



**STATE BAR** *of* **TEXAS**

# REFERENDUM 2011

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

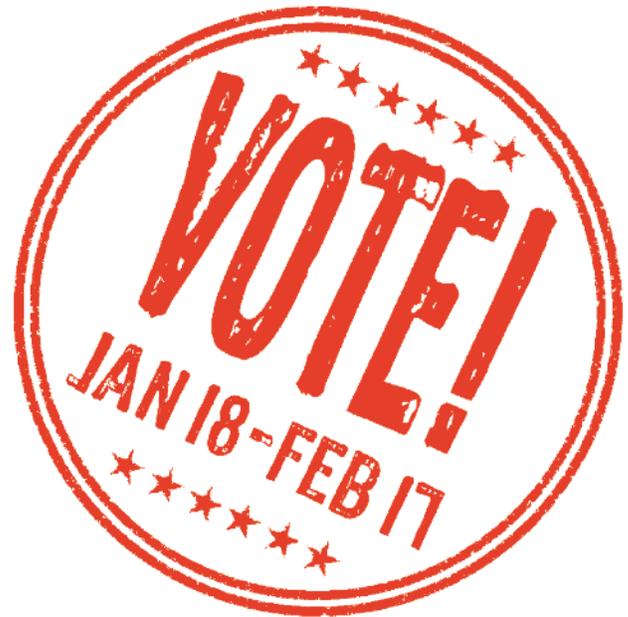
Texas lawyers have until Feb. 17, 2011, at 5 p.m. to vote on proposed amendments to the Texas Disciplinary Rules of Professional Conduct.

To assist lawyers as they prepare to vote, TexasBarCLE has made available in its Online Classroom a *free* webcast on the proposed changes to the disciplinary rules. Panelists Linda Eads, Tom Watkins, and Kennon Peterson touch on the process of amending the rules, but focus mainly on four new proposed rules (Rules 1.00, 1.13, 1.14, and 1.17) and the proposed amendments to four conflicts-of-interest rules (Rules 1.06 through 1.09) that have sparked debate during the amendment process.

Participants can earn *2 hours* of MCLE ethics credit. You can also find a link to a program featuring opponents of the Referendum. For more information and to register, visit [www.texasbarcle.com](http://www.texasbarcle.com).



STATE BAR of TEXAS  
**REFERENDUM 2011**  
TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT



# VOTE IN THE STATE BAR REFERENDUM

The Supreme Court of Texas has ordered a referendum of all Texas lawyers on proposed amendments to the Texas Disciplinary Rules of Professional Conduct. Only active members of the State Bar of Texas may vote in the Referendum.

Votes for the State Bar of Texas Referendum can be cast either by paper ballot or by voting online from Jan. 18 to Feb. 17, 2011.

The voting process is as follows:

1. On Jan. 18, attorneys eligible to vote were mailed a referendum ballot that includes voting instructions. A blast email was also sent to attorneys with a valid email address on file with the Bar giving them instructions on how to vote online. If you did not receive this email, have recently changed your email address, or do not have a correct email address on file with the State Bar, you may still vote online. Go to the State Bar's website at [www.texasbar.com](http://www.texasbar.com). **Don't forget to check your spam/junk mail settings and mail folders to see if the email was blocked.** Referendum emails are sent from [statebaroftexas@vres.us](mailto:statebaroftexas@vres.us).
2. The referendum mailing also contained a voter authorization number (VAN) with instructions on how to go online and vote. Attorneys may use this VAN and their bar card number to log on to the Referendum website and cast their ballot. If you have not received your paper ballot by U.S. mail, or if you have any questions regarding voting, please call (800) 218-4026 for assistance Monday through Friday, 8:30 a.m.–5 p.m. CST.
3. Attorneys may either submit their paper ballot via mail or vote online. The secure election system will not allow duplicate votes.
4. If you have any questions regarding the proposed amendments to the Rules, please contact Ray Cantu at [ray.cantu@texasbar.com](mailto:ray.cantu@texasbar.com) or (800) 204-2222, Ext. 1506.

**THE DEADLINE TO CAST BALLOTS IS FEB. 17, 2011 AT 5 P.M. CST.**



STATE BAR of TEXAS

# REFERENDUM 2011

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

## Q&A with Tom Watkins

*The Texas Bar Journal sat down with Thomas H. Watkins, who served as chair of the Supreme Court of Texas Task Force on the Texas Disciplinary Rules of Professional Conduct, to discuss Referendum 2011 and the proposed changes to the Texas disciplinary rules. Referendum voting ends on Feb. 17, 2011 at 5 p.m.*

**Q: How did you become an authority on the Texas disciplinary rules?**

A: The Supreme Court of Texas called and asked if I would chair the Task Force on the Texas Disciplinary Rules of Professional Conduct. I puffed up like a toad. I was so proud. It wasn't until seven years later that I realized this is what a Republican Supreme Court does to punish a Democrat.

