

# MEETING OF THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

July 8, 2020  
By Teleconference

## MINUTES

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

Members Not Present: Hon. Dennise Garcia.

State Bar of Texas Staff Present: 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 10:01 a.m. Mr. Squires called the roll and a quorum was present. (Mr. Hagen joined the meeting later.)

### B. COMMENTS FROM THE CHAIR

Mr. Kinard thanked those joining the meeting and those listening to the meeting. Mr. Kinard thanked all those who have provided comments, questions, and suggested changes. Mr. Kinard emphasized the importance of public feedback and encouraged members of the public to continue submitting comments on rule change proposals. Mr. Kinard encouraged those listening to look at State Bar President Larry McDougal's page in the most recent issue of the *Texas Bar Journal*. Mr. Kinard stated that it was good to see that a rules vote was on his list of objectives for this term.

### C. UPDATE ON POSSIBLE STATE BAR BOARD OF DIRECTORS ACTION ON PROPOSED CHANGES TO PART VII. INFORMATION ABOUT LEGAL SERVICES, TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT (TDRPC), AND PROPOSED RULE 13.04. VOLUNTARY APPOINTMENT OF CUSTODIAN ATTORNEY FOR CESSATION OF PRACