June 3, 2021

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

RE: Submission of Proposed Rule Recommendation – Rule 1.18, Texas Disciplinary Rules of Professional Conduct

Dear Mr. Ginn:

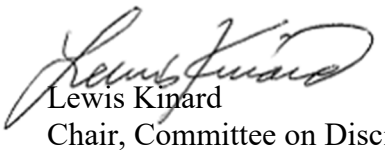
Pursuant to section 81.0875 of the Texas Government Code, the Committee on Disciplinary Rules and Referenda initiated the rule proposal process for proposed Rule 1.18 of the Texas Disciplinary Rules of Professional Conduct, relating to duties to prospective clients. The Committee published the proposed 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 October 2020 meeting, the Committee voted to recommend the proposed rule to the Board of Directors with certain amendments. The final recommended version of proposed Rule 1.18 includes significant amendments based on public comments received.

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

Committee on Disciplinary Rules and Referenda
Overview of Proposed Rule

Texas Disciplinary Rules of Professional Conduct
Rule 1.18. Duties to Prospective Client

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda (Committee) related to proposed Rule 1.18 of the Texas Disciplinary Rules of Professional Conduct (TDRPC), pertaining to duties to prospective clients.

Actions by the Committee

- **Initiation** – The Committee voted to initiate the rule proposal process at its June 18, 2020, meeting.
- **Publication** – The proposed rule was published in the September 2020 issue of the *Texas Bar Journal* and the August 21, 2020, issue of the *Texas Register*. The proposed rule was concurrently posted on the Committee's website. Information about the public hearing and the submission of public comments was included in the publications and on the Committee's website.
- **Additional Outreach** – Email notifications regarding the proposed rule were sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices), Committee email subscribers, and other potentially interested parties on September 1 and September 10, 2020. An additional email notification was sent to Committee email subscribers on September 14, 2020.
- **Public Comments** – The Committee accepted public comments through October 6, 2020. The Committee received 14 written public comments on the proposed rule.
- **Public Hearing** – On September 17, 2020, the Committee held a public hearing by Zoom teleconference. One individual addressed the Committee at the public hearing.
- **Recommendation** – The Committee voted at its October 7, 2020, meeting to recommend the proposed rule to the Board of Directors with certain amendments. The final recommended version of proposed Rule 1.18 includes significant amendments based on public comments received.

Overview

Proposed Rule 1.18, TDRPC, sets out a lawyer's duties to a prospective client and is substantially based on Rule 1.18 of the American Bar Association Model Rules of Professional Conduct. A vast majority of states have adopted Model Rule 1.18 or a variation of it.[1] Texas is currently one of only five states that have not adopted a disciplinary rule addressing duties owed to prospective clients.[2] However, Texas lawyers are often confronted with questions about the

[1] Memorandum from Committee Member Vincent R. Johnson (June 16, 2020), available at page 13 of this packet.
[2] *Id.*

subject.[3] Model Rule 1.18 "has been taught in law schools and tested on the Multistate Professional Responsibility Examination for nearly a full generation."[4]

Proposed Rule 1.18 addresses who constitutes a "prospective client," the protection of confidential information, and conflicts of interest.[5] If adopted, Proposed Rule 1.18 will provide much-needed clarity for Texas lawyers.

Amendments in Response to Public Comments

The Committee received public comments in support of the published proposal, as well as comments expressing concerns about certain language contained in the originally published version.

A number of public comments raised concerns about information received from individuals that was unsolicited or that was provided in bad faith to attempt to create a conflict of interest.

While the initially proposed Comment to proposed Rule 1.18 attempted to address these issues, the Committee responded to the public feedback by making a number of amendments to proposed Rule 1.18 itself, as well as to paragraph 2 of the proposed Comment.[6]

First, the Committee amended proposed Rule 1.18(a) by expressly including a requirement that a person must consult with a lawyer "in good faith" in order to constitute a "prospective client." The Committee further addressed this point by adding the following language to proposed Rule 1.18(a):

> A person who communicates with a lawyer for the purpose of disqualifying the lawyer, or for some other purpose that does not include a good faith intention to seek representation by the lawyer, is not a "prospective client" within the meaning of this Rule.

The Committee further strengthened the proposal by providing additional clarification to these issues in the proposed Comment. As amended, paragraph 2 of the proposed Comment states, "A communication by a person to a lawyer does not constitute a consultation unless the lawyer, either in person or through the lawyer's advertising, specifically requests or invites the submission of information that is not generally known about a particular potential representation."

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[3] *Id.*
[4] *Id.*
[5] The Committee initiated a separate rule proposal (Proposed Rule 1.00, TDRPC), which is currently under consideration and would add new defined terms to the TDRPC. "Client," "[i]nformed consent" and "[s]creened" are among the proposed new defined terms, and each appears in the text of proposed Rule 1.18.
[6] The final version of proposed Rule 1.18 recommended by the Committee is provided at page 6 of this packet. Additionally, a copy of the recommended proposal showing the changes from the originally published proposal is provided at page 9 of this packet.

Additional Documents

Included on the pages that follow are the final recommended version of proposed Rule 1.18 (page 6), a copy of the recommended proposal showing the amendments to the originally published version (page 9), a copy of the proposal as originally published in the September 2020 *Texas Bar Journal* (page 12), an initial memorandum on the subject from CDRR Member Vincent R. Johnson (page 13), and the public comments received (page 29).

Texas Disciplinary Rules of Professional Conduct

Proposed Rule 1.18. Duties to Prospective Client (Final Recommended Version)

Rule 1.18. Duties to Prospective Client

(a) A person who consults with a lawyer in good faith about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. A person who communicates with a lawyer for the purpose of disqualifying the lawyer, or for some other purpose that does not include a good faith intention to seek representation by the lawyer, is not a "prospective client" within the meaning of this Rule.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as these Rules would permit or require with respect to a client, or if the information has become generally known or would not be significantly harmful to the former prospective client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is not directly apportioned any part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment:

Client-Lawyer Relationship

1. Prospective clients, like clients, may disclose information to a lawyer, place documents or other

property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

2. A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. A communication by a person to a lawyer does not constitute a consultation unless the lawyer, either in person or through the lawyer's advertising, specifically requests or invites the submission of information that is not generally known about a particular potential representation. A consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client."

3. It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, with limited exceptions, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

4. In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.06, then consent from all affected present or former clients must be obtained before accepting the representation.

5. A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

6. Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

7. Under paragraph (c), the prohibition in this Rule is imputed to other lawyers, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be

avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

8. Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

9. For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.01. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.14.

Texas Disciplinary Rules of Professional Conduct

Proposed Rule 1.18. Duties to Prospective Client

(Showing Amendments to Published Version)

Rule 1.18. Duties to Prospective Client

(a) A person who consults with a lawyer in good faith about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. A person who communicates with a lawyer for the purpose of disqualifying the lawyer, or for some other purpose that does not include a good faith intention to seek representation by the lawyer, is not a "prospective client" within the meaning of this Rule.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as these Rules would permit or require with respect to a client, or if the information has become generally known or would not be significantly harmful~~disadvantageous~~ to the former prospective client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is not directly apportioned any part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment:

Client-Lawyer Relationship

1. Prospective clients, like clients, may disclose information to a lawyer, place documents or other

property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

2. A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. A communication by a person to a lawyer does not constitute a consultation unless the ~~Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a~~ lawyer, either in person or through the lawyer's advertising ~~in any medium~~, specifically requests or invites the submission of information that is not generally known about a particular potential representation ~~that is not generally known. without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a~~A consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." ~~Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client." A person who communicates information to a lawyer for purposes which do not include a good faith intention to retain the lawyer in the subject matter of the consultation is not a "prospective client" within the meaning of this Rule.~~[1]

3. It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, with limited exceptions, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

4. In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.06, then consent from all affected present or former clients must be obtained before accepting the representation.

5. A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the

prospective client.

6. Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

7. Under paragraph (c), the prohibition in this Rule is imputed to other lawyers, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

8. Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

9. For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.01. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.14.

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.18. Duties to Prospective Client

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 October 6, 2020. 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 at 10:30 a.m. CDT on September 17, 2020. For teleconference participation information, please go to texasbar.com/cdrr/participate.

Proposed Rule (Redline Version)

Rule 1.18. Duties to Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as these Rules would permit or require with respect to a client, or if the information has become generally known or would not be disadvantageous to the former prospective client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is not directly apportioned any part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Proposed Rule (Clean Version)

Rule 1.18. Duties to Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as these Rules would permit or require with respect to a client, or if the information has become generally known or would not be disadvantageous to the former prospective client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is not directly apportioned any part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client. TBJ

June 16, 2020

TO: Prospective Clients Rule Subcommittee (Claude Ducloux and Amy Bresnen)

FROM: Vincent R. Johnson

RE: Adding a "Duties to Prospective Client" Rule to the Texas Disciplinary Rules

In 2002, the ABA House of Delegates promulgated Model Rule 1.18, entitled "Duties to Prospective Client." That rule was based on § 15 of the *Restatement (Third) of the Law Governing Lawyers* (2000), which states that a lawyer owes a prospective client a duty to: protect confidential information; avoid adverse representation in a substantially related matter; safeguard property entrusted to the lawyer; and exercise care in giving preliminary advice.[1] The ABA made minor changes to Model Rule 1.18 in 2012. The current version of the rule is set forth in Appendix A (page 1).

A vast majority of states have adopted a prospective client rule based on Model Rule 1.18, often in terms identical to the ABA language (e.g., AK, DE, IN, IA, KS, KY, LA, ME, MA, MI, NE, OK, RI, SD, UT, WV, WI). State variations are shown in Appendix A (pages 2-9). There is a high degree of consensus that a rule addressing the duties owed by lawyers to prospective clients is an appropriate, if not essential, component of a state ethics code.

Texas is one of only five states that have not adopted any disciplinary rule on duties to prospective clients (AL, GA, MS, TX, and VA). Yet questions about the duties owed by Texas lawyers to prospective clients have long confronted members of the bar.[2] A proposed rule on the duties owed by lawyers to prospective clients was defeated in the failed 2011 State Bar Referendum. *See* Appendix B.

I recommend that we propose the adoption of a rule patterned as closely as possible on ABA Model Rule 1.18. The reason for taking this approach is that the ABA Model Rule is what has been taught in law schools and tested on the Multistate Professional Responsibility Examination for nearly a full generation. Unless there is good reason for variation, we should minimize confusion about whether Texas differs from the Model Rule.

