STATE BAR of TEXAS

RULES VOTE

FEBRUARY 2 - MARCH 4 **2021**

STATEMENTS ON THE PROPOSED AMENDMENTS TO THE DISCIPLINARY RULES OF PROFESSIONAL CONDUCT AND THE TEXAS RULES OF DISCIPLINARY PROCEDURE

The Texas Bar Journal *asked a few State Bar members their opinion on the 2021 Rules Vote. Below are their responses.*

BALLOT ITEM A

SCOPE AND OBJECTIVES OF REPRESENTATION; CLIENTS WITH DIMINISHED CAPACITY

Disability Rights Texas Legal Director Richard LaVallo, *Austin*

Proposed Rule 1.16 eviscerates the essential component of trust in the attorney-client relationship by allowing an attorney to disclose confidential information when he or she perceives a client to have diminished capacity "for whatever reason" and when the attorney believes it is "reasonably necessary to protect the client's interests." I am concerned about the impact this will have on clients who are already disempowered due to their disabilities and trust their attorney to be their advocate, not their protector. One can imagine how it may be misused with other clients perceived to have diminished capacity, including those who are survivors of trauma. This rule should begin and end with subsection (a) that requires a lawyer to "maintain a normal client-lawyer relationship with the client." Rule 1.05(c) already provides adequate guidance for several circumstances when a lawyer may disclose otherwise confidential information. Those exceptions include when authorized by law, for instance reporting statutes. Even though Proposed Rule 1.16 is based on American Bar Association Model Rule 1.14, it deletes the safeguards in ABA Model Rule 1.6(a), which limit when an attorney can disclose confidential information. Comment 5 also permits an attorney to take protective action based on "the client's best interests" in spite of the actual wishes of the client or requiring the zealous advocacy for a client's constitutional rights and the adversarial process when required to defend the rights of clients with diminished capacity. Fundamentally, this rule creates a substituted judgment and best interest standard when representing clients thought to have diminished capacity.

Steve Waldman, *Houston*

Existing Rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct is both restrictive and obligatory, and it thus fails to solve many problems facing a lawyer with a client suffering from diminished capacity. By requiring the lawyer to seek court intervention, the associated expense, delay, and disruption may discourage a lawyer from responding to a client's diminished capacity. Further, the lawyer is given no guidance, and no ethical coverage, if he or she takes timely action other than court intervention to protect an impaired client, including defusing potentially dangerous situations.

New Rule 1.16 provides broader, more substantive, and more helpful guidance to attorneys.

Paragraph (a) instructs the lawyer to "maintain a normal client-lawyer relationship" with the client, "as far as reasonably possible," an objective that is attainable and client-centered.

Paragraph (b) sets out criteria for acting that are concrete, tied to "physical, financial, or other harm," but the lawyer's conduct is based on a reasonable standard. The rule provides a non-exclusive list of options, including "consulting with individuals or entities" to "take action to protect the client," and, seeking court action where appropriate. The rule and its comments advise the lawyer to consider the totality of the circumstances and then take appropriate action, considering the scope and severity of incapacity and the degree of threatened harm.

Finally, paragraph (c) gives the lawyer ethical cover for making disclosures necessary to protect the client's interests.

Rule 1.16 and its comments provide a lawyer with guidelines for addressing the client with diminished capacity, one of the most difficult problems a lawyer encounters.

BALLOT ITEM B

CONFIDENTIALITY OF INFORMATION—EXCEPTION TO PERMIT DISCLOSURE TO SECURE LEGAL ETHICS ADVICE

Gaines West, *College Station*

As part of the 2021 referendum, the Committee on Disciplinary Rules and Referenda seeks to add Rule 1.05(c)(9) to the Texas Disciplinary Rules of Professional Conduct, or TDRPC. Generally speaking, Rule 1.05 governs what a lawyer may disclose when representing a client during the lawyer-client relationship. A fundamental principle of that relationship is that the lawyer may not reveal confidential information without the client's informed consent. This recommended proposed permissive disclosure exception is nearly identical to the one provided in American Bar Association Model Rule 1.6.

