Summary of Proposed Disciplinary Rules
For Tentative 2021 Rules Vote
(*Updated 8.5.20*)

In 2017, the Texas Legislature amended Chapter 81 of the Government Code to create the Committee on Disciplinary Rules and Referenda (CDRR) and to overhaul the disciplinary rule proposal process. In order to be adopted under the new process, a proposed rule must be approved by the CDRR, the State Bar Board of Directors, State Bar membership, and the Supreme Court of Texas. The following is a summary of proposed rules or rule changes that may be included in a tentative February 2021 Rules Vote. Each proposal relates to the Texas Disciplinary Rules of Professional Conduct (TDRPC) and/or the Texas Rules of Disciplinary Procedure (TRDP).

Recommended by CDRR and Approved by Board

Confidentiality of Information – Exception to Permit Disclosure to Secure Legal Ethics Advice
Adds Rule 1.05(c)(9), TDRPC, which permits a lawyer to disclose confidential information to secure legal advice about the lawyer's compliance with TDRPC.

Scope and Objectives of Representation; Clients with Diminished Capacity
Amends Rule 1.02, TDRPC, by deleting paragraph (g) and revising an internal reference, and adds Rule 1.16, TDRPC, which is intended to provide improved guidance to lawyers when representing a client with diminished capacity.

Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services
Adds Rule 6.05, TDRPC, which provides very narrow exceptions to certain conflict of interest rules when a lawyer provides limited pro bono legal services through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, or nonprofit legal services program.

Assignment of Judges in Disciplinary Complaints and Related Provisions
Amends Rules 3.01 to 3.03, TRDP, by transferring assignment duties from the Supreme Court to the Presiding Judges of the Administrative Judicial Regions when a respondent in a disciplinary complaint elects to proceed in district court, relaxing geographic restrictions on assignments, and clarifying procedures involved.

Information About Legal Services (Lawyer Advertising and Solicitation)
Amends Part VII, TDRPC, by simplifying and modernizing lawyer solicitation and advertising rules. Among other changes, the proposal simplifies disclaimer and filing requirements, while maintaining the prohibition on false or misleading communications about a lawyer's qualifications or services. The proposal permits a lawyer to practice law under a trade name that is not false or misleading.

Voluntary Appointment of Custodian Attorney for Cessation of Practice
Adds Rule 13.04, TRDP, which authorizes a lawyer to voluntarily designate a custodian attorney to assist with the designating attorney's cessation of practice and provides limited liability protection for the custodian attorney.

Approved by CDRR and Board Vote Expected in September 2020

Confidentiality of Information – Exception to Permit Disclosure to Prevent Client Death by Suicide
Adds Rule 1.05(c)(10), TDRPC, which permits a lawyer to disclose confidential information when the lawyer has reason to believe it is necessary to do so in order to prevent a client from dying by suicide.

Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline
Amends Rule 8.03, TDRPC, and Rules 1.06 and 9.01, TRDP, by extending self-reporting and reciprocal-discipline provisions to cover certain discipline by a federal court or federal agency.

For more information about the proposals or about the CDRR, go to texasbar.com/CDRR.

July 22, 2020

Mr. John Charles "Charlie" Ginn, Chair
State Bar of Texas Board of Directors
McCraw Law Group
[redacted]

RE: Submission of Proposed Rule Recommendation – Rule 1.05(c)(10), Texas Disciplinary Rules of Professional Conduct

Dear Mr. Ginn:

Pursuant to section 81.0875 of the Texas Government Code, the Committee on Disciplinary Rules and Referenda initiated the rule proposal process for proposed amendments to Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, relating to confidentiality of information and clients contemplating suicide. The Committee published the proposed rule changes in the *Texas Bar Journal* and the *Texas Register*. The Committee solicited and considered public comments and held a public hearing on the proposed rule changes. At its July 2020 meeting, the Committee voted to recommend proposed Rule 1.05(c)(10) to the Board of Directors.

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

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

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

Sincerely,

Lewis Kinard
Chair, Committee on Disciplinary Rules and Referenda

cc: Larry P. McDougal Sr.
Sylvia Borunda Firth
Randall O. Sorrels
Trey Apffel
John Sirman
Ray Cantu
KaLyn Laney
Seana Willing
Ross Fischer

Committee on Disciplinary Rules and Referenda
Overview of Proposed Rule

Rule 1.05(c)(10), Texas Disciplinary Rules of Professional Conduct
Confidentiality – Clients Contemplating Suicide

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda (Committee) related to proposed Rule 1.05(c)(10) of the Texas Disciplinary Rules of Professional Conduct (TDRPC), pertaining to the permissive disclosure of confidential information to prevent a client from dying by suicide.

Actions by the Committee

- **Initiation** – The Committee voted to initiate the rule proposal process at its January 16, 2020, meeting.
- **Publication** – The proposed rule was published in the April 2020 issue of the *Texas Bar Journal* and the March 27, 2020, issue of the *Texas Register*. The proposed rule was concurrently posted on the Committee's website. Information about the public hearing and the submission of public comments was included in the publications and on the Committee's website.
- **Additional Outreach** – Email notifications regarding the proposed rule were sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices), Committee email subscribers, and other potentially interested parties on April 1, June 1, and June 10, 2020. Additional email notifications were sent to Committee email subscribers on May 1 and June 15, 2020.
- **Public Comments** – The Committee accepted public comments through June 20, 2020, as well as any written public comments received before its July 8, 2020, meeting. The Committee received a total of 11 written public comments from 10 individuals.
- **Public Hearing** – On June 18, 2020, the Committee held a public hearing by Zoom teleconference. No members of the public addressed the Committee at the public hearing.
- **Recommendation** – The Committee voted at its July 8, 2020, meeting to recommend the proposed rule to the Board of Directors (Board) with certain amendments.

Overview

By a letter dated December 18, 2019, Noelle Reed, Chair of the Commission for Lawyer Discipline (Commission), submitted a formal request on behalf of the Commission for the Committee to initiate the rule proposal process and consider certain amendments related to Rule 1.05, TDRPC, with regard to clients contemplating suicide.[1] As described in Commission Chair Reed's letter, "[s]uicide and threats of suicide are not unusual in legal matters - particularly in emotionally charged, high-conflict cases involving divorce, child custody, and domestic

[1] *See* Letter from Commission Chair Noelle Reed to Committee Chair Lewis Kinard (Dec. 18, 2019) at page 8 of this packet.

violence."[2] The letter further described that "[a]ccording to calls to the Office of the Chief Disciplinary Counsel (CDC) ethics helpline, lawyers involved in these types of cases frequently encounter clients who are contemplating suicide, causing the lawyer to wrestle with his/her moral obligation to try to stop the client from committing the act and his/her ethical obligations to maintain client confidentiality under Rule 1.05."[3]

Currently, the TDRPC do not include a provision expressly addressing or authorizing the disclosure of confidential information[4] with regard to a client contemplating suicide.

Rule 1.05(c)(7) includes an exception permitting the disclosure of confidential information "[w]hen 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." Additionally, Rule 1.05(e) includes a mandatory disclosure requirement related to the prevention of "a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person" under certain circumstances. However, attempted suicide is not a criminal act under Texas law or the laws of the vast majority of other states.[5] Attempted suicide is also not a fraudulent act.

The Commission request letter offered suggested amendments to Rule 1.05(c)(7) and Rule 1.05(e).[6]

At its January 16, 2020, meeting, the Committee voted to initiate the rule proposal process as requested by the Commission. After careful deliberation, the Committee voted to publish proposed changes to Rule 1.05(c)(7), which would permit a lawyer to reveal confidential information based on a reasonable belief that such disclosure is necessary to prevent a client from dying by suicide.[7] The Committee decided not to propose changes to Rule 1.05(e).[8]

In response to a public comment and to meet the recommendations of the mental health community, the Committee subsequently amended the proposal by changing the phrase "committing suicide" to "dying by suicide."[9] Further, the Committee voted to move the proposed

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[2] *Id.*

[3] *Id.*

[4] Rule 1.05 broadly defines "confidential information" to include information protected by the lawyer-client privilege, as well as unprivileged information "relating to a client or furnished by the client… acquired by the lawyer during the course of or by reason of the representation of the client." Rule 1.05 generally prohibits a lawyer from revealing confidential information without an applicable exception, and also restricts the use of confidential information to the disadvantage of a client or former client.

[5] As noted in Commission Chair Reed's letter, "although some may argue that a client threatening suicide may be likely to utilize criminally prohibited methods to carry out such an act (thereby potentially authorizing disclosure), a lawyer's ability to act should not turn on this fact-specific and unsettled analysis, particularly in a situation in which time may be of the essence." *See* Commission Chair Reed's Letter at page 8 of this packet.

[6] *See id.*

[7] The version originally published by the Committee, which is available at page 11 of this packet, used the phrase "committing suicide," but subsequent amendments, described herein and available at page 12 of this packet, changed that language to "dying by suicide."

[8] The Committee had concerns that, due to the mandatory language of Rule 1.05(e), an amendment to that provision could lead to potential increased disciplinary liability in situations where the lawyer may be unsure about the likelihood of attempted suicide by a client. The proposed permissive exception, on the other hand, merely *protects* a lawyer who acts on a reasonable belief that such disclosure is necessary to prevent the client from dying by suicide.

[9] *See* the final recommended version of the proposed rule at page 7 of this packet.

new provision regarding clients contemplating suicide to a new subparagraph (c)(10),[10] thereby leaving current subparagraph (c)(7) unchanged.[11] As amended and recommended by the Committee, proposed Rule 1.05(c)(10) provides:

> (c) A lawyer may reveal confidential information:
>
> ***
>
> (10) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide.

Public Comments

The Committee received public comments supporting and opposing the proposed changes.

One lawyer, who is on the board of the American Association of Suicidology, expressed strong support for the proposal, but suggested the Committee amend the proposal to use the phrase "dying by suicide" (an amendment which the Committee subsequently adopted).[12] That lawyer, who frequently speaks to lawyers about suicide prevention, stated, "[t]he subject of confidentiality was always in the mix. For Texas, at least, the problem will be fixed."[13]

Other lawyers expressed concerns that adoption of the proposed changes would require a lawyer to make a mental health determination and, at least one, questioned whether the proposed changes would expose a lawyer to increased liability.[14] However, the proposed rule only gives the lawyer the *permissive option* of disclosing confidential information when the lawyer has a *reasonable belief* it is necessary to prevent the client from dying by suicide, thereby *protecting* the lawyer from professional discipline under such circumstances. A lawyer is not required to disclose confidential information under the proposed rule, nor is the lawyer required to make a medical determination. Further, under the current TDRPC, even if a lawyer knows with certainty that a client intends to attempt suicide imminently, there is no exception that expressly permits a lawyer to reveal confidential information to prevent the client from dying by suicide. The proposed rule will add clarity to the TDRPC, as many lawyers are uncertain how current Rule 1.05 applies to the prevention of client death by suicide.

Another lawyer expressed concerns that the proposed changes do not go far enough and advocated that the disclosure of confidential information should be mandatory when a lawyer reasonably believes it is necessary to prevent a client from dying by suicide.[15] While appreciative

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[10] Rule 1.05(c) currently includes eight subparagraphs, and the Board has already approved a separate proposal, which is numbered as proposed Rule 1.05(c)(9).
[11] *See id.*
[12] *See* Public Comment from Searcy Simpson at page 17 of this packet.
[13] *See id.*
[14] *See, e.g.*, Public Comments from Richard Wilson (page 22 of this packet), Clint Blackman III (page 25 of this packet), and Kevin Owens (page 26 of this packet).
[15] *See* Public comment from John Kiraly at page 24 of this packet.

of the lawyer's feedback, the Committee felt the proposed rule strikes an appropriate balance by allowing, but not requiring, the disclosure of confidential information under such circumstances.[16]

Additional Documents

Included on the pages that follow are the final recommended version of proposed Rule 1.05(c)(10), the published proposal that appeared in the April 2020 issue of the *Texas Bar Journal*, amendments to the published proposal, and public comments received.

[16] Subparagraphs (e) and (f) of Rule 1.05 address the mandatory disclosure of confidential information.

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.05. Confidentiality of Information

Proposed Rule 1.05(c)(10) – July 2020 Recommended Version

Proposed Rule (Redline Version)

Rule 1.05. Confidentiality of Information

***

(c) A lawyer may reveal confidential information:

***

(10) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide.

***

Proposed Rule (Clean Version)

Rule 1.05. Confidentiality of Information

***

(c) A lawyer may reveal confidential information:

***

(10) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide.

***

STATE BAR OF TEXAS

Noelle Reed
Chair, Commission for Lawyer Discipline

December 18, 2019

Mr. Lewis Kinard, Chair
Committee on Disciplinary Rules and Referenda
P.O. Box 12487
Austin, TX 78711

Dear Chairman Kinard:

Pursuant to Sec. 87.0875(c)(3) of the Texas Government Code, the Commission for Lawyer Discipline (CFLD) respectfully requests that the Committee on Disciplinary Rules and Referenda (CDRR) initiate the rule proposal process and consider certain amendments to (1) Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct (TDRPC); and (2) TDRPC Rule 8.03(f), along with Rule 1.06 and/or Rule 9.01 of the Texas Rules of Disciplinary Procedure (TRDP).

I. TDRPC Rule 1.05 and the Suicidal Client

Suicide and threats of suicide are not unusual in legal matters - particularly in emotionally charged, high-conflict cases involving divorce, child custody, and domestic violence. According to calls to the Office of the Chief Disciplinary Counsel (CDC) ethics helpline, lawyers involved in these types of cases frequently encounter clients who are contemplating suicide, causing the lawyer to wrestle with his/her moral obligation to try to stop the client from committing the act and his/her ethical obligations to maintain client confidentiality under Rule 1.05. Although Rule 1.05 includes exceptions permitting and/or requiring the disclosure of confidential information to prevent a client from committing a criminal or fraudulent act under certain circumstances, under Texas law, suicide is neither a crime nor a fraudulent act. Therefore, under Rule 1.05 as it is currently drafted, an attorney risks violating Rule 1.05 by disclosing confidential information he/she believes is necessary to prevent a client from committing suicide.

Many lawyers who have encountered this situation have told CDC ethics attorneys that they would be willing to risk discipline in order to attempt to prevent a client from committing suicide. Others have indicated that revealing a client's confidential information in an effort to prevent the client from committing suicide would not be worth the risk. All agree that bringing clarity and certainty to the rule would be helpful.

Additionally, although some may argue that a client threatening suicide may be likely to utilize criminally prohibited methods to carry out such an act (thereby potentially authorizing disclosure), a lawyer's ability to act should not turn on this fact-specific and unsettled analysis, particularly in a situation in which time may be of the essence.

Rule 1.05(c)(7) governs the permissive disclosure of confidential information to prevent a criminal or fraudulent act by a client, while Rule 1.05(e) governs mandatory disclosure of information necessary to prevent a criminal or fraudulent act by a client. The following suggested amendments to Rule 1.05 would address the current gap regarding a client contemplating suicide.

1.05(c) A lawyer may reveal confidential information:

…

(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**, or any other act that is likely to result in death or substantial bodily harm to a person, including the client, regardless of whether it constitutes a criminal act**.

…

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

II. Reciprocal Discipline for Federal Court or Federal Agency Discipline.

Currently, the CDC does not have express authority to issue reciprocal discipline against an attorney who has been sanctioned, suspended, or disbarred from practicing in federal court, including a bankruptcy or immigration court. Under TDRP Rule 1.06(CC)(2), reciprocal discipline may be pursued for attorney misconduct that results in discipline issued in another state or in the District of Columbia. Though federal judges and federal agencies, such as the Executive Office for Immigration Review (EOIR), do not sanction attorneys with great frequency, attorneys licensed in Texas should not be able to avoid reporting federal court discipline to the CDC under TDRPC Rule 8.03(f), nor should they be able to avoid reciprocal discipline in Texas, when such discipline is warranted to protect the public.

TDRPC Rule 8.03(f) reads as follows:

A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment.

TRDP Rule 1.06(CC)(2) reads as follows:

"Professional Misconduct" includes:

Attorney conduct that occurs in another state or in the District of Columbia and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct.

TRDP Rule 9.01 reads as follows:

Orders From Other Jurisdictions: Upon receipt of information indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction, the Chief Disciplinary Counsel shall diligently seek to obtain a certified copy of the order or judgment of discipline from the other jurisdiction, and file it with the Board of Disciplinary Appeals along with a petition requesting that the attorney be disciplined in Texas. A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action under this Part, subject to the defenses set forth in Rule 9.04 below.

Addressing this gap could be accomplished in several ways: (1) amend TDRP Rule 9.01 to include the following language - "…an attorney licensed to practice law in Texas has been disciplined in another ~~jurisdiction~~ **state, by a federal court, or by a federal agency**…"; (2) amend TDRP Rule 1.06(CC)(2) to include the following language – "Attorney conduct that occurs in another state**, a federal court, before a federal agency,** or in the District of Columbia…"; (3) amend TDRPC Rule 8.03(f) to add the following language – "…the attorney-regulatory agency of another jurisdiction**, including a federal court or federal agency,** …"; or (4) add a separate definition under TDRP Rule 1.06 for "other jurisdiction" that would include federal courts and federal agencies. This change would enable the CDC to rely on orders or judgments of discipline issued by federal courts and agencies to more effectively address attorney misconduct without having to separately prove the underlying allegations and without the risk that the statute of limitations bars a new action for the underlying misconduct.

On behalf of the Commission and the Chief Disciplinary Counsel, we thank you in advance for your consideration of these proposed changes.

Please contact us if you need additional information or have any questions or concerns.

Respectfully yours,

Noelle Reed, Chair
Commission for Lawyer Discipline

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.05. Confidentiality of Information

The Committee on Disciplinary Rules and Referenda, or CDRR, was created by Government Code section 81.0872 and is responsible for overseeing the initial process for proposing a disciplinary rule. Pursuant to Government Code section 81.0876, the Committee publishes the following proposed rule. The Committee will accept comments concerning the proposed rule through June 20, 2020. Comments can be submitted at texasbar.com/CDRR or by email to CDRR@texasbar.com. A public hearing on the proposed rule will be held at 10:30 a.m. on June 18, 2020, in Room 101 of the Texas Law Center (1414 Colorado St., Austin, Texas, 78701).

Proposed Rule (Redline Version)

1.05. Confidentiality of Information

***

(c) A lawyer may reveal confidential information:

***

(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, or from committing suicide.

***

Proposed Rule (Clean Version)

1.05. Confidentiality of Information

***

(c) A lawyer may reveal confidential information:

***

(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, or from committing suicide.

*** TBJ

To: Committee on Disciplinary Rules and Referenda (CDRR)

From: CDRR Subcommittee on Proposed Changes to Rule 1.05, Texas Disciplinary Rules of Professional Conduct (Timothy Belton, Amy Bresnen, Claude Ducloux)

Date: July 1, 2020

Re: Proposed Amendments – Proposed Changes to Rule 1.05 with Regard to Clients Contemplating Suicide

CDRR recently published proposed changes to Rule 1.05, Texas Disciplinary Rules of Professional Conduct, to address the disclosure of confidential information as related to clients contemplating suicide.

To meet the recommendations of the mental health community, the Subcommittee previously recommended amending the proposal to change proposed new language from "committing suicide" to "dying by suicide."

Additionally, the Subcommittee now recommends moving the proposed new provision regarding clients contemplating suicide to a new subparagraph (c)(10). This amendment would leave current subparagraph (c)(7) unchanged, and would instead create a new subparagraph that focuses exclusively on the disclosure of confidential information when the lawyer has reason to believe it is necessary to prevent the client from dying by suicide.

As recommended by the Subcommittee, the amended proposal would read as follows (proposed new language underlined):

Proposed Rule
1.05. Confidentiality of Information

***

(c) A lawyer may reveal confidential information:

***

(10) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide.

***

Committee on Disciplinary Rules and Referenda
Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.05. Confidentiality of Information
(Confidentiality and Clients Contemplating Suicide)

Public Comments Received
Through July 8, 2020

From: Ken Horwitz
To: cdrr
Subject: RE: New Proposed Rule Changes Published and Public Hearing Update
Date: Wednesday, April 1, 2020 9:21:56 AM

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

The country is shut down and you are holding a public hearig?

Kenneth M. Horwitz
Glast, Phillips & Murray, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254
(972) 419-8383 (phone)
(469) 206-5031 (fax)

From: State Bar of Texas - CDRR [mailto:cdrr@texasbar.com]
Sent: Wednesday, April 01, 2020 9:08 AM
To: Ken Horwitz
Subject: New Proposed Rule Changes Published and Public Hearing Update

State Bar of Texas

Proposed Rule Changes

New Proposed Rule Changes Published
April 7, 2020, Public Hearing Update

New Proposed Rule Changes Published for Public Comment

The Committee on Disciplinary Rules and Referenda has published proposed changes to Rule 1.05.

Texas Disciplinary Rules of Professional Conduct, in the April issue of the *Texas Bar Journal* and the March 27 issue of the *Texas Register*. The proposed rule changes relate to the disclosure of confidential information with regard to a client contemplating suicide.

