



COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

2023 Annual Report



COMMITTEE MEMBERS

M. Lewis Kinard—Chair
Timothy D. Belton
Amy Bresnen
Scott Brumley

Robert Denby
Claude E. Ducloux
Hon. Phyllis Martinez Gonzalez
Professor Vincent R. Johnson
Karen Nicholson

ABOUT

The Committee on Disciplinary Rules and Referenda was created by the 2017 Texas Legislature in Section 81.0872 of the State Bar Act. The committee consists of nine members: seven attorney members and two non-attorney public members. The committee is statutorily charged to:

1. Regularly review the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure;
2. At least annually issue to the Supreme Court of Texas and the State Bar of Texas Board of Directors a report on the adequacy of the disciplinary rules; and
3. Oversee the initial process for proposing a disciplinary rule.

Representing a broad range of perspectives, the committee consists of:

- Three attorneys appointed by the president of the State Bar;
- One non-attorney public member appointed by the president of the State Bar;
- Four attorneys appointed by the Supreme Court; and
- One non-attorney public member appointed by the Supreme Court.

The president of the State Bar and the chief justice of the Supreme Court alternate designating an attorney member of the committee to serve as the presiding officer of the committee for a term of one year. Committee members serve staggered three-year terms, with one-third of the members' terms expiring each year.

TERM EXPIRING DECEMBER 31, 2023

Claude E. Ducloux–Austin
Professor Vincent R. Johnson–San Antonio
M. Lewis Kinard, Chair–Dallas¹

TERM EXPIRING DECEMBER 31, 2024

Robert Denby–Houston
Hon. Phyllis Martinez Gonzalez–El Paso
Karen Nicholson (Public Member)–Austin

TERM EXPIRING DECEMBER 31, 2025

Timothy D. Belton (Public Member)–Bellaire
Amy Bresnen–Austin
Scott Brumley–Amarillo

¹Reappointed for term expiring December 31, 2026, and as chair for term expiring December 31, 2024.

A NOTE FROM THE CHAIR



M. Lewis Kinard
Chair

A handwritten signature in black ink, which appears to read "M. Lewis Kinard". The signature is fluid and cursive, written on a plain white background.

With your support and participation, the committee has now completed six years of work under its statutory charge. Each individual and organization who listened to a monthly meeting, submitted comments and questions, appeared at a public hearing, and volunteered on a subcommittee has contributed to the work of our small core group. This year was notable in that the committee finished a bundle of 12 proposed rule changes on which the Supreme Court of Texas has now directed the State Bar of Texas to conduct a referendum.

We still have work to do! This will be the second referendum since the committee was formed, and hopefully, such voting will become a routine activity of our bar's self-governance.

Thank you all for your continued support and your valuable participation in maintaining the Texas Rules of Disciplinary Procedure and Texas Disciplinary Rules of Professional Conduct. Next year will be busy!

2023 COMMITTEE

TERM EXPIRING DECEMBER 31, 2023



Claude E. Ducloux (Austin) is certified in both civil trial (1984) and civil appellate law (1987) by the Texas Board of Legal Specialization; licensed in Texas, Colorado, and California; and speaks regularly on legal ethics, law office management, and trial-related topics. He is a former president of the Austin Bar Association and a former chair of the Texas Board of Legal Specialization, the Texas Bar Foundation, the Texas Bar College, and the Texas Center for Legal Ethics. Ducloux has written extensively on various legal education and disciplinary issues and is a U.S. Army veteran.



Vincent R. Johnson (San Antonio) is the Katherine A. Ryan Distinguished Chair for Global, Comparative, and International Law at St. Mary's University. He teaches and writes in the areas of torts, professional responsibility, legal malpractice law, and government ethics law. Johnson has served as a Fulbright Scholar in Burma, China, and Romania. His articles have been cited in more than 215 law reviews and 70 federal and state court decisions. Johnson is an elected member of the American Law Institute. He received his J.D. from the University of Notre Dame, an LL.M. from Yale Law School, and a second LL.M. from the London School of Economics and Political Science.



M. Lewis Kinard, Chair (Dallas)² is executive vice president, general counsel, and assistant corporate secretary for the American Heart Association, or AHA, in Dallas. He was the last chair of the State Bar Committee on Disciplinary Rules and Professional Responsibility and served on that committee for seven years. Kinard has over 30 years of legal practice in a range of substantive areas, is licensed to practice law in Texas and Arkansas, and formerly held a "single client" license in Colorado. At the AHA, he has focused on international commercial agreements, ground-breaking collaborative research programs, and growing the AHA's legal department to keep pace with the organization's evolving global legal needs. Kinard earned a bachelor's degree from the University of Arkansas and a J.D. from SMU Dedman School of Law.

¹Reappointed for term expiring December 31, 2026, and as chair for term expiring December 31, 2024.

