

# SUMMARY OF PROPOSED DISCIPLINARY RULE AMENDMENTS

WRITTEN BY BRAD JOHNSON

The Committee on Disciplinary Rules and Referenda is responsible for overseeing the initial process for proposing changes to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure.<sup>1</sup> For a proposed rule to be adopted under the process, it must be approved by the committee, the State Bar of Texas Board of Directors, State Bar membership, and the Texas Supreme Court.<sup>2</sup>

Since its inception in 2017, the nine-member committee has worked steadfastly to fulfill its statutory mandate. This resulted in the committee recommending, and the board of directors approving, eight separate rule proposals for a vote by bar membership. On September 29, 2020, the Supreme Court ordered that a membership vote on the Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure take place between February 2 and March 4, 2021.<sup>3</sup>

During its drafting of the eight rule proposals, the committee went to great lengths to solicit public feedback and encourage public participation. The committee held monthly public meetings, published each proposal for public comment in the *Texas Bar Journal* and the *Texas Register*, and held at least one public hearing on each proposal. The committee received hundreds of public comments and, in many cases, made revisions based on public feedback.

The committee consists of M. Lewis Kinard (chair), Timothy Belton, Amy Bresnen, Claude Ducloux, Justice Dennise Garcia, Rick Hagen, Vincent Johnson, W. Carl Jordan, and Karen Nicholson. Jane King previously served on the committee.

## Ballot Item A

### Scope and Objectives of Representation; Clients with Diminished Capacity

The proposal deletes Rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct and adds Proposed Rule 1.16, which is intended to provide improved guidance when a lawyer represents a client with diminished capacity.

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.<sup>4</sup> Additionally, Proposed Rule 1.16 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.”<sup>5</sup> 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.<sup>6</sup>

## Ballot Item B

### Confidentiality of Information—Exception to Permit Disclosure to Secure Legal Ethics Advice

Proposed Rule 1.05(c)(9) of the Texas Disciplinary Rules of Professional Conduct expressly provides that a lawyer may disclose confidential information “[t]o secure legal advice about the lawyer’s compliance with these Rules.”

## Ballot Item C

### Confidentiality of Information—Exception to Permit Disclosure to Prevent Client Death by Suicide

Proposed Rule 1.05(c)(10) of the Texas Disciplinary Rules of Professional Conduct permits a lawyer to disclose confidential information “[w]hen the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide.”

Currently, the Texas Disciplinary Rules of Professional Conduct do not include a provision expressly addressing the disclosure of confidential information with regard to a client contemplating suicide. While current provisions of Rule 1.05 address the permissive, and in some cases mandatory, disclosure of confidential information with regard to criminal or fraudulent acts by a client, attempted suicide is not a criminal act under the Texas Penal Code or the laws of many other states.<sup>7</sup> Attempted suicide is also not a fraudulent act.<sup>8</sup>

Proposed Rule 1.05(c)(10) is a permissive exception intended to protect a lawyer from professional discipline when the lawyer chooses to disclose confidential information based on a reasonable belief such action is necessary to prevent a client from dying by suicide. Proposed Rule 1.05(c)(10) does not require a lawyer to disclose confidential information.

The State Bar’s Ethics Helpline routinely receives calls from lawyers with questions about their professional obligations when representing a client contemplating suicide. Proposed Rule 1.05(c)(10) is intended to provide clarity on this subject.

## Ballot Item D

### Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services

To facilitate the provision of free legal services to those in need, Proposed Rule 6.05 of the Texas Disciplinary Rules of Professional Conduct creates narrow exceptions to

certain conflict of interest rules when a lawyer provides certain short-term, pro bono legal services. Proposed Rule 6.05 is based on Rule 6.5 of the American Bar Association, or ABA, Model Rules of Professional Conduct, which was adopted in 2002 in response to concerns that “a strict application of the conflict-of-interest rules” may deter lawyers from providing certain short-term, volunteer legal services.<sup>9</sup> Currently, 48 states, as well as the District of Columbia, have adopted either Model Rule 6.5 or a variation of Model Rule 6.5.

Paragraph (a) of Proposed Rule 6.05 provides that the conflict limitations of Texas Disciplinary Rules 1.06, 1.07, and 1.09 do not prohibit a lawyer from providing limited pro bono legal services unless the lawyer actually “knows, at the time the services are provided, that the lawyer would be prohibited by those limitations from providing the services.”

Paragraph (b) provides that certain conflicts will not be imputed to other lawyers in a firm with the lawyer providing limited pro bono legal services, so long as the lawyer adequately protects confidential information of the pro bono client from other lawyers in the firm.