The Committee has also published proposed changes to Rule 8.03, Texas Disciplinary Rules of Professional Conduct, and Rules 1.06 and 9.01, Texas Rules of Disciplinary Procedure, in the April issue of the *Texas Bar Journal* and the March 27 issue of the *Texas Register*. The proposed rule changes relate to the reporting of professional misconduct and reciprocal discipline for federal court or federal agency discipline.

The Committee will accept comments concerning the above-referenced proposed rule changes through June 20, 2020. Comments on the proposed rule changes can be submitted here.

Public hearings on the above-referenced proposed rule changes will be held at 10:30 a.m. on June 18, 2020. (Any updates to the public hearings will be posted at texasbar.com/cdrr/participate.)

April 7, 2020, Public Hearing Update

Lawyer Advertising and Solicitation Rules
Voluntary Appointment of Custodian Attorney for Cessation of Practice

The Committee on Disciplinary Rules and Referenda will hold a public hearing on proposed changes to Part VII, Texas Disciplinary Rules of Professional Conduct, and proposed Rule 13.04, Texas Rules of Disciplinary Procedure, at 10:30 a.m. on April 7, 2020. The Committee will continue to accept comments on these proposed rule changes through April 10, 2020. Comments can be submitted here.

UPDATE: As a safety precaution related to the coronavirus, the Committee will hold the April 7 public hearings by teleconference only. The updated participation information is as follows and replaces the previous number provided:

Join from PC, Mac, iOS or Android Device:
Meeting URL: https://texasbar.zoom.us/j/265275523
Meeting ID: 265 275 523
Telephone Audio or Audio-Only:
888-788-0099 (Toll Free)
Meeting ID: 265 275 523
(Bridge will open at 10:00 a.m. Meeting will begin at 10:30 a.m.)

If you plan to participate in either public hearing on April 7, it is requested that you email CDRR@texasbar.com in advance of the hearing with your name and the public hearing item you wish to speak on so the Committee can group speakers by topic during the hearings. To allow enough time for all who wish to be heard during the hearings, the Committee may limit initial comments from each speaker to three minutes, and extend that time if the Committee needs further discussion with the speaker.

Additional Information

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

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

Sincerely,
Committee on Disciplinary Rules and Referenda

Committee on Disciplinary Rules and Referenda

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

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Change in Rule 1.05
Date: Wednesday, April 1, 2020 10:14:33 AM

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

Contact

First Name	Searcy
Last Name	Simpson
Email	[redacted]
Member	Yes
Barcard	18408800

Feedback

Subject	Proposed Change in Rule 1.05

Comments

The proposed change is excellent with one necessary change needed. For a number of years the word “committing” is no longer used. The phrase which needs to be used is “dying by suicide.” I am on the board of directors for the American Association of Suicidology or I would not have been in the know about this important distinction. See https://suicidology.org/ I am pleased to see this change. I frequently speak to lawyers across the country about preventing suicide. The subject of “confidentiality” was always in the mix. For Texas, at least, the problem will be fixed. (c) A lawyer may reveal confidential information: *** (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, or from committing suicide.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rules Regarding "Compentency Attorneys" and Similiar Proposals
Date: Wednesday, April 1, 2020 1:09:14 PM

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

Contact

First Name	Richard
Last Name	Edgell
Email	[redacted]
Member	Yes
Barcard	6420900

Feedback

Subject	Proposed Rules Regarding "Compentency Attorneys" and Similiar Proposals

Comments

1. Better Law already exists. 2. The Law has been Improved and "tweeked" for centuries. 3. The Law already provides a very high standard of "utmost good faith and fair dealing" under equitable and trust law to protect attorneys and everyone else. 4. The Texas Supreme Court is elected. 5. It is the Supreme Court for the Constitution, Laws, Statutes, and other laws of the State of the State of Texas, not the State Bar of Texas, which is or should be the attorneys who having fulfilled the requirements of the law and having been approved by the State Board of Law Examiners are entitled to license as an Attorney and Counselor at Law and having taken the oath provided by law are authorized to practice as Attorney and Counselor at Law in all the Courts of the State of Texas, and the Clerk of the Supreme Court of the Texas may affix the Seal of the Supreme Court of the Supreme Court, at Austin, or apparently has done so, for example, "this 5th day of November AD 1982" for Richard Baxter Edgell. 6. The State Bar of Texas is not an administrative agency. 7. The Texas Legislature cannot delegate judicial power it does not have to the State Bar of Texas or any other person or thing, because the Texas Constitution uses principles such as separation of powers and checks and balances between legislative, executive, and judicial branches and this is consistent with Federal law including the Constitution, Laws, and Statues of the United States. 8. Prior to entry into the Union or union with the Union, the Republic of Texas provided higher standards than the Constitution, Laws, and Statutes of the United States, including the "Rule" and "Open Courts." There is a Baylor Law School Law Review article which you can find which discusses this in detail. 9 Texas insisted, and the United States agreed, that Texas could have higher standards than the United States in the Texas judicial system. 10. The "Open courts" were not vigilante groups or the so-called "Klan." People have lied or been misinformed about this. 11. Concluding, rely on existing law, including trust law, which includes the utmost good faith and fair dealing standard, to avoid losing the work of all Texas ethnic groups who suffered, fought, and died to maintain high standards including Texas trust law and the utmost good faith and fair dealing standard in 1. previously stated. I strongly recommend that the proposed rules not be adopted because they are unconstitutional; violative of statutory law; arbitrary and capricious; not supported by substantial evidence as to their necessity or quality; not supported by subject matter jurisdiction, or notice jurisdiction because no one's life, liberty,. or property are safe while the Legislature, a governmental entity purporting to be like the Legislature, or other such entity, are in session (and the judicial power is different from the legislative power, and because of this we have the Open Courts of the State of Texas which are always to be in session), and further with regard to Texas jurisdiction generally, there are legal limits on any particular group of persons or people to change the laws of the State of Texas, especially those that have provided a higher standard than the Federal standard since the time of the Republic of Texas and before the Republic of the State of Texas; and for the other reasons stated in Government Code 2002 (which may have been amended; but which may be found and researched, unless perhaps you, for example, forge books, alter books, fail to return books, or engage in other such activity; in which case, the Open Records Act may provide you copies of certain records, subject to exceptions and restrictions for such things as privacy, health, and safety, if you provide

reasonable payment, for example for copying costs; and the Texas Open Records Act is similar to Federal Congressional legislation and meets Federal standards, most likely), I waive none of my rights. Respectfully submitted, Richard B. Edgell, Attorney at Law, SBOT 06420900 today when I checked by computer. I do not give my current address or residence in Mexico, to protect myself and others, including responsible police and judiciary, and I can do that, under Texas law, in Rio Rancho, this 1st day of April, AD 2002 Regardless of whom I am or hwe I identify myself, the arguments are still the same and can be judged on their merits..

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Change to Rules Regarding Suicide
Date: Tuesday, April 7, 2020 4:09:49 PM

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

Contact

First Name	Kee
Last Name	Ables
Email	[redacted]
Member	Yes
Barcard	24009854

Feedback

Subject	Proposed Change to Rules Regarding Suicide

Comments

I agree to the proposed change.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Changes to Rule 1.05
Date: Monday, June 1, 2020 4:17:53 PM

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

Contact

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

Feedback

Subject	Proposed Changes to Rule 1.05

Comments

I oppose the change because, although it is uncomfortable to contemplate, there is no consensus that suicide is inherently irrational. We keep client confidences every day about conduct that we may find extreme, morally reprehensible, or that has irreversible consequences, but is not criminal or fraudulent.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Change to Disciplinary Rule 1.05
Date: Wednesday, June 10, 2020 9:49:58 AM

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

Contact

First Name	Richard
Last Name	Wilson
Email	[redacted]
Member	Yes
Barcard	00794967

Feedback

Subject	Proposed Change to Disciplinary Rule 1.05

Comments

As a defender of attorneys against malpractice claims and grievances, I am concerned about and opposed to the proposed change to DR 1.05 to permit the disclosure of confidential information when an attorney BELIEVES the client will commit suicide. What education and understanding do attorneys have to make this subjective determination? We are educated on crime and fraud, and on every other exception in subpart c. We are not doctors educated on depression and suicidal thoughts. Do not create an exception for subjective beliefs outside our area of expertise.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Change to Rule 1.05(c)(7)
Date: Wednesday, June 10, 2020 10:12:59 AM

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

Contact

First Name	Millie
Last Name	Thompson
Email	[redacted]
Member	Yes
Barcard	24067974

Feedback

Subject	Proposed Change to Rule 1.05(c)(7)

Comments

I disagree with the proposed change that adds that an attorney may reveal attorney-client privileged information when the client might commit suicide. People who tell others they are suicidal are asking for help. Those who intend to commit suicide, and don't want interference, don't tell anyone their plans. Based on experience with Veterans with PTSD, when someone expresses suicidal thoughts, they are seeking help to prevent the suicide. Those folks are typically open to the recipient of the information contacting people that can help. Meaning, the clients that tell lawyers they are suicidal will also typically waive confidentiality - they want help. There's no need for an ethical-out when the clients will likely waive privilege, anyway. Further, most people (including lawyers) don't realize that the police cannot help people experiencing mental illness, mental health crises, etc. The police simply lack the tools to productively help. All they can do is arrest (and use force to effectuate the arrest). Giving lawyers a way to call the police on clients for something like this will lead to unfortunate situations where police pull their weapons on vulnerable people. Perhaps, the rule or notes could say something to the effect of "a lawyer may disclose *to an entity or person whose mission is to help those experiencing mental health crises, like psychiatrists, the Veterans Administration, or similar. Peace officers are not considered to be appropriate people to whom the lawyer may report such information." We don't need more law enforcement contact with the public. Police can't fix everything. Let's stop digging that hole.

From: john kiraly
To: cdrr
Subject: Proposed Rule Change 1.05
Date: Wednesday, June 10, 2020 12:41:36 PM

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

Good afternoon.

When I look at this rule as it was and as it is proposed, I take issue with the fact that it is discretionary because of the use of the word "may."

I believe that we need to take a stand as a State Bar and make this a mandate for attorneys by ensuring that all attorneys always act responsibly in the face of potential: crime, fraud, or self-harm of a client. By not taking a stand, we have watered down the very essence of our responsibilities and the trust that the public has put in us.

Repace the word "may" with the word "shall" or we have accomplished nothing by this change.

Proposed Rule (Redline Version)

1.05. Confidentiality of Information

***
(c) A lawyer may reveal confidential information:

***
(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, or from committing suicide.

--
Kind Regards,

John M. Kiraly, Esq.
Attorney at Law
[redacted]
Texas Bar Lic # 24103169

From: [redacted]
To: cdrr
Subject: CDRR Comment: Rule 1.05 Confidentiality of Information
Date: Wednesday, June 10, 2020 3:45:56 PM

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

Contact

First Name	Clint
Last Name	Blackman III
Email	[redacted]
Member	Yes
Barcard	00789977

Feedback

Subject	Rule 1.05 Confidentiality of Information

Comments

To the Committee on Disciplinary Rules and Referenda: In reference to your public hearing slated for June 18, 2020, I state the following concerns in opposition to the proposed changes to Rule 1.05 regarding confidential information: The proposed change to Rule 1.05 regarding suicide would force legal counsel to make mental illness decisions. It is a known fact that trained and licensed mental illness professionals often times cannot accurately determine if a patient is serious about suicide or not. As lawyers we are not trained to make these decisions. Clients ask what happens at their death in the process of estate planning. Will we now be required to evaluate each and every client as to if they are suicidal? Say we have personal fears or concerns for a client, but they are wrong, will we cause the client to suffer trauma or damages because of a "suicide whistle" blown in error? Should we be liable for "I thought he might suicide" errors? Is it ethical to subject all of our clients to a new suicide scrutiny rule? How would we make such a suicide determination? The proposed rule does not answer any of these concerns or give us guidance on how to make these important determinations. If we decide a client has thoughts of suicide, who do we report this to? The proposed rule change does not tell us. If we report a client's confidential thoughts and their medical reasons, would we not violate the Federal HIPAA laws preventing disclosure of confidential medical information to persons the client has not authorized such disclosures? Is there some exemption in the HIPAA law that allows a state bar to create an exception to Federal law? I have not seen such an exemption. Lastly, if such a "suicide notice" ethical rule is created that allows a lawyer to notify authorities or someone that a client is considering suicide, is the lawyer liable to a decedent's family because the suicide was carried out and the lawyer didn't issue a notification to authorities? What if the client merely jokes about suicide? How many times do we hear: "I'll kill myself if _____ gets elected." Is that a real threat or is it a joke? The proposed rule does not give us any guidance on how to deal with these important nuances to understanding an ethical rule. Rules created to answer "heartache" issues rarely are good rules for every situation. Sincerely, Clint C. Blackman III Dallas, Texas

From: Kevin Owens
To: cdrr
Subject: comments concerning the proposed change to Rule 1.05. Confidentiality of Information
Date: Saturday, June 13, 2020 4:45:03 PM

Committee on Disciplinary Rules and Referenda Proposed Rule Changes (The Committee),

I send this email to provide you all with comments concerning the recent proposed rule change to Texas Disciplinary Rules of Professional Conduct Rule 1.05. Confidentiality of Information.

https://www.texasbar.com/Content/NavigationMenu/CDRR/Documents1/Rule1_05-Publication.pdf

Essentially, the proposed rule change adds a lawyer's belief that a client will commit suicide as an allowed reason to reveal confidential information. In providing comments I represent no one but myself, and in no way should they be read as the views of another person or organization. Everything that follows is nothing more than my non-expert opinion.

The Committee should reject the proposed rule change, despite how reasonable it appears at first glance. The general theme of what I write below is concisely expressed in Matthew 7:13–14:

> Enter by the narrow gate. For the gate is wide and the way is easy that leads to destruction, and those who enter by it are many. For the gate is narrow and the way is hard that leads to life, and those who find it are few.

https://biblia.com/bible/esv/matthew/7/13-14

The proposed rule change is an existential threat to the legal profession in Texas. It undermines the legitimacy of the lawyers because it materially weakens an attorney's duty of confidentiality to a degree that it will result in more harm than good. Confidential information will be revealed when it is not necessary--not even to prevent a client from committing suicide--leading to excessive harm to clients. It is practically impossible to discipline lawyers for misusing the reason added by the change that allows lawyers to reveal confidential information, creating the potential for the release of confidential information for any number of inappropriate reasons. Perhaps the true intent is to coerce a client to the benefit of the lawyer. Perhaps the true intent is to influence a jury to view the client more favorably. As long as the lawyer could provide an explanation reasonable enough to avoid discipline the "trick" will work. I ask the Committee to contemplate how the Chief Disciplinary Counsel would make the "right call" on grievances that report actual misconduct versus grievances reporting conduct permitted by the proposed rule change. If the Committee were to consider the topic, I think the Committee would understand the unresolvable, practical issues with enforcing the proposed rule change.

For example, a client has not paid a fee owed to the lawyer. Then, the lawyer reveals confidential information, and the lawyer states that it was because they had reason to believe it was necessary to do so in order to prevent the client from committing suicide. The client files a grievance, claiming that the real reason for the lawyer to reveal confidential information was to retaliate against the client for delaying payment of the fee. The Committee should consider two questions, 1) When the lawyer justifies their actions with reports of the client's statements and behavior, what constitutes "good enough" evidence for a lawyer to believe revelation of confidential information is necessary? 2) If the core issue is whether to believe the client or the lawyer, what "tools" might the Chief Disciplinary Counsel apply to reach a conclusion?

From the perspective of a lawyer, the proposed rule change puts lawyers in an unreasonably difficult position. Malpractice insurance may become prohibitively expensive. In addition, the emotional toll on lawyers should not be ignored: one would need to weight 1) the guilt resulting from a scenario where the lawyer did not reveal confidential information and the client committed suicide, against 2) the more predictable harm to the client, the case, and the lawyers professional reputation if the lawyer revealed confidential information, even if doing so did actually prevent the client from committing suicide.

If the Committee has not already done so, you all may want to solicit comments from the Texas State Board of Examiners of Psychologists.

http://www.tsbep.texas.gov/index.php

My opinion relies on a number of assumptions, some of which are philosophical and others are questions of fact.

- Lawyers are not psychologists, and it isn't reasonable to expect them to practice psychology (i.e., evaluate risk of suicide) in addition to the practice of law.
    - The proposed rule change is too vague. The standard for licensed psychologists in Texas is a probability of imminent physical harm to self or others. Strictly speaking, it is not enough for a client to desire to be dead, have thoughts of suicide (i.e., suicidal ideation), have a specific plan for how to commit suicide, and have access to the means to execute that plan: the risk must also be imminent. For example, if all of that were established and a client stated "I am going to leave now, I will not take my mobile phone with me, and I will kill myself" then a psychologist would have a strong justification for revealing confidential information. Psychologists might not adhere to such a strict standard in practice, but doing so opens them to the possibility of professional discipline and civil liability.
    - Arguably, the consequences from the revelation of confidential information would be more severe for a defendant in

a criminal case than if confidential information--as it relates to psychotherapy--were to be revealed by a psychologist. When one also considers that lawyers are less capable of assessing risk of suicide and the proposed standard for lawyers is less strict than for psychologists (i.e., "necessary" might not include "imminent"), the proposed rule change would be a recipe for disaster.

- "State of the art," "best in class," methods for measuring risk of suicide have significant limitations (i.e., even the "experts" get it wrong much of the time). Assume that it were possible for lawyers to use the best available methods for assessing risk of suicide. Even then, there is significant risk of false positives (i.e., unnecessary disclosure) and false negatives (i.e., revelation of confidential information would have prevented a completed suicide). One of the strongest predictors of suicide, depression, is relatively common. One of the most common methods to complete suicide is with a firearm, yet only a small percent of gun owners commit suicide each year. Instead of relying on my comments, I encourage the Committee to consider expert opinions regarding accuracy of state-of-the-art suicide risk assessment methodologies. I will link to a few web pages the Committee might want to consider.
    - https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0180292
    - http://patientsafety.pa.gov/ADVISORIES/documents/201810_assessingintent.pdf
    - https://ebmh.bmj.com/content/22/3/125
    - https://www researchgate net/publication/309145166_Suicide_Risk_Assessment_What_Psychologists_Should_Know
    - https://www.scientificamerican.com/article/suicide-risk-assessment-doesnt-work/
- The topic of suicide is highly emotionally charged (particularly for those personally affected by the suicide of a loved one), and those who have not sudied the topic likely have misconceptions. Reason and evidence might not be enough to persuade some people. Being smart or educated does not vaccinate one against the kind of error in judgement I am alluding to. I encourage the Committee to consider the possibility that personal bias may affect the Committee's decision making process.
- The materiality of harm from misuse of the proposed rule change is an "unknown unknown."
    - One hopes 100% of lawyers act ethically 100% of the time, but hope is not enough to rely upon. If it were, there would be no need for a disciplinary procedure. I believe most lawyers behave ethically "even when no one is looking." I do not intend to suggest malicious intent or negligence on the part of any lawyer. However, when considering rules of professional conduct, one should consider unscrupulous lawyers: 1) how the rules could encourage ethical behavior, and 2) how unscrupulous lawyers could "game" the rules to facilitate their unethical behavior.
    - It is reasonable to allow a lawyer to reveal confidential information in order to prevent a crime because there is reason to believe the threat of discipline discourages unpermitted disclosure of confidential information. Lawyers are experts at the law, and rules are enforced by those who are also experts at the law. Lawyers can be expected to be making the right call when they believe their client will commit a crime. The Chief Disciplinary Counsel can be expected to make the right call when reviewing grievances. Lawyers know this too, so the threat of discipline is credible. None of this holds when "risk of crime" is replaced with "risk of suicide."
    - To the extent rules of professional conduct effectively facilitate ethical behavior of otherwise unscrupulous lawyers (and I generally believe the rules are effective), it is difficult to accurately estimate the materiality of the harm these people could do. How many are there? What would they do if they believed they could successfully evade discipline for unethical behavior? These are not questions that anyone can answer.
    - Combined with practical challenges of detection and enforcement, if the proposed rule changes were adopted it would be practically impossible to measure the extent the changes would be misused. If the proposed rule changes are adopted and really do lead to problems so significant that the Committee would prefer to reverse the rule change, there is no way for the Committee to detect such a problem when it actually exists.
- At a philosophical level, a client that files a grievance along the lines of "my lawyer should not have believed revealing confidential information was necessary to prevent me from committing suicide" is faced with trying to prove a counterfactual. Again, this is less of a problem when the behavior in question is a crime or fraud. In addition, the credibility of a client that files such a grievance is likely to be doubted.

Please let me know if you have any questions.

