i) in regard to the lawyer's right to reveal to the court the facts reasonably necessary to secure the guardianship or other protective order.~~

**Rule 1.16 Clients with Diminished Capacity**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.

Comment:

1. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. However, maintaining the ordinary client-lawyer relationship may not be possible when the client suffers from a mental impairment, is a minor, or for some other reason has a diminished capacity to make adequately considered decisions regarding representation. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often can understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, some people of advanced age are capable of handling routine financial matters but need special legal protection concerning major transactions. Also, some children are regarded as having opinions entitled to weight in legal proceedings concerning their custody.

2. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the lawyer's knowledge of the client's long-term commitments and values.

3. The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the client has a guardian or other legal representative, the lawyer should, as far as possible, accord the client the normal status of a client, particularly in maintaining communication. If a guardian or other legal representative has been appointed for the client, however, the law may require the client's lawyer to look to the representative for decisions on the client's behalf. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

4. The client may wish to have family members or other persons participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

**Taking Protective Action**

5. Paragraph (b) contains a non-exhaustive list of actions a lawyer may take in certain circumstances to protect a client who does not have a guardian or other legal representative. Such actions could include consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as existing durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the client's wishes and values to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.

6. A client with diminished capacity also may cause or threaten physical, financial, or other harm to third parties. In such situations, the client's lawyer should consult applicable law to determine the appropriate response.

7. When a legal representative has not been appointed, the lawyer should consider whether an appointment is reasonably necessary to protect the client's interests. Thus, for example, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, applicable law provides for the appointment of legal representatives in certain circumstances. For example, the Texas Family Code prescribes when a guardian ad litem, attorney ad litem, or amicus attorney should be appointed in a suit affecting the parent-child relationship, and the Texas Probate Code prescribes when a guardian should be appointed for an incapacitated person. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the lawyer's professional judgment. In considering alternatives, the lawyer should be aware of any law that requires the lawyer to advocate on the client's behalf for the action that imposes the least restriction.

**Disclosure of the Client's Condition**

8.Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. As with any client-lawyer relationship, information relating to the representation of a client is confidential under Rule 1.05. However, when the lawyer is taking protective action, paragraph (b) of this Rule permits the lawyer to make necessary disclosures. Given the risks to the client of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client.

**Emergency Legal Assistance**

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

# Proposed Rule 1.05(c)(9) Redlined

**Rule 1.05. Confidentiality of Information**

(a) "Confidential information" includes both "privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

<u>(9) To secure legal advice about the lawyer's compliance with these Rules.</u>

(d) A lawyer also may reveal unprivileged client information:

(1) When impliedly authorized to do so in order to carry out the representation.
(2) When the lawyer has reason to believe it is necessary to do so in order to:
(i) carry out the representation effectively;
(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;
(iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or
(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

Comment:

**Permitted Disclosure or Use When the Lawyer Seeks Legal Advice**

23. A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's responsibility to comply with these Rules. In most situations, disclosing or using confidential information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure or use is not impliedly authorized, subparagraph (c)(9) allows such disclosure or use because of the importance of a lawyer's compliance with these Rules.

# Committee on Disciplinary Rules and Referenda

Rule 1.02. Scope and Objectives of Representation
Rule 1.05 Confidentiality of Information
Rule 1.16 Clients with Diminished Capacity

**Electronic Comments**

*The Committee on Disciplinary Rules and Referenda (CDRR) was created by Government Code section 81.0872 and is responsible for overseeing the initial process for proposing a disciplinary rule. The following comments were collected electronically through November 1, 2018 at texasbar.com/CDRR.*

| First Name | Last Name | Rule | Comments |
|---|---|---|---|
| Robert | Schuwerk | 1.02 and 1.16 | The referenced proposed amendments raise several problems. The first is that the protections afforded clients by deleted paragraph (g) are not carried forward in new Rule 1.16. The second is that only the first paragraph of new Rule 1.16 is a rule. Paragraphs (b) and (c) of that proposed Rule would be better included as comments. The third is that removing whatever protections are to be extended to clients under some form of disability from Rule 1.02 is somewhat questionable, as many other such protections for all clients are included there. I would recommend (I) restoring paragraph 1.02(g); (ii) adding proposed Rule 1.16(a) to Rule 1.02 as a new paragraph (h); and (iii) retaining proposed new Rules 1.16(b) and (c) as comments to amended Rule 1.02. |
| Brooke | Allen | 1.02, 1.05, and 1.16 | Committee, I am a probate judge in Tarrant County. I deal with parties where diminished capacity is at issue probably more than any other type of court. I believe deleting (g) of 1.02 and adding 1.16 is an absolutely necessary change. This provides due process for those people who may or may NOT be incapacitated instead of forcing the exact person they are trusting to "turn" on them and break the attorney-client privilege. However, it still allows attorneys to make the decision if they believe their client needs additional protection (while only allowing necessary client information to be disclosed). It is my hope this passes. All people deserve due process and effective representation and these changes are much more in line with such fundamental rights. Should you have questions for me, my cell is [redacted] and the Court number is 817.884.1415. Thank you, Brooke Allen |
| Sanjay | Chadha | 1.16 | I support the deletion of 1.02(g) as it eliminates the threat to the basis tenants of attorney client relation ship, "confidentiality" and "attorney client privilege". It also relieves the lawyers from assuming a health professional role. Lawyers are not qualified to make those assessments, but much more import. For same reason, I am concerned about some of the language in proposed addition of Rule 1.16. Particularly, 1.16(b) should add an "and" instead of comma in the first sentence, as we don't need lawyers taking actions that other people cannot undo without significant cost and penalty occurring to client, based simply on a belief of diminished capacity and no imminent threat of harm. It also needs some qualifier on requiring disclosure of such action to client before taking the action. |

| First Name | Last Name | Rule | Comments |
|---|---|---|---|
| Erin | Hartung | 1.02 and 1.16 | I am concerned with the proposed rule change to alter the requirement for an attorney to obtain a GAL for clients of diminished capacity to a permissive ability of the attorney to obtain the GAL. I am concerned because if the client's attorney is not required to secure a GAL when one is needed, then who will? Who will know that the client needs a GAL and how to secure one? It certainly is not right to expect a client of diminished legal capacity to make that analysis and determination. And, placing that burden on other individuals within the client's circle does not guarantee that all clients who need a GAL will receive one. The attorney is in the best position to know when a client is in need of a GAL. If an attorney wishes to engage a client who has diminished legal capacity, the attorney should be required as part of their ethical duties to ensure that the client is equipped with full legal representation, including representation of a GAL. This onus should be placed on no one but the attorney, and the onus will, as a practical matter, be placed elsewhere unless the duty remains on attorneys representing clients of diminished capacity. For this reason, I object to the proposed changes to Rules 1.02 and 1.16. |
| Frederick | Moss | 1.16 | As a former member of the State Bar's Committee on the Rules of Ethics, I was pleased to see that the new Committee on Disciplinary Rules and Referenda proposes Rule changes to clarify a lawyer's ethical duties relative to clients with diminished capacity. The proposed rule was drafted by the Rules Committee I was on. I feel that the Texas Bar has undermined the chances that the proposal will pass in a referendum. Texas lawyers do not have access to the rationale for the changes. They need to know why the current rules are (woefully) inadequate and the reasons for the particular proposed language. An open meeting in Austin is simply not sufficient. The Bar, the CDRR, or the TBJ should publish links to both the former Rules Committee's report supporting the changes and the proposed comments to Rule 1.16. Without this information, Texas lawyers are likely to vote against change when they don't understand the need for it. All Texas lawyers who represent individual clients need these changes to be adopted. |
| Steve | Waldman | 1.16 | The proposed rule is not sufficiently tailored to protect both the lawyer and the client from a determination of diminished capacity made on the basis of insufficient evidence. Unless a lawyer has professional training to make an assessment of diminished capacity, s/he is unable to make the judgment set out in (a), "When a client's capacity to make adequately considered decisions…is diminished…because of…mental impairment…," or to formulate the "reasonable believes" determination required in (b), "…that the client has diminished capacity…" Imposing such requirement upon a lawyer may lead a lawyer to exceed the scope of his professional training and unduly infringe upon the rights of his client. This may also lead to liability for the lawyer, for either the exercise or non-exercise of the obligation inherently created by this new rule. The absence of any guiding standard in (a), and the use of the "reasonably believes" standard in (b) are inappropriately vague and impermissibly untethered to a objective criteria and competent, professional guidance. Further, the phrase "as far as reasonably possible" in (a) is vague, and thus impossible to satisfy. Paragraph (a) should be rewritten to state as follows: (a) When a lawyer has objective evidence that a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall take reasonable steps to act in the best interests of the client. In making a determination that a client's capacity is diminished due to mental impairment, a lawyer shall rely on professionals who are competent to assess mental impairment. (b) When the lawyer has competent evidence that the client has diminished capacity…(remainder the same) (c) When acting in furtherance of (a) or (b), the lawyer may disclose…(remainder the same) |
| Julie | Balovich | 1.16 | Rule 1.16(b) is overbroad. It could be ok with more limiting language. It does not define diminished capacity. If diminished capacity is intended to be defined by 1.16(a), it allows anything to be a factor in diminished capacity. Rule 1.16(b) does not require the lawyer to consider the client's wishes in assessing the client's interests. The rule a written does not appear to require the attorney to heed any particular caution with respect to a client's protected health information. |

