June 26, 2023

Ms. Kennon Wooten, Chair
State Bar of Texas Board of Directors
[redacted]

RE: Submission of Proposed Rule Recommendations – Rule 5.01, Texas Disciplinary Rules of Professional Conduct

Dear Ms. Wooten:

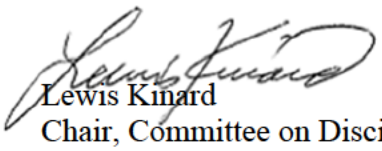
Pursuant to Section 81.0875 of the Texas Government Code, the Committee on Disciplinary Rules and Referenda initiated the rule proposal process for proposed Rule 5.01, Texas Disciplinary Rules of Professional Conduct, relating to the Responsibilities of a Partner or Supervisory Lawyer. The Committee published the proposed rule in the *Texas Bar Journal* and the *Texas Register*. The Committee solicited public comments and held a public hearing on the proposed rule. At its June 7, 2023, meeting, the Committee voted to recommend the proposed rule to the Board of Directors.

Included in this submission packet, you will find the proposed rule 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: Cindy V. Tisdale: [redacted]
Steve Benesh: [redacted]
Laura Gibson: [redacted]
Trey Apffel
Ray Cantu
KaLyn Laney
Seana Willing
Chris Ritter
Ross Fischer

Committee on Disciplinary Rules and Referenda
Overview of Proposed Rule

Texas Disciplinary Rules of Professional Conduct
Rule 5.01. Responsibilities of a Partner or Supervisory Lawyer

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda (Committee) related to proposed Rule 5.01 of the Texas Disciplinary Rules of Professional Conduct (TDRPC), relating to Responsibilities of a Partner or Supervisory Lawyer. The Committee initiated the rule proposal process on December 7, 2022.

Actions by the Committee

- **Initiation** – The Committee voted to initiate the rule proposal process at its December 7, 2022, meeting.
- **Publication** – The proposed rule was published in the March 2023 issue of the *Texas Bar Journal* and the March 3, 2023, 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 March 21, 2023, and April 4, 2023. An additional email notification was sent to Committee email subscribers on April 7, 2023.
- **Public Comments** – The Committee accepted public comments through April 13, 2023. The Committee received written public comments from six individuals on the proposed rule.
- **Public Hearing** – On April 12, 2023, the Committee held a public hearing by Zoom teleconference. Two individuals addressed the Committee at the public hearing.
- **Recommendation** – The Committee voted at its June 7, 2023, meeting to recommend the proposed rule, with recommendations on the interpretive comments, as amended, to the Board of Directors.

Overview

Current Rule 5.01, TDRPC, states that a partner or supervising lawyer shall be subject to discipline because of another lawyer's violation of the rules of professional conduct under certain circumstances. Proposed Rule 5.01 would clarify the duty of lawyers to supervise others within their firms. The proposed rule would impose a duty on lawyers who are in firm management to create and implement firm-wide policies and procedures to supervise others within their firm. Unlike American Bar Association (ABA) Model Rule 5.1, proposed Rule 5.01 does not impose such a duty on all lawyers in a firm, as some partners and supervising lawyers may not have actual

managerial responsibility. The Committee considered, but rejected, a proposal that imposed a duty on a law firm itself.

Amendments in Response to Public Comments

At the June 7, 2023, meeting, there were no motions to amend the proposed rule. The Committee voted to recommend the proposed rule, with recommended interpretive comments as amended from the version published in March 2023,[1] to the Board of Directors.

Additional Documents

Included in the pages that follow this Overview of Proposed Rule are: 1) proposed Rule 5.01 as published in the March 2023 *Texas Bar Journal* (Bates Numbers 000005 – 000007); 2) proposed Rule 5.01 as published in the March 3, 2023, issue of the *Texas Register* (Bates Numbers 000008 – 000011); 3) public comments received in response to the publications (Bates Numbers 000012 – 000034); 4) the link to the video recording of the Committee's public hearing on proposed Rule 5.01 conducted by Zoom teleconference on April 12, 2023,[2] with the name of each speaker and time-stamp of the speaker's oral comments (Bates Number 000035); 5) a memorandum on possible amendments to Rules 5.01 – 5.04 dated October 28, 2022, from Committee Member Robert Denby (Bates Numbers 000036 – 000043); 6) a memorandum on proposed Rule 5.01 dated December 2, 2022, from Committee Member Robert Denby (Bates Numbers 000044 – 000048); and 7) a memorandum on proposed Rule 5.01 dated May 4, 2023, from Committee Member Robert Denby (Bates Numbers 000049 – 000051).

[1] Interpretive comments are promulgated by the Supreme Court of Texas and are not subject to the rule proposal process set out in Subchapter E-1, Chapter 81, Texas Government Code.

[2] The Committee also heard public comments on proposed Rules 1.08, 3.09, 5.05, and 8.05, TDRPC, on April 12, 2023.

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

Rule 5.01. Responsibilities of a Partner or Supervisory Lawyer

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 April 13, 2023. Comments can be submitted at texasbar.com/CDRR or by email to cdrr@texasbar.com. The committee will hold a public hearing on the proposed rule by teleconference on April 12, 2023, at 10 a.m. CDT. For teleconference participation information, please go to texasbar.com/cdrr/participate.

Proposed Rule (Redline Version)

Rule 5.01. Responsibilities of a Partner or Supervisory Lawyer

~~A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:~~

~~(a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or~~

~~(b) The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.~~

(a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to these Rules.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer complies with these rules.

(c) A lawyer shall be responsible for another lawyer's violation of these rules if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment:

~~1. Rule 5.01 conforms to the general principle that a lawyer is not vicariously subjected to discipline for the misconduct of another person. Under Rule 8.04, a lawyer is subject to discipline if the lawyer knowingly assists or induces another to violate these rules. Rule 5.01(a) additionally provides that a partner or supervising lawyer is subject to discipline for ordering or encouraging another lawyer's violation of these rules. Moreover, a partner or supervising lawyer is in a position of authority over the work of other lawyers and the partner or supervising lawyer may be disciplined for permitting another lawyer to violate these rules.~~

~~2. Rule 5.01(b) likewise is concerned with the lawyer who is in a position of authority over another lawyer and who knows that the other lawyer has committed a violation of a rule of professional conduct. A partner in a law firm, the general counsel of a government agency's legal department, or a lawyer having direct supervisory authority over specific legal work by another lawyer, occupies the position of authority contemplated by Rule 5.01(b).~~

~~3. Whether a lawyer has "direct supervisory authority over the other lawyer" in particular circumstances is a question of fact. In some instances, a senior associate may be a supervising attorney.~~

~~4. The duty imposed upon the partner or other authoritative lawyer by Rule 5.01(b) is to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's known violation. Appropriate remedial action by a partner or other supervisory lawyer would depend on many factors, such as the immediacy of the partner's or supervisory lawyer's knowledge and involvement, the nature of the action that can reasonably be expected to avoid or mitigate injurious consequences, and the seriousness of the anticipated consequences. In some circumstances, it may be sufficient for a junior partner to refer the ethical problem directly to a designated senior partner or a management committee. A lawyer supervising a specific legal matter may be required to intervene more directly. For example if a supervising lawyer knows that a supervised lawyer misrepresented a matter to an opposing party in negotiation, the supervisor as well as the other lawyer may be required by Rule 5.01(b) to correct the resulting misapprehension.~~

~~5. Thus, neither Rule 5.01(a) nor Rule 5.01(b) visits vicarious disciplinary liability upon the lawyer in a position of authority. Rather, the lawyer in such authoritative position is exposed to discipline only for his or her own knowing actions or failures to act. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.~~

~~6. Wholly aside from the dictates of these rules for discipline, a lawyer in a position of authority in a firm or government agency or~~

~~over another lawyer should feel a moral compunction to make reasonable efforts to ensure that the office, firm, or agency has in effect appropriate procedural measures giving reasonable assurance that all lawyers in the office conform to these rules. This moral obligation, although not required by these rules, should fall also upon lawyers who have intermediate managerial responsibilities in the law department of an organization or government agency.~~

~~7. The measures that should be undertaken to give such reasonable assurance may depend on the structure of the firm or organization and upon the nature of the legal work performed. In a small firm, informal supervision and an occasional admonition ordinarily will suffice. In a large firm, or in practice situations where intensely difficult ethical problems frequently arise, more elaborate procedures may be called for in order to give such assurance. Obviously, the ethical atmosphere of a firm influences the conduct of all of its lawyers. Lawyers may rely also on continuing legal education in professional ethics to guard against unintentional misconduct by members of their firm or organization.~~

[1] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Disciplinary Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm, whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners engage in any ancillary business.