Thank you,

Kevin Owens

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Changes to Rule 1.05, TDRPC – Relating to the Disclosure of Confidential Information and Clients Contemplating Suicide
Date: Sunday, July 5, 2020 6:33:59 PM

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

Contact

First Name	Kevin
Last Name	Owens
Email	[redacted]
Member	No

Feedback

Subject	Proposed Changes to Rule 1.05, TDRPC – Relating to the Disclosure of Confidential Information and Clients Contemplating Suicide

Comments

The updated wording and subparagraph placement (pg. 7 of the July 8, 2020 materials), in my opinion, does not save the proposal and it should not be approved. In addition to the reasons I and others have mentioned, the rule change is unnecessary for a few reasons. First, change to rule 1.05 under consideration is redundant because of the changes to rules 1.05 and 1.16 approved on April 26, 2019, 1.16(b) in particular. Second, it is not clear that revealing confidential information would be necessary to prevent a client from dying by suicide. The way this scenario would play out in real life is that a peace officer would make contact with the client as a result of the report made by the attorney. The peace officer would "investigate" and then determine if the client meets the criteria to be detained under the authority of section 573.001.(a) of the Texas Health and Safety Code. The criteria can be met based on information "from a representation of a credible person", see 573.001.(c)(1). An attorney saying nothing more than "I believe my client should be detained under section 573.001.(a)" would probably be enough to stop their client from dying by suicide.

Committee on Disciplinary Rules and Referenda

Transcript of Public Hearing on Proposed Changes to Rule 1.05, Texas Disciplinary Rules of Professional Conduct (Relating to Confidentiality and Clients Contemplating Suicide)
June 18, 2020 – By Zoom Teleconference

Video of the full Committee meeting, including the public hearings, is available at texasbar.com/CDRR.

Lewis Kinard:

So, second hearing is proposed changes to Rule 1.05, of the tes- Texas Disciplinary Rules of Professional Conduct. This is the confidentiality rule, relating to the disclosure of confidential information and clients, uh, contemplating suicide. Uh, it's on pages four through 18 of the materials. Uh, Brad, Cory, do we have anybody signed up to speak on this one?

Brad Johnson:

No Chair, no one has signed up currently, and if anyone on the, the phone or on the computer now would like to s- uh, speak on this, then again, be sure to raise your hand on the Zoom, uh, window, or ... and if you're on the phone, you can press star nine and that'll raise your hand.

Lewis Kinard:

I remember seeing a lot of comments on it, so I was kind of thinking people would, would sign up to, to speak.

Amy Bresnen:

Hey- hey Brad, would this be a good time to bring up the uh ... the moving of the provision to a standalone provision?

Claude Ducloux:

Yeah, I think so. Let's- let's do it.

Amy Bresnen:

Okay, so currently, this is located in (c)(7), which also mentions criminal and fraudulent acts ... uh, which usually involve a third party, uh, whereas suicide does not.

Claude Ducloux:

Right.

Amy Bresnen:

Furthermore there are lawyers who still think that committing suicide is legally a criminal act or, in some cases, a fraudulent act. So, we were discussing moving it to a standalone provision, let’s just say provision (10), because I think that the ethics one takes up-

Claude Ducloux:

Right.

Amy Bresnen:

... provision (9). In- in doing so, I- I think it would actually remove the stigma, that it has now by, by being in the same provision with the fraudulent and criminal act- activity. I- I think it would actually help um, this amendment pass, because we have-

Claude Ducloux:

Right. Standalone- just separate it from anything- you can reveal criminal stuff, or suicide, so take suicide out of the criminal acts, and they would- and, or, if you have a good faith that he may be in danger of dying by suicide, have its own uh ...

Amy Bresnen:

Yeah. It- it seems like if it's, if it's still in uh, provision seven, that it's almost a, a non s- um, a non-s ... sequitur. So ...

Rick Hagen:

Amy, can you get closer to your mic?

Amy Bresnen:

Yeah. Sorry about that, y'all. So, um-

Lewis Kinard:

So, um ... you know I- I think ... what we do with it on a- a um ... publishing and, and, um, process and how this is organized in the rule is, is not really a big substantive issue whether- we can figure that out once we get to our next decision point on this one.

Claude Ducloux:

Mm-hmm (affirmative).

Lewis Kinard:

Which is when, Brad? What do we have?

Brad Johnson:

You'll- uh, Committee, you'll have the option at your next meeting on July 8th, or at your August 5th meeting. Um, so as soon as the next meeting, you can vote on whether to amend and or recommend this to the Board of Directors.

Lewis Kinard:

Okay.

Claude Ducloux:

All right.

Lewis Kinard:

All right. And then, I'm assuming there's no one, uh, wishing to speak on 1.05, so we can close that hearing. Hearing no objections there. Move on to the third, uh, public hearing and discussion on proposed changes to Rule 8.03, Texas Disciplinary Rules of Professional Conduct, and related Rules 1.06 and 9.01 of Texas Rules of Disciplinary Procedure, relating to reporting professional misconduct and reciprocal discipline for federal court or federal agency discipline, pages 19 through 33 of the materials.

August 7, 2020

Mr. John Charles "Charlie" Ginn, Chair
State Bar of Texas Board of Directors
McCraw Law Group
[redacted]

RE: Submission of Proposed Rules Recommendation – Rule 8.03, Texas Disciplinary Rules of Professional Conduct, and Rules 1.06 and 9.01, Texas Rules of Disciplinary Procedure

Dear Mr. Ginn:

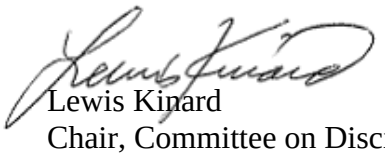
Pursuant to section 81.0875 of the Texas Government Code, the Committee on Disciplinary Rules and Referenda initiated the rule proposal process for proposed amendments to Rule 8.03 of the Texas Disciplinary Rules of Professional Conduct and Rules 1.06 and 9.01 of the Texas Rules of Disciplinary Procedure, relating to reporting professional misconduct and reciprocal discipline for federal court or federal agency discipline. The Committee published the proposed rule changes in the *Texas Bar Journal* and the *Texas Register*. The Committee solicited and considered public comments and held a public hearing on the proposed rule changes. At its August 5, 2020, meeting, the Committee voted to recommend the proposal to the Board of Directors with certain amendments.

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

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

As always, thank you for your attention to this matter and for your service to the State Bar. Should the Board require any other information, please do not hesitate to contact me.

Sincerely,



Lewis Kinard
Chair, Committee on Disciplinary Rules and Referenda

cc: Larry P. McDougal Sr.
Sylvia Borunda Firth
Randall O. Sorrels
Trey Apffel
John Sirman
Ray Cantu
KaLyn Laney
Seana Willing
Ross Fischer

Committee on Disciplinary Rules and Referenda
Overview of Proposed Rule Changes

Rule 8.03, Texas Disciplinary Rules of Professional Conduct
Rules 1.06 and 9.01, Texas Rules of Disciplinary Procedure

Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda (Committee) related to proposed changes to Rule 8.03 of the Texas Disciplinary Rules of Professional Conduct (TDRPC) and Rules 1.06 and 9.01 of the Texas Rules of Disciplinary Procedure (TRDP), pertaining to reporting professional misconduct and reciprocal discipline for federal court or federal agency discipline.

Actions by the Committee

- **Initiation** – The Committee voted to initiate the rule proposal process at its February 5, 2020, meeting.
- **Publication** – The proposed rule changes were published in the April 2020 issue of the *Texas Bar Journal* and the March 27, 2020, issue of the *Texas Register*. The proposed rule changes were concurrently posted on the Committee's website. Information about the public hearing and the submission of public comments was included in the publications and on the Committee's website.
- **Additional Outreach** – Email notifications regarding the proposed rule changes were sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices), Committee email subscribers, and other potentially interested parties on April 1, June 1, and June 10, 2020. Additional email notifications were sent to Committee email subscribers on May 1 and June 15, 2020.
- **Public Comments** – The Committee accepted public comments through June 20, 2020. The Committee received a total of 13 written public comments from 12 individuals.
- **Public Hearing** – On June 18, 2020, the Committee held a public hearing by Zoom teleconference. One member of the public addressed the Committee at the public hearing.
- **Recommendation** – The Committee voted at its August 5, 2020, meeting to recommend the proposal to the State Bar of Texas Board of Directors (Board) with certain amendments.

Overview

By a letter dated December 18, 2019, Noelle Reed, Chair of the Commission for Lawyer Discipline (Commission), submitted a request[1] on behalf of the Commission for the Committee to initiate the rule proposal process and consider certain amendments to Rule 8.03(f), TDRPC, and

[1] *See* Letter from Commission Chair Noelle Reed to Committee Chair Lewis Kinard (Dec. 18, 2019) at page 9 of this packet.

Rules 1.06 and/or 9.01, TRDP, to expressly extend self-reporting and reciprocal-discipline provisions to cover discipline by a federal court or federal agency.[2] As stated in Commission Chair Reed's letter:

> Under [Rule 1.06(CC)(2), TRDP], reciprocal discipline may be pursued for attorney misconduct that results in discipline issued in another state or in the District of Columbia. Though federal judges and federal agencies, such as the Executive Office for Immigration Review (EOIR), do not sanction attorneys with great frequency, attorneys licensed in Texas should not be able to avoid reporting federal court discipline to the [Office of the Chief Disciplinary Counsel] under TDRPC Rule 8.03(f), nor should they be able to avoid reciprocal discipline in Texas, when such discipline is warranted to protect the public.

At its February 5, 2020, meeting, the Committee voted to initiate the rule proposal process as requested by the Commission. After careful deliberation, the Committee voted to publish proposed changes to Rule 8.03, TDRPC, and Rules 1.06 and 9.01, TRDP.[3] The proposed changes extend self-reporting and reciprocal-discipline provisions to cover certain federal court or federal agency discipline.

In drafting the proposal, the Committee took care to include language defining what constitutes "discipline" by a federal court or federal agency for purposes of the proposed self-reporting and reciprocal-discipline requirements. As originally published for public comment, the proposed new language provided that, for purposes of Rule 8.03(f), TDRPC, and Part IX, TRDP, "'discipline' by a federal court or federal agency includes any action affecting the lawyer's ability to practice before that court or agency or any public reprimand; the term does not include a letter of 'warning' or 'admonishment' or a similar advisory by a federal court or federal agency."

After publication, the Committee deliberated on amending the proposed language to more narrowly define what constitutes "discipline" by a federal court or federal agency.

At its August 5, 2020, meeting, the Committee voted to amend the proposal to expressly limit the proposed new language for Rule 8.03(f), TDRPC, and Rule 9.01, TDRP, to define "'discipline' by a federal court or federal agency [to mean] *a public reprimand, suspension, or disbarment* [emphasis added]," and to recommend the proposal, as amended, to the Board.[4] The recommended proposal continues to clarify that "the term does not include a letter of 'warning' or 'admonishment' or a similar advisory by a federal court or federal agency." In particular, the

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[2] Currently, Rule 8.03(f), TDRPC, requires an attorney to report discipline by "the attorney-regulatory agency of another jurisdiction" to the Office of the Chief Disciplinary Counsel (CDC), and Part IX, TRDP, sets out procedures wherein the CDC shall petition the Board of Disciplinary Appeals requesting that the attorney "disciplined in another jurisdiction" be disciplined in Texas. Rule 9.01, TRDP, states, "A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action under this Part, subject to the defenses set forth in Rule 9.04 below."

[3] The proposed rule changes, as originally published for public comment in the April 2020 issue of the *Texas Bar Journal*, are available at page 12 of this packet.

[4] The proposed amendments adopted by the Committee are available at page 13 of this packet. The final recommended version of the proposal, which includes the aforementioned amendments, is available at page 6 of this packet.

Committee intended the amendments to clarify that the proposed self-reporting and reciprocal-discipline provisions are not applicable to mere procedural disqualification in a particular case before a federal court or federal agency.

Public Comments

The Committee received several public comments regarding the published proposal. A number of comments raised concerns about the scope of the originally published proposal based upon its inclusion of the phrase "any action affecting the lawyer's ability to practice before that court or agency" in its definition of "discipline" by a federal court or federal agency.[5]

As previously discussed, the Committee subsequently amended the proposal by expressly limiting "discipline" by a federal court or federal agency to mean "a public reprimand, suspension, or disbarment" for purposes of Rule 8.03, TDRPC, and Part IX, TRDP. The amended language recommended by the Committee clarifies that the provisions at issue are not intended to address mere procedural disqualification in a particular case before a federal court or federal agency, and are limited to the categories of discipline listed.

Further, Rule 8.05(a), TDRPC, specifies that a lawyer "may be disciplined here for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule. 8.04." Comment 3 to that Rule states, "[t]his state will not impose discipline for conduct arising in connection with the practice of law in another jurisdiction or resulting in lawyer discipline in another jurisdiction unless that conduct constitutes professional misconduct under Rule 8.04."

Additional Documents

Included on the pages that follow are the final recommended version of the proposed rule changes, the published proposal that appeared in the April 2020 issue of the *Texas Bar Journal*, amendments to the published proposal, and public comments received.

[5] *See, e.g.*, Public Comments from Jessica Lewis (page 20 of this packet), Richard Schafer (page 23 of this packet), Eddie Gomez (page 25 of this packet), and Allan Goldstein (page 26 of this packet).

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 8.03. Reporting Professional Misconduct

Texas Rules of Disciplinary Procedure
Rule 1.06. Definitions
Rule 9.01. Orders From Other Jurisdictions

(August 2020 Recommended Version)

Proposed Rules (Redline Version)

Texas Disciplinary Rules of Professional Conduct

Rule 8.03. Reporting Professional Misconduct

***

(f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, "discipline" by a federal court or federal agency means a public reprimand, suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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Texas Rules of Disciplinary Procedure

1.06. Definitions:

***

CC. "Professional Misconduct" includes:

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2. Attorney conduct that occurs in another ~~state or in the District of Columbia~~ jurisdiction, including before any federal court or federal agency, and results in the

disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct.

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9.01. Orders From Other Jurisdictions: Upon receipt of information indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction, including by any federal court or federal agency, the Chief Disciplinary Counsel shall diligently seek to obtain a certified copy of the order or judgment of discipline from the other jurisdiction, and file it with the Board of Disciplinary Appeals along with a petition requesting that the attorney be disciplined in Texas. A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action under this Part, subject to the defenses set forth in Rule 9.04 below. For purposes of this Part, "discipline" by a federal court or federal agency means a public reprimand, suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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Proposed Rules (Clean Version)

Texas Disciplinary Rules of Professional Conduct

Rule 8.03. Reporting Professional Misconduct

***

(f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, "discipline" by a federal court or federal agency means a public reprimand, suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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Texas Rules of Disciplinary Procedure

1.06. Definitions:

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CC. "Professional Misconduct" includes:

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2. Attorney conduct that occurs in another jurisdiction, including before any federal court or federal agency, and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct.

***

9.01. <u>Orders From Other Jurisdictions</u>: Upon receipt of information indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction, including by any federal court or federal agency, the Chief Disciplinary Counsel shall diligently seek to obtain a certified copy of the order or judgment of discipline from the other jurisdiction, and file it with the Board of Disciplinary Appeals along with a petition requesting that the attorney be disciplined in Texas. A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action under this Part, subject to the defenses set forth in Rule 9.04 below. For purposes of this Part, "discipline" by a federal court or federal agency means a public reprimand, suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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STATE BAR OF TEXAS

Noelle Reed
Chair, Commission for Lawyer Discipline

December 18, 2019

Mr. Lewis Kinard, Chair
Committee on Disciplinary Rules and Referenda
P.O. Box 12487
Austin, TX 78711

Dear Chairman Kinard:

Pursuant to Sec. 87.0875(c)(3) of the Texas Government Code, the Commission for Lawyer Discipline (CFLD) respectfully requests that the Committee on Disciplinary Rules and Referenda (CDRR) initiate the rule proposal process and consider certain amendments to (1) Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct (TDRPC); and (2) TDRPC Rule 8.03(f), along with Rule 1.06 and/or Rule 9.01 of the Texas Rules of Disciplinary Procedure (TRDP).

I. TDRPC Rule 1.05 and the Suicidal Client

Suicide and threats of suicide are not unusual in legal matters - particularly in emotionally charged, high-conflict cases involving divorce, child custody, and domestic violence. According to calls to the Office of the Chief Disciplinary Counsel (CDC) ethics helpline, lawyers involved in these types of cases frequently encounter clients who are contemplating suicide, causing the lawyer to wrestle with his/her moral obligation to try to stop the client from committing the act and his/her ethical obligations to maintain client confidentiality under Rule 1.05. Although Rule 1.05 includes exceptions permitting and/or requiring the disclosure of confidential information to prevent a client from committing a criminal or fraudulent act under certain circumstances, under Texas law, suicide is neither a crime nor a fraudulent act. Therefore, under Rule 1.05 as it is currently drafted, an attorney risks violating Rule 1.05 by disclosing confidential information he/she believes is necessary to prevent a client from committing suicide.

Many lawyers who have encountered this situation have told CDC ethics attorneys that they would be willing to risk discipline in order to attempt to prevent a client from committing suicide. Others have indicated that revealing a client's confidential information in an effort to prevent the client from committing suicide would not be worth the risk. All agree that bringing clarity and certainty to the rule would be helpful.

Additionally, although some may argue that a client threatening suicide may be likely to utilize criminally prohibited methods to carry out such an act (thereby potentially authorizing disclosure), a lawyer's ability to act should not turn on this fact-specific and unsettled analysis, particularly in a situation in which time may be of the essence.

Rule 1.05(c)(7) governs the permissive disclosure of confidential information to prevent a criminal or fraudulent act by a client, while Rule 1.05(e) governs mandatory disclosure of information necessary to prevent a criminal or fraudulent act by a client. The following suggested amendments to Rule 1.05 would address the current gap regarding a client contemplating suicide.

1.05(c) A lawyer may reveal confidential information:

…

(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**, or any other act that is likely to result in death or substantial bodily harm to a person, including the client, regardless of whether it constitutes a criminal act**.

…

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

II. Reciprocal Discipline for Federal Court or Federal Agency Discipline.

Currently, the CDC does not have express authority to issue reciprocal discipline against an attorney who has been sanctioned, suspended, or disbarred from practicing in federal court, including a bankruptcy or immigration court. Under TDRP Rule 1.06(CC)(2), reciprocal discipline may be pursued for attorney misconduct that results in discipline issued in another state or in the District of Columbia. Though federal judges and federal agencies, such as the Executive Office for Immigration Review (EOIR), do not sanction attorneys with great frequency, attorneys licensed in Texas should not be able to avoid reporting federal court discipline to the CDC under TDRPC Rule 8.03(f), nor should they be able to avoid reciprocal discipline in Texas, when such discipline is warranted to protect the public.

TDRPC Rule 8.03(f) reads as follows:

A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment.

TRDP Rule 1.06(CC)(2) reads as follows:

"Professional Misconduct" includes:

Attorney conduct that occurs in another state or in the District of Columbia and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct.

TRDP Rule 9.01 reads as follows:

Orders From Other Jurisdictions: Upon receipt of information indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction, the Chief Disciplinary Counsel shall diligently seek to obtain a certified copy of the order or judgment of discipline from the other jurisdiction, and file it with the Board of Disciplinary Appeals along with a petition requesting that the attorney be disciplined in Texas. A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action under this Part, subject to the defenses set forth in Rule 9.04 below.

Addressing this gap could be accomplished in several ways: (1) amend TDRP Rule 9.01 to include the following language - "…an attorney licensed to practice law in Texas has been disciplined in another ~~jurisdiction~~ **state, by a federal court, or by a federal agency**…"; (2) amend TDRP Rule 1.06(CC)(2) to include the following language – "Attorney conduct that occurs in another state**, a federal court, before a federal agency,** or in the District of Columbia…"; (3) amend TDRPC Rule 8.03(f) to add the following language – "…the attorney-regulatory agency of another jurisdiction**, including a federal court or federal agency,** …"; or (4) add a separate definition under TDRP Rule 1.06 for "other jurisdiction" that would include federal courts and federal agencies. This change would enable the CDC to rely on orders or judgments of discipline issued by federal courts and agencies to more effectively address attorney misconduct without having to separately prove the underlying allegations and without the risk that the statute of limitations bars a new action for the underlying misconduct.

On behalf of the Commission and the Chief Disciplinary Counsel, we thank you in advance for your consideration of these proposed changes.

Please contact us if you need additional information or have any questions or concerns.

Respectfully yours,

Noelle Reed, Chair
Commission for Lawyer Discipline

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 8.03. Reporting Professional Misconduct

Texas Rules of Disciplinary Procedure
Rule 1.06. Definitions
Rule 9.01. Orders From Other Jurisdictions (Reciprocal Discipline)

The Committee on Disciplinary Rules and Referenda, or CDRR, was created by Government Code section 81.0872 and is responsible for overseeing the initial process for proposing a disciplinary rule. Pursuant to Government Code section 81.0876, the Committee publishes the following proposed rules. The Committee will accept comments concerning the proposed rules through June 20, 2020. Comments can be submitted at texasbar.com/CDRR or by email to CDRR@texasbar.com. A public hearing on the proposed rules will be held at 10:30 a.m. on June 18, 2020, in Room 101 of the Texas Law Center (1414 Colorado St., Austin, Texas, 78701).

