



STATE BAR *of* **TEXAS**

REFERENDUM 2011

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

The Supreme Court of Texas has directed the State Bar to conduct a referendum of all members on proposed amendments to the Texas Disciplinary Rules of Professional Conduct.

Lawyers may vote online or by paper ballot. Online voting will begin at 8 a.m. on Jan. 18, 2011. Paper ballots will be distributed the same day. Completed ballots must be received by the State Bar by 5 p.m. on Feb. 17, 2011.

The proposed amendments were published in the December issue of the *Texas Bar Journal*. This issue of the magazine includes additional resources to help educate members as they prepare to vote.

For more information, including clean and redlined versions of the proposed changes, please visit www.texasbar.com/rulesupdate.



The Supreme Court of Texas

CHIEF JUSTICE
WALLACE B. JEFFERSON

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PUBLIC INFORMATION OFFICER
OSLER McCARTHY

December 21, 2010

Dear Texas Lawyers,

You have the privilege to help establish the ethical standards that govern our profession. I encourage you to exercise that privilege by analyzing the proposed amendments to the Texas Disciplinary Rules of Professional Conduct; making educated, independent decisions regarding the amendments; and voting on them in the referendum.

The Court proposed these amendments after engaging in a collaborative exchange with members of the State Bar of Texas and the general public. In 2003, the Court appointed a task force to analyze extensive changes made to the ABA Model Rules of Professional Conduct in 2002, compare the changes with the current Texas rules and other states' rules, and make recommendations for improvements to the Texas rules. Between 2003 and 2008, the Court oversaw the work of not only the task force but also the State Bar Committee on the Texas Disciplinary Rules of Professional Conduct, which also submitted recommendations. Between 2008 and 2009, the Court devoted multiple administrative conferences to considering the task force's and committee's recommendations. We studied their proposals in conjunction with comparable ABA language, existing Texas rules, and applicable law, among other things.

Because these amendments affect all of you and the clients you serve, the Court and State Bar leadership felt the revisions should be vetted by lawyers with diverse backgrounds and expertise. To that end, the Court task force and State Bar committee included, among others, lawyers from small, mid-sized, and large firms; in-house counsel; government lawyers; academics; and representatives of disciplinary authorities. To obtain additional perspectives, we also sought feedback from all Texas lawyers and members of the general public in a public-comment period between 2009 and 2010.

The Court listened. We made many changes in response to helpful suggestions we received from lawyers in multiple practice areas, members of the general public, and academics specializing in professional responsibility. As a result, the initial version of the proposed amendments (issued in October 2009) differs substantially from the current one (issued in November 2010). This impressive collaboration among the bench, the bar, and the public has generated amendments that enhance the profession's role as the guardian of rights and liberties under law.

If you adopt these amendments, our rules will be more consistent overall with the ABA rules. Some of them may also serve as a model for other states and the ABA in crafting ethical standards for the legal profession.

I am proud of the process that resulted in the proposed amendments. I urge you to study them carefully and exercise your right to vote. I think you will conclude, as the Court has, that they will serve you and your clients well.

Sincerely,

A handwritten signature in black ink that reads "Wallace B. Jefferson".

Wallace B. Jefferson
Chief Justice, Supreme Court of Texas

A SUPREME COLLABORATION

By Lillian B. Hardwick

The proposed amendments to the Texas Disciplinary Rules of Professional Conduct owe much to what now seems like uncanny foresight on the part of the State Bar. Not long after the Supreme Court of Texas promulgated the current rules in 1990, the State Bar of Texas Board of Directors created a standing committee with the stated purpose of evaluating and suggesting revisions to the disciplinary rules in Texas.

Selecting the initial members of the committee required less genius because a pool of likely members had already formed. Several years earlier, the Board had assembled a group of academicians and practitioners to review the American Bar Association's 1983 Model Rules of Professional Conduct and to suggest changes to the Texas Code of Professional Responsibility. The group worked for four years on what became Texas' current disciplinary rules. That it has taken twice as long to review the ABA's 2003 Model Rules reflects the unprecedented role the Supreme Court of Texas has played as well as a checks and balances system that is second to none.

Composition of the Standing Committee

The State Bar Board of Directors selected as the standing committee's first chair the chief reporter of the earlier committee, John F. Sutton, Jr., the former dean of the University of Texas School of Law. Sutton was a logical choice, not only because of his role on the earlier committee, but also because he had served as the principal drafter of the 1969 Model Code of Professional Responsibility and as chair of the committee that revised the Texas Canons of Ethics.

The associate reporters of the earlier committee, Walter Steele, Jr., a professor of law at SMU, and Robert P. Schuwerk, a professor of law at the University of Houston, were also named to the standing committee. With the addition of Gary Gurwitz of Atlas & Hall, another member of the former committee, the Board helped to ensure continuity. Sutton, Steele, Schuwerk, and Gurwitz, along with Harlow Sprouse of Sprouse Shrader & Smith, who joined the committee in 1995, were constants through 2006, when the committee completed a comprehensive review of the Texas Disciplinary Rules of Professional Conduct in light of the ABA's 2003 Model Rules.

After drafting the language for the new Rules, the committee spent three years preparing interpretive comments and studying the defined terms. Throughout the process, the committee maintained continuity through overlapping chairs. Schuwerk, who succeeded Sutton as chair in 1994, remained chair for the first year of the committee's review of the 2003 Model Rules. In 2004, Linda Eads, a professor of law at SMU, became chair and was serving in that capacity when Chief Justice Wallace Jefferson requested input from the committee by December 2006. Eads and Lillian Hardwick, who had joined the committee in 2001, served as co-chairs in 2006–2007, with Hardwick serving as chair during the drafting of the comments. Pat Chamblin of Mehaffy Weber, who served as vice chair in 2009–2010, took over as chair in July 2010.

The 28 members of the committee have always included several law professors who specialize in teaching professional responsibility. They are as comfortable teaching the Texas Rules as they are the Model Rules. Most came to teaching after serving as practitioners or consulting on attorney ethics. The committee's members have always represented myriad practice areas and law firm sizes. That breadth of experience has been invaluable to the committee's deliberations.

Marching Orders

Like its counterparts across the country, the Supreme Court of Texas appointed a task force to assess the need for changes to the Rules and to suggest new language. In Texas, the Supreme Court has inherent power to regulate the practice of law. The Court wanted independent input on the Rules to complement the work of the State Bar committee.

As the task force finished its work, the Court asked the committee to explain in detail why it agreed or disagreed with specific suggestions from the task force. In response, the committee prepared reports for each of the Rules indicating areas of agreement and disagreement with the task force, the Model Rules, and the current Texas Rules. The committee was reporting directly to the Court, as well as to the State Bar Board and State Bar president. Committee chairs met with the chief justice to clarify how to proceed.