The following paragraphs shows in redlined format how I would propose to change Model Rule 1.18 for addition to the Texas Rules (presumably as Texas Disciplinary Rule 1.18):

> Rule 1.18 Duties to Prospective Client
>
> (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except ~~as Rule 1.9 would permit with respect to information of a former client.~~as these Rules would permit or require with

[1] GEOFFREY HAZARD, *et al.*, THE LAW OF LAWYERING § 23.02 (4th ed., 2017 Supp.).

[2] *See, e.g.*, Texas Ethics Opinion 463 (1989) ("No provision of the Texas Code of Professional Responsibility prevents an attorney from using for the benefit of his client information obtained from a prospective client that is neither confidential nor secret.").

respect to a client, or if the information has become generally known or would not be disadvantageous to the former prospective client.[3]

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment

Client-Lawyer Relationship

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

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[3] The reference in Model Rule 1.18(b) to Model Rule 1.9 provides an easy cross-reference to language in the "Duties to Former Clients" rule, which states:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

However, there is no similar language in the parallel Texas rule (Rule 1.09, Conflict of Interest: Former Client). Therefore, the substance of the cross-reference in Model Rule 1.18 has been written into the text of the proposed Texas Rule.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client." A person who communicates information to a lawyer for purposes which do not include a good faith intention to retain the lawyer in the subject matter of the consultation is not a "prospective client" within the meaning of this Rule.[4]

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, ~~except as permitted by Rule 1.9~~with limited exceptions, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.06~~7~~, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. ~~See Rule 1.0(e) for the definition of informed consent.~~ If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

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[4] Similar to Nevada Rule 1.18(e).

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers ~~as provided in Rule 1.10~~, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. ~~See Rule 1.0(k) (requirements for screening procedures).~~ Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.01. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.14~~5~~.

Appendix A

American Bar Association
CPR Policy Implementation Committee

Variations of the ABA Model Rules of Professional Conduct

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Variations from ABA Model Rule are noted. Based on reports of state committees reviewing recent changes to the model rules. For information on individual state committee reports, see http://www.americanbar.org/groups/professional_responsibility/policy/mrpc.html.

Comments not included.

*Current links to state Rules of Professional conduct can be found on the ABA website:

	http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html. ** Highlight indicates adoption of Ethics 20-20 Commission August 2012 and February 2013 Rule amendment(s): black-letter or Comment.
AL Effective 2/19/09	Does not adopt
AK *Amendment effective 10/15/2017	Same as MR
AZ *Amendment Effective 1/1/16	(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or: (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the prospective client, including a description of the particular screening procedures adopted; when they were adopted; a statement by the personally disqualified lawyer and the new firm that the prospective client's material confidential information has not been disclosed or used in violation of the Rules; and an agreement by the new firm to respond promptly to any written inquiries or objections by the prospective client about the screening procedure; and Adds (3): the personally disqualified lawyer and the partners of the new firm reasonably believe that the steps taken to accomplish the screening of material confidential information will be effective in preventing such information from being disclosed to the new firm and its client.
AR *Amendment effective 6/26/2014	(b): Deletes "that" before "information"; retains "learned in the consultation" after "information"
CA Effective 11/1/2018	(a) Adds after "who": "directly or through an authorized representative"; changes language after "lawyer" to: "for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client" (b) changes "who has learned from" to "who has communicated with"; adds after "reveal information": "protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that the lawyer learned as a result of the consultation" (c) Adds after "received": "from the prospective client information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that is material to the matter, except as provided in paragraph (d)."; Changes "disqualified" to "prohibited" (d)(2)(i): changes "disqualified" to "prohibited"

	(d)(2)(ii): adds after "prospective client": "to enable the prospective client to ascertain compliance with the provisions of this rule."
CO *Amendment effective April 6, 2016	(c) Replaces "that person in the matter" with "the prospective client."
CT *Amendments effective 1/1/2015	(a): adds "or communicates" after "discusses" and "concerning" before "the possibility" (d)(2)(i): deletes "and is apportioned no part of the fee therefrom"
DE *Amendments effective 3/1/2013	Same as MR
District of Columbia Effective 2/1/07	(b): replaces language after "consultation with "except as permitted by Rule 1.6" (c): replaces "information" with "confidence or secret," deletes "that could be significantly harmful to that person in the matter" (d): replaces "disqualifying information as defined in paragraph (c)" with "a confidence or secret from the prospective client" (d)(1): deletes "confirmed in writing" Does not have MR (d)(2) (d)(2): same as MR (d)(2)(i) but deletes language after "matter" Does not have MR (d)(2)(ii)
FL Effective 5/22/06	(a): adds to beginning "Prospective Client." (b): adds to beginning "Confidentiality of Information." (c): adds to beginning "Subsequent Representation.", replaces "significantly harmful to" in first sentence with "used to the disadvantage of," replaces "under this paragraph" in the second sentence with "under this rule" (d): adds to beginning "Permissible Representation."
GA* Effective 1/1/01	**Has not amended Rule since the most recent amendments to the ABA Model Rules* Does not have
HI Effective 1/1/14	(a): Changes "consults" to "discusses" (b): Changes "learned information from" to "had discussions with"; adds "learned in the consultation" after "reveal information" (d): Adds at beginning: "Representation is allowed with consent or screening." (d)(1): Changes "informed consent" to "consent after consultation" (d)(2): Replaces "took reasonable measures to avoid exposure" to "did not obtain more disqualifying information than was reasonably necessary"
ID *Amendments	(b): Similar to MR but retains language "learned in the consultation" after "reveal that information"

effective 7/1/2014	
IL *Amendment Effective 1/1/2016	(d)(1) Deletes "confirmed in writing;" Adds to end of paragraph, "that lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;" Deletes (d)(2)(i) and (ii).
IN Effective 1/1/05	Same as MR prior to Ethics 20-20 changes
IA *Amendments effective 1/1/2013	Same as MR
KS *Amendments effective 3/1/2014	Adds "Client-Lawyer Relationship" to title
KY Effective 7/15/09	Same as MR prior to Ethics 20-20 changes
LA *Amendment effective 4/1/2015	Same as MR
ME Effective 8/1/09	Same as MR prior to Ethics 20-20 changes
MD Effective 7/1/05	(d): Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.
MA Amendment Effective 7/1/2015	Same as MR
MI *Amendment effective Sept. 1, 2018	Identical.
MN Amendment effective 4/1/15	(b) Replaces "learned information from" with "consulted with"; adds "that" before "information" and after adds "obtained in the consultation"

MS Effective 11/3/05	Did not adopt
MO Effective 7/1/07	(d)(2) Last clause, starting with "the disqualified lawyer" is similar to MR (d)(2) combines MR (d)(2) and (d)(2)(ii). Does not adopt MR (d)(2)(i).
MT	See Montana Rule 1.20 for Duties to Prospective Clients (a) Same as MR (b) Even when no client-lawyer relationship ensues, a lawyer who has had consultations with a prospective client shall not use or reveal information, except as Rule 1.9 would permit with respect to information of a former client. (c) Same as MR (d) Same as MR
NE Effective 9/1/05	Same as MR prior to Ethics 20-20 changes
NV *Amendments Effective 4/4/2014	Adds (e) A person who communicates information to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, or for purposes which do not include a good faith intention to retain the lawyer in the subject matter of the consultation, is not a "prospective client" within the meaning of this Rule. Adds (f) A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client. Adds (g) Whenever a prospective client shall request information regarding a lawyer or law firm for the purpose of making a decision regarding employment of the lawyer or law firm: (1) The lawyer or law firm shall promptly furnish (by mail if requested) the written information described in Rule 1.4(c). (2) The lawyer or law firm may furnish such additional factual information regarding the lawyer or law firm deemed valuable to assist the client. (3) If the information furnished to the client includes a fee contract, the top of each page of the contract shall be marked "SAMPLE" in red ink in a type size larger than the largest type used in the contract and the words "DO NOT SIGN" shall appear on the client signature line.
NH Effective 1/1/08	(b) Changes "had discussions with" to "received and reviewed information from;" deletes "learned in the consultation;" (d)(2)(a) and (b) are equivalent to MR (d)(2)(i) and (ii).
NJ *Amendments	Title is "Prospective Client" (a) (MR b): A lawyer who has had communications in consultation with a

effective April 14, 2016	prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as RPC 1.9 would permit in respect of information of a former client. (b) is similar to MR (c), but does not include the last sentence of MR (c) and refers to "former prospective clients." (c) is similar to MR (d). The first sentence of (c) is from last sentence of MR (c). The exception for screening is like the Ethics 2000 August 2001 draft. (d) (MR a): A person who communicates with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client" and if no client-lawyer relationship is formed, is a "former prospective client".
NM *Amendment effective 12/31/2015	Changed to Rule 16-118; (a) Renamed "**A definition of "prospective client;**'" (b) Renamed "**B. Confidential information**;" Replaces "Rule1.9" with "Rule 16-109 of the Rules of Professional Conduct;" (c) Renamed "**C. Certain representations prohibited**;" Replaces "paragraph (b)" with "Paragraph B of this rule" and "paragraph (d)" with "Paragraph D" in two instances; (d) Renamed "**D. When representation is permitted**;" Replaces "paragraph (c)" with "Paragraph C."
NY *Amendments Effective 1/1/2017	(a) Adds to beginning "Except as provided in Rule 1.18(c), a"; adds quotes around "prospective client" Does not adopt MR (d)(2)(i); Adds: *(i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;* *(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;* *(iii) the disqualified lawyer is apportioned no part of the fee therefrom; and* Adds (c)(3): *(3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.* Adds (e): *(e) A person is not a prospective client within the meaning of paragraph (a) if the person:* *(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or* *(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter.*
NC	(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

