

Agenda

Committee on Disciplinary Rules and Referenda

DATE: Wednesday, August 8, 2018

TIME: 10:00 a.m. – 12:00 p.m.

1. Roll Call
2. Approval of the Minutes of the Last Meeting (Page 2-3)
3. Meeting Dates (Page 4)
4. Advertising Rules (18-6 through 18-10) - (Page 6-9)
 - a. Subcommittee Report
5. Proposed Rules (18-3 and 18-4) - Initiated - Status Update (Page 10-18)
 - a. 18-3 Ethics Advice Comments (Page 11)
 - b. 18-4 Diminished Capacity Comments (Page 14-18)
6. Proposed Rules (18-1, 18-2, and 18-5)– Not Initiated (Page 19-25)
 - a. 18-1 Confidentiality Comments (Page 20-21)
 - b. 18-2 Substantial Bodily Harm Comments (Page 23-24)
7. Rules Process - Next Steps (Page 26-27)
8. Annual Report
9. Agenda Items for Next Meeting
10. Adjourn

MEETING OF THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

July 11, 2018
Texas Law Center, Room 102
Austin, Texas

MINUTES

CALL TO ORDER

The meeting was called to order at 10:10 a.m.

In attendance: Chairman M. Lewis Kinard; Claude Ducloux; Amy Bresnen; Rick Hagen; W. Carl Jordan; Vincent Johnson; Timothy Belton; Hon. Dennise Garcia and Jane King. Also present: Michelle Jordan, Staff Attorney; Cory Squires, Staff Liaison, Ray Cantu, Assistant Deputy Director; Gene Major, Division Head for Advertising Review.

A. APPROVAL OF MINUTES

The Committee reviewed the minutes from the June 11, 2018 meeting. Mr. Ducloux made a Motion that the Committee approve the minutes. The Motion was seconded by Ms. Bresnen. The Committee voted in favor of the Motion.

B. ADVERTISING RULES

Mr. Kinard informed the Committee that he has requested Mr. Johnson to chair a subcommittee concerning the advertising rules. Mr. Johnson presented to the Committee a description of the history of lawyer advertising and its rules.

Steve Tatum, immediate past Chair of the Advertising Review Committee spoke to the Committee about the history of his Committee's work on the new proposed rules. Mr. Tatum stated that he believes the newly proposed rules reflect more of what other jurisdictions are doing with advertising rules. He also stated that the newly proposed rules make it easier for attorneys to understand and comply with the rules. Chuck Noteboom, another past Chair of the Advertising Review Committee was also present and agreed with Mr. Tatum's statements. Mr. Tatum, Mr. Noteboom, and Mr. Major answered questions from the Committee concerning the advertising rules.

The Committee discussed whether, in a referendum vote, the entire group of newly proposed advertising rules should be voted on together as one subject, considering the one subject rule pursuant to the statute, or if each should be considered separately in a referendum vote.

Mr. Kinard requested that Mr. Johnson head a subcommittee to consider whether to initiate the proposed advertising rules and to submit a report on their findings. The report should be provided to the Committee at its August meeting and a decision on initiation will be made at the Committee's September meeting. The subcommittee members will be Mr. Johnson, Mr. Ducloux and Ms. Bresnen.

C. PROPOSED RULES - INITIATED

The Committee discussed proposed rules docketed as 18-3 and 18-4, which have already been initiated. Mr. Ducloux made a Motion to publish the latest draft of these rules. Ms. Bresnen seconded the Motion. The Committee voted in favor of the Motion.

The Committee decided to follow the timeline for these rules as proposed in the July meeting materials packet.

D. PROPOSED RULES – NOT INITIATED

The Committee discussed the proposed rules that had not been initiated, specifically docketed 18-1, 18-2 and 18-5. Mr. Hagen reported speaking to different groups regarding these rules. Mr. Ducloux and Mr. Hagan will comprise a subcommittee concerning these proposed rules. The subcommittee will draft potential comments and will submit their recommendations to the Committee at the next meeting. If the Committee feels that comments should be proposed, then the subcommittee will draft a document to be sent to the Supreme Court requesting the Court's permission to submit comments to it.

E. COMMENTS

Mr. Johnson suggested that the proponent of any rule be responsible for drafting any necessary comments and the Committee agreed to this proposal. As such, Mr. Johnson will prepare any necessary comments to his initiated rules docketed as 18-3 and 18-4.

F. ANNUAL REPORT

Mr. Kinard proposed that at the next meeting, the Committee should divide and assign to individual Committee members the task of reviewing parts of the current Rules of Professional Conduct and the Rules of Disciplinary Procedure for the annual report. He encouraged members to review the rules so that they could state their preferences as to assignments.

Mr. Hagen volunteered to review the Section 3 Rules of Professional Conduct. Mr. Johnson volunteered to review the Section 1 Rules of Professional Conduct. Mr. Jordan volunteered to review the Section 5 Rules of Professional Conduct.

Cory Squires stated that he had been working on a draft format for the annual report which he will provide to Mr. Kinard.

ADJOURNMENT

Mr. Ducloux made a Motion to Adjourn. Ms. Bresnen seconded the Motion. The Committee voted in favor of the Motion and the meeting adjourned at 11:30 a.m.

MEETINGS

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

Members of the public are welcome to attend each quarterly meeting at the Texas Law Center.

Following 2018-19, future quarterly meetings will take place one week prior to State Bar of Texas Board of Directors meetings. Quarterly meetings will be held at the Texas Law Center at 10:30 a.m.

Any necessary monthly meetings will be held on the Wednesday of the first full work week of each month at 10:00 a.m.

The public can listen to all meetings via teleconference:

Call-in: 1-605-475-5604 Passcode: 2870504#

QUARTERLY MEETING DATES

Meetings held at Texas Law Center

Wednesday, Feb. 7, 2018: 10:30 a.m. – 2:00 p.m. | Agenda - Minutes

Monday, June 11, 2018: 10:30 a.m. – 2:30 p.m. | Agenda - Materials

Thursday, September 4, 2018: 10:30 a.m. – 2:30 p.m.

Thursday, January 10, 2019: 10:30 a.m. – 2:30 p.m.

Thursday, April 18, 2019: 10:30 a.m. – 2:30 p.m.

Thursday, June 6, 2019: 10:30 a.m. – 2:30 p.m.

MONTHLY MEETING DATES

Meeting held via Teleconference

Wednesday, March 7, 2018: 1:30 p.m. – 3:30 p.m. | Agenda - Minutes

Wednesday, April 11, 2018: 10:00 a.m. – 12:00 p.m. | Agenda - Minutes - Materials

Tuesday, May 8, 2018: 10:00 a.m. – 12:00 p.m. | Agenda - Minutes - Materials

Wednesday, July 11, 2018: 10:00 a.m. – 12:00 p.m.

Wednesday, August 8, 2018: 10:00 a.m. – 12:00 p.m.

Wednesday, October 3, 2018: 10:00 a.m. – 12:00 p.m.

Wednesday, November 7, 2018: 10:00 a.m. – 12:00 p.m.

Wednesday, December 5, 2018: 10:00 a.m. – 12:00 p.m.

Wednesday, February 6, 2019: 10:00 a.m. – 12:00 p.m.

Wednesday, March 6, 2019: 10:00 a.m. – 12:00 p.m.

TEXAS COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
RULE PROPOSAL DOCKETING STATEMENT

Docket No.: 18-6
Subject: Rule 7.01 Communications Concerning a Lawyer's Services
Request Received: 7-11-18

Requestor: SBOT Board of Directors
Contact Info: _____

Description of Rule: New Rule Modification of Existing Rule
Combines elements of current rules 7.01 and 7.02 to set forth what a lawyer can/can't communicate about his services.

Rules Affected by Proposal:
7.01; 7.02

Assigned to: _____

Deadline to Initiate or Decline: 9-8-18 Completed: _____

If declined: Date of Written Decision: _____

Deadline to Publish in Texas Register: _____ Completed: _____

Deadline to Publish in Bar Journal: _____ Completed: _____

End Date of Comment Period: _____

Date of Public Hearing(s): _____

Deadline for Committee Final Vote: _____ Completed: _____

Committee Referral to Board of Directors: _____

Other Notes: _____

TEXAS COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
RULE PROPOSAL DOCKETING STATEMENT

Docket No.: 18-7
Subject: Rule 7.02 Advertisements and Solicitation Communications
Disseminated in the Public
Request Received: 7-11-18
Requestor: SBOT Board of Directors
Contact Info: _____

Description of Rule: New Rule Modification of Existing Rule
Combines elements of current rules 7.04 and 7.05 to set forth what a lawyer can/can't
do with regard to publicly disseminated advertisements and solicitations.

Rules Affected by Proposal:
7.04; 7.05

Assigned to: _____

Deadline to Initiate or Decline: 9-8-18 Completed: _____

If declined: Date of Written Decision: _____

Deadline to Publish in Texas Register: _____ Completed: _____

Deadline to Publish in Bar Journal: _____ Completed: _____

End Date of Comment Period: _____

Date of Public Hearing(s): _____

Deadline for Committee Final Vote: _____ Completed: _____

Committee Referral to Board of Directors: _____

Other Notes: _____

TEXAS COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
RULE PROPOSAL DOCKETING STATEMENT

Docket No.: 18-8
Subject: Rule 7.03 Employment and Fees
Request Received: 7-11-18

Requestor: SBOT Board of Directors
Contact Info: _____

Description of Rule: New Rule Modification of Existing Rule
Combines elements of current rules 7.03 and 7.06 to set forth what a lawyer can/can't
do in seeking employment and the paying of related fees.

Rules Affected by Proposal:
7.03; 7.06

Assigned to: _____

Deadline to Initiate or Decline: 9-8-18 Completed: _____

If declined: Date of Written Decision: _____

Deadline to Publish in Texas Register: _____ Completed: _____

Deadline to Publish in Bar Journal: _____ Completed: _____

End Date of Comment Period: _____

Date of Public Hearing(s): _____

Deadline for Committee Final Vote: _____ Completed: _____

Committee Referral to Board of Directors: _____

Other Notes: _____

TEXAS COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
RULE PROPOSAL DOCKETING STATEMENT

Docket No.: 18-9
Subject: Rule 7.04 Filing Requirements for Public Advertisements and
Written, Recorded, Electronic, or Other Digital Solicitations
Request Received: 7-11-18

Requestor: SBOT Board of Directors
Contact Info: _____

Description of Rule: New Rule Modification of Existing Rule
Sets forth the filing requirements for public advertisements and solicitations.

Rules Affected by Proposal:
7.07

Assigned to: _____

Deadline to Initiate or Decline: 9-8-18 Completed: _____

If declined: Date of Written Decision: _____

Deadline to Publish in Texas Register: _____ Completed: _____

Deadline to Publish in Bar Journal: _____ Completed: _____

End Date of Comment Period: _____

Date of Public Hearing(s): _____

Deadline for Committee Final Vote: _____ Completed: _____

Committee Referral to Board of Directors: _____

Other Notes: _____

TEXAS COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
RULE PROPOSAL DOCKETING STATEMENT

Docket No.: 18-10
Subject: Rule 7.05 Exempt Communications
Request Received: 7-11-18

Requestor: SBOT Board of Directors
Contact Info: _____

Description of Rule: New Rule Modification of Existing Rule
Sets forth exemptions to the filing requirements of public advertisements and solicitations.

Rules Affected by Proposal:
7.07

Assigned to: _____

Deadline to Initiate or Decline: 9-8-18 Completed: _____

If declined: Date of Written Decision: _____

Deadline to Publish in Texas Register: _____ Completed: _____

Deadline to Publish in Bar Journal: _____ Completed: _____

End Date of Comment Period: _____

Date of Public Hearing(s): _____

Deadline for Committee Final Vote: _____ Completed: _____

Committee Referral to Board of Directors: _____

Other Notes: _____

TEXAS COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
RULE PROPOSAL DOCKETING STATEMENT

Docket No.: 18-3
Subject: Confidentiality- Ethics Advice
Request Received: 5-8-18

Requestor: Committee Proposal
Contact Info: _____

Description of Rule: New Rule Modification of Existing Rule
To add an exception to permit disclosure of confidential information for the attorney to obtain ethics
advice

Rules Affected by Proposal:
1.05(c)

Assigned to: Vincent Johnson

Deadline to Initiate or Decline: N/A Completed: 6-11-18

If declined: Date of Written Decision: N/A

Deadline to Publish in Texas Register: 12-11-18 Completed: _____

Deadline to Publish in Bar Journal: 12-11-18(really 11-1-18) Completed: _____

End Date of Comment Period: _____

Date of Public Hearing(s): _____

Deadline for Committee Final Vote: _____ Completed: _____

Committee Referral to Board of Directors: _____

Other Notes: _____

TO: Texas Disciplinary Rules and Referenda Committee
FROM: Vincent R. Johnson, South Texas Professor of Law, St. Mary's University; TDRRC Member
Date: August 5, 2018
Re: 18-3, Ethics Advice, Proposed Comment