Proposed Rules (Redline Version)
Texas Disciplinary Rules of Professional Conduct
Rule 8.03. Reporting Professional Misconduct

***

(f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, "discipline" by a federal court or federal agency includes any action affecting the lawyer's ability to practice before that court or agency or any public reprimand; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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Texas Rules of Disciplinary Procedure
1.06. Definitions:

***

CC. "Professional Misconduct" includes:

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2. Attorney conduct that occurs in another ~~state or in the District of Columbia~~ jurisdiction, including before any federal court or federal agency, and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct.

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9.01. Orders From Other Jurisdictions: Upon receipt of information indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction, including by any federal court or federal agency, the Chief Disciplinary Counsel shall diligently seek to obtain a certified copy of the order or judgment of discipline from the other jurisdiction, and file it with the Board of Disciplinary Appeals along with a petition requesting that the attorney be disciplined in Texas. A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action under this Part, subject to the defenses set forth in Rule 9.04 below. For purposes of this Part, "discipline" by a federal court or federal agency includes any action affecting the lawyer's ability to practice before that court or agency or any public reprimand; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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Proposed Rules (Clean Version)
Texas Disciplinary Rules of Professional Conduct
Rule 8.03. Reporting Professional Misconduct

***

(f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, "discipline" by a federal court or federal agency includes any action affecting the lawyer's ability to practice before that court or agency or any public reprimand; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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Texas Rules of Disciplinary Procedure
1.06. Definitions:

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CC. "Professional Misconduct" includes:

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2. Attorney conduct that occurs in another jurisdiction, including before any federal court or federal agency, and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct.

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9.01. Orders From Other Jurisdictions: Upon receipt of information indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction, including by any federal court or federal agency, the Chief Disciplinary Counsel shall diligently seek to obtain a certified copy of the order or judgment of discipline from the other jurisdiction, and file it with the Board of Disciplinary Appeals along with a petition requesting that the attorney be disciplined in Texas. A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action under this Part, subject to the defenses set forth in Rule 9.04 below. For purposes of this Part, "discipline" by a federal court or federal agency includes any action affecting the lawyer's ability to practice before that court or agency or any public reprimand; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

*** TBJ

Proposed Amendments to Proposed Rule Changes

Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline

Proposed Rules (New Proposed Amendments in Red)

Texas Disciplinary Rules of Professional Conduct

Rule 8.03. Reporting Professional Misconduct

***

(f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, "discipline" by a federal court or federal agency ~~includes any action affecting the lawyer's ability to practice before that court or agency or any public reprimand~~ means a public reprimand, suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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Texas Rules of Disciplinary Procedure

1.06. Definitions:

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CC. "Professional Misconduct" includes:

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2. Attorney conduct that occurs in another ~~state or in the District of Columbia~~ jurisdiction, including before any federal court or federal agency, and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct.

***

9.01. Orders From Other Jurisdictions: Upon receipt of information indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction, including by any federal court or federal agency, the Chief Disciplinary Counsel shall diligently seek to obtain a certified copy of the order or judgment of discipline from the other jurisdiction, and file it with the Board of Disciplinary Appeals along with a petition requesting that the attorney be

disciplined in Texas. A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action under this Part, subject to the defenses set forth in Rule 9.04 below. For purposes of this Part, "discipline" by a federal court or federal agency ~~includes any action affecting the lawyer's ability to practice before that court or agency or any public reprimand~~ means a public reprimand, suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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Committee on Disciplinary Rules and Referenda
Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 8.03. Reporting Professional Misconduct

Texas Rules of Disciplinary Procedure
Rule 1.06. Definitions
Rule 9.01. Orders From Other Jurisdictions

Public Comments Received
Through June 20, 2020

From: Ken Horwitz
To: cdrr
Subject: RE: New Proposed Rule Changes Published and Public Hearing Update
Date: Wednesday, April 1, 2020 9:21:56 AM

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

The country is shut down and you are holding a public hearig?

Kenneth M. Horwitz
Glast, Phillips & Murray, P.C.
14801 Quorum Drive, Suite 500
Dallas, Texas 75254
(972) 419-8383 (phone)
(469) 206-5031 (fax)

From: State Bar of Texas - CDRR [mailto:cdrr@texasbar.com]
Sent: Wednesday, April 01, 2020 9:08 AM
To: Ken Horwitz
Subject: New Proposed Rule Changes Published and Public Hearing Update

State Bar of Texas

Proposed Rule Changes

New Proposed Rule Changes Published
April 7, 2020, Public Hearing Update

New Proposed Rule Changes Published for Public Comment

The Committee on Disciplinary Rules and Referenda has published proposed changes to Rule 1.05.

Texas Disciplinary Rules of Professional Conduct, in the April issue of the *Texas Bar Journal* and the March 27 issue of the *Texas Register*. The proposed rule changes relate to the disclosure of confidential information with regard to a client contemplating suicide.

The Committee has also published proposed changes to Rule 8.03, Texas Disciplinary Rules of Professional Conduct, and Rules 1.06 and 9.01, Texas Rules of Disciplinary Procedure, in the April issue of the *Texas Bar Journal* and the March 27 issue of the *Texas Register*. The proposed rule changes relate to the reporting of professional misconduct and reciprocal discipline for federal court or federal agency discipline.

The Committee will accept comments concerning the above-referenced proposed rule changes through June 20, 2020. Comments on the proposed rule changes can be submitted here.

Public hearings on the above-referenced proposed rule changes will be held at 10:30 a.m. on June 18, 2020. (Any updates to the public hearings will be posted at texasbar.com/cdrr/participate.)

April 7, 2020, Public Hearing Update

Lawyer Advertising and Solicitation Rules
Voluntary Appointment of Custodian Attorney for Cessation of Practice

The Committee on Disciplinary Rules and Referenda will hold a public hearing on proposed changes to Part VII, Texas Disciplinary Rules of Professional Conduct, and proposed Rule 13.04, Texas Rules of Disciplinary Procedure, at 10:30 a.m. on April 7, 2020. The Committee will continue to accept comments on these proposed rule changes through April 10, 2020. Comments can be submitted here.

UPDATE: As a safety precaution related to the coronavirus, the Committee will hold the April 7 public hearings by teleconference only. The updated participation information is as follows and replaces the previous number provided:

Join from PC, Mac, iOS or Android Device:
Meeting URL: https://texasbar.zoom.us/j/265275523
Meeting ID: 265 275 523
Telephone Audio or Audio-Only:
888-788-0099 (Toll Free)
Meeting ID: 265 275 523
(Bridge will open at 10:00 a.m. Meeting will begin at 10:30 a.m.)

If you plan to participate in either public hearing on April 7, it is requested that you email CDRR@texasbar.com in advance of the hearing with your name and the public hearing item you wish to speak on so the Committee can group speakers by topic during the hearings. To allow enough time for all who wish to be heard during the hearings, the Committee may limit initial comments from each speaker to three minutes, and extend that time if the Committee needs further discussion with the speaker.

Additional Information

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

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

Sincerely,
Committee on Disciplinary Rules and Referenda

Committee on Disciplinary Rules and Referenda

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

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comment on Rule Changes (Rules 1.06, 8.03, & 9.01)
Date: Wednesday, April 1, 2020 9:28:31 AM

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

Contact

First Name	Shea
Last Name	Palavan
Email	[redacted]
Member	Yes
Barcard	24083616

Feedback

Subject	Comment on Rule Changes (Rules 1.06, 8.03, & 9.01)

Comments

Just an efficiency idea: Since it appears the changes to this are just the inclusion of federal courts/agencies under "jurisdiction," wouldn't it be less cumbersome to just add an overall definition in the Rules for "jurisdiction" that states it indicates the term includes a federal court or federal agency. Similarly, could just add an overall definition in the Rules for "discipline" which includes the added language.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comments to Proposed Changes to TDRPC Rules 8.03 and 9.01
Date: Wednesday, April 1, 2020 10:26:23 AM

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

Contact

First Name	Jessica
Last Name	Lewis
Email	[redacted]
Member	Yes
Barcard	24060956

Feedback

Subject	Comments to Proposed Changes to TDRPC Rules 8.03 and 9.01

Comments

The proposed changes to Rules 8.03 and 9.01 are broad and ambiguous in their plain language meaning and, therefore, inappropriate and overreaching. For example, "any action affecting the lawyer's ability to practice before that court . . ." could be read to include virtually anything. If the focus is to require reporting of actions taken to "limit" a lawyer's ability to practice before a federal court due to some misconduct, then it should be stated in that way, such as "any action limiting the lawyer's ability to practice before that court due to that lawyer's misconduct . . ." Further, the inclusion of "any public reprimand" is equally broad and concerning, as under that plain language, a lawyer who was "publicly reprimanded" by a federal judge for an inconveniently late filing, for example, would have to notify the disciplinary counsel of that rebuke. I don't think the following sentence of clarification truly addresses this ambiguity as to a public reprimand, as it focuses on written warnings/admonishments. For the purpose of reporting, I think it makes sense to limit it to issues significant enough to warrant some formal written reprimand. We as attorneys who deal with statutory language frequently know the importance of clear language and the need for a clear expectation to be set when disciplinary measures are involved. While language often doesn't provide us the ability to communicate with sufficient precision to survive all challenges, the language pointed out here falls far short of the more basic standards of providing adequate notice and setting reasonably clear expectations for the bar. Further, it leaves too much room for interpretation and discretion by those enforcing the rules. Thanks for your time and efforts in this work. Feel free to reach out, if needed. Jessica Lewis

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rules Regarding "Compentency Attorneys" and Similiar Proposals
Date: Wednesday, April 1, 2020 1:09:14 PM

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

Contact

First Name	Richard
Last Name	Edgell
Email	[redacted]
Member	Yes
Barcard	6420900

Feedback

Subject	Proposed Rules Regarding "Compentency Attorneys" and Similiar Proposals

Comments

1. Better Law already exists. 2. The Law has been Improved and "tweeked" for centuries. 3. The Law already provides a very high standard of "utmost good faith and fair dealing" under equitable and trust law to protect attorneys and everyone else. 4. The Texas Supreme Court is elected. 5. It is the Supreme Court for the Constitution, Laws, Statutes, and other laws of the State of the State of Texas, not the State Bar of Texas, which is or should be the attorneys who having fulfilled the requirements of the law and having been approved by the State Board of Law Examiners are entitled to license as an Attorney and Counselor at Law and having taken the oath provided by law are authorized to practice as Attorney and Counselor at Law in all the Courts of the State of Texas, and the Clerk of the Supreme Court of the Texas may affix the Seal of the Supreme Court of the Supreme Court, at Austin, or apparently has done so, for example, "this 5th day of November AD 1982" for Richard Baxter Edgell. 6. The State Bar of Texas is not an administrative agency. 7. The Texas Legislature cannot delegate judicial power it does not have to the State Bar of Texas or any other person or thing, because the Texas Constitution uses principles such as separation of powers and checks and balances between legislative, executive, and judicial branches and this is consistent with Federal law including the Constitution, Laws, and Statues of the United States. 8. Prior to entry into the Union or union with the Union, the Republic of Texas provided higher standards than the Constitution, Laws, and Statutes of the United States, including the "Rule" and "Open Courts." There is a Baylor Law School Law Review article which you can find which discusses this in detail. 9 Texas insisted, and the United States agreed, that Texas could have higher standards than the United States in the Texas judicial system. 10. The "Open courts" were not vigilante groups or the so-called "Klan." People have lied or been misinformed about this. 11. Concluding, rely on existing law, including trust law, which includes the utmost good faith and fair dealing standard, to avoid losing the work of all Texas ethnic groups who suffered, fought, and died to maintain high standards including Texas trust law and the utmost good faith and fair dealing standard in 1. previously stated. I strongly recommend that the proposed rules not be adopted because they are unconstitutional; violative of statutory law; arbitrary and capricious; not supported by substantial evidence as to their necessity or quality; not supported by subject matter jurisdiction, or notice jurisdiction because no one's life, liberty,. or property are safe while the Legislature, a governmental entity purporting to be like the Legislature, or other such entity, are in session (and the judicial power is different from the legislative power, and because of this we have the Open Courts of the State of Texas which are always to be in session), and further with regard to Texas jurisdiction generally, there are legal limits on any particular group of persons or people to change the laws of the State of Texas, especially those that have provided a higher standard than the Federal standard since the time of the Republic of Texas and before the Republic of the State of Texas; and for the other reasons stated in Government Code 2002 (which may have been amended; but which may be found and researched, unless perhaps you, for example, forge books, alter books, fail to return books, or engage in other such activity; in which case, the Open Records Act may provide you copies of certain records, subject to exceptions and restrictions for such things as privacy, health, and safety, if you provide

reasonable payment, for example for copying costs; and the Texas Open Records Act is similar to Federal Congressional legislation and meets Federal standards, most likely), I waive none of my rights. Respectfully submitted, Richard B. Edgell, Attorney at Law, SBOT 06420900 today when I checked by computer. I do not give my current address or residence in Mexico, to protect myself and others, including responsible police and judiciary, and I can do that, under Texas law, in Rio Rancho, this 1st day of April, AD 2002 Regardless of whom I am or hwe I identify myself, the arguments are still the same and can be judged on their merits..

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed changes to Rule 8.03
Date: Wednesday, April 1, 2020 2:03:09 PM

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

Contact

First Name	Richard
Last Name	Schafer
Email	[redacted]
Member	Yes
Barcard	24007988

Feedback

Subject	Proposed changes to Rule 8.03

Comments

I recommend clarifying the rule to make clear that "any action affecting the lawyer's ability to practice before that court or agency" does not include a order disqualifying the attorney in a particular case.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed changes 8.03, 1.06 and 9.01
Date: Wednesday, April 1, 2020 5:31:43 PM

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

Contact

First Name	James
Last Name	Roberts
Email	[redacted]
Member	Yes
Barcard	17008500

Feedback

Subject	Proposed changes 8.03, 1.06 and 9.01

Comments

I would suggest that adding "final and not subject to appeal" to the references to "order or judgment." I think the reasons should be obvious.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed rule change 8.03
Date: Monday, June 1, 2020 10:38:52 AM

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

Contact

First Name	Eddie
Last Name	Gomez
Email	[redacted]
Member	Yes
Barcard	24055562

Feedback

Subject	Proposed rule change 8.03

Comments

My concern with this rule change is that the definition of a disciplinary matter is written broadly enough that it includes an attorney failing to pay federal court admission renewal dues since that "affects the attorney's ability to practice in federal court." This situation is clearly not disciplinary and should not trigger a reporting obligation for the attorney. Thank you.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed changes to Rule 1.05 and 8.03 Texas Disciplinary Rules of Professional Conduct,
Date: Friday, June 5, 2020 1:33:17 PM

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

Contact

First Name	Allan
Last Name	Goldstein
Email	[redacted]
Member	Yes
Barcard	080907950

Feedback

Subject	Proposed changes to Rule 1.05 and 8.03 Texas Disciplinary Rules of Professional Conduct,

Comments

Reporting from a Federal Court "any action affecting the lawyer's ability to practice before that court or agency or any public reprimand" seems too broad. Would that include if the lawyer did not renew his license to practice in federal court.? I doubt that is the intent but it seems it might be included. Also, if a Judge is critical of a lawyer's performance and expresses it somehow in writing would that require a report of a reprimand; or is there some definition of "public reprimand." Just think the proposed language is too broad and could have unintended consequences.

From: Dorothea
To: cdrr
Subject: Proposed rule change - Opposed
Date: Friday, June 5, 2020 3:26:49 PM

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

Hello:

I oppose the addition of the language to rule 8.03 “or federal agency”. I have the same opposition to the proposed changes to rules 1.06 and 9.01. I think it’s too vague. I have no idea how I would be disciplined by a federal agency (other than a federal court) that would have bearing on my ability or fitness to practice law in the state of Texas. I think it is grossly over broad and it is going to scoop up some activity that is unintended. I do not oppose the reference to “any federal court” clearly that is relevant. I don’t know what it means to be disciplined by a federal agency. What if I am given a ticket by the National Park service for camping without a license, or not properly putting out my campfire, or having my dog walk on a trail that’s not authorized for pets, or not appropriately securing my food so that bears won’t get into it, or not properly discarding my trash from my campsite, is that something that I need to report to the Texas bar? It seems absurd. That concludes my comments in opposition.

Thank you,

Dorothea Laster
SBN: 11970400

Sent from my iPhone

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed changes to TDRPC 8.03, 1.06 & 9.01
Date: Wednesday, June 10, 2020 11:17:13 AM

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

Contact

First Name	Wesley
Last Name	Hill
Email	[redacted]
Member	Yes
Barcard	24032294

Feedback

Subject	Proposed changes to TDRPC 8.03, 1.06 & 9.01

Comments

Respectfully, federal agency should be dropped from the proposed amendments. Federal agency decisions do not always provide the same procedural due process and guarantees of fairness that federal courts or attorney-regulatory agencies of other jurisdictions provide, and thus should not be entitled to the to the reciprocal discipline system's typical deference.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed reciprocal discipline rules
Date: Thursday, June 11, 2020 3:23:46 PM

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

Contact

First Name	Samuel
Last Name	Whitley
Email	[redacted]
Member	Yes
Barcard	24033331

Feedback

Subject	Proposed reciprocal discipline rules

Comments

I write in opposition to the proposed reciprocal discipline rules and ask that the Committee NOT take any further action with respect to these proposed amendments. I am opposed to these rules because I believe that subjecting an attorney to State Bar of Texas discipline based upon action issued by a federal agency is excessive and would unjustifiably damage a Texas-admitted lawyer's disciplinary record, professional reputation and career. In addition, the proposed rules are not necessary to ensure ethical representation by Texas lawyers. As an example of the effects mentioned above, I refer you to 17 C.F.R. 201.102(e), which permits the Securities and Exchange Commission to censure, suspend, or permanently disbar an attorney from appearing before the Commission. One of the reasons for such discipline is if the attorney is found to have willfully violated any federal securities law or rule or regulation. Keep in mind that these are CIVIL laws (although in certain instances, securities violations may be prosecuted criminally). If the SEC determines that a lawyer should be suspended or prevented from appearing before the Commission, then that lawyer would be unable to practice in many areas of securities law, and that is fine. But if the proposed rule amendments are adopted, a Texas lawyer could then be disciplined in Texas as a result of the SEC's action. This subsequent discipline could serve to prevent the lawyer from practicing in other non-securities law practice areas, which would make the punishment broader than it should be or needs to be. For instance, if a lawyer were disciplined by the SEC under Rule 102(e), the lawyer could then be disbarred in Texas, thereby preventing him from practicing ANY type of law, not just securities law, which is the legal area that caused the problem. This is a draconian measure that would take away a person's livelihood for no good reason. Now, a response could be that a Texas lawyer will not automatically be disbarred just because he is suspended or disbarred before a federal agency (such as the SEC). But can it be said that a lawyer will NOT be disbarred because of such federal agency action? Of course not. In addition, even if a lesser sanction is ordered by the Texas Bar, this lesser sanction would only serve to sully the reputation of the Texas lawyer and prevent him from making a living, even if he stays away from the practice area that originally led to the federal agency action. Furthermore, Texas reciprocal discipline is not necessary to protect the public since each federal agency would have jurisdiction to monitor and pursue compliance with its disciplinary action against the lawyer. In sum, I believe that permitting reciprocal discipline against Texas lawyers due to actions taken by federal agencies unjustifiably and unreasonably "piles on" the lawyer, will unnecessarily sully his reputation, and will prevent him from making an honest living and servicing clients, even in areas that had nothing to do with the original federal agency discipline. For these reasons, I ask that the Committee NOT further pursue the proposed amendments regarding reciprocal discipline. Thank you.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Opposition to amending reciprocal discipline Rules 8.03, 1.06 and 9.01, as proposed
Date: Wednesday, June 17, 2020 4:26:09 PM

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

Contact

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

Feedback

Subject	Opposition to amending reciprocal discipline Rules 8.03, 1.06 and 9.01, as proposed