The Court asked the task force and the committee to present their diverging views in appellate-argument form but mediation format to provide the Court with materials to make its own decisions. Three core members of the committee — the chair and previous chairs — compiled presentations on the various Rules. Other members of the committee also made presentations on some of the Rules, with the result being that essentially half of the committee members who drafted the Rules made presentations to representatives of the Court, debating the merits

of the recommendations with members of the task force.

The Court undertook its own research and decision-making as it does when deciding cases. The Court asked the committee to draft comments for the Rules on which it and the task force substantially agreed. Once the Court had decided on tentative language for the Rules on which the task force and the committee had *not* agreed, it provided that language to the committee and asked for comments.

Following the publication of the initial proposed Rules in the November 2009 issue of the *Texas Bar Journal*, the Court sought the committee's response to public comments and to the substitute language the Court had proposed. More often than not, the committee suggested that its draft interpretive comments, which had not been published, would clarify issues raised in the public comments. Nonetheless, the public comments served an important role in reflecting how lawyers might view the proposed changes. As yet another check, a subcommittee of the State Bar Board of Directors reviewed the Rules and interpretive comments as finalized by the Court and considered issues that were raised in the public comments and in response to presentations around the state. Critical to this process was the Court's rules attorney, Kennon Peterson, who ensured close coordination among the moving parts.

Formulation of Guidelines

At the outset, the committee selected a guiding principle to return to when considering the new Model Rules and any revisions to the current Texas Rules: *The Rules should provide protection to the public*. While this certainly included protecting the public from unscrupulous lawyers, it had another meaning, as well. The committee concluded that the Rules could not be so onerous to lawyers that the Rules would deter lawyers from undertaking representation in the first place. The public, the committee concluded, benefited from having a greater number of lawyers from which to select.

From the perspective of pure protection of the public, the committee tried to incorporate more fiduciary law into the Rules. Agency law provides that, as a fiduciary, a lawyer owes a client the duties of loyalty, candor, and confidentiality. To the extent that these duties could be expressed in the Rules, the Rules would further deter a breach of duties by lawyers. The mid-1980s committee had a similar goal when examining the prior Texas Rules of Professional Conduct. As with that committee, the standing committee occasionally concluded that, despite its best efforts, some permutations of fiduciary duty simply could not be adequately expressed in a disciplinary rule. The client, in those circumstances, would nonetheless be able to pursue civil remedies.

Examples of more detail regarding fiduciary duty appear in expanded requirements for client communications. These appear in Rule 1.03 (communication), as well as Rule 1.07 (representation of multiple clients in the same matter) and Rule 1.08(g) (communication of settlement details with an aggregate settlement).

The committee sought to incorporate more fiduciary law into the Rules for two reasons. First, it reasoned that a contravention of fiduciary duty harms the public. To the extent, then, that such behavior could be deterred in a disciplinary Rule, the public would benefit. Second, the committee sought to advise lawyers how to steer clear of litigation with clients, which harms the profession as well as the individuals involved.

The committee also endeavored to draft the Rules so that lawyers would not risk discipline by inadvertent violations. The committee's goal was to have scienter whenever possible, so that the State Bar Office of Chief Disciplinary Counsel would have to show that the lawyer had the requisite state of mind prior to finding a Rule violation. One example reflects the change in the practice of law from the time of the adoption of the current Rules. Lawyers often practice in large firms with multiple offices in Texas or in other states. Proposed Rule 1.09, concerning conflicts with former clients, imposes discipline only on a lawyer "who knows or reasonably should know" of a prohibition on representation occasioned by the prior representation of an affiliated lawyer. Similarly, the limitation in Rule 1.06, regarding current clients, stretches only to affiliated lawyers who "know or reasonably should know" of a representation limitation created by a prior representation.

One example, in particular, demonstrates the committee's desire not to deter a lawyer's incentive to represent a client while at the same time providing additional protection for clients as a whole. Texas Rule 1.04, the rule regarding fees, has long had as the standard for a prohibited fee one that is "unconscionable." While the mid-1980s committee believed this standard encompassed the intent of the ABA in its 1983 Model Rule, it sets a high bar for disciplinary purposes. The ABA standard of "reasonable," on the other hand, sets such a low bar that virtually any fee agreement could be challenged, which could discourage lawyers from certain representations. The committee opted for a return to the pre-1990 standard in Texas: "clearly excessive." Not only did this prove workable for fee agreements prior to 1990, but it is applicable in other areas of the law.

The committee resolved to use shorter sentences and more direct language in the comments. Also, it made sure that words of authority (e.g., "shall" or "shall not") appeared only in the Rules and not in the comments to prevent the comments from inadvertently adding to the obligations in the Rules.

Finally, the committee learned that lawyers often had trouble locating the defined terms, which were part of the Preamble. The committee followed the ABA's lead in setting out defined terms in Rule 1.00. Then, preceding the comments for each Rule, the committee set out the defined terms that appeared in the Rule.

How the Committee Proceeded

During the drafting process, the Court set two major deadlines for the committee. The first was the end of 2006, when the Court asked for input on all of the Rules. The second deadline was the end of 2009, when the Court requested all of the drafted comments. To meet these goals, the committee had

multiple meetings lasting up to two-and-a-half days (typically Friday morning through noon on Sunday). Between November 2004, when Chief Justice Jefferson first sought feedback on the work of the task force, and November 2006, the committee met 39 times. The average meeting was attended by 17 people.

In addition to the meetings of the full committee, the chair formed regional subcommittees that met several times to consider less controversial Rules. The subcommittees would report their findings and recommendations to the full committee, which would discuss the issues and language. Once the Court announced the deadline for the comments, the committee proceeded similarly, working through subcommittees and having monthly two-day meetings of the full committee.

Throughout the process, the committee learned that states with large numbers of lawyers and sufficient resources to conduct careful examination of the Model Rules did pretty much the same thing. When the committee believed that the Model Rule language was not in sync with Texas practice, yet the Texas Rule was out of date, it explored language adopted by other states that had also considered and rejected the ABA language. For example, in considering whether to adopt the ABA's standard of "unreasonable" and inclusion of expenses in the rule regarding fees, the committee saw numerous versions of fee rules throughout the states, which confirmed that other states were being as scrutinizing. Also, when the committee revised its definition of "fraud," a member prepared a table showing the range of definitions other states had adopted, presumably driven by that state's case law.

The chair of the District of Columbia Bar, who was consulted on language variation, explained that her committee also took

many years to review its rules in light of the Model Rule language and that their board asked for a presentation on each of the rules, similar to what the Texas Supreme Court sought. The chair of the bar committee in South Carolina reported that the state supreme court had appointed a committee and that this committee and the bar's committee debated before the court their respective recommendations, following several years of review by both committees. Although New York has a voluntary bar, not a unified bar, a committee of professors and practitioners worked for more than a year comparing its rules — which followed the format of the Model Code that predated the 1983 Model Rules — with the 2003 Model Rules. The biggest change the court made was the adoption of the Model Rules format.

Conclusion

No one could have predicted in 2003 that Texas would devote eight years to revising its disciplinary Rules. Throughout the process, representatives of other states have frequently asked how Texas planned to respond to certain Model Rules. Texas has always been a leader. In the past, other states and even the ABA have followed the language Texas has adopted. The chairs of the committee believe that will happen again when the new Rules are in place.

Lillian B. Hardwick of Austin served as chair or co-chair of the State Bar Committee on the Texas Disciplinary Rules of Professional Conduct from 2006–2010.



Vote January 18 – February 17, 2011

STATEMENT OF SUPPORT

Past Members of the State Bar of Texas Committee On the Texas Disciplinary Rules of Professional Conduct

Past Members of the Supreme Court of Texas Task Force On the Texas Disciplinary Rules of Professional Conduct

Texas lawyers will have the opportunity to approve the first comprehensive revision of the Texas Disciplinary Rules of Professional Conduct in 20 years during Referendum 2011, Jan. 18–Feb. 17, 2011.

Recognizing that these rules are a great advancement over the current rules and that numerous lawyers from a variety of backgrounds and practice areas and from throughout the state have reviewed these proposals, looked at the ABA Model Rules, and sought input from their colleagues and the public;

Recognizing the importance of self-governance and that the current rules have not been thoroughly reviewed or revamped in more than 20 years, in a time when the practice has changed dramatically;

We the undersigned members of either the State Bar Committee on the Texas Disciplinary Rules of Professional Conduct (2002-2010) and/or the Supreme Court Task Force on the Texas Disciplinary Rules of Professional Conduct (2003-2007) support the adoption of the proposed amendments to the Texas Disciplinary Rules of Professional Conduct as printed in the December issue of the Texas Bar Journal.

State Bar Committee on the Disciplinary Rules

John F. Sutton, Jr., *San Angelo*

CHAIR, 1990–1994

Robert P. Schuwerk, *Austin*

CHAIR, 1994–2004

Linda Eads, *Dallas*

CHAIR, 2005–2007

Lillian B. Hardwick, *Austin*

CHAIR, 2006–2010

Patricia Chamblin, *Beaumont*

CHAIR, 2010–2011

Constance K. Acosta, *Houston*

William F. Baker, *Lubbock*

Gary G. Beck, *Austin*

Susan Louise Bickley, *Houston*

James E. Brill, *Houston*

Ralph H. Brock, *Lubbock*

Cynthia Ann Brooks, *Houston*

Gary D. Douglas, *Midland*

Scott A. Durfee, *Houston*

Susan Saab Fortney, *Lubbock*

Valarie C. Glass, *McAllen*

Rebecca Ann Gregory, *Dallas*

Gary R. Gurwitz, *McAllen*

Greg Hasley, *Houston*

Joseph H. Hawthorn, *Beaumont*

Robert J. Hearon, Jr., *Austin*

Leila Safi Hobson, *El Paso*

M. Lewis Kinard, *Houston*

Cynthia Elaine Masters, *Hempstead*

William B. Mateja, *Dallas*

Greg Smolenski McHugh, *Dallas*

Frederick C. Moss, *Dallas*

Randall M. Pais, *The Woodlands*

Carol Collins Payne, *Dallas*

Mark L. Perlmutter, *Austin*

Mark D. Pierce, *Austin*

Hugh Massey Ray III, *Houston*

Richard D. Roper III, *Dallas*

Marcus F. Schwartz, *Hallettsville*

Luther H. Soules III, *San Antonio*

Harlow L. Sprouse, *Amarillo*

Walter W. Steele Jr., *Dallas*

G. Allan Van Fleet, *Houston*

James H. Wallenstein, *Dallas*

James C. Winton, *Houston*

Eric Lyf Yollick, *The Woodlands*

George Parker Young, *Fort Worth*

Supreme Court Task Force on the Disciplinary Rules

Beryl Crowley, *Austin*

Susan Saab Fortney, *Lubbock*

Vincent Perini, *Dallas*

Kenneth Raney, *Dallas*

Eduardo Roberto Rodriguez, *Brownsville*

Robert P. Schuwerk, *Austin*

Luther H. Soules, III, *San Antonio*

Thomas H. Watkins, *Austin*

Mark White, *Amarillo*



STATE BAR of TEXAS

REFERENDUM 2011

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

GUIDE TO THE ISSUES

The following guide is adapted from a brochure that is being distributed to all Texas lawyers to assist them as they prepare to vote on proposed amendments to the Texas Disciplinary Rules of Professional Conduct. Referendum voting will take place online or by paper ballot from Jan. 18–Feb. 17, 2011. This guide lists the six questions that will appear on the ballot as well as an overview of key changes. For more information, visit www.texasbar.com/rulesupdate.

A. Terminology, Competent and Diligent Representation, Scope of Representation and Allocation of Authority, Communication, Fees, Confidentiality, Safekeeping Property, and Declining or Terminating Representation:

Do you favor the adoption of Proposed Rules 1.00–1.05 and 1.15–1.16 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

The proposed changes:

- Create a separate “Terminology” rule for ease of reference. Terminology added includes “affiliated,” “confirmed in writing,” “informed consent,” “personally prohibited,” “reasonably should know,” “represents,” and “writing” or “written.” Terminology revised includes “firm” or “law firm,” “fitness,” “fraud” or “fraudulent,” “partner,” “substantial” or “substantially,” and “tribunal.”
- Provide a “reasonableness” standard in accepting and limiting attorney-client representation as well as “informed consent” in limiting the scope, objectives, and general methods of representation.
- Enhance requirements of communication regarding client decisions and objectives.
- Change the prohibited fee standard from “unconscionable” to “clearly excessive,” add communication requirements regarding fees and expenses, and require the lawyer to tell a client which expenses the client will have to pay in a contingency-fee matter, regardless of the outcome.
- Define “confidential information” differently and exclude from the definition information that “is or becomes generally known or is readily obtainable from sources generally available to the public.” Modify scienter standards to govern the use and disclosure of current, former, and prospective client’s confidential information.

- Require that a lawyer safeguard and hold in trust client and third-person property; keep it separate; upon receiving property, notify the client of the proposed distribution of the property, notify the third person of the receipt of property the lawyer knows belongs to the third person, and, upon request, render a full accounting to the client and a partial accounting to the third person. Also provide for proper handling of disputed property, and unearned and advanced fees and expenses.
- Require that a lawyer comply with all applicable laws and rules of practice and procedure when terminating representation.

B. Conflicts of Interest: Multiple Clients in the Same Matter:

Do you favor the adoption of Proposed Rule 1.07 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

The proposed changes:

- Establish parameters for the representation of two or more clients in the same matter.
- Require a lawyer to disclose to the clients that the lawyer must act impartially for all clients, refrain from advocating for one client against another, and withdraw from representation of some or all clients in certain instances. Also require informed consent — confirmed in writing — from all clients to the representation.
- Provide an exception in cases in which the representation is by court order or appointment (example: class action lawsuits) and court standards differ from the rule.
- Provide an imputation standard for affiliated lawyers.