*Amendment effective October 2, 2014	(1) the disqualified lawyer is timely screened from any participation in the matter; and (2) written notice is promptly given to the prospective client.
ND * Amendment effective July 1, 2016	(d): replaces "disqualifying information as defined in paragraph (c)" with "significantly harmful information" (d)(1): changes end to "have given consent" (d)(2): changes "disqualifying information" to "significantly harmful information,"; adds "and notice is promptly given to the prospective client" to end (d)(2)(i) and (ii): does not have
OH Amendment Effective 4/1/2015	(d): adds to end "either of the following applies" (d)(2): adds to end "both of the following apply"
OK Effective 1/1/08	Same as MR prior to Ethics 20-20 changes
OR Effective 12/1/06, and effective 1/1/14	(a) A person who discusses **consults** with a lawyer **about** the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with **learned information from** a prospective client shall not use or reveal **that** information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
PA *Amendments effective 11/21/2013	Paragraph (a) is identical. (b) deletes "that" before "information"; adds "which may be significantly harmful to that person" after "information". (c) PA changes "received" to "learned" (d) PA changes "received disqualifying" to "learned"; (d)(1) PA deletes "confirmed in writing" (d)(2) "all of the following apply" MR (d)(2) is similar to (d)(2)(i): Deletes "the lawyer who received the information" and replaces with "the disqualified lawyer"; deletes "and" at end. MR (d)(2)(1) is similar to (d)(2)(ii): Deletes "timely"
RI Effective 4/15/07	Same as MR prior to Ethics 20-20 changes
SC Effective 10/1/05	(a) A person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship.
SD *Amendment	Identical

effective 7/1/2018	
TN Effective 1/1/2011 Amendment effective March 6, 2017	(d)(2)(i) Deletes language after "any participation in the patter;" Adds (e) *When no client-lawyer relationship ensues, a prospective client is entitled, upon request, to have the lawyer return all papers and property in the lawyer's possession, custody, or control that were provided by the prospective client to the lawyer in connection with consideration of the prospective client's matter.*
TX	Does not adopt.
UT *Amendment effective May 1, 2015	Identical
VT Effective 9/1/09	(a) Adds clause, "in good faith," after "a person who;" (b) Adds after "except as:" "Rule 1.6 would require or permit or as Rule 1.9."
VA Effective 1/1/04	Does not adopt
WA Amendment Effective Sept. 1, 2016	(b): adds to end "or except as provided in paragraph (e)" (c): changes to "except as provided in paragraphs (d) and (e)"; adds "or LLLT" after "a lawyer" in the second sentence; also in the second sentence, adds "or paragraph (c) of LLLT RPC 1.18" after "under this paragraph"; adds "or LLLT" after "which that lawyer". Adds (e) A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. The prospective client may also expressly consent to the lawyer's subsequent use of information received from the prospective client.
WV *Amendment effective 1/1/2014	Same as MR
WI *Amendment effective Jan. 1, 2017	Identical
WY *Amendment effective 10/6/14	(d)(1): Adds "a" before "writing" and adds "signed by the client" after

As of Jan. 2, 2020

2011 Referendum

Appendix B

Rule 1.17. Prospective Clients [new]

(a) A person who in good faith discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) A lawyer shall not use or disclose confidential information provided by the prospective client, except as provided in Rule 1.05 or (d)(2).

(c) A lawyer who has received confidential information from a prospective client shall not represent a person with interests materially adverse to those of the prospective client in the same or a substantially related matter, except as provided in (d)(l) or (d)(2). When a lawyer is personally prohibited by this paragraph from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter.

(d) When a lawyer has received confidential information from a prospective client, representation of a client with interests materially adverse to those of the prospective client in the same or a substantially related matter is permissible if:

(1) the prospective client has provided informed consent, confirmed in writing, to the representation; or

(2) the lawyer conditioned the discussion with the prospective client on the prospective client's informed consent that no information disclosed during the discussion would be confidential or prohibit the lawyer from representing a different client in the matter.

Terminology: See Rule 1.00 for the definitions of "affiliated," "confirmed in writing," "informed consent," "knows," "person," "personally prohibited," "reasonably should know," "represents," and "writing."

Comment:

1. Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth, and the prospective client and lawyer often proceed no further. Thus, not all of the protection given to a client or former client is appropriate for a prospective client.

2. To attempt to avoid acquiring information from a prospective client that could prohibit the lawyer from undertaking another representation, the lawyer considering whether to represent the prospective client in a new matter may choose to limit the receipt of information from that prospective client to information that will assist the lawyer in determining whether a conflict of interest or other reason for declining the representation exists.

3. The requirement in paragraph (a) that a lawyer's services be sought "in good faith" is intended to preclude the tactical disclosure of confidential information to a lawyer so as to prevent the individual lawyer or the lawyer's firm from representing an adverse party.

4. A person does not become a prospective client unless that person actually "discusses" with a lawyer the possibility of forming a client-lawyer relationship, and the relationship discussed is in regard to a particular matter. A person's uninvited, unilateral contact with a lawyer does not constitute a discussion, regardless of whether the contact was made with a good-faith desire to employ the lawyer. A discussion, within the meaning of paragraph (a), requires bilateral oral or written communication. Under paragraph (a) and subparagraph (d)(2), a lawyer's discussion with a prospective client may occur either directly or through an agent or other representative authorized to act on the prospective client's behalf.

5. Often, a prospective client needs to reveal confidential information to the lawyer during an initial discussion, prior to the decision about forming a client-lawyer relationship. The lawyer often must learn such confidential information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) in this Rule prohibits the lawyer from using or disclosing that information, except as permitted by Rule 1.05 or by virtue of a waiver obtained under subparagraph (d)(2) in this Rule.

6. The concern underlying paragraph (c) is the possibility that a lawyer who cannot undertake a representation under this Rule will seek to avoid that prohibition by having another lawyer in the lawyer's firm (i.e., an affiliated lawyer), who is not personally subject to the prohibition, assume responsibility for the representation. Because the personally prohibited lawyer's knowledge of the prospective client's confidential information is imputed to the affiliated lawyer, a representation by the affiliated lawyer would not prevent the harm that this Rule is designed to prevent. Accordingly, paragraph (c) generally restricts an affiliated lawyer's ability to undertake a representation that a personally prohibited lawyer cannot undertake. If the affiliated lawyer never actually obtains the prospective client's confidential information, however, the affiliated lawyer's restriction ends when the affiliation with the personally prohibited lawyer ends.

7. Paragraph (c) also provides that an affiliated lawyer should not be disciplined for undertaking a representation unless the affiliated lawyer knew or reasonably should have known that the lawyer was prohibited from undertaking the representation. An affiliated lawyer in a large firm, especially a firm with offices in different cities, would be particularly vulnerable to an unwitting and innocent violation of the Rule absent this scienter requirement. But this scienter requirement does not diminish or otherwise affect the affiliated lawyer's obligation to make efforts before undertaking a representation to ascertain the existence of a conflict of interest relating to that representation. See Rule l .00(r).

8. A lawyer does not need to use or disclose a prospective client's confidential information in a representation to be subject to discipline under this Rule. Actual unauthorized use or disclosure, however, may violate Rule 1.05.

9. Although subparagraphs (d)(l) and (d)(2) do not require a lawyer to provide written disclosures when obtaining a prospective client's informed consent, the lawyer should consider making such disclosures in writing to avoid difficulties that may arise when a lawyer claims to have made disclosures and the prospective client claims otherwise.

10. Although the informed consent referenced in subparagraph (d)(2) does not need to be confirmed in writing, the lawyer should consider obtaining a written consent signed by the prospective client before discussions with the prospective client begin. Subparagraph (d)(2) requires the lawyer to obtain the consent, whether written or oral, before the discussion commences.

11. Courts have employed the "substantial relationship" standard used in this Rule in disqualification opinions. Texas courts have held that, for disqualification purposes, a matter is substantially related to another matter if a genuine threat exists that a lawyer may divulge in one representation confidential information acquired by the lawyer in another representation because the facts and issues involved in the representations are so similar. But a lawyer should note the circumstances resulting in discipline may differ from those under which a court may disqualify the lawyer. For example, in deciding whether to disqualify a lawyer, a court will consider the competing interests of all litigants involved. The disciplinary standard found in this Rule does not require consideration of competing interests. Therefore, while a review of disqualification opinions may help a lawyer understand the parameters of the "substantial relationship" standard, the holdings in such opinions should not be used as conclusive statements that a disciplinary matter would have the same result.

Committee on Disciplinary Rules and Referenda
Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.18. Duties to Prospective Client

Public Comments Received
Through October 6, 2020

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comment in support of Proposed changes to Rules 1.00, 1.18
Date: Tuesday, September 1, 2020 9:50:45 AM

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

Contact

First Name	Nathan
Last Name	Block
Email	[redacted]
Member	Yes
Barcard	24005355

Feedback

Subject	Comment in support of Proposed changes to Rules 1.00, 1.18

Comments

I am very much in favor of adoption of the proposed changes to rules 1.00 and 1.18. They appear to codify what has always been the expectation of ethical practice and are entirely appropriate.

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed Rule 1.18
Date: Tuesday, September 1, 2020 9:55:09 AM

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

Contact	
First Name	John
Last Name	Nation
Email	[redacted]
Member	Yes
Barcard	14819700

Feedback	
Subject	Proposed Rule 1.18

Comments
I think all attorneys should already understand the policies behind this proposed rule. I believe the Rule reminds us of these duties and is an appropriate rule.

From: Kent Canada
To: cdrr
Subject: Comment to Proposed Rules -- 1.00 and 1.18
Date: Tuesday, September 1, 2020 10:03:13 AM

How could a "screen" possibly work in today's electronic world?

These proposed changes are a bad idea.

Kent Canada

--
Kent Canada
Attorney at Law
1900 Preston Road #267 - PMB 238
Plano, Texas 75093

[redacted]
800-425-5059 telecopy

Twitter: LegalReason

From: [redacted]
To: cdrr
Subject: CDRR Comment: Rule 1.18
Date: Tuesday, September 1, 2020 11:30:32 AM

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

Contact

First Name	Sean
Last Name	Palmer
Email	[redacted]
Member	Yes
Barcard	24037233

Feedback

Subject	Rule 1.18

Comments

In form and substance, the rule is too vague and ambiguous and subjects attorney to have to bear a professional responsibility and accountability to each and every person who in any way contacts a lawyer or any person who contacts a staff member. This includes calls to law office, replies to a website form, Yelp inquiry etc whether or not the member of the public has disclosed personal identification information such as name. The burden on the attorney outweighs any reasonable protection to the public. With the myriad ways a member of the public may come into contact with an attorney through the internet such as website forms, Facebook posts, AVVO and many other formats, the regular transfer of information of any manner or degree could be considered a "consultation" by the member of the public- all without the need to even leave any identifying information such as a name. This rule would place the attorney-practitioner in great vulnerability to suit by nearly any person who shares unsolicited information in any number of electronic mediums. In the vast realm of virtual contact available through the internet and the identification of what constitutes the rule's proposed protected class known as "prospective client" impossibly vague .

