

MEETING OF THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

February 5, 2020
Texas Law Center, Room 102
Austin, Texas
And by Teleconference

MINUTES

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

Members Not Present: Claude Ducloux; W. Carl Jordan.

State Bar of Texas Staff Present: Brad Johnson, Disciplinary Rules and Referenda Attorney; Cory Squires, Staff Liaison; Lowell Brown, Communications Division Director.

A. CALL TO ORDER; ROLL CALL

Mr. Kinard called the meeting to order at 10:03 a.m. Mr. Squires called the roll and a quorum was present.

B. APPROVAL OF THE MINUTES OF THE LAST MEETING

Mr. Kinard addressed the Committee on this agenda item. Ms. Bresnen made a motion that the Committee approve the minutes from the January 16, 2020, meeting. Mr. Hagen seconded the motion. The Committee voted in favor of the motion.

C. COMMENTS FROM THE CHAIR

Mr. Kinard provided an update on the State Bar Board of Directors January 24, 2020, meeting. Mr. Kinard explained that the Board voted to: 1) reject the Committee's recommendation for proposed changes to Rule 1.01 (Competent and Diligent Representation), Texas Disciplinary Rules of Professional Conduct (TDRPC); 2) approve proposed Rule 6.05 (Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services), TDRPC; and 3) return the proposed changes to Part VII (Information about Legal Services), TDRPC, for further consideration, particularly regarding the issue of lawyer trade names. Mr. Kinard noted that a lawsuit was recently filed in the Western District of Texas regarding the current restriction in the TDRPC on the use of trade names by lawyers. Mr. Kinard explained that similar lawsuits regarding the use of trade names by lawyers are pending in other jurisdictions around the country. Mr. Kinard briefed the Committee on his presentation of the Committee annual report to the Board.

D. PROPOSED LAWYER ADVERTISING AND SOLICITATION RULES – PART VII. INFORMATION ABOUT LEGAL SERVICES, TDRPC

Mr. Kinard addressed the Committee regarding the statute governing the rule proposal process and its application when a rule is returned by the Board for further consideration by the Committee. Mr.

Kinard suggested the Committee may want to consider reinitiating the rule proposal process for the lawyer advertising and solicitation rules. The Committee discussed rule timelines and procedures. Mr. Kinard noted that he thinks the Bar is currently looking at early 2021 for a possible rules vote by membership. Ms. Bresnen addressed the Committee on reinitiating the proposal and addressed possible timelines. Mr. Kinard clarified that the lawsuit at issue was filed against the Chief Disciplinary Counsel and that the Committee is not a party to the litigation. Mr. Kinard noted that one option in the rule proposal process is to let other parts of the proposed rules address false and misleading communications rather than specifically addressing trade names. Dean Johnson asked Mr. Kinard about his understanding of the scope of the return of the proposal by the Board. Mr. Kinard responded that it was his understanding and interpretation of Board comments and the Discipline and Client-Attorney Assistance Subcommittee recommendation that the trade name issue was the only component of the rule proposal they had concerns with. Dean Johnson discussed options for addressing the trade name issue in the rule proposal. Dean Johnson described one option as deleting proposed Rule 7.07, which, as previously drafted, would have carried forward the prohibition on a lawyer in private practice using a trade name. Dean Johnson described another option as substituting a proposed rule specifically prohibiting a lawyer from practicing under a trade name that is false or misleading. Dean Johnson described a third option along the lines of the New Jersey rule on lawyer trade names. Dean Johnson noted that regardless of the approach taken, the previously recommended proposal included language generally prohibiting false or misleading communications. Ms. Bresnen expressed a preference for the first option described by Dean Johnson. Mr. Kinard noted proposed Rule 7.01(a)'s prohibition on false or misleading communication about the qualifications or services of a lawyer or law firm. Mr. Kinard also noted the possibility of separating the trade name issue into an independent proposal. The Committee further discussed pending litigation regarding trade names and different options for moving forward in the rule proposal process. Dean Johnson noted that he was beginning to favor the option of eliminating proposed Rule 7.07 from the proposal, leaving in place the general prohibitions on false and misleading statements to address the issue. Ms. Nicholson expressed her support for that approach. Mr. Hagen expressed that he would like to see public comments on the New Jersey model. Ms. Bresnen and Mr. Kinard discussed the next steps in the rule proposal process. Brad Johnson responded with comments. Ms. Bresnen made a motion to initiate the rule proposal process for Rules 7.01 through 7.07, TDRPC. Dean Johnson seconded the motion. The Committee further discussed the motion. Mr. Hagen expressed his preference for the New Jersey rule on trade names. The Committee voted in favor of the motion.

