THE COMMITTEE EXPLAINS THE PROPOSED RULES

MEMBERS OF THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA WEIGH IN ON THE HISTORY, PROCESS, AND SUBSTANCE OF THE DISCIPLINARY RULE CHANGES UNDER CONSIDERATION.

THE RULEMAKING PROCESS HAS CHANGED. AND FOR GOOD REASON.

WRITTEN BY **AMY BRESNEN**

The Committee on Disciplinary Rules and Referenda, or CDRR, was created by the 85th Legislature as a centerpiece of the State Bar Sunset bill. The CDRR was intended to address inefficiencies and lack of timeliness and public input that plagued previous rulemakings. The CDRR is tasked with regularly reviewing the Disciplinary Rules of Professional Conduct and the Rules of Disciplinary Procedure, providing annual reports to the Texas Supreme Court and State Bar of Texas Board of Directors on the adequacy of the rules, and being the gatekeeper over the process of proposing and vetting disciplinary rules.[1]

In 2016, the Sunset Advisory Commission, evaluating the bar during its Sunset review process, made a startling recommendation: Scrap the referendum and leave rulemaking entirely to the Supreme Court.[2]

The recommendation cited past failures of the old process, notably the 2011 referendum where all proposed rules failed and the chaotic eight-year process preceding it. Under then-state Sen. Kirk Watson's leadership, the Legislature took its task seriously, crafting a solution that allows bar members to continue governing themselves by referendum. After considering input from stakeholders, the Legislature established a process that emphasizes transparency and efficiency and that promotes participation by the general public and bar membership.

Transparency

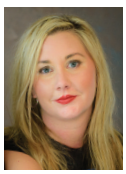
The Legislature intended the CDRR's operations to be fully transparent. This is why every CDRR monthly meeting is open to the public regardless of whether the committee is actually deliberating a rule. This was not only to enact good governance; it was a direct response to the previous rulemaking attempts that alienated many attorneys and the public at large. It's also why there is a statutorily mandated minimum 30-day *public* comment period while a proposed rule is being considered. For the advertising rules, the CDRR extended the initial comment period to three months. And, it's why the committee holds a public hearing on each proposed rule, and if the proposed rule is substantially changed during its deliberation, the committee will hold another public hearing on it. For example, given the substantial interest among the public and bar, and the extensive public comment, the CDRR held four public hearings on the advertising rules.

Efficiency

To facilitate efficiency in the rulemaking process, the Legislature made the CDRR a gatekeeper and coordinator for overseeing the process for proposing and vetting a disciplinary rule. The Legislature also ensured that public and bar input would be considered early in the process. For a proposed rule to advance, it must be published for public comment in the *Texas Register* and *Texas Bar Journal* within six months of initiation of the rule proposal process. Additionally, the committee is statutorily required to submit an annual review of the disciplinary rules to ensure the committee's work will be regular and ongoing, instead of having long periods of review and inactivity, while recognizing that there may be years when the committee determines the rules are adequate and doesn't propose any changes.

NOTES

1. Tex. S.B. 302, 85th Leg., R.S. (2017).
2. Sunset Advisory Commission: State Bar of Texas Staff Report (April 2016).



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THE PROPOSED RULES ON ADVERTISING AND SOLICITATION

STATE BAR OF TEXAS RULES VOTE, FEBRUARY 2 TO MARCH 4, 2021

WRITTEN BY **VINCENT R. JOHNSON**

Note: This article addresses the rule proposal appearing as ballot item E.

The proposed rules dealing with lawyer advertising and solicitation seek to clarify, simplify, and modernize this area of the law, while nevertheless continuing to endorse principles and practices that have proved to be sound. Here are some of the high points.

Proposed Rule 7.01: Communications Concerning a Lawyer's Services

Front and center, this provision states the basic rule that is the cornerstone in this area of the law: namely, a lawyer shall not make a false or misleading statement about legal services. This rule, which is rooted in constitutional jurisprudence, applies to all communications offering legal representation.

The proposed provision then defines what constitutes an "advertisement" or a "solicitation communication." These definitions are structurally important because certain rules laid down in subsequent sections apply only to advertisements or solicitation communications.

In general, an advertisement is a communication directed to the public at large, whereas a solicitation communication is directed to a specific person. However, as defined by this rule, a communication falls into neither category unless it is "substantially motivated by pecuniary gain." This means that lawyers promoting various forms of nonprofit legal services, such as legal aid for the poor, do not need to worry about complying with the disclosure and filing requirements that are applicable to advertisements and solicitation communications. (Of course, they must still comply with the ban on false or misleading statements.)

Because statements that are truthful and not misleading are constitutionally protected, this rule abandons the traditional prohibition against the use of trade names. Unless it is false or misleading, use of a trade name is permitted. A large majority of jurisdictions now permit the use of trade names.

Proposed Rule 7.02: Advertisements

The requirements of this rule dealing with advertisements will feel familiar because they are rooted in earlier law. An advertisement:

- must identify a lawyer responsible for its content (and the lawyer's primary practice location);
- may disclose that the lawyer has been certified or designated as possessing special competence, including by the Texas Board of Legal Specialization, if certain requirements are met; and
- must disclose whether a client who is represented on a contingent fee basis will be obligated to pay for other expenses, such as costs of litigation.