C. Other Conflicts of Interest:

Do you favor the adoption of Proposed Rules 1.06 and 1.08–1.12 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

The proposed changes:

- Follow the ABA standard when determining whether a conflict of interest exists.
- Address representations a lawyer shall not undertake, even with a client's informed consent, and representations a lawyer may undertake with a client's informed consent, despite the existence of a conflict of interest. An interpretative comment clarifies that the rule does not abrogate a government lawyer's authorization under law to engage in representations.
- Remove the "substantially related matter" standard for determining whether a conflict exists.
- Provide an imputation standard for affiliated lawyers.
- Restrict a lawyer's ability to solicit a substantial gift from a client and modify the definition of relationships that fall within the rule's confines.
- Clarify that a client who is represented by a court-appointed attorney or a lawyer employed by a legal services program does not have to obtain the client's informed consent in order for the lawyer to receive compensation from someone other than the client.
- Impose restrictions on aggregate settlements in civil matters and aggregate agreements in criminal matters and enhance the disclosures a lawyer must make to a client before executing the settlement or agreement.
- Set forth new standards for agreements between lawyers and clients to refer their disputes to arbitration.
- Address a lawyer's ability to prospectively limit liability to a client or settle a claim or potential claim not only for malpractice, but also for professional misconduct such as a breach of a fiduciary duty (an interpretive comment clarifies that a lawyer cannot make an agreement with a client to limit the lawyer's obligations under these rules or their enforcement).
- Restrict a lawyer's ability to represent a person in a matter in which the person's interests are materially adverse to the interests of a former client if the matter is the same as, or substantially related to, a matter in which the lawyer or the

lawyer's former firm represented the former client and provide an imputation standard for affiliated lawyers.

- Address a lawyer's use and disclosure of information related to a former client.
- Revise the conflicts standards for a lawyer who is or has been a public officer or employee and enhance requirements for the notice that must be given when screening is implemented.
- Revise standards for adjudicatory officials to include court lawyers (newly defined term) and third-party neutrals in a nonbinding proceeding and enhance requirements for the notice that must be given when screening is implemented.
- Clarify a lawyer's obligations to an organization regarding protecting the organization's interests, initiating reasonable remedial measures, addressing the joint representation of the organization and its constituents, and allowing, in limited circumstances, the disclosure of confidential information of the organization.

D. Prohibited Sexual Relations, Diminished Capacity, and Prospective Clients:

Do you favor the adoption of new Proposed Rules 1.13, 1.14, and 1.17 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

The proposed changes:

- Address conditioning representation or the payment of fees on sexual relations with a client, prospective client, or other person as well as prohibited sexual relations between a lawyer and a client.
- Address a lawyer's duties when representing a client with diminished capacity and allow the lawyer to take protective action for the client, such as seeking the appointment of an attorney or guardian ad litem and disclosing information to the extent the lawyer reasonably believes is necessary to protect the client's interests.
- Define a "prospective client" and address a lawyer's obligations relating to a prospective client, including use and disclosure of the prospective client's information and subsequent representation of a client with interests materially adverse to the interests of the prospective client.

E. Advocate, Law Firms and Associations, Public Service, and Maintaining the Integrity of the Profession:

Do you favor the adoption of Proposed Rules 3.01–3.10, 5.01–5.07, 6.01–6.03, and 8.01–8.05 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

The proposed changes:

- Clarify a lawyer’s obligation of candor toward a tribunal.
- Refine a lawyer’s obligation relating to criminal or fraudulent conduct and expand the description of a lawyer’s obligation relating to the offer or use of false, material evidence.
- Establish new and revised standards for trial publicity, address permissible conduct, and add an imputation standard for affiliated lawyers.
- Revise duties imposed on lawyers with managerial or supervisory authority, rather than duties imposed on partners who do not always have authority. Clarify that a lawyer is not expected to take remedial action beyond the scope of the lawyer’s authority.

- Clarify that when a tribunal appoints a lawyer to represent a person, the lawyer is obligated to represent the person until the representation is terminated.
- Require that a lawyer report to the Office of the Chief Disciplinary Counsel a finding of guilt or an order of deferred adjudication by any court for the commission of an intentional or serious crime as defined by the Texas Rules of Disciplinary Procedure within 30 days of the finding or order.

F. Counselor, Non-Client Relationship, Information About Legal Services, and Severability of Rules:

Do you favor the adoption of Proposed Rules 2.01–2.02, 4.01–4.04, 7.01–7.07, and 9.01 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

The proposed changes:

- Are primarily technical, adding references to terminology and consistency in format.

For more information about Referendum 2011, including the final proposed rules, interpretive comments, and a redlined version of the proposed changes, please visit www.texasbar.com/rulesupdate.

ADDITIONAL RESOURCES

The members of the Texas Disciplinary Rules of Professional Conduct Committee have written commentary about specific rules that have been discussed throughout the public comment period, including:

Rationale for Changes to Fees (Rule 1.04)

Representation of Adverse Parties by Government Lawyers (Rules 1.06 and 1.07)

Responses to Criticisms of Rules 1.06, 1.07, and 1.09

Prohibited Sexual Relations (Rule 1.13)

Safekeeping Property (Rule 1.15)

Maintaining the Impartiality of the Tribunal (Rule 3.05)

For more information, visit www.texasbar.com/rulesupdate.



STATE BAR of TEXAS

REFERENDUM 2011

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

STATEMENT OF SUPPORT

Past Presidents of the State Bar of Texas

I support the proposed amendments to the Texas Disciplinary Rules of Professional Conduct that Texas lawyers will vote on during Referendum 2011. I acknowledge the hard work that has gone into drafting the proposed rules, appreciate the opportunities stakeholders were given to provide input, commend the Supreme Court of Texas for making changes based on that feedback, recognize the need to update the rules, and encourage members to vote in favor of the proposed rules during the Referendum that will take place from Jan. 18–Feb. 17, 2011.

David J. Beck, *Houston*
James L. Branton, *San Antonio*
Martha Dickie, *Austin*
Charles R. “Bob” Dunn, *Houston*
Harper Estes, *Midland*
Wayne Fisher, *Houston*
Kelly Frels, *Houston*
Guy N. Harrison, *Longview*
Roland K. Johnson, *Fort Worth*
Darrell Jordan, *Dallas*
Lloyd Lochridge, *Austin*

Colleen McHugh, *Corpus Christi*
Harriet Miers, *Dallas*
W. Frank Newton, *Beaumont*
James N. Parsons III, *Palestine*
Richard Pena, *Austin*
Eduardo Roberto Rodriguez, *Brownsville*
Charles L. Smith, *San Antonio*
Cullen Smith, *Waco*
Blake Tartt, *Houston*
Gib Walton, *Houston*
Bill Whitehurst, *Austin*

RESOLUTIONS OF SUPPORT

Committees, Sections, and Bar Associations

At press time, the following entities had passed resolutions supporting the proposed amendments to the Texas Disciplinary Rules of Professional Conduct. For an updated list, visit www.texasbar.com/rulesupdate.