2023 COMMITTEE

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Robert Denby (Houston) is a member of Vinson & Elkins' Office of the General Counsel and a leading authority on legal ethics, professional responsibility, and risk management for law firms. Prior to joining Vinson & Elkins, Denby spent 16 years at the Attorneys' Liability Assurance Society, or ALAS, the premier malpractice carrier for large law firms, including seven years as the head of ALAS' industry-leading Loss Prevention Group. He is well versed in the key risk management issues that law firms encounter and helps the firm and its lawyers navigate those issues. He is an accomplished speaker and nationally recognized as an expert in attorney well-being. Beyond his loss prevention skills, Denby is an experienced trial lawyer and litigation manager.



Hon. Phyllis Martinez Gonzalez (El Paso) presides over Texas Title IV-D Court #44. As the only Texas Title IV-D judge with an enhanced service docket, her court links representatives from various community services with individual parties to meet underlying needs. Using an enhanced service docket enables her to assist families in a meaningful way. Gonzalez presents on the national, state, and local levels to educate parents, children, and the legal community. She has also served as an assistant attorney general and managing attorney for the Office of Attorney General of the state of Texas while holding a dual position as a special assistant U.S. attorney and assistant attorney general in the Major Crimes Division with the U.S. Attorney's Office for the Western District of Texas. Gonzalez sits on various advisory boards and boards of directors, as well as the National Council of Juvenile and Family Court Judges committees.



Karen Nicholson—Public Member (Austin) served on the board of the League of Women Voters of the United States, where her service included vice president and chair of both the Advocacy and Litigation and the Education committees. She has also served as president of LWV Texas and LWV Midland and on the boards of the Richardson and Houston leagues. Currently, she is the advocacy director for LWV Austin Area. Contributions to the legal community include being a public member of the Commission for Lawyer Discipline and the Grievance Oversight Committee. She currently serves on the Texas Legal Services Center Board and as a commissioner for the Texas Access to Justice Commission. Education has long been one of her primary focuses. Before retiring to Austin, Nicholson was vice president of the Midland ISD Board of Trustees. She taught in the Austin and Richardson ISDs and was an adjunct professor of mathematics at Midland College. She has served in volunteer education positions and on advisory committees, including president of the Midland Council PTA, a math tutor, bond elections committees, the Chamber of Commerce Education Committee, and many others.

2023 COMMITTEE

TERM EXPIRING DECEMBER 31, 2025



Timothy D. Belton –Public Member (Bellaire) is chairman and CEO of ZeoGas LLC, a development company pursuing a clean methanol project in the Port Arthur area. He serves as an independent director of the Buckingham Senior Living Community, an independent director of Thesis Capital Partners, and as president of the Business Ethics Forum. Belton began his career at Andersen Consulting Strategic Services, now known as Accenture, where he led major change through his leadership in the firm's post-merger integration practice. He later served as the restructuring officer and then COO of TRC Companies, as well as the chairman and CEO of TDECU Holdings. Belton served as a trustee and Finance Committee chair of the Texas Center for Legal Ethics, director and chairman of the Finance Committee of Texas Legal, Inc., and as a public member of the State Bar of Texas Board of Directors. Belton holds a BBA in business and technology management from the University of Texas McCombs School of Business and an MBA from Harvard Business School.



Amy Bresnen (Austin) is an attorney and lobbyist at BresnenAssociates, Inc. Her private sector representation of clients has included major corporate and small businesses, local governments, and nonprofits with such diverse issues as ethics, civil justice, family law, women's issues, public education, human rights, water, telecommunications, mental health care, regulation of various professions, eminent domain, the judiciary, gaming, pension systems, taxes and fees, technology, transportation, state appropriations, electric regulation, and issues affecting public safety personnel. Bresnen published an article about the latest changes to the Texas anti-SLAPP law in the *St. Mary's Law Journal* ("Targeting the Texas Citizen Participation Act: The 2019 Texas Legislature's Amendments to a Most Consequential Law") that has been downloaded over 5,000 times. She holds a J.D. from St. Mary's University, an MPA from Texas State University, and a Bachelor of Science degree in speech communication with a minor in political science from Texas Christian University.



Scott Brumley (Amarillo) is the county attorney of Potter County, a position in which he has served since January 2005. From 1995 until he took office, he was the Civil Division chief of the Potter County Attorney's Office. Brumley is responsible for handling and litigating a variety of civil issues involving Potter County and its officials. He has served as chair of the Government Law Section Council of the State Bar of Texas, president and board chair of the Texas District and County Attorneys Association, and chair of the Texas Association of Counties Risk Management Pool Board. He frequently writes and speaks on ethics and county-related legal issues. Brumley graduated from Texas Tech University in 1989 with a bachelor's degree in journalism (where he was editor in chief of the university's daily newspaper) and from the Texas Tech University School of Law in 1992.