| First Name | Last Name | Rule | Comments |
|---|---|---|---|
| Richard | LaVallo | 1.16 | Dear Members of the Committee on Disciplinary Rules and Referenda (CDRR): On behalf of Disability Rights Texas, the protection and advocacy system for Texans with disabilities, I am submitting comments concerning Proposed Rule 1.16. Proposed Rule 1.16 is an improvement over current Rule 1.02(g) because it proposes taking action other than the appointment of a guardian or a legal representative for a client when an attorney believes that a client lacks legal competence. It is our recommendation that the CDRR incorporate the new alternatives to guardianship in subsection (b) of the Proposed Rule 1.16. In 2015, the Texas Legislature reformed the Estates Code by requiring probate courts to consider alternatives to guardianship and supports and services before creating a guardianship. In Tex. Est. Code §§ 1002.0015 and 1357.001 et seq., the Legislature not only identified the alternatives to guardianship, but also created supported decision making agreements as a new alternative to guardianship. Since guardianship is a drastic remedy that removes an individual's right to make decisions on his or her own behalf, alternatives to guardianship including supported decision making are now mandated to avoid the necessity of creating a guardianship and maximizing the self-reliance and independence of the person at risk of being placed under a guardianship. Tex. Est. Code § 1001.001(b). Alternatives to guardianship and supported decision making can also be utilized to minimize the risk of physical, financial or other harm that a client may be exposed to. We would propose that the following alternatives to guardianship be specifically included in the list of action that could be taken to protect a client: medical power of attorney, durable power of attorney, representative payee, management trust, special needs trust and supported decision making agreement. Subsection (b) also states that an attorney could submit a letter to the court to initiate a guardianship. The Estate Code clearly states that a court may only appoint either a guardian with either full or limited authority over an person "only as necessary to promote and protect the well-being" of the person. Tex. Est. Code § 1001.001(a). If the probate court finds that a person lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property with or without supports and services, the court may create a limited guardianship. An attorney's concerns about his or her client's diminished capacity would typically arise in the context of representing a client in a particular matter. Therefore, even if a guardianship is required, the attorney should submit an information letter to initiate a limited guardianship that is specifically focused on the matters germane to the attorney's representation, rather than requesting a full guardianship that could potentially remove all of the client's rights. Finally, subsection (b) should be revised to include "next friends". Under Tex. R. Civ. P. 44, a minor or an adult with diminished capacity who does not have a legal guardian may be represented by a "next friend." If an attorney does not believe that his or her client has the capacity to make decisions that are necessary to initiate or proceed with litigation, the client could be represented by a "next friend.' This would enable an attorney to continue to represent a client with diminished capacity without the necessity of seeking a guardianship or taking any other protective measure. We appreciate the opportunity to provide comment to this important Rule. Richard LaVallo Legal Director Disability Rights Texas 2222 W. Braker Ln. Austin, TX 78758 [redacted] d 512.454.4816 p 512.454.3999 f [redacted] This message and any attachments may contain information that is confidential, an attorney-client communication, and/or attorney work product. If you are not identified as a recipient on this message or otherwise believe you have received this message and any attachments in error, please immediately notify the sender and delete all copies of these materials. Thank you. |

# Public Comments - Written Comments

Presented here are the written comments submitted through a comment form on the CDRR webpage. These comments are related to the following proposed rule changes:

- Rule 1.02 Scope and Objectives of Representation
- Rule 1.05 Confidentiality of Information
- Rule 1.16 Clients with Diminished Capacity

The following comments were collected from September 1, 2018, through November 1, 2018.

**HILARY SHEARD**

Attorney-at-Law
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Austin, TX 78757
Phone: (512) 524 1371 • Fax: (512) 646 7067
[redacted]

October 23, 2018

State Bar of Texas
Committee on Disciplinary Rules and Referrals
1414 Colorado Street, Suite 500
Austin, TX 78701

Dear Committee Members:

I am writing with some comments concerning proposed rule changes, particularly those concerning Texas Disciplinary Rule of Professional Conduct 1.16, concerning clients with "diminished capacity." I am an attorney whose practice is devoted entirely to criminal appeals and habeas corpus work, primarily in death penalty cases. Death penalty cases almost always involve some exploration of the client's mental health, and issues of competency, sanity and the use of mental health problems as mitigating evidence at sentencing are common in the work I do. In addition to my legal practice, I am also a board member and treasurer of "Capacity for Justice," http://www.capacityforjustice.org/, a non-profit that provides cross-training for lawyers and for mental health experts who wish to conduct competency and sanity evaluations in criminal proceedings.

Generally, I am glad to see some attempt to improve this rule - the existing guidance is so vague that it is of little practical help. So, thank you all for your efforts in this area.

**No Definition of "Diminished Capacity"**

The term "diminished capacity" is not defined. A definition would be helpful, not least because of the existing use of the term "diminished capacity" for the purpose of Texas criminal law. *See Jackson v. State*, 160 S.W.3d 568 (Tex. Crim. App. 2005) and *Ruffin v. State*, 270 S.W.3d 586, 596-97 (Tex. Crim. App. 2008). Clarification of what individuals the rule is intended to protect seems to be necessary.

**Disclosure of Otherwise Confidential Information**

It is good to see subsection (c), allowing for the disclosure of otherwise confidential information in appropriate circumstances. As the Supreme Court of the United States has acknowledged, in *Medina v. California*, 505 U.S. 437, 451 (1992) "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense," but at the moment, there is frequent debate among defense attorneys about what it is permissible to disclose, and in what circumstances, when representing an impaired client. It will be helpful if there is now a safe harbor for counsel who feel it is in their client's interest to disclose otherwise privileged communications, especially given the strict privilege rule binding on criminal counsel under TEX. R. EVID. 505(b)(2).

**Protective Action**

It would be helpful if the rule – or a comment to the rule–clarified that "protective action" can include conducting proceedings *ex parte* and/or in chambers, with any transcripts, pleadings or orders being placed under seal. Also, if there was a suggestion that counsel could seek a protective order to limit the disclosure of otherwise privileged material, to ensure that it is not used against the client at a later date for some other purpose. Bluntly, I know from discussion with other attorneys, and from cases that I have worked on, that many criminal practitioners do not think to request such measures, or do not even know that a protective order can be requested. Some "prompting" about specific appropriate actions would help to ensure that clients' interests are in fact protected. For this reason, it seems that Rule 1.02 (g), with its suggestion that appointment of a guardian might be requested could usefully be retained rather than eliminated, or the guardianship language incorporated into Rule 1.16.

**Mentally-ill Clients Seeking to Discharge Counsel**

What happens when a mentally-ill client seeks to dismiss counsel? This is an area where I think there is a real need for some ethical guidance, especially for appointed counsel in criminal cases.

In *Indiana v. Edwards*, 554 U.S. 164, 177-8 (2008), the United States Supreme Court addressed the question whether the federal Constitution requires a state trial judge to allow a mentally ill defendant, upon request, to proceed *pro se* at trial.

*Edwards* held that the Constitution does not forbid States from insisting upon representation by counsel for those competent enough to stand trial but who suffer from "severe mental illness" to the point where they are not competent to conduct trial proceedings by themselves. *Id.* The *Edwards* court concluded "that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so," and therefore "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under [the *Dusky v. United States*, 362 U.S. 402, 402 (1960) standard] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards*, 554 U.S. at 177-178.

In criminal cases a mentally competent client can generally discharge appointed counsel and represent him or herself, since that is a right guaranteed by the Sixth Amendment to the United States Constitution. *Faretta v. California*, 422 U.S. 806 (1975). Since *Edwards*, however, it is clear that when clients are sufficiently mentally ill, they may have counsel forced upon them, rather than being permitted to represent themselves.

It is a sad fact that appointed counsel sometimes resist being discharged by their clients -- the financial incentives for counsel to stay on a case are obvious, and indigent defendants have to seek the cooperation of the courts if they want to have substitute counsel appointed. Many judges suspect clients facing criminal charges of "gaming the system" and are reluctant to permit substitution. And many counsel do not believe they have an obligation to have the question of discharge and alternative representation decided by the judge. The client's wishes and their (sometimes meritorious) reasons for wanting to discharge counsel may therefore go unheard.

Even when the issue of dissatisfaction with counsel is aired, many clients are inhibited about talking about their case and counsel in a public courtroom, and few judges think to move the proceedings into chambers, or to assure the client by proving other protective measures. Not to mention that some clients may have genuine concerns about their attorneys, but lack the vocabulary or legal knowledge to define why their lack of confidence in counsel is justified. I have frequently seen situations where clients sought to have counsel removed from their case, but where the courts have not been responsive or understanding of the client's limitations. For example, I once watched a judge asking a defendant for some concrete examples of why the

client thought the lawyer's performance was deficient. The defendant simply did not understand the word "concrete" other than in reference to building materials, and it took some time–and much embarrassment–for the defendant to admit he did not understand the question.

There are also, sadly, some scenarios where counsel cling on to a case despite the client's repeated protests, and the client and attorney end up in an almost adversarial relationship. For example, I have seen a case where counsel and their unquestionably mentally ill client were in constant–and often public– conflict with each other throughout the proceedings. Counsel claimed the client was competent to stand trial, but staunchly opposed their client being permitted to discharge "his" attorneys, claiming he lacked capacity to do so under *Edwards*. The client tried to represent his own interests at a hearing to determine whether he should be permitted to represent himself, where his attorneys were stating on the record that they thought he was not fit to represent himself, and were opposing his wishes. Thus, the hearing became one at which the client received no actual assistance in litigating the question of whether he was competent to stand trial *per se*, and his request to represent himself was thwarted by those wishing to continue to represent him. He was ultimately forced to go to trial with counsel with whom he largely refused to communicate. The continuing conflict between counsel and their mentally ill, vocal, and very unhappy client tainted the subsequent trial in various ways.

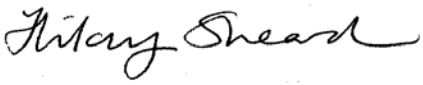
I have also represented a client who had previously had appointed counsel who literally refused to remove himself from the case, and actually wrote the client a letter stating "you cannot fire me inasmuch as you did not hire me. I am your counsel of record until I am relieved of that responsibility by the court. I will let you know when that occurs." The attorney in question never asked the court in question for a hearing, or attempted to be relieved from the client's representation. The same attorney advised the judge in question that the client's letters to the judge should be disregarded because they infringed the rule against hybrid representation.

Particularly in the context of the mentally-ill client, it seems to me that it would be desirable if the rules (or comments thereto) could address the situation where appointed counsel–who may or may not be guided by what s/he believes to be the client's best interests–opposes the client's request to discharge them. For example, the discharge of counsel rule, Rule 1.15(a)(3), could be toughened up, by imposing a clear requirement that counsel must inform the court of the situation and ask for a hearing, and perhaps by mandating that currently appointed counsel request the

appointment of separate counsel appointed to independently advise the client–especially a mentally-ill client–and to represent the client's wishes, and/or to act as quasi-amicus counsel whose role is to ensure that the court is apprized of all available information in making its decision. Since Texas criminal law places the burden on the client to ask for a hearing and to demonstrate why a request for substitution of new counsel is justified, *Hill v. State*, 686 S.W.2d 184, 185-87 (Tex. Crim. App. 1985), it seems harsh not to provide the client, especially the mentally-ill client, with some support in making that showing.

