

Summary of Ballot Item A

Scope and Objectives of Representation; Clients with Diminished Capacity

Short Summary:

The proposal deletes Rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct and adds Proposed Rule 1.16 of the Texas Disciplinary Rules of Professional Conduct. Proposed Rule 1.16 is intended to provide improved guidance when a lawyer represents a client with diminished capacity. Among its provisions, Proposed Rule 1.16 permits a lawyer to take reasonably necessary protective action when the lawyer reasonably believes that a client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest. Proposed Rule 1.16 provides a non-exhaustive list of actions a lawyer may be authorized to take, including informal consultations that may be prohibited under the current Rules.

Detailed Summary:

The proposal deletes Rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct, and replaces it with Proposed Rule 1.16, which addresses a lawyer's duties when representing a client with diminished capacity.

Rule 1.02(g) provides that a lawyer “*shall* take reasonable action to secure the *appointment of a guardian or other legal representative* for, or seek other *protective orders* with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client [emphasis added].”

Currently, Rule 1.02(g) is the only Texas disciplinary rule that directly addresses a lawyer's duties when representing a client who may lack legal competence, and, when its conditions are met, provides a mandate for formal legal action. Such formal action, such as a proceeding to appoint a guardian or to seek other protective orders, may potentially be much more drastic than an informal action that would adequately protect the client's interests, such as a consultation with a family member or friend of the client about the client's condition. Further, many lawyers may be unclear what “other protective orders” may be sought under Rule 1.02(g). While interpretive comments to Rules 1.02, 1.03, and 1.05 currently provide some additional guidance, the interpretive comments are merely persuasive authority and a lawyer is required to parse multiple portions of the Rules and comments for guidance on the relevant professional obligations.

The proposal adds Rule 1.16, which is intended to provide improved and comprehensive guidance when a lawyer represents a client with diminished capacity.

Paragraph (a) of Proposed Rule 1.16 provides that a lawyer “shall, as far as reasonably possible, maintain a normal client-lawyer relationship” when representing a client with diminished capacity. Paragraph (b) permits a lawyer to take “reasonably necessary protective action” when the lawyer “reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's

own interest.” While still allowing for formal legal action based on the lawyer’s professional discretion, paragraph (b) does not mandate that a lawyer must take formal legal action. Rather, paragraph (b) clarifies that “[s]uch action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.” Finally, paragraph (c) provides that “[w]hen taking protective action pursuant to (b), the lawyer may disclose the client’s confidential information to the extent the lawyer reasonably believes is necessary to protect the client’s interests.”

While substantially based on Rule 1.14 of the American Bar Association Model Rules of Professional Conduct, Proposed Texas Rule 1.16 is amended to better reflect the types of formal protective actions that may be available under applicable Texas law.

Note: The State Bar of Texas staff has provided this document as a general summary of the rule proposal. It may not address every aspect of the proposal, and reasonable minds may differ on the characterization of the proposal. Voters are strongly encouraged to directly review the Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure, which are available at texasbar.com/rulesvote.