From: Michael Miller
To: cdrr
Subject: Re: Seeking Comments on Proposed Rules
Date: Tuesday, September 1, 2020 2:06:12 PM

I have comments on proposed rule 1.18.

It should be OK to use or reveal information from a prospective client if one learns or has learned it also from any other source, whether or not it is generally known. Thus, I would amend (b) by replacing "the information has become generally known" with "the lawyer learns or has learned the information also from any source other than that prospective client." I would also amend (c) by adding at the end of the first sentence: "or unless paragraph (b) allows the lawyer to use or reveal that information."

I'd like your thoughts and would be happy to discuss further. Please reply by email.

Michael Miller

On Tuesday, September 1, 2020, 9:38:12 AM CDT, State Bar of Texas - CDRR <cdrr@texasbar.com> wrote:

State Bar of Texas

Proposed Rules Published

Public Comments Sought

The Committee on Disciplinary Rules and Referenda has published the following proposed rules in the September issue of the *Texas Bar Journal* and the August 21 issue of the *Texas Register*:

- Rule 1.00. Terminology, Texas Disciplinary Rules of Professional Conduct
- Rule 1.18. Duties to Prospective Client, Texas Disciplinary Rules of Professional Conduct
- Rule 13.05. Termination of Custodianship, Texas Rules of Disciplinary Procedure

For additional information, including to view proposed interpretive comments, please go to the Committee's Docketed Requests page.

The Committee will accept comments concerning the proposed rules through October 6, 2020. Comments can be submitted here, or by email to cdrr@texasbar.com.

A public hearing on each of the proposed rules will be held by teleconference at 10:30 a.m. CDT on September 17, 2020. For teleconference participation information, please go to texasbar.com/cdrr/participate. If you plan to participate in a scheduled public hearing, it is requested that you email cdrr@texasbar.com in advance of the hearing with your name and the public hearing item you wish to speak on so the Committee can group speakers by topic during the hearings.

Additional Information

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

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

Sincerely,

Committee on Disciplinary Rules and Referenda

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed TDRPC 1.18
Date: Wednesday, September 2, 2020 6:09:27 PM

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

Contact

First Name	Frederick
Last Name	Moss
Email	[redacted]
Member	Yes
Barcard	14583400

Feedback

Subject	Proposed TDRPC 1.18

Comments

I applaud the proposed rule and hope it passes a referendum. However, I can foresee that if passed, lawyers will present every prospective client with a boilerplate consent/waiver to sign. The consent would have the prospective client agree that he or she will not relate any information that is "substantially harmful" to the matter, that the lawyer has undertaken reasonable precautions to avoid gathering any substantially harmful information, and if such information has been revealed, the prospective client agrees not to seek to disqualify the lawyer should the lawyer end up representing the prospective client's adversary in the same matter. This scenario is inevitable if 1.18 passes. Is there anything you can put in the comments to this rule that might mitigate this practice? Alternatively, because of what actions by lawyers that I foresee if 1.18 passes, wouldn't it be simpler just to have the rule prohibit a lawyer from any and all representations against a prospective client regardless of what information is gathered (while allowing for screening to permit other lawyers in the firm to continue)? I know that this opens the door to "taint shopping," but the rule could state that if the prospective client was not acting in good faith, the lawyer is not acting unethically in being adverse to the phony prospective client. Finally, I trust that the comments to 1.18 as proposed will include a statement to the effect that bad faith attempts to taint the lawyer do not make acting contra to the ersatz prospective client unethical. In fact, why not put the "good faith" requirement in the Rule itself? Thank you for your good work, and good luck!

From: [redacted]
To: cdrr
Subject: CDRR Comment: Proposed TDRPC 1.18
Date: Thursday, September 3, 2020 4:34:51 PM

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

Contact

First Name	Frederick
Last Name	Moss
Email	[redacted]
Member	Yes
Barcard	14583400

Feedback

Subject	Proposed TDRPC 1.18

Comments

This is a follow up comment to the one I sent earlier. First, thank you for sending the proposed Rule's proposed Comments. They are excellent. I have two suggestions: First, that in 1.18(a) the words "who, in good faith, consults" be added to the definition of who qualifies as a "prospective client." This element is stated explicitly (in other language) in the Comment, but some do not think it proper for a comment to add a substantial limit or expansion of the text of the Rule. This addition would negate this argument. The comment would then be explaining a term used in the Rule, which is the proper function of Comments. Second, the Rule and Comment adopt the ABA's "confirmed in writing" requirement. However, unless I missed it, the TDRPC do not have the ABA's definition of "confirmed in writing" (Model Rule 1.0(b)) in its Terminology section. If I am correct, I suggest that the ABA's definition be added to the Texas Rules Terminology section so that everyone will understand what the term means. Thank you for your consideration and for your good work.

From: Richard Hunt
To: cdrr
Subject: Comment on Proposed Rule 1.18
Date: Monday, September 7, 2020 11:01:45 AM

I do not believe the proposed rule finds an appropriate balance between the expectations of a prospective client and need to gather some information before deciding to take on a matter. There are areas of practice – notably family law – where clients are often advised to call as many potential opposing counsel as possible with the goal of creating conflicts that will eliminate them from representing the client. The proposed rule makes that manipulation much easier. Apart from deliberate abuse clients generally do not want their first consultation to end before it begins with a demand for the name of the opposing parties so conflicts can be run; in fact, it may not be possible to determine if there is a conflict without some information.

I believe the proposed rule should be amended to:

a. require that attorneys inform prospective clients at the outset that information exchanged is not confidential unless the client explicitly requests it,
b. provide that information is confidential only if (i) the prospective client requests it and (ii) it is not known to any adverse party and is of a type that would be reasonably expected to provide an advantage to adverse parties,
c. provide that the rule does not apply to unsolicited written communications (email, text, snail mail etc) from the prospective client provided the attorney receiving the communication promptly informs the client that the prospective client's information will not be treated as confidential unless and attorney-client relationship is formed and
d. does not apply at all to a prospective client who is already represented by counsel in the same or a related matter.

Richard M. Hunt
Hunt | Huey PLLC

Please Note our New Address

3333 Lee Parkway, Suite 600
Dallas, Texas 75219
214-641-9182 direct
214-279-6124 fax
[redacted]
hunthuey.com
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2/18/2019

MEMO TO: Committee On Disciplinary Rules

RE: Proposed Rule 1.18 – Prospective Client

In response to the requests for comments concerning the proposed rules, we have the following comments for consideration by the committee:

1. In general, the terminology of the proposed rule is vague or overly broad. As a result, the rule extends the parameters of the rule beyond reasonable boundaries.

2. The terminology defining a "prospective client" as a person who speaks with a lawyer about the "possibility of forming a client-lawyer relationship" is overly broad. Those terms allow any person who speaks with a lawyer concerning any topic to claim he/she is entitled to the protection of the rule.

3. The terminology prohibiting communication states the lawyer is not to "use or reveal" any "information". The language is overly broad. Prohibiting the dissemination of confidential communications to the detriment of a potential client is an understandable objective. As proposed, the rule covers a much wider area by forbidding all "use" of all information of all kinds without regard to the nature of the information or whether it is damaging to the potential client.

4. The terminology concerning the permissible release of information that is "generally known" is indefinite and overly broad. There is no definition or standard by which to discern the persons to whom the information is common knowledge.

5. The terminology allowing the dissemination of information that is "not disadvantageous" to the prospective client is vague in nature. An overall look at the Rule appears to state –

    a. all communications are "information",
    b. the "use" of that information is prohibited,

c. a lawyer is not allowed to "reveal" that information, BUT
d. the information may be released if it is "commonly known" by an undefined group of persons, or
e. information may be released if it is not "disadvantageous" to the potential client.

In summary, the proposed Rule lacks specificity in the language defining: a) the relationship that creates an obligation on the part of the lawyer, b) what communications are to be kept confidential, c) the limitations on handling the communications, d) the circumstances that allow dissemination of the information and e) the description of the type of information that may be released.

Thank you for your time and consideration.

Mackoy, Hernandez, Qualls, Jones & Woods, L.L.P.

Deborah Mackoy
SBOT 00796576

Lisa Hernandez
SBOT 00796746

Christine Qualls
SBOT 24037310

Laura Jones
SBOT 24078755

Kay Woods
SBOT 21952750

Robert J. Matlock
SBOT 13199000

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comment to proposed TDRPC 1.18
Date: Thursday, September 10, 2020 9:37:59 AM

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

Contact

First Name	J.K.
Last Name	Leonard
Email	[redacted]
Member	Yes
Barcard	12209750

Feedback

Subject	Comment to proposed TDRPC 1.18

Comments

There is no provision for "involuntary" or "unagreed" contact by a person who later claims to be a "prospective client". This concern is especially true in today's environment of mass emailing by persons seeking legal help, many of which are pure scams, but not always. If such a person chooses to disclose information in a cold-call email/voicemail/letter and the attorney declines to engage in even a discussion about that issue, the currently proposed rule might become a tactic for unilateral DQ efforts. While this may not be a widespread issue, it is a real one, in my opinion. It would seem that a section or comment that provides an exception to requiring waiver by the "prospective client" under these circumstances would be worth considering. If (d)(2) is intended to address this, it is certainly not clear and difficult to determine how to proceed.

From: Jackson Walls
To: cdrr
Subject: Proposed rule 1.18 Duties to Prospective Clients, Texas Disciplinary Rules of Professional Conduct
Date: Friday, September 11, 2020 2:05:36 AM

To the Committee:

Comment

The problem with the proposed rule, section (C), is that it sets up a clear method for any lawyer or client to disqualify an adverse lawyer. Suppose a person, call him the Defendant: 1) has been sued, or 2) is subject to a demand letter, or 3) has knowledge that a person with an as yet unstated claim has at times used a particular lawyer with known expertise and ability, herein called Lawyer King Kong. Suppose that said Defendant or his lawyer wants to prevent King Kong from being involved in the dispute. Suppose further that to achieve this end said Defendant makes an appointment with King Kong and in the initial meeting makes statements that will disqualify King Kong, under this rule, from representing the claimant. In such a situation the Defendant will be able to prevent the claimant from using his lawyer of choice.