RULE PROPOSAL PROCESS

RULE PROPOSAL A request to initiate the rule proposal process may be made by: (1) a resolution of the State Bar of Texas Board of Directors; (2) a request by the Supreme Court of Texas; (3) a request by the Commission for Lawyer Discipline; (4) a petition signed by at least 10% of registered members of the State Bar; (5) a concurrent resolution of the Legislature; or (6) a petition signed by at least 20,000 people, of which at least 51%, or 10,200 or more, must be Texas residents. Additionally, the Committee on Disciplinary Rules and Referenda can initiate the rule proposal process on its own.

INITIATION The committee must vote to initiate the rule proposal process or decline in writing within 60 days of receiving a request.

PUBLICATION A proposed rule must be published in the Texas Register and the *Texas Bar Journal* within six months of initiation of the rule proposal process.

COMMENT PERIOD The committee shall give interested parties at least 30 days from the date of publication to submit comments on the proposed rule to the committee.

PUBLIC HEARING During the comment period, the committee shall hold a public hearing on the proposed rule at the committee's discretion or if requested by: (1) at least 25 people; (2) a state agency or political subdivision of this state; or (3) an association with at least 25 members.

COMMITTEE VOTE The committee shall vote on whether to recommend a proposed rule to the board of directors not later than the 60th day after the final day of the comment period.

BOD VOTE The State Bar Board of Directors shall 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 shall vote for or against the rule or return the rule to the committee for additional consideration. If the rule is approved, the board shall petition the Supreme Court to order a vote by State Bar members.

VOTING On receipt of a petition filed by the board of directors, the Supreme Court shall: (1) distribute a copy of the rule in ballot form to each member of the State Bar and order a vote on the rule; and (2) publish the rule in the Texas Register and the *Texas Bar Journal*. The Supreme Court shall give State Bar members: (1) at least 30 days to consider a proposed disciplinary rule before voting begins; and (2) 30 days to vote on the proposed disciplinary rule following the period for considering the proposed rule.

ADOPTION The Supreme Court by majority vote may approve or reject a proposed disciplinary rule in its entirety, but may not approve or reject only part of the rule. If the Supreme Court does not vote on the rule on or before the 120th day after the date the rule is approved by State Bar members, the rule is considered approved by the Supreme Court.

2023 SUMMARY



In 2023, the committee continued its careful review of the Texas Disciplinary Rules of Professional Conduct, or TDRPC, and the Texas Rules of Disciplinary Procedure, or TRDP. Throughout the review, the committee maintained its commitment to transparency and public participation in the rule proposal process. The committee held 11 meetings during 2023, which included one public hearing on five proposed rules and one public hearing on three proposed rules. The committee used videoconference technology for the meetings and public hearings, which facilitated public participation throughout the process. The committee initiated nine rule proposals in 2023 and studied and made recommendations regarding interpretive comments.

To learn more, go to texasbar.com/CDRR.

2023 Committee on Disciplinary Rules and Referenda. Pictured top row from left: Haksoon Andrea Low (Committee on Disciplinary Rules and Referenda attorney), Cory Squires (State Bar of Texas staff liaison), Karen Nicholson, Robert Denby; middle row from left: Amy Bresnen, Hon. Phyllis Martinez Gonzalez, Scott Brumley, M. Lewis Kinard (chair); bottom row from left: Professor Vincent R. Johnson, Claude E. Ducloux. Note: Timothy Belton is not pictured.



OUTREACH AND COMMUNICATIONS

To maximize public participation in the rule proposal process, the committee's website includes meeting materials and agendas, a schedule of meeting dates and participation methods, rule proposals and timelines, audio and/or video of meetings, and other information. Members of the public can submit comments on proposed rules through the website and can also sign up for committee email updates. In 2023, the website received 13,944 visits.

During the year, the committee published eight rule proposals for public comment in the *Texas Bar Journal* and Texas Register, held one public hearing on five rule proposals and one public hearing on three rule proposals, and received a combined total of 103 written public comments on the rule proposals. Information about rule proposals and public hearings was emailed to Texas lawyers, committee email subscribers, and other interested parties. The committee utilized videoconference technology to facilitate public participation in meetings and hearings. Prior year outreach and communications data can be found at texasbar.com/cdrr/annualreport.

COMMITTEE ACTIVITY	2023
Rule Proposals Initiated	9
Rule Proposals Published	8
Rule Proposals Recommended	13
Rule Requests from Supreme Court	1
Rule Requests from Board	0
Rule Requests from Commission for Lawyer Discipline	0
Self-Initiated Rule Proposals*	9
Comment Requests from Supreme Court **	0
Recommendations on Comments	9
Formal Rule Requests Denied	0

COMMUNICATIONS	2023
Written Public Comments on Rule Proposals***	103
Email Notices Sent	15
Public Hearings Held****	2

*This item refers to initiated proposals not based on a formal third-party request.