Comments

6/17/2020: Reciprocal discipline: Opposition to amending reciprocal discipline Rules 8.03, 1.06 and 9.01, as proposed. The pending reform proposals involving reciprocal discipline with entities other than attorney regulatory agencies could make it far more difficult for clients who have found an attorney whom they trust, to use that attorney even in forums where that lawyer lacks experience. If such rule changes are indeed enacted, then what sane attorney would want to run the risks of venturing out (even at the client's request) to help such trusting clientele in a comparatively unfamiliar jurisdiction or forum such as a federal courtroom or federal agency? It's hard enough persuading legal counsel to represent a client in an unfamiliar (especially a rural) state jurisdiction here in Texas, due to the risk of being "home-towned" with unwritten rules, erratic judicial conduct and / or an unforeseeably ignoring of existing applicable rules & attorney protections. The Texas Bar labor union (whose constitutionality remains the subject of ongoing federal litigation) does not even protect its compulsory member lawyers from the in-state jurisdiction scenario's hazards, so can you imagine how bad it could be regarding the federal courts and agencies? Are these proposed rule changes not intended to make it easier for law firms to poach clients away from attorneys whom such clients nevertheless trust even for atypical legal forums? Anyhow, judging from how the Texas Bar has behaved over the past few years, it is supposedly still permissible for that Bar to prosecute lawyers for allegedly violating merely unwritten rules, even if such unwritten rules do clientele and society a disservice. There are a few, albeit mild, checks and balances that enable a prosecuted lawyer to combat such predatory prosecutions inflicted by the Texas Bar, but they are insufficient (as TexasBarSunset.com helps further explain). Exacerbating matters, such checks & balances do not seem to exist substantially (if at all) in federal courtrooms or in federal agencies. That is why the existing rules offer reciprocal discipline apparently merely with attorney discipline authorities in other states. Even that is unduly hazardous for well-meaning attorneys, by the way... Unwritten rules that apply in less familiar forums such as federal courts and agencies expand exponentially the risks that lawyers have to endure if they take a chance and represent a trusting client there at the client's request. If the Texas Bar could nevertheless reciprocally rubber-stamp findings & discipline emanating from such (arguably inadequately supervised) forums, client requests for a trusted attorney's ongoing involvement regardless of the forum will be denied more often by the trusted lawyers. This result would deflate potential economic growth that such clients would otherwise try to generate. Entrepreneurs and businesses need to feel comfortable before investing their capital, energy and reputations in new ventures, after all. An inability to use trusted legal counsel in the event that certain problems emerge would certainly be a factor in clients' decision-making process. Can a country like the USA, already with nearly $30 trillion in national debt (USDebtClock.org) even excluding Social Security, Medicare and Medicaid entitlement promises (which are much larger still), afford to deflate prospects for economic growth like that? Anyway, it is worth considering how some (politically appointed yet unelected) federal judges are known to be irritable, advancement-seeking, agenda-driven and even favor-pursuing. Nobody is perfect and attorneys are all human. Besides, stress can bring out some of the worst in all of us. Meanwhile some federal agency venues are

known to be politically biased and even motivated to act accordingly. They are at times subjugated to the whims of federal bureaucrats who seek longstanding perks & benefits (such as increasingly large federal pensions) which have helped further drench the rest of us in ever-growing federal debt. Attorneys who run the risk of dealing with such potentially hostile forums at their trusting clients' request need to be able to limit their potential losses to such forums, without having them overflow into the attorneys' primary legal environments here in Texas, do they not? The proposed reciprocal discipline-focused rule changes would nevertheless apparently eliminate the self-preserving (and client-protecting) ability to shield one's traditional legal niche(s) from unforeseen fallout endured elsewhere in the federal realm. Egregious instances of attorney misconduct in such alternative locales and forums could nevertheless be prosecuted by the Texas Bar, with its (unfortunately insufficient) checks & balances being available, right? Why change that then? To make it easier for Texas Bar employees to land sinecure jobs and obtain other benefits from law firms seeking help with poaching away clients from their enduringly trusted attorneys? The Texas economy does not have to facilitate such self-serving parasitism or client poaching-related tactics in order to continue trying to successfully cope with increasingly demanding economic and even pandemic challenges. To say the least, it is unfair (if not corruption-encouraging) that certain privileged attorneys get to make such reform proposals without having to go through the traditional reform-requesting channels that ordinary (compulsory) members of the Texas Bar must still endure. Particularly rigorous scrutiny of possible conflicts of interest are warranted. We do not need more Kathy Holder type conflicts of interest involved with overseeing attorneys' disciplinary status here in Texas. I would be more than willing to follow-up with additional feedback upon request. Respectfully submitted, Rich Robins Houston, Texas Editor: TexasBarSunset.com

From: [redacted]
To: cdrr
Subject: CDRR Comment: Opposition to amending reciprocal discipline Rules 8.03, 1.06 and 9.01, as proposed.
Date: Thursday, June 18, 2020 12:40:26 AM

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

Contact

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

Feedback

Subject	Opposition to amending reciprocal discipline Rules 8.03, 1.06 and 9.01, as proposed.

Comments

Opposition to amending reciprocal discipline Rules 8.03, 1.06 and 9.01, as proposed. This submission is in opposition to amending reciprocal discipline-related rules 8.03, 1.06 and 9.01, as proposed. First of all, the pending reform proposals involving reciprocal discipline with entities other than attorney regulatory agencies could make it far more difficult for clients who have found an attorney whom they trust, to use that attorney even in forums where that lawyer lacks experience. If such rule changes are indeed enacted, then what sane attorney would want to run the risks of venturing out (even at the client's request) to help such trusting clientele in a comparatively unfamiliar jurisdiction or forum such as a federal courtroom or federal agency? It's hard enough persuading legal counsel to represent a client in an unfamiliar (especially a rural) state jurisdiction here in Texas, due to the risk of being "home-towned" with unwritten rules, erratic judicial conduct and / or an unforeseeable ignoring of existing applicable rules & attorney protections. The Texas Bar labor union (whose constitutionality remains the subject of ongoing federal litigation) does not even protect its compulsory member lawyers from the in-state jurisdiction scenario's hazards when the Bar nevertheless prosecutes member attorneys. Can you imagine how bad it could be regarding hazards of the federal courts and agencies, then? Are these proposed rule changes not actually intended to sneakily make it easier for certain law firms to poach clients away from attorneys whom such clients nevertheless trust even for atypical legal forums? Anyhow, judging from how the Texas Bar has behaved over the past few years, it is supposedly still permissible for that Bar to prosecute lawyers for allegedly violating merely unwritten rules, even if such unwritten rules do clientele and society a disservice. There are a few, albeit mild, checks and balances that enable a prosecuted lawyer to combat such predatory prosecutions inflicted by the Texas Bar, but they are insufficient (as TexasBarSunset.com helps further explain). Exacerbating matters, such checks & balances do not seem to exist substantially (if at all) in federal courtrooms or in federal agencies. That is why the existing rules offer reciprocal discipline apparently merely with attorney discipline authorities in other states. Even that is unduly hazardous for well-meaning attorneys, by the way. Why worsen matters by extending reciprocity to federal courts and agencies, then? Unwritten rules that apply in less familiar forums such as federal courts and agencies expand exponentially the risks that lawyers have to endure if they take a chance and represent a trusting client there at the client's request. If the Texas Bar is nevertheless allowed to reciprocally rubber-stamp findings & discipline emanating from such (arguably inadequately policed) federal forums, client requests for a trusted attorney's ongoing involvement regardless of the forum will consequently be denied more often by the trusted lawyers. This result would deflate potential economic growth that such clients would otherwise try to generate. Entrepreneurs and businesses need to feel comfortable before investing their capital, energy and reputations in new ventures, after all. An inability to use trusted legal counsel in the event that certain problems emerge would certainly be a factor in clients' decision-making process. Can a country like the USA, already with nearly $30 trillion in national debt (USDebtClock.org) even excluding Social Security, Medicare and Medicaid entitlement promises (which are much larger still), afford to deflate prospects for economic growth like that? Anyway, it is worth considering how some

(politically appointed yet unelected) federal judges are known to be irritable, advancement-seeking, agenda-driven and even favor-pursuing. Nobody is perfect and attorneys are all human. Besides, stress can bring out some of the worst in all of us. Meanwhile some federal agency venues are known to be politically biased and even motivated to act accordingly. They are at times subjugated to the whims of federal bureaucrats who seek longstanding perks & benefits (such as increasingly large federal pensions) which have helped further drench the rest of us in ever-growing federal debt. Attorneys who run the risk of dealing with such potentially hostile forums at their trusting clients' request need to be able to limit their potential losses to such forums, without having them overflow into such attorneys' primary legal environments here in Texas, do they not? The proposed reciprocal discipline-focused rule changes would nevertheless apparently eliminate the self-preserving (and client-protecting) ability to shield one's traditional in-state legal niche(s) from unforeseen fallout endured elsewhere in the federal realm. Egregious instances of attorney misconduct in such alternative federal locales and forums could nevertheless be prosecuted by the Texas Bar, with its (unfortunately insufficient) checks & balances being available, right? Why change that, then? To make it easier for Texas Bar employees to land sinecure jobs and obtain other benefits from law firms seeking help with poaching away clients from their enduringly trusted attorneys? The Texas economy does not have to tolerate such self-serving parasitism or client poaching-related tactics in order to continue trying to successfully cope with increasingly demanding economic and even pandemic challenges. To say the least, it is unfair (if not corruption-encouraging) that certain privileged attorneys still get to make such rules-related reform proposals without even having to go through the traditional reform-requesting channels that ordinary (compulsory) members of the Texas Bar must still endure. Particularly rigorous scrutiny of possible conflicts of interest is warranted. We do not need more Kathy Holder-type conflicts of interest involved with overseeing attorneys' licensing status here in Texas. I would be more than willing to follow-up with additional feedback upon request. Respectfully submitted, Rich Robins Houston, Texas Editor: TexasBarSunset.com

Committee on Disciplinary Rules and Referenda

Transcript of Public Hearing on Proposed Changes to Rule 8.03, Texas Disciplinary Rules of Professional Conduct, and Rules 1.06 and 9.01, Texas Rules of Disciplinary Procedure (Relating to Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline)
June 18, 2020 – By Zoom Teleconference

Video of the full Committee meeting, including the public hearings, is available at texasbar.com/CDRR.

Lewis Kinard:

Move on to the third, uh, public hearing and discussion on proposed changes to Rule 8.03, Texas Disciplinary Rules of Professional Conduct, and related Rules 1.06 and 9.01 of Texas Rules of Disciplinary Procedure, relating to reporting professional misconduct and reciprocal discipline for federal court or federal agency discipline, pages 19 through 33 of the materials.

Lewis Kinard:

I know we have comments on this one that we've received online. Is there anybody signed up to speak or indicating any interest in uh, commenting or questioning on that rule?

Brad Johnson:

Lewis, we don't have anyone signed up in advance, but we do have someone with a hand raised right now, so in just a moment-

Lewis Kinard:

Okay.

Brad Johnson:

... I will unmute them, um ... it is a telephone caller and the- the last two digits end with 7-9.

Lewis Kinard:

All right.

Brad Johnson:

[crosstalk]... that person, in the meantime if anyone else does wish to spe- speak again, just go ahead and raise your hand, but I'm gonna unmute that person now, if they could just introduce themself here in just second.

Lewis Kinard:

Okay, you're here and open for speak- speaking, sorry.

Rich Robins:

Thank you very much. Can you all hear me?

Lewis Kinard:

We can.

Claude Ducloux:

Yes.

Rich Robins:

Great. If I'm speaking too loudly, please let me know. My name is Rich Robins, I'm an attorney in Houston, Texas, and I'm an editor of the not-for-profit website TexasBarSunset.com. Um, I have submitted uh, basically commentary about this proposed change, which hopefully uh, you all have got access to, but if there are any follow up questions, please um, feel free to contact me at TexasBarSunset.com, I'd be delighted to offer any sorts of response or perform any free research that needs to be done to further the analysis.

Rich Robins:

Uh, I understand that I have a couple of minutes to speak only, so I'll try to be concise. Um, I think a major concern with this rule proposal is that it would make it tougher for entrepreneurs and other clients here in Texas to inspire their attorneys to stick with them, in the event that the clients have a legal need in federal agencies, or in federal courts.

Rich Robins:

There are not really uh, that many checks and balances available in the attorney disciplinary realm, in federal agencies or in federal courts. Uh, n- nevertheless, especially at the federal judicial level, there's an awful lot of pressure to get an awful lot of work done, and this can sometimes be reflected in um, the stories we hear about judicial temperament.

Rich Robins:

I understand that um, Judge Samwell Kent of Galveston, a federal judge uh, whom you all might recall wound up in prison for his sexual escapades with his employees ... I understand that he used to sometimes uh, show his employees that he was boss by beating up on attorneys in his court room. Uh ... the checks and balances needed to inspire an attorney to take on a case just aren't present in such a hostile environment, and they've got life tenure, so it's not like there's uh, that much of a way of getting justice afterwards. I think we're playing with fire by adopting this sort of reform.

Rich Robins:

I am not hearing my voice echoed, are you all as well? I'm sorry if you are.

Lewis Kinard:

No, you're fine.

Claude Ducloux:

Fine. You're fine.

Rich Robins:

Oh great, great. Um ... Federal agencies, meanwhile, they are uh, often appointed with uh, political biases that they're encouraged to act on, especially if they want advancement, uh, after their terms expire. Uh, this, sort of like, uh, the federal judicial uh, hazard, is something to keep in mind as well, as a reason for opposing this reform ... um, it's- it's really difficult to practice law, uh, adequately for one's client, if one has to worry about offending, for example, the US Senator who put a judge, or uh, a member of a federal agency's commission, uh, in power ...

Rich Robins:

And, it does no service to the client when, uh, an attorney has to hold back punches that otherwise uh, could be useful in defense of one's client. I- I ask that you all look to the example of uh, the Bar's prosecution of people who venture out into state court venues, especially in rural counties. Now ... there- there are statistics out nowadays which show that whereas in 1992, nearly all civil defendants had attorneys. Now that figure is nearly 25 percent, as opposed to nearly 100 percent, 28 years ago, it's now 25 percent. And why is that? Because with the internet, it is so much easier to file frivolous grievances about people.

Rich Robins:

We are not, uh, impressed, as attorneys, with the Bar's protection of us. Uh ... I- am aware of cases where attorneys have been prosecuted for not abiding by unwritten rules, unwritten rules. Now, think about how each venue has unwritten rules. Think about a federal agency. Think about a particular federal judge. How can an attorney keep up with all of those? Well, by joining a big law firm, I guess, and letting specialists focus on those venues.

Rich Robins:

Which leads me to my next point: What is the motive behind this proposed reform? Is it to make it easier to poach clients away from their long-standing attorneys? And is that the kind of motive that we want driving how our system of ethics is protected and periodically modified?

Rich Robins:

I am not making accusations against the person who proposed this reform, but I do see the potential for a conflict of interest there that warrants scrutiny. I also think it's a source of concern that it is so easy for some attorneys to propose uh, a referendum agenda item, or a reform ... without having to go through the same hurdles that the rest of us little people have to go through.

Rich Robins:

I believe that I've exceeded my three minutes, I very much appreciate your patience. If there are any questions in the future I'd be delighted to try my best to answer them and do the free research or whatever.

Lewis Kinard:

Sure.

Rich Robins:

Again, I'm at TexasBarSunset.com, hopefully you all-

Lewis Kinard:

What-

Rich Robins:

... all uh, have access to the materials [crosstalk]-

Lewis Kinard:

Mist- yeah, Mr. Robins, I- I've got- I've got a couple of questions, actually, and- and there may be others but ... I was look- you know, the ... the goal of this is to basically require lawyers to report to the Chief Disciplinary Counsel, um, when they've been disciplined somewhere else, I think probably because it's hard for the, the CDC to get access to all that information under some sort of automatic fashion.

Lewis Kinard:

Uh ... what is it about that process of re- self-reporting that seems to be a problem, in your mind, and/or allowing the CDC to decide whether that other action is, uh, serious enough to warrant some sort of action in Texas?

Rich Robins:

Well, I'm gonna have to pull up the actual reform here, and it's gonna take me a while, but to my knowledge, um ... from what I'm recalling, there is uh, some sort of automatic reciprocal discipline that's being pursued here, is there not?

Claude Ducloux:

I can answer that-

Rich Robins:

Thank you, Claude.

Claude Ducloux:

It- it's only- there are- um, Rich, thank you very much for your comments, I read both the, that you said very thoroughly, 'cause I'm- because this is sort of a, an area of practice that I've done for 40 years. Um-

Rich Robins:

Mm-hmm (affirmative).

Claude Ducloux:

And as just- j- as Mr. Kinard said, this is mainly a process to say, hey, if you got um, disciplined ... first of all, they have to look at the discipline. If it's of what we call a serious crime, a crime involving the fraudulent appropriation of money or other property, or a felony of moral turpitude, that results in automatic discipline uh, of it.

Claude Ducloux:

If it's something be- that we- you violated a rule of the Patent and Trademark Office, but it was not a serious discipline, you're not- uh, I- I have no doubt that the CDC is not gonna spend a whole lot of time

saying, "Well we're not gonna discipline you for using form 89 when you should have used form 88," and you got a letter of reprimand for not, for not using the right form.

Claude Ducloux:

So, although it says that, that only refers to if it would qualify for reciprocal discipline under the same offense in the State of Texas. What they're trying to do is not have two trials. If they foun- if they went through an entire process where you're pre- where the lawyer was protected by due process, had his or her own attorney, had the chance to defend themselves, had the chance and they found facts, they don't wanna have to redo that trial in Texas.

Claude Ducloux:

They said, that's conclusive. If you got, um, disciplined, in Montana for this, we get to use those findings of, of fact here. This isn't for people who, you know, don't show up on time for- in federal court, and a federal judge gets mad at him. That's not "discipline," for purpose of this rule.

Claude Ducloux:

The- I mean- I hope that helps a little bit.

Rich Robins:

I appreciate that, Claude. Um, I'm still a bit concerned about uh, anyone’s giving a rubber stamp to discipline that emanates from another jurisdiction. Um, it's been said that you can get hometowned; if one goes and litigates in a “foreign jurisdiction,” that- that is not one's own county, for example, and how trustworthy are the findings of fact and conclusions of law, waged by a judge in that "foreign district," such as, for example, Montana. Or even East Texas, if one is not practicing in East Texas.

Rich Robins:

So, really, I- I would hesitate to put even more of a dampener on potential economic growth here in Texas by uh, startling attorneys to the point that they will not accept um, the opportunity to help their client in potentially hazardous regions where they can get hometowned. So, um, I'm sure that we'll probably have more interaction, I'd be delighted to interact uh, with you privately, um, 'cause I don't wanna consume the other peoples' uh, valuable time here.

Rich Robins:

Uh, I'd like to be able to have a chance to look over, again, the rule proposals, like um, in- in light of what you said, but, even as you mentioned, there's an unwritten rule in there that you had just uh, spelled out, uh, with regards to what would be prosecuted by the Bar and what would not. Notice how that's an unwritten rule, and isn't it hard on attorneys to have to guess what the unwritten rules are, even here in Texas.

Rich Robins:

Now imagine in a federal court. Imagine in a federal agency, or imagine up in Montana, it's even worse. And I know for a fact that the Texas Bar has been known to go after people, for not abiding by mere unwritten rules, especially if that attorney was successful at blocking uh, predetorially pursued dues increase that the Bar wanted, in violation of our referendum protections.

Rich Robins:

It's no uh, surprise that there's ongoing federal litigation against the Texas Bar to try to abolish it like most attorneys in the United States have the privilege of enjoying. Uh, uh, the ability to practice their professions without having to be members of a compulsory labor union. We'll see how that goes in the Fifth Circuit. Let's, let's not [crosstalk]-

Lewis Kinard:

Well Mr. Robins, just real quickly, the- I had another question. Isn't this already really in the rule now that these, this language is sort of clarifying ... because the current rule says, when someone's disciplined in another jurisdiction, then it may aut- it's actually automatically professional misconduct under our rules today. Um, have you s- have you seen any indications of where that- uh- an abuse like you're fearing will happen, has happened? That someone has somehow, um, I guess been ina- inappropriately disciplined in Texas for something they didn't do somewhere else, but got disciplined anyway?

Rich Robins:

I have not been a victim of that, um, I have heard, on, stories of folks who are questioning the constitutionality of how it happened to them, and I'd be more than happy to uh, look into this further, um, an- and to really peruse the referendum proposal, uh, which is not appearing before me at the moment, and I'm not sure in which folder I saved it.

Rich Robins:

Uh, it looks like... yeah, it's- it's gonna take me, uh, a bit of time to find that, and I do apologize for that. I was under the impression I'd have three minutes just to give my commentary and then to get out of the way so that other people could go ahead and testify.

Claude Ducloux:

Okay.

Lewis Kinard:

We appreciate it. I know it's in the Texas Bar Journal, um, I think it's the last issue, and it's also on our website. Texasbar.com, CDRR. We want-

Claude Ducloux:

(laughs)

Karen Nicholson:

(laughs)

Lewis Kinard:

... everybody to remember that, uh, because it is posted there. Um, but I appreciate you taking the time. Uh, like Claud, said, you- you clearly put a lot of thought into, uh, your comments, and- and we appreciate, uh, e- everyone who does that, because we do read all the comments, all of the... all of the comments-

Rich Robins:

Yes, yes.

Lewis Kinard:

... and, uh, it- it- it's important to us that people do comment, take the time to read these. Uh, and we also appreciate you calling in for comments. Anybody else on the committee have questions for Mr. Robins?

Rich Robins:

L- Lewis, may I please interrupt, please, and mention something?

Lewis Kinard:

Sure, sure.

Rich Robins:

Okay. You said that it's in the journal, printed up.

Lewis Kinard:

Yes.

Rich Robins:

Uh, I never received the journal, and I have repeatedly let the Texas Bar know that I would like to. I don't know how many other people pay for something they don't get from the Texas Bar, but they had said that they send it, I never get it. So yesterday, I- I, uh, downloaded from texasbar.com/CDRR, um, the- the reform proposals, and- and I read it several times when I... when I formed the conclusion that these hazards exist, that... you know, the Bar will probably tell you all one thing but then do another. They do not want those of us who are known to speak out against what the Bar tries to do. They don't want us to be informed. I've got all kinds of data about this.