I trust that these observations are of some use to the committee, and would be glad to provide any further information or input if requested.

With all good wishes,
Sincerely,



Hilary Sheard.

# Comments on Proposed Disciplinary Rule Amendments: Rules 1.02(g), 1.05, 1.16

Submitted by:

Amon Burton
Charles Herring, Jr.
James C. McCormack
Jason Panzer
Gaines West

We respectfully submit these comments to the State Bar's Committee on Disciplinary Rules and Referenda (CDRR). Below we offer some initial general comments and then specific comments on the current proposals concerning amendments to Rules 1.02 and 1.05 and proposed new Rule 1.16.[1]

## I. General Comments

We offer the following general comments and suggestions concerning the Committee's work.

1. Because this Committee's work likely will result in a referendum election on the proposed rules and rule amendments, we encourage the Committee to study closely the last rules referendum, in 2011. Bar members overwhelmingly voted against the proposals, generally by an 80% margin. Unfortunately, this Committee begins with that inherited legacy of dismal failure. Therefore, we encourage the Committee to examine how that effort went "off the tracks" so badly.

A few of the problems that became evident during that process were: (1) failing to reach out to and receive input from the major stakeholder groups who would be most directly affected by specific rule changes; (2) forcing a vote too quickly after publication of the proposals and comments, despite many requests for a postponement (including from the Bar President at the time); (3) creating unnecessary differences between the Texas rules and the ABA Model Rules, thus causing problems and increased expense for multi-state firms, especially large law firms; (4) failing to allow opponents of the proposed rules to participate equally in Bar forums; (5) failing to

[1] Each of the individuals submitting these comments has substantial experience working with the Texas Disciplinary Rules of Professional Conduct, including representing complainants and respondents in disciplinary matters; handling lawyer-liability lawsuits; testifying as expert witnesses; serving on professional committees dealing with rules issues; and writing and lecturing on various subjects involving the rules. Resumes for each of us are attached to these comments.

conduct or provide a costs-benefits analysis on the proposals; (6) failing to consider whether each proposal would increase, decrease, or leave unchanged the level of protection of the public.

2. If it ain't broke, don't fix it. We encourage the Committee to propose only rules and amendments to existing rules that are necessary to address demonstrated, existing problems in legal practice.

The Texas Disciplinary Rules of Professional Conduct were adopted in 1990, after the American Bar Association (ABA) had adopted the Model Rules of Professional Conduct in 1983. Since 1983, the ABA has adopted over 100 sets of amendments to the Model Rules. Texas has conducted only the one failed referendum in 2011. Yet Texas lawyers continue to practice effectively, and the rules have not exactly been static.

Court decisions continuously apply and interpret the rules, as have opinions of the Professional Ethics Committee. When necessary, as happened recently, the Texas Supreme Court has issued clarifying comments.[2] Most recently, the Court amended Rule 8.03 in accordance with the self-reporting requirement adopted by the Legislature's instruction in the last Session.[3]

Many observers believe that the ABA too often amends the Model Rules, sometimes to make very minor changes.

Every rule change creates systemic costs. Lawyers (at least those who choose to vote) have to study the proposed changes before the referendum vote. When changes are adopted, lawyers have to study the changes approved, and if the changes are significant, lawyers have to make corresponding changes in their practices and procedures and forms. Law firm manuals and procedures have to be changed. Multi-state law firms and practitioners have to evaluate any differences from the Model

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[2] For example, in March 2016, the Texas Supreme Court added a new comment to Rule 1.06 for the purpose of overturning the result stated PEC Opinion 644—after law school deans across Texas had complained about Opinion 644. In July 2016, the PEC revised the previous version of Opinion 644 to track the new Comment 19 to Rule 1.06. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.06 cmt. 19 (making clear that a law firm is not prohibited from representing a client merely because a lawyer in the firm has a conflict arising from work the lawyer did as a law clerk before being licensed if the law firm screens the lawyer from the matter); 2014 WL 4960462 (the first version of Op. 644) *with* 2016 WL 4015410 (the revised version of Op. 644).

[3] *See* Tex. Gov't Code § 81.081 (requiring the chief disciplinary counsel to develop guidelines for lawyers to self-report misconduct); Texas Supreme Court Order Adopting Amendments to Texas Disciplinary Rule of Professional Conduct 8.03, Misc. Docket No. 18-9030 (March 1, 2018); Tex. Disciplinary Rules Prof'l Conduct R 8.03(e)-(f).

Rules and from other states' rules, and determine how to reconcile or otherwise accommodate any inconsistencies. Professional-liability insurers have to assess the significance of the changes. And on and on.

Accordingly, our first suggestion is that the Committee exercise restraint, and not adopt changes for the sake of change unless the Committee concludes that those changes are truly necessary for Texas lawyers.

3. Consistency with the Model Rules. When the Committee decides to propose a new rule or an amendment to an existing rule, we encourage the Committee, whenever possible, to use the language from the counterpart Model Rule, without any changes, except when different language is necessary either because of some difference in substantive Texas law or because of some important, articulable reason.

Law practice, like our economy, is increasingly national and even international. Multi-state law firms are common. In Texas, even some small law firms now have offices in other states. In personal-injury practice, many Texas lawyers have become licensed in California, New York, or other states that have laws perceived as more protective of victims' rights. Mass torts increasingly end up in multi-district-litigation (MDL) forums.

Those practice changes complicate rules issues for lawyers. Lawyers may be subject to different rules—even inconsistent rules—addressing the same issue in different states.

A major advantage of tracking the Model Rules as closely as possible is that those rules are the forms that the most states use and follow. Additionally, many of the Model Rules have remained unchanged, or substantially unchanged, since the original adoption of the Model Rules in 1983. Thus, lawyers and law firms have 35 years of interpretive court opinions, ethics opinions, and commentary to use in interpreting new Texas rules or rule amendments that track the Model Rules.

Every deviation from the Model Rule requires practitioners—and particularly multi-state practitioners—to ask Why? and to have to figure out (or speculate) on the reasons for each difference. And again, multi-state practitioners and multi-state professional-liability insurance carriers must rewrite firm manuals and practitioner guidance to analyze and explain each difference.

In the rule-making leading up to the referendum in 2011, too often we saw changes in wording that apparently resulted from some member of the task force or the Bar's committee simply deciding "I like a different word better." The Committee should avoid that, unless there's a good reason.

Changes to the Texas Disciplinary Rules that differ from the language in the Model Rules create an additional systemic cost—for lawyers, law firms, and ultimately for clients. We encourage the Committee to strive for consistency with the Model Rules whenever possible to avoid this problem.

4. Lawyer and public participation. We encourage the Committee to invite and vigorously encourage participation in the rule-making process from all segments of the Bar and the public.

Texas Government Code § 81.08786(a)(4) requires that this Committee "make all reasonable efforts to solicit comments from different geographic regions in this state, nonattorney members of the public, and members of the state bar."[4]

Yet we heard from public-interest groups just before and after the Committee's public hearing on October 10, 2018, that they had not been contacted and that as far as they knew, no one had attempted to "solicit [their] comments." Indeed, the Committee acknowledged during its October 10, 2018 public hearing that it had not communicated with public-interest groups regarding the Committee's most recent proposed rule changes.

Non-compliance with the statute governing this Committee's operations may or may not raise an issue concerning the legality of the Committee's procedures and any resulting referendum proposal. But in terms of creating (and, in fact, restoring) the confidence and trust that are critically important to conducting any successful referendum election, we submit that diligent and ongoing outreach to all interest groups should be a key focus for the Committee.

We encourage the Committee to distribute as broadly as possible all communications concerning its work—including its website, hearing notices, published rule proposals, etc. We also encourage Committee members to follow up with personal phone calls to Bar section chairs, legal service organizations, professional organizations (e.g., Texas Trial Lawyers Association, Texas Association of Defense Counsel, Texas District and County Attorneys Association, Texas Criminal Defense Lawyers Association, etc.), public interest organizations, etc., to explain the Committee's basic functions and request their participation in the rule-making process.

This Committee already has access to lists and contact information for many groups and stakeholders—through the State Bar, Texas Lawyers Care, the Office of Chief Disciplinary Counsel, the Texas Access to Justice Commission, etc. We encourage to Committee to develop a comprehensive outreach list through all of those resources and to reach out as broadly as possible.

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[4] Tex. Gov't Code § 81.08786(a)(4).

Attached hereto as Exhibit 1 is a list of some of the groups that the Committee should invite to participate in this process.

5. Explaining proposed changes. As indicated by our specific comments below, some of the comments are in the form of questions concerning why the Committee has proposed the particular changes that it has published. We suggest that for each change that the Committee proposes, the Committee provide, at least on its website, a summary of the reason for the changes. That would both aid understanding and save time for lawyers and the public.

Explaining the rationale for the Committee's actions also would likely assist in avoiding unnecessary opposition during the rule-making process and during the referendum election. Because § 81.078(d) requires that Bar members vote on each proposed rule separately, providing an explanation of all proposed changes to each rule at the outset should help voters understand the proposals, as well as save this Committee time in answering questions and responding to comments. Additionally, under the new statutory scheme adopted through SB 302, opposition can surface at several junctures: now, during the present comment period; at the Board level, as the Board considers the Committee's proposals under Government Code § 81.0877; during the referendum campaign, under § 81.0878(c); and then during the Texas Supreme Court's consideration under § 81.0879. Clarifying and explaining the Committee's reasoning would also help avoid unwanted opposition throughout the rule-making process.

## II. Comments on specific proposed changes.

We understand that at present, the Committee has requested comments on possible changes to three Disciplinary Rules: Rule 1.02(g) (proposed deletion); Rule 1.05(c)(9) (proposed new provision); and Rule 1.16 (proposed new rule). Our specific comments follow:

### A. *Proposed deletion of Rule 1.02(g) and addition of Rule 1.16*

These two changes are related. The Committee proposes to eliminate Rule 1.02(g) and replace it with new Rule 1.16—concerning clients with diminished capacity.

Proposed new Rule 1.16 would generally track ABA Model Rule 1.14, but with some significant differences.

