

Agenda

Committee on Disciplinary Rules and Referenda

DATE: Wednesday, April 11, 2018

TIME: 10:00 a.m. – 12:00 p.m.

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1. Roll Call
 2. Approval of the Minutes of the Last Meeting (Pages 1 2)
 3. Operational Matters
 - a. Committee Webpage
 - b. Committee Portal
 - c. Proposed 2018 19 Quarterly Committee Meeting Schedule (Page 3)
 - d. Calendaring the “Annual Reviews” of rules
 - e. Meeting Access Options (Pages 4-11)
 4. Prioritizing the List of Topics For Consideration as Proposed Rules (Pages 12 14)
 5. Outline Drafting Process/Parameters (Pages 15 16)
 6. Old Business
 7. Agenda Items for Next Meeting
 8. Adjourn

MEETING OF THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

March 7, 2018
Texas Law Center, Room 102
Austin, Texas

MINUTES

CALL TO ORDER

The meeting was called to order at 1:30 p.m.

Those in attendance at the meeting were: Chairman M. Lewis Kinard; Claude Ducloux; Timothy Belton; Amy Bresnen; Rick Hagen; Hon. Dennise Garcia; W. Carl Jordan; and Jane King. Also present were: Linda Acevedo, Chief Disciplinary Counsel; Michelle Jordan, Staff Attorney; Anne Davis, Executive Administrative Manager; and Brad Powell, Information Technology Division Director.

Not present was Vincent Johnson.

A. APPROVAL OF MINUTES

The Committee reviewed the minutes from the February 7, 2018 meeting and a suggestion for revision was made. Mr. Ducloux made a motion that the Committee approve the minutes as revised. The motion was seconded by Mr. Hagen. The Committee voted unanimously in favor of the motion.

B. MEETING DEFINITIONS

The Committee discussed a document which was distributed prior to the meeting entitled, "Committee on Disciplinary Rules and Referenda Meeting Definitions". No action was taken with regard to the document.

C. ACCESS

The Committee discussed issues and options to open access to meetings. Linda Acevedo and Brad Powell spoke about different technological options with regard to open access.

D. DOCUMENTS

The Committee discussed types of work output. The Committee also discussed options for a docketing system. Mr. Ducloux volunteered to draft a Docketing Statement as well as a Resolution Initiating a Rule Proposal and present them to the Committee.

Linda Acevedo and Brad Powell discussed with the Committee technology issues with regard to document sharing.

E. OATHS

Mr. Kinard brought to the attention of the Committee an issue raised by Ms. Bresnen concerning the issue of whether members are required to take certain oaths of office. Ms. Bresnen will provide to the Committee members a memo she prepared concerning the issue as well as referenced statutes. The Committee anticipates receiving additional information and legal opinions from Bar Counsel Don Jones with regard to this issue and therefore will take no action at this time.

F. POTENTIAL TOPICS

The Committee discussed potential topics that the Committee could look to in deciding which rules the Committee might begin work on.

G. BUDGET

Linda Acevedo discussed with the Committee their budget and the budgeting process.

H. FUTURE MEETINGS

The Committee discussed some strategies for the scheduling of future meetings. Some future meetings dates were discussed and Anne Davis will poll the members as to their availability on specific dates. However, no specific future meetings were set at this time.

ADJOURNMENT

Mr. Ducloux made a Motion to Adjourn. The motion was seconded by the Ms. King. The Committee voted unanimously in favor of the motion and the meeting adjourned at 3:15 p.m.

**COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
2018-19 PROPOSED MEETINGS**

MEETINGS

Below are the proposed committee meeting dates and details for 2018-19.

Staff proposes that quarterly meetings be scheduled one week prior to State Bar of Texas Board of Directors meetings. Quarterly meetings will be scheduled at the Texas Law Center.

For any subsequent monthly meetings, staff recommends they be held on the first Wednesday of all other months at 10:30 a.m. If a January meeting is needed it will be held on the second Wednesday of the month.

QUARTERLY MEETING DATES

Monday, June 11: 10:30 a.m. – 2:30 p.m.

Thursday, September 20: 10:30 a.m. – 2:30 p.m.

Thursday, January 10: 10:30 a.m. – 2:30 p.m.

Thursday, April 18: 10:30 a.m. – 2:30 p.m.

Thursday, June 6: 10:30 a.m. – 2:30 p.m.

All: I've attached some suggestions about how to go forward with regard to closed vs. public meetings and public participation. I hope you'll find this to be helpful.

I also came across, for work purposes, the Judicial Branch Certification Commission's (JBCC) Public Meetings Policy. I think this is a good outline to use. Note that it states *up front* that the Commission is not subject to the Open Meetings Act. I think we need to make this clear as well. I do disagree with JBCC's policy on allowing the public to record meetings, but nonetheless, I think this document will be a good resource for us. There's no reason to completely reinvent the wheel.

Let me know if I can help. Thanks!

Amy Bresnen
Attorney at Law
BresnenAssociates
311 W. 5th Street, Suite 1002
Austin, TX, 78701
P: [REDACTED]

Steve Bresnen
Attorney at Law
BresnenAssociates
311 W. 5th Street, Suite 1002
Austin, TX, 78701
[REDACTED]

Judicial Branch Certification Commission
Public Meetings Policy
(Effective September 5, 2014)

1. **Policy** The purpose of this policy is to address notice and public access to meetings of the Judicial Branch Certification Commission, which is a judicial branch entity and therefore not subject to the Open Meetings Act.

2. **Definitions.**
 - (a) "Closed meeting" means a meeting to which the public does not have access.
 - (b) "Deliberation" means an oral or written verbal exchange during a meeting.
 - (c) "JBCC" means the Judicial Branch Certification Commission established in Chapter 151, Texas Government Code, and includes duly-established official advisory boards and committees of the JBCC.
 - (d) "Meeting" means:
 - (1) a deliberation among members constituting a quorum, or between a quorum and another person, during which public business or public policy over which the JBCC has supervision or control is discussed or considered or during which the JBCC takes formal action; or
 - (2) except as otherwise provided in Section 2(d)(3), a gathering:
 - (A) that is conducted by the JBCC or for which the JBCC is responsible;
 - (B) at which a quorum is present;
 - (C) that has been called by the JBCC; and
 - (D) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the Office of Court Administration, about the public business or public policy over which the JBCC has supervision or control.
 - (3) "Meeting" does not include:
 - (A) the gathering of a quorum at a social function unrelated to the public business of the JBCC, or the attendance by a quorum at a regional, state, or national convention or workshop, if formal action is not taken and any

discussion of public business is incidental to the social function, convention, or workshop;

(B) the attendance by a quorum at a meeting of a committee or agency of the legislature if the deliberations at the meeting by the members of that JBCC consist only of publicly testifying at the meeting, publicly commenting at the meeting, and publicly responding at the meeting to a question asked by a member of the legislative committee or agency; or

(C) the attendance by a quorum at a judicial hearing or proceeding unrelated to the public business of the JBCC, if formal action is not taken and any discussion of JBCC business is incidental

(c) "Open" means open to the public.

(f) "Quorum" means a majority of the formally-appointed members of the JBCC or duly-established official advisory boards and committees of the JBCC.

3. Public Meetings Requirement.

(a) Every meeting of the JBCC or an advisory board or committee of the JBCC shall be open to the public, except as provided by this policy. This requirement does not preclude the use of telephone or video teleconferencing equipment, provided that at least one location shall be open to the public and posted in accordance with Section 6.

(b) At each meeting, the JBCC will give members of the public the opportunity to appear and speak about issues within the jurisdiction of the JBCC. The chair of the JBCC may set reasonable limits on presentations by members of the public, including limits on the number, frequency, and length of presentations.

(c) This public meetings policy precludes deliberation through written communication, including electronic mail.

4. Minutes. The JBCC shall prepare and keep minutes and may make an audio recording of each public meeting, except that consultations with an attorney in a closed session pursuant to Section 7 may not be recorded. The minutes of a public meeting are judicial records under Rule 12 of the Rules of Judicial Administration and shall be available for public inspection and copying.

5. Recording of a Meeting by a Person in Attendance-

- (a) A person in attendance may record all or any part of a public meeting of the JBCC by means of a tape recorder, video camera, or other means of audio or visual reproduction.
- (b) The chair of the JBCC may adopt reasonable policies to maintain order at a meeting, including policies relating to:
 - (1) the location of recording equipment; and
 - (2) the manner in which the recording is conducted.
- (c) A policy adopted under Subsection (b) may not prevent or unreasonably impair a person from exercising a right granted under Subsection (a).

6. Meeting Notice Required.

- (a) The JBCC shall post on its website written notice of the date, hour, place, and subject of each JBCC meeting for at least 72 hours before the scheduled time of the meeting.
- (b) The JBCC shall maintain an e-mail distribution list of persons requesting notice of JBCC meetings and shall provide e-mail notification of the date, hour, place and subject of each meeting to the distribution list at least 72 hours before the scheduled time of the meeting.
- (c) If the JBCC posts notice of a meeting and then is unable to attain a quorum, the members present may discuss and deliberate JBCC matters, but shall not vote or otherwise take formal action.
- (d) In an emergency, the notice of a meeting or the supplemental notice of a subject added as an item to the agenda for a meeting for which notice has been posted in accordance with this policy is sufficient if it is posted for at least two hours before the meeting is convened. The emergency must be reasonably unforeseeable, and the JBCC shall clearly identify the emergency in the notice.

7. Exceptions to Requirement that Meetings Be Open. The JBCC may conduct a closed meeting to:

- (a) consult with its attorney:
 - (1) when the JBCC seeks the advice of its attorney about:
 - (A) pending or contemplated litigation, or
 - (B) a settlement offer; or

- (2) on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this policy:
 - (b) deliberate a negotiated contract or a prospective gift or donation to the JBCC if deliberation in an open meeting would have a detrimental effect on the position of the JBCC in negotiations with a third person;
 - (c) deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee, or to hear a complaint or charge against an officer or employee;
 - (d) deliberate the deployment, or specific occasions for implementation, of security personnel or devices;
 - (e) deliberate a test item or information related to a test item if the JBCC believes that the test item may be included in a test the JBCC administers to individuals who seek to obtain or renew a license or certificate that is necessary to engage in an activity; or
 - (f) deliberate information regarding an applicant for certification, registration, or licensure or the subject of a complaint to the JBCC that would be confidential under law or the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

- 8. **Investigation.** The JBCC, when investigating a matter, may exclude a witness from a hearing during the examination of another witness in the investigation.

**Committee on Disciplinary Rules and Referenda:
Ideas on Public Attendance and Participation at
Meetings of the Committee**

Basics

1. The Preamble to the Disciplinary Rules of Professional Conduct makes it clear that the Rules are for the protection of society in general, the legal system and clients. The public should be allowed to attend and participate in meetings of the Committee because the Legislature has tasked the Committee with a central role in protecting the public.
2. The President of the State Bar of Texas on March 8, 2018, announced additional steps to increase transparency within the activities of the State Bar. The Committee should follow the lead of President Vick.
3. The numerous agencies in the Executive and Legislative Branches honor the principle of meetings open to public attendance and public participation. The Committee should apply the same principles to its activities, even if the Open Meetings Act does not apply to the Committee's meetings and even though Subchapter E-1 of the State Bar Act only requires public attendance and participation in limited circumstances. Subchapter E-1 contains provisions analogous to procedures of the Executive and Legislative Branches. The Committee has the discretion to fill in the blanks.
4. The backdrop for the Legislature's establishment of the Committee and its central role in the review and formulation of the Disciplinary Rules was the Sunset Commission's analysis of a failed rule making process about which many of the complaints were a lack of transparency. It would be a mistake for the Committee to begin its work under the cloud that will inevitably follow meetings in which public attendance is impeded and public participation is not encouraged. *Opportunities* for public attendance and participation will enhance public trust and acceptance of the Committee's work.
5. The provisions of the Open Meetings Act that allow public agencies to hold executive sessions (i.e., secret meetings) do not describe circumstances the Committee is likely to experience. For example: The Committee will not be considering real property acquisitions as described in Section 551.072, Government Code. Absent established circumstances justifying secrecy, Committee meetings should be held in public.
6. Public attendance and public participation can be honored while allowing the Committee to do its work in an efficient manner that is not unnecessarily burdensome on the Committee's and staff's workload.