The rule also addresses how long a lawyer must conform to a specific fee or range of fees promoted in an advertisement.

Proposed Rule 7.03: Solicitation and Other Prohibited Communications

This rule carries forward traditional prohibitions against in-person solicitation. However, the rule now makes clear that the anti-solicitation ban applies not only to in-person contact, but also to "telephone, social media, or electronic communication initiated by a lawyer, or by a person acting on behalf of a lawyer, that involves communication in a live or electronically interactive manner."

For the first time in Texas, this rule expressly indicates that it *does not* prophylactically ban all solicitation communications with "a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters." In such situations there is little risk of abuse. However, the rule continues to prohibit any communication that involves "coercion, duress, overreaching, intimidation, or undue influence."

A solicitation communication must not be "misleadingly designed to resemble a legal pleading or other legal document" and, with limited exceptions, must be "plainly marked" ADVERTISEMENT.

This provision continues the traditional rule that a lawyer may not pay or give anything of value to a person not licensed to practice law for soliciting or referring prospective clients, except that now "nominal gifts given as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services" are permitted.

In addition, reciprocal referral agreements with another lawyer or nonlawyer professional are now allowed provided "(i) the … agreement is not exclusive; (ii) clients are informed of the existence and nature of the agreement; and (iii) the lawyer exercises independent professional judgment in making referrals."

The rule continues the prohibition against paying or giving anything of value to a prospective client (other than certain litigation expenses and other financial assistance permitted by the rules), except that now "ordinary social hospitality of nominal value" will be permitted.

Proposed Rule 7.04: Filing Requirements for Advertisements and Solicitation Communications

This rule continues the filing requirements for certain advertisements and solicitation communications. It also continues to allow lawyers to seek preapproval of advertisements and solicitation communications.

Proposed Rule 7.05: Communications Exempt from Filing Requirements

This rule greatly expands the number of situations in which advertisements or solicitation communications are exempt from the filing requirements of Rule 7.04. In particular, "(a) any communication of a bona fide nonprofit legal aid

organization that is used to educate members of the public about the law or to promote the availability of free or reduced-fee legal services" is exempt.

In addition, "information and links posted on a law firm website, except the contents of the website homepage" are exempt.

Professional newsletters are exempt if they are sent to "(1) existing or former clients; (2) other lawyers or professionals; (3) persons known by the lawyer to be experienced users of the type of legal services involved for business matters; (4) members of a nonprofit organization which has requested that members receive the newsletter; or (5) persons who have asked to receive the newsletter."

There is also an exemption from filing 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."

There are other exemptions that reduce the burdens of filing.

Proposed Rule 7.06: Prohibited Employment

This rule states when violation of various rules dealing with communications about legal services, or general principles of misconduct, result in personal disqualification, imputed disqualification of other lawyers in a firm, or restrictions on referral-related payments.

Voting in favor of this part of the referendum will reduce the uncertainties that too often surround speech about legal services in the digital age, while at the same time continuing to protect potential clients from the harm that may be caused by false and misleading statements or overreaching practices.

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LIMITED PRO BONO LEGAL SERVICES: THE CASE FOR PROPOSED RULE 6.05

WRITTEN BY **M. LEWIS KINARD**

Note: This article addresses the rule proposal appearing as ballot item D.

The need for Proposed Rule 6.05 in Texas became clear after Hurricane Ike in 2008. In the weeks after the rains stopped, I helped orient and encourage dozens of lawyers who wanted to help people handle the critical, unexpected legal complications of surviving a huge natural disaster. Working with the Houston Bar Association, lawyers from Lone Star Legal Aid went over topics such as completing Federal Emergency Management Agency forms, alternative ways to prove ownership and identification, emergency food stamp and Medicare options, and who is responsible for removing a neighbor's fence or house from one's own yard.

It was great to see so many lawyers eager to go to the disaster relief centers where families poured in seeking help putting their lives back together. But when the disaster legal aid desks were set up, very few of those trainees appeared.

The same thing happened after Hurricane Harvey in 2017 and even the wildfire season of 2011. Most of the disaster legal aid work was handled by professional legal aid attorneys, a few volunteers provided through the American Bar Association, and standing pro bono programs in large counties.

What happened? When asked, those who gave an answer generally pointed to one thing: the fear of imputed conflicts of interest under Disciplinary Rules 1.06, 1.07, and 1.09. Many firms discouraged or restricted their associates from going out to remote help centers because there were few options and no time to complete conflicts checks before assisting each disaster victim. A well-meaning attorney might provide advice adverse to a lucrative present or future client of the firm, even if only represented by a distant office.

In response to stories like this around the country, the American Bar Association's Ethics 2000 Commission added Model Rule 6.5 in 2002. Every state except Texas and one other has adopted the rule or a version of it. We need this rule. More accurately, *Texans* need the bar to approve this rule.

Conflict of interest rules are important protections for clients—present, former, and future. But the drafters didn't contemplate situations where lawyers do not know all their firm's clients or, in an effort to address urgent, simple legal questions, might unknowingly cause significant economic consequences to the other lawyers in their firms as well as their other clients.