Notably, the proposed addition to the Texas rules allows a lawyer to secure confidential advice about compliance with the TDRPC. In most cases, disclosing information necessary to carry out the lawyer's representation of the client is impliedly authorized by the TDRPC. If passed in the 2021 referendum, this rule change would expressly authorize a lawyer to get advice about complying with ethical rules without first seeking the client's consent.

Lawyers have too often stood at the crossroad of having to decide whether to seek help to ethically guide their representation of a client. This change will bring needed clarity and have the added benefit of encouraging ethical representation.

BALLOT ITEM C

CONFIDENTIALITY OF INFORMATION—EXCEPTION TO PERMIT DISCLOSURE TO PREVENT CLIENT DEATH BY SUICIDE

Skip Simpson, *Frisco*

It may be one of the most dangerous situations—a client who is considering killing himself or herself. Should the lawyer reach out for assistance to prevent a suicide attempt? The answer is yes—and the lawyer needs a confidentiality of information exception to permit disclosure to prevent client death by suicide.

Lawyers may be confronted with clients who are so despondent about their circumstances that they state they are considering "leaving this earth," "just disappearing," or something else that worries the lawyer.

In those cases it is appropriate to ask the client, "Are you suicidal?"

Once the lawyer has started screening for suicidal thinking, the lawyer cannot be hampered by the notion of confidentiality. Even for mental health specialists, where there are concerns that the patient may be at risk for suicide, confidentiality is trumped by the need to save a life. Information from family, for instance, may be lifesaving; at such times, confidentiality must be broken.

The U.S. surgeon general and the National Action Alliance for Suicide Prevention issued the National Strategy for Suicide Prevention.[1] Goal 7 of the report includes lawyers as professionals whose work brings them into contact with clients with suicide risk. The goal is to train lawyers on how to address suicidal ideations and on how to respond to those affected.

Part of responding to clients affected by suicidal thinking is reaching out for assistance.

Richard Wilson, *Houston*

We should reject the proposed change to Texas Disciplinary Rules of Professional Conduct Rule 1.05. If one looks at other reasons for disclosing confidential information, they concern areas where lawyers have the education and training to recognize when disclosure is appropriate. In contrast to the other exceptions, Proposed Rule 1.05(c)(10) permits lawyers to make untrained judgments about a client's mental state with no real guidance. What is a reasonable belief? How are lawyers, as a profession, trained to make that judgment? What if the lawyer's reasonable belief is wrong and the client is stigmatized by the disclosure? And to whom should this reasonable belief be reported? The proposed rule change offers no guidance.

What if a client explains to his or her lawyer he or she has been diagnosed with a terminal illness and the next 18 months will involve pain that is both physical for the client and emotional for the client and his or her spouse before the client passes. The client seeks legal advice on the following questions: (1) What states permit physician-assisted death and (2) does their life insurance policy pay benefits in the event of such an act? Must the lawyer report the client and override an arguably rational decision for which the client has sought legal advice?

Changing the disciplinary rules will not solve this societal problem. Clients have their families, doctors, psychologists, religious organizations, and professionals trained to help them. This change in the disciplinary rules, while it appears well-intentioned, will do more harm than good.

NOTES

1. U.S. Surgeon General and National Action Alliance for Suicide Prevention, *2012 National Strategy for Suicide Prevention: Goals and Objectives for Action,* U.S. Department of Health & Human Services (Sept. 2012).

BALLOT ITEM D

CONFLICT OF INTEREST EXCEPTIONS FOR NONPROFIT AND LIMITED PRO BONO LEGAL SERVICES

State Bar of Texas Pro Bono Workgroup Co-Chairs
Terry Tottenham, *Austin*, and Roland Johnson, *Fort Worth*

The Pro Bono Workgroup was formed in 2013 with the mission of enhancing the culture of pro bono service in Texas. Proposed Rule 6.05 addresses conflicts of interest during the provision of limited pro bono legal services at pro bono clinics or similar limited settings. Its adoption is a priority for our workgroup because it will

enable more lawyers to provide pro bono legal services to low-income Texans.