Executive Committee, Texas Center for Legal Ethics
Council, State Bar of Texas Construction Law Section
Council, State Bar of Texas Government Lawyers Section
State Bar of Texas Legal Services to the Poor in Civil Matters Committee
State Bar of Texas Pattern Jury Charge Committee—Negligence
African Bar Association in America
Bell County Bar Association
Dallas Bar Association
Dallas Asian American Bar Association
Houston Bar Association
Laredo-Webb County Bar Association



FIVE BENEFITS OF THE PROPOSED RULES

Members of the State Bar Committee on the Texas Disciplinary Rules of Professional Conduct prepared the following response to the question, "Why do the Texas Disciplinary Rules need to be amended?"

1. The Rules Need Updating

- ABA Model Rules have been amended 30 times since 1983.
- Existing Rules are 20 years old and have had no comprehensive review and update. Other jurisdictions have updated their Rules, leaving Texas behind.
- Current Rule language largely drafted in mid-1980s.
- Just six or seven states have not substantially revised their rules since ABA Ethics 2000 review.
- Changes in the law not reflected in current Rules:
 - Example:** Causes of actions against lawyers (breach of fiduciary duty as opposed to just "malpractice" (See Rule 1.08(g)(1) (Conflicts of Interest: Prohibited Transactions).
 - Example:** Rule 1.12 (Organization as a Client) clarifies duties under Sarbanes-Oxley.
- Changes in the practice of law are not reflected in the current Rules:
 - Example:** Different working relationships have developed among lawyers (lateral lawyers, lawyer affiliations, temporary lawyers, contract lawyers).
 - Example:** Greater communication and research technologies need to be addressed.
 - Example:** Greater geographical diversity affects how lawyers practice.

2. New Rules Bring Texas Into Greater Alignment With ABA Model Rules, Resulting in Greater Uniformity and Consistency Across Jurisdictions, While also Reflecting Specialized Texas Practice Standards and Case Law

- Only Delaware has adopted Model Rules verbatim (Chief Justice of Delaware Supreme Court was head of ABA Ethics 2000 Commission). States with a large number of lawyers and substantial resources (e.g., California, New York, and Texas) have studied Model Rules extensively and made changes to reflect their states' practices and case law.
- Proposed Rule 1.06 (Conflict of Interest) eliminates Texas' unique "substantial relationship" test and adopts the general "material limitation" standard used in the ABA Model Rule and most other jurisdictions.

- Proposed Rule 1.05 (Confidentiality) eliminates the "privileged/non-privileged" distinction, and now is more consistent with the ABA Rule.
- Proposed Rule 1.05 (Confidentiality) eliminates the "has reason to believe" scienter, which is difficult to understand.
- Proposed Rule 1.03 (Communication) tracks more closely with the ABA Rule; specifically, the new Rule has five requirements for communication, while the current Rule has only three. As lack of communication is the primary reason lawyers have a complaint filed against them, this should benefit lawyers, as well as clients.
- The proposed Rules adopt the ABA's scienter definitions.
- The proposed Rules change "consents after consultation" to "informed consent," as did the ABA Rule. The ABA reasoned that "informed consent" was the intended meaning of "consents after consultation," and the former term is more easily defined and understood.
- Compliance with the proposed Texas Rules will exceed standards set by the ABA Rules, especially the conflicts rules, and thus will ensure compliance with both standards.
- Definition of "fraud" in the proposed Rules reflects the ABA standard generally, but modified to take into account the prevailing substantive standards applied in Texas. See Proposed Rule 1.00(j).

3. The Proposed Rules and Comments Are Clearer And Easier to Understand

Example: Proposed Rule 1.00 (Terminology) is a separate rule for definitions used in the Rules and comments to same.

Example: Proposed Rule 1.04(d) (Fees) was converted from a narrative to a list.

Example: Proposed Rule 1.05 (Confidentiality) has been reorganized based on requisite scienter for use or disclosure of confidential information.

Example: Proposed Rule 1.15 (Safekeeping Property) (current Rule 1.14) clarifies scienter and the attorneys' duties in safekeeping property.

Example: Proposed Rule 1.06 (Conflicts of Interest), comment 4 clarifies issues related to representation of an organization and its affiliates.

Example: Proposed Rule 1.06 (Conflicts of Interest) comment 22 clarifies issues related to government lawyers' authority to undertake certain representation pursuant to statute.

Example: Proposed Rule 1.12 (Organization as Client) clarifies duties for lawyers who represent organizational clients.

4. The Proposed Rules Provide Additional Protections For Clients

- Proposed Rule 1.04 (Fees) changes the standard from “unconscionable” to “clearly excessive.”
- Proposed Rule 1.08 (Conflicts of Interest: Prohibited Transactions) adds required arbitration disclosures.
- Proposed Rule 1.08 (Conflicts of Interest: Prohibited Transactions) adds a comment on aggregate settlements, which will prevent lawyers from claiming all they have to do with an aggregate settlement is comply with Rule 1.08, but not Rules 1.02, 1.04, 1.05, and 1.06. It also provides additional disclosures to clients on settlement.
- The proposed Rules add three new rules: Rule 1.17 (Prospective Clients); Rule 1.14 (Diminished Capacity), and Rule 1.13 (Prohibited Sexual Relations).
- Proposed Rule 1.07 (Conflicts of Interest: Multiple Clients in the Same Matter) requires disclosures for representation of multiple clients.
- Increased requirements for communication and consent.
- Proposed Rule 3.07 (Trial Publicity) permits defensive statement on behalf of a client.
- Rule 1.08(b) (Conflicts of Interest: Prohibited Transactions) has an updated list of persons related to a lawyer, which closes a loophole and provides additional protection to clients.

5. The Proposed Rules Provide Additional Protections For Lawyers

- The proposed Rules include a scienter standard when possible, versus the ABA Model Rules' strict liability standard.
- The proposed conflicts Rules include a scienter standard for affiliated lawyers (*e.g.*, no Rule violation if an affiliated lawyer takes representation if he or she did not know or reasonably know of prohibition/conflict) (*See* Rules 1.06(e), 1.07(c), 1.08(i), 1.09(e), 1.10(d), 1.11(c), and 1.17(c)). Thus, an affiliated lawyer who innocently takes on a prohibited matter will not be subject to discipline.
- Proposed Rule 1.07 (Conflicts of Interest: Multiple Clients in the Same Matter) contains “safe harbor” disclosures to be made when a lawyer represents multiple clients in a single matter.