Suggestions

1. **Give the public notice of Committee meetings** at least 7 days prior to the meeting. The notices should be posted on the Home Page of the State Bar's website. This will give the public a readily accessible place to get notice without the Committee or Bar having to go

through the (slightly) more cumbersome procedures of posting notice through the *Texas Register*.

2. **Hold meetings in places and rooms that are accessible and convenient to the public.** Not all Committee meetings need to be held in Austin. It will improve the convenience to the public (and Committee members who don't live in Austin) to have some meetings in other locations around the state.
3. **Use a stakeholder or workgroup process to gain public input while making posted Committee meetings efficient.** Many state agencies hold "stakeholder" meetings outside of the posted full meetings of the agencies' governing board to increase public participation. Often, these stakeholder meetings are attended by people who are particularly affected by whatever issue is being discussed, have specialized expertise in a given area or have expressed a particular interest in the subject matter. These are sometimes attended by less than a quorum of an agency's board or, often, by staff of the agency who lead the discussion and convey the information gained to the agency's board for consideration at a formal meeting.
4. **Allow public attendance at all Committee meetings and public participation at most meetings.** Public attendance at a Committee meeting does not need to always mean public participation at that meeting. Attendance may, at any given meeting, mean observation only. This is true of meetings held under the House and Senate Rules that are designated "formal meetings," which almost always occur only after a "public meeting" at which public participation has been allowed. Legislative Committees often hold meetings at which the public attends, but the testimony consists of invited witnesses only.

Any Committee meeting at which public participation is going to be limited or not allowed should be clearly designated as such in the meeting notice posted on the State Bar website. I suggest a capitalized bold and enlarged designation so that members of the public come to the meeting with the right expectations.

5. **Set aside time for public comments at most Committee meetings** (see Item 4 above). Most Executive Branch agencies have agendas that set aside some time for public comments. In the case of agencies, these public comment periods are often not expressly limited to an agenda item, although if not so limited, the board is unable to act at that meeting on any comments that are not addressed to a specific agenda item.

Usually, testimony in the public comment period is time-limited, although the fewer the witnesses, the more likely the witnesses will be given (a little) more time. The Chair is in control of the length of time that is allocated to public comments and can exercise discretion based on how lengthy the agenda for that day is, how many commenters, etc. Although public comments taken at the beginning of a meeting are the most courteous to the public (rather than making them sit through an entire meeting before they have their say), some agencies put the comment period toward the end of the meeting.

Any Committee meeting at which public participation is going to be allowed but may be limited should be clearly designated as such in the meeting notice posted on the State Bar website. I suggest a capitalized bold and enlarged designation so that members of the public

come to the meeting with the right expectations. The Committee should devise a standard notice that state's the Chair's authority and discretion to regulate the comment period.

