

MEETING OF THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

October 5, 2020
By Teleconference

MINUTES

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

Members Not Present: Rick Hagen.

State Bar of Texas Staff Present: Ray Cantu, Deputy Executive Director; Brad Johnson, Disciplinary Rules and Referenda Attorney.

A. CALL TO ORDER; ROLL CALL

Mr. Kinard called the meeting to order at 10:01 a.m. Brad Johnson called the roll and a quorum was present.

B. COMMENTS FROM THE CHAIR

Mr. Kinard thanked those who have submitted public comments and other feedback during the rule proposal process. Mr. Kinard explained that many improvements were made to proposed rules in response to public feedback. Mr. Kinard also discussed the importance of participation as it relates to self-governance.

C. UPDATE ON ACTION BY STATE BAR OF TEXAS BOARD OF DIRECTORS AND POSSIBLE ACTION BY SUPREME COURT OF TEXAS RELATED TO A 2021 RULES VOTE BY STATE BAR OF TEXAS MEMBERSHIP

Mr. Kinard explained that on September 25, 2020, the State Bar Board of Directors voted to approve two additional rule proposals recommended by the Committee. Specifically, the Board approved a proposal relating to confidentiality of information and clients contemplating suicide, as well as a proposal relating to reporting professional misconduct and reciprocal discipline for federal court or federal agency discipline. Mr. Kinard explained that the Board also voted to petition the Supreme Court of Texas for a rules vote by Bar membership.

Mr. Kinard explained that on September 29, 2020, the Supreme Court ordered a rules vote to take place beginning on February 2 and ending on March 4, 2021. The Court set out the form of the ballot, which will include eight separate rule proposals for Bar members to vote on. Voting will take place with paper and electronic ballots. Mr. Kinard thanked the Supreme Court and the Bar Board for their thoughtful consideration and action on these matters. Mr. Kinard noted that information about the Committee is available at texasbar.com/cdrr, and information relating to the rules vote is available at texasbar.com/rulesvote.

D. APPROVAL OF THE MINUTES OF THE LAST MEETING

Mr. Kinard and Mr. Ducloux addressed the Committee on this agenda item. Mr. Ducloux made a motion to approve the minutes from the September 17, 2020, meeting. Ms. Bresnen seconded the motion. The Committee voted in favor of the motion.

E. PROPOSED RULE 1.00. TERMINOLOGY, TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT (TDRPC)

Mr. Kinard addressed the Committee on this agenda item. Mr. Kinard explained that proposed Rule 1.00, TDRPC, was recently published for public comment and that the Committee previously discussed possible amendments to the published proposal. Mr. Kinard explained that the Committee could vote today on amending the proposal, but was under no obligation to do so. Professor Johnson addressed the Committee on the proposal, including a proposed change to the definition of “[i]nformed consent.” Mr. Ducloux addressed the Committee on the subject. Professor Johnson also addressed the Committee regarding the possible addition of terminology related to who qualifies as a “client” and the meaning of “represents.” The Committee discussed its procedural options related to the proposal. Brad Johnson responded to questions regarding rule proposal procedures. The Committee discussed tabling the proposal until a future date and publishing it again with the additional terminology. Mr. Ducloux made a motion to table the proposal until the next meeting. Ms. Bresnen seconded the motion. The Committee voted in favor of the motion.

F. PROPOSED RULE 1.18. DUTIES TO PROSPECTIVE CLIENT, TDRPC

Mr. Kinard addressed the Committee on this agenda item. The Committee discussed public comments received on proposed Rule 1.18, TDRPC. Professor Johnson addressed the Committee regarding draft proposed amendments to the proposed Rule and proposed interpretive comments. The Committee discussed the proposed Rule, as well as issues related to disqualification in court proceedings. Mr. Jordan addressed the draft amendments to paragraph two of the proposed comments, and Professor Johnson explained possible revisions to that language based on Mr. Jordan’s feedback. In response to a question from Mr. Kinard, Brad Johnson addressed the Committee’s procedural options related to the proposal. Professor Johnson made a motion to recommend proposed Rule 1.18 and its proposed interpretive comments to the State Bar Board of Directors with certain amendments. Ms. Bresnen seconded the motion. The Committee voted in favor of the motion.

G. PROPOSED RULE 13.05. TERMINATION OF CUSTODIANSHIP, TEXAS RULES OF DISCIPLINARY PROCEDURE (TRDP)

Mr. Kinard and Mr. Ducloux addressed the Committee on proposed Rule 13.05, TRDP. Mr. Ducloux made a motion to recommend proposed Rule 13.05 to the State Bar Board of Directors. Ms. Bresnen seconded the motion. The Committee voted in favor of the motion.

H. PROPOSED RULE 1.17, TDRPC – RELATING TO THE SALE OF A LAW PRACTICE

Mr. Kinard addressed the Committee on proposed Rule 1.17, TDRPC, relating to the sale of a law practice. Mr. Kinard discussed the timeline and procedural options related to the proposal. Professor

Johnson addressed the Committee on the subject, including a recent memo provided by Chief Disciplinary Counsel Seana Willing regarding the sale of a law practice. The Committee further discussed the subject, including its procedural options. Brad Johnson addressed the Committee regarding the rule proposal process. The Committee discussed waiting until early 2021 to publish a proposal for public comment. Mr. Ducloux made a motion to table the subject until the Committee's first meeting in 2021, at which time the Committee would have the opportunity to vote to initiate the rule proposal process again and potentially publish a proposal for public comment. Ms. Bresnen seconded the motion. The Committee voted in favor of the motion. Mr. Kinard thanked the Committee members and Ms. Willing for their work and comments.

I. COMMITTEE ANNUAL REPORT

Mr. Kinard addressed the Committee on this agenda item. Mr. Kinard explained that the Committee's annual report would be on the agenda for approval by the December meeting.

J. PROPOSED RULE TIMELINES

Mr. Kinard asked Brad Johnson whether there were any timeline issues that needed to be addressed. Mr. Johnson responded that the Committee had covered the relevant timelines.

K. AGENDA ITEMS FOR NEXT MEETINGS

Mr. Kinard asked whether anyone on the Committee had any items to add for the next meeting agenda. No Committee members indicated that they had any items to add.

L. APPROVAL OF 2021 COMMITTEE MEETING SCHEDULE

Mr. Kinard addressed the Committee on this agenda item. Mr. Ducloux suggested changing the proposed July 2021 meeting date from July 7 to July 14. Mr. Kinard responded with comments. Mr. Kinard noted that because of rules vote activities taking place in early 2021, the schedule did not include a January meeting date. Mr. Ducloux made a motion to approve the schedule, with the change to a July 14 meeting date for that month. Professor Johnson seconded the motion. The Committee voted in favor of the motion.

Mr. Ducloux noted Committee outreach and education related to the 2021 rules vote. Professor Johnson and Mr. Kinard responded with comments. Ms. Bresnen asked whether the Committee had reached out the State Bar section chairs. Brad Johnson and Mr. Kinard responded with comments.

M. ADJOURNMENT

Mr. Ducloux made a motion to adjourn. Mr. Belton seconded the motion. The Committee voted in favor of the motion. The meeting adjourned at 11:51 a.m.