Unfortunately, Proposed Rule 1.16 is identical to the proposed version overwhelmingly rejected by Texas lawyers in the 2011 referendum. By itself, that fact

doesn't make the rule ill-advised. As discussed above, the "packaging" of the referendum into a few ballot propositions with many rules lumped into each proposition was a serious design defect. Government Code § 81.078(d) now requires a separate vote on each proposed rule. Nonetheless, the Committee is starting with a proposal that Texas lawyers previously rejected overwhelmingly, a point that any opponents will likely point out during any referendum election.

Comments:

1. Whether this proposed change is truly necessary for Texas lawyers and the public (see Introduction, Comment 2, above) may be questionable, but without arguing that point and assuming that it is, we generally commend the Committee for generally following the ABA Model Rule 1.14 on the issue (see Introduction, Comment 3, above).

2. However, the proposed rule does significantly deviate from the ABA Model Rule 1.14 in certain respects, and some of those deviations seem dubious—and calculated to generate opposition during a referendum election. While paragraph (a) of proposed Rule 1.16 is identical to Model Rule 1.14(a), paragraphs (b) and (c) are significantly different.

Proposed Rule 1.16(b) and (c) read:

> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.
>
> (c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.

ABA Model Rule 1.14(b) and (c) read:

> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting

with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

3. Professor Robert Schuwerk and Charles Herring, Jr. both testified at the Committee's public hearing on October 10, 2018, concerning how proposed Rule 1.16(b) represents a major departure from the existing structure of the Texas Disciplinary Rules of Professional Conduct. Proposed Rule 1.16(b) speaks in terms of what actions a lawyer "may" take; it does not direct what a lawyer "shall" do. Current Rule 1.02(g), which it would replace, uses "shall."

That change is very different from the current structure of the Disciplinary Rules. Paragraph 10 of the Preamble to the current Disciplinary Rules defines the current disciplinary structure of the rules:

> The Texas Disciplinary Rules of Professional Conduct define proper conduct *for purposes of professional discipline. They are imperatives*, cast in the terms *shall or shall not. The Comments* are cast often in the terms of *may or should* and are permissive, defining areas in which the lawyer has professional discretion. When a lawyer exercises such discretion, whether by acting or not acting, no disciplinary action may be taken.

(Emphasis added.)

The Committee should consider carefully the significance of that change. At a minimum, that structural change would require amending the Preamble. More importantly, that change will mean that the "rules" are no longer black-letter guidelines that lawyers may look to determine what conduct will or will not result in discipline.

On the other hand, the Model Rules take a different approach from the Texas Disciplinary Rules. The Model Rules use "may." Indeed, Model Rule 1.14(b) does exactly that. Paragraph 14 of the Model Rules Preamble reads:

> Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the

> Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

Thus, this Committee could decide to change the structure of the Texas Disciplinary Rules to track the Model Rule structure—having both imperative rules and permissive rules. We take no position on which approach the Committee should take. We simply suggest that the Committee carefully consider the significant structural issue embedded in that change in proposed Rule 1.16(b). If the Committee opts for the imperative-and-permissive-rules approach, the Committee should recommend that the Texas Supreme Court make corresponding changes in the Preamble. Further, explanatory materials distributed before any subsequent referendum vote also should describe the structural change.

4. Proposed Rule 1.16(b) departs from Model Rule 1.14(g) in sentence structure—breaking the rule into two sentences, instead of one sentence. That is non-substantive, and perhaps better grammatically, given the longer list of possible actions set out in the Proposed Rule. But again, each change comes with systemic costs, albeit small in this instance.

5. More importantly, Proposed Rule 1.16(b) modifies the Model Rule 1.14(b) listing of actions that a lawyer may take when the lawyer forms the required "reasonable belief" concerning the client's diminished capacity.

> Model Rule 1.14(b): ". . . seeking the appointment of a *guardian ad litem, conservator or guardian.*"
>
> Proposed Rule 1.16(b): ". . . seeking the appointment of *a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.*"

Thus, Proposed Rule 1.16(b) adds three options and deletes one. It adds seeking appointment of (1) an attorney ad litem, (2) amicus attorney, and (3) submitting an information letter to a court to initiate guardianship proceedings. It deletes seeking appointment of a guardian (other than by submitting the letter).

We generally understand that the Committee has added the three specific options because of particular procedures involved in Texas practice. Again, assuming that's correct, and because the listing in the proposed rule is not exclusive ("may include, but is not limited to"), our general preference would be to track the Model Rules language, when possible, and add or specify options unique to Texas in the comments to the rules.

More important, and more unclear, is the reason for deleting the option of seeking appointment of a guardian. While we are not guardianship or estate lawyers, those we have spoken with have explained that while the "information letter" procedure set out in the proposed rule is allowed by the Texas Estates Code,[5] the Code does not prohibit a lawyer from seeking a guardianship when necessary.[6]

Omission of the option to seek a guardian may generate otherwise avoidable opposition to the proposal during the referendum election. Lawyers may view the change as unnecessarily "tying their hands" or appearing to do so. Although the rule is clear that the listed options are not exclusive, omitting the guardian option suggests that that is a disfavored option. Public-interest groups may view the deletion of the guardian option as reducing the options and duties for lawyers to protect senior citizens and other clients who may have diminished capacity.

If the point of deleting the guardian option is that current practice or procedure favors the "information letter," that point could be made in a comment to the rule.

In any event, providing clear explanations for the Committee's changes and choices will help prevent the inadvertent creation of red-flag issues for the referendum election.

6. Proposed Rule 1.16(c) also deviates from Model Rule 1.14(c), as indicated in the italicized passages below:

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[5] *See generally* Tex. Estates Code § 1102.003.

[6] *See* Tex. Estates Code §§ 1251.001, et seq. (appointment of temporary guardianship); § 1101.001 et seq. (appointment of permanent guardianship); ABA Formal Ethics Op. 96-404 (1996) (interpreting Model Rule 1.14 to allow for the appointment of a guardian, "While there may be circumstances in which the appointment of a general guardian to assume control over every aspect of the client's life is the only reasonable course, in some, if not many, circumstances it may be sufficient for the client's protection to arrange for a guardian to manage the client's financial affairs, allowing the client to continue managing his personal affairs."); Restatement (Third) of the Law Governing Lawyers, § 24(4) ("A lawyer representing a client with diminished capacity . . . may seek appointment of a guardian or take other protective action within the scope of the representation when doing so is practical . . . .").

> Model Rule 1.14(c): "*Information relating to the representation of a client with diminished capacity is protected by Rule 1.6.* When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but *only to the extent reasonably necessary* to protect the client's interests."
>
> Proposed Rule 1.16(c): "When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information *to the extent the lawyer reasonably believes* is necessary to protect the client's interests."

The two changes, without more explanation, appear likely to attract opposition from public-interest groups.

First, Proposed Rule 1.16(c) omits the first sentence of Model Rule 1.14(c), which, but its terms, emphasizes the protection of client confidentiality. The Committee may have concluded that existing Texas Rule 1.05 adequately addresses the confidentiality issue. But if that's the point of the change, it seems unnecessary and an unhelpful deviation from the Model Rule template.

Second, Proposed Rule 1.16(c) selects a different standard for the extent of disclosure authorized when a lawyer decides to take protective action for a client with diminished capacity. Does the Committee intend a substantive difference in allowing disclosure "to the extent *the lawyer reasonably believes* is necessary," rather than the Model Rule standard allowing disclosure "*only to the extent reasonably necessary*"? If the Committee does not intend a substantive difference, then again we suggest following the Model Rule standard. If the Committee does intend a substantive difference, we suggest that the Committee should explain the difference, in line with Comment I.5, above.[7]

## B. Proposed addition of Rule 1.05(c)(9)

The Committee proposes to add a new subparagraph to Texas Disciplinary Rule 1.05(c):

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[7] Current, somewhat convoluted Texas Rule 1.05 uses multiple standards in the permissive-disclosure settings addressed in Rule 1.05(c): "When the lawyer has *reason to believe it is necessary* to do so in order to comply with a court order, ..." (1.05(c)(4)), "To the extent *reasonably necessary* to enforce a claim ..." (1.05(c)(5)), "When the lawyer has *reason to believe* it is necessary ... to prevent the client from committing a criminal or fraudulent act ..." (1.05(c)(7)), "To the extent revelation *reasonably appears necessary* to rectify the consequences of a client's criminal or fraudulent act ..." (1.05(c)(8)).

> "(c) A lawyer may reveal confidential information: . . . (9) To secure legal advice about the lawyer's compliance with these Rules."

That permissive-disclosure exception is identical to Model Rule 1.6(b)(4), and we support this change.[8]

We have also heard from one professional-liability insurance carrier who requests clarification in the comment to the rule that that confidentiality exception also applies to disclosures to in-house ethics counsel at law firms, in accordance with ABA Formal Op. 08-453 (2008).

[8] We note that the same language appeared in proposed Rule 1.5(c)(4) in the defeated 2011 referendum.