Proposed Texas Rule 1.05(c)(9)

The CDRR has previously voted to recommend that Texas Disciplinary Rule 1.05(c) be amended to add a ninth subsection (shown below with underscoring and bold):

(c) A lawyer may reveal confidential information:

- (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
- (2) When the client consents after consultation.
- (3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.
- (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.
- (5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
- (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.
- (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
- (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.
- (9) To secure legal advice about the lawyer's compliance with these Rules.**

Proposed Comment Change

If the proposed change is enacted, the Comment to TDRPC 1.05 should be revised by adding after Comment 22 (currently the final Comment to Rule 1.05) the following heading and numbered paragraph:

Permitted Disclosure or Use When the Lawyer Seeks Legal Advice

23. A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's responsibility to comply with these Rules. In most situations, disclosing or using confidential information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure or use is not impliedly authorized, subparagraph (c)(9) allows such disclosure or use because of the importance of a lawyer's compliance with these Rules.

Had the 2011 Texas Referendum been successful, it would have added language to TDRPC Rule 1.05 similar to the proposed amendment that will create Rule 1.05(c)(9). The Comment would have been revised by

adding the heading and paragraph 23 shown above.¹ The proposed Comment is substantially identical to Model Rules of Professional Conduct Rule 1.6 cmt. 9 (2018).

¹ However, the cross-reference would not have been to subparagraph (c)(9) because the relevant sections of the Referendum proposal were numbered differently.

TEXAS COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
RULE PROPOSAL DOCKETING STATEMENT

Docket No.: 18-4
Subject: Diminished Capacity
Request Received: 5-8-18

Requestor: Committee Proposal
Contact Info: _____

Description of Rule: New Rule Modification of Existing Rule
Delete rule 1.02g and replace it with a new rule to specify the duties an attorney has when the client has diminished capacity

Rules Affected by Proposal:
1.02(g)

Assigned to: Vincent Johnson

Deadline to Initiate or Decline: N/A Completed: 6-11-18

If declined: Date of Written Decision: N/A

Deadline to Publish in Texas Register: 12-11-18 Completed: _____

Deadline to Publish in Bar Journal: 12-11-18(really 11-1-18) Completed: __

End Date of Comment Period: _____

Date of Public Hearing(s): _____

Deadline for Committee Final Vote: _____ Completed: _____

Committee Referral to Board of Directors: _____

Other Notes: _____

TO: Texas Disciplinary Rules and Referenda Committee (TDRRC)
FROM: Vincent R. Johnson, South Texas Professor of Law, St. Mary's University; TDRRC Member
Date: August 5, 2018
Re: 18-4, Diminished Capacity, Proposed Comment

Proposed Texas Rule 1.16

The CDRR has previously voted to recommend the deletion of current Texas Disciplinary Rule 1.02(g) and the adoption of a new rule, Rule 1.16, which would state as follows:

Rule 1.16 Clients with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.

Proposed Comment

If Proposed Rule 1.16 is adopted, the Comment should read as follows:

1. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. However, maintaining the ordinary client-lawyer relationship may not be possible when the client suffers from a mental impairment, is a minor, or for some other reason has a diminished capacity to make adequately considered decisions regarding representation. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often can understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, some people of advanced age are capable of handling routine financial matters but need special legal protection concerning major transactions. Also, some children are regarded as having opinions entitled to weight in legal proceedings concerning their custody.

2. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision, variability of

state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the lawyer's knowledge of the client's long-term commitments and values.

3. The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the client has a guardian or other legal representative, the lawyer should, as far as possible, accord the client the normal status of a client, particularly in maintaining communication. If a guardian or other legal representative has been appointed for the client, however, the law may require the client's lawyer to look to the representative for decisions on the client's behalf. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

4. The client may wish to have family members or other persons participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

Taking Protective Action

5. Paragraph (b) contains a non-exhaustive list of actions a lawyer may take in certain circumstances to protect a client who does not have a guardian or other legal representative. Such actions could include consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as existing durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the client's wishes and values to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.