Paragraph (c) addresses the eligibility information that an applicant is generally required to provide when applying for limited pro bono legal services.

Paragraph (d) provides that, for purposes of Proposed Rule 6.05, “‘limited pro bono legal services’ means legal services that are: (1) provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, or nonprofit legal services program; (2) short-term services such as legal advice or other brief assistance with pro se documents or transactions, provided either in person or by phone, hotline, internet, or video conferencing; and (3) provided without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter.”

Finally, paragraph (e) is intended to clarify that “[l]awyers are not deemed to be part of the same firm simply because they volunteer through the same [limited pro bono legal services program].”<sup>10</sup>

### **Ballot Item E Information About Legal Services (Lawyer Advertising and Solicitation)**

This comprehensive proposal amends Part VII of the Texas Disciplinary Rules of Professional Conduct by simplifying and modernizing lawyer advertising and solicitation rules. While not exhaustive, the following list summarizes many of its provisions.

The proposal:

- continues to prohibit “a false or misleading communication about the qualifications or services

of a lawyer or law firm.”<sup>11</sup>

- defines “advertisement” and “solicitation communication.”<sup>12</sup>
- permits a lawyer to practice law under a trade name that is not false or misleading.<sup>13</sup> (This is a change from the current blanket prohibition on the use of trade names by lawyers in private practice.<sup>14</sup> The proposed allowance for trade names that are not false or misleading is generally consistent with the rules of the vast majority of other states.)
- continues to require that an advertisement include the name of a lawyer responsible for its content.<sup>15</sup>
- simplifies disclaimer requirements.<sup>16</sup>
- continues to permit statements in advertising that a lawyer has been certified as possessing special competence only when the certification has been awarded by the Texas Board of Legal Specialization, or TBLS, or an organization accredited by TBLS, but allows other statements regarding fields of practice or specialization so long as they are not false or misleading.<sup>17</sup>
- continues to prohibit solicitation through in-person contact or through telephone, social media, or other electronic communications that are live or electronically interactive, with certain limited exceptions.<sup>18</sup> (Proposed Rule 7.03 expressly references “social media,” which is an update from current Rule 7.03.<sup>19</sup>)
- exempts communications directed to “another lawyer,” to “a person who has a family, close personal, or prior business or professional relationship with the lawyer,” or to “a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters” from certain solicitation restrictions.<sup>20</sup> (This expands current solicitation exemptions, which apply to a lawyer’s family members and past or present clients.<sup>21</sup>)
- exempts certain nominal gifts “that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services” from Proposed Rule 7.03’s prohibition on giving anything of value to a person not licensed to practice law who solicits or refers prospective clients.<sup>22</sup>
- permits certain non-exclusive reciprocal referral agreements not otherwise prohibited by the rules.<sup>23</sup>
- expands exemptions to filing requirements.<sup>24</sup>
- adds a broad exemption to filing requirements for “a communication in social media or other media, which does not expressly offer legal services, and that: (1) is primarily informational, educational, political, or artistic in nature, or made for entertainment

purposes; or (2) consists primarily of the type of information commonly found on the professional resumes of lawyers.”<sup>25</sup>

- maintains the general provisions of Rule 7.06 regarding prohibited employment, with updates to internal references.

### Ballot Item F

#### Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline

This proposal amends Rule 8.03(f) of the Texas Disciplinary Rules of Professional Conduct and Rules 1.06(CC)(2) and 9.01 of the Texas Rules of Disciplinary Procedure by extending existing self-reporting and reciprocal-discipline provisions to cover certain professional discipline by a federal court or federal agency. The proposal specifically defines “discipline by a federal court or federal agency” as meaning a public reprimand, suspension, or disbarment.<sup>26</sup> The proposal clarifies that the term does not include “a letter of ‘warning’ or ‘admonishment’ or a similar advisory by a federal court or federal agency.”<sup>27</sup> The provisions also do not apply to mere procedural disqualification in a particular case.

### Ballot Item G

#### Assignment of Judges in Disciplinary Complaints and Related Provisions

This proposal amends Rules 3.01, 3.02, and 3.03 of the Texas Rules of Disciplinary Procedure by providing greater flexibility in the assignment of judges when a respondent in a disciplinary complaint elects to proceed in district court. The proposal also clarifies and updates various procedures involved, including to resolve inconsistencies between current Rule 3.02 and other statutes and rules.<sup>28</sup>

The proposal transfers judicial assignment duties from the Texas Supreme Court to the presiding judges of the administrative judicial regions and relaxes geographic restrictions on judicial assignments in disciplinary complaints. The proposal is intended to address the significant travel burdens a judge may face when assigned under the current framework, along with the potential accompanying disruptions to the judge’s regular docket.