**Q: What is the most frustrating criticism of the proposed rules?**

A: There have been a number of criticisms based on misunderstanding. For example, the proposed "No sex with clients" rule. Several have complained that it doesn't go as far as the American Bar Association model rule. In fact, it's almost exactly the same. If anything, it's stronger.

**Q: What is the most compelling argument for adopting the proposed amendments?**

A: First, there are areas in the disciplinary rules where we need more uniformity. Second, there are areas where we need better protection for lawyers. Third, there are areas where we need better protection for clients.

**Q: Have lawyers and the public had enough opportunity to provide input?**

A: There have been plenty of opportunities. The truth is that lawyers have very busy schedules and are driven by client needs. You have to take time out of a busy schedule to study and consider the proposed rules. Of course, that's true of the old rules, too.

**Q: Are there surprises in the rules?**

A: Every change — every current rule, for that matter — is a surprise to some. Some think the multiple-client representation rule is burdensome. In fact, it's not as burdensome as the current rule, which is ignored. The new rules are useable. The current rules are not useable.

**Q: Why is the ballot divided into six questions?**

A: There are various issues for various segments of the bar membership.

**Q: Which are the easiest ballot questions to vote "Yes" on?**

A: All of them are easy to vote "Yes" on. The most misunderstood proposals are the conflicts of interest rules. Most misread

proposed Rules 1.06 and 1.07. Proposed Rule 1.06 removes the "substantially related matter" test. Some want to keep it. Personally, I don't understand that. They want to be able to sue and defend the same client. I think that's bad PR for us as a profession. The "substantially related matter" test is not recognized in federal courts or the ABA Model Rules. If we're striving for uniformity, we need to fix that.

**Q: Why are proposed Rules 1.06 and 1.07 separate?**

A: Proposed Rules 1.06 and 1.07 are essentially covered by 1.06 in the current rules. Some don't like having an extra rule. I believe strongly that we need it. If you are ever sued for malpractice, the disclosures required under current Rule 1.06(c)(2) will haunt you. There's no way you could have complied. Proposed Rule 1.07 eliminates that. The disclosures under the current rule are replaced with three important disclosures that create a safe harbor. The tradeoff is that you have to make the disclosures every time, but there's a safe harbor. You'd be better off than under the current system. I think that's a good tradeoff.

**Q: Are the comments and criticisms that have circulated about the proposed rules fair?**

A: Lots of groups and individuals have provided input. That has been an essential part of this process. The proposed rules have changed from one draft to the next. The instances where those criticisms have not been adopted have been because of counter opinions and compromises. If you try to design a horse by committee you're going to get a camel. The proposed rules are a camel. But they can't be accused simultaneously of being not enough like the ABA Model Rules and changing too much. If we adopted the ABA rules, it would require far more changes.

**Q: What happens if the proposed rules don't pass?**

A: We're stuck with what we've got. We'll be a national embarrassment on the "No sex with clients" rule. A whole lot of work will go down the tubes.

**Q: If a member of the State Bar is just tuning in now, what's the best way to get up to speed on the proposed changes in order to make an informed decision?**

A: There will be plenty of presentations at CLE programs. Of course, not every lawyer will be interested in or affected by

all of the disciplinary rules. There are various practices that are not covered by all of the disciplinary rules. In my opinion, Texas lawyers know a whole lot more about the disciplinary rules because of the attempts to change them. If they fail, a lot of good education has taken place. If they pass, it will improve how lawyers comply. Lawyers will start off with better knowledge of the new rules than they have of the current rules.

**Q: Any final thoughts?**

A: As with any legislative act, any court decision, or any public endeavor that you begin to scrutinize, it's easy to pick out portions and say, "They don't do that right." But you have to

pay attention to the compromises that were necessary to move forward. There are provisions in the original U.S. Constitution we find objectionable today. Everyone says, "That's wrong." But were they worth it if otherwise we didn't get a country? I hope Texas lawyers will recognize other views in order to achieve much-needed changes.

*Thomas H. Watkins is a partner in Brown McCarroll, L.L.P. in Austin. A graduate of the University of Texas School of Law, he is a member of the American College of Trial Lawyers and the American Board of Trial Advocates. A frequent speaker at CLE seminars, Watkins has served on the Texas Commission for Lawyer Discipline and as chair of the Texas Board of Disciplinary Appeals.*



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 was 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 concludes at 5 p.m. on Feb. 17, 2011. This guide lists the six questions that appear on the ballot as well as an overview of key changes. For more information, visit [www.texasbar.com/rulesupdate](http://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](http://www.texasbar.com/rulesupdate).*



**STATE BAR of TEXAS**

**REFERENDUM 2011**

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

**Voting ends on Feb. 17 at 5 p.m.**