6. A client with diminished capacity also may cause or threaten physical, financial, or other harm to third parties. In such situations, the client's lawyer should consult applicable law to determine the appropriate response.

7. When a legal representative has not been appointed, the lawyer should consider whether an appointment is reasonably necessary to protect the client's interests. Thus, for example, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, applicable law provides for the appointment of legal representatives in certain circumstances. For example, the Texas Family Code prescribes when a guardian ad litem, attorney ad litem, or amicus attorney should be appointed in a suit affecting the parent-child relationship, and the Texas Probate Code prescribes when a guardian should be appointed for an incapacitated person. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the lawyer's professional judgment. In considering alternatives, the lawyer should be aware of any law that requires the lawyer to advocate on the client's behalf for the action that imposes the least restriction.

Disclosure of the Client's Condition

8. Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. As with any client-lawyer relationship, information relating to the representation of a client is confidential under Rule 1.05. However, when the lawyer is taking protective action, paragraph (b) of this Rule permits the lawyer to make necessary disclosures. Given the risks to the client of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

The paragraphs 1 to 8 of the proposed Comment, and the related heading, are taken from the Comment language proposed in the failed 2011 Texas Referendum, with only minor stylistic changes.¹ That material generally corresponds to the first eight paragraphs of the Comment for Model Rules of Professional Conduct Rule 1.14,² although the order is somewhat different. Paragraphs 9 and 10 are quoted from the

¹ The relevant provision in the 2011 Texas Referendum was numbered Rule 1.14.

² The Comment to Model Rules of Professional Conduct R. 1.14 (2018) states:

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs

Comments 9 and 10 to the current version of Model Rules of Professional Conduct R. 1.14. That material did not appear in the Comment to the proposed version of Texas Rule 1.14 that was part of the 2011 Referendum.

the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

TEXAS COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
RULE PROPOSAL DOCKETING STATEMENT

Docket No.: 18-1
Subject: Confidentiality- Child/Elder Abuse
Request Received: 5-8-18

Requestor: Committee Proposal
Contact Info: _____

Description of Rule: New Rule Modification of Existing Rule
To add child and elder abuse to the attorney's duty to report under the rule

Rules Affected by Proposal:
1.05(e)

Assigned to: Claude Ducloux

Deadline to Initiate or Decline: N/A Completed: _____

If declined: Date of Written Decision: N/A

Deadline to Publish in Texas Register: _____ Completed: _____

Deadline to Publish in Bar Journal: _____ Completed: _____

End Date of Comment Period: _____

Date of Public Hearing(s): _____

Deadline for Committee Final Vote: _____ Completed: _____

Committee Referral to Board of Directors: _____

Other Notes: 18-1 "Tabled" at 6-11-18 meeting;

TO: Texas Disciplinary Rules and Referenda Committee
FROM: Claude E. Ducloux; TDRRC Member
Date: August 6, 2018
Re: 18-1, Reporting of Child/Elder Abuse, Proposed Comment
18-2, Reporting of “substantial bodily harm”

In our previous meetings, I had originally proposed the following changes to TDRPC 1.05(e) which covers the permissive disclosure of confidential information extraordinary circumstances.

To review, I had proposed two changes :

Proposed Texas Rule 1.05(e) under docketing statements 18-1 and 18-2

(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.

During our thorough discussion of these proposals, counsel for the CDRR, Ms. Jordan, has recommended that the proposed change previously voted to recommend that any such changes are better handled by adding or amending a comment, rather than discussing specific categories of statutes or amending the type of harm from “substantial” to a less specific definition.

Thus, here are my proposed revisions to the comment(s) under Rule 1.05(e):

Proposed Comment Change referencing 18-1 (disclosure of abuse)

On the issue of special statutes requiring disclosure:

Revision to Comment 13.

13. Third, the lawyer may learn that a client intends prospective conduct that is criminal or fraudulent. A “crime” or “criminal act” under subparagraph (e) should be interpreted to include disclosure of statutorily defined child abuse and elder abuse which are designated as criminal acts under existing statutes in the lawyer’s jurisdiction. The lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. When the threatened injury is grave, the lawyer's interest in preventing the

harm may be more compelling than the interest in preserving confidentiality of information. As stated in sub-paragraph (c)(7), the lawyer has professional discretion, based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act. In some situations of this sort, disclosure is mandatory. **Thus, a lawyer's duty extends to compliance under specific statutes requiring disclosure of certain conduct, which may include statutorily defined child abuse and elder abuse under existing statutes in the lawyer's jurisdiction.** See paragraph (e) and Comments 18-20.