[3] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm would not necessarily be required to promulgate firm-wide policies intended to reasonably assure that the law firm's lawyers comply with these rules. However, a lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this rule.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.04(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.04(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.02.

Proposed Rule (Clean Version)

Rule 5.01. Responsibilities of a Partner or Supervisory Lawyer

(a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to these rules.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer complies with these rules.

(c) A lawyer shall be responsible for another lawyer's violation of these rules if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment:

[1] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and

procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Disciplinary Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm, whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners engage in any ancillary business.

[3] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm would not necessarily be required to promulgate firm-wide policies intended to reasonably assure that the law firm's lawyers comply with these rules. However, a lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this rule.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.04(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

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[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.02. **TBJ**

ted by an ineligible applicant; the application is not submitted in the manner and form required by the Application Kit; the application is submitted after the deadline established in the Application Kit; or the application does not meet other requirements as stated in the RFA and the Application Kit.

How to Obtain Application Kit: The OAG will post the Application Kit on the OAG's website at https://www.texasattorneygeneral.gov/divisions/grants. Updates and other helpful reminders about the application process will also be posted at this location. Potential applicants are encouraged to refer to the site regularly.

Deadlines and Filing Instructions for the Grant Application:

Create an On-Line Account: Creating an on-line account in the Grant Offering and Application Lifecycle System (GOALS) is required to apply for a grant. *If an on-line account is not created, the Applicant will be unable to apply for funding.* To create an on-line account, the Applicant must email the point of contact information to Grants@oag.texas.gov with the following information:

--First Name

--Last Name

--Email Address *(It is highly recommended to use a generic organization email address if available)*

--Organization Legal Name

Application Deadline: The Applicant must submit its application, including all required attachments, to the OAG by the deadline and the manner and form established in the Application Kit.

Filing Instructions: Strict compliance with the submission instructions, as provided in the Application Kit, is required. The OAG will **not** consider an Application if it is not submitted by the due date. The OAG will **not** consider an Application if it is not in the manner and form as stated in the Application Kit.

Minimum and Maximum Amounts of Funding Available: Minimum and maximum amounts of funding are subject to change as stated in the Application Kit. The minimum amount of funding for all programs is $20,000 per fiscal year. The maximum amount for a program is $49,500 per fiscal year.

Start Date and Length of Grant Contract Period: The grant contract period (term) is up to two years from September 1, 2023 through August 31, 2025, subject to and contingent on funding and/or approval by the OAG.

No Match Requirements: There are no match requirements.

Award Criteria: The OAG will make funding decisions that support the efficient and effective use of public funds. Scoring components will include, but are not limited to, information provided by the applicant on the proposed project activities and budget. Funding decisions will be determined using a competitive allocation method.

Grant Purpose Area: All grant projects must address one or more of the purpose areas as stated in the Application Kit.

Prohibitions on Use of Grant Funds: OAG grant funds may not be used to support or pay the costs of lobbying; indirect costs; fees to administer a subcontract; any portion of the salary or any other compensation for an elected government official; the purchase of food and beverages except as allowed under Texas State Travel Guidelines; the purchase or lease of vehicles; the purchase of promotional items or recreational activities; costs of travel that are unrelated to the direct delivery of services that support the OAG grant-funded program; the costs for consultants or vendors who participate directly in writing a grant application; or for any unallowable costs set forth in applicable state or federal law, rules, regulations, guidelines, policies, procedures or cost principles. Grant funds may not be used to purchase any other products or services the OAG identifies as inappropriate or unallowable within this RFA or the Application Kit.

OAG Contact Person: If additional information is needed, contact the Grants Administration Division at Grants@oag.texas.gov, or (512) 936-0792.

TRD-202300842
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: February 22, 2023

♦ ♦ ♦

State Bar of Texas

Committee on Disciplinary Rules and Referenda Proposed Rule Changes, Rules 1.08, 5.01, 5.05, 8.05, Texas Disciplinary Rules of Professional Conduct

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

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(c) A lawyer shall be responsible for another lawyer's violation of these rules if:

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~~5. Thus, neither Rule 5.01(a) nor Rule 5.01(b) visits vicarious disciplinary liability upon the lawyer in a position of authority. Rather, the lawyer in such authoritative position is exposed to discipline only for his or her own knowing actions or failures to act. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.~~

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[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm, whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners engage in any ancillary business.

[3] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm would not necessarily be required to promulgate firm-wide policies intended to reasonably assure that the law firm's lawyers comply with these rules. However, a lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this rule.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.04(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.04(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.02.

Proposed Rule (Clean Version)

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Comment:

[1] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and

procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Disciplinary Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

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[3] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm would not necessarily be required to promulgate firm-wide policies intended to reasonably assure that the law firm's lawyers comply with these rules. However, a lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this rule.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.04(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.04(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.02. TBJ

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 5.01. Responsibilities of a Partner or Supervisory Lawyer

Public Comments Received
Through April 13, 2023

From: [redacted]
To: cdrr
Subject: Moss Comments on the Proposed Revisions to TDRPC 1.08, 5.01, 5.05 and 8.05
Date: Thursday, March 16, 2023 1:04:55 PM
Attachments: Moss Comments on proposed TDRPC 1.08.1.docx
Moss Comments on Proposed TDRPC 5.05.1.docx
Moss Comments on Proposed TDRPC 5.01.1.docx
Moss Comments on proposed TDRPC 8.05.1.docx

Dear Rules and Referendum Committee:

I appreciate your hard work in bringing forward these important and necessary changes to the TDRPC, and the opportunity to submit comments.

I have attached, separately, my comments on the four rules. I have very few suggestions about the Rules themselves. Most of my observations and suggestions concern the proposed Comments.

In reading my suggestions, I hope you will not view them as mere pedantic quibbling with the language of the proposed comments, most of which are taken verbatim from the Model Rules. That many of the Comments that I complain about are from the Model Rules does not, I think, make them sacrosanct. Several are flawed. The Model Rules drafters were fallible, and I think that we (you) can do better.

I fear that revising the Comments at this point may entail some delay and complications, and that this may inhibit the Committee's willingness to revisit and revise Comments. In any event, I hope the Comments can be revised by you or the Court without too much difficulty.

Thank you for your attention and consideration.

Prof. Fred C. Moss (Emeritus)
Dallas

One does not ask of one who suffers: What is your country and what is your religion? One merely says: You suffer, that is enough for me. -Louis Pasteur, chemist and bacteriologist (27 Dec 1822-1895)

Moss Comments on Proposed Revisions to TDRPC 5.01

1. Generally, this Rule imposes duties on managerial and directly supervising firm lawyers to take remedial measures when they know of misconduct by a member of the firm and the harm still can be mitigated or avoided. But, what about the situation where the firm's authorities learn of the misconduct when the harm can no longer be avoided or mitigated? Unfortunately, I believe some firms sweep members' misconduct under the rug, quietly recompensing harmed clients and firing or disciplining the miscreant lawyers, but never reporting the misconduct to the Bar. Perhaps, a Comment to this Rule should refer to Rule 8.03 which imposes a duty on the lawyers to report serious misconduct to the Bar. The firm's authorities should be reminded that in serious cases they can't simply "make it go away quietly."

2. Compared to ABA Model Rule 5.1(a), proposed 5.01(a) significantly narrows the application of the duty to implement measures to ensure all firm lawyers conform to the TDRPC by eliminating partners who have not been delegated this responsibility. This lets these partners stick their head in the sand even when they know the firm management has failed in this responsibility. On the other hand, the ABA treats all partners, shareholders and "members of other associations authorized to practice law" equally and applies the duty of 5.1(a) to all. The Texas proposal will take many partners, shareholders, etc. "off the hook" even when they know of such failings. However, this position seems to be contradicted by the last sentence of proposed Comment [3]. Even if this narrowed application of paragraph (a) is wise, it does not seem to be consistent with Comment [3]. See my comment #4 on Comment [3] below.