**This item refers to interpretive rule comments separate from proposed rule changes.

***This item refers to public comments on rule proposals but does not include public comments on rules under consideration before initiation of the rule proposal process.

****These public hearings covered eight proposals.

RULE REVIEW

CLIENT-LAWYER RELATIONSHIP

After years of study that began in 2020, the committee proposed a new scheme where TDRPC Rules 1.00, 1.09, 1.10, and 1.18, in conjunction, clarify the conflict-of-interest rules for the imputation of a conflict of interest and broaden the use of screening so that screening is no longer limited to only a few specific contexts. With the proposed new scheme, the committee recognized the movement of lawyers among law firms has become increasingly common, and thus, the committee proposed rules to manage a conflict of interest involving a lawyer's former or prospective client.

In its study, the committee considered terms, as currently contained in Part I of the TDRPC and found throughout the conflict-of-interest rules, which required definition to best implement the scheme.

TERMINOLOGY

To update and clarify the terminology used in the TDRPC, the committee continued to receive public comments on new and amended terms it proposed while it considered public comments on other rule proposals affected by the terminology. The committee previously initiated the rule proposal process for a version of Rule 1.00 on July 8, 2020, and initiated the process again for a different version of Rule 1.00 on March 3, 2021. On March 4, 2022, the committee re-published the version of the proposed rule published in 2021 because the committee on that date also published proposed Rules 1.09 and 1.10. In response to feedback received from the public after each publication, comment period, and public hearing, the committee considered and refined changes to Rule 1.00 before submitting the proposed rule to the board.

On May 4, 2022, the committee voted unanimously to recommend proposed Rule 1.00 to the board for review and consideration. The version of proposed Rule 1.00, as recommended to the board, added defined terms for: 1) "Confirmed in writing"; 2) "Informed consent"; 3) "Represent," "Represents," or "Representation"; 4) "Screened"; and 5) "Writing" or "Written." Additionally, proposed Rule 1.00 clarified the current definition of "Fraud" or "Fraudulent" as applied to a negligent failure to apprise another of relevant information.

On October 19, 2022, the committee submitted proposed Rule 1.00 to the board. On January 27, 2023, the board voted to approve the proposed rule. On October 2, 2023, the board petitioned the Supreme Court of Texas to order a vote by bar membership on the proposed rule. By order of the court, the bar membership will vote on the proposed rule from April 1, 2024, to April 30, 2024.



CONFLICT OF INTEREST INVOLVING A FORMER CLIENT AND USE OF SCREENING

The committee continued its efforts to delete and replace current TDRPC Rule 1.09 with proposed Rule 1.09 to describe the duties of a lawyer who has formerly represented a client or whose present or former law firm has previously represented a client. The committee proposed to replace and retitle current Rule 1.10 with a new rule that endorses the use of screening to manage former-client conflicts of interest and other conflicts arising under Rule 1.06, the general conflicts of interest rule. In the process, the committee proposed to renumber current Rules 1.10-1.16 as Rules 1.11-1.17.

On May 4, 2022, after considering comments received during the comment period and at the public hearing, the committee voted unanimously to recommend proposed Rules 1.09 and 1.10 to the board for review and consideration. On October 19, 2022, the committee submitted proposed Rules 1.09 and 1.10 to the board. On January 27, 2023, the board voted to approve the proposed rules. On October 2, 2023, the board petitioned the Supreme Court of Texas to order a vote by bar membership on the proposed rules. By order of the court, the bar membership will vote on the proposed rules from April 1, 2024, to April 30, 2024.

CONFLICT OF INTEREST INVOLVING A PROSPECTIVE CLIENT AND USE OF SCREENING

Although most of its study and consideration occurred prior to 2023, the committee proposed TDRPC Rule 1.18, to describe the duties owed by a lawyer to a prospective client, including a former prospective client. The proposed rule addresses who constitutes a “prospective client,” the protection of confidential information, and the use of screening to avoid conflicts of interest occurring with prospective clients. In 2020, the committee initiated, published, received public comment on, and voted to recommend proposed Rule 1.18 to the board. On June 3, 2021, the committee submitted proposed Rule 1.18 to the board.

On September 24, 2021, the board voted unanimously to approve the proposed rule. On October 2, 2023, the board petitioned the Supreme Court of Texas to order a vote by bar membership on the proposed rules. By order of the court, the bar membership will vote on the proposed rules from April 1, 2024, to April 30, 2024.