- Proposed Rule 1.08 (Conflicts of Interest: Prohibited Transactions) contains “safe harbor” disclosures for arbitration provision.
- Proposed Rule 3.07 (Trial Publicity) permits a lawyer to defend himself/herself if trashed in press. The proposed rule elevated this protection from a comment to the Rule itself, thus creating a safe harbor for defensive extrajudicial statement under appropriate circumstances.
- Comments throughout the proposed Rules contain suggestions for documenting disclosures in writing.
- Proposed Rule 1.15 (Safekeeping Property) (current Rule 1.14) tells a lawyer what to do upon receipt of property when a dispute exists between a client and a third person over right to property.
- Proposed Rule 1.15(e) (Safekeeping Property) (current Rule 1.14) permits a lawyer to put personal funds into a trust account for paying service charges.
- Proposed Rule 1.17 (Prospective Clients) protects lawyers from a “prospective client” who is just trying to conflict out every lawyer in town, rather than hiring a lawyer, because such a person does not qualify as a prospective client unless acting in a good faith attempt to hire a lawyer. The rule also talks specifically about the ability to get a waiver of conflict and states that unilateral communication from a “prospective client” does not, by itself, make that person a prospective client.
- Proposed Rules 5.01 (Responsibilities of a Managerial or Supervisory Lawyer) and 5.03 (Responsibilities Regarding Nonlawyers) provide protection for partners who have no knowledge of Rule violations by associates or nonlawyers.
- Proposed Rule 6.03 (Law Reform Activities Affecting Client Interests) gives lawyers guidance on law reform activities, particularly when such activities may affect the interests of a client.



STATE BAR of TEXAS

REFERENDUM 2011

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Vote January 18 – February 17, 2011



STATE BAR of TEXAS

REFERENDUM 2011

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

HOW WOULD YOU ADVISE A TEXAS LAWYER TO VOTE?

The Texas Bar Journal asked a cross-section of State Bar members how they would advise a Texas lawyer to vote in Referendum 2011. Below are some of the responses.

Mark White, Amarillo

I urge lawyers to vote “Yes” to the referendum.

The rules can’t get any better. They are the product of thousands of hours of drafting and debate by the smartest lawyers in Texas over many years. Like any rules, someone can always find some sentence to quibble about; but realistically, this is as good as it gets.

There is a real urgency. If we don’t embrace these Rules, it may take several more years to get some adopted, and we will be far out of step with the rest of the nation. The State Bar undergoes Sunset review in 2015. By then, the Legislature must know that we are tending diligently to the business of lawyer discipline. This will send that message.

These rules really do inform us about how to handle sticky situations — much better than the old. For example, Rule 1.07 gives guidance to lawyers who are representing multiple parties in a single transaction. I like the prospective client rule, 1.17; it addresses the practice of clients intentionally conflicting out lawyers. Similarly, the updated confidentiality rule, 1.05, gives lawyers protection in this age when much information is already available to the public.

Because the work on the Rules was accomplished by every kind of practitioner, the Rules are lawyer friendly and at the same time provide solid protection for the public.

Don’t be scared of these Rules. Take the time to understand how they will work in real life and you will be glad we have them.

Jim McCormack, Austin

These proposed Rules fail the one test that counts: they are not demonstratively better than the current disciplinary rules — and yet they still impose the same costs as real improvements would.

All sets of regulations have costs; however, proponents of new regulations are obligated to make good-faith efforts to quantify those costs. The State Bar (especially the grievance system), the courts, the public (especially clients), hundreds of law firms, and 85,000 Texas attorneys will all incur the high costs of rules that differ in ways, great and small, from the rules that have governed us well for the last 20 years. Those costs will certainly include: (1) hard dollars and time that will be spent by the Bar, the courts, law firms, and lawyers to learn and accurately apply new rules; (2) the cost to lawyers and clients of lost precedent (and the cost of developing new precedent amid uncertainty) in both grievance and legal malpractice cases. A business-like approach would have produced an objective “cost versus benefit” analysis.

Instead, some proponents’ have focused mostly on their “sunk costs” in developing these proposals over the last seven years. This is understandably human. “Sunk cost” advocacy is always backward looking and justifies continuing a course of action based upon prior investment of time and resources. It is emotion-driven and cannot objectively assess current merits or future problems. These proposed rules will cost Texas lawyers more than they will ever be worth.

Pat Chamblin, Beaumont

I will vote in favor of the proposed amendments and encourage my colleagues to do so. My decision is based upon careful study and my experience on the State Bar’s Texas Disciplinary Rules of Professional Conduct Committee.

These are good rules that will well serve our profession and our clients. A few other points bear mentioning:

First, revising the rules took years of effort by many Texas lawyers. There were areas of disagreement, but these lawyers worked together to develop the best possible rules.

Second, the lawyers who participated in the process were truly representative of Texas lawyers. Most are practicing lawyers and include solos, lawyers in small and large law firms, and government and in-house lawyers. Their diverse practices include all types of legal work. They come from all areas of the state and practice in cities, big and small. They share the concerns of Texas lawyers.

Third, Texas lawyers took advantage of the numerous opportunities they had to comment on the proposed Rules. Some lawyers criticized the Rules, and that was an important part of the process. Comments and criticisms resulted in improvements to the proposed Rules. The Rules that are up for a vote are not the same as the ones published in the fall of 2009 or the spring and summer of 2010.

Now, the time has come to vote. Our privilege of self-governance comes with a responsibility to educate ourselves, rather than simply relying on the opinions of others. I encourage Texas lawyers to read the proposed Rules and comments and then cast an informed vote. My vote will be in favor of the proposed amendments because they are a significant improvement over the existing Rules.

Chuck Herring, Austin

“Keep Austin Weird” is a great slogan; “Make the Rules Weird” is not. But consider, for example, proposed Rule 1.07. It would make Texas unique — and not in a good way. It would

require every lawyer who represents two or more clients in a matter to give new “Miranda warnings.” It would apply to litigators and transactional lawyers alike, large firms and solos.

It also would prohibit lawyers from advising joint clients about (unspecified) “issues that arise among the clients” — even if the clients both ask for the advice.

Worse, Rules 1.06 and 1.07 expressly cross-incorporate one another. Texas would be the only state with two general conflict-of-interest rules. (Moreover, Rule 1.06(c)(2) requires still other informed-consent “warnings.”)

Another problem: The Fifth Circuit applies “ethical rules announced by the national profession.” Federal courts examine both the Texas Rules and the ABA Model Rules. After 20 years of federal jurisprudence analyzing conflicts, we would start over. The changes would affect both state and federal court standards.

Overall, the proposed changes would substantially alter Texas law practice — case-acceptance standards, conflict-consents, disqualifications, fees, duties to prospective clients, plaintiffs’ counsel disbursements to third parties — on and on. You should read the rules and comments — yes, 160-plus pages, 65,000 words — before voting.