3. Comments [3] and [5] present several drafting difficulties and ambiguities. The Rule generally differentiates only between lawyers having "managerial authority" and those having "direct supervisory authority." But Comment [3] introduces the notion of the lawyer with "intermediate managerial responsibilities." This term is not found in the Rule. (It is in Model Rule 5.1's Comment [1], but is not defined there.) We must guess who is covered by this term. It needs defining in some way, at least with an "e.g." The rest of the Comment discusses lawyers who are the managers of a branch of a multi-office firm and who are subordinate to the firm's general firm, management committee or manager. If this is to whom the "intermediate" manager refers, perhaps the Comment could read:

   > The duties imposed by paragraph (a) do not apply to partners, shareholders or other lawyers who have only intermediate managerial responsibilities, such as the managing lawyer of a branch office, if the firm has a designated managing lawyer or committee, or other body charged with the responsibility to fulfill those duties.

4. Continuing with Comment [3], the last sentence seems to make it misconduct when a lawyer in the firm "reasonably should know" that the firm's delegated body or person is not living up to the duties imposed by (a). This is a negligence standard that is not in the Rule itself, violating the drafting standard that Comments cannot broaden duties not found in the Rule itself. Also, this language is not found in the Model Rule or its Comments. If one agrees with the Comment as stated, then the Rule must include it, perhaps by adding this negligent violation in a new (c)(3) subsection. E.g.,

(3) A lawyer in a firm who knows or reasonably should know that the firm's delegated body or person has failed to provide and implement measures required by this rule must take corrective steps.

5. Comment [5] is befuddling. Subparagraph (c)(2) imposes the duty to take remedial action (when possible) upon a supervising lawyer and a lawyer with managerial authority when they know of a firm member's misconduct. The Comment imposes this duty upon other lawyers having "*comparable managerial authority*" who know of the misconduct. One must guess at who has managerial authority "comparable" to a managing (or supervising?) lawyer. Even though this language is lifted verbatim from the Model Rule's comment, we need to add its examples, which were omitted. Comment [1] to Model Rule 5.1 gives some examples of who might have "comparable managerial authority" when it mentions "lawyers having comparable managerial authority in a legal service organization or a law department of an enterprise or government agency." I suggest adding this language to the proposed Comment to flesh out the meaning of this novel term.

6. The purpose of the third sentence of Comment [5] is unclear notwithstanding the fact is it, again, taken verbatim from the Model Rule's Comment [5]. *"Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of the other firm lawyers engaged int the matter."* What's the point of this sentence? If the intent is to discriminate between those lawyers with only indirect (Tort?) responsibility for all work done in the firm and those who are in charge of a particular matter, and to say that the duty to take remedial measures applies only to the latter category of lawyers, then the sentence should state this more directly. E.g.,

   The duty to take remedial measures required by paragraph (c)(2) does not apply to partners and lawyers who have only indirect responsibility for all work being done by the firm. A partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of the other firm lawyers engaged in the matter.

7. Comment [6] has an arguably ambiguous "it": ". . . even though <u>it</u> does not entail a violation of paragraph (c) . . . ." While this language is directly from the Model Rule Comment, perhaps the ambiguity could be eliminated thusly:

   Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervising lawyer even though <u>the supervising lawyer did not violate</u> paragraph (c) because there was no direction, ratification, or knowledge of the violation.

8. In short, I think we can and should improve on the Model Rules' language.

From: Reneau, S. Ryan
To: cdrr
Subject: Re: Seeking Comments on Proposed Rules 1.08, 3.09, 5.01, 5.05, 8.05, TDRPC
Date: Tuesday, March 21, 2023 10:46:41 AM

I plan to address the committee at the April 12, 2023, meeting regarding Rule 5.01.

S. Ryan Reneau
Senior Counsel
Chamberlain Hrdlicka
Attorneys at Law
112 East Pecan Street | Suite 1450
San Antonio, TX 78205
Main: 210.253.8383 **Direct:** 210.278.5805 **Fax:** 210.253.8384
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SAN ANTONIO • HOUSTON • ATLANTA • PHILADELPHIA

From: State Bar of Texas - CDRR <cdrr@texasbar.com>
Date: Tuesday, March 21, 2023 at 10:22 AM
To: Reneau, S. Ryan [redacted]
Subject: Seeking Comments on Proposed Rules 1.08, 3.09, 5.01, 5.05, 8.05, TDRPC

State Bar of Texas

Proposed Rules Published

Public Comments Sought

Proposed Rules 1.08 (Conflict of Interest: Prohibited Transactions), 3.09 (Special Responsibilities of a Prosecutor),

5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), 8.05 (Jurisdiction), TDRPC

The Committee on Disciplinary Rules and Referenda published Proposed Rule 3.09 (Special Responsibilities of a Prosecutor) of the Texas Disciplinary Rules of Professional Conduct in the January issue of the Texas Bar Journal and the January 13 issue of the Texas Register. The Committee on Disciplinary Rules and Referenda published Proposed Rules 1.08 (Conflict of Interest: Prohibited Transactions), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), and 8.05 (Jurisdiction) of the Texas Disciplinary Rules of Professional Conduct in the March issue of the Texas Bar Journal and the March 3 issue of the Texas Register.

The Committee will accept comments concerning Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05, TDRPC, through April 13, 2023. Comments can be submitted here, or by email to cdrr@texasbar.com.

The Committee will hold a public hearing on Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05 by teleconference at 10:00 a.m. CDT on April 12, 2023. For teleconference participation information, please go to texasbar.com/cdrr/participate. If you plan to address the Committee at the public hearing, it is requested that you email cdrr@texasbar.com in advance of the hearing stating on which rule(s) you will comment.

Additional Information

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From: Reneau, S. Ryan
To: cdrr
Subject: Public Hearing April 12 re Rule 5.01
Date: Tuesday, March 21, 2023 10:19:30 AM

I would like to participate in the April 12, 2023, CDRR public comment meeting regarding rule 5.01.

S. Ryan Reneau
Senior Counsel
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Attorneys at Law
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San Antonio, TX 78205
Main: 210.253.8383 **Direct:** 210.278.5805 **Fax:** 210.253.8384
Email: [redacted]
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From: Ryan Reneau
To: cdrr
Subject: Rule 5.01 Comments
Date: Wednesday, April 12, 2023 11:29:00 AM

To the Committee on Disciplinary Rules and Referenda:

The modifications to Rule 5.01 exacerbate the problems existing with the current language. It absolves supervisory lawyers of responsibility with regard to the keeping of client funds, specifically lawyers in large firms, and reduces their duties to less than corporate officers for mere financial disclosures.

1. "Reasonable efforts" is an ambiguous standard.

The term "reasonable efforts" is an ambiguous standard. The reasonable person standard makes sense in the context of case law developed over decades, published so courts may apply it consistently, and decided by juries of citizens who are the embodiment of reasonable persons. The Rules are applied thousands of times a year by attorneys within the Office of the Chief Disciplinary Counsel behind closed doors without ever publishing a single explanation or guidance. This will lead to uneven application of the rules and further frustration by the public when filing a grievance.

As highlighted by the Ombudsman in her report this past year, "individuals noted that their experience filing a grievance was markedly different depending upon which investigator handled the matter or which grievance committee members made up the panel that oversaw their hearing." The standard must be unambiguous with regard to fund custody and evenly applied to all attorneys.

2. "Reasonable efforts" is unenforceable due to the Office of Chief Disciplinary Counsel's lack of expertise in financial controls.

The Office of the Chief Disciplinary Counsel lacks experience in the area of financial and accounting controls. In fact, it has no policies or procedures in place for the investigation of financial fraud committed by attorneys or with their assistance by clients. None! A Texas Public Records Act request submitted formally through the Texas State Bar Open Records Portal confirmed this fact. Reliance on her office to determine whether the actions taken with regard to the custody of funds held by an attorney on behalf of a client or third party are reasonable is misplaced.

3. "Reasonable efforts" is a low, low standard.