CONFLICT OF INTEREST INVOLVING A PUBLIC DEFENDER'S OFFICE AND USE OF SCREENING

After the State Bar Board of Directors voted to approve a proposed rule governing the use of screening to manage conflicts of interest involving prospective clients and to approve proposed rules governing the use of screening to manage conflicts of interest involving former clients in September 2021 and January 2023, respectively, lawyers in a public defender's office requested that the committee consider a rule that applies screening specifically to those lawyers. The committee voted to initiate the rule proposal process for proposed Rule 1.11, pending renumbering, on May 3, 2023. That proposed rule was withdrawn. The committee again initiated the rule proposal process on October 4, 2023. The committee continued to consider the rule proposal through the remainder of 2023.

PROHIBITED TRANSACTIONS

The committee studied modifications to TDRPC Rule 1.08, which governs business dealings between a lawyer and a client. The committee proposed Rule 1.08(a) that specifies and clarifies the actions that a lawyer must take before the lawyer claims to have acquired an ownership or business interest in property belonging to the client.

On November 3, 2022, the committee voted to initiate the rule proposal process for proposed Rule 1.08(a). Also on November 3, 2022, the committee voted to publish proposed Rule 1.08(a). The committee published the rule proposal in the March 2023 issue of the *Texas Bar Journal* and the March 3, 2023, issue of the *Texas Register*. The committee held a public hearing on proposed Rule 1.08(a) on April 12, 2023, and accepted public comments through April 13, 2023.

On May 3, 2023, the committee voted unanimously to recommend proposed Rule 1.08(a) to the board for review and consideration. On May 23, 2023, the committee submitted proposed Rule 1.08(a) to the board. On June 21, 2023, the board voted to approve the proposed rule. On October 2, 2023, the board petitioned the Supreme Court of Texas to order a vote by bar membership on the proposed rule. By order of the court, the bar membership will vote on the proposed rule from April 1, 2024, to April 30, 2024.

SPECIAL RESPONSIBILITIES OF A PROSECUTOR

For nearly two years, the committee considered and proposed three versions of TDRPC Rule 3.09, that imposes specific duties upon a prosecutor. The version of proposed Rule 3.09 that the committee recommended to the board adds the requirement that a prosecutor disclose information to the defendant, defense counsel, and the tribunal and an entity examines and litigates claims of actual innocence in the prosecutor's jurisdiction, or the appropriate prosecutor in the jurisdiction where the conviction was obtained, when the prosecutor knows of new and credible information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted.

Furthermore, the committee's proposed rule requires a prosecutor to take certain action to ensure that the defendant is represented by counsel and to cooperate with defense counsel. The proposed rule provides that a prosecutor who concludes in good faith that information is not subject to disclosure does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

The committee first initiated the rule proposal process for Rule 3.09 on October 6, 2021. After soliciting public comments during a comment period and a public hearing, the committee voted not to recommend the proposed rule to the board on June 1, 2022. The committee initiated the rule proposal process for Rule 3.09 a second time on June 1, 2022. The committee formed a subcommittee, which included four committee members, a non-member prosecutor, and a non-member defense attorney to consider the rule proposal further. The subcommittee convened four meetings and accepted oral and written comments from parties with diverse perspectives. The subcommittee considered numerous alternative drafts of the proposed rule, including submissions from participants. On November 3, 2022, the committee voted not to publish the proposed rule.

On November 3, 2022, the committee voted to initiate the rule proposal process for proposed Rule 3.09 a third time. The committee voted to publish proposed Rule 3.09 in the January 2023 issue of the *Texas Bar Journal* and the January 13, 2023, issue of the *Texas Register*. The committee held a public hearing on proposed Rule 3.09 on April 12, 2023, and accepted public comments through April 13, 2023.

On May 3, 2023, after discussing the public comments it received, the committee amended the published version of the proposed rule. The committee voted unanimously to recommend proposed Rule 3.09, as amended, to the board for review and consideration. On July 14, 2023, the committee submitted proposed Rule 3.09 to the board. On September 29, 2023, the board voted to approve the proposed rule. On October 2, 2023, the board petitioned the Supreme Court of Texas to order a vote by the bar membership on the proposed rule. By order of the court, the bar membership will vote on the proposed rule from April 1, 2024, to April 30, 2024.

NON-CLIENT RELATIONSHIPS

In 2023, the committee continued its study of possible changes to Part IV of the TDRPC. The committee initiated the rule proposal process for TDRPC Rules 4.01, 4.02, 4.03, and 4.04 on February 1, 2023. The committee determined that no amendments were necessary and did not publish proposed amendments to Rules 4.01 on Truthfulness in Statements to Others and 4.02 on Communication with One Represented by Counsel.

The committee proposed to amend Rule 4.03 to expressly prohibit a lawyer from giving legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client. The committee proposed to amend Rule 4.04(c) to require that, in representing a client, a lawyer who receives a document or electronically stored information and knows that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

The committee published proposed Rules 4.03 and 4.04 in the April 2023 issue of the *Texas Bar Journal* and the April 7, 2023, issue of the *Texas Register*. The committee held a public hearing on proposed Rules 4.03 and 4.04 on June 7, 2023, and accepted public comments through June 8, 2023. On August 2, 2023, the committee voted unanimously to recommend proposed Rules 4.03 and 4.04 to the board for review and consideration. On August 9, 2023, the committee submitted proposed Rules 4.03 and 4.04 to the board. On September 29, 2023, the board voted to approve proposed Rule 4.03 but voted to reject proposed Rule 4.04.