Rich Robins:

Uh, the membership of the Texas Bar does not want the Texas Bar around. In the most recent referend- ... excuse me, the most recent election for the president and the, um, the members of the board, 82% abstained from voting. This is despite the fact that there were two months during which to vote. The vote was internet-enabled, two months long. Only 18% voted. The rest realized there's no point in voting 'cause the Bar is gonna do what it wants to further self-enrich. It has a $54 million budget proposal, annual budget proposal, before us right now.

Rich Robins:

You got, like, maybe almost a dozen people at the Texas Bar who make more money than the Governor of Texas or the Chief Justice of the Supreme Court. There is no way, if you all held a referendum on whether or not the attorneys wanna keep the Texas Bar around, there is no way that the Texas Bar would survive that. [crosstalk]-

Lewis Kinard:

Well I appreciate... I appreciate those- those, uh, thoughts, and we're kind of focused on, uh, these rules though here, our... it's a little beyond our jurisdiction to take on that issue. But, um, anyway, a- are... does anyone else on the Committee have questions for Mr. Robins?

Lewis Kinard:

(silence)

Lewis Kinard:

All right. Well, we thank you again for calling in. And I appreciate it. Uh, anybody else-

Rich Robins:

[crosstalk] disposal... I'm at y'all's disposal, but TexasBarSunset.com. Please don't be bashful, and if you want your inquiries to be confidential, I will keep them confidential.

Lewis Kinard:

All right, thank you.

Rich Robins:

Thank you.

Lewis Kinard:

Anybody else, uh, Brad or Cory signed up for, uh, comment on these rules?

Brad Johnson:

No one else has, Lewis, and again, if anyone's on the line or on the computer and would like to speak, go ahead and please raise your hand or press *9 and we'll be sure to call on you. And I- I don't see any hands, Lewis.

Lewis Kinard:

All right. All right, we'll close those. Uh, that's the end of our public hearings and that segment of our agenda today.

FOR BOARD CONSIDERATION 9-25-2020

STATE BAR OF TEXAS
BOARD OF DIRECTORS
RESOLUTION

Whereas *TEX. GOV'T. CODE CHAPTER 81, SUBCHAPTER E-1 establishes the Disciplinary Rule Proposal Process relating to the Texas Disciplinary Rules of Professional Conduct (TDRPC) and the Texas Rules of Disciplinary Procedure (TRDP); and*

Whereas *The Committee on Disciplinary Rules and Referenda (CDRR) has submitted proposed amendments to the TDRPC and the TRDP as described below to the State Bar Board of Directors for action in accordance with TEX. GOV'T CODE* Sec. 81.0876; *and*

Whereas *At its regularly scheduled meeting on April 26, 2019, the Board approved two proposals relating to the TDRPC as follows: 1. Adding Rule 1.05(c)(9), which permits a lawyer to disclose confidential information to secure legal advice about the lawyer's compliance with the TDRPC; and 2. Amending Rule 1.02 and adding Rule 1.16, which addresses the representation of clients with diminished capacity; and*

Whereas *At its regularly scheduled meeting on January 24, 2020, the Board approved the addition of Rule 6.05 to the TDRPC, which provides narrow exceptions to certain conflicts of interest rules when a lawyer provides limited pro bono legal services through certain pro bono or assisted pro se programs; and*

Whereas *At its regularly scheduled meeting on April 17, 2020, the Board approved amendments to Rule 3.01, 3.02, and 3.03 of the TRDP, which transfer judicial assignment duties from the Supreme Court of Texas to the Presiding Judges of the Administrative Judicial Regions when a respondent in a disciplinary complaint elects to proceed in district court, and which also revise associated provisions, including geographic restrictions on assignments; and*

Whereas *At its regularly scheduled meeting on June 24, 2020, the Board approved two proposals as follows: 1. Amending Part VII of the TDRPC to update and simplify the lawyer advertising and solicitation rules; and 2. Adding Rule 13.04 to the TRDP, which authorizes a lawyer to voluntarily designate a custodian attorney to assist with the cessation of the designating lawyer's practice and provides limited liability protection for the custodian attorney; and*

Whereas *At its regularly scheduled meeting on September 25, 2020, the Board approved two proposals relating to the TDRPC as follows: 1. Adding Rule 1.05(c)(10), which permits a lawyer to disclose confidential information when the lawyer has reason to believe it is necessary to do so in order to prevent a client from dying by suicide; and 2. Amending Rule 8.03 of the TDRPC, and Rules 1.06 and 9.01 of the TRDP, by extending self-reporting and reciprocal-discipline provisions to cover discipline by a federal court or federal agency.*

BE IT THEREFORE RESOLVED *that the Board of Directors of the State Bar of Texas at its regularly called meeting on the 25th day of September 2020 meeting, considered all proposed amendments to the TDRPC and the TRDP which the board has approved. On motion made, the Board voted to:*

1. *Petition the Supreme Court of Texas, pursuant to TEX. GOV'T CODE Section 81.0877, to order a referendum on the proposed amendments by the eligible members of the State Bar;*

2. *Approve the proposed ballot form for a referendum, as included in* ***Appendix A*** *of this resolution, to be distributed to eligible members of the State Bar of Texas in paper ballot format, and electronic ballot format pursuant to TEX. GOV'T CODE Section 81.0241; and*

3. *Approve the schedule for a referendum vote to begin on February 2, 2021 and end on March 4, 2021 at 5pm CT.*

Resolution adopted *this 25th day of September, 2020 by the State Bar Board of Directors.*

_____
Larry P. McDougal, President
State Bar of Texas

_____
Sylvia Borunda Firth, President-Elect
State Bar of Texas

_____
John Charles Ginn
Chair of the Board
State Bar of Texas

witnessed by

_____
Trey Apffel, Executive Director
State Bar of Texas

APPENDIX A

FORM OF BALLOT

A. Scope and Objectives of Representation; Clients with Diminished Capacity

Do you favor the adoption of the proposed amendments to Rule 1.02 of the Texas Disciplinary Rules of Professional Conduct and the adoption of Proposed Rule 1.16 of the Texas Disciplinary Rules of Professional Conduct, as published in the January 2021 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

B. Confidentiality of Information – Exception to Permit Disclosure to Secure Legal Ethics Advice

Do you favor the adoption of Proposed Rule 1.05(c)(9) of the Texas Disciplinary Rules of Professional Conduct, as published in the January 2021 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

C. Confidentiality of Information – Exception to Permit Disclosure to Prevent Client Death by Suicide

Do you favor the adoption of Proposed Rule 1.05(c)(10) of the Texas Disciplinary Rules of Professional Conduct, as published in the January 2021 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

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

Do you favor the adoption of Proposed Rule 6.05 of the Texas Disciplinary Rules of Professional Conduct, as published in the January 2021 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

E. Information About Legal Services (Lawyer Advertising and Solicitation)

Do you favor the adoption of the proposed amendments to Part VII of the Texas Disciplinary Rules of Professional Conduct, as published in the January 2021 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

F. Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline

Do you favor the adoption of the proposed amendments to Rule 8.03 of the Texas Disciplinary Rules of Professional Conduct and Rules 1.06 and 9.01 of the Texas Rules of Disciplinary Procedure, as published in the January 2021 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

G. Assignment of Judges in Disciplinary Complaints and Related Provisions

Do you favor the adoption of the proposed amendments to Rules 3.01–3.03 of the Texas Rules of Disciplinary Procedure, as published in the January 2021 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

H. Voluntary Appointment of Custodian Attorney for Cessation of Practice

Do you favor the adoption of Proposed Rule 13.04 of the Texas Rules of Disciplinary Procedure, as published in the January 2021 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

A copy of the proposed changes to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure can be found at www.texasbar.com/rulesvote

NOTE: The State Bar Board of Directors will vote on the proposals included in ballot items "C" and "F" at its September 25, 2020, meeting.

DRAFT DRAFT DRAFT
Updated 3 p.m. 8/04/2020

State Bar of Texas Rules Vote: February 2021
Communications Schedule*

*Based on hypothetical voting period of February 8-March 9, 2021

9/25/20 State Bar board votes to schedule election

9/25/20 Eblast to membership announcing board vote and next steps

OCT/NOV Supreme Court issues order for State Bar to conduct election

OCT/NOV (day after court order issued) Email to directors and eblast to membership regarding court order

Ongoing Emails/website updates/social media

NOVEMBER 2020

1 November *Texas Bar Journal* containing Board Update (mentioning that the board recommended to the Texas Supreme Court proposed amendments to the Texas Disciplinary Rules of Professional Conduct)

JANUARY 2021

1 January *Texas Bar Journal* containing:

- Teaser on cover
- Court order calling election
- Proposed rules and comments
- President's and/or Executive Director's Page(s) on importance of process/voting
- Article by Lewis Kinard or Brad Johnson? (Comparable to background and explanation article published in December 2010 by rules attorney Kennon Peterson)
- House ad

4 January *Texas Bar Journal* eblast to membership

4 Letter from SBOT and sample resolution sent to section chairs, committee chairs, and local, regional, and specialty bars

4 Letter seeking support from State Bar past presidents

4 Roll out short promo for all TexasBarCLE courses that encourages people to know the issues and vote

11 Provide articles to constituent groups for inclusion in eblasts, newsletters, social media, and other communications

Ongoing Website updates/blog posts/social media

FEBRUARY 2021

1 February *Texas Bar Journal* containing:

- Rules vote on the cover;
- President's Page
- Executive Director's Page
- Rules Vote 2020 intro
- Letter from Supreme Court?
- A Supreme Collaboration (background info on committee)?
- Statement of support from CDRR?
- Guide to the issues
- Statement of support from past presidents
- Resolutions of support (committees, sections, and bar associations)
- 5 benefits of proposed rules (author?)
- Point/counterpoint (a collection of varying views from SBOT members)
- House ad

1 February *Texas Bar Journal* eblast to membership

1 Letters to constituents from State Bar directors about rules vote, encourage support, stress importance of voting

8 Rules vote begins; ballots distributed to eligible members

8 *State Bar of Texas Podcast* episode released featuring interviews about the election and encouraging voting

15 Eblast to membership encouraging voting

25 Eblast to membership encouraging voting

Ongoing Website updates/blog posts/social media

Ongoing Recruit section chairs, firm managing partners, local bar presidents, etc., to email friends, constituents, etc., to remember to vote

MARCH 2021

1 March *Texas Bar Journal* containing:

- Teaser on cover

- President's Page and/or Executive Director's Page
- Referendum recap (guide to the issues, how to vote)
- House ad
- Other articles?

1 March *Texas Bar Journal* eblast to membership

4 Eblast to membership encouraging voting

8 Last day to vote; ballots are due by 5 p.m.

Ongoing Website updates/blog posts/social media

APRIL 2021

1 April *Texas Bar Journal* containing:

- Election results
- President's Page

1 April *Texas Bar Journal* eblast to membership

Proposed Amendments to the
Texas Disciplinary Rules of Professional Conduct and
Texas Rules of Disciplinary Procedure
For Tentative 2021 Rules Vote

Note: This packet includes certain proposed interpretive comments, which are provided as a reference for the proposed amendments, but will not be voted on as part of a rules vote by bar membership.

Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure

Scope and Objectives of Representation; Clients with Diminished Capacity

Texas Disciplinary Rules of Professional Conduct

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.

Confidentiality of Information – Exception to Permit Disclosure to Secure Legal Ethics Advice

Texas Disciplinary Rules of Professional Conduct

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:

***

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

***

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.

Confidentiality of Information – Exception to Permit Disclosure to Prevent Client Death by Suicide

Texas Disciplinary Rules of Professional Conduct

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:

****

(10) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide.

****

[No Proposed Comment Changes Associated with this Item]

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

Texas Disciplinary Rules of Professional Conduct

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment:

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

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

Scope of Representation

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

Conflicts and the Lawyer Providing Limited Pro Bono Legal Services

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

Imputation of Conflicts

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

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

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

Eligibility Information

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

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

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

Limited Pro Bono Legal Service Programs

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

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

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

Firm

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

Information About Legal Services (Lawyer Advertising and Solicitation)

Texas Disciplinary Rules of Professional Conduct

VII. INFORMATION ABOUT LEGAL SERVICES

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

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

(b) This Rule governs all communications about a lawyer's services, including advertisements and solicitation communications. For purposes of Rules 7.01 to 7.06:

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

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

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

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

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

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

~~(a) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the names of a professional corporation, professional association, limited liability partnership, or professional limited liability company may contain "P.C.," "L.L.P.," "P.L.L.C.," or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Nothing herein shall prohibit a married woman from practicing under her maiden name.~~

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

~~(c) The name of a lawyer occupying a judicial, legislative, or public executive or administrative position shall not be used in the name of a firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~

~~(d) A lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.~~

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

~~(f) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.02(a).~~

Comment:

1. This Rule governs all communications about a lawyer's services, including firm names, letterhead, and professional designations. Whatever means are used to make known a lawyer's

services, statements about them must be truthful and not misleading. As subsequent provisions make clear, some rules apply only to "advertisements" or "solicitation communications." A statement about a lawyer's services falls within those categories only if it was "substantially motivated by pecuniary gain," which means that pecuniary gain was a substantial factor in the making of the statement.

Misleading Truthful Statements

2. Misleading truthful statements are prohibited by this Rule. For example, a truthful statement is misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

Use of Actors

3. The use of an actor to portray a lawyer in a commercial is misleading if there is a substantial likelihood that a reasonable person will conclude that the actor is the lawyer who is offering to provide legal services. Whether a disclaimer—such as a statement that the depiction is a "dramatization" or shows an "actor portraying a lawyer"—is sufficient to make the use of an actor not misleading depends on a careful assessment of the relevant facts and circumstances, including whether the disclaimer is conspicuous and clear. Similar issues arise with respect to actors portraying clients in commercials. Such a communication is misleading if there is a substantial likelihood that a reasonable person will reach erroneous conclusions based on the dramatization.

Intent to Refer Prospective Clients to Another Firm

4. A communication offering legal services is misleading if, at the time a lawyer makes the communication, the lawyer knows or reasonably should know, but fails to disclose, that a prospective client responding to the communication is likely to be referred to a lawyer in another firm.

Unjustified Expectations

5. A communication is misleading if there is a substantial likelihood that it will create unjustified expectations on the part of prospective clients about the results that can be achieved. A communication that truthfully reports results obtained by a lawyer on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Depending on the facts and circumstances, the inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to mislead the public.

Required Statements and Disclaimers

6. A statement or disclaimer required by these Rules must be presented clearly and conspicuously such that it is likely to be noticed and reasonably understood by an ordinary person. In radio,

television, and Internet advertisements, verbal statements must be spoken in a manner that their content is easily intelligible, and written statements must appear in a size and font, and for a sufficient length of time, that a viewer can easily see and read the statements.

Unsubstantiated Claims and Comparisons

7. An unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as to lead a reasonable person to conclude that the comparison or claim can be substantiated.

Public Education Activities

8. As used in these Rules, the terms "advertisement" and "solicitation communication" do not include statements made by a lawyer that are not substantially motivated by pecuniary gain. Thus, communications which merely inform members of the public about their legal rights and about legal services that are available from public or charitable legal-service organizations, or similar non-profit entities, are permissible, provided they are not misleading. These types of statements may be made in a variety of ways, including community legal education sessions, know-your-rights brochures, public service announcements on television and radio, billboards, information posted on organizational social media sites, and outreach to low-income groups in the community, such as in migrant labor housing camps, domestic violence shelters, disaster resource centers, and dilapidated apartment complexes.

Web Presence

9. A lawyer or law firm may be designated by a distinctive website address, e-mail address, social media username or comparable professional designation that is not misleading and does not otherwise violate these Rules.

Past Success and Results

10. A communication about legal services may be misleading because it omits an important fact or tells only part of the truth. A lawyer who knows that an advertised verdict was later reduced or reversed, or that the case was settled for a lesser amount, must disclose those facts with equal or greater prominence to avoid creating unjustified expectations on the part of potential clients. A lawyer may claim credit for a prior judgement or settlement only if the lawyer played a substantial role in obtaining that result. This standard is satisfied if the lawyer served as lead counsel or was primarily responsible for the settlement. In other cases, whether the standard is met depends on the facts. A lawyer who did not play a substantial role in obtaining an advertised judgment or settlement is subject to discipline for misrepresenting the lawyer's experience and, in some cases, for creating unjustified expectations about the results the lawyer can achieve.

Related Rules

11. It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. *See* Rule 8.04(a)(3); *see also* Rule 8.04(a)(5) (prohibiting communications stating or implying an ability to improperly influence a government agency or official).

~~1. A lawyer or law firm may not practice law using a name that is misleading as to the identity of the lawyers practicing under such name, but the continued use of the name of a deceased or retired member of the firm or of a predecessor firm is not considered to be misleading. Trade names are generally considered inherently misleading. Other types of firm names can be misleading as well, such as a firm name that creates the appearance that lawyers are partners or employees of a single law firm when in fact they are merely associated for the purpose of sharing expenses. In such cases, the lawyers involved may not denominate themselves in any manner suggesting such an ongoing professional relationship as, for example, "Smith and Jones" or "Smith and Jones Associates" or "Smith and Associates." Such titles create the false impression that the lawyers named have assumed a joint professional responsibility for clients' legal affairs. See paragraph (d).~~

~~2. The practice of law firms having offices in more than one state is commonplace. Although it is not necessary that the name of an interstate firm include Texas lawyers, a letterhead including the name of any lawyer not licensed in Texas must indicate the lawyer is not licensed in Texas.~~

~~3. Paragraph (c) is designed to prevent the exploitation of a lawyer's public position for the benefit of the lawyer's firm. Likewise, because it may be misleading under paragraph (a), a lawyer who occupies a judicial, legislative, or public executive or administrative position should not indicate that fact on a letterhead which identifies that person as an attorney in the private practice of law. However, a firm name may include the name of a public official who is actively and regularly practicing law with the firm. But see Rule 7.02(a)(5).~~

~~4. With certain limited exceptions, paragraph (a) forbids a lawyer from using a trade name or fictitious name. Paragraph (c) sets out this same prohibition with respect to advertising in public media or communications seeking professional employment and contains additional restrictions on the use of trade names or fictitious names in those contexts. In a largely overlapping measure, paragraph (f) forbids the use of any such name or designation if it would amount to a "false or misleading communication" under Rule 7.02(a).~~

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

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

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

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

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

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

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

~~(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it:~~

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

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

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

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

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

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

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

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

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

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

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

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

~~(c) A lawyer shall not advertise in the public media or state in a solicitation communication that the lawyer is a specialist except as permitted under Rule 7.04.~~

~~(d) Any statement or disclaimer required by these rules shall be made in each language used in the advertisement or solicitation communication with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.~~

Comment:

1. These Rules permit the dissemination of information that is not false or misleading about a lawyer's or law firm's name, address, e-mail address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language abilities; names of references and, with their consent, names of clients regularly represented; and other similar information that might invite the attention of those seeking legal assistance.

Communications about Fields of Practice

2. Lawyers often benefit from associating with other lawyers for the development of practice areas. Thus, practitioners have established associations, organizations, institutes, councils, and practice groups to promote, discuss, and develop areas of the law, and to advance continuing education and skills development. While such activities are generally encouraged, participating lawyers must refrain from creating or using designations, titles, or certifications which are false or misleading. A lawyer shall not advertise that the lawyer is a member of an organization whose name implies

that members possess special competence, unless the organization meets the standards of Rule 7.02(b). Merely stating a designated class of membership, such as Associate, Master, Barrister, Diplomate, or Advocate, does not, in itself, imply special competence violative of these Rules.

3. Paragraph (b) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied by Rule 7.01 to communications concerning a lawyer's services.

4. The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

Certified Specialist

5. This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by the Texas Board of Legal Specialization or by an organization that applies standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable, if the organization is accredited by the Texas Board of Legal Specialization. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

~~1. The Rules within Part VII are intended to regulate communications made for the purpose of obtaining professional employment. They are not intended to affect other forms of speech by lawyers, such as political advertisements or political commentary, except insofar as a lawyer's effort to obtain employment is linked to a matter of current public debate.~~

~~2. This Rule governs all communications about a lawyer's services, including advertisements regulated by Rule 7.04 and solicitation communications regulated by Rules 7.03 and 7.05. Whatever means are used to make known a lawyer's services, statements about them must be truthful and nondeceptive.~~

~~3. Sub-paragraph (a)(1) recognizes that statements can be misleading both by what they contain and what they leave out. Statements that are false or misleading for either reason are prohibited. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.~~

~~4. Sub-paragraphs (a)(2) and (3) recognize that truthful statements may create "unjustified expectations." For example, an advertisement that truthfully reports that a lawyer obtained a jury verdict of a certain amount on behalf of a client would nonetheless be misleading if it were to turn~~

~~out that the verdict was overturned on appeal or later compromised for a substantially reduced amount, and the advertisement did not disclose such facts as well. Even an advertisement that fully and accurately reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Those unique circumstances would ordinarily preclude advertisements in the public media and solicitation communications that discuss the results obtained on behalf of a client, such as the amount of a damage award, the lawyer's record in obtaining favorable settlements or verdicts, as well as those that contain client endorsements.~~

~~5. Sub-paragraph (a)(4) recognizes that comparisons of lawyer's services may also be misleading unless those comparisons "can be substantiated by reference to verifiable objective data." Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. Statements comparing a lawyer's services with those of another where the comparisons are not susceptible of precise measurement or verification, such as "we are the toughest lawyers in town", "we will get money for you when other lawyers can't", or "we are the best law firm in Texas if you want a large recovery," can deceive or mislead prospective clients.~~

~~6. The inclusion of a disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client, but it will not necessarily do so. Unless any such qualifications and disclaimers are both sufficient and displayed with equal prominence to the information to which they pertain, that information can still readily mislead prospective clients into believing that similar results can be obtained for them without reference to their specific factual and legal circumstances. Consequently, in order not to be false, misleading, or deceptive, other of these Rules require that appropriate disclaimers or qualifying language must be presented in the same manner as the communication and with equal prominence. See Rules 7.04 (q) and 7.05(a)(2).~~

~~7. On the other hand, a simple statement of a lawyer's own qualifications devoid of comparisons to other lawyers does not pose the same risk of being misleading and so does not violate sub-paragraph (a)(4). Similarly, a lawyer making a referral to another lawyer may express a good faith subjective opinion regarding that other lawyer.~~

~~8. Thus, this Rule does not prohibit communication of information concerning a lawyer's name or firm name, address, and telephone numbers; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; names of references and with their consent, names of clients regularly represented; and other truthful information that might invite the attention of those seeking legal assistance. When a communication permitted by Rule 7.02 is made in the public media, the lawyer should consult Rule 7.04 for further guidance and restrictions. When a communication permitted by Rule 7.02 is made by a lawyer through a solicitation communication, the lawyer should consult Rules 7.03 and 7.05 for further guidance and restrictions.~~

9. Sub-paragraph (a)(5) prohibits a lawyer from stating or implying that the lawyer has an ability to influence a tribunal, legislative body, or other public official through improper conduct or upon irrelevant grounds. Such conduct brings the profession into disrepute, even though the improper or irrelevant activities referred to are never carried out, and so are prohibited without regard to the lawyer's actual intent to engage in such activities.

Communication of Fields of Practice

10. Paragraphs (a)(6), (b) and (c) of Rule 7.02 regulate communications concerning a lawyer's fields of practice and should be construed together with Rule 7.04 or 7.05, as applicable. If a lawyer in a public media advertisement or in a solicitation communication designates one or more specific areas of practice, that designation is at least an implicit representation that the lawyer is qualified in the areas designated. Accordingly, Rule 7.02(a)(6) prohibits the designation of a field of practice unless the communicating lawyer is in fact competent in the area.

11. Typically, one would expect competency to be measured by special education, training, or experience in the particular area of law designated. Because certification by the Texas Board of Legal Specialization involves special education, training, and experience, certification by the Texas Board of Legal Specialization conclusively establishes that a lawyer meets the requirements of Rule 7.02(a)(6) in any area in which the Board has certified the lawyer. However, competency may be established by means other than certification by the Texas Board of Legal Specialization. See Rule 7.04(b).

12. Lawyers who wish to advertise in the public media that they specialize should refer to Rule 7.04. Lawyers who wish to assert a specialty in a solicitation communication should refer to Rule 7.05.

Actor Portrayal Of Clients

13. Sub-paragraph (a)(7) further protects prospective clients from false, misleading, or deceptive advertisements and solicitations by prohibiting the use of actors to portray clients of a lawyer or law firm. Other rules prohibit the use of actors to portray lawyers in the advertising or soliciting lawyer's firm. See Rules 7.04(g), 7.05(a). The truthfulness of such portrayals is extremely difficult to monitor, and almost inevitably they involve actors whose apparent physical and mental attributes differ in a number of material respects from those of the actual clients portrayed.

Communication in a Second Language

14. The ability of lawyers to communicate in a second language can facilitate the delivery and receipt of legal services. Accordingly, it is in the best interest of the public that potential clients be made aware of a lawyer's language ability. A lawyer may state an ability to communicate in a second language without any further elaboration. However, if a lawyer chooses to communicate with potential clients in a second language, all statements or disclaimers required by the Texas Disciplinary Rules of Professional Conduct must also be made in that language. See paragraph (d). Communicating some information in one language while communicating the rest in another is potentially misleading if the recipient understands only one of the languages.

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

(a) The following definitions apply to this Rule:

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

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

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

(1) another lawyer;

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

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

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

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

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

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

(i) another lawyer;

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

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

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

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

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

(i) the reciprocal referral agreement is not exclusive;

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

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

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

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

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

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

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

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

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

~~(c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by Rule 1.04(f) or by paragraph (b) of this Rule.~~

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

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

~~(f) As used in paragraph (a), "regulated telephone or other electronic contact" means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.~~

Comment:

Solicitation by Public and Charitable Legal Services Organizations

1. Rule 7.01 provides that a "'solicitation communication' is a communication substantially motivated by pecuniary gain." Therefore, the ban on solicitation imposed by paragraph (b) of this Rule does not apply to the activities of lawyers working for public or charitable legal services organizations.

Communications Directed to the Public or Requested

2. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is made in response to a request for information, including an electronic search for information. The terms "advertisement" and "solicitation communication" are defined in Rule 7.01(b).

The Risk of Overreaching

3. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services via in-person or regulated telephone, social media, or other electronic contact. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

4. The potential for overreaching that is inherent in in-person or regulated telephone, social media, or other electronic contact justifies their prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be sent by regular mail or e-mail, or by other means that do not involve communication in a live or electronically interactive manner. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, with minimal risk of overwhelming a person's judgment.

5. The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

Targeted Mail Solicitation

6. Regular mail or e-mail targeted to a person that offers to provide legal services that the lawyer knows or reasonably should know the person needs in a particular matter is a solicitation communication within the meaning of Rule 7.01(b)(2), but is not prohibited by subsection (b) of this Rule. Unlike in-person and electronically interactive communication by "regulated telephone, social media, or other electronic contact," regular mail and e-mail can easily be ignored, set aside, or reconsidered. There is a diminished likelihood of overreaching because no lawyer is physically present and there is evidence in tangible or electronic form of what was communicated. *See Shapero v. Kentucky B. Ass'n*, 486 U.S. 466 (1988).

Personal, Family, Business, and Professional Relationships

7. There is a substantially reduced likelihood that a lawyer would engage in overreaching against a former client, a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent an entity; entrepreneurs who regularly engage business, employment law, or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations.

Constitutionally Protected Activities

8. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries. *See In re Primus*, 436 U.S. 412 (1978).

Group and Prepaid Legal Services Plans

9. This Rule does not prohibit a lawyer from contacting representatives of organizations or entities that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties. Such communications may provide information about the availability and terms of a plan which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to persons who are seeking legal services for themselves. Rather, it is usually addressed to a fiduciary seeking a supplier of legal services for others, who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the information transmitted is functionally similar to the types of advertisements permitted by these Rules.

Designation as an Advertisement

10. For purposes of paragraph (d)(2) of this Rule, a communication is rebuttably presumed to be "plainly marked or clearly designated an 'ADVERTISEMENT'" if: (a) in the case of a letter transmitted in an envelope, both the outside of the envelope and the first page of the letter state the word "ADVERTISEMENT" in bold face all-capital letters that are 3/8" high on a uncluttered background; (b) in the case of an e-mail message, the first word in the subject line is "ADVERTISEMENT" in all capital letters; and (c) in the case of a text message or message on social media, the first word in the message is "ADVERTISEMENT" in all capital letters.

Paying Others to Recommend a Lawyer

11. This Rule allows a lawyer to pay for advertising and communications, including the usual costs of printed or online directory listings or advertisements, television and radio airtime, domain-name registrations, sponsorship fees, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons, and website designers.

12. This Rule permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement, or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

13. A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rule 5.04(a) (division of fees with nonlawyers) and Rule 5.04(c) (nonlawyer interference with the professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.01 (communications concerning a lawyer's services).

To comply with Rule 7.01, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. *See also* Rule 5.03 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.04(a)(1) (duty to avoid violating the Rules through the acts of another).

Charges of and Referrals by a Legal Services Plan or Lawyer Referral Service

14. A lawyer may pay the usual charges of a legal services plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements.

15. A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

Reciprocal Referral Arrangements

16. A lawyer does not violate paragraph (e) of this Rule by agreeing to refer clients to another lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive, the client is informed of the referral agreement, and the lawyer exercises independent professional judgment in making the referral. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. A lawyer should not enter into a reciprocal referral agreement with another lawyer that includes a division of fees without determining that the agreement complies with Rule 1.04(f).

Meals or Entertainment for Prospective Clients

17. This Rule does not prohibit a lawyer from paying for a meal or entertainment for a prospective client that has a nominal value or amounts to ordinary social hospitality.

~~1. In many situations, in-person, telephone, or other prohibited electronic solicitations by lawyers involve well-known opportunities for abuse of prospective clients. Traditionally, the principal concerns presented by such contacts are that they can overbear the prospective client's will, lead to hasty and ill advised decisions concerning choice of counsel, and be very difficult to police. The approach taken by this Rule may be found in paragraph (f), which prohibits such communications if they are initiated by or on behalf of a lawyer or law firm and will result in the person contacted~~

communicating with any person by telephone or other electronic means. Thus, forms of electronic communications are prohibited that pose comparable dangers to face-to-face solicitations, such as soliciting business and "chat rooms" or transmitting an unsolicited, interactive communication to a prospective client that, when accessed, puts the recipient in direct contact with another person. Those that do not present such opportunities for abuse, such as pre-recorded telephone messages requiring a separate return call to speak to or retain an attorney or websites that must be accessed by an interested person and that provide relevant and truthful information concerning a lawyer or law firm, are permitted.

2. Nonetheless, paragraph (a) and (f) unconditionally prohibit those activities only when profit for the lawyer is a significant motive and the solicitation concerns matters arising out of a particular occurrence, event, or series of occurrences or events. The reason this outright ban is so limited is that there are circumstances where the dangers of such contacts can be reduced by less restrictive means. As long as the conditions of sub-paragraphs (a)(1) through (a)(3) are not violated by a given contact, a lawyer may engage in in-person, telephone, or other electronic solicitations when the solicitation is unrelated to a specific occurrence, event, or series of occurrences or events. Similarly, subject to the same restrictions, in-person, telephone, or other electronic solicitations are permitted where the prospective client either has a family or past or present attorney-client relationship with the lawyer or where the potential client had previously contacted the lawyer about possible employment in the matter.

3. In addition, Rule 7.03(a) does not prohibit a lawyer for a qualified non-profit organization from in-person, telephone, or other electronic solicitation of prospective clients for purposes related to that organization. Historically and by law, nonprofit legal aid agencies, unions, and other qualified nonprofit organizations and their lawyers have been permitted to solicit clients in-person or by telephone, and more modern electronic means of communication pose no additional threats to consumers justifying a more restrictive treatment. Consequently, Rule 7.03(a) is not in derogation of those organizations' constitutional rights to employ such methods. Attorneys for such nonprofit organizations, however, remain subject to this Rule's general prohibitions against undue influence, intimidation, overreaching, and the like.

Paying for Solicitation

4. Rule 7.03(b) does not prohibit a lawyer from paying standard commercial fees for advertising or public relations services rendered in accordance with these Rules. In addition, a lawyer may pay the fees required by a lawyer referral service that meet the requirements of Occupational Code Title 5, Subtitle B, Chapter 952. However, paying, giving, or offering to pay or give anything of value to persons not licensed to practice law who solicit prospective clients for lawyers has always been considered to be against the best interest of both the public and the legal profession. Such actions circumvent these Rules by having a non-lawyer do what a lawyer is ethically proscribed from doing. Accordingly, the practice is forbidden by Rule 7.03(b). As to payments or gifts of value to licensed lawyers for soliciting prospective clients, see Rule 1.04(f).

5. Rule 7.03(c) prohibits a lawyer from paying or giving value directly to a prospective client or any other person as consideration for employment by that client except as permitted by Rule 1.08(d).

~~6. Paragraph (d) prohibits a lawyer from agreeing to or charging for professional employment obtained in violation of Rule 7.03. Paragraph (c) further requires a lawyer to decline business generated by a lawyer referral service unless the lawyer knows or reasonably believes that service is operated in conformity with statutory requirements.~~

~~7. References to "a lawyer" in this and other Rules include lawyers who practice in law firms. A lawyer associated with a firm cannot circumvent these Rules by soliciting or advertising in the name of that firm in a way that violates these Rules. See Rule 7.04(c).~~

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

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

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

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

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

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

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

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

~~(1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms. A lawyer engaged in the trademark practice may use the designation~~

~~"Trademark," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms. A lawyer engaged in patent and trademark practice may hold himself or herself out as specializing in "Intellectual Property Law," "Patent, Trademark, Copyright Law and Unfair Competition," or any of those terms.~~

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

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

~~(b) A lawyer who advertises in the public media:~~

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

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

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

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

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

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

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

(c) Separate and apart from any other statements, the statements referred to in paragraph (b) shall be displayed conspicuously, and in language easily understood by an ordinary consumer.

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

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

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

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

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

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

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

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

(2) the advertisement states:

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

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

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

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

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

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

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

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

(2) names each of the cooperating lawyers;

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

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

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

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

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

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

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

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

Comment:

1. The Advertising Review Committee shall report to the appropriate disciplinary authority any lawyer whom, based on filings with the Committee, it reasonably believes disseminated a communication that violates Rules 7.01, 7.02, or 7.03, or otherwise engaged in conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See* Rule 8.03(a).

Multiple Solicitation Communications

2. Paragraph (a) does not require that a lawyer submit a copy of each written solicitation letter a lawyer sends. If the same form letter is sent to several persons, only a representative sample of each form letter, along with a representative sample of the envelopes used to mail the letters, need be filed.

Requests for Additional Information

3. Paragraph (b) does not empower the Advertising Review Committee to seek information from a lawyer to substantiate statements or representations made or implied in communications about legal services that were not substantially motivated by pecuniary gain.

~~1. Neither Rule 7.04 nor Rule 7.05 prohibits communications authorized by law, such as notice to members of a class in class action litigation.~~

~~**Advertising Areas of Practice and Special Competence**~~

~~2. Paragraphs (a) and (b) permit a lawyer, under the restrictions set forth, to indicate areas of practice in advertisements about the lawyer's services. See also paragraph (d). The restrictions are designed primarily to require that accurate information be conveyed. These restrictions recognize that a lawyer has a right protected by the United States Constitution to advertise publicly, but that the right may be regulated by reasonable restrictions designed to protect the public from false or misleading information. The restrictions contained in Rule 7.04 are based on the experience of the legal profession in the State of Texas and are designed to curtail what experience has shown to be~~

misleading and deceptive advertising. To ensure accountability, sub-paragraph (b)(1) requires identification of at least one lawyer responsible for the content of the advertisement.

3. Because of long-standing tradition a lawyer admitted to practice before the United States Patent Office may use the designation "patents," "patent attorney," or "patent lawyer" or any combination of those terms. As recognized by paragraph (a)(1), a lawyer engaged in patent and trademark practice may hold himself out as concentrating in "intellectual property law," "patents, or trademarks and related matters," or "patent, trademark, copyright law and unfair competition" or any combination of those terms.

4. Paragraph (a)(2) recognizes the propriety of listing a lawyer's name in legal directories according to the areas of law in which the lawyer will accept new matters. The same right is given with respect to lawyer referral service offices, but only if those services comply with statutory guidelines. The restriction in paragraph (a)(2) does not prevent a legal aid agency or prepaid legal services plan from advertising legal services provided under its auspices.

5. Paragraph (a)(3) continues the historical exception that permits advertisements by lawyers to other lawyers in legal directories and legal newspapers (whether written or electronic), subject to the same requirements of truthfulness that apply to all other forms of lawyer advertising. Such advertisements traditionally contain information about the name, location, telephone numbers, and general availability of a lawyer to work on particular legal matters. Other information may be included so long as it is not false or misleading. Because advertisements in these publications are not available to the general public, lawyers who list various areas of practice are not required to comply with paragraph (b).

6. Some advertisements, sometimes known as tombstone advertisements, mention only such matters as the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, dates of admission to bars, the acceptance of credit cards, and fees. The content of such advertisements is not the kind of information intended to be regulated by Rule 7.04 (b). However, if the advertisement in the public media mentions any area of the law in which the lawyer practices, then, because of the likelihood of misleading material, the lawyer must comply with paragraph (b).

7. Sometimes lawyers choose to advertise in the public media the fact that they have been certified or designated by a particular organization or that they are members of a particular organization. Such statements naturally lead the public to believe that the lawyer possesses special competence in the area of law mentioned. Consequently, in order to ensure that the public will not be misled by such statements, sub-paragraph (b)(2) and paragraph (c) place limited but necessary restrictions upon a lawyer's basic right to advertise those affiliations.

8. Rule 7.04(b)(2) gives lawyers who possess certificates of specialization from the Texas Board of Legal Specialization or other meritorious credentials from organizations approved by the Board the option of stating that fact, provided that the restrictions set forth in subparagraphs (b)(2)(i) and (b)(2)(ii) are followed.

9. Paragraph (c) is intended to ensure against misleading or material variations from the statements required by paragraph (b).

10. Paragraphs (e) and (f) provide the advertising lawyer, the Bar, and the public with requisite records should questions arise regarding the propriety of a public media advertisement. Paragraph (e), like paragraph (b)(1), ensures that a particular attorney accepts responsibility for the advertisement. It is in the public interest and in the interest of the legal profession that the records of those advertisements and approvals be maintained.

Examples of Prohibited Advertising

11. Paragraphs (g) through (o) regulate conduct that has been found to mislead or be likely to mislead the public. Each paragraph is designed to protect the public and to guard the legal profession against these documented misleading practices while at the same time respecting the constitutional rights of any lawyer to advertise.

12. Paragraph (g) prohibits lawyers from misleading the public into believing a non-lawyer portrayor or narrator in the advertisement is one of the lawyers prepared to perform services for the public. It does not prohibit the narration of an advertisement in the third person by an actor, as long as it is clear to those hearing or seeing the advertisement that the actor is not a lawyer prepared to perform services for the public.

13. Contingent fee contracts present unusual opportunities for deception by lawyers or for misunderstanding by the public. By requiring certain disclosures, paragraph (h) safeguards the public from misleading or potentially misleading advertisements that involve representation on a contingent fee basis. The affirmative requirements of paragraph (h) are not triggered solely by the expression of "contingent fee" or "percentage fee" in the advertisement. To the contrary, they encompass advertisements in the public media where the lawyer or firm expresses a mere willingness or potential willingness to render services for a contingent fee. Therefore, statements in an advertisement such as "no fee if no recovery" or "fees in the event of recovery only" are clearly included as a form of advertisement subject to the disclosure requirements of paragraph (h).

14. Paragraphs (i), (j), (k) and (l) jointly address the problem of advertising that experience has shown misleads the public concerning the fees that will be charged, the location where services will be provided, or the attorney who will be performing these services. Together they prohibit the same sort of "bait and switch" advertising tactics by lawyers that are universally condemned.

15. Paragraph (i) requires a lawyer who advertises a specific fee or range of fees in the public media to honor those commitments for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement itself specifies a shorter period. In no event, however, is a lawyer required to honor an advertised fee or range of fees for more than one year after publication.