Reasonable efforts is too low a standard to apply to the custody of funds. This may be an appropriate standard to determine whether a supervising attorney has confirmed that an associate replied to a client in a timely fashion. It is wholly inappropriate regarding financial matters. The defense, "but I tried" should not absolve a supervising attorney when client or third-party funds are lost or fraudulently transferred.

Further, Comment 1 requires lawyers with managerial authority to make reasonable efforts to establish internal policies and procedures. No consideration is given to whether the resulting policies are themselves reasonable or reasonably designed to accomplish their goals. In the

corporate financial controls context, one strategy is to minimize the internal controls to minimize the opportunity to fail. If there is no control policy, then there is no control failure for an auditor to find. The same strategy will inevitably be applied by some firms in this context. If there are minimal policies, formulated with "reasonable effort," then the Office of Chief Disciplinary Counsel can never use the failure to follow a policy as evidence of misconduct.

4. The comments fail to address the supervision of non-attorneys keeping client funds (e.g., a firm CFO).

The comments fail to address the role and responsibility of a lawyer who supervises non-attorney subordinates. Large firms regularly employ financial professionals to manage the firms bank accounts and perform the accounting function. It cannot be "reasonable efforts" to state, "I hired a CFO, so I'm not responsible for funds in firm custody." The responsibility must ultimately be with an attorney or the State Bar lacks any enforcement mechanism whatsoever over large firms.

5. "Appropriate remedial action" is ambiguous as well.

The Rule and comments fail to describe appropriate remedial action. That is understandable given the broad categories of misconduct to which this rule must apply; however, with regard to funds held on behalf of clients and third parties, there should be no ambiguity. An accounting of all funds must be made, all duplicate or erroneous entries corrected, and all suspect cash movements must be investigated and supported. There should be no leeway in the financial context.

The Office of Chief Disciplinary Counsel lacks expertise in what is appropriate for financial matters. It is not a mandatory procedure for the investigator or assistant disciplinary counsel to confirm a purported accounting is complete and accurate by reconciling it to bank account records, even when fraud is asserted. This is the most basic audit principal and would be the first step in determining whether appropriate remedial actions have been taken with regard to funds in an attorney's custody. She makes it the duty of the client to provide evidence the accounting is incorrect despite all evidence being in the hands of the attorney. Unless the Committee is explicit in this regard, the Rule will not be enforced.

6. The Committees focus should be the prevention of attorney misconduct, not remediation.

The Rule and comments as a whole focus on remediation of harm. Good controls and policies are designed to prevent harm. This theme should be evident, and it is not. It should not be considered reasonable efforts to have policies that merely detect misconduct. Reasonable efforts require the implementation of policies to prevent misconduct, particularly in the mismanagement of funds.

7. Someone must be responsible.

One of the lessons from the financial crimes of the early 2000s that seems to be forgotten is that someone must be responsible or no one will be responsible. Chief Executive Officers and Chief Financial Officers must sign their names on annual financial statements today because of that lesson. There must be an attorney responsible for the policies and controls over client

and third-party funds. The comments fail to require any periodic review of policies and controls, fail to require an attorney to analyze whether they have been effective, and fail to require any attorney to approve them and sign their name.

Regards,

S. Ryan Reneau
- JD LLM CPA CFA -

From: Peter Lomtevas
To: cdrr
Subject: Re: Seeking Comments on Proposed Rules 1.08, 3.09, 5.01, 5.05, 8.05, TDRPC
Date: Tuesday, March 21, 2023 11:26:47 AM

To The CDRR,

As For Rule 3.09 Special Responsibilities of a Prosecutor

In (f): What puzzles me is that the rule must specify in writing that a prosecutor cannot fake a case. Was faking a case the norm before this rule? Is this newly included paragraph a reaction to all the innocent people imprisoned falsely?

In General: Why are missing any specified sanctions and punishments of prosecutors who fake cases? We have these rules, so what if a prosecutor breaks any?

In the Comments Section: What puzzles me is that in a government that must be open and in cases where proceedings are public, what "privileged" information can a prosecutor have that is not subject to disclosure? Who makes that call among prosecutors that something possibly exculpatory can be deemed "privileged?"

As for Rule 1.08 - Conflicts of Interest

Comments: I completely disagree with the underlying assumption contained within this comment that lawyers are tricky, evil geniuses and businessmen who want to enter into business with a lawyer are idiots. The reality is the opposite: the businessman is crafty, and the lawyer is perfectly naive given the weak legal education (focused on federal law) he has received in law school compounded by the weak preparation afforded by bar review (focused on state law). Businessmen learn by daily experience while lawyers study the test.

Hence, the various statement made as to how clients are at risk without careful and independent guidance is a mind fake that places at risk the attorney who may want to leave private practice because of all the risk that entails.

As for Rule 5.01 - Responsibilities of a Supervisory Lawyer

I do not care what amendments take place that pertain to large attorney organizations. I only care about the solo practitioner and all the pitfalls in the rules that face him.

However, lawyers make awful leaders, and imposing upon them a duty to spot misconduct can be overwhelming.

Rule 5.05 - As For Unauthorized Practice of Law

I oppose state-level licensure of lawyers. This rule, whether in its old form or its new form, supports the isolation and protection of groups of lawyers and judges who are without public review and scrutiny. These groups become comfortable with each other and can rip off innocent citizens who believe there is justice in those courts.

This isolation from view mutates into appellate court complacency characterized by affirming every order entered by the trial court. Municipalities can be made immune from suit by a judge who is elevated, paid and promoted by the municipality. Lawyers stay quiet so they can win cases before such a judge. Judges can use any political fad in their orders, and no one can question them.

In recent years, political fads are now baked into statutes that judge cannot question. So, a parent who loses a child because of domestic violence has no recourse: has no defense, has no appeal. How about the child? We have unexplained school shootings around this nation. Are groups of lawyers and judges implementing federal family legislation at the root of these? An outsider cannot come without a year-long delay because of licensure?

I also oppose the law examiner's board review of lawyers seeking admission from state to state. Even the most trouble-free attorney must have all his complaints and arbitration re-litigated before each subsequent review board. In one state, client suits against the lawyer must be picked through. In other states, a lawyer's suits against clients must be picked through. Full faith and credit of one state's adjudications of a lawyer's misconduct mean nothing. This must stop.

I support a universal law license that is in force throughout the nation in any court. No state's laws are unique especially those preempted by federal legislation. The question is what has not been preempted by federal legislation? Which attorney cannot learn quickly a state's variations in the law and properly represent the public.

I do not subscribe to the idea that law licensure protects the hapless client from a bad lawyer. I submit that the lawyer needs better protection from the bad client. But that is a topic for a different discussion because we do not a code of conduct for clients.

<u>As for Rule 8.05 - Jurisdiction</u>

Lawyers understand they have lost very many of the civil rights over the years. We cannot speak freely. We have to watch how we assemble in protests. I was a litigant in a contract dispute with an auto dealer where the imbecile judge yelled out, "You're a lawyer! This case cries out for a number," meaning I had no case and I had to settle while the dealer faked his case with no contractual terms giving rise to the suit. A well placed judicial complaint cause a judicial recusal, and a different judge decided the case on its merits.

Now comes multiple jeopardy again the lawyer. I am admitted in four states and like a game of dominoes, if a client fakes a charge against me that one state sustains, I lose all four state licenses. Violence including rape make for sensational disbarments.

The language of your proposal, as the language in all your previous proposals, tightens the noose around the neck of the lawyer. The word,"may" is now replaced with "is subject to." What was a possibility is now a definite. Attorney discipline is becoming a turkey shoot.

The impact upon the public is devastating. Lawyers who leave practice cause a drop in supply which elevates counsel fees for the remaining population. If the idiot client made the complaint, then that client cut the branch upon which he sat. Disciplinary committees of non-practicing lawyers end up incorrectly deciding the lawyer's discipline, and another lawyer leaves practice.

There is also the loss of subject matter expert attorneys who leave. One area well publicized as enduring the most attorney discipline complaints is family law. Non-family practitioners discipline family law lawyers, and when those leave practice, clients have even fewer family lawyers from whom to hire.

This highly concentrated batch of practitioners does not operate in the client's best interests, but rather in their own best interests. Cases are decided with discipline in mind (heavy stipping), and the outcomes rarely match the facts and the law. A judge only needs to say "boo" at the lawyer, and the stipulation of settlement comes right away selling out the lawyer's client.

Comment: This statement is vague: *as well as lawyers not admitted to practice in this state who provide or offer any legal services in this jurisdiction*. What is a "legal service?" Is it advice online? Is it what?

Comment: This is not true - *lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction*. Lawyer discipline has nothing to do with protecting clients; it has everything to do with protecting groupings of local judges and their local lawyers from exposure. Clients are not stupid and lawyers are not geniuses.

Comment: *The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters*. This is also ridiculous. A law license, like a driver license, does not make a lawyer an agent of the state. Lawyers are supposed to be independent of the state, and operate on both sides of a controversy. Here, the state has taken up a superior role as if the state is command headquarters and the lawyer is a soldier on the front. Personal service of process cannot be to the state because lawyers are not agents of the state; instead service of civil process must remain "personal" and not artificial.

Ultimately, the crossed off portions of the Comment section provided better protections for lawyers. I do not understand why the state has taken up arms against lawyers, but that is something we should be asking the voters in this state.

Peter

www.lomtevas.com

On Tuesday, March 21, 2023 at 10:03:29 AM CDT, State Bar of Texas - CDRR <cdrr@texasbar.com> wrote:

State Bar of Texas

Proposed Rules Published

Public Comments Sought

Proposed Rules 1.08 (Conflict of Interest: Prohibited

Transactions), 3.09 (Special Responsibilities of a Prosecutor), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), 8.05 (Jurisdiction), TDRPC

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The Committee will hold a public hearing on Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05 by teleconference at 10:00 a.m. CDT on April 12, 2023. For teleconference participation information, please go to texasbar.com/cdrr/participate. If you plan to address the Committee at the public hearing, it is requested that you email cdrr@texasbar.com in advance of the hearing stating on which rule(s) you will comment.

Additional Information

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

From: John McIntyre
To: cdrr
Subject: Re: Seeking Comments on Proposed Rules 1.08, 3.09, 5.01, 5.05, 8.05, TDRPC
Date: Tuesday, March 21, 2023 11:27:08 AM

OVERBROAD , VIOLATE FREEDOM OF SPEECH, AND FREEDOM OF CONTRACT ! DUPLICITY TOO!

On Tuesday, March 21, 2023 at 10:02:49 AM CDT, State Bar of Texas - CDRR <cdrr@texasbar.com> wrote:

State Bar of Texas

Proposed Rules Published

Public Comments Sought

Proposed Rules 1.08 (Conflict of Interest: Prohibited Transactions), 3.09 (Special Responsibilities of a Prosecutor), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), 8.05 (Jurisdiction), TDRPC

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Committee on Disciplinary Rules and Referenda

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

From: Louis Leichter
To: cdrr
Subject: RE: Public Hearing Reminder - Proposed Disciplinary Rule Changes
Date: Tuesday, April 4, 2023 10:29:40 AM
Attachments: image001.png

Good luck

Very truly yours,

Louis Leichter, Principal/Attorney
[redacted]

LEICHTER
LAW FIRM PC

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HOUSTON* | 3700 N Main St., Houston, TX 77009 | Phone: (713) 714-2446

McALLEN* | 214 N 16th St., #128, McAllen, TX 78501 | Phone: (956) 205-0884

***Meetings with lawyers are by appointment only at these locations.**
www.LeichterLaw.com » *Video conferencing: 3000452@lifesizecloud.com*

From: State Bar of Texas - CDRR <cdrr@texasbar.com>
Sent: Tuesday, April 4, 2023 10:04 AM
To: Louis Leichter [redacted]
Subject: Public Hearing Reminder - Proposed Disciplinary Rule Changes

State Bar of Texas

Public Hearing Reminder

April 12 Public Hearing on Proposed Rules 1.08 (Conflict of Interest: Prohibited Transactions), 3.09 (Special Responsibilities of a Prosecutor), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), 8.05 (Jurisdiction), TDRPC

The Committee on Disciplinary Rules and Referenda published Proposed Rule 3.09 (Special Responsibilities of a Prosecutor) of the Texas Disciplinary Rules of Professional Conduct in the January issue of the Texas Bar Journal and the January 13 issue of the Texas Register. The Committee on Disciplinary Rules and Referenda published Proposed Rules 1.08 (Conflict of Interest: Prohibited Transactions), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), and 8.05 (Jurisdiction) of the Texas Disciplinary Rules of Professional Conduct in the March issue of the Texas Bar Journal and the March 3 issue of the Texas Register.

The Committee will hold a public hearing on Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05 by teleconference at 10 a.m. CDT on April 12, 2023. For teleconference participation information, please go to texasbar.com/cdrr/participate, where an agenda with a Zoom link will be posted before the meeting. If you plan to address the Committee at the public hearing, it is requested that you email cdrr@texasbar.com in advance of the hearing stating on which rule(s) you will comment.

The Committee will continue to accept comments concerning Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05 through April 13, 2023. Comments can be submitted here, or by email to cdrr@texasbar.com.

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.

Committee on Disciplinary Rules and Referenda

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

From: Seana Willing
To: cdrr
Cc: Andrea Low
Subject: Re: Written Comments from CDC on Proposed Rule Changes
Date: Tuesday, April 11, 2023 4:40:48 PM
Attachments: CDC Comments (041123).docx
Administering Justice Maryland Interprets Rule 3.8(d).pdf

Andrea, I received feedback from our Ethics Helpline Attorneys as well as from CDC Regional Counsel regarding some of the proposed rule changes. We hope these written comments will prove helpful for the committee.

I will see you tomorrow at the Public Hearing; however, I do not intend to address the committee or make any public comments at the hearing. If asked, I can try to answer questions but we hope the memo speaks for itself.

Thank you!

Seana

STATE BAR OF TEXAS

Office of Chief Disciplinary Counsel

Date: April 11, 2023

To: Andrea Lowe, Rules Attorney

From: Seana Willing, Chief Disciplinary Counsel

Re: CDC Comments on Proposed Rules

Andrea,

Please accept these comments from the Office of Chief Disciplinary Counsel regarding some of the proposed rule changes being considered at the Public Hearing on April 12, 2023. The comments and recommendations are the result of consultation with CDC Regional Counsel and the Bar's Ethics Attorneys, who are happy to provide additional information is needed.

Regarding proposed TDRPC Rule 1.08:

We understand that the CDRR is substantively following the ABA Model Rule in its revisions of 1.08(a) and that the proposed comments are the same verbatim.

We would point out that the use of the words "or" and "adverse" in the first paragraph of the proposed rule may be problematic. For example, a fee agreement that includes stock in a start-up company to pay for the lawyer's services requires compliance with Rule 1.08(a) under Comment 1; however, is such an arrangement *adverse* to a client who has no other means to afford legal services? If it is not an adverse acquisition of stock, why does Comment 1 say it has to follow the rule?

Suggestion: Instead of saying "adverse to a client" substitute "prohibited by Rule 1.06." It is stronger than Comment 3 since not all conflicts can be waived under 1.06.

With regard to Comment 1 to Rule 1.08, which specifically states that the rule does not apply to "ordinary fee agreements," we would raise a concern with regard to *renegotiated* fee

agreements during the course of representation. Despite the conclusion in Ethics Opinion 679, the case law is clear about the presumption of unfairness to the client under these circumstances leading to the need for an additional requirement of fairness to the client if they negotiate a *new* fee agreement during the course of the representation. In such a situation, the attorney would still be able to rebut the presumption of unfairness.

We would like to see the Comment to 1.08 clarified to address that the rule *does* apply to renegotiated fee agreements; it should only exclude the original fee agreement which is negotiated before the creation of the attorney-client relationship.

Finally, Comment 1 talks about a lawyer being able to loan a client money. Depending on the fact pattern, such a loan may violate Rules 1.08 (d), (h) and, or 7.03(f). Comment 1 does not reference these rules.

Regarding proposed TDRPC Rule 3.09:

Our concern is that the added obligations to notify defendants or defense attorneys of the new information will be difficult to enforce when considering paragraph (g): "*A prosecutor who concludes in good faith that information is not subject to disclosure under paragraph (f) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.*" It would be helpful to include a requirement that the prosecutor document in the State's file that s/he has knowledge of the new information and the reason(s) why the prosecutor determined that the information is not subject to disclosure. Having to create and maintain such a written record may prevent situations where prosecutors have allegedly ignored new information that does not support their theory of the case.

