

MEETING OF THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

June 18, 2020
By Teleconference

MINUTES

Members Present: Chair M. Lewis Kinard; Timothy Belton; Amy Bresnen; Claude Ducloux; Hon. Dennise Garcia; Rick Hagen; Dean Vincent Johnson; W. Carl Jordan; Karen Nicholson.

State Bar of Texas Staff Present: Ray Cantu, Deputy Executive Director; Brad Johnson, Disciplinary Rules and Referenda Attorney; Cory Squires, Staff Liaison; Dean Schaffer, Succession Planning Program Administrator.

A. CALL TO ORDER; ROLL CALL

Mr. Kinard called the meeting to order at 10:32 a.m. Mr. Squires called the roll and a quorum was present.

B. COMMENTS FROM THE CHAIR

Mr. Kinard welcomed attendees and noted that this was the second public-hearing meeting via Zoom. Mr. Kinard explained the procedures for the public hearings.

C. PUBLIC HEARING ON PROPOSED RULE 13.05, TEXAS RULES OF DISCIPLINARY PROCEDURE (TRDP) – RELATING TO THE VOLUNTARY APPOINTMENT OF A CUSTODIAN ATTORNEY TO ACT DURING A DISABILITY

Mr. Kinard called to order the public hearing on proposed Rule 13.05, TRDP, relating to the voluntary appointment of a custodian attorney to act during the disability of another attorney. Brad Johnson explained that Laura Gibson (Immediate Past Chair of the State Bar Board of Directors), Greg Sampson, and Dean Schaffer each signed up to address the Committee. Mr. Sampson addressed the Committee, including on a suggested redraft of proposed Rule 13.05 to address the termination of a custodianship, which he recently submitted to the Committee. Mr. Kinard and Mr. Ducloux responded with comments. Ms. Gibson next addressed the Committee on the subject, including on the suggested redraft of proposed Rule 13.05. Mr. Kinard asked whether the suggested redraft was intended as a substitute for the version of proposed Rule 13.05 that was published by the Committee and Ms. Gibson confirmed that was correct. Mr. Kinard asked Brad Johnson whether the suggested substitution was posted on the Committee's website. Mr. Johnson confirmed that it was included in the meeting materials posted on the Committee website. Mr. Kinard noted that those listening to the meeting could access it at the Committee's website, texasbar.com/cdrr. Mr. Schaffer next addressed the Committee and provided an overview of the State Bar's Succession Planning Program. Mr. Ducloux responded with comments. Mr. Sampson responded with comments. Mr. Ducloux, Mr. Sampson, and Mr. Schaffer further discussed cessations of practice. Mr. Kinard responded with comments. No other members of the public indicated they wanted to address the Committee during the public hearing. Mr. Sampson addressed the Committee regarding the Bar's custodian designation efforts, as well as on cessation of practice rules. Mr. Sampson inquired about

whether the suggested redraft of proposed Rule 13.05 would need to be published for public comment or could be handled as a revision to the current proposal. Mr. Kinard responded that the Committee would have to determine how to approach the complete substitution offered while there is already a rule proposal in process. Mr. Kinard explained that this was more than a new sentence or phrase and would probably require publication and an opportunity for the public to comment, but that it was not something the Committee had decided yet. Mr. Ducloux expressed his appreciation to Ms. Gibson and Mr. Sampson for the ability to designate a custodian attorney online and encouraged others to utilize the resource. With no one else indicating a desire to speak, Mr. Kinard announced the closing of the public hearing.