## Exhibit 1 -- Organization Contact List

MALDEF – San Antonio
www.maldef.org

American Gateways – Austin
www.americangateways.org

Grassroots Leadership – Austin
www.grassrootsleadership.org

NAACP – Austin (Nelson Linder)
www.naacpaustin.com

SWAFE – Austin (formerly Safe Place)
www.safeaustin.org

RAICES – Austin
www.raicestexas.org

Texas Legal Services Center
[redacted]

Texas Public Interest Research Group
[redacted]

Common Cause
[redacted]

Common Ground for Texans
[redacted]

Texans for Public Justice
[redacted]

Community not Commodity
[redacted]

Clean Elections Texas
[redacted]

Moveon.org
[redacted]

Center for Public Policy Priorities
[redacted]

Dallas Peace and Justice Center
[redacted]

# Public Comments - Public Hearing

Presented here are the comment excerpts from the October 10, 2018 public hearing. The public hearing was related to the following proposed rule changes:

- Rule 1.02 Scope and Objectives of Representation
- Rule 1.05 Confidentiality of Information
- Rule 1.16 Clients with Diminished Capacity

Provided below are comment excerpts from the public hearing held on October 10, 2018 at 10:00 a.m. at the Texas Law Center.

| First Name | Last Name | Comments |
|---|---|---|
| Bob | Schuwerk | Um, my question is, really about the 102 and 116 change. Um, the- the rule 1.16 as I read it, uh, it requires nothing of lawyers.<br>I mean, it- it vests complete discretion to do or not to do, in various things. And, so I- I kinda wonder why it isn't a comment. Uh, rather than a rule. I didn't- for years we more or less, with very rare exceptions, follow the- the idea that, if we weren't willing to tell lawyers they had to do something or they could not do something, it did- it wasn't a rule, but rather it was a comment.<br>Um, course, if you eliminate paragraph G, it would- there's nothing for it to be a comment too. Because there's nothing left anywhere in the rules that talks about the particular issues that are addressed in rule 1.16. So I was just curious as to whether this a one and done, that was seen as a special need to give lawyers more guidance in this area, so we're gonna break the general rule of, the rules actually imposing obligations, or, on lawyers, or whether this is a more general change in philosophy in rule drafting.<br>Yeah, so, it looks- maybe I read it too hastily-<br>But as I read rule 1.16 It offers lawyers suggestions on how they might wish to proceed. Gives them the freedom to proceed. Um, but does not tell them to do anything. Uh, and- and my concern with things like that is that, if nothing forbade a lawyer to do those things, until now, rule 1.16 is not necessary as aa disciplinary rule.<br><br>I- I have no quarrel by the way, with the substance of rule 1.16, I mean, I- I'm not saying that those suggestions to lawyers are misguided or inappropriate at all, it's just that they don't seem to me to be rule material. |

| First Name | Last Name | Comments |
|---|---|---|
| Holly | Taylor | Hi, my names Holly Taylor, I'm the rules attorney for the court of criminal appeals. And I mainly just have a few questions.<br>So, my first question is, are there any people who are criminal law practitioners on your committee?<br>Okay. And is the term diminished capacity defined in the rules anywhere?<br>That- That's something that has some concern to us. There are very specific, uh, criminal law statutes. I haven't had that much time to look at it to be honest, I saw this posting yesterday, so [laughter]. Um. I- There are very specific criminal law statutes having to do with what a, uh, criminal defense attorney needs to do, when they have, and what a judge needs to do when they have concerns about the capacity of- of the attorney's client. And so, I- I just, I'm just wondering whether the committee has considered, uh, the interaction between those code of criminal procedures statutes and this rule, the new rule proposed.<br>Sure. I guess- The thing that caught our eye was 1.16, sub-section C<br>Which, uh, when taking protective action pursuant to subsection B, the lawyer may disclose the client's confidential information to the extent the lawyer resonabl- l- reasonably believes is necessary to protect the client's interest. We just had some concerns 'cause it seems like some pretty broad language, especially given that the term "diminish capacity" is not defined. Uh ...<br>W- well, but, um, under the comments th- I- I- it makes it ... Again, as professor [Schuwerk 00:24:32] were saying, there's lost of comments say, "No, your, your duty is to, a- as little as possible to accomplish that task and protect the client." You don't go back 20 years, you don't say that, you know ... You have to judge the minimal information that would allow you to comply with this, so I'm sorry that all the rules aren't, uh, all- aren't available. All the comments aren't. |

| First Name | Last Name | Comments |
|---|---|---|
| Charles | Herring | And uh ... Yeah, we, we do all the lawyering. I've got six lawyers and that's about all we do is law and order. Uh, legal malpractice, professional responsibility issues, representing lawyers and clients and grievance hearings and lawsuits and all of that. And helping lawyers and clients avoid problems when we can. But we work with these rules every day and, uh, some of it's in the firm. We're, um, involved heavily in the 2011, uh, referendum, uh, loss. All these ... Uh, the propose rules then ... And I, I would make two observations, if I may offer general observations based on what we learned through that. One is, um ... Because I have a lot of clients who are large law firms, multi jurisdictional law firms and actually small law firms now that are more multi jurisdictional [inaudible 00:26:16] that, uh, have moved into California and New York as well, where there's law they can actually practice, um, in some instances. Um, but, the big ... One of the big objections in 2011 that I heard from my client base, the multi jurisdictional firms, is please stick to the model rules-<br>-as closely as possibly because every time we do a firm manual, every time we're trying to have our national ethics conferences for our own firm and deal with our carriers, we have to talk about the, the variations. Now, it's a little bit noble to have variations because Bob [Schuwerk 00:26:51] and I get hired, as you do, to explain-<br>-the variations sometimes, but, but seriously for the-<br>-and the clients as well who ultimately bear their transactional cost, I would strongly recommend that the committee adhere whenever possible to the model rule language and if you need to amplify or explain a Texas twist, do that in a proposed comment whenever possible. It just makes life a whole lot-<br>-easier and it reduces the costs of the rules. I would also, uh, echo mister, uh, Leon's, uh, comment. Um, I heard earlier this week that, uh ... From public citizen who I've represented at times that they were not, had not been contacted, um, uh, by the committee. And I know you have the statutory obligation that mister Leon mentioned and, um, when I was on the Supreme Court's grievance oversight committee we worked with CDC, um, to develop a list of local organizations throughout the state that the bar could educate the public through concerning the grievance procedure, the [inaudible 00:27:55] procedure, the fact that you can file a grievance.<br><br>Um, and they had a pretty good list at the time and I would recommend that [crosstalk 00:28:01] this committee acquire that list and, by email or otherwise, just communicate because the public interest groups, particularly public citizen, was active in 2011. I'm sure they will be now. And the sooner you get them in the loop and the sooner they get buy in or you have an opportunity to get their comments, the better to avoid later, later opposition.<br>Um, I'm not gonna comment. I- I'll, I'll submit written comments on the, on the, uh, specific rules. On professor, uh, [Schuwerks's 00:28:30] comment I would amplify ... I think I looked at the rule. There is a ... In 1.16a you do have a mandatory. You do have a "shall" in there, but that's maintaining relationship. The 1.02g that you've pulled into 1.16 [crosstalk 00:28:47] new rule, um, you do have ... A lawyer may do this, may do that. Um, and, and as I think the professor mentioned, we see that in the ABA model rules. The preamble to the Texas Rules, however, says, " The rules ... A rule's a reason, the rules define proper conduct, they are imperatives cast in terms of 'shall' or 'shall not'."<br>Well, that rule, the way it's proposed now, the departs from that, um, and I think that's an important philosophical issue for your committee to address whether you wanna have suggestions in the rules, as opposed to the comments or ... Which is how we traditionally done that in Texas. I ... Whether you wanna leave the rules as rules of discipline, in terms of "shall", uh, and imperatives.<br>I, I've talked over my two minutes or three minutes. I'll, I'll stop there, but [crosstalk 00:29:39] will submit some, some detail comments, um, after this before your November, uh, w-, uh, your, uh ... November one deadline I think for written comments [crosstalk 00:29:48] |

| First Name | Last Name | Comments |
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| Carlos Leon | | First and foremost, for letting me speak at this public hearing. I'm a member of the public speaking for myself. For proposed Rule 1.05C9, "Published comments to specify to whom the lawyer may reveal confidential information to secure legal advice about the lawyer's compliance with these rules to close a potential loophole before it opens by intentionally limiting who is eligible to provide that legal advice to the inquiring lawyer. To minimize potential confidential information leakage, to maximally protect the lawyer, client and client's interests."<br>That legal advice provider should be required to not reveal to anyone else the confidential information revealed to him or her by the inquiring lawyer, amplifying consideration five from opinion number 673, issued by the Professional Ethics Committee for the State Bar of Texas, August 2018 in front of you now on record, handed out here at this meeting by me. In fact, not only do considerations one through four also appear applicable, but considerations two and three are critical when confidential information is electronically revealed and or discussed.<br>Because the electronic communication can be seen, heard, and or altered, and or shared by others like the NSA, which electronically vacuums it all up all the time. Should Rule 1.05C9 be adopted? Published comments explicating all this upfront to avoid creating negative outcomes for lawyers and their clients. In Jesus name I pray, Amen. Thank you, Lord. God bless Texas, the United States of America constitutional law and truth, and above all, God's word. |

# Public Comments - Public Hearing

Presented here is the complete transcript from the October 10, 2018 public hearing. The public hearing was related to the following proposed rule changes:

- Rule 1.02 Scope and Objectives of Representation
- Rule 1.05 Confidentiality of Information
- Rule 1.16 Clients with Diminished Capacity

The following is a transcript of the public hearing held on October 10, 2018 at 10:00 a.m. at the Texas Law Center.

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| Claude Ducloux: | 00:03 | All right, uh, welcome whoever is on the line with us today. I would ask that if you are on the line try to mute yourself so we don't hear, uh, your background noise or your, you know, your legal assistant coming in to talk to you. Good morning, everyone. I'm Claude Ducloux and seated next to me is Amy Bresnan. We are the members of here, uh, for the committee for Disciplinary Rules and Referenda, which we nicknamed CDRR. Our chair, Lewis Kinard, and-and other CDRR members are participating by teleconference. |
| Claude Ducloux: | 00:33 | Now and, uh, you might know, and for those of you who don't know, our committee was created by a new government code Section 81.072 to improve the disciplinary rule process. The committee is responsible for receiving, and analyzing, and recommending any disciplinary rule changes. Uh, today we are seeking your comments specific to our first batch of, uh, proposed rule changes and those are to the following. It's Rule 102, uh, the Scope and Objectives of Representation. There's a minor change to that. |
| Claude Ducloux: | 01:06 | Rule 105 on, uh, confidential, Confidentiality of Information. I know, uh, if you're here commenting you probably are aware of that. That's the rule that basically outlines those, uh, particular situations where a lawyer is allowed to divulge otherwise confidential information. And we have a spe-specific proposal that allows a lawyer now to seek ethics advice from another lawyer and to divulge information for that purpose. And Rule 116 and that deals ... 1.16 and that deals with clients with diminished capacity. |
| Claude Ducloux: | 01:40 | Now as part of this new process we have a fairly open and precise path to-to a process to follow, which allows lawyers and the public to comment. So in following that new procedure the-the committee published these, uh, proposed rule changes in the Texas Bar Journal and in the Texas Register, uh, and the |

committee will accept comments from you and from anyone through November 1st of 2018. And comments can be submitted at texasbar.com/CDRR. I'll say that two more times. You can submit comments online at texasbar.com/CDRR, texasbar.com/CDRR.

Claude Ducloux: 02:22 And, uh, if you wish to comment, uh, please fill here today, fill out please one of these blue cards and hand it up here to-to Amy and myself so we can call on-on you, uh, uh, specifically. Uh, and each speaker I-I don't we think we have a lot of speakers so we'll probably be a little more liberal than, uh, we didn't know what to expect. Uh, let me say we're all sort of here on a first date, uh, under the new statutes.

Claude Ducloux: 02:49 So I'll assure you though that the committee has met every single month and we've been working hard every single month to try to do what we collect-collectively believe will be, uh, in the interest of modernizing the rules to make them easier to understand, and to assist the profession and the public while protecting the integrity of the practice of law. And with that, I will open the meeting. What I'd like to do. I have one comment, uh, about ... do I have anyone that would like to comment on the Rule 102, the Scope and Objectives of Representation?

Claude Ducloux: 03:26 I only have one card so far and that's a different rule. I wanted to sort of see if it was an easy part of the process to-to do these in-in order. So if anybody would like to-to do that, that's, uh, fine. You know, so I don't have any comments. Mr. Kinard, we don't have any comments on that. All right, let's go to, uh, Rule 105. That's the situations where lawyers can divulge, uh, in-in certain circumstances confidential information.

Claude Ducloux: 03:57 You should have that, uh, before you, uh, and that basically says that in addition to those situations, uh, that a lawyer is allowed, that we can also divulge confidential information specifically for the lawyer to obtain ethics advice from an ethics attorney. And that seems like what we've always done anyway. I-I-I think that, I think Jack Herring is here and-and I both probably get three, or four, or 10 maybe, maybe he gets 10 calls a week from people saying, “Here's a situation." And of course, we always treat that as confidential information.

Claude Ducloux: 04:32 But it was nice to have this opportunity to clarify that rule saying, “Yeah, that's a specific exception also to go get ethics advice.” And of course you follow the rest of the rule and it says you can't divulge more than is necessary, and you have to pull back other things that have been instructed to you, uh, by your

client, but that's an exception. Uh, do I have any other comments on that rule? Well, I don't so I'm ... yes, go ahead.

Bob Schuwerk: 04:59 Yeah, I'm Marty. I just wanted to know whether your committee is rationing in comments as they change these rules and explain how they work?

Claude Ducloux: 05:07 Yes, we will be but the-the comments, uh, as we understand. And again, this is a new process. Uh, we believe the comments have to be sent to the Supreme Court. I will give you an example, though, for example. Now that Texas has statutes, uh, governing the disclosure of, uh, child abuse. When a lawyer has, uh, reliable knowledge of child abuse or elder abuse, there is a duty to disclose that. Well, we talked about putting that into a rule and then when we read all of the-the, uh, parameters for actually drafting rules, it appeared to us that that should be clarified in a comment.

Claude Ducloux: 05:45 So to say the lawyers' duty to disclose includes a legal and a-a duty if required by law to disclose that just clarifies for the lawyer that yes, you have the same duty. Of course, you have that underlying duty that you can't reveal more than is necessary. But we're going to clarify with three proposed comments to Rule 105 that there is a legal duty if you're, uh, if you're state or, uh -

Bob Schuwerk: 06:09 And those will eventually be circulated as the rules then?

Claude Ducloux: 06:13 Well, they're going to be available to see online, but I think those go to the court, uh, to enact comments. We have big ... uh, it's a great question because we had a big discussion during one of our meetings about well, do we try to pass, uh, comments as rules? And, uh, with all the best information and briefing we could do, we decided that no, we have to suggest comments to the court as a clarification rather than try and enact comments, because those are not part of the rules. Okay. So but yes.

Claude Ducloux: 06:46 The-the comments ... each one of these rules that there's usually at least a corresponding comment in one of the numbered comments under the rule that tries to clarify why-why that was added. This additionally clarifies that a lawyer has the right to receive, you know, ethics advice under confidentiality to make sure that he or she is pursuing the ethical path in representing this client. So that-that's what we'll have to. Uh, that of course, is a big rule of-of discussion. All right.

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| Claude Ducloux: | 07:20 | Now I think we're-we're down to then the-the 116 ... I'm sorry. |
| Claude Ducloux: | 07:26 | I'm sorry, yes. Carlos Leon. You can come over here if you want so that ... we can all hear you from there but I think if we're going to be making record, maybe you ought to use the microphone. |
| Carlos Leon: | 07:37 | Okay. |
| Claude Ducloux: | 07:38 | You wanted to talk first about, uh, Rule 105 and then I-I know you had another comment just simply about this procedure, and we'll hold onto-to that for a second. |
| Carlos Leon: | 07:47 | You got it, sir. So with Carlos Leon in Austin, Texas October 10, 2018 to speak what's right. |
| Claude Ducloux: | 07:57 | Yeah. |
| Carlos Leon: | 07:58 | First and foremost, for letting me speak at this public hearing. I'm a member of the public speaking for myself. For proposed Rule 1.05C9, "Published comments to specify to whom the lawyer may reveal confidential information to secure legal advice about the lawyer's compliance with these rules to close a potential loophole before it opens by intentionally limiting who is eligible to provide that legal advice to the inquiring lawyer. To minimize potential confidential information leakage, to maximally protect the lawyer, client and client's interests." |
| Carlos Leon: | 08:44 | That legal advice provider should be required to not reveal to anyone else the confidential information revealed to him or her by the inquiring lawyer, amplifying consideration five from opinion number 673, issued by the Professional Ethics Committee for the State Bar of Texas, August 2018 in front of you now on record, handed out here at this meeting by me. In fact, not only do considerations one through four also appear applicable, but considerations two and three are critical when confidential information is electronically revealed and or discussed. |
| Carlos Leon: | 09:32 | Because the electronic communication can be seen, heard, and or altered, and or shared by others like the NSA, which electronically vacuums it all up all the time. Should Rule 1.05C9 be adopted? Published comments explicating all this upfront to avoid creating negative outcomes for lawyers and their clients. In Jesus name I pray, Amen. Thank you, Lord. God bless Texas, the United States of America constitutional law and truth, and above all, God's word. |

Claude Ducloux: 10:16 Thank you very much and I know one of the things that we are addressing, because I think of your concerns was cyber security and that is another area that we are looking at, uh, at least adding additional comments that lawyers have to keep up with, uh, the latest technology and the details of preserving all confidential information when using digital methods of communication. So your-your words are well taken, and well spoken, and I appreciate your being here. Uh, because let's have ... does anybody else, did anybody fill out a blue card or would you like to make a comment? We, I think we have time if somebody would like to make a comment.

Claude Ducloux: 11:01 I know that, uh, I did receive some comments, uh, saying that in-in our, uh, descriptions we, uh, varied from the, uh, model rule of the ABA by not including the word, uh, and appointment of a guardian and instead we added the phrase, "Or submission of an information to ... submitting an information with jurisdiction to initiate a guardianship, uh, proceedings for the client." And we did that in contemplation that the way the Texas probate, uh, system works.

Claude Ducloux: 11:34 And, uh, also a-a concern, a maximum concern that not put a lawyer in a position where he or she would be deciding on a guardianship him or herself. So we-we think that we made a good choice. That was I think the one, uh, diversion from the ABA model rule that we made in this and we, uh, took it under a great consideration. I do appreciate very much, and I welcome those people who commented because.

PART 1 OF 3 ENDS [00:12:04]

Claude Ducloux: 12:00 Appreciate very much, and I welcome those people who commented because, as they were telling us, its easier to pass these rules if you're saying are model rules. But we think we have an obligation to endure that they, uh, meet, uh the mandates of Texas law and consider other things that are happening in the law.

Claude Ducloux: 12:18 Um, there is also, I will say there are also, if, unless anybody has any comments, there is also a comment uh on that, that the model rule says, uh, "You- in- in subsection C, that the law is allowed to re- to reveal, uh, to the extent, re- reasonably necessary." Well we clarified that to say, "under whose standard? What the lawyer knows?" So we said that the lawyer reasonably believes is necessary, because you have to examine what's in the lawyer's knowledge when he's doing that.

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| Claude Ducloux: | 12:50 | For example, it might be typical in a case, and I'm making up this example, I'm not speaking on behalf of the committee, I'm just saying it would be- if you believe your client is declining, your first obligation might be to tell that lawyer's spouse. But if the lawyer's acknowledged that there is some conflict going on between this spouse, you might say, "I need to reveal this outside of that." |
| Claude Ducloux: | 13:12 | So, it's- you can do that to what you reasonable believe is the best way to transmit that information. That was the purpose of clarifying it's what that- what that is. Even though it's a minor variance from the, uh, model rule. Uh, I'm- I'm, now, I- There was one more Mr. Carlos, you had a comment about, it less there- I don't have any more blue cards so, I want to address, you additionally had some comments about process that you wanted to, and you filled out a blue card and I think you have a minute left, so you can go ahead, or you can just- we'll allow you what you- the time you need to do that. |
| Carlos Leon | 13:46 | Oh, yeah I would appreciate that. |
| Claude Ducloux: | 13:47 | Sure. |
| Carlos Leon | 13:48 | I'll go back over there. |
| Claude Ducloux: | 13:49 | That's fine. Thank you. |
| Carlos Leon | 13:50 | I might need a little more than 3 minutes 'cause I'm gonna ask 'em to put your web page on the screen for all of us to view, and that's what- will give the actual call number. |
| Claude Ducloux: | 13:58 | I don't think we can do that this miring, but go ahead. I'm- I'm happy to tell you your- |
| Carlos Leon | 14:02 | Oh, we can't do that? I appreciate you letting me know. |
| Claude Ducloux: | 14:03 | Sure. |
| Carlos Leon | 14:06 | Okay. So according to the September 2018 Texas Law journal, page 622, in front you of you, its on the other side of my hand out. You said, quote, "Pursuing to government codes section 81.076, the committee publishes the following proposed rules." That's false. Because it's actually pursuant to government code section 81. 0876. |