We also have a concern to the extent that the proposed changes require the CDC and grievance committee panels to make the determination that the new and credible information creates a likelihood that the convicted defendant did not commit the offense. We would prefer that we not have to make that determination in a disciplinary case.

We have also attached an article, *Attorney Grievance Commission of Maryland v. Cassilly,* which demonstrates the need for the CDRR's proposed rule changes.

Regarding proposed TDRPC Rule 5.01:

We support this rule change but suggest moving paragraphs (a) and (b) to comments since it is not clear whether and to what extent it would be a rule violation if an attorney did not comply with these provisions. Instead, these provisions could be factors to use to prove a violation of paragraph (c), which provides a clearer violation.

Nevertheless, we support the language providing the following preventative measure: "…*shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to these Rules.*" This is a subtle but important difference from the rule as it currently reads.

Additionally, we suggest the use of "Texas Disciplinary Rules of Professional Conduct" in Comments 1 and 8, as opposed to a generic reference.

Regarding proposed TDRPC Rule 5.05:

Including information and guidance regarding the remote practice of law is a welcome and overdue clarification to Rule 5.05 and will provide guidance to many attorneys calling for assistance on the Ethics Helpline. However, the comments provided by the UPLC regarding the proposed changes to Rule 5.05 also deserve serious consideration.

Regarding proposed TDRPC Rule 8.05:

As we pointed out earlier, Section 81.071 of the Texas Government Code controls jurisdiction in disciplinary proceedings and actions. According to statute, "[e]ach attorney admitted to practice in this state and each attorney specially admitted by a court of this state for a particular proceeding is subject to the disciplinary and disability jurisdiction of the supreme court and the Commission for Lawyer Discipline, a committee of the state bar." Although clarification of Rule 8.05 is welcome since the Ethics Helpline Attorneys receive many calls from attorneys licensed outside of Texas who are interested in providing or offering legal services in Texas, it remains unclear to us whether the Court, by rule, can alter whether or to what extent attorneys who are not admitted to practice in this state would fall under the jurisdiction of the Court and the CFLD.

Additionally, it is unclear what this sentence in Comment 2 means: "A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.05 appoints an *official* to be designated by this *court* to receive service of process in this jurisdiction." These terms could use clarification.

Suggestion: Define or explain "an official." Use "a tribunal" instead of "this court" so that it applies to evidentiary hearings.

Thank you for your consideration of this request. Please let us know if we can provide any additional information to the Committee.

Video of Public Hearing on Proposed Rule 5.01 of the Texas Disciplinary Rules of Professional Conduct

Held on April 12, 2023, by the Committee on Disciplinary Rules and Referenda

Video of Public Hearing on April 12, 2023

https://texasbar-wo4m90g.vids.io/videos/d39fd8b21c10e9c55a/cdrr-meeting-april-12-2023

Comments on proposed Rule 5.01:

Ryan Reneau at 1:05:05

Jerry R. Hall at 1:09:03

M E M O R A N D U M

To: TCDRR Members

cc: Haksoon Andrea Low
Cory Squires

From: Robert Denby

Date: October 28, 2022

Re: Texas Disciplinary Rules 5.01 through 5.04

I agreed to review the existing TxDRPC Rules 5.01 through 5.04 and report on whether we should consider amending any of them. As you'll recall, Rules 5.01, 5.02, and 5.03 concern supervision of other lawyers and law firm staff. Rule 5.04 establishes that only lawyers may own law firms, and that lawyers cannot split fees with non-lawyers. As described below, I am suggesting that we consider changing 5.01 (and making conforming changes to 5.03); I do not think 5.02 requires modification. With respect to 5.04, which has been the subject of significant national debate in recent years, I propose to table this discussion for the time being to see if changes made in other states bear fruit.

I. Lawyer Supervision (Rules 5.01 through 5.03)

To start with a basic point, the Rules mostly regulate *lawyers*; they do not, by and large, regulate *law firms*. There are some exceptions, of course: the Rules indeed define "law firm" and the word "firm" appears 161 times in the Rules. Law firms play a role in the regulatory scheme in various ways, but the core ethical obligations created by the Rules apply only to *lawyers.*

This dichotomy creates some unusual outcomes. For example, no one disputes that more experienced lawyers should supervise the less experienced lawyers, and non-lawyers, who are working for them. (For simplicity, I'll just use the terms "partner" and "associate" here, recognizing that the reality may be more nuanced in individual cases.) But how do we decide which partners are responsible for an associate's misconduct? Texas and the Model Rules have very different approaches for handling that issue. Neither approach is fully satisfying.

Model Rules 5.1 and 5.3 creates a three-tier approach for associates and staff, respectively. Simplifying somewhat:

- All partners in a firm have to make sure the firm has appropriate policies and procedures in place to ensure that everyone is abiding by the Rules (5.1(a), 5.3(a));
- Partners directly supervising associates and staff must make sure those people are abiding by the Rules (5.1(b), 5.3(b)); and

- A partner is subject to discipline for an associate or staff member's violation of the Rules if she directs the behavior, knows about it, and "ratifies" it, or "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action" (5.1(c), 5.3(c)).

For these purposes, I'm really only interested in the first of those points: namely, the proposition that all partners in a law firm have an obligation to ensure that the firm has appropriate policies and procedures in place. In larger firms, this rule is unrealistic. In a firm with, say, 50 partners, do each of them really need to go visit with the firm's CFO every year and satisfy themselves that the firm's trust accounting policies are appropriate and are rigorously enforced? As a practical matter, of course not – the firm will designate a managing partner or a managing committee to oversee those practices. The idea of having 50 cooks in the kitchen on that issue – and on *every* issue that touches on the Rules – would be chaos.

Perhaps for that reason, Texas rejected that approach. Our versions of 5.01 and 5.03 are quite different. We did not adopt Model Rule 5.1(a) or (b), and we did not adopt 5.3(a) or (b). We basically only adopted 5.1(c) and 5.3(c). As a result, Texas partners are responsible for the misconduct of associates and staff only if they caused or encouraged it, or if they knew about it but failed to fix it. In contrast, *no one* in Texas has any broader responsibility to ensure that the firm has appropriate policies and procedures in place.

One might argue that neither approach is very satisfying. Take two hypotheticals:

- A Houston transactional lawyer in a large, multi-office firm brings on a new client. She runs the new file through the firm's New Business Intake process and receives approval from that department, indicating no conflicts. Per firm protocol, she also circulates an all-attorney email asking if anyone sees a problem with her taking on the new matter, and receives no replies. However, the firm has an undetected conflict. The New Business Intake team missed it because the firm's GC and its management committee designed the conflict system to report only matters that were less than three years old. The conflicting matter, however, was seven years old and therefore did not show up on the conflict report even though it was directly relevant.

  Under those facts, in Texas, the transactional partner could be subject to discipline for the conflict, even though she followed firm protocols and had no reason to suspect there was a problem. The GC and the management committee would *not* be subject to sanction, even though, at least in the vernacular sense, it was their "fault" for instituting an unreasonably short, three-year look-back period.

  On the other hand, the result is no more sensible under the Model Rules. Under the Model Rules, a Dallas-based litigation partner, for instance, is theoretically subject to sanction for the Houston transactional partner's conflict, even though he knew nothing about that matter and had nothing to do with the decision to create a three-year look-back period in the conflict system. The litigation partner – and *all* of the other partners – could face discipline for failing to ensure that the firm's conflict system was adequate. This also seems somewhat divorced from reality.

- A partner agrees to supervise a junior associate on a pro bono criminal matter. Shortly afterwards, the partner departs the firm. The firm has no process in place to ensure that a departing partner's remaining matters are appropriately re-assigned to others, and therefore fails to assign a new supervising attorney to the pro bono matter for several months. In the meantime, the junior associate blows a filing deadline. Under the Texas rules, only the junior associate is subject to discipline; no partner in the firm is (assuming no one else knew about the deadline). And under the Model rules, all of the partners are.