D. PUBLIC HEARING ON PROPOSED CHANGES TO RULE 1.05, TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT (TDRPC) – RELATING TO THE DISCLOSURE OF CONFIDENTIAL INFORMATION AND CLIENTS CONTEMPLATING SUICIDE

Mr. Kinard called to order the public hearing on proposed changes to Rule 1.05, TDRPC, relating to the disclosure of confidential information and clients contemplating suicide. Mr. Kinard asked whether anyone had signed up to speak. Brad Johnson responded that no one signed up in advance. No members of the public indicated they wanted to address the Committee during the public hearing. Ms. Bresnen suggested the possibility of moving the provision regarding clients contemplating suicide from subparagraph (c)(7), as proposed, to a new subparagraph, which would serve as a standalone provision on the subject. Ms. Bresnen noted it could be added as subparagraph (c)(10), since there is already a separate proposal that would add subparagraph (c)(9) (relating to securing ethics counsel). Mr. Ducloux responded with comments and expressed support for the amendment. Mr. Kinard responded with comments and asked Brad Johnson when the next decision point was for the Committee. Mr. Johnson explained that the Committee would have the option of voting at its July 8 or August 5 meeting whether to amend the proposal and/or recommend the proposal to the State Bar Board of Directors. With no one else indicating a desire to speak, Mr. Kinard announced the closing of the public hearing.

E. PUBLIC HEARING ON PROPOSED CHANGES TO RULE 8.03, TDRPC, AND RULES 1.06 AND 9.01, TRDP – RELATING TO REPORTING PROFESSIONAL MISCONDUCT AND RECIPROCAL DISCIPLINE FOR FEDERAL COURT OR FEDERAL AGENCY DISCIPLINE

Mr. Kinard called to order the public hearing on proposed changes to Rule 8.03, TDRPC, and Rules 1.06 and 9.01, TRDP, relating to reporting professional and reciprocal discipline for federal court or federal agency discipline. Mr. Kinard asked whether anyone had signed up to speak or was indicating a desire to speak. Brad Johnson responded that no one signed up in advance but that someone had a hand raised to speak. Rich Robins addressed the Committee on the subject and expressed concerns about the proposed changes, which he also submitted in writing. Mr. Kinard responded with comments and questions. Mr. Robins responded with comments. Mr. Ducloux responded with comments and Mr. Robins responded. Mr. Kinard responded with an additional question and Mr. Robins responded. Mr. Kinard thanked Mr. Robins and others who have provided comments. Mr. Robins responded with additional comments and Mr. Kinard thanked Mr. Robins. With no one else indicating a desire to speak, Mr. Kinard announced the closing of the public hearing.

F. APPROVAL OF THE MINUTES OF THE LAST MEETING

Mr. Kinard addressed the Committee on this agenda item. Mr. Ducloux made a motion to approve the minutes from the May 6, 2020, meeting. Ms. Bresnen seconded the motion. The Committee voted in favor of the motion.

G. UPDATE ON PROPOSED CHANGES TO PART VII. INFORMATION ABOUT LEGAL SERVICES, TDRPC, AND PROPOSED RULE 13.04. VOLUNTARY APPOINTMENT OF CUSTODIAN ATTORNEY FOR CESSATION OF PRACTICE, TRDP

Mr. Kinard addressed the Committee on this agenda item. Mr. Ducloux and Brad Johnson responded with comments. Mr. Kinard explained that the State Bar Board of Directors Discipline and Client-Attorney Assistance Subcommittee (DCAAP) approved the rule proposals. Brad Johnson briefed the Committee on the subject and noted that the Board is expected to consider the rule proposals next week.