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| Carlos Leon | 14:33 | Two sentences later, you said, quote, "Comments can be submitted at texlaw.com/cdrr." Really? Where and how on the webpage do you expect that to happen? |
| Claude Ducloux: | 14:44 | Right. |
| Carlos Leon | 14:45 | I'd say put it on screen but I know we can't do that, so I'll just continue. |
| Carlos Leon | 14:48 | Further, there's no announcement of this public hearing on your webpage or on the state bar of Texas Event calender or list. All of that directly contradicts government code 81.0876a4, which says, "This committee shall 'make all reasonable efforts to solicit comments from different geographic regions in this state, not attorney members of the public, and members of the state bar' not following that statue negatively affects 81.0876c and e." Which say, quote, "The committee shall give interested parties at least 30 days from the date the proposed disciplinary rule is published, to submit comments on the rule to the committee." End that quote. On conclusion of the comment period described by sub-section C, the committee may amend the proposed disciplinary rule, in response to the comments. End quote. |
| Carlos Leon | 15:40 | Therefore, I respectfully suggest you immediately take the following action. First of all, fix these mistakes. Second, uh, next to the announcement, or first of all, put this announcement on your actual webpage, the CDRR website page. Then second, next to the announcement, create 2 hyperlinks. One to the text of the proposed rule changes, as printed on pages 622 and 623, and one to a specific comment box for visitors to type or attach comments on the proposed rule changes that you are required by law to make all reasonable efforts to solicit. Lastly, someone needs to be assigned the responsibility to make sure these tasks get done right now, and from now on. For future proposed rule charges or be held accountable if not. |
| Claude Ducloux: | 16:37 | Thank you. |
| Claude Ducloux: | 16:38 | Thank you very much, those were excellent suggestions and indeed, as I said this is our first public hearing, it's our first publication, I think we can do and we will do a better job in publishing this to all the stakeholders and people who would like to have, uh, input on that. And I appreciate that you brought that to our attention. |
| Claude Ducloux: | 16:56 | Uh, I'm not sure since I don't have the statute on me, I think, it- that should probably be 0872etC. Which means and the |

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| | | sequential provisions after that. But we'll look at that and make sure that we accurately, and I think that's an excellent idea. I think it's- people would love to just be able to say, "I can go here, look at the rule, and have make a comment," And- and then we can have those. Those are excellent ideas and I hope that our IT people could make that- that happen. 'Cause it's a- it's a great idea Carlos. And, again, this is a- a great benefit you've done by being at our meeting this morning. |
| Carlos Leon | 17:31 | Thanks for hearing and considering. |
| Claude Ducloux: | 17:35 | Okay. Um, and of course, if anybody has any comments to any of these rules, or wants to discuss them further, we have time. And, uh, yes. |
| Michelle Jordan: | 17:43 | We need a blue card |
| Claude Ducloux: | 17:43 | What? |
| Michelle Jordan: | 17:45 | We need a blue card |
| Claude Ducloux: | 17:46 | Oh we- |
| Bob Schuwerk | 17:46 | Um, yeah [inaudible 00:17:49]. |
| Claude Ducloux: | 17:49 | Would you- would you fill out a blue card, so we can keep a record of that? |
| Bob Schuwerk | 17:53 | I'll fill that out [crosstalk 00:17:57] and hand it up to you. |
| Bob Schuwerk | 17:59 | Uh, good miring, my name is Bob Schuwerk for those of you who don't know me. Was on the- |
| Claude Ducloux: | 18:03 | Welcome, Professor Schuwerk. |
| Bob Schuwerk | 18:05 | Thank you. On the rules committee for some years, as you know. Um, my question is, really about the 102 and 116 change. Um, the- the rule 1.16 as I read it, uh, it requires nothing of lawyers. |
| Claude Ducloux: | 18:22 | Mm-hmm (affirmative) |
| Bob Schuwerk | 18:23 | I mean, it- it vests complete discretion to do or not to do, in various things. And, so I- I kinda wonder why it isn't a comment. Uh, rather than a rule. I didn't- for years we more or less, with very rare exceptions, follow the- the idea that, if we weren't willing to tell lawyers they had to do something or they could |

not do something, it did- it wasn't a rule, but rather it was a comment.

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| Bob Schuwerk | 18:51 | Um, course, if you eliminate paragraph G, it would- there's nothing for it to be a comment too. Because there's nothing left anywhere in the rules that talks about the particular issues that are addressed in rule 1.16. So I was just curious as to whether this a one and done, that was seen as a special need to give lawyers more guidance in this area, so we're gonna break the general rule of, the rules actually imposing obligations, or, on lawyers, or whether this is a more general change in philosophy in rule drafting. |
| Claude Ducloux: | 19:35 | I don't think it's a general change in philosophy at all. I think uh, we've been- we've tried to be careful in reading those and- and that why, for example, in my clarification, it was pointed out that that shouldn't be in a rule, it should be in a comment. And so we are- we are concentrating a lot on the comments to clarify those things. I- Is it your position that the rule doesn't require anything? Is that what it- it is? |
| Bob Schuwerk | 19:57 | Yeah, so, it looks- maybe I read it too hastily- |
| Claude Ducloux: | 20:00 | In other words it looks too much like a comment. |
| Bob Schuwerk | 20:01 | But as I read rule 1.16 It offers lawyers suggestions on how they might wish to proceed. Gives them the freedom to proceed. Um, but does not tell them to do anything. Uh, and- and my concern with things like that is that, if nothing forbade a lawyer to do those things, until now, rule 1.16 is not necessary as aa disciplinary rule. |
| Claude Ducloux: | 20:34 | Well- |
| Bob Schuwerk | 20:35 | I- I have no quarrel by the way, with the substance of rule 1.16, I mean, I- I'm not saying that those suggestions to lawyers are misguided or inappropriate at all, it's just that they don't seem to me to be rule material. |
| Claude Ducloux: | 20:49 | Okay. I- I understand that we do have those debates all the time and I appreciate those comments. |
| Bob Schuwerk | 20:54 | Sure. |
| Claude Ducloux: | 20:57 | Thanks very much. Thank you for making the effort to appear, Professor. |

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| Bob Schuwerk | 21:04 | That's alright. [inaudible 00:21:05] [laughter] |
| Claude Ducloux: | 21:06 | Okay. Uh, anybody else, uh, want to make a comment? Yeah. Hi. |
| Claude Ducloux: | 21:13 | Can I have your blue cards so I can have it for the record? |
| Holly Taylor: | 21:18 | I mean, I could give you my card or I could just give you my name? I'm an attorney. |
| Claude Ducloux: | 21:21 | Okay, yeah I think- |
| Michelle Jordan: | 21:22 | You need a blue card. |
| Claude Ducloux: | 21:22 | We- Pardon? |
| Michelle Jordan: | 21:22 | You need a blue card. |
| Claude Ducloux: | 21:25 | Yeah, we- we, unfortunately, under the statute I think we need to keep a record. |
| Audience Member | 21:28 | Well, the concern we had was that, she's an attorney, I'm in a judge run courtroom, and she's an attorney in our court, and so, I guess [inaudible 00:21:38]. |
| Claude Ducloux: | 21:39 | Oh, I- I think everybody- all I know is what I'm told to do, and that's everybody's suppose to, you know, file a blue card. |
| Holly Taylor: | 21:46 | I'm on the rules committee for our court, hence how we- we knew you [inaudible 00:21:49]. |
| Claude Ducloux: | 21:48 | Thank you. Again, this is our- the first hearing, I'm- I'm gonna follow the rules. Just gonna [laughter]. Thank you. Yes, please. |
| Holly Taylor: | 21:58 | Hi, my names Holly Taylor, I'm the rules attorney for the court of criminal appeals. |
| Claude Ducloux: | 22:01 | Thank you very much. |
| Holly Taylor: | 22:02 | And I mainly just have a few questions. |
| Claude Ducloux: | 22:04 | Sure. |
| Holly Taylor: | 22:04 | So, my first question is, are there any people who are criminal law practitioners on your committee? |

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| Claude Ducloux: | 22:11 | Yes. Uh, and- and in fact, uh Rick Hagen's on the committee and you will see an up coming- Uh, hello? Are you there? Rick? |
| Rick Hagen: | 22:21 | Yes I'm here. |
| Claude Ducloux: | 22:21 | Okay, so he's on the court. |
| Holly Taylor: | 22:22 | Right. |
| Claude Ducloux: | 22:22 | And he is a- a very viable and outspoken voice on thing that need to be done for the criminal lawyers. |
| Holly Taylor: | 22:29 | Okay. And is the term diminished capacity defined in the rules anywhere? |
| Claude Ducloux: | 22:35 | I am not sure. [laughter] |
| Holly Taylor: | 22:36 | Okay. |
| Claude Ducloux: | 22:40 | I- I don't think so. |
| Holly Taylor: | 22:41 | That- That's something that has some concern to us. There are very specific, uh, criminal law statutes. I haven't had that much time to look at it to be honest, I saw this posting yesterday, so [laughter]. Um. I- There are very specific criminal law statutes having to do with what a, uh, criminal defense attorney needs to do, when they have, and what a judge needs to do when they have concerns about the capacity of- of the attorney's client. And so, I- I just, I'm just wondering whether the committee has considered, uh, the interaction between those code of criminal procedures statutes and this rule, the new rule proposed. |
| Claude Ducloux: | 23:21 | Uh, well I can tell you, nothing in our rules obviates the Texas estate's code, the- any other rules, uh, that it does, that are applicable to the definition to diminished capacity. Uh, this of course, is- deals with the ethical obligations when you sense that there is. But I- I think the lawyers under the duty to observe diminished capacity, under the guides of the laws that would be applicable to that situation. If its criminal defendants, certainly if- If they're criminal definitions that would be it if it's a probate situation, you'd probably look to the- he or she would probably look to the estates code. |
| Holly Taylor: | 23:58 | Sure. I guess- The thing that caught our eye was 1.16, sub-section C |

PART 2 OF 3 ENDS [00:24:04]