These results stem from the fact that the Rules apply only to individual lawyers, and not to law firms *per se*. That approach leads to the unfortunate "all or none" dichotomy we see above – either all of the partners of a firm are jointly and severally responsible for managing its systems and processes, or none of them are. Neither approach seems very practical.

I'd venture that the solution, if one is needed, would be to subject law *firms* to discipline under 5.01 and 5.03. New York follows this approach. Its version of 5.1(a) says, "A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules." New Jersey, similarly, says that, "(a) Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct." In the U.K., the Solicitors Regulatory Authority has two separate rulebooks, one for individual solicitors and one for firms (they're nearly identical).

Is such a change needed? I don't know. Law firms generally establish thorough policies and procedures for a lot of good reasons (reputation, malpractice) even if not required to by the ethics rules. I'm not sure that changing the rule to require firm-based supervision would materially increase the quantity or the quality of supervision in Texas, but it might provide an enforcement avenue in those cases where a problem emerged as a result of a systemic failure.

If we were to pursue this approach, we might revise Rules 5.01 and 5.03 like this:

> **Rule 5.01 Responsibilities of a Law Firm, Partner or Supervisory Lawyer**
>
> (a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.
>
> (b) A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:
>
> (1~~a~~) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or
>
> (2~~b~~) The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.

Comment:

1. Rule 5.01(a) establishes that law firms have an obligation to take reasonable measures to ensure that its lawyers follow these Rules. Rule 5.01(b) conforms to the general principle that a lawyer is not vicariously subjected to discipline for the misconduct of another person. Under Rule 8.04, a lawyer is subject to discipline if the lawyer knowingly assists or induces another to violate these rules. Rule 5.01(b~~a~~) additionally provides that a partner or supervising lawyer is subject to discipline for ordering or encouraging another lawyer's violation of these rules. Moreover, a partner or supervising lawyer is in a position of authority over the work of other lawyers and the partner or supervising lawyer may be disciplined for permitting another lawyer to violate these rules.

2. Rule 5.01(b)(2) likewise is concerned with the lawyer who is in a position of authority over another lawyer and who knows that the other lawyer has committed a violation of a rule of professional conduct. A partner in a law firm, the general counsel of a government agency's legal department, or a lawyer having direct supervisory authority over specific legal work by another lawyer, occupies the position of authority contemplated by Rule 5.01(b)(2).

3. Whether a lawyer has direct supervisory authority over the other lawyer in particular circumstances is a question of fact. In some instances, a senior associate may be a supervising attorney.

4. The duty imposed upon the partner or other authoritative lawyer by Rule 5.01(b) is to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's known violation. Appropriate remedial action by a partner or other supervisory lawyer would depend on many factors, such as the immediacy of the partner's or supervisory lawyer's knowledge and involvement, the nature of the action that can reasonably be expected to avoid or mitigate injurious consequences, and the seriousness of the anticipated consequences. In some circumstances, it may be sufficient for a junior partner to refer the ethical problem directly to a designated senior partner or a management committee. A lawyer supervising a specific legal matter may be required to intervene more directly. For example, if a supervising lawyer knows that a supervised lawyer misrepresented a matter to an opposing party in negotiation, the supervisor as well as the other lawyer may be required by Rule 5.01(b) to correct the resulting misapprehension.

5. Thus, ~~neither Rule 5.01(a) nor~~ Rule 5.01(b) does not visit~~s~~ vicarious disciplinary liability upon the lawyer in a position of authority. Rather, the lawyer in such authoritative position is exposed to discipline only for his or her own knowing actions or failures to act. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

6. Regardless of whether any individual attorney might face discipline under Rule 5.01(b) for failing to supervise another lawyer, the lawyer's firm has an obligation ~~Wholly aside from the dictates of these rules for discipline, a lawyer in a position of authority in a firm or government agency or over another lawyer should feel a moral compunction~~ to make reasonable efforts to ensure that it has instituted ~~the office, firm, or agency has in effect~~

appropriate procedural measures giving reasonable assurance that all lawyers in the office conform to these rules. Thus, the firm could be subject to discipline even if no supervising attorney is. ~~This moral obligation, although not required by these rules, should fall also upon lawyers who have intermediate managerial responsibilities in the law department of an organization or government agency.~~

7. The measures that ~~should~~ must be undertaken by a firm to give such reasonable assurance may depend on the structure of the firm or organization and upon the nature of the legal work performed. In a small firm, informal supervision and an occasional admonition ordinarily will suffice. In a large firm, or in practice situations where intensely difficult ethical problems frequently arise, more elaborate procedures may be called for in order to give such assurance. Obviously, the ethical atmosphere of a firm influences the conduct of all of its lawyers. Lawyers may rely also on continuing legal education in professional ethics to guard against unintentional misconduct by members of their firm or organization.

Echoing that, conforming changes to Rule 5.03 might include these:

Rule 5.03 Responsibilities Regarding Nonlawyer Assistants

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate.

(b) With respect to a nonlawyer employed or retained by or associated with a lawyer:

(1~~a~~) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(2~~b~~) a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

(i~~1~~) the lawyer orders, encourages, or permits the conduct involved; or

(ii~~2~~) the lawyer:

(A~~i~~) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency's legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and

(B~~ii~~) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct.

Comment:

> 1. Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants act for the lawyer in rendition of the lawyer's professional services. A law firm must, and a lawyer should, give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.
>
> 2. Each lawyer in a position of authority in a law firm or in a government agency should make reasonable efforts to ensure that the organization has in effect measures giving reasonable assurance that the conduct of nonlawyers employed or retained by or associated with the firm or legal department is compatible with the professional obligations of the lawyer. This ethical obligation includes lawyers having supervisory authority or intermediate managerial responsibilities in the law department of any enterprise or government agency.

II. Lawyer Independence (Rule 5.4)

Model Rule 5.4 – providing that only lawyers may own law firms, and precluding fee-splitting with non-lawyers – has long been the subject of intense debate. The rule dates to the Canons of Professional Ethics in 1928; it survived the transition to the Model Code of Professional Responsibility in 1969 and the subsequent adoption of the Model Rules of Professional Conduct in 1983. The rule has been adopted by virtually all of the states. Washington, D.C. has a limited exception; it permits non-lawyers to own equity in firms under certain circumstances; this is generally known as the "lobbyist exception," permitting DC firms to grant partner status to non-lawyer lobbyists who work on firm matters. The Texas rule (5.04) largely tracks the Model Rule.

The rule comes under fire with some regularity. In the 1970s and 80s, the Kutak Commission proposed eliminating the fee sharing prohibition; the ABA voted down the proposal when they realized that it would permit Sears Roebuck or H&R Block to open law offices, staffed by salaried lawyers, in strip malls across the country. A bridge too far, apparently.

In just the past few years, however, the movement to permit non-lawyer ownership has made some headway. 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 ABA House of Delegates (the policy-making body within the ABA), is divided on the topic. It issued a statement in 2020, supporting the attempts by various states to experiment with non-lawyer ownership. But just this past summer, it issued Resolution 402; concluding that:

> The sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession. The law governing lawyers that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law should not be revised.

Resolution 402 will surely not be the final word on the subject.

Advocates of change believe that relaxing the rules against non-lawyer ownership/fee splitting would:

- Permit law firms to offer additional services
- Permit law firms to raise capital necessary to fund major expansions and technology-driven innovations
- Allow technology-driven enterprises to enter the market, lowering the cost of legal services

From a functional perspective, one might expect three different types of non-lawyers to be interested in acquiring law firms. First, civically minded groups might try to offer legal services to individuals who cannot afford to hire traditional lawyers. (Profit-driven actors might try that too, if they believe they can figure out how to wring a profit from these low-cost services.) Second, strategic buyers might be interested in acquiring firms to expand the range of services they currently offer to their own clients (accounting firms might acquire tax boutiques; Human Resource advisories might acquire immigration law firms). And third, financial investors might buy, or invest in, firms with promising profit margins.