Proposed Comment change referencing 18-2 (substantial bodily harm)

Proposed revision to Comment 18:

Rule 1.05(e) and (f) place upon a lawyer **both** professional obligations **and legal obligations** in certain situations to make disclosure in order to prevent certain serious crimes by a client or to prevent involvement by the lawyer in a client's crimes or frauds. Except when **such disclosure is required by law, or** death or serious bodily harm is likely to result, a lawyer's initial obligation is to attempt to dissuade the client from committing the crime or fraud or to persuade the client to take corrective action; see Rule 1.02(d) and (e).

Proposed Revision to Comment 20

20. Although a violation of paragraph (e) will subject a lawyer to disciplinary action, the lawyer's decisions whether or how to act should not constitute grounds for discipline unless the lawyer's conduct **was required by law, or the lawyer's conduct** in the light of those decisions was unreasonable under all existing circumstances as they reasonably appeared to the lawyer. This construction necessarily follows from the fact that paragraph (e) bases the lawyer's affirmative duty to act on how the situation "reasonably appears" to the lawyer, while that imposed by paragraph (f) arises only when a lawyer "knows" that the lawyer's services have been misused by the client. See also Rule 3.03(b).

TEXAS COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
RULE PROPOSAL DOCKETING STATEMENT

Docket No.: 18-2
Subject: Confidentiality- Substantial Bodily Harm
Request Received: 5-8-18

Requestor: Committee Proposal
Contact Info: _____

Description of Rule: New Rule Modification of Existing Rule
To remove the requirement that the bodily harm be "substantial" for an attorney to have a duty to report

Rules Affected by Proposal:
1.05(e)

Assigned to: Claude Ducloux

Deadline to Initiate or Decline: N/A Completed: _____

If declined: Date of Written Decision: N/A

Deadline to Publish in Texas Register: _____ Completed: _____

Deadline to Publish in Bar Journal: _____ Completed: _____

End Date of Comment Period: _____

Date of Public Hearing(s): _____

Deadline for Committee Final Vote: _____ Completed: _____

Committee Referral to Board of Directors: _____

Other Notes: 18-2 "Continued to next meeting" at 6-11-18 meeting;

TO: Texas Disciplinary Rules and Referenda Committee
FROM: Claude E. Ducloux; TDRRC Member
Date: August 6, 2018
Re: 18-1, Reporting of Child/Elder Abuse, Proposed Comment
18-2, Reporting of “substantial bodily harm”

In our previous meetings, I had originally proposed the following changes to TDRPC 1.05(e) which covers the permissive disclosure of confidential information extraordinary circumstances.

To review, I had proposed two changes :

Proposed Texas Rule 1.05(e) under docketing statements 18-1 and 18-2

(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.

During our thorough discussion of these proposals, counsel for the CDRR, Ms. Jordan, has recommended that the proposed change previously voted to recommend that any such changes are better handled by adding or amending a comment, rather than discussing specific categories of statutes or amending the type of harm from “substantial” to a less specific definition.

Thus, here are my proposed revisions to the comment(s) under Rule 1.05(e):

Proposed Comment Change referencing 18-1 (disclosure of abuse)

On the issue of special statutes requiring disclosure:

Revision to Comment 13.

13. Third, the lawyer may learn that a client intends prospective conduct that is criminal or fraudulent. A “crime” or “criminal act” under subparagraph (e) should be interpreted to include disclosure of statutorily defined child abuse and elder abuse which are designated as criminal acts under existing statutes in the lawyer’s jurisdiction. The lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. When the threatened injury is grave, the lawyer's interest in preventing the

harm may be more compelling than the interest in preserving confidentiality of information. As stated in sub-paragraph (c)(7), the lawyer has professional discretion, based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act. In some situations of this sort, disclosure is mandatory. **Thus, a lawyer's duty extends to compliance under specific statutes requiring disclosure of certain conduct, which may include statutorily defined child abuse and elder abuse under existing statutes in the lawyer's jurisdiction.** See paragraph (e) and Comments 18-20.