The Committee discussed possible language for publication. Mr. Squires responded with comments. Judge Garcia made a motion to publish proposed Rules 7.01 through 7.06 from the previous proposal, which would include deletion of previously proposed Rule 7.07. The Committee discussed the motion. Brad Johnson responded with comments. Judge Garcia discussed the concept of a possible separate proposal regarding trade names. Mr. Kinard and Brad Johnson responded with comments. The Committee further discussed the motion. Mr. Kinard clarified that elimination of proposed Rule 7.07 from the proposal, as drafted, would mean repeal of the trade name prohibition if adopted. Brad Johnson responded with comments. Mr. Hagen expressed interest in seeing how the New Jersey defendant responds in pending litigation related to trade names. Ms. Bresnen and Mr. Kinard responded with comments. The Committee further discussed the motion and the next steps in the rule proposal process. Ms. Nicholson asked questions pertaining to the rule proposal timeline. Brad Johnson and Ms. Bresnen responded with comments. Dean Johnson called the question. Mr. Kinard restated the motion to publish proposed Rules 7.01 through 7.06 as

replacements for current Rules 7.01 through 7.07, TDRPC. The Committee voted in favor of the motion (with one member voting against the motion).

E. PROPOSED RULES 3.01 (DISCIPLINARY PETITION), 3.02 (ASSIGNMENT OF JUDGE), AND 3.03 (FILING, SERVICE AND VENUE), TEXAS RULES OF DISCIPLINARY PROCEDURE (TRDP) – RELATING TO THE ASSIGNMENT OF JUDGES AND RELATED PROCEDURES WHEN A RESPONDENT IN A DISCIPLINARY COMPLAINT ELECTS TO PROCEED IN DISTRICT COURT

Mr. Kinard addressed the Committee on this agenda item. Mr. Kinard discussed public comments received on the proposed changes to Rules 3.01, 3.02, and 3.03, TRDP, including recent suggestions submitted by Presiding Judge David Evans. Brad Johnson responded with comments. Ms. Bresnen made a motion to table the item until the Committee’s next meeting. Ms. Nicholson seconded the motion. The Committee voted in favor of the motion. The Committee will take the item up again at its March 4, 2020, meeting.

F. PROPOSED RULE 13.04. VOLUNTARY APPOINTMENT OF CUSTODIAN ATTORNEY FOR CESSATION OF PRACTICE, TRDP

Mr. Kinard addressed the Committee on this agenda item. Mr. Kinard discussed a proposed amendment to proposed Rule 13.04, TRDP. The proposed amendment would replace the word “assumption” with “cessation” in paragraph (B) of the version previously approved for publication by the Committee. Ms. Nicholson made a motion to approve the proposed amendment. Dean Johnson seconded the motion. The Committee voted in favor of the motion. Brad Johnson noted that the proposed Rule would be published in the March 2020 issue of the *Texas Bar Journal*.

G. PROPOSED LAWYER ADVERTISING AND SOLICITATION RULES – PART VII. INFORMATION ABOUT LEGAL SERVICES, TDRPC

The Committee returned to the subject of the proposed advertising and solicitation rules. The proposal will be published in the March 2020 issue of the *Texas Bar Journal* and in the *Texas Register*. The Committee will accept public comments through April 10, 2020, and will hold a public hearing at its April 7, 2020, quarterly meeting. The published proposal will include an explanation of the revision from the previously recommended version.

Dean Johnson left the meeting.

H. SUPREME COURT OF TEXAS REQUEST FOR A RECOMMENDATION ON A COMMENT TO PART XIII. CESSATION OF PRACTICE, TRDP – RELATING TO THE VOLUNTARY APPOINTMENT OF CUSTODIAN ATTORNEYS TO ASSIST WITH THE CESSATION OF PRACTICE

Mr. Kinard addressed the Committee on this agenda item. Ms. Bresnen and Mr. Belton responded with comments. Mr. Kinard addressed the item further and Brad Johnson responded with comments. No action was taken on this item and it will be carried forward to the March 4, 2020, meeting agenda.