The access-to-justice arguments are certainly appealing. Very briefly, there is ample evidence that many Americans cannot afford a lawyer and therefore go without a lawyer in situations where they would plainly be better served with counsel. A 2022 report by Legal Services Corporation observed that low-income Americans believe they go without any or enough legal help for 92% of their legal problems. A 2019 report by the Justice Lab at Georgetown Law Center noted that about 30 million people every year lack adequate representation in state courts. The access-to-justice proponents tend to believe that eliminating these rules could lower costs by, for example, permitting non-lawyers to perform various functions that are now off-limits, or by permitting tech companies to create a programs that could generate draft divorce agreements, immigration filings, landlord/tenant pleadings, etc. These companies would presumably hire a fair number of lawyers, but could be owned by non-lawyers.

Those are laudable goals. In contrast, I am much more ambivalent about permitting accounting firms to buy tax boutiques, or investors to buy into profitable law firms. Those developments would presumably make some people richer and some poorer, but I am skeptical that they would improve the caliber of legal work, or make lawyers available to clients who do not currently have access to them. And I see significant potential downside in permitting non-lawyer ownership in those contexts. Investors generally don't owe fiduciary duties to customers of the companies they invest in; there would be some tension between those investors' financial goals and the attorney/client obligations of the lawyers who would be working for them.

As a result, I would tread very cautiously here. I recommend that we monitor how these developments play out in Utah, Arizona, and any other jurisdiction that starts down this path, and revisit the issue in, say, two years when there will be more data available.[1] At this point, there are only a handful of entities taking advantage of these more relaxed rules in those states, and it is much too early to make any judgement about whether the experiment is a success or not. If

[1] It's worth noting that, in the U.K. and Australia, law firms have been permitted to become publicly traded since 2007. Neither country has seen a lot of activity on that front; in both jurisdictions, only five firms are listed. The Slater & Gordon firm from Australia has attracted the most press coverage, partly because it was the first firm to go public anywhere. It debuted on the ASX exchange in 2007 at $130AUD, reached a peak of $646AUD in April 2015, crashed shortly thereafter, restructured in 2017, and currently trades at 54 cents.

someone finds a way to make a meaningful improvement in the access-to-justice area without simultaneously jeopardizing the independent judgment of attorneys, we should certainly be open to it.

M E M O R A N D U M

To: TCDRR Members

cc: Haksoon Andrea Low
Cory Squires

From: Robert Denby

Date: December 2, 2022

Re: Texas Disciplinary Rule 5.01

Following up on our discussion at our last meeting, I continue to believe that existing Texas Rule 5.01, regarding the duty of lawyers to supervise others within their firms, is inadequate because it does not impose an obligation on anyone to ensure that the firm has appropriate policies and procedures in place. I also continue to believe that Model Rule 5.1 goes too far in this regard, because it imposes such an obligation on all partners in a firm, regardless of whether they have actual managerial responsibility or not.

My prior proposal – to impose such a duty on the firm itself – was soundly rejected. My current proposal is more modest – to take the Model Rule, but modify it to clarify that the duty to create firm-wide policies and procedures rests with firm management. Below is a redline version, showing proposed changes over Model Rule 5.1. Note, much of this language is borrowed from California, which grappled with these same issues when they adopted a new code in 2018.

Rule 5.01: Responsibilities of a Partner or Supervisory Lawyer

(a) A ~~partner in a law firm, and a~~ lawyer who individually or together with other lawyers possesses ~~comparable~~ managerial authority in a law firm~~,~~ shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to these rRules ~~of Professional Conduct~~.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer complies with these ~~conforms to the~~ rRules~~ of Professional Conduct.~~

(c) A lawyer shall be responsible for another lawyer's violation of these ~~R~~rules ~~of Professional Conduct~~ if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer ~~is a partner or~~ has ~~comparable~~ managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Similarly, I would propose some changes to the Model Rules' comments:

Comment

~~[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.~~

[1~~2~~] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Disciplinary Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[2~~3~~] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm, whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners engage in any ancillary business. ~~Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.~~

[3] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm would not necessarily be required to promulgate firm-wide policies intended to reasonably assure that the law firm's lawyers comply with these rules. However, a lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this rule.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.04(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.04(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.02~~(a)~~.

For reference, current Texas Rule 5.01 says:

Rule 5.01. Responsibilities of a Partner or Supervisory Lawyer

A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:

(a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or

(b) The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.

Comment:

1. Rule 5.01 conforms to the general principle that a lawyer is not vicariously subjected to discipline for the misconduct of another person. Under Rule 8.04, a lawyer is subject to discipline if the lawyer knowingly assists or induces another to violate these rules. Rule 5.01(a) additionally provides that a partner or supervising lawyer is subject to discipline for ordering or encouraging another lawyer's violation of these rules. Moreover, a partner or supervising lawyer is in a position of authority over the work of other lawyers and the partner or supervising lawyer may be disciplined for permitting another lawyer to violate these rules.

2. Rule 5.01(b) likewise is concerned with the lawyer who is in a position of authority over another lawyer and who knows that the other lawyer has committed a violation of a rule of professional conduct. A partner in a law firm, the general counsel of a government agency's legal department, or a lawyer having direct supervisory authority over specific legal work by another lawyer, occupies the position of authority contemplated by Rule 5.01(b).

3. Whether a lawyer has “direct supervisory authority over the other lawyer” in particular circumstances is a question of fact. In some instances, a senior associate may be a supervising attorney.

4. The duty imposed upon the partner or other authoritative lawyer by Rule 5.01(b) is to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's known violation. Appropriate remedial action by a partner or other supervisory lawyer would depend on many factors, such as the immediacy of the partner's or supervisory lawyer's knowledge and involvement, the nature of the action that can reasonably be expected to avoid or mitigate injurious consequences, and the seriousness of the anticipated consequences. In some circumstances, it may be sufficient for a junior partner to refer the ethical problem directly to a designated senior partner or a management committee. A lawyer supervising a specific legal matter may be required to intervene more directly. For example if a supervising lawyer knows that a supervised lawyer misrepresented a matter to an opposing party in negotiation, the supervisor as well as the other lawyer may be required by Rule 5.01(b) to correct the resulting misapprehension.

5. Thus, neither Rule 5.01(a) nor Rule 5.01(b) visits vicarious disciplinary liability upon the lawyer in a position of authority. Rather, the lawyer in such authoritative position is exposed to discipline only for his or her own knowing actions or failures to act. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

6. Wholly aside from the dictates of these rules for discipline, a lawyer in a position of authority in a firm or government agency or over another lawyer should feel a moral compunction to make reasonable efforts to ensure that the office, firm, or agency has in effect appropriate procedural measures giving reasonable assurance that all lawyers in the office conform to these rules. This moral obligation, although not required by these rules, should fall also upon lawyers who have intermediate managerial responsibilities in the law department of an organization or government agency.

7. The measures that should be undertaken to give such reasonable assurance may depend on the structure of the firm or organization and upon the nature of the legal work performed. In a small firm, informal supervision and an occasional admonition ordinarily will suffice. In a large firm, or in practice situations where intensely difficult ethical problems frequently arise, more elaborate procedures may be called for in order to give such assurance. Obviously, the ethical atmosphere of a firm influences the conduct of all of its lawyers. Lawyers may rely also on continuing legal education in professional ethics to guard against unintentional misconduct by members of their firm or organization.

From: Denby, Bob
To: Andrea Low
Subject: Rule 5.01
Date: Thursday, May 4, 2023 5:13:23 PM
Attachments: TX Rule 5.01 (post-hearing revision) .docx

Andrea, hope you're doing well. At the meeting this week, I noted that I had marked up proposed Rule 5.01 to accommodate some comments from the public. That version – showing proposed changes over the prior proposal – is attached. Happy to discuss. Thanks,

Bob

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Proposed Rule ~~(Clean Version)~~

Rule 5.01. Responsibilities of a Partner or Supervisory Lawyer

(a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to these rules.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer complies with these rules.

(c) A lawyer shall be responsible for another lawyer's violation of these rules if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment:

[1] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Disciplinary Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraphs (a) or (b) will depend on the circumstances. The question might depend upon the law firm's structure and the nature of its practice, including the size of the law firm, whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners engage in any ancillary business.

[3] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm would not necessarily be required to promulgate firm-wide policies intended to reasonably assure that the law firm's lawyers comply with these rules. ~~However, a lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this rule.~~

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.04(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having ~~comparable~~ managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. ~~Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a~~ A partner or manager in charge of a particular matter ordinarily ~~also~~ has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.04(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.02.