If this referendum is defeated, we’ll probably still get new rules. But the rule-making process likely will be more inclusive and problem areas reduced. I think that’s better for the public, clients, and our profession.

Vincent “Vee” Perini, Dallas

I am a criminal defense lawyer. I plan to vote “Yes” on all six ballot questions because I believe the proposed revisions serve criminal defense lawyers better than before.

That is especially so with Rule 3.03 (Candor Toward the Tribunal) and Rule 3.07 (Trial Publicity). Both incorporate new language that was part of the ABA Model Code revision. In the case of perjured testimony and other false evidence (Rule 3.03), the new rule allows a lawyer to refuse to offer evidence he “reasonably believes, but does not know, is false” — except the defendant’s own testimony in a criminal trial. This acknowledges that the defendant has an absolute right to testify. In making this change, the proposed rule puts into Black Letter Law the difference between “belief” and “knowledge” (both of which are defined in Rule 1.00 [Terminology]). The revised rule also simplifies a lawyer’s duty when he knows testimony or evidence is false.

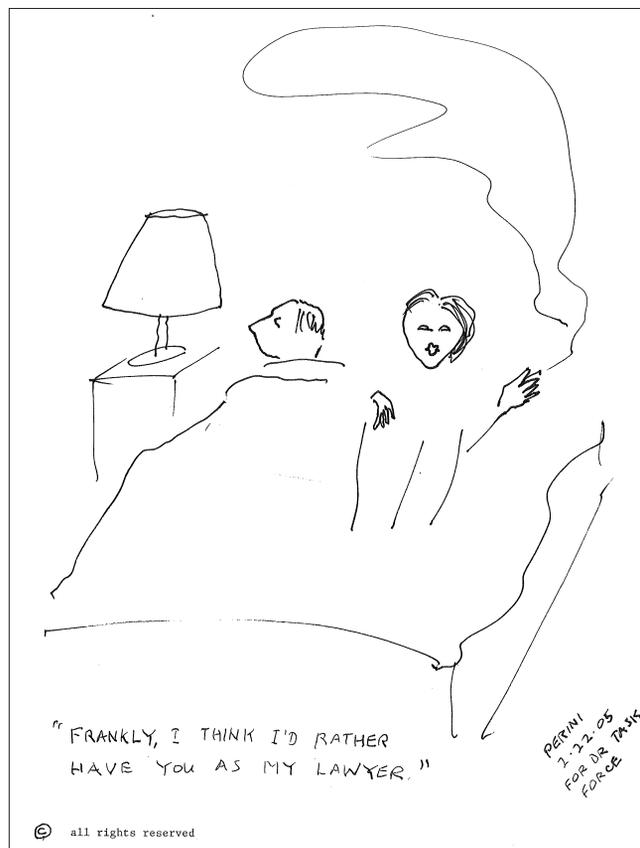
The former rule about trial publicity (Rule 3.07) has been completely rewritten, making a trial lawyer’s obligation easier to understand. Best of all, it includes a “self defense” provision found in the new ABA Model Rule which allows a lawyer to respond to prejudicial publicity about his client.

At first blush, some criminal defense lawyers may chafe at two other changes that relate to attorney fees. The first redefines when a fee is illegal from “unconscionable” to “clearly excessive,” a lower but more reasonable standard for disciplinary action (Rule 1.04, “Fees”). The second ought to be part of the fee rule but is hidden in Rule 1.14 (“Safekeeping Property”). It requires us to deposit fees paid in advance into a trust account “to be

withdrawn ... only as fees are earned or expenses are incurred” (Rule 1.14[d]), a rule which codifies recent case law.

Finally, how can I not mention the dilemma which, upon passage of new Rule 1.13 (Prohibited Sexual Relations), will henceforth characterize the attorney-client relationship?

Nothing better illustrates it, if I may say so, than a cartoon I scribbled while the Supreme Court Task Force debated the subject, viz:



Amon Burton, Austin

Many of the proposed rules we are being asked to vote on deviate dramatically from the national standards reflected in the ABA Model Rules and the Restatement of the Law Governing Lawyers at a time when the practice of law has become multi-jurisdictional and, equally important, at a time when other states going through this process of updating their disciplinary rules (most recently California) have abandoned their unique ethics rules in favor of uniformity. The national standards of attorney conduct are applied in all federal courts in the Fifth Circuit, and all newly licensed Texas lawyers have to pass a test on the ABA Model Rules. To vote now in favor of making our ethics rules even more unique than other states is in my opinion swimming upstream and would be a missed opportunity to get our disciplinary rules more consistent with the realities of our daily experience in practicing law.

In addition, I keep reminding myself that disciplinary rules exist to establish minimum standards of ethical conduct for the

protection of clients and to preserve public respect for the legal system. After studying the proposed rules, I came to realize that our existing Texas Disciplinary Rules actually provide considerably more protection for clients.

For these reasons, I do not support adopting these proposed amendments and will vote “No” on each of the six choices we are given on the ballot. I will simultaneously urge the State Bar to restart this process with the goal of revising the Texas Disciplinary Rules to conform much more closely to the ABA Model Rules.

A final note: I was a member of the State Bar Committee and I dissented to the proposed rules the Committee submitted to the Court. I am not alone. Other former and present members of the State Bar Committee have also decided not to endorse these controversial proposed rules.

James E. Brill, Houston

I particularly recommend a vote favoring the Rules in Group D on the ballot.

Current Rule 1.02(g) requires a lawyer to actively pursue the appointment of guardians for clients with diminished capacity. As a probate lawyer, I particularly favor Rule 1.14 when dealing with such clients. This Rule eliminates that requirement, permits less restrictive procedures, allows the disclosure of confidential information to help facilitate proper care of those clients, and reduces the risk of grievances for not applying for guardianships.

Proposed Rule 1.13 dealing with sexual relations with clients seems to state the obvious: a lawyer’s ability to provide objective advice to a client is highly likely to be impaired by the emotions generated by a sexual encounter with the lawyer’s client and it could also lead to a violation of proposed Rule 1.01 relating to diligent representation.

If a lawyer meets with a prospective client but is not hired, proposed Rule 1.17 provides a road map for the lawyer who does not wish to be automatically disqualified from representing an opposing party. For the lawyer to avoid future disqualification, the lawyer must warn a prospective client not to disclose any information that the prospective client regards as confidential, because such information may be disclosed by the lawyer, even to an adverse party. For this exception to Rule 1.05 to be effective, the prospective client must not only give informed consent, but also agree in writing not to disclose any confidential information unless a formal attorney-client relationship is established.

Roy B. Ferguson, Marfa

Fairness of a disciplinary system hinges on predictability. Thanks to years of interpretive rulings and discussions, Texas attorneys know with reasonable certainty what violates the rules and what doesn’t. So while the Rules could use some updating, we should be wary of sweeping changes that impact their predictability.