### Ballot Item H

#### Voluntary Appointment of Custodian Attorney for Cessation of Practice

Currently, Rule 13.03 of the Texas Rules of Disciplinary Procedure allows a court to assume jurisdiction of an attorney’s law practice and to appoint a custodian attorney to assist with the cessation of practice. Current Rule 13.03 also limits the custodian attorney’s liability except for intentional misconduct or gross negligence.

To protect client interests through cessation planning and limit the burden on courts, Proposed Rule 13.04 authorizes a lawyer to voluntarily designate a custodian attorney to assist with the designating attorney’s cessation of practice without court involvement. As with current Rule 13.03, Proposed Rule 13.04 limits the custodian attorney’s liability except for intentional misconduct or gross negligence. Proposed Rule 13.04 provides that the limitation of liability “shall not apply to any legal representation taken over by the custodian attorney.”

*This article includes a general summary of the Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure. It does not address every aspect of the proposed amendments, and reasonable minds may differ on the characterization of the proposed amendments. Readers are strongly encouraged to directly review the proposed amendments, which are available in this issue of the Texas Bar Journal and at [texasbar.com/rulesvote](http://texasbar.com/rulesvote). Proposed interpretive comments are provided for reference but are not voted on by bar membership.*

### NOTES

1. See Tex. Gov’t Code § 81.0873.
2. *Id.* § 81.08792.
3. Supreme Court of Texas Order of Approval of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure, Misc. Docket No. 20-9114 (Sept. 29, 2020).
4. Proposed Rule 1.16(a), Texas Disciplinary Rules of Professional Conduct (TDRPC).
5. Proposed Rule 1.16(b), TDRPC.
6. See Proposed Rule 1.16(b) and (c), TDRPC.
7. See current Rule 1.05(c)(4), (c)(7), (c)(8), (e), and (f), TDRPC.
8. See Terminology, TDRPC.
9. ABA Ethics 2000 Commission, Model Rule 6.5: Reporter’s Explanation of Changes (2002), available at [https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule65rem/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule65rem/) (last visited Oct. 15, 2020).
10. Paragraph 14, Proposed Comment to Proposed Rule 6.05, TDRPC.
11. Proposed Rule 7.01(a), TDRPC; see also current Rule 7.02(a), TDRPC.
12. Proposed Rule 7.01(b), TDRPC.
13. Proposed Rule 7.01(c), TDRPC.
14. See current Rule 7.01(a), TDRPC.
15. See Proposed Rule 7.02(a), TDRPC; see also current Rule 7.04(b), TDRPC.
16. Compare Proposed Rules 7.01, 7.02, and 7.03, TDRPC, with current Rules 7.01, 7.02, 7.04, and 7.05, TDRPC.
17. Compare Proposed Rule 7.02(b), TDRPC, with current Rules 7.02(c) and 7.04(a) and (b), TDRPC.
18. See Proposed Rule 7.03(a) and (b), TDRPC; see also current Rule 7.03(a) and (f), TDRPC.
19. Proposed Rule 7.03(a), TDRPC; see also current Rule 7.03(a) and (f), TDRPC.
20. Proposed Rule 7.03(b) and (d), TDRPC.
21. See current Rules 7.03(a) and 7.05(f), TDRPC.
22. Proposed Rule 7.03(e), TDRPC.
23. See Proposed Rule 7.03(e)(2), TDRPC.
24. Compare Proposed Rule 7.05, TDRPC, with current Rule 7.07, TDRPC.
25. Proposed Rule 7.05(g), TDRPC.
26. Proposed Rule 8.03(f), TDRPC, and Proposed Rule 9.01, Texas Rules of Disciplinary Procedure (TRDP).
27. Proposed Rule 8.03(f), TDRPC, and Proposed Rule 9.01, TRDP.
28. For example, Proposed Rule 3.02 of the Texas Rules of Disciplinary Procedure: (1) corrects a current erroneous reference to “Administrative Judicial District” (Section 74.042(a) of the Government Code provides that “[t]he state is divided into 11 administrative judicial regions”); (2) resolves inconsistencies regarding objections to assigned active judges (which are not permitted under Sections 74.053(e) and 74.057 of the Government Code); and (3) brings new procedures regarding recusal and disqualification in line with the Texas Rules of Civil Procedure.



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