H. DISCUSSION AND POSSIBLE ACTION: DUTIES OWED TO PROSPECTIVE CLIENTS

Mr. Kinard addressed the Committee on this agenda item. Dean Johnson briefed the Committee on a memo he prepared on a possible rule proposal regarding the duties owed to a prospective client. Dean Johnson discussed a provision of the American Bar Association (ABA) Model Rules of Professional Conduct dealing with the duties owed to a prospective client, and, in particular, the duties owed to a former prospective client. Dean Johnson explained that approximately 45 states have adopted some version of ABA Model Rule 1.18, with a very large number enacting it verbatim. Dean Johnson provided background on the subject and explained how conflicts of interest are addressed under Model Rule 1.18 and the draft proposed Texas rule included in his memo, which is based on Model Rule 1.18. Mr. Ducloux responded with comments and expressed his strong support for the rule proposed by Dean Johnson. Mr. Kinard responded with comments, noting that the draft proposed rule would protect lawyers and the public. Ms. Bresnen responded with comments and a question. Mr. Kinard responded with comments. Mr. Ducloux asked about the next step to move the proposal forward. Brad Johnson responded that the Committee could vote to initiate the rule proposal process today and could vote at the next meeting on whether to publish a proposed rule for public comment. Mr. Ducloux made a motion to initiate the rule proposal process for a proposed rule addressing duties owed to prospective clients. Ms. Bresnen seconded the motion. The Committee voted in favor of the motion. Brad Johnson addressed the Committee on the draft proposed rule and the current Texas rules. Dean Johnson responded with comments. Mr. Jordan addressed the Committee on the draft proposed rule. Mr. Ducloux and Dean Johnson responded with comments. Mr. Kinard responded with comments and stated that the item will be carried forward to the next meeting. Brad Johnson explained that, since there is no August issue of the *Texas Bar Journal*, the next issue it could be published in is the September issue.

I. DISCUSSION AND POSSIBLE ACTION: CLOSURE, SALE, AND/OR SUCCESSION OF A LAW PRACTICE

Mr. Kinard addressed the Committee on this agenda item. Dean Johnson explained that the subcommittee on the subject (Dean Johnson, Ms. Bresnen, and Mr. Ducloux) had not discussed sale

of a law practice yet. Dean Johnson provided background on the law regarding the sale of a law practice, including discussion of ABA Model Rule 1.17, which addresses the sale of a law practice. Mr. Kinard responded with comments and a question. Dean Johnson responded with comments.

J. UPDATE ON POSSIBLE TIMELINE FOR A RULES VOTE BY BAR MEMBERSHIP

Mr. Kinard addressed the Committee on this agenda item. Brad Johnson briefed the Committee on the subject, explaining that tentatively the State Bar Board of Directors could vote in September 2020 to petition the Supreme Court for a referendum and to approve a ballot, which could possibly set the timeline for a vote by Bar membership starting in February 2021. Mr. Johnson noted that a number of steps would have to take place between September and February, and that the Board and the Supreme Court would likely evaluate the timeline with regard to the current pandemic. Mr. Johnson explained that, under this tentative timeline, those proposed rules approved by the Board by September could possibly be voted on in early 2021. Mr. Cantu explained that the Board would consider a resolution for approval, which would describe the components of a rules vote. Mr. Cantu noted that February 2021 was the current projection for a rules vote, but that it would all be predicated on whether there are delays due to the pandemic. Mr. Squires discussed the education efforts that would take place prior to a rules vote and that Committee members may be asked to contribute to those efforts. Mr. Ducloux responded regarding the importance of education on the proposed rules. Mr. Kinard responded with comments.

K. PROPOSED RULE TIMELINES

Mr. Kinard asked whether there were any timeline issues that needed to be discussed. Brad Johnson provided a reminder that, at its next meeting, the Committee would have the option to vote to amend and/or recommend the current rule proposal relating to Rule 1.05, TDRPC, as well as the rule proposal relating to reciprocal discipline. Mr. Ducloux responded with comments. Mr. Ducloux expressed his appreciation for the work Brad Johnson has done for the Committee. Mr. Kinard and other Committee members expressed their agreement with Mr. Ducloux' remarks.

L. AGENDA ITEMS FOR NEXT MEETINGS

Mr. Kinard asked whether anyone had any agenda items to request for the next meeting. No Committee members offered any new items for consideration. Brad Johnson noted that the rule proposal regarding duties to prospective clients would be on the next agenda for possible publication, and that the sale of a law practice subject could also be carried forward for possible publication. Mr. Ducloux asked whether the next meeting was set for July 8 at 10:00 a.m. Brad Johnson confirmed the date and time.

M. ADJOURNMENT

Ms. Bresnen made a motion to adjourn. Mr. Ducloux seconded the motion. The Committee voted in favor of the motion. Mr. Ducloux thanked Mr. Kinard for a great meeting. Mr. Kinard thanked the Committee members and everyone else that joined or participated in the meeting. The meeting adjourned at 12:05 p.m.