Rather than modify all rules with imputed conflict provisions, this new rule carves a very narrow exception in a way that strikes a balance between protecting the client's interests and keeping prohibitions against a firm representing a party adverse to another client.

The proposed rule describes when it applies (very limited help in a short period of time, such as a help desk), what a lawyer must do to earn and keep the exemption (avoid known conflicts and not share confidential client information with other firm lawyers, e.g.) and requires the services to be run by a court, bar association, law school, or nonprofit legal services program (for accountability).

The exception is narrow. The benefit to the public will be broad.

M. LEWIS KINARD
is executive vice president, general counsel, and assistant corporate secretary at the American Heart Association. He spent six years on the State Bar of Texas Committee on Texas Disciplinary Rules of Professional Conduct until it was disbanded in 2018. With over 30 years of legal and business experience, Kinard is serving as the first chairperson of the Committee on Disciplinary Rules and Referenda.

A PRACTICING LAWYER'S GUIDE TO THE PROPOSALS

WRITTEN BY **CLAUDE DUCLOUX**

Note: This article addresses the rule proposals appearing as ballot items A, B, C, F, G, and H.

Ballot Item A: Scope and Objectives of Representation; Clients with Diminished Capacity

As our population ages, and many people work longer than they anticipated, the danger of encountering clients with decreased mental facility is increasing. Lawyers need a rule like this, equipping and guiding us with additional tools for handling situations that put the client or the client's estate at risk. The proposal deletes Rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct and adds Proposed Rule 1.16. Among its provisions, Proposed Rule 1.16 permits a lawyer to take appropriate protective action when the lawyer reasonably believes that a client has diminished capacity; is at risk of substantial physical, financial, or other harm unless action is taken; and cannot adequately act in the client's own interest. Proposed Rule 1.16 provides a non-exhaustive list of actions a lawyer may be authorized to take, including informal consultations that may be prohibited under the current rules.

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 specifically clarifies that a lawyer is permitted to disclose confidential information to secure legal advice about the lawyer's compliance with the Texas Disciplinary Rules of Professional Conduct. The purpose of this rule change is primarily to confirm that lawyers may consult ethics counsel and disclose confidential information to the extent necessary to obtain appropriate advice.

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 when the lawyer has reason to believe it is necessary to do so to prevent a client from dying by suicide.

In these days of mounting mental health issues, this is an important exception that may save lives. Most importantly, as lawyers are not trained as mental health professionals, there is no requirement that a lawyer act on this rule. If he or she chooses not to do so, that decision cannot be held against the lawyer under this provision. This is permissive—not mandatory.

Ballot Item F: Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline

Many lawyers are not aware that several wide areas of federal practice, such as patent law and immigration law, operate their own grievance systems. This rule requires that a Texas lawyer who has been disciplined in one of these non-state systems owes the same duty to report that discipline as is owed when disciplined by a state system. This proposal amends Rule 8.03 of the Texas Disciplinary Rules of Professional Conduct and Rules 1.06 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 limits "'discipline' by a federal court or federal agency" to mean a public reprimand, suspension, or disbarment. The proposal clarifies that minor infractions, such as failure to timely pay annual fees or bar dues, or letters of admonishment or warning, or disqualification as counsel, are certainly *not* reportable acts.

Ballot Item G: Assignment of Judges in Disciplinary Complaints and Related Provisions

When a lawyer accused of misconduct is notified of the finding of "just cause" by the Office of Chief Disciplinary Counsel, he or she may choose within 20 days to have the matter heard in district court. Under the current rules, the Supreme Court assigns a district judge from a different judicial region to hear the case. These proposed rule changes simplify the assignment of such judges by: 1) transferring judicial assignment duties from the Texas Supreme Court to the presiding judges of the administrative judicial regions when a respondent in a disciplinary complaint elects to proceed in district court; 2) relaxing geographic restrictions on judicial assignments in disciplinary complaints; and 3) clarifying and updating various procedures involved in the assignment of judges in disciplinary complaints.

Ballot Item H: Voluntary Appointment of Custodian Attorney for Cessation of Practice

Proposed Rule 13.04 of the Texas Rules of Disciplinary Procedure authorizes a lawyer to voluntarily designate a custodian attorney to assist with the designating attorney's cessation of practice and provides limited liability protection for the custodian attorney. For many years, the Rules of Disciplinary Procedure have included so-called emergency provisions in Rules 13.01, 13.02, and 13.03 for a district court to appoint one or more custodians (similar to what we'd call a "conservator") to assume jurisdiction over an attorney's practice when that attorney is unable (for a number of reasons outlined in Rule 13.02) to continue the practice. The benefit of that custodianship is that the appointee(s) are protected from claims except for "intentional misconduct or gross negligence." It's a very good and useful tool. So, why not give lawyers an additional voluntary option to create those custodianships and save on court time and costs? That's what this new rule does: allows a simplified voluntary procedure to appoint a custodian to help wind up the practice of a lawyer who has ceased practicing and affords those custodians the same protections for undertaking those tasks. **TBJ**

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