I. SUBCOMMITTEE REPORT REGARDING TEMPORARY CESSATION OF PRACTICE AND/OR TEMPORARY MANAGEMENT OF LAW PRACTICE

Mr. Kinard addressed the Committee on this agenda item. Mr. Belton responded with comments. Mr. Belton noted that there are currently continuing legal education (CLE) courses related to this topic and to the subject of the next agenda item. No action was taken on this item and it will be carried forward to the March 4, 2020, meeting agenda.

J. RULE 1.05. CONFIDENTIALITY OF INFORMATION, TDRPC – RELATING TO THE DISCLOSURE OF CONFIDENTIAL INFORMATION WITH REGARD TO CLIENTS CONTEMPLATING SUICIDE

Mr. Kinard addressed the Committee on this agenda item. Ms. Bresnen addressed the Committee regarding feedback she received on the subject. Ms. Bresnen discussed possible options regarding the proposal. Mr. Kinard and Brad Johnson responded with comments. Mr. Kinard suggested the subcommittee on this subject have a proposal for consideration at the next meeting. No action was taken on this item and it will be carried forward to the March 4, 2020, meeting agenda.

K. COMMISSION FOR LAWYER DISCIPLINE REQUEST TO INITIATE THE RULE PROPOSAL PROCESS FOR RULE 8.03(F), TDRPC, ALONG WITH RULE 1.06 AND/OR RULE 9.01, TRDP – RELATING TO REPORTING PROFESSIONAL MISCONDUCT AND RECIPROCAL DISCIPLINE FOR FEDERAL COURT OR FEDERAL AGENCY DISCIPLINE

Mr. Kinard addressed the Committee on this agenda item. Mr. Kinard noted that Mr. Ducloux was working on this request and had discussed the subject with Chief Disciplinary Counsel Seana Willing. Mr. Kinard explained that this meeting was the deadline to take action to initiate the rule proposal process in response to the request from the Commission for Lawyer Discipline. Brad Johnson responded with comments. Mr. Kinard briefed the Committee on the subject of the request and related considerations. Ms. Nicholson made a motion to initiate the rule proposal process for the rules at issue. Brad Johnson addressed the Committee on the rule proposal process. Ms. Bresnen seconded the motion. Ms. Bresnen and Mr. Kinard further discussed the subject. The Committee voted in favor of the motion.

L. RULE 3.06. MAINTAINING INTEGRITY OF JURY SYSTEM, TDRPC – ADDRESSING POST-TRIAL COMMUNICATIONS WITH JURORS

Mr. Kinard addressed the Committee on this agenda item. Brad Johnson and Mr. Belton responded with comments. Mr. Hagen addressed the Committee on the subject. Mr. Hagen explained that he solicited and received feedback on the subject. Mr. Hagen explained that he is of the opinion that there is no need to add a comment on this subject and that it can be tabled. No action was taken on this item. Mr. Kinard explained the item will not be carried forward unless someone sees the need to bring it up again. Mr. Hagen expressed his agreement.

M. AGENDA ITEMS FOR NEXT MEETINGS

Mr. Kinard asked whether Committee members had any additional items to take up. No additional

items were suggested.

N. PROPOSED RULE TIMELINES

Mr. Kinard asked whether there were any additional rule timelines that needed to be discussed. Brad Johnson responded that all of the relevant timelines have been covered. Brad Johnson noted that there are two public hearings scheduled for the Committee's April 7, 2020, meeting. One hearing will be on proposed Rule 13.04 (Voluntary Appointment of Custodian Attorney for Cessation of Practice), TRDP, and the other will be on Part VII (Information about Legal Services), TDRPC (the lawyer advertising and solicitation rules). Mr. Kinard noted that the Committee's next monthly meeting is scheduled for March 4, 2020.

O. ADJOURNMENT

Mr. Belton made a motion to adjourn. Ms. Nicholson seconded the motion. The Committee voted in favor of the motion. The meeting adjourned at 11:38 a.m.