The proposed rule simply invites more gamesmanship and will substitute one bad outcome for another. It is, therefore, not advisable to enact this rule.

Yours truly,

Jackson Walls,
Amarillo, Texas
Bar Card: 20793500

From: Derek Cook
To: cdrr
Subject: FW: LABA- Action Request- Proposed Rule 1.18 of Texas Disciplinary Rules of Professional Conduce
Date: Tuesday, September 15, 2020 9:48:50 AM
Attachments: image001.png
Importance: High

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

Hello,

My name is Derek Cook, and I am the District 16 Director to the State Bar of Texas Board of Directors. Below are emails I received from a constituent expressing concern over proposed Rule 1.18. Upon reviewing these concerns and the proposed rule, I, too, have similar concerns. I believe the proposed rule, as drafted, is vague, unclear, and creates uncertainty for attorneys attempting to vet and maintain conflict-free representation of a client. I ask that CDRR decline to move forward with recommending this rule, as drafted.

Thank you,

Derek Cook
LYNCH, CHAPPELL & ALSUP PC | 300 N. Marienfeld, Suite 700, Midland, Texas 79701
MAIN 432.683.3351| DIRECT 432.688.1371 | FAX 432.683.2587 | EMAIL [redacted]
| WEB www.lcalawfirm.com

From: Andrew Seger <[redacted]>
Sent: Thursday, September 10, 2020 3:39 PM
To: Derek Cook <[redacted]>
Cc: Tommy Ortloff <[redacted]>; Randy Rouse <[redacted]>
Subject: FW: LABA- Action Request- Proposed Rule 1.18 of Texas Disciplinary Rules of Professional Conduce
Importance: High

Dear Mr. Cook

I believe you are my State Bar Representative. In that regard, I would direct you to my e-mail to the Lubbock Area Bar Association regarding the Committee on Disciplinary Rules and Referenda proposed Rule 1.18 of the Texas Disciplinary Rules of Professional Conduct which can be found below. I believe that this Rule is ill conceived, and disproportionately disfavors small firm practitioners who lack the resources to log every unsolicited call, e-mail and contacts and at the risk of disqualification. It also institutionalizes the practice of Strategic Disqualification as set out below. This is without mention of the fact of imposing duties on an attorney towards third parties, and utterly without regard to that attorneys consent.

As a practitioner in Midland, this Rule will also uniquely disfavor you and your law firm as well. Here is an example: Say Lynch Chapel has a long standing relationship with Henry Petroleum, and Randy Rouse (who is cc'd with this email) needs to file a quiet title suit against parties whom claim to be

unleased co-tenants. The third parties are aware of this fact, and send an unsolicited e-mail to Randy containing "information", which they later claim is "significantly harmful" to their position in litigation. As I interpret this new Rule, that would require the disqualification of not only Mr. Rouse, but your entire law firm as well, unless an arduous screening process is followed. Thus with a mere email, a non-client is able to significantly disrupt a relationship your firm has had with a client over the span of several decades.

My position on this matter is explained in greater length in my e-mail to the Lubbock Area Bar Association below. As my State Bar Representative, I would implore you to take action to oppose this measure. I feel that this is extreme overreach on the part of the Committee on Disciplinary Rules and Referenda, and certainly a rule which no one has asked for. Thanks so much, and please feel free to reach out with any questions you may have

Andy

Andrew R. Seger
Key Terrell & Seger, LLP
P.O. Box 98433 (Mail)
Lubbock, Texas 79499
4825 50th St., Ste A
Lubbock, Texas 79408
Telephone: (806) 793-1906
Facsimile: (806) 792-2135
E-mail: [redacted]

KEY TERRELL & SEGER LLP
1941
ATTORNEYS AT LAW

From: Andrew Seger
Sent: Thursday, September 10, 2020 11:44 AM
To: 'Levi Siebenlist' <[redacted]>
Cc: [redacted]; Dustin Burrows <[redacted]>; Ted Liggett <[redacted]>; [redacted]' <[redacted]>; 'Andrew Curtis' <[redacted]>; [redacted]; Ryan Bigbee <[redacted]>; [redacted]; [redacted]; Brad Odell <[redacted]>; [redacted]; [redacted]' <[redacted]>; 'Dub Wade' <[redacted]>; [redacted]' <[redacted]>; [redacted]' <[redacted]>; 'Jeff R. Lashaway' <[redacted]>; Don C. Dennis ([redacted]) <[redacted]>; [redacted]' <[redacted]>; [redacted]' <[redacted]>; [redacted]' <[redacted]>; [redacted]' <[redacted]>
Subject: LABA- Action Request- Proposed Rule 1.18 of Texas Disciplinary Rules of Professional Conduce

Levi,

Thanks for fielding may call today. I am writing to you in your capacity as an Officer of the Lubbock Area Bar Association and regarding the proposed Rule 1.18 of the Texas Disciplinary Rules of Professional Conduct involving a lawyers purported duties to "prospective clients". I believe that this

proposed rule will multiply operations costs and overhead for all attorneys in a financially significant manner. Further the proposed Rule will adversely impact attorneys practicing in smaller markets such as Lubbock. And it would be particularly devastating to attorneys practicing in small towns such as Plainview, Levelland, Brownfield, etc. A link to the proposed rule can be found on the email forwarded below. I am writing to request action by the LABA's to oppose this proposed rule and for the reasons set forth below.
.

My Understanding Of Proposed Rule 1.18

My reading of the proposed rule is as follows: Under the proposed rule anyone who "consults" with a lawyer regarding a prospective matter is a prospective client. Moreover, if the lawyer "receives information" from the prospective client, he or she prohibited from undertaking representation adverse to that client if he has received information that could be "significantly harmful" to that person in the matter. Furthermore, and absent a rigorous screening process, every lawyer in the same firm is similarly prohibited from undertaking said representation. No definition or guidance is given as to what constitutes "consultation" or what information might be considered "significantly harmful" to the prospective client with regard to the matter. As I read this rule, a party unilaterally sending an e-mail to an attorney, without that attorneys consent, could potentially constitute a consultation and an ensuing disqualification.

Burdensome And Higher Overhead Costs For Practitioners

The primary problem with this rule is that keeping track of conflicts of interest is difficult as is. Many firms pay vendors thousands and thousands of dollars every year for software systems to track actual conflicts. Under this rule, this process will be Exponentially Expanded, attorneys and law firms will now be ethically bound to track every errant email and stray phone call, so as to avoid a prospective disqualification. Our recordkeeping requirements are already onerous as is and this, quite simply, is a bridge too far for a small firm practitioner such as myself. However, there is no question that enacting this prospective Rule will multiply operating costs considerably for large and small firms alike.

Problem of Strategic Disqualification And Disproportionate Impact On Attorneys Practicing In Smaller Markets

A secondary problem arises for attorneys practicing in smaller markets. In that regard, most attorneys on the civil side are familiar with the practice employed by certain parties known as "Strategic Disqualification". This occurs when a putative litigant will call an attorney, without having any intention of retaining him or her, and speak with that attorney on a matter for the **sole** purpose of disqualifying that attorney from representing the other side of the dispute. This happens frequently in Family Law cases, but I have also seen it on the commercial side as well.

As written, proposed Rule 1.18 institutionalizes this practice. It penalizes lawyers who do nothing more than receive an email, or who happen to take an unexpected phone call and are unable to cut off the "prospective client" before "information" is revealed.

Think about it in the context of the following hypothetical: I live in Pampa (population 17.235) and I know my wife wants to file for divorce, which I do not want. So I preemptively and unilaterally send out emails to every family law attorney in town which contains "information". Now every firm in town is automatically disqualified from representing my wife. And as such, my wife must now to Amarillo or some

larger market to seek representation, and at a significantly higher price.

This problem of Strategic Disqualification is not necessarily present for practitioners in larger communities that have so many lawyers as to make this strategy impracticable. However, what it does do, is benefit attorneys in larger markets by driving business away from small town lawyers to larger cities.

Request For Action By LABA

I am writing to request action on the part of the Lubbock Area Bar Association to oppose this prospective rule as being adverse to the interests of its constituents. To this end there is a hearing scheduled at 10:30 a.m. and as outlined in the email immediately below. The Committee on Disciplinary Rules and Referenda will accept written comments through and until October 6 and at the contact information set forth in the email below. I would therefore respectfully request that you forward this e-mail on to the LABA board for a prompt determination of whether or not it will take action. Thanks so much and I appreciate your taking the time to review this e-mail

Andy

Andrew R. Seger
Key Terrell & Seger, LLP
P.O. Box 98433 (Mail)
Lubbock, Texas 79499
4825 50th St., Ste A
Lubbock, Texas 79408
Telephone: (806) 793-1906
Facsimile: (806) 792-2135
E-mail: [redacted]

KEY TERRELL & SEGER LLP
1941
ATTORNEYS AT LAW

From: State Bar of Texas - CDRR [mailto:cdrr@texasbar.com]
Sent: Thursday, September 10, 2020 9:14 AM
To: Andrew Seger <[redacted]>
Subject: [MARKETING] Public Hearing Reminder - Proposed Rules

State Bar of Texas

Public Hearing Reminder

September 17 Public Hearings on Proposed Rules

The Committee on Disciplinary Rules and Referenda recently published the following proposed rules for public comment:

- Rule 1.00. Terminology, Texas Disciplinary Rules of Professional Conduct
- Rule 1.18. Duties to Prospective Client, Texas Disciplinary Rules of Professional Conduct
- Rule 13.05. Termination of Custodianship, Texas Rules of Disciplinary Procedure

The Committee will hold a public hearing on each of the proposed rules by teleconference at 10:30 a.m. CDT on September 17, 2020. For teleconference participation information, please go to texasbar.com/cdrr/participate. If you plan to participate in a scheduled public hearing, it is requested that you email cdrr@texasbar.com in advance of the hearing with your name and the public hearing item you wish to speak on so the Committee can group speakers by topic during the hearings.

For additional information, including to view proposed interpretive comments, please go to the Committee's Docketed Requests page.

The Committee will continue to accept written comments concerning the proposed rules through October 6, 2020. 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.