16. Paragraph (j) prohibits advertising the availability of a satellite office unless the requirements of subparagraphs (1) or (2) are satisfied. Paragraph (j) does not require, however, that a lawyer or

~~firm specify which of several properly advertised offices is its "principal" one, as long as the principal office is among those advertised and the advertisement discloses the city or town in which that office is located. Experience has shown that, in the absence of such regulation, members of the public have been misled into employing a lawyer in a distant city who advertises that there is a nearby satellite office, only to learn later that the lawyer is rarely available to the client because the nearby office is seldom open or is staffed only by lay personnel. Paragraph (j) is not intended to restrict the ability of legal services programs to advertise satellite offices in remote parts of the program's service area even if those satellite offices are staffed irregularly by attorneys. Otherwise low-income individuals in and near such communities might be denied access to the only legal services truly available to them.~~

~~17. When a lawyer or firm advertises, the public has a right to expect that lawyer or firm will perform the legal services. Experience has shown that attorneys not in the same firm may create a relationship wherein one will finance advertising for the other in return for referrals. Nondisclosure of such a referral relationship is misleading to the public. Accordingly, paragraph (k) prohibits such a relationship between an advertising lawyer and a lawyer who finances the advertising unless the advertisement discloses the nature of the financial relationship between the two lawyers. Paragraph (l) addresses the same problem from a different perspective, requiring a lawyer who advertises the availability of legal services and who know or should know at the time that the advertisement is placed in the media that business will likely be referred to another lawyer or firm, to include a conspicuous statement of that fact in any such advertising. This requirement applies whether or not the lawyer to whom the business is referred is financing the advertisements of the referring lawyer. It does not, however, require disclosure of all possible scenarios under which a referral could occur, such as an unforeseen need to associate with a specialist in accordance with Rule 1.01(a) or the possibility of a referral if a prospective client turns out to have a conflict of interest precluding representation by the advertising lawyer. Lawyers participating in any type of arrangement to refer cases must comply with Rule 1.04(f).~~

~~18. Paragraph (m) protects the public by forbidding mottos, slogans, and jingles that are false or misleading. There are, however, mottos, slogans, and jingles that are informative rather than false or misleading. Accordingly, paragraph (m) recognizes an advertising lawyer's constitutional right to include appropriate mottos, slogans, and jingles in advertising.~~

~~19. Some lawyers choose to band together in a cooperative or joint venture to advertise. Although those arrangements are lawful, the fact that several independent lawyers have joined together in a single advertisement increases the risk of misrepresentation or other forms of inappropriate expression. Special care must be taken to ensure that cooperative advertisements identify each cooperating lawyer, state that each cooperating lawyer is paying for the advertisement, and accurately describe the professional qualifications of each cooperating lawyer. See paragraph (o). Furthermore, each cooperating lawyer must comply with the filing requirements of Rule 7.07. See paragraph (p).~~

~~20. The use of disclosures, disclaimers and qualifying information is necessary to inform the public about various aspects of a lawyer or firm's practice in public media advertising and solicitation communications. In order to ensure that disclaimers required by these rules are conspicuously displayed, paragraph (q) requires that such statements be presented in the same manner as the~~

~~communication and with prominence equal to that of the matter to which it refers. For example, in a television advertisement that necessitates the use of a disclaimer, if a statement or claim is made verbally, the disclaimer should also be included verbally in the commercial. When a statement or claim appears in print, the accompanying disclaimer must also appear in print with equal prominence and legibility.~~

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

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

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

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

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

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

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

(1) existing or former clients;

(2) other lawyers or professionals;

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

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

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

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

(1) another lawyer;

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

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

(g) a communication in social media or other media, which does not expressly offer legal services, and that:

(1) is primarily informational, educational, political, or artistic in nature, or made for entertainment purposes; or

(2) consists primarily of the type of information commonly found on the professional resumes of lawyers;

(h) an advertisement that:

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

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

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

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

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

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

(4) the educational background of the lawyer;

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

(6) foreign language abilities;

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

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

(9) the acceptance or nonacceptance of credit cards;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) A copy of each written, audio, audio-visual, digital media, recorded telephone message, or other electronic solicitation communication, the relevant approval thereof, and a record of the date of each such communication; the name, address, telephone number, or electronic address to which

~~each such communication was sent; and the means by which each such communication was sent shall be kept by the lawyer or firm for four years after its dissemination.~~

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

> ~~(1) directed to a family member or a person with whom the lawyer had or has an attorney client relationship;~~
>
> ~~(2) that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;~~
>
> ~~(3) if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or~~
>
> ~~(4) that is requested by the prospective client.~~

Comment:

1. This Rule exempts certain types of communications from the filing requirements of Rule 7.04. Communications that were not substantially motivated by pecuniary gain do not need to be filed.

Website-Related Filings

2. While the entire website of a lawyer or law firm must be compliant with Rules 7.01 and 7.02, the only material on the website that may need to be filed pursuant to this Rule is the contents of the homepage. However, even a homepage does not need to be filed if the contents of the homepage are exempt from filing under the provisions of this Rule. Under Rule 7.04(c), a lawyer may voluntarily seek pre-approval of any material that is part of the lawyer's website.

~~1. Rule 7.03 deals with in-person, telephone, and other prohibited electronic contact between a lawyer and a prospective client wherein the lawyer seeks professional employment. Rule 7.04 deals with advertisements in the public media by a lawyer seeking professional employment. This Rule deals with solicitations between a lawyer and a prospective client. Typical examples are letters or other forms of correspondence (including those sent, delivered, or transmitted electronically), recorded telephone messages, audiotapes, videotapes, digital media, and the like, addressed to a prospective client.~~

~~2. Written, audio, audio-visual, and other forms of electronic solicitations raise more concerns than do comparable advertisements. Being private, they are more difficult to monitor, and for that reason paragraph (c) requires retention for four years of certain information regarding all such solicitations. See also Rule 7.07(a). Paragraph (a) addresses such concerns as well as problems stemming from exceptionally outrageous communications such as solicitations involving fraud,~~

~~intimidation, or deceptive and misleading claims. Because receipt of multiple solicitations appears to be most pronounced and vexatious in situations involving accident victims, paragraphs (b)(1), (b)(2), (c)(1), (c)(4) and (c)(5) require that the envelope or other packaging used to transmit the communication, as well as the communication itself, plainly disclose that the communication is an advertisement, while paragraphs (b)(5) and (c)(3) require disclosure of the source of information if the solicitation was prompted by a specific occurrence.~~

~~3. Because experience has shown that many written, audio, audio-visual, electronic mail, and other forms of electronic solicitations have been intrusive or misleading by reason of being personalized or being disguised as some form of official communication, special prohibitions against such practices are necessary. The requirements of paragraph (b) and (c) greatly lessen those dangers of deception and harassment.~~

~~4. Newsletters or other works published by a lawyer that are not circulated for the purpose of obtaining professional employment are not within the ambit of paragraph (b) or (c).~~

~~5. This Rule also regulates audio, audio-visual, or other forms of electronic communications being used to solicit business. It includes such formats as recorded telephone messages, movies, audio or audio-visual recordings or tapes, digital media, the Internet, and other comparable forms of electronic communications. It requires that such communications comply with all of the substantive requirements applicable to written solicitations that are compatible with the different forms of media involved, as well as with all requirements related to approval of the communications and retention of records concerning them. See paragraphs (c), (d), and (e).~~

~~6. In addition to addressing these special problems posed by solicitations, Rule 7.05 regulates the content of those communications. It does so by incorporating the standards of Rule 7.02 and those of Rule 7.04 that would apply to the solicitation were it instead a comparable form of advertisement in the public media. See paragraphs (a)(2) and (3). In brief, this approach means that, except as provided in paragraph (f), a lawyer may not include or omit anything from a solicitation unless the lawyer could do so were the communication a comparable form of advertisement in the public media.~~

~~7. Paragraph (f) provides that the restrictions in paragraph (b) and (c) do not apply in certain situations because the dangers of deception, harassment, vexation and overreaching are quite low. For example, a written solicitation may be directed to a family member or a present or a former client, or in response to a request by a prospective client without stating that it is an advertisement. Similarly, a written solicitation may be used in seeking general employment in commercial matters from a bank or other corporation, when there is neither concern with specific existing legal problems nor concern with a particular past event or series of events. All such communications, however, remain subject to Rule 7.02 and paragraphs (h) through (o) of Rule 7.04. See sub-paragraph (a)(2).~~

~~8. In addition, paragraph (f) allows such communications in situations not involving the lawyer's pecuniary gain. For purposes of these rules, it is presumed that communications made on behalf of a nonprofit legal aid agency, union, or other qualified nonprofit organization are not motivated~~

~~by a desire for, or by the possibility of obtaining, pecuniary gain, but that presumption may be rebutted.~~

Rule 7.06. Prohibited Employment

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

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

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

Comment:

1. This Rule deals with three different situations: personal disqualification, imputed disqualification, and referral-related payments.

Personal Disqualification

2. Paragraph (a) addresses situations where the lawyer in question has violated the specified advertising rules or other provisions dealing with serious crimes and barratry. The Rule makes clear that the offending lawyer cannot accept or continue to provide representation. This prohibition also applies if the lawyer ordered, encouraged, or knowingly permitted another to violate the Rules in question.

Imputed Disqualification

3. Second, paragraph (b) addresses whether other lawyers in a firm can provide representation if a person or entity in the firm has violated the specified advertising rules or other provisions dealing with serious crimes and barratry, or has ordered, encouraged, or knowingly permitted another to engage in such conduct. The Rule clearly indicates that the other lawyers cannot provide representation if they knew or reasonably should have known that the employment was procured by conduct prohibited by the stated Rules. This effectively means that, in such cases, the

disqualification that arises from a violation of the advertising rules and other specified provisions is imputed to other members of the firm.

Restriction on Referral-Related Payments

4. Paragraph (c) deals with situations where a lawyer knows or reasonably should know that a case referred to the lawyer or the lawyer's law firm was procured by violation of the advertising rules or other specified provisions. The Rule makes clear that, even if the lawyer's conduct did not violate paragraph (a) or (b), the lawyer can continue to provide representation only if the lawyer does not pay anything of value, such as a referral fee, to the person making the referral.

~~Selection of a lawyer by a client often is a result of the advice and recommendation of third parties--relatives, friends, acquaintances, business associates, and other lawyers. Although that method of referral is perfectly legitimate, the client is best served if the recommendation is disinterested and informed. All lawyers must guard against creating situations where referral from others is the consequence of some form of prohibited compensation or from some form of false or misleading communication, or by virtue of some other violation of any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9). Paragraph (a) forbids a lawyer who violated these rules in procuring employment in a matter from accepting or continuing employment in that matter. This prohibition also applies if the lawyer ordered, encouraged, or knowingly permitted another to violate these rules. Paragraph (b) also forbids a lawyer from accepting or continuing employment in a matter if the lawyer knows or reasonably should know that a member or employee of his or her firm or any other person has procured employment in a matter as a result of conduct that violates these rules. Paragraph (c) addresses the situation where the lawyer becomes aware that the matter was procured in violation of these rules by an attorney or individual, but had no culpability. In such circumstances, the lawyer may continue employment and collect a fee in the matter as long as nothing of value is given to the attorney or individual involved in the violation of the rule(s). See also Rule 7.03(d), forbidding a lawyer to charge or collect a fee where the misconduct involves violations of Rule 7.03(a), (b), or (c).~~

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

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

> ~~(1) a copy of the written, audio, audio-visual, digital, or other electronic solicitation communication being sent or to be sent to one or more prospective clients for the purpose of obtaining professional employment, together with a representative sample of the envelopes or other packaging in which the communications are enclosed;~~
>
> ~~(2) a completed lawyer advertising and solicitation communication application form; and~~

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

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

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

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

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

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

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

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

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

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

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

(d) A lawyer who desires to secure an advance advisory opinion, referred to as a request for pre-approval, concerning compliance of a contemplated solicitation communication or advertisement may submit to the Advertising Review Committee, not less than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a) or (b), or the intended initial access

page submitted pursuant to paragraph (c), including the application form and required fee; provided however, it shall not be necessary to submit a videotape or DVD if the videotape or DVD has not then been prepared and the production script submitted reflects in detail and accurately the actions, events, scenes, and background sounds that will be depicted or contained on such videotapes or DVDs, when prepared, as well as the narrative transcript of the verbal and printed portions of such advertisement. If a lawyer submits an advertisement or solicitation communication for pre-approval, a finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding or disciplinary action but a finding of compliance is binding in favor of the submitting lawyer as to all materials actually submitted for pre-approval if the representations, statements, materials, facts and written assurances received in connection therewith are true and are not misleading. The finding of compliance constitutes admissible evidence if offered by a party.

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

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

(i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, electronic addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as "attorney", "lawyer", "law office", or "firm;"

(ii) the particular areas of law in which the lawyer or firm specializes or possesses special competence;

(iii) the particular areas of law in which the lawyer or firm practices or concentrates or to which it limits its practice;

(iv) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;

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

(vi) foreign language ability;

(vii) fields of law in which one or more lawyers are certified or designated, provided the statement of this information is in compliance with Rule 7.02(a) through (c).

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

(ix) the acceptance or nonacceptance of credit cards;

(x) any fee for initial consultation and fee schedule;

(xi) other publicly available information concerning legal issues, not prepared or paid for by the firm or any of its lawyers, such as news articles, legal articles, editorial opinions, or other legal developments or events, such as proposed or enacted rules, regulations, or legislation;

(xii) in the case of a website, links to other websites;

(xiii) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;

(xiv) any disclosure or statement required by these rules; and

(xv) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;

(2) an advertisement in the public media that:

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

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

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

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

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

(i) existing or former clients;

(ii) other lawyers or professionals; or

(iii) members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for, or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition

of legal services by a lawyer; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization;

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

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

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

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

Comment:

1. Rule 7.07 covers the filing requirements for public media advertisements (see Rule 7.04) and written, recorded, or other electronic solicitations (see Rule 7.05). Rule 7.07(a) deals with solicitation communication sent by a lawyer to one or more specified prospective clients. Rule 7.07(b) deals with advertisements in the public media. Rule 7.07(c) deals with websites. Although websites are a form of advertisement in the public media, they require different treatment in some respects and so are dealt with separately. Each provision allows the Bar to charge a fee for reviewing submitted materials, but requires that fee be set solely to defray the expenses of enforcing those provisions.

2. Copies of non-exempt solicitations communication or advertisements in public media (including websites) must be provided to the Advertising Review Committee of the State Bar of Texas either in advance or concurrently with dissemination, together with the fee required by the State Bar of Texas Board of Directors. Presumably, the Advertising Review Committee will report to the appropriate grievance committee any lawyer whom it finds from the reviewed products has disseminated an advertisement in the public media or solicitation communication that violates Rules 7.02, 7.03, 7.04, or 7.05, or, at a minimum, any lawyer whose violation raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.03(a).

3. Paragraph (a) does not require that a lawyer submit a copy of each and every written solicitation letter a lawyer sends. If the same form letter is sent to several people, only a representative sample of each form letter, along with a representative sample of the envelopes used to mail the letters, need be filed.

4. A lawyer wishing to do so may secure an advisory opinion from the Advertising Review Committee concerning any proposed advertisement in the public media (including a website) or any solicitation communication in advance of its first use or dissemination by complying with Rule 7.07(d). This procedure is intended as a service to those lawyers who want to resolve any possible doubts about their proposed advertisements' or solicitations' compliance with these Rules before utilizing them. Its use is purely optional. No lawyer is required to obtain advance clearance of any advertisement in the public media (including a website) or any solicitation communication from the State Bar. Although a finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding, a finding of compliance is binding in favor of the submitting lawyer as to all materials actually submitted for review, as long as the lawyer's presentation to the Advertising Review Committee in connection with that advisory opinion is true and not misleading.

5. Under its Internal Rules and Operating Procedures, the Advertising Review Committee is to complete its evaluations no later than 25 days after the date of receipt of a filing. The only way that the Committee can extend that review period is to: (1) determine that there is reasonable doubt whether the advertisement or solicitation communication complies with these Rules; (2) conclude that further examination is warranted but cannot be completed within the 25-day period; and (3) advise the lawyer of those determinations in writing within that 25 day period. The Committee's Internal Rules and Operating Procedures also provide that a failure to send such a communication to the lawyer within the 25-day period constitutes approval of the advertisement or solicitation communication. Consequently, if an attorney submits an advertisement in the public media (including a website) or a solicitation communication to the Committee for advance approval not less than 30 days prior to the date of first dissemination as required by these Rules, the attorney will receive an assessment of that advertisement or communication before the date of its first intended use.

6. Consistent with the effort to protect the first amendment rights of lawyers while ensuring the right of the public to be free from misleading advertising and the right of the Texas legal profession to maintain its integrity, paragraph (e) exempts certain types of advertisements and solicitation communications prepared for the purpose of seeking paid professional employment from the filing requirements of paragraphs (a), (b), and (c). Those types of communications need not be filed at all if they were not prepared to secure paid professional employment.

7. For the most part, the types of exempted advertising listed in sub-paragraphs (e)(1) to (e)(5) are objective and less likely to result in false, misleading or fraudulent content. Similarly the types of exempted solicitation communications listed in sub-paragraphs (e)(6) to (e)(8) are those found least likely to result in harm to the public. See Rule 7.05(f), and comment 7 to Rule 7.05. The fact that a particular advertisement or solicitation made by a lawyer is exempted from the filing requirements of this Rule does not exempt a lawyer from the other applicable obligations of these Rules. See generally Rules 7.01 through 7.06.

8. Paragraph (f) does not empower the Advertising Review Committee to seek information from a lawyer to substantiate statements or representations made or implied in advertisements or written communications that do not seek to obtain paid professional employment for that lawyer.

Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline

Texas Disciplinary Rules of Professional Conduct

Rule 8.03. Reporting Professional Misconduct

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(f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, "discipline" by a federal court or federal agency means a public reprimand, suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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Texas Rules of Disciplinary Procedure

1.06. Definitions:

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CC. "Professional Misconduct" includes:

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2. Attorney conduct that occurs in another ~~state or in the District of Columbia~~ jurisdiction, including before any federal court or federal agency, and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct.

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9.01. Orders From Other Jurisdictions: Upon receipt of information indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction, including by any federal court or federal agency, the Chief Disciplinary Counsel shall diligently seek to obtain a certified copy of the order or judgment of discipline from the other jurisdiction, and file it with the Board of Disciplinary Appeals along with a petition requesting that the attorney be disciplined in Texas. A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action under this Part, subject to the defenses set forth in Rule 9.04 below. For purposes of this Part, "discipline" by a federal court or federal agency means a public reprimand,

suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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[No Proposed Comment Changes Associated with this Item]

Assignment of Judges in Disciplinary Complaints and Related Provisions

Texas Rules of Disciplinary Procedure

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

A. Notice that the action is brought by the Commission for Lawyer Discipline, a committee of the State Bar.

B. The name of the Respondent and the fact that he or she is an attorney licensed to practice law in the State of Texas.

C. A request for assignment of an active district judge to preside in the case.

~~C~~D. Allegations necessary to establish proper venue.

~~D~~E. A description of the acts and conduct that gave rise to the alleged Professional Misconduct in detail sufficient to give fair notice to Respondent of the claims made, which factual allegations may be grouped in one or more counts based upon one or more Complaints.

~~E~~F. A listing of the specific rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking Sanctions.

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

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

3.02. Assignment of Judge:

A. Assignment Generally: Upon receipt of a Disciplinary Petition, the ~~Clerk of the Supreme Court of Texas shall promptly bring the Petition to the attention of the Supreme Court. The Supreme Court~~ Presiding Judge shall ~~promptly appoint~~ assign an active district judge ~~who does not reside in the Administrative Judicial District in which the Respondent resides~~ whose district does not include the county of appropriate venue to preside in the case. An assignment of a judge from another region shall be under Chapter 74, Government Code. The Presiding Judge ~~and the Clerk of the Supreme Court~~ shall transmit a copy of the ~~Supreme Court's appointing~~

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

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

3.03. Filing, Service and Venue: After the trial judge has been ~~appointed~~ assigned, the Chief Disciplinary Counsel shall promptly file the Disciplinary Petition and a copy of the ~~Supreme Court's appointing Order~~ Presiding Judge's assignment order with the district clerk of the county of alleged venue. The Respondent shall then be served as in civil cases generally with a copy of the Disciplinary Petition and a copy of the ~~Supreme Court's appointing Order~~ Presiding Judge's assignment order. In a Disciplinary Action, venue shall be in the county of Respondent's principal place of practice; or if the Respondent does not maintain a place of practice within the State of Texas, in the county of Respondent's residence; or if the Respondent maintains neither a residence

nor a place of practice within the State of Texas, then in the county where the alleged Professional Misconduct occurred, in whole or in part. In all other instances, venue is in Travis County, Texas.

[No Proposed Comment Associated with this Item]

Voluntary Appointment of Custodian Attorney for Cessation of Practice

Texas Rules of Disciplinary Procedure

13.04. Voluntary Appointment of Custodian Attorney for Cessation of Practice: In lieu of the procedures set forth in Rules 13.02 and 13.03, an attorney ceasing practice or planning for the cessation of practice ("appointing attorney" for purposes of this Rule) may voluntarily designate a Texas attorney licensed and in good standing to act as custodian ("custodian attorney" for purposes of this Rule) to assist in the final resolution and closure of the attorney's practice. The terms of the appointing documents, which shall be signed and acknowledged by the appointing attorney and custodian attorney, may include any of the following duties assumed:

A. Examine the client matters, including files and records of the appointing attorney's practice, and obtain information about any matters that may require attention.

B. Notify persons and entities that appear to be clients of the appointing attorney of the cessation of the law practice, and suggest that they obtain other legal counsel.

C. Apply for extension of time before any court or any administrative body pending the client's employment of other legal counsel.

D. With the prior consent of the client, file such motions and pleadings on behalf of the client as are required to prevent prejudice to the client's rights.

E. Give appropriate notice to persons or entities that may be affected other than the client.

F. Arrange for surrender or delivery to the client of the client's papers, files, or other property.

The custodian attorney shall observe the attorney-client relationship and privilege as if the custodian were the attorney of the client and may make only such disclosures as are necessary to carry out the purposes of this Rule. Except for intentional misconduct or gross negligence, no person acting as custodian attorney under this Rule shall incur any liability by reason of the actions taken pursuant to this Rule.

The privileges and limitations of liability contained herein shall not apply to any legal representation taken over by the custodian attorney.

[No Proposed Comment Associated with this Item]