On October 2, 2023, the board petitioned the Supreme Court of Texas to order a vote by the bar membership on proposed Rule 4.03. By order of the court, the bar membership will vote on the proposed rule from April 1, 2024, to April 30, 2024.

At its meeting on October 4, 2023, the committee discussed the concerns raised by the board about the version of proposed Rule 4.04 that the committee recommended and that the board rejected. The committee discussed possible action in response to the board's vote but did not re-initiate the rule proposal process or take any further action on Rule 4.04 in 2023.

RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER



The committee sought to clarify the duty of lawyers to supervise others within their firms. Proposed TDRPC Rule 5.01 imposes a duty on lawyers who are in firm management to create and implement firm-wide policies and procedures to supervise others within their firm. The committee considered, but rejected, a proposal that imposed a duty on a law firm itself.

On December 7, 2022, the committee voted to initiate the rule proposal process for Rule 5.01. The committee published proposed Rule 5.01 in the March 2023 issue of the *Texas Bar Journal* and the March 3, 2023, issue of the *Texas Register*. The Committee held a public hearing on proposed Rule 5.01 on April 12, 2023, and accepted public comments through April 13, 2023.

On June 7, 2023, the committee voted unanimously to recommend proposed Rule 5.01 to the board for review and consideration. On June 26, 2023, the committee submitted proposed Rule 5.01 to the board. On September 29, 2023, the board voted to approve the proposed rule. On October 2, 2023, the board petitioned the Supreme Court of Texas to order a vote by bar membership on the proposed rule. By order of the court, the bar membership will vote on the proposed rule from April 1, 2024, to April 30, 2024.

UNAUTHORIZED PRACTICE OF LAW; REMOTE PRACTICE OF LAW

In 2023, the committee continued to consider proposed TDRPC Rule 5.05 as it relates to the multijurisdictional practice of law. In particular, the committee considered changes that would regulate lawyers who practice remotely from another jurisdiction. The committee recognized that changes in technology and mobility have impacted the multijurisdictional practice of law and the remote practice of law. The committee's proposal provided guidance on how and when a Texas lawyer engages in the unauthorized practice of law, particularly if the lawyer practices law in multiple jurisdictions. As part of its review and study of Rule 5.05, the committee consulted caselaw in various jurisdictions and advisory opinions from legal agencies and organizations throughout the country.

On September 7, 2022, the committee voted to initiate the rule proposal process for proposed Rule 5.05. The committee published proposed Rule 5.05 in the March 2023 issue of the *Texas Bar Journal* and the March 3, 2023, issue of the Texas Register. The committee held a public hearing on proposed Rule 5.05 on April 12, 2023, and accepted public comments through April 13, 2023.

On June 7, 2023, the committee voted unanimously to recommend proposed Rule 5.05 to the State Bar of Texas Board of Directors for review and consideration. On July 6, 2023, the committee submitted proposed Rule 5.05 to the board. On September 29, 2023, the board voted to approve the proposed rule. On October 2, 2023, the board petitioned the Supreme Court of Texas to order a vote by bar membership on the proposed rule. By order of the court, the bar membership will vote on the proposed rule from April 1, 2024, to April 30, 2024.

JURISDICTION AND CHOICE OF LAW

The committee recognized that proposed Rule 5.05 gave rise to the need for clarification of the rules that apply to lawyers who are not admitted to practice and/or not physically present in Texas. Therefore, the committee proposed to amend current TDRPC Rule 8.05 and add new TDRPC Rule 8.06. Proposed Rules 5.05, 8.05, and 8.06, in combination, guide lawyers and the disciplinary authority of Texas as to which rules apply when lawyers engage in the multijurisdictional and/or remote practice of law.

Proposed Rule 8.05 states that a lawyer who is admitted to practice in Texas is subject to the disciplinary authority of Texas regardless of where the lawyer's conduct occurs, a lawyer who is not admitted in Texas is subject to the disciplinary authority of Texas if the lawyer provides or offers to provide any legal services in Texas, and a lawyer may be subject to the disciplinary authority of Texas and another jurisdiction for the same conduct.

Proposed Rule 8.06 applies the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction. Proposed Rule 8.06 specifies that a lawyer admitted in Texas is subject to the disciplinary authority of Texas for an advertisement or solicitation that is intended to be received by prospective clients in Texas or is intended to secure employment to be performed in Texas, even if the communication complies with the rules governing communications by lawyers in that jurisdiction.