This Referendum constitutes sweeping change. Everyone at the State Bar and the Supreme Court worked diligently to

present a comprehensive package. But is this overhaul necessary? Has the existing system failed so completely as to require wholesale replacement? Or would tweaks to a few Rules suffice?

The proposed Rules introduce nomenclature that may render largely meaningless decades of interpretation and greatly diminish the predictability of the system. For a time, enforcement will cast a wide net, and unsuspecting and well-meaning colleagues will likely be caught in it.

Unfortunately, the format of the Referendum exacerbates the problem. I cannot recommend approval of Ballot Questions D and E because each has at least one bad rule lumped in with the good. For example, Rules 1.13, 1.14, and 1.17 are combined in Ballot Question D. Rule 1.13(c) (regarding sex with clients) requires a lawyer to provide intimate details of private, personal conduct (was it a “sexual relationship,” how and when things progressed, and whether it was “ongoing”). But in rejecting Rule 1.13 to keep the Bar out of the bedroom, you also reject Rule 1.14 (regarding clients with diminished capacity). And Ballot Question A (which defines the new terms) also deletes the prior diminished capacity rule. So, voting in favor of the new definitions (“Yes” on A) and against the sex police (“No” on D), means there will henceforth be no rule for handling clients with diminished capacity. An unfortunate consequence.

The conflict of interest Rules (1.06–1.12) are overwhelming, and overkill. I believe that proposed Rule 1.07, which has been widely denounced, will negatively impact a majority of Texas lawyers, whether through multi-jurisdictional practice, or drafting wills for spouses, or representing partners or business owners in litigation. I am voting “No” on Ballot Question B.

Unfortunately, I must vote “No” on Ballot Question E. This Question (which encompasses 24 provisions), hinges on Rule 3.03. Proposed Rule 3.03(a)(2) requires a lawyer to go back and “correct” any false statement of material law or fact “previously made” to a “tribunal.” This obligation appears to last for at least 4 years after a lawsuit is complete under 3.03(f) (until a bill of review is no longer available). There is no distinction between “false” and “incorrect” statements. The possible reach of this rule is frightening, given that under proposed Rule 1.00(u), “tribunal” includes arbitrations and even “legislative bodies” (city councils? zoning boards? school boards?) without an exclusion for a lawyer’s personal matters. In addition, many clients will likely be upset when they learn that in seeking a TRO, their lawyer disclosed adverse information provided in confidence by the client. (Proposed Rule 3.03(e) removes the exception “privileged information.”) As proposed, 3.03(a) provides ammunition to disgruntled opposing counsel, and 3.03(e) to disgruntled clients.

I would prefer that the Referendum be resubmitted with each Rule posed as a unique ballot question, so that each can stand on its own merits. However, faced with the ballot at hand, I recommend voting “Yes,” on A, C, and F, and “No,” on B, D, and E.

Claude Ducloux, Austin

A decision to embrace new Rules is completely dependent on the Bar's willingness to read and follow its stated requirements. These Rules are not merely aspirational; many of the Rules require strict attention to detail.

Generally, I favor passage of the Rules. But I have the benefit of working with these rules frequently in my practice, part of which involves advising lawyers on ethical matters. I would prefer, of course, to pick and choose among these (a line-item veto, perhaps?), but, if not, here are my thoughts.

YEA: If you will actually make the effort to *read* the rule changes, and commit to following them, vote to *approve* them. The clarifications in Rules 1.12, and 1.14 through 1.17 (among others) are intended to help both the legal profession, and serve the public interest.

NAY: If you believe that merely having a good heart, personal integrity, and an honest demeanor will get you through any ethical crisis, vote against these rules. Why? Because the rules involving conflicts of interest and client relations have so many new requirements to follow that you can completely overlook new stated duties to commemorate things in writing.

Caveats: Any change will involve a period of adjustment, mistakes, and misunderstanding. Many changes are simply intended to modernize our practices, such as Rule 1.05 which contains clarifications to allow lawyers certain exemptions to discuss confidential information. I predict, however, the changes to Rules 1.06 and 1.07 are going to be very challenging and will need further comments for full understanding. Rule 1.07, which deals with duties to multiple clients, can be troublesome, and subject to unintentional violation. Give Rule 1.07 special review before voting. Note especially the new rules which require certain matters *to be in writing*, including Rules 1.06(c)(3); 1.07(a)(4); 1.08 (a)(3); 1.08(f), 1.09 (a)(b) and (c).

Julie Oliver, Austin

We as lawyers pride ourselves on maintaining the highest standards of professionalism. But the proposed new Rules significantly lower that standard and would endanger clients and damage lawyers. Vote "No" on the Referendum.

For example, proposed Rule 1.17 establishes a confidentiality standard for "prospective clients." By signing a simple form, a prospective client can waive confidentiality. The lawyer can use the information from the consultation against the prospective client when later representing another party in the same matter. No lawyer in the position of a "prospective client" would agree to such an arrangement. No lawyer would advise a client who was seeking consultation with another attorney to agree to such an arrangement. This provision encourages lawyers to take advantage of unsuspecting, unsophisticated prospective clients. It's a bad idea for prospective clients, and it's a bad idea for lawyers who might attempt to take advantage of clients in this way. Such lawyers may be subject to liability claims, including for breach of fiduciary duty and DTPA violations.

Another example is the proposal authorizing binding

arbitration provisions in attorney-client contracts. Professional Ethics Committee Opinion 586 established standards for such provisions, but the proposal would reduce those protections. It would even eliminate the opinion's requirement that the agreement be "fair and reasonable" to the client, condoning lawyer overreaching. And it would permit this overreaching without disclosure to the client of most of the potential disadvantages. That's bad for clients and bad for lawyers.

The proposed changes consistently tempt lawyers to exploit clients. This would lead to more professional liability claims and would severely tarnish our profession's image.

Lillian B. Hardwick, Austin

I would advise a lawyer to vote "Yes" to all categories of the proposed Rules. Based on having worked with up to 100 fellow-drafters during the eight-year revision process, I can say that virtually every viewpoint, practice area, and concern has been considered. Due to what I've seen over the past eight years, I believe that all 85,000 lawyers in Texas, if they had personally served on the State Bar drafting committee, would conclude similarly. Certainly not every committee member voted for the language in every single Rule as it was presented to the Court, but most of us cannot recall exactly how we voted on any particular Rule. What was important was that we expressed our positions, which were duly considered. We were part of a process to produce the most comprehensive and comprehensible set of disciplinary Rules in the country. We believe that is what we achieved and that the changes subsequently made by the Court, in response to its own research and public comments, even more completely reflect the views of Texas and its lawyers.

Edward F. Fernandes, Austin

I would advise a Texas lawyer to vote "Yes" on all six questions on the ballot. Many of the changes do not alter the substance of the Rules, but instead clarify the meaning of the Rules, making the Rules easier to understand. These changes are long overdue.



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