Proposed Rule 6.05 would allow volunteer lawyers to provide limited advice and brief assistance at pro bono legal advice clinics without worry that they may unknowingly encounter conflicts of interest or that participation in these events will impute conflicts to other lawyers in the firm and prevent the firm from accepting paying clients. If a lawyer decides to provide extended services or full representation, the general conflict rules apply. Collecting eligibility information like income and demographic information will also not in itself create a conflict.

We urge you to vote to adopt Proposed Rule 6.05 because it strikes an appropriate balance between the needs and concerns of lawyers and legal entities, the needs and concerns of the public, and our mandate as Texas attorneys to promote access to justice pursuant to the Disciplinary Rules of Professional Conduct and the Texas Lawyer's Creed.

BALLOT ITEM E

INFORMATION ABOUT LEGAL SERVICES (LAWYER ADVERTISING AND SOLICITATION)

Michael C. Sanders, *Houston*

Texas attorneys should reject the usage of trade names and vote against Ballot Item E. Revised Texas Disciplinary Rules of Professional Conduct Rule 7.01(c) taints the rest of Ballot Item E by allowing attorneys to practice under a trade name. Although most of the changes proposed in Item E are stylistic or are not controversial, the language allowing the use of trade names requires a vote against this ballot item.

Attorneys should not practice under a trade name. Approving the use of gimmicky trade names would cheapen the profession for lawyers who already struggle against negative stereotypes. An attorney should not be chosen based upon who came up with the catchiest name and registered it first. Allowing for trade names was a late addition to the proposed amendments, indicating its lack of support.

Prohibiting misleading trade names provides no comfort. Rule 7.01(a) already prohibits trade names, yet Texas attorneys openly use them anyway. One attorney I encountered used a trade name indicating a level of competence the attorney clearly did not have. If the bar does not stop the open use of trade names now, it will not police misleading trade names later.

The trade name rule should have been proposed separately. Other than the trade name rule and uncontroversial changes to the filing requirements for attorney advertising, the proposed amendments consist of current language with stylistic and organizational changes. Texas attorneys should tell the drafting committee to resubmit the uncontroversial portions of the amendments separate from the trade name rule. A vote against Ballot Item E will send that message.

Zach Wolfe, *Houston*

The proposed revisions to Part VII of the Texas Disciplinary Rules of Professional Conduct, which contains Rules 7.01-7.07 governing lawyer advertising and solicitation, are a welcome change.

Full disclosure: I submitted a detailed public comment about these changes, and the Committee on Disciplinary Rules and Referenda graciously took into account some of my suggestions.

The change that will get the attention is allowing law firms to use trade names. But the other changes would be a significant improvement, making it easier for Texas lawyers to use social media without violating rules on lawyer advertising.

Here are the best of the proposed changes:

One general "false and misleading" rule would replace the previous confusing "per se" rules. This would avoid the need for the current clarifying Interpretive Comment 26.

An exemption for content that "is primarily informational, educational, political, or artistic in nature, or made for entertainment purposes." This would codify and expand the State Bar's current Interpretive Comment 17.

An exemption for "the type of information commonly found on the professional resumes of lawyers." Are Texas lawyers who fail to file their LinkedIn profiles technically violating the current rules? This change would help avoid that problem.

You can say you "specialize"—if that's true—without being board-certified. Texas lawyers can get around the current rule by using a different word than "specialize."

You will not be allowed to claim you can achieve results through the unlawful use of violence. Who knew this was necessary? Only in Texas.

BALLOT ITEM F

REPORTING PROFESSIONAL MISCONDUCT AND RECIPROCAL DISCIPLINE FOR FEDERAL COURT OR FEDERAL AGENCY DISCIPLINE

Jessica Lewis, *Dallas*

While the final proposed changes to Texas Disciplinary Rules of Professional Conduct 8.03, 1.06, and 9.01 do not suffer from the broadness and vagueness that plagued an earlier version, they permit ambiguity by using "public reprimand" as a reporting trigger without further clarification. "Public reprimand" is listed as a type of "Sanction" in the Texas Rules of Disciplinary Procedure, but neither those rules nor the Texas Disciplinary Rules of Professional Conduct define the term. While a technical legal definition of the term can be tracked down from external sources, should we not instead seek to make the meaning of such rules—drafted by lawyers for application to lawyers of all experience levels and practice areas—readily transparent? I argue that we should and that these changes do not satisfy that purpose. The plain-language