Proposed Comment change referencing 18-2 (substantial bodily harm)

Proposed revision to Comment 18:

Rule 1.05(e) and (f) place upon a lawyer **both** professional obligations **and legal obligations** in certain situations to make disclosure in order to prevent certain serious crimes by a client or to prevent involvement by the lawyer in a client's crimes or frauds. Except when **such disclosure is required by law, or** death or serious bodily harm is likely to result, a lawyer's initial obligation is to attempt to dissuade the client from committing the crime or fraud or to persuade the client to take corrective action; see Rule 1.02(d) and (e).

Proposed Revision to Comment 20

20. Although a violation of paragraph (e) will subject a lawyer to disciplinary action, the lawyer's decisions whether or how to act should not constitute grounds for discipline unless the lawyer's conduct **was required by law, or the lawyer's conduct** in the light of those decisions was unreasonable under all existing circumstances as they reasonably appeared to the lawyer. This construction necessarily follows from the fact that paragraph (e) bases the lawyer's affirmative duty to act on how the situation "reasonably appears" to the lawyer, while that imposed by paragraph (f) arises only when a lawyer "knows" that the lawyer's services have been misused by the client. See also Rule 3.03(b).

TEXAS COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
RULE PROPOSAL DOCKETING STATEMENT

Docket No.: 18-5
Subject: Candor Toward the Tribunal-child-elder abuse
Request Received: May 8, 2018

Requestor: Committee Proposal
Contact Info: _____

Description of Rule: New Rule Modification of Existing Rule
To add child and elder abuse to the attorney's duty to report under the rule

Rules Affected by Proposal:
3.03(a)(2)

Assigned to: Claude Ducloux

Deadline to Initiate or Decline: N/A Completed: _____

If declined: Date of Written Decision: N/A

Deadline to Publish in Texas Register: _____ Completed: _____

Deadline to Publish in Bar Journal: _____ Completed: _____

End Date of Comment Period: _____

Date of Public Hearing(s): _____

Deadline for Committee Final Vote: _____ Completed: _____

Committee Referral to Board of Directors: _____

Other Notes: 18-5 "Continued to next meeting" at 6-11-18 meeting;

Proposed Future Timeline for June or July meetings

Below is a proposed future timeline for any rules that are voted as ready for publication at either the June or July meetings. It is important that we have dates nailed down before we publish so that the publication will also give readers notice of the end date of the comment period and notice of the date and details of the public hearing.

Publications – Publications will include details on dates and participation methods for the comment period and the public hearing.

- **Texas Bar Journal - September 1, 2018**

(Please note that after the June 11, 2018 meeting it will be too late to get the rules published in the July Bar Journal and the Bar Journal does not publish an August issue.)

- **Texas Register – August 22, 2018**

Comment Period- November 1, 2018

After publication comments will be accepted through November 1, 2018.

Public Hearing- October 10, 2018

There will be a public hearing sometime during the comment period. We have tentatively scheduled it for October 10, 2018 because we have to hold it in the big room, Room 101, and that means we have to reserve it well in advance.

There is nothing in the statute that tells us any specifics about the public hearing, such as does the whole Committee or a quorum have to be there or just the Chairman. We have learned that when the SBOT has its budget public hearing, only one person attends as a representative of SBOT and that is usually the SBOT President.

Additionally, the Chairman could hand off the responsibility to another member of the Committee to be his proxy and representative of the Committee. If the Chairman wants to use a proxy, it would probably be easier for someone who lives in Austin, such as Claude or Amy, to attend and preside over the public hearing.

Final Vote by Committee on the Proposed Rule- November 7, 2018 or December 5, 2018

The Committee must vote on whether to recommend a proposed rule to the Board of Directors at either the November 7, 2018 meeting or the December 5, 2018 meeting. This vote must be held at a meeting open to the public and with notice to the public.

Possible Future Timeline for Advertising Rules

NOTE: Committee timeline begins July 11, 2018. The following dates are the maximum amount of time pursuant to the statute

Deadline to Initiate – September 8, 2018

Publications – Publications will include details on dates and participation methods for the comment period and the public hearing.

- **Texas Bar Journal - March 1, 2019 (Must Submit by February 1, 2019)**
- **Texas Register – March 1, 2019 (Must Submit by February 20, 2019)**

Comment Period- March 1, 2019 through April 29, 2019

After publication comments will be accepted through April 29, 2019.

Public Hearing- To be held during comment period

Deadline for Final Vote - June 27, 2019

This vote must be held at a meeting open to the public and with notice to the public.