Sincerely,

Committee on Disciplinary Rules and Referenda

Committee on Disciplinary Rules and Referenda

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

From: Linda Russell
To: cdrr
Subject: Proposed Rule 1.18
Date: Friday, September 25, 2020 10:29:01 AM

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

I practice in a small firm in Lubbock, and I have the following concerns about proposed Rule 1.18:

- Proposed Rule 1.18 would make anyone who "consults" with a lawyer regarding a prospective matter a prospective client. If the lawyer "receives information" from the prospective client, he or she is prohibited from undertaking representation adverse to that client if he has received information that could be "significantly harmful" to that person in the matter. Furthermore, and absent a rigorous screening process, every lawyer in the same firm is similarly prohibited from undertaking said representation.

- This rule could expand record-keeping procedures—resulting in burdensome and higher overhead costs—and adversely impact attorneys practicing in smaller markets, like me.

- The rule could "institutionalize" the practice of "strategic disqualification," where a putative litigant will call an attorney, without any intention of retention, to disqualify an attorney from representing a party on the other side of the dispute.

Thank you for the opportunity to give my input concerning the proposed rule.

Linda Russell
SBN: 24046778

Sent from Mail for Windows 10

To: Texas State Bar CDRR
From: Roy Leatherberry (TSB# 00789441)
Re: Proposed Amendments to Rule 1.00 and New Rule 1.18
Date: October 6, 2020

I am writing the Committee to encourage the Committee to decline to press forward with the proposals regarding these rules.

ABA Model Rule 1.18 was initially proposed as part of the Ethics 2000 Commission of the ABA with the intent of incorporating the Restatement of the Law Governing Lawyers. However, as is often the case, the "Restatement" was not a restatement of law at all but, rather, the expression of a desire as to what the law ought to be.

Beginning in 2005 various states began adopting the Rule in one form or another.

Texas did not.

Multiple referendums have occurred in Texas and the consistent opinion of the Texas legal community is that this rule is not only not necessary, it is not desirable.

In a 2010 article[1], Kenno L. Peterson summarized what had occurred through that date and provided a nice chart comparing the ABA rule to the rule as proposed at that time (which was numbered 1.17). There were numerous differences that had been incorporated, which recognize the problems associated with the ABA Model Rule. Mr. Peterson stated:

> Both proposed Rule 1.17 and ABA Rule 1.18 recognize that, while it is important to protect a prospective client's interests, the protections afforded to a prospective client generally should not be as extensive as the protections afforded to an actual client to whom a lawyer owes the full range of fiduciary duties. But these rules, as well as other related rules, approach this balancing act in fairly divergent ways.

One of the additions to the proposed rule was the inclusion of a "good faith" requirement on the part of the prospective client.

> As explained in comment 3 to the proposed rule, "[t]he requirement in paragraph (a) that a lawyer's services be sought 'in good faith' is intended to preclude the tactical disclosure of confidential information to a lawyer so as to prevent the individual lawyer or the lawyer's firm from representing an adverse party."

Another point of deviation between the Model rule and the proposed rule was noted:

> In addition, proposed Rule 1.17(c), like other proposed rules, does not follow the ABA in referring to a "disqualified" lawyer. The concepts of discipline and disqualification, while related, are not the same. In that regard, paragraph 13 of the

[1] 23 App. Advoc. 268.

> preamble to the proposed rules provides that "these Rules are not designed to be standards for procedural decisions, such as disqualification." And paragraph 20 of the preamble to the ABA rules provides similarly that "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation." To avoid any unintended blurring of the standards of disqualification and discipline, the proposed rules simply do not refer to disqualified lawyers or disqualification.

The rules proposed in 2020, tracking more closely the Model rule, do not seem to have considered the work that had been undertaken prior to the 2010 proposals.

Nevertheless, during the 2011 Referendum, as recognized in the March 2011 edition of the Texas Bar Journal, the proposed amendments "went down in flames."[2] More than 77% of the votes were *against* this rule.[3]

It is not clear why, under the circumstances, why anyone thinks that this rule should rise from those flames, especially in a format that was not even acceptable to the committee members and the Supreme Court in 2010, prior to the referendum.

This ABA Model Rule is and has always been an attempt to impose, on the legal community, *policy* concerns by an obvious *minority* in a manner that rejects the entirety of the common law in Texas.

In *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*,[4] the Texas Supreme Court observed: "It is by now axiomatic that legislative enactments generally establish public policy."[5]

The Legislature has *not* however, expressed any public policy suggesting an extension of a lawyer's duty to a non-client beyond that as already exists and which is well-reflected in the Formal Ethics opinions.

It is, and always has been the policy in Texas that the duty of an attorney is to the *client* and not some third party.[6] Texas Rule of Evidence 503(a)(1), of course, defines "client" as "a person … who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer."[7]

This is reflected in Opinion 651 by the Professional Ethics Committee for the State Bar of Texas in 2015.[8] The hypothetical presented involves a lawyer who invites the prospective client to send information and, despite warnings that the information would not be treated as confidential, the

[2] 74 Tex. B.J. 192 (2010).
[3] 74 Tex. B.J. 195 (2010).
[4] *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494 (Tex. 2015).
[5] *Id.* at 504.
[6] *See e.g., Barcelo v. Elliot*, 923 S.W.2d 575, 577 (Tex. 1996).
[7] There seems to be a split of authority as to whether there is a presumption, including a conclusive presumption, as to whether confidential information was imparted. Compare *In re Gerry*, 173 S.W.3d 901 (Tex. App.—Tyler 2005, no pet.) and *In re Z.N.H.*, 280 S.W.3d 481 (Tex. App.—Eastland 2009, no pet.).
[8] 79 Tex. B.J. 44 (2016)

prospective client transmits such confidential information. Receipt of the information results in a determination that taking on of that prospective client would conflict with representation of a current client.

The Ethics opinion is that the individual submitting the information is *not* a client, although there may be a duty of confidentiality imposed that "may" create a conflict of interest with a current client.

The Ethics opinion then explicitly recognizes that *existing* Rules are sufficient to address the situation.

Under those rules, because the lawyer had previously provided notification to the prospective client that any communication would *not* be treated as confidential. Thus the committee concluded:

> [T]he law firm and its lawyers will not have an obligation to protect or refrain from using information received.

The rules currently proposed, however, would likely result in a very different conclusion which, thus, is not a conclusion that reflects *current* law but is, instead, reflective of a *policy* choice that has been rejected time and time again by the Texas legal community.

In drafting these comments I have done extensive multi-state research (both cases[9] and Ethics opinions[10]) into the situations involving this rule and it is clear that in those states where the Model Rule has been adopted, the rule is being used as a sword to prevent a party from having the representation that the party desires.

Thus, my major concern is that the rule will be interpreted in such a way as to deprive the *existing* client of the right to choose the attorney it desires. Attorneys are not fungible and the right to counsel of one's choice rests with the individual. It is, indeed, the constitutional right of an individual to have the attorney of its choice unless there are very strong reasons to not permit such.

---

[9] *Sturdivant v. Sturdivant*, 241 S.W.3d 740 (Ark. 2006); *ADP, Inc. v. PMJ Enterprises, LLC*., 2007 WL 836658 ((D.N.J. Mar. 14, 2007); *Phase II Chin, LLC v. Forum Shops, LLC*, 2009 WL 10709796, D.Nev. (Feb. 19, 2009); *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, Cal.App. 2 Dist., Apr. 07, 2010, as modified (May 06, 2010), review denied (Jun 23, 2010); *O Builders & Assoc. v. Yuna Corp.*, 19A3d 966 (N.J. 2011); *State ex rel. Thompson v. Dueker*, 346 S.W.3d 390 (Mo.App. E.D. 2011); *In re Marriage of Perry*, 293 P.3d 170 (Mont. 2013); *In re Carpenter*, 863 N.W.2d 223 (N.D. 2015); *Keuffer v. O.F. Mossberg & Sons, Inc.*, 373 P.3d 14 (Mont. 2016); *Xiao Hong Liu v. VMC East Coast LLC*, No. 16 CV 5184 (AMD)(RML), 2017 WL 4564744 (E.D.N.Y. Oct. 11, 2017); *Mt. Hebron District Missionary Baptist Association of AL, Inc. v. Sentinel Insurance Company, Limited*, 2017 WL 3928269, M.D.Ala. (Sep. 07, 2017); *Kidd v. Kidd*, 219 So.3d 1021 (Fla.App. 5 Dist 2017); *Lopez v. Flores*, 223 So.3d 1033 (Fla.App. 3 Dist 2017); *Skybell Tech., Inc. v. Ring Inc.*, No. SACV 18-00014 JVS (JDEx), 2018 WL 6016156 (C.D. Cal. Sept. 18, 2018); *Dahleh v. Mustafa*, 2018 WL 1167675, (N.D.Ill. Mar. 05, 2018); *In re Onejet, Inc*., 614 B.R. 522 (Bkrtcy.W.D.Pa. 2020); *Zalewski v. Shelroc Homes, LLC*, 856 F.Supp.2d 426 (N.D.N.Y 2020); *Ocean Thermal Energy Corp. v. Coe*, 2020 WL 5237276, C.D.Cal. (July 29, 2020).

[10] Formal Opinion 2006-2 (The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics); Iowa State Barr Association Opinion 07-02 (2007); Wisconsin Formal Ethics Opinion EF-10-03 (2010); Formal Opinion 2013-1 (The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics); ABA Formal Opinion 492 (June 9, 2020)

As explained by the U.S. Supreme Court in *Whole Woman's Health v. Hellerstedt*,[11] even if there were a legitimate state interest in a particular policy, a rule that has "the effect of placing a substantial obstacle in the path" of the consumer of the constitutionally protected service "cannot be considered a permissible means of serving its legitimate ends."

But, given that two decades has passed since the Model Rule was proposed, and given the overwhelming rejection of the rule by the legal community in Texas in 2011, it is clear that no legitimate state interest in passing this rule exists. If it did, then we would already have it.

In short, in light of the rule having already been rejected by the legal community in Texas, and in the absence of a clearly public policy rationale articulated by the legislature, there is simply no sound basis for proposing this rule at all.

Thank you for your attention to these comments.

