

MEETING OF THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

September 17, 2020
By Teleconference

MINUTES

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

State Bar of Texas Staff Present: Trey Apffel, Executive Director; Ray Cantu, Deputy Executive Director; Seana Willing, Chief Disciplinary Counsel; Brad Johnson, Disciplinary Rules and Referenda Attorney; Cory Squires, Staff Liaison.

A. CALL TO ORDER; ROLL CALL

Mr. Kinard called the meeting to order at 10:30 a.m. Mr. Squires called the roll and a quorum was present.

B. COMMENTS FROM THE CHAIR

Mr. Kinard thanked those members of the State Bar of Texas and the public who have submitted input or comments to the Committee. Mr. Kinard explained that the Committee reads and considers every submission during the rule proposal process. Mr. Kinard encouraged those listening to continue submitting comments. Mr. Kinard noted that information about how to participate is available at texasbar.com/cdr.

C. PUBLIC HEARING ON PROPOSED RULE 1.00. TERMINOLOGY, TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT (TDRPC)

Mr. Kinard explained the procedures for the public hearings. Mr. Kinard called to order the public hearing on proposed Rule 1.00, TDRPC, which incorporates the TDRPC Terminology as Rule 1.00 and adds defined terms. Mr. Kinard noted that the proposal was recently published in the *Texas Bar Journal* and *Texas Register*, and that the Committee will continue to accept public comments through October 6. Mr. Kinard asked whether anyone had signed up to speak. Brad Johnson responded that no one signed up in advance. Mr. Kinard asked whether anyone who has joined the meeting would like to speak. No members of the public indicated they wanted to address the Committee during the public hearing. Mr. Kinard noted that the Committee had received written public comments on the subject. Mr. Kinard explained that the Committee would have the option to vote on any possible amendments to the proposal at its October 7 meeting, as well as on whether to recommend the proposal to the State Bar of Texas Board of Directors. Mr. Kinard noted that the deadline to vote is December 5, so the Committee has until its December 2 meeting to vote on whether to take action. With no other members of the public expressing a desire to address the Committee, Mr. Kinard announced the conclusion of the public hearing.

D. PUBLIC HEARING ON PROPOSED RULE 1.18. DUTIES TO PROSPECTIVE CLIENT, TDRPC

Mr. Kinard called to order the public hearing on proposed Rule 1.18, TDRPC, which addresses duties to prospective clients. Mr. Kinard noted that the proposal was recently published in the *Texas Bar Journal* and *Texas Register*, and that the Committee will continue to accept public comments through October 6. Mr. Kinard asked whether anyone had signed up to speak. Brad Johnson responded that no one signed up in advance. Mr. Kinard asked whether anyone who has joined the meeting would like to speak. Initially, no members of the public indicated they wanted to address the Committee. Mr. Kinard noted that the Committee had received written public comments on the proposal. Mr. Kinard explained that the Committee would have the option to vote on any possible amendments to the proposal at its October 7 meeting, as well as on whether to recommend the proposal to the State Bar of Texas Board of Directors. Mr. Kinard noted that the deadline to vote is December 5. The Committee will accept public comments through October 6. Professor Johnson briefed the Committee on proposed amendments to proposed Rule 1.18 and its proposed comments, which address concerns raised in public comments. Mr. Kinard explained that the proposed amendments would be on the agenda for the next Committee meeting. Mr. Ducloux addressed the Committee on the subject, including on public comments received. Mr. Kinard and Ms. Nicholson responded with additional comments on the proposed amendments. One member of the public addressed the Committee regarding the definition of “[i]nformed consent” in proposed Rule 1.00, which appears in the language of proposed Rule 1.18. Professor Johnson responded with comments. Mr. Kinard and Brad Johnson responded with additional comments. With no other members of the public expressing a desire to address the Committee, Mr. Kinard announced the conclusion of the public hearing.

E. PUBLIC HEARING ON PROPOSED RULE 13.05. TERMINATION OF CUSTODIANSHIP, TEXAS RULES OF DISCIPLINARY PROCEDURE (TRDP)

Mr. Kinard called to order the public hearing on proposed Rule 13.05, TRDP, which addresses the termination of a voluntary custodianship conducted under proposed Rule 13.04, TRDP. Mr. Kinard explained that the proposal was recently published in the *Texas Bar Journal* and *Texas Register*, and that the Committee will continue to accept public comments through October 6. Mr. Kinard explained that the Committee could take action on the proposal at its October 7 meeting, and had until December 5 to do so. Mr. Kinard asked whether anyone had signed up to speak. Laura Gibson addressed the Committee on the subject. Mr. Ducloux and Mr. Belton responded with comments. With no other members of the public expressing a desire to address the Committee, Mr. Kinard announced the conclusion of the public hearing. Mr. Kinard thanked those listening, those who have provided comments, and those who spoke during the public hearings.

F. OTHER COMMUNICATIONS TO THE COMMITTEE FROM THE PUBLIC

Mr. Kinard asked whether any other members of the public wanted to address the Committee. No members of the public indicated they wanted to address the Committee. Mr. Kinard noted that those listening can go to texasbar.com/cdrr to submit written comments.

G. 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 August 5, 2020, meeting. Mr. Hagen 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. As a reminder, Mr. Kinard noted that the Committee voted to initiate the rule proposal process at its July 8 meeting but had not yet voted to publish a proposal on the subject for public comment. At Mr. Kinard's request, Ms. Willing addressed the Committee on the subject. Ms. Willing indicated that she would provide a memo on the subject for the Committee's consideration. Mr. Kinard thanked Ms. Willing and responded with additional comments. Ms. Willing and Mr. Ducloux further discussed the subject. The Committee did not take action on the agenda item and will revisit it at the Committee's October meeting.