6. **Consider allowing public comments on specific agenda items before the Committee while the item is under discussion.** Most agencies do this, although not all of them and not all the time. Those who want to comment are required to sign a witness affirmation card in advance of the agenda item coming before the board, which allows the Chair to know how many will talk and allocate time as appropriate.
7. **Develop a standardized witness card** for use for public comments, whether in a general public comment periods or in connection with specific agenda items.
8. **Explicitly state any special circumstances in which all or part of a meeting would be closed,** if the Committee can envision circumstances that would compel all or part of a meeting to be closed. A meeting that included such a circumstance can be held in public until such time as the subject that compels closure is ready for discussion and then re-opened to the public when that discussion is completed. No action should be taken in a closed meeting.
9. **Ensure that there is an efficient mechanism for the Committee to both receive and disseminate written communication.** Public participation can and should include encouragement by the Committee to the public to communicate in writing, in addition to attendance and speaking at Committee meetings. Experience in the Executive and Legislative Branches shows that easy access to written communication will often reduce the public's need to attend meetings in person and/or speak at meetings. And, written communications are often more complete and thoughtful than oral testimony given in a limited time period. The Committee should make a concerted effort to publicize to the public the mechanism(s) for providing written communication.
10. **Adopt a process of scheduled quarterly meetings of the Committee with standard agenda items that maximize public participation** in those meetings. Quarterly meetings scheduled well in advance can allow Committee members, interested groups and individual members of the public to plan for their participation well in advance and to travel to the meetings if necessary. Public participation can be maximized at such meetings to offset a lack of public participation that may result from meetings with invited-only testimony or at which public participation may not be allowed where justified.
11. **Place a periodic update on the Committee's work in the State Bar Journal.**
12. **Adapt the attached "Public Meetings Policy" of the Judicial Branch Certification Commission** to the ideas above and the needs of the Committee. It can be found electronically here:
2<http://www.txcourts.gov/media/471197/JBCC-Public-Meetings-Policy-Eff-090514.pdf>

To: Chairman Kinard, and Members of the Sup Ct. Disc Rules and Referenda Committee
FROM: Claude Ducloux
DATE: March 30, 2018

At our last meeting we discussed sending in some proposals to improve or modify rules. Lewis followed up Michelle Jordan's email to us on March 8 2018, mentioning some areas we discussed. Since my wife, Susan, and I are going to Japan to visit my son tomorrow, and won't return until April 9, I wanted to send you all these thoughts on a couple of rule proposals, so all of you would have them for our April 11 conference call at 10 a.m. As you can see, I would suggest we consider adding some language to 1.05 (e) ("Confidentiality of Information") to encompass reports of abuse, (and deleting the requirement of "substantial" bodily harm; as opposed to bodily harm; and also consider adding a new subsection (g) to rule 1.05 to ensure that we mention digital technology in the rule about confidentiality of Information. See what you think.

To differentiate the rules from my comments, my comments hereafter are in Blue:

PROPOSED REVISION to TDRPC 1.05 (e) (Clarifying that bodily injury need not be "substantial" and adding provisions requiring lawyer to reveal the likelihood of child abuse and elder abuse)

Here is the rule section as currently written: TDRPC 1.05

...

(e) When a lawyer has confidential information establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), or by Rule 4.01(b).

Proposed Revision to Rule 1.05 (e):

(e) When a lawyer has confidential information establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or ~~substantial~~ bodily harm to a person, including conduct constituting child abuse or elder abuse, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act or abuse.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.02(a)(2), or by Rule 4.01(b).

[this related rule could also be updated]

Rule 3.03 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

...

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

Proposed revision:

...

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act, including conduct constituting child abuse or elder abuse;

...

But I don't think this related rule requires revision

Rule 4.01 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

...

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

[no changes necessary to include child or elder abuse]

NEW PROPOSED RULE 1.05(g)

Rule revision concerning protection of client information sent digitally over the internet:

I propose that we consider adding a new subsection which I have assembled based upon language in new model rule 1.6, and as explained in ABA opinions 471, and 477R:

(g) The duty of confidentiality extends to the lawyer's reasonable choice of digital applications for the storage, transmission and communication of a client's confidential information. In considering maintaining the confidentiality of a client's information, the lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Now I concede that the first sentence above may be considered properly as only commentary, and the second sentence has the actual directive language. But I like the first sentence because it has the context of the prohibition.