[11] *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2309 (2016)

Committee on Disciplinary Rules and Referenda

Transcript of Public Hearings on
Proposed Rules 1.00 (Terminology) and 1.18 (Duties to Prospective Client)
Texas Disciplinary Rules of Professional Conduct

September 17, 2020 – By Zoom Teleconference

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

Brad Johnson:
And we are set.

Lewis Kinard:
All right, are we waiting on anyone else?

Lewis Kinard:
Looking to see who's there.

Lewis Kinard:
Looks like we have-

Brad Johnson:
I believe everyone's on.

Lewis Kinard:
All right. Cory, would you please call the roll?

Cory Squires:
Sure. Mr. Belton.

Tim Belton:
Here.

Cory Squires:
Ms. Bresnen.

Amy Bresnen:
Here.

Cory Squires:
Mr. Ducloux.

Claude Ducloux:
Here.

Cory Squires:
Judge Garcia.

Dennise Garcia:
Here.

Cory Squires:
Mr. Hagen.

Rick Hagen:
Here.

Cory Squires:
Professor Johnson.

Vincent Johnson:
Here.

Cory Squires:
Mr. Jordan.

Carl Jordan:
Here.

Cory Squires:
Mr. Kinard.

Lewis Kinard:
Here.

Cory Squires:
Ms. Nicholson.

Karen Nicholson:
Here.

Cory Squires:
We have a quorum.

Lewis Kinard:

All right, thank you. Uh, we have three public hearings today as listed on the agenda, but first I wanna say once again how much we appreciate the input and comments from the Bar and the public. We read each and every one of the submissions and we take them into consideration. In addition to what we hear during these public hearings, a- and as the Legislature intended that we should. As we, and we deliberate on those as we draft the rule language, uh, to recommend to the Bar's Board of Directors and explanatory comments that we propose to the Supreme Court. So thank you, thank you, and keep those comments coming. You can find the page on how to participate by going to texasbar.com/cdrr.

Lewis Kinard:

So we'll now move to i- item a-, uh, agenda item three, we have these public hearings. We're gonna just take them one at a time. For each hearing, we'll first call on those who have signed up in advance to speak then we'll call anyone else who has joined the meeting who wants to speak on a public hearing item. You can raise your hand in Zoom. We have, uh, Brad and Cory watching for those hands going up. If you're just on the telephone you can press star 9 to raise your hand and we'll unmu- mute you when it's your turn. We ask that you limit your comments to three minutes, we may extend that time as necessary if we have follow up questions so please stay on until we thank you and prepare for the next person.

Lewis Kinard:

So I now call to order the public hearing on proposed Rule 1.0 of the Texas Disciplinary Rules of Professional Conduct which would incorporate terminology into a rule numbered 1.00 and add additional defined terms. This was recently published in the Texas Bar Journal and Texas Register, and as a reminder the Committee will accept public comments through October 6th. Do we have anyone who's signed up in advance to speak on this?

Brad Johnson:

No, Chair, we don't have anyone in advance that signed up.

Lewis Kinard:

All right, is there anyone who's joined the meeting who would like to speak on this item?

Brad Johnson:

I'm not, I'm not seeing any hands right now, Chair.

Lewis Kinard:

We have received a few public comments on this, um, while we're waiting to see if people are still looking for where star 9 is or, or how to raise their hand. Uh, and they're beginning at page 10 of the materials and the packet that was posted, the Committee next meets October 7th at which time we'll have the option to vote on any possible amendments to the proposal or to recommend it to the Board of Directors. Our deadline to take action is December 5th, so we have until our December 2nd meeting to vote.

Lewis Kinard:

Uh, while we're, while we're waiting, Professor Johnson you led the subcommittee, is there anything you'd like to add regarding this proposal or any response to any public comments?

Vincent Johnson:

Not at this time.

Lewis Kinard:

All right, anybody else on the Committee? Okay, this will conclude our public hearing on proposed Rule 1.00. Item, uh, the next public hearing is on, uh, 1.18 proposed rule to Texas Rules of Professional, Disciplinary Rules of Professional Conduct. I'll call that public hearing to order now. Uh, this proposed rule addresses duties to prospective clients. This was recently published in the Texas Bar Journal and the Texas Register. We also have until October 6th, uh, to accept public comments that haven't come in yet. Has anyone signed up to speak in advance on this item?

Brad Johnson:

No, Lewis, no one has on this item.

Lewis Kinard:

All right, do you, is anyone who's joined the meeting would like to speak on this item? Just raise your hand through Zoom or do star 9 through the phone. We wanna give everybody a chance to, uh, speak and participate. We have received a bunch of comments on this, uh, several of them appear starting at page 19 of your materials. A couple, uh, came through even after the packet was posted. Before we turn to those, I wanna see if there was anybody who wanted to speak orally today.

Brad Johnson:

No, Chair, I'm still, there's no hands raised currently.

Lewis Kinard:

All right, um-

Brad Johnson:

[crosstalk] listening, um, you know, go ahead and raise your hand please or press star 9.

Lewis Kinard:

And then like the other proposed rule, the Committee meets next October 7th. We'll have the option to vote on any amendments to the proposal then or go ahead and recommend it. Our deadline is, uh, December 5th. We won't take any further action until after public comment period closes October 6th. Um, but I know Professor Johnson, you've been looking at some of the comments and thinking about some ways to address some of those concerns.

Lewis Kinard:

I also note, uh, and I think it was your, your, your comment actually, that some of the concerns are addressed or will be addressed in the draft comments that our Committee will suggest to the Supreme

Court along with the eventual rule proposal. Uh, Professor Johnson anything you'd like to speak to, um, at this meeting?

Vincent Johnson:

Yes, uh, I, I went through everything, uh, yesterday again, reread all of the comments and, um, considered ways in which we could respond to, to some concerns. Uh, uh, in part it seems, uh, essential that we move certain material out of the, um, comments and up into the rule because we're, we're just getting clobbered on, on, um, issues that should not exist because we- we've taken a position in the comments. But, uh, it would be much better, uh, moving forward with a proposal that would go to Texas, uh, lawyers to vote on to get these, uh, points clarified as, as early in the, in the black letter rule as, as possible.

Vincent Johnson:

So, uh, there wa- uh, so la- late last evening I gave, uh, Brad a, uh, document that I think he has shared with you. Which, uh, is, um, shows how, um, I would make certain redline changes to the, um, the rule. So they, uh, Rule 1.18 section (a) starts off with the, the usual definition that is found in the model rules and in the codes of other states. And it says that, "A person who consults with a lawyer about the possibility of forming a lawyer-client relationship with respect to a matter is a prospective client."

Vincent Johnson:

I would do two things to improve this rule. One, and I think we've talked about this in a prior meeting, uh, I would put the words "in good faith", uh, "consults in good faith", uh, right in that first sentence. And then I would add a second sentence that addresses the issue that has, uh, disturbed so many of the, uh, attorneys who, who submitted public comments. The second sentence would s-, would say that, "A person who communicates with a lawyer for the purpose of disqualifying the lawyer or for some other purpose that does not include a good faith intention to seek representation by the lawyer, is not a 'prospective client' within the meaning of this Rule."

Vincent Johnson:

We had very similar language that was part of comment two, but, uh, it would be very helpful to get that language right up at the top so that, uh, lawyers are placed at ease about, um, the, uh, the taint shopping issue and, uh, and it will be clear that this la- lawyer doesn't protect anyone who, uh, acts in bad faith and who is trying to, um, uh, choreograph a, um, uh, uh, a disqualification w- with never having a, uh, a good faith intention to hire the lawyer. So I think those changes would be very wise, I think they would put us in a stronger position as the proposal moves forward, uh, with the, uh, State Bar Board of Directors and then ultimately with the, the Texas, uh, lawyers who will vote in the referendum.

Vincent Johnson:

And the, uh, the second paragraph, um, I, I have thought about the, uh, the question of what information is protected. Um, so if there has been a pro-, a prospective client relationship, um, what information is the lawyer required to hold confidential going forward? The, um, and, um, uh, one of the comments, you know, wa- was very helpful, it did force me to think about the way this was worded and, and it ultimately became clear to me that there was an inconsistency between section (b) which deals with revelation of information learned from a prospective client, and section (c) which deals with not representing later on somebody in the same or substantially related matter, um, whose interests are adverse to the former prospective client.

Vincent Johnson:

In, as originally worded in section (b), the standard was that the lawyer could not, uh, reveal information, um, uh, could reveal information that was generally known or would not be disadvantageous to the client. And in subsection (c) it didn't speak in terms of this, this weak requirement of disadvantageous, it said that there was only a disqualification from representing the new client in the same or substantially related matter if the lawyer, um, uh, if the information received by the lawyer could be significantly harmful. The, and so, so there was this difference between disadvantageous and significantly harmful. Significantly harmful seems to provide a lot more breathing room for what a, um, uh, a lawyer, uh, can say, uh, or take into account, uh, in representing a client.

Vincent Johnson:

So I would suggest in subsection (b) that, that that be reworded, uh, re- reworded, uh, to say that a lawyer shall not use information to learn from a prospective client quote, "except as these Rules would permit or require with respect to a client, or if the information has become generally known or would not be significantly harmful to the former prospective client." Uh, and so I, I think that pro- provides a lot more breathing room, um, uh, in that role and, and so, um, um, I thi-, I think that would make it more likely that we would be able to pass this in the end. And, and it makes sense to me that if significantly harmful is the standard that's connected to the subsequent representation rule that, that that same standard should work with regard to the, the revelation rule and in part, um, (b). And then, um, and then in comment two to the rule I, I thought, uh, the more I read it the more I could see why, why lawyers might be troubled with the way it was worded. The, uh, and so, in addition to taking out the language that would now move up to subsection (a) of the black letter rule, uh, I would reword, um, uh, section 2 so that it would, um, read like this.

Vincent Johnson:

So and, and just starting with the whole rule. "A, a person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." So that stays the same. Then the changes begin. "A communication by a person to a lawyer does not constitute a consultation unless the lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation that is not generally known."

Vincent Johnson:

And so thi- this is, this would be saying that you only trigger a prospective client relationship when you invite the revelation of personal information, information that is not generally known. And so this would, um, address the concern that was expressed in the comments, uh, about, um, uh, persons who, um, uh, tried to conflict out all the lawyers in town by sending them, um, uh, information about a case. If the lawyer, under this change, if the lawyer did not invite or request the submission of the information it wouldn't count as a consultation, it wouldn't be a prospective client relationship, it wouldn't lead to disqualification.