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| Holly Taylor: | 24:00 | -that caught our eye was 1.16 subsection C. |
| Claude Ducloux: | 24:04 | Yes. |
| Holly Taylor: | 24:04 | Which, uh, when taking protective action pursuant to subsection B, the lawyer may disclose the client's confidential information to the extent the lawyer resonabl- l- reasonably believes is necessary to protect the client's interest. We just had some concerns 'cause it seems like some pretty broad language, especially given that the term "diminish capacity" is not defined. Uh ... |
| Holly Taylor: | 24:27 | W- well, but, um, under the comments th- I- I- it makes it ... Again, as professor [Schuwerk 00:24:32] were saying, there's lost of comments say, "No, your, your duty is to, a- as little as possible to accomplish that task and protect the client." You don't go back 20 years, you don't say that, you know ... You have to judge the minimal information that would allow you to comply with this, so I'm sorry that all the rules aren't, uh, all- aren't available. All the comments aren't. |
| Claude Ducloux: | 24:55 | But yes, we're- ... That what- that's what we're trying to do with those comments. |
| Holly Taylor: | 24:59 | Okay. Thank you. |
| Claude Ducloux: | 25:00 | Thank you very much for your comment. Thank you for being here, judge. [inaudible 00:25:03] we have a judge on the court of criminal appeals here today. Thank you, I appreciate that. Uh, u- uh, Chuck, did you have a comment or something like that? |
| Charles Herring: | 25:12 | Well, wasn't going to, but the Bob said something [inaudible 00:25:15] |
| Claude Ducloux: | 25:12 | Alright. |
| Charles Herring: | 25:16 | And we get a- |
| Claude Ducloux: | 25:16 | Can't let, uh, uh, professor [Schuwerk 00:25:18] [crosstalk 00:25:18] speak. Pardon ... Yeah, he's gonna fill out a card. He, he, he promises to fill out a card. |
| Charles Herring: | 25:23 | Uh, first of all, thank you for doing this. It's a lot of work. |
| Claude Ducloux: | 25:27 | [crosstalk 00:25:27] The imminent, uh, Charles Herring. |

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| Charles Herring: | 25:29 | And uh ... Yeah, we, we do all the lawyering. I've got six lawyers and that's about all we do is law and order. Uh, legal malpractice, professional responsibility issues, representing lawyers and clients and grievance hearings and lawsuits and all of that. And helping lawyers and clients avoid problems when we can. But we work with these rules every day and, uh, some of it's in the firm. We're, um, involved heavily in the 2011, uh, referendum, uh, loss. All these ... Uh, the propose rules then ... And I, I would make two observations, if I may offer general observations based on what we learned through that. One is, um ... Because I have a lot of clients who are large law firms, multi jurisdictional law firms and actually small law firms now that are more multi jurisdictional [inaudible 00:26:16] that, uh, have moved into California and New York as well, where there's law they can actually practice, um, in some instances. Um, but, the big ... One of the big objections in 2011 that I heard from my client base, the multi jurisdictional firms, is please stick to the model rules- |
| Claude Ducloux: | 26:34 | Whenever possible [crosstalk 00:26:35] |
| Charles Herring: | 26:35 | -as closely as possibly because every time we do a firm manual, every time we're trying to have our national ethics conferences for our own firm and deal with our carriers, we have to talk about the, the variations. Now, it's a little bit noble to have variations because Bob [Schuwerk 00:26:51] and I get hired, as you do, to explain- |
| Claude Ducloux: | 26:53 | Yeah. |
| Charles Herring: | 26:53 | -the variations sometimes, but, but seriously for the- |
| Claude Ducloux: | 26:56 | (laughs) |
| Charles Herring: | 26:57 | -and the clients as well who ultimately bear their transactional cost, I would strongly recommend that the committee adhere whenever possible to the model rule language and if you need to amplify or explain a Texas twist, do that in a proposed comment whenever possible. It just makes life a whole lot- |
| Charles Herring: | 27:15 | -easier and it reduces the costs of the rules. I would also, uh, echo mister, uh, Leon's, uh, comment. Um, I heard earlier this week that, uh ... From public citizen who I've represented at times that they were not, had not been contacted, um, uh, by the committee. And I know you have the statutory obligation that mister Leon mentioned and, um, when I was on the Supreme Court's grievance oversight committee we worked |

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| | | with CDC, um, to develop a list of local organizations throughout the state that the bar could educate the public through concerning the grievance procedure, the [inaudible 00:27:55] procedure, the fact that you can file a grievance. |
| Charles Herring: | 27:57 | Um, and they had a pretty good list at the time and I would recommend that [crosstalk 00:28:01] this committee acquire that list and, by email or otherwise, just communicate because the public interest groups, particularly public citizen, was active in 2011. I'm sure they will be now. And the sooner you get them in the loop and the sooner they get buy in or you have an opportunity to get their comments, the better to avoid later, later opposition. |
| Charles Herring: | 28:21 | Um, I'm not gonna comment. I- I'll, I'll submit written comments on the, on the, uh, specific rules. On professor, uh, [Schuwerks's 00:28:30] comment I would amplify ... I think I looked at the rule. There is a ... In 1.16a you do have a mandatory. You do have a "shall" in there, but that's maintaining relationship. The 1.02g that you've pulled into 1.16 [crosstalk 00:28:47] new rule, um, you do have ... A lawyer may do this, may do that. Um, and, and as I think the professor mentioned, we see that in the ABA model rules. The preamble to the Texas Rules, however, says, " The rules ... A rule's a reason, the rules define proper conduct, they are imperatives cast in terms of 'shall' or 'shall not'." |
| Charles Herring: | 29:11 | Well, that rule, the way it's proposed now, the departs from that, um, and I think that's an important philosophical issue for your committee to address whether you wanna have suggestions in the rules, as opposed to the comments or ... Which is how we traditionally done that in Texas. I ... Whether you wanna leave the rules as rules of discipline, in terms of "shall", uh, and imperatives. |
| Charles Herring: | 29:35 | I, I've talked over my two minutes or three minutes. I'll, I'll stop there, but [crosstalk 00:29:39] will submit some, some detail comments, um, after this before your November, uh, w-, uh, your, uh ... November one deadline I think for written comments [crosstalk 00:29:48] |
| Claude Ducloux: | 29:48 | Thank you. Well, we need to hear from, uh, all of you lawyers who practice in the area of legal ethics. It's very important input. Um [crosstalk 00:29:57] |
| Charles Herring: | 29:57 | Probably you don't. Probably you don't. |
| Claude Ducloux: | 29:59 | [crosstalk 00:29:59] I know you're, I know you're teasing. |

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| Charles Herring: | 30:01 | Yeah, the other ... Following up on that, the other thing that we found in the referendum, at the end we had groups like the criminal defense lawyers who were very upset, you haven't talked to us about this and you're proposing that rule, the [plies 00:30:14] lawyers. Now, in the real world, regular human beings don't ever wanna hear about these rules and regular lawyers don't. But sometimes they have to. |
| Claude Ducloux: | 30:23 | Right. |
| Charles Herring: | 30:23 | And to avoid opposition, and avoid ... 'Cause you're not just writing a rule, you're writing an election ballet proposition. And the legacy you have inherited is a, uh, 80% defeat the last time on, on basically identical rules you're proposing right now, uh, for the two, uh, as far as you've gotten. Um, you've gotta do something different. You've gotta get more buy-in I think, more outreach, uh, or else, uh, people are gonna say, "You're just selling the same goods that the buyers rejected overwhelmingly last time." You will hear that- |
| Claude Ducloux: | 30:57 | Yeah. |
| Charles Herring: | 30:58 | -if you get contested rules. And so, the more you get buy-in, the more you get participation I think the better. It's hard to do, but [crosstalk 00:31:04] |
| Claude Ducloux: | 31:04 | Well, it's, uh ... You know what, l- let me just make one r- [inaudible 00:31:07] and that is simply we spend so many hours looking at these and, uh, sometimes there are rules are, are in the public and in the lawyer's best interest. Even if they were defeated under that process last time, they, uh, you know with better explanations and, uh ... But we're hopeful that we're, we're trying. Really, everyone on this committee is motivated to do what we really think is in the best and we're, we're aware of that history. We're aware of the history of referendu- and we will move forward. |
| Claude Ducloux: | 31:39 | But your comments are extremely well taken, they are noted and we, we wanna make a better, uh, process [crosstalk 00:31:47] |
| Charles Herring: | 31:47 | -res- respond very briefly if I might. |
| Claude Ducloux: | 31:48 | Yeah. |
| Charles Herring: | 31:48 | Uh, one of the benefits you have, one of the advantages you have, and, as professor [schuwerk 00:31:53], uh, and I both |

commented after the, the debacle in 2011, um, the way the proposals were packaged in five or six general propositions ... You had controversial rules lumped in with rules [crosstalk 00:32:07]

Claude Ducloux: 32:07 Exactly. We're aware of that.

Charles Herring: 32:08 And you now have the advantage. And we work with Senator Watson to make sure that this would be true, that there is a separate vote on every rule. And so, your ... You don't have that, uh, detriment.

Claude Ducloux: 32:18 Right, right.

Charles Herring: 32:18 And I think that's a great freedom-

Claude Ducloux: 32:20 [crosstalk 00:32:20] with all that, that whole rule package if you hated one rule you voted everything down [crosstalk 00:32:24] Everything was thrown out. There was great stuff in there that never made it because-

Charles Herring: 32:27 That was a great way not to do it and-

Claude Ducloux: 32:29 Right.

Charles Herring: 32:29 -and you're not handicapped by that fortunately.

Claude Ducloux: 32:31 Right. Thank you very much-

Charles Herring: 32:32 Thank you.

Claude Ducloux: 32:33 -uh, Mr. Herring. I appreciate your appearance. Uh, does anyone else have any, uh, additional comments here? Thank you all then for your, uh, attendance at our first meeting, again. As I say, we're on our first date here trying to w- w- work this process with you. I think we'll t- we'll continue to improve it and we'll tr- continue to make every effort to make, uh, uh, comments more accessible and easily, uh, made to future, uh, rules. We do anticipate you're gonna see some more rules coming out in the, uh, in the d- in December bar journal that's going to streamline some of our a- advertising procedures that are the, the subject of, of a great amount of, uh, problem for a lot of lawyers, so controversy is, is, uh, the nicest word, uh, that I can say.

Claude Ducloux: 33:20 So, thank you all very much. All of the comments were just wonderful. I, I am just honored to, to be here, uh, to preside

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| | | today in the absence of Mr. Kinard, uh, Lewis. Are you still there? |
| Lewis Kinard: | 33:32 | Yes, hi. Thank you, Claude for handling this. I very much appreciate it. [inaudible 00:33:37] today. |
| Claude Ducloux: | 33:37 | Okay. Thank you very much. And with that, I think we'll, we'll close the hearing and, you know ... I don't wanna say fire up the margaritas or [inaudible 00:33:47] (crowd laughs) |
| Claude Ducloux: | 33:46 | Than- (laughs) Thank you very much. We're adjourned. |
| Lewis Kinard: | 33:50 | Thank you. |
| Charles Herring: | 33:50 | Thank you. |

PART 3 OF 3 ENDS [00:33:57]