On January 4, 2023, the committee voted to initiate the rule proposal process for proposed Rule 8.05. The committee published proposed Rule 8.05 in the March 2023 issue of the *Texas Bar Journal* and the March 3, 2023, issue of the Texas Register. The committee held a public hearing on proposed Rule 8.05 on April 12, 2023, and accepted public comments through April 13, 2023. On May 3, 2023, the committee voted unanimously to recommend proposed Rule 8.05 to the board for review and consideration. On June 26, 2023, the committee submitted proposed Rule 8.05 to the board.

On February 1, 2023, the committee voted to initiate the rule proposal process for proposed Rule 8.06. The committee published proposed Rule 8.06 in the April 2023 issue of the *Texas Bar Journal* and the April 7, 2023, issue of the Texas Register. The committee held a public hearing on proposed Rule 8.06 on June 7, 2023, and accepted public comments through June 8, 2023. On August 2, 2023, the committee voted unanimously to recommend proposed Rule 8.06 to the board for review and consideration. On August 9, 2023, the committee submitted proposed Rule 8.06 to the board.

On September 29, 2023, the board voted to approve proposed Rules 8.05 and 8.06. On October 2, 2023, the board petitioned the Supreme Court of Texas to order a vote by the bar membership on the proposed rules. By order of the court, the bar membership will vote on the proposed rules from April 1, 2024, to April 30, 2024.

FEES AND SAFEKEEPING OF PROPERTY

The committee desired to clarify and resolve issues regarding the acceptance of flat fees and the definition of a retainer. The committee proposed amendments to TDRPC Rules 1.04 and 1.14 to confirm that a lawyer may charge a flat fee in advance, although it may not be non-refundable, and to require that the lawyer disclose to the client in writing that fees should be deposited to a trust account, although the parties may waive that requirement.

On October 4, 2023, the committee voted to initiate the rule proposal process for Rules 1.04 and 1.14. The committee received feedback from committees and members of the State Bar as well as the public through the remainder of 2023.

H.B. 2384 AND H.B. 5010 PASSED BY THE 88TH TEXAS LEGISLATURE

On June 5, 2023, the Supreme Court of Texas requested that the committee study and recommend amendments to the Texas Rules of Disciplinary Procedure to conform the rules to H.B. 2384 and H.B. 5010 as passed in the 88th Legislature. After soliciting input from multiple sources and deliberating publicly, the committee submitted its Report on the Study of and Recommendations for Amendments to the Texas Rules of Disciplinary Procedure to the court on August 8, 2023.

The committee recommended adding that an evidentiary hearing panel must impose a public sanction against a Respondent found to have knowingly made a false declaration on an application for a place on the ballot as a candidate for judicial office under TRDP Rule 2.17. The committee recommended adding or amending definitions of “Cognizable individual interest,” “Complaint,” and “Inquiry” under TRDPP Rule 1.06, staying proceedings and deadlines while an appeal by a respondent of a classification of a grievance as a complaint is pending under TRDP Rule 2.10(B), clarifying that the Board of Disciplinary Appeals may affirm or reverse classification determinations by the Office of Chief Disciplinary Counsel for both complainants and respondents under TDRP Rule 7.08(C), and clarifying that determinations by the Board of Disciplinary Appeals on whether a grievance is a complaint or an inquiry, as well as case transfer decisions, are conclusive and may not be appealed to the Supreme Court of Texas under TRDP Rule 7.11.

On August 25, 2023, the court issued an order preliminarily approving the amendments to Rules 1.06, 2.10, 2.17, 7.08, and 7.11 as recommended by the committee, which became effective on September 1, 2023. The court requested public comments through December 1, 2023. Following the comment period, on December 18, 2023, the court incorporated additional revisions to Rule 2.17 and issued its Final Approval of Amendments to Texas Rules of Disciplinary Procedure 1.06, 2.10, 2.17, 7.08, and 7.11, effective immediately. Throughout the comment period, the committee remained available to study the rules further and make recommendations at the court’s request.

RULES CONSIDERED BY THE TEXAS ACCESS TO JUSTICE COMMISSION

After the committee began its review and study of TDRPC Rules 5.01-5.04 toward the end of 2022, the committee decided not to initiate a rule proposal to amend Rule 5.04. Noting that Utah and Arizona have recently changed their rules to permit non-lawyers to own legal services entities, and several other states are actively exploring the possibility, the committee agreed to monitor data on these developments and revisit the issue when more data is available. The committee also agreed to follow the development of proposals by entities in Texas that could affect the disciplinary rules.

On October 24, 2022, the Supreme Court of Texas requested the Texas Access to Justice Commission, or TAJC, to examine existing rules and propose modifications that would allow: 1) Qualified non-attorney paraprofessionals to provide limited legal services directly to low-income Texans; and 2) Non-attorneys to have economic interests in entities that provide legal services to low-income Texans while preserving professional independence.