Vincent Johnson:

And I, I, I think that reading is consistent with the model rule standard, I think it's just clearer. Uh, and, um, and so that would be the, the final change. So, so that, these, uh, this is what I'd be proposing to, to tighten it up and make it, uh, ready to, to go onto the next stage.

Lewis Kinard:

All right good a- and I know that today we, we aren't scheduled to debate or deliberate on this but we definitely want, you know, to, to take these into consideration and it'll be on our agenda for next month when we will deliberate. Um, and before I move on I saw Claude had a question but, uh, Brad, anybody raise their hand? Anybody else indicate they need to speak?

Brad Johnson:

Uh, not currently, Chair. Again if anyone who... We just had a few people join the meeting, if anyone would like to speak on this agenda item regarding duties to prospective clients you can raise your hand on Zoom or if you're on the phone press star 9.

Lewis Kinard:

So, so if anybody on the Committee want to at least log some points that you want to, uh, deliberate upon, uh, next month and yes, Claude.

Claude Ducloux:

Oh, I was just going to say, um, uh Br- I was going to ask Brad because this is something that, that the Committee has thought about. And for those of you, this is our one chance if you're here for a public hearing to know, um, that we, how seriously we take this in trying to improve these rules. Um, I, you know, I've been what they call a bar rookie for 43 years and this has been the hardest working committee I've ever been on. We, you know, are constantly consulting and trying to improve, listening to your comments, and really want this to be a, a modern improvement to the rules and, and I wanna thank Professor Johnson who has really taken the lead on a lot of these things, bringing us what's going on.

Claude Ducloux:

Uh, but we co- are constantly thinking about this, and especially those of us who have practiced law for 40 years know how hard it is to teach this area. And we see from the quality of the, of the it feedback we're getting from the public, they are concerned about what is now becoming the word taint shopping, or that we want to somehow taint the lawyer if we don't him or, want him or her to be on the other side of that case by trying to divulge information that will conflict her and her firm out, and we're trying to address that by adding these, these gates, these steeple chases like, "No, no, no, no, you're not really here for any purpose."

Claude Ducloux:

And then, uh, the other part is the educating the lawyers don't accept information. Have a click tab on your, uh, website and things like that so people can't try to do this intentionally. But, um, I, Brad, I wanted to ask you, if we wanted to accept those improvements, which I think, uh, we've been talking about a long time and I know that, uh, (laughs) at least Professor Johnson's probably been sleepless on this because we talked about it so much. Do we need a motion or are we just, you know, uh, what, what should have we do but we don't need that today. All right thank you very much.

Brad Johnson:

[inaudible] I think next meeting would-

Lewis Kinard:

Next meeting would-

Claude Ducloux:

And I wanted to thank Professor Johnson for putting that time into this.

Lewis Kinard:

Yeah, yeah, no it will be on our agenda next month. Um, I do want to note, uh, Professor Johnson, that when we do talk I'll, I will ask about this concept of significantly harmful and how it fits into, uh, the scheme of definitions, uh, there and, and other definitions on that continuum, I guess, of harm. So not today but just, if you don't mind noting, where, where does that fit? How will it, uh, affect anything else or play into, um, other standards?

Vincent Johnson:

All right, good.

Lewis Kinard:

All right, if there's anybody else on the Committee with any questions, notes, comments... Yes, Karen.

Karen Nicholson:

Well, I just wanted to also say thank you very much, uh, from a lay standpoint, uh, I think you have taken the comments very well but, and this is the lay standpoint, it's just clearer. You've just worded it really well so that you can, when one reads it, it just makes a lot more sense so thank you for all the work that you've done on that Professor Johnson.

Brad Johnson:

And Lewis, we do have, um, one hand raised on the hearing now if you'd like me to...

Lewis Kinard:

Yes, let's recognize that person please.

Brad Johnson:

All right, I'm gonna, um, Mr. Panzer, I'm gonna go ahead and change you over to a participant so give me just one second here.

Brad Johnson:

And it may take just one second for him to...

Lewis Kinard:

That's fine.

Jason Panzer:

Okay, can you all hear me?

Lewis Kinard:

We can. Thank you, and thanks for joining and we have a, a three minute, uh, initial time slot so if you don't mind just talk to us about your, your comments and thoughts on this proposed rule.

Jason Panzer:

Very briefly, first I want to commend you all for your, uh, hard work. It is evident, uh, in, in the product that you are putting out, um, and I think as I've previously commented to the Committee and writing with regard to other rules, I welcome, um, the Committee's adoption of, uh, rules that have otherwise been adopted, um, in the ABA Model Rules. My only question, and I have not heard all of the meeting and I apologize, uh, I was not able to, uh, prepare adequately and, and hope to maybe follow up with something more thorough in writing, is with regard to the proposed amendments to the terminology in order to, um, clarify the proposed Rule 1.18, specifically informed consent.

Jason Panzer:

And my question is, I think, uh ... uh, cutting in there. Um, my question is with regard to the proposed definition of informed consent, to the effect that could have on other, uh, rules, specifically 1.06(c)(2), and whether or not the definition of informed consent, uh, conflicts with or will cause confusion as to what proper consent is under 1.06(c)(2) and what is consent under Rule 1.09(a)? Frequently when you talk to the ethics counsel at the Bar as to what does prior consent mean, under 1.09(a) they will refer you to 1.06(c)(2). So my question is if the... our concern is if the Committee is going to adopt or propose the definition of informed consent, uh, is to at least ... consistent throughout the, or to, uh, include some clarification as to, uh, what informed consent, uh, means. If it just, the definition of informed consent, if it just applies to rule, proposed Rule 1.8 and not other rules or if it's broader.

Jason Panzer:

So with that I'll stop and thank you all again for your hard work.

Lewis Kinard:

Sure, Mr. Panzer. Hang on one second, uh, anybody have further questions or responses to Mr. Panzer's questions?

Vincent Johnson:

Without informed consent-

Brad Johnson:

I think I [crosstalk]-

Lewis Kinard:

Uh, yes, Professor Johnson.

Vincent Johnson:

Yes, uh, so, uh, as f-, uh, as far as I recall the definition of informed consent that we, we have proposed is the exact, uh, ABA definition. I, I don't think there was any tweaking of it or, or changes. We can double check that but, um-

Jason Panzer:

You're, you're-

Vincent Johnson:

... I, I, I think that's correct.

Jason Panzer:

You're, you're, you're correct Professor Johnson but, but the language of informed consent, as you know, the, the language in 1.06(c)(2) is much broader than what's required for consent under the Model Rules and so I'm wanting to make sure there's no confusion if this rule is adopted.

Vincent Johnson:

Well, I, I think that if this were put in the definitional section of the, um, uh, of the, uh, Texas Disciplinary Rules then it would apply to whenever we use that term in the Texas Disciplinary Rules. It would, uh, inform, uh, 1.06 and 1.09 as, as well as, uh, any other, uh, provision using that language.

Vincent Johnson:

I don't, I don't see any tension between these. I, I, I think that, uh, uh, to the extent that 1.06 is more specific, it just builds on the, um, uh, the foundation laid by the basic definition of, of informed consent. So I, I don't see it as, uh, as creating confusion. Uh, I assumed that, uh, that the, uh, that the great body of, uh, precedent that has interpreted, uh, 1.06 and what, uh, informed consent means, uh, there would, would remain in place and would not be undercut in any way.

Jason Panzer:

I, I, I have not specifically researched this recently, but I seem to recall that when there was passage of 1.06(c)(2) there was a heated discussion as to not adopt the ABA's definition of informed consent. I'm not trying to weigh in on that, my thought is if it is the Committee's intention to adopt the ABA's definition of informed consent and have it apply across the rules, that that needs to be clarified. And I think the Bar would need to be informed about that 'cause that is a substantial change to the rules. I'm not, uh, advocating against that change. I'm just asking for clarification to avoid confusion, uh, in the future. And again I think that it... Uh, it may be even take out the word informed consent and just say consent but, uh, again that's a much broader, uh, amendment than an amendment addressing specifically proposed Rule 1.18 as I understand what Professor Johnson is, is, is stating.

Lewis Kinard:

Okay, good. Uh, we'll look at that, and, um, again this rule will be on our agenda next month so we'll have a little more deliberation over, uh, this, this point and others raised in comments. Uh, we thank you so much for your, uh, joining the call and giving comments. Yes, Brad?

Brad Johnson:

I was just gonna add to the, the question Mr. Panzer was asking. I think the part of the basis for the question may be when you look at Rule 1.06(c)(2) it, it doesn't include the word informed, it says consent and then describes, um, kinda what that means. So I think that may be part of the reason for the, the question.

Lewis Kinard:

Well, that doesn't mean that it's not a valid, you know, point of con- potential confusion. So it could be something that we need to address somewhere to at least make it clear that there's an issue or the court may need to clarify a comment under 1.06. So, um, but I think it's gla- it's good that someone raised this so we know that there is that potential point of confusion, and it's, it's like we were talking about the previous, uh, rule, um, the clearer we make it the easier we make it for lawyers to get it right. So, um, that, that's one of our goals.

Jason Panzer:

And I, I would add to that, um, Mr. Johnson, likewise Rule 1.09(a), which refers to without prior consent. Again it doesn't say informed consent, but if the term informed consent is to apply to 1.09(a) I think that needs to be, uh, clarified somewhere and informed to the Bar that if they're voting on that in a referendum the effect it's going to have throughout the rules. And just to make sure it's consistent.

Lewis Kinard:

All right, thank you very much.

Jason Panzer:

Thank you all again for your hard work.

Lewis Kinard:

All right, you're welcome. Uh, anyone else, Brad, that's, uh, ready to talk on, uh, this 1.18?

Brad Johnson:

Uh, no other hands are raised, Chair, and, and Mr. Panzer, just so you know I'm gonna move you back as an attendee, it may take just a second for you to swap over there but you shouldn't have to do anything on your end.

Jason Panzer:

Thank you.

Lewis Kinard:

All right, anybody else on the Committee have anything else to add in regards to proposed Rule 1.18?

Lewis Kinard:

All right, this will conclude our public hearing on 1.18 and we'll now move on to, uh, the public hearing on proposed Rule 13.05 of the Texas Rules of Disciplinary Procedure.