meaning of public reprimand includes statements a court or agency may not intend as formal discipline but that become "discipline" by the inclusion of the term in its definition. The assumption of there being an order or judgment could be seen as a cure to the ambiguity (i.e., to exclude mere comments in an opinion, etc.), but Rule 8.03 provides no clear requirement for or description of the type of order or judgment referenced. Even excluding warning letters and the like, an attorney receiving an informal-but-public censure not intended as a formal disciplinary action may be left uncertain as to whether reporting is appropriate. Accordingly, while not fatally flawed, these proposed changes could have benefited from further explanation.

BALLOT ITEM G

ASSIGNMENT OF JUDGES IN DISCIPLINARY COMPLAINTS AND RELATED PROVISIONS

Tracy Christopher, *Houston*

A lawyer can elect to have his or her disciplinary complaint heard in district court. In the last bar year, that happened 30 times. So, we are changing three rules for 30 cases a year.

Currently, the Texas Supreme Court appoints a district judge who does not reside in your administrative judicial district for your case. If you are a Harris County lawyer, the Supreme Court can assign any district judge who presides outside of the 11th Administrative Judicial District. The Supreme Court has 394 district judges to pick from. Odds are the Supreme Court will assign a judge that you have not practiced in front of.

Under the proposed revisions, the presiding judge of the administrative judicial district will make the assignment to a judge "whose district does not include the county of appropriate venue." So, if you are a Harris County lawyer, the presiding judge has 23 judges to pick from (from Brazoria, Fort Bend, Galveston, Matagorda, and Wharton). This will disproportionately burden the smaller county judges with assignments. If you reside in a smaller county, odds are that you will get one of the Harris County judges assigned to your case.

Because the lawyer makes the election, a lawyer needs to understand where the assigned judge will come from. Perhaps you think this will favor you or perhaps not. As a trial judge who presided over these cases, I would prefer not to know the lawyer. There is a reason that we try to have jurors who do not know the parties—shouldn't it be the same for your judge?

Chief Justice Christopher's comments are her own and do not reflect the view of the 14th Court of Appeals in Houston.

BALLOT ITEM H

VOLUNTARY APPOINTMENT OF CUSTODIAN ATTORNEY FOR CESSATION OF PRACTICE

Greg Sampson, *Dallas*

The alarming increase in law practice cessations is exceeding the availability of custodians courts can appoint under current rules. While a valuable solution when it can be timely pursued, in too many cases custodian appointments are too late, funds are insufficient, qualified custodians cannot be found, and clients are unable to transition to new counsel before harm is done. There is also concern that many practices are being informally ushered through closure by well-meaning but unauthorized lawyer friends and non-lawyer family members who may unintentionally violate confidentiality and other professional responsibility rules.

As an alternative custodianship procedure, Proposed Rule 13.04 of the Texas Rules of Disciplinary Procedure would solve many of these problems. Importantly, the lawyer handpicks the best lawyer to serve as custodian in advance through the State Bar's online portal. Upon receiving notice of a cessation, the State Bar may immediately initiate the custodianship by contacting the appointed custodian who can investigate the need for custodianship and begin the process without the need for court appointment or supervision. Then, operating with client consent and pursuant to a custodian agreement with the appointing attorney, this informed custodian can proceed efficiently to wind down the practice and transfer client files to successor counsel, mitigating harm to the clients. Since this process involves advanced client consent and each custodian remains bound by applicable professional responsibility rules during custodianship, this rule protects the public. Limited liability for custodians under this proposed rule will also encourage more lawyers to serve and should result in far fewer cessations without authorized custodians. **TBJ**

Note: *For more information, voters are strongly encouraged to directly review the proposed amendments, which are available at* ***texasbar.com/rulesvote****. Opinions expressed on the Texas Bar Blog and in the Texas Bar Journal are solely those of the authors. Have an opinion to share? Email us your letters to the editor or articles for consideration at tbj@texasbar.com. View our submission guidelines at texasbar.com/submissions.*