On December 5, 2023, the Access to Legal Services Working Group of the TAJC issued its report and recommendations. The report proposed creating a pilot program, regulated and overseen by the Judicial Branch Certification Commission and the Supreme Court, that permits non-attorney ownership under an exception to TDRPC Rule 5.04 for entities that demonstrate a business model that provides services to low-income Texans and includes infrastructure to protect clients and ensure attorney independence. On December 15, 2023, the TAJC voted against the working group's proposal to create the recommended pilot program.

The TAJC approved the proposed modifications that would allow paraprofessionals to represent and assist low-income Texans with certain matters in certain areas of the law and community justice workers to provide limited-scope representation in justice court cases, under the supervision of an attorney working for a legal aid entity or other nonprofit entity. The TAJC also approved the proposal to create rules, qualifications, licensing, and disciplinary infrastructure within the Judicial Branch Certification Commission to ensure paraprofessionals have the necessary training, skill, and oversight to deliver quality services while protecting the public.

While serving on the committee in 2023, one committee member served on the TAJC and one committee member served on the Access to Legal Services Working Group. At its monthly meetings in 2023, the committee discussed the TAJC's ongoing work and considered how the recommendations and actions of the TAJC may implicate disciplinary rules regarding non-attorney ownership of a law practice and attorney supervision of non-attorney staff.

TEXAS LAWYER'S CREED

The committee received a request from a member of the public to consider incorporating portions of the Texas Lawyer's Creed into the disciplinary rules. The committee discussed alternatives, including possible amendments to the preamble of the TDRPC, and decided to continue discussion in 2024.

INTERPRETIVE COMMENTS

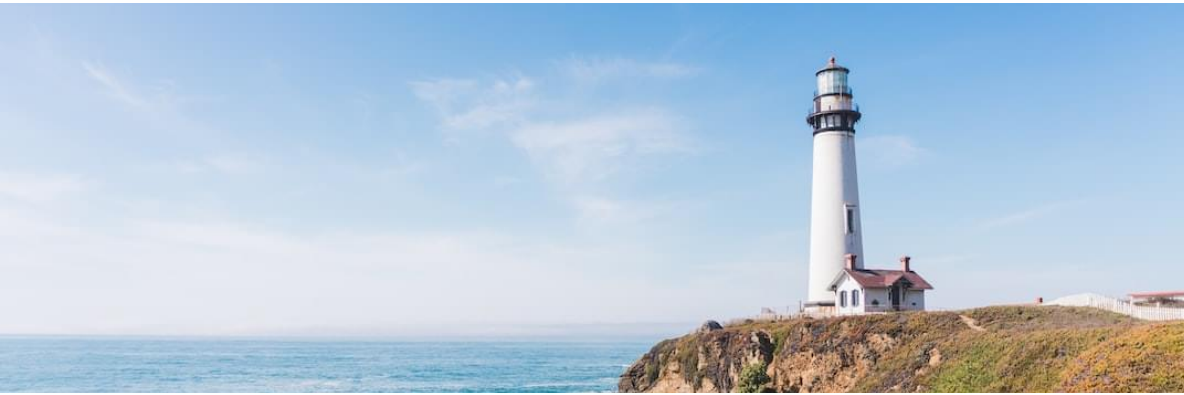
With each rule proposal, the committee recommended the addition of new interpretive comments, amendment of existing interpretive comments, and/or renumbering of interpretive comments to clarify proposed TDRPC Rules 1.00, 1.04, 1.08, 1.09, 1.10, 1.11, 1.14, 1.18, 3.09, 4.03, 4.04, 5.01, 5.05, 8.05, 8.06.

PREPARATION FOR RULES VOTE 2024

On October 6, 2023, the Supreme Court of Texas issued an Approval of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure. From April 1, 2024, to April 30, 2024, the bar membership will vote on 12 proposed rules³ on the ballot. During that period, the committee will provide its expertise on the rule proposals with published educational materials, continuing legal education videos, and presentations to local bar associations. The committee will also be available to provide any information requested by the Supreme Court of Texas during the court's deliberations after the referendum.

LOOKING AHEAD

The committee will continue its review of the disciplinary rules, its oversight of the process for proposing a disciplinary rule, and its work on rule proposals for possible future consideration by the bar membership.



CONTACT US

To review the committee's meeting schedule and for other information about the committee, go to texasbar.com/CDRR.

Or contact:

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³The ballot items include proposed TDRPC Rules 1.00, 1.08, 1.09, 1.10, 3.09, 4.03, 5.01, 5.05, 8.05, 8.06 approved by the board in 2023 and described under Rule Review in this report. The ballot items also include proposed TDRPC Rules 1.18 and TDRP 13.05 approved by the board in 2021 and described in detail in annual reports from prior years.