I. PROPOSED CHANGES TO RULE 8.04, TDRPC – RELATING TO HARASSMENT OR DISCRIMINATION IN CONDUCT RELATED TO THE PRACTICE OF LAW

Mr. Kinard addressed the Committee on this agenda item. Mr. Kinard explained that Judge Garcia submitted draft proposed changes to Rule 8.04, TDRPC, which are based on Rule 8.4(g) of the American Bar Association (ABA) Model Rules of Professional Conduct. Mr. Kinard noted recent actions by the State Bar of Texas Board of Directors on the subject and discussed the rule proposal process set out in the Texas Government Code. At Mr. Kinard's request, Mr. Apffel addressed the Committee regarding recent actions by the State Bar Board of Directors. Mr. Apffel explained that, at its special-called September 10 meeting, the Board of Directors voted to refer ABA Model Rule 8.4(g) to its Discipline and Client-Attorney Assistance Subcommittee (DCAAP) for study. Mr. Apffel explained that DCAAP was charged with reviewing ABA Model Rule 8.4(g), Rule 5.08 of the TDRPC, and the public input submitted before and during the Board meeting. Mr. Apffel explained that DCAAP was also charged with reporting its recommendations, if any, to the Board at a future meeting. Mr. Apffel explained that the study was requested by State Bar members at the Board's July 27 special-called meeting. Mr. Apffel further discussed the Board's consideration of the matters. Judge Garcia addressed the Committee on the draft proposed changes to Rule 8.04, TDRPC, as well as on possible updates to Rule 5.08, TDRPC. Professor Johnson addressed the draft proposed changes. Mr. Hagen asked a question on the subject and Mr. Kinard and Judge Garcia responded with comments. Mr. Belton expressed his opposition to adoption of the language of Model Rule 8.4(g). The Committee further discussed the subject. Mr. Kinard suggested giving DCAAP time to consider the matter and possibly including it on the Committee's November meeting agenda, when DCAAP might have an update on its review available. The Committee did not take action on the agenda item.

J. UPDATE ON RULE PROPOSALS SUBMITTED TO STATE BAR OF TEXAS BOARD OF DIRECTORS:

- 1. PROPOSED RULE 1.05(C)(10), TDRPC – RELATING TO THE DISCLOSURE OF CONFIDENTIAL INFORMATION AND CLIENTS CONTEMPLATING SUICIDE**

2. 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 addressed the Committee on both parts of this agenda item. Mr. Kinard explained that DCAAP recently voted in favor of proposed Rule 1.05(c)(10), TDRPC (relating to the disclosure of confidential information and clients contemplating suicide), as well as in favor of 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 explained that both proposals may be voted on by the State Bar Board of Directors at its September 25 meeting and, if approved, may appear on an upcoming rules vote ballot. Mr. Cantu confirmed that the proposals would be included on the agenda for the September 25 Board meeting.

K. UPDATE ON TIMELINE FOR A RULES VOTE BY STATE BAR OF TEXAS MEMBERSHIP

Mr. Kinard addressed the Committee on this agenda item. At Mr. Kinard's request, Brad Johnson briefed the Committee on the prospective timeline for a tentative 2021 rules vote by State Bar membership. Mr. Johnson explained that the State Bar of Texas Board of Directors is expected to vote at its September 25 meeting on a resolution regarding a petition to the Supreme Court of Texas for a rules vote by State Bar membership, with a voting period tentatively starting in February 2021.

L. EDUCATION AND COMMUNICATIONS BY COMMITTEE MEMBERS RELATED TO A RULES VOTE BY STATE BAR OF TEXAS MEMBERSHIP

Mr. Kinard addressed the Committee on this agenda item. Mr. Kinard explained that with a rules vote tentatively scheduled to begin in February 2021, there will be opportunities for public education and outreach. Mr. Kinard explained that there may be a series of public Zoom forum events, recorded CLE presentations, opportunities to contribute in the *Texas Bar Journal*, and other communications and forums. Mr. Kinard explained that he wanted to gauge the interest of Committee members in participating in some or all of these various education efforts. Mr. Kinard explained that this will in part depend on actions by the State Bar of Texas Board of Directors and the Supreme Court of Texas related to a rules vote timeline. Mr. Kinard mentioned that Brad Johnson would be reaching out to Committee members to gauge interest. Mr. Kinard explained that he thought Committee members could be an informative voice on the proposed changes. Mr. Ducloux expressed his interest in contributing. Brad Johnson noted that the Committee may have more information about the timeline and ballot for a tentative 2021 rules vote by its next meeting.

M. 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.

N. AGENDA ITEMS FOR NEXT MEETINGS

Mr. Kinard addressed the Committee on this agenda item. Mr. Kinard asked whether anyone had any requests or suggestions for the next meeting agenda. Mr. Belton suggested that it would be helpful to have an additional summary timeline for the various proposed rules. Professor Johnson explained that a public comment suggested adding definitions of “client” and “represent[s]” to the TDRPC Terminology. Professor Johnson indicated he would be preparing a draft defining those terms. Professor Johnson also suggested that it would be helpful to include proposed interpretive comments with proposed rules that are published for public comment. In response to a question from Mr. Kinard, Brad Johnson explained that he thought it would possible to include proposed interpretive comments in both *Texas Bar Journal* and *Texas Register* publications. Mr. Kinard agreed that it would be useful and also noted that the proposed interpretive comments are currently posted online at texasbar.com/cdrr. Mr. Kinard mentioned that each of the three proposals the Committee held a public hearing on today would be included for discussion and possible action, including possible amendment, at the Committee’s October meeting.

O. ADJOURNMENT

Mr. Ducloux made a motion to adjourn. Ms. Bresnen seconded the motion. The Committee voted in favor of the motion. The meeting adjourned at 12:03 p.m.