This is some of the discussion in ABA Opinion 477R, which I relate in my own Cybersecurity CLE speeches -CD

In order to determine when additional security methods are required, the committee turned to the factors outlined in paragraph 18 of the Comment to Model Rule 1.6:

- The sensitivity of the information
- The likelihood of disclosure if additional safeguards are not employed
- The cost of employing additional safeguards

- The difficulty of implementing the safeguards and
- The extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

The committee recommended the following steps lawyers should take to guard against disclosures, including:

- 1. Understand the nature of the threat.** Consider the sensitivity of the client's information and whether it poses a greater risk of cyber theft. If there is a higher risk, greater protections may be warranted.
- 2. Understand how client confidential information is transmitted and where it is stored.** Have a basic understanding of how your firm manages and accesses client data. Be aware of the multiple devices such as smartphones, laptops and tablets that are used to access client data, as each device is an access point and should be evaluated for security compliance.
- 3. Understand and use reasonable electronic security measures.** Have an understanding of the security measures that are available to provide reasonable protections for client data. What is reasonable may depend on the facts of each case, and may include security procedures such as using secure Wi-Fi, firewalls and anti-spyware/anti-virus software and encryption.
- 4. Determine how electronic communications about clients' matters should be protected.** Discuss with the client the level of security that is appropriate when communicating electronically. If the information is sensitive or warrants extra security, consider safeguards such as encryption or password protection for attachments. Take into account the client's level of sophistication with electronic communications. If the client is unsophisticated or has limited access to appropriate technology protections, alternative nonelectronic communication may be warranted.
- 5. Label client confidential information.** Mark communications as privileged and confidential to put any unintended lawyer recipient on notice that the information is privileged and confidential. Once on notice, under Model Rule 4.4(b) Respect for Rights of Third Persons, the inadvertent recipient would be on notice to promptly notify the sender.
- 6. Train lawyers and nonlawyer assistants in technology and information security.** Under Model Rules 5.1 and 5.3, take steps to ensure that lawyers and support personnel in the firm understand how to use reasonably secure methods of communication with clients. Also, follow up with law firm personnel to ensure that security procedures are adhered to, and periodically reassess and update security procedures.
- 7. Conduct due diligence on vendors providing communication technology.** Take steps to ensure that any outside vendor's conduct comports with the professional obligations of the lawyer.

Talk to you all on the 11th.

--Claude

RESOLUTION INITIATING RULE PROPOSAL

WHEREAS, the Committee on Disciplinary Rules and Referenda (the "Committee") has been formed in accordance with Tex. Gov't Code §81.0872; and

WHEREAS, the Committee has received a proposal to initiate a new Texas Disciplinary Rule of Professional Conduct for adoption, which has been docketed as file _____; and

WHEREAS, such proposal was received on or about _____, 2018, and the Committee is required to act within sixty (60) days; and

WHEREAS, the Committee hereby initiates the Rule Proposal Process under Tex. Gov't Code §81.0875, and RESOLVES to publish the proposed Rule in the form prescribed by the Committee in: 1) the Texas Register; and 2) the Texas Bar Journal not later than 6 months from the date of this resolution.

This resolution is hereby passed by a majority of the Committee on this the ____ day of _____, 2018.

M. LEWIS KINARD, Chairman

TEXAS COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
Rule Proposal Docketing Statement

Docket No. : _____

Date Received: _____

Requestor: _____

Contact Info: _____

Description of Rule: New Rule Modification of Existing Rule

TRDPC Rules Affected by Proposal:

Assigned to: _____

Date to Initiate or Decline (60 days after Date Received): _____

Date and Nature of Decision:

Initiation of Rule Process: (date) _____

or

Decline to Initiate Rule Process: (date) _____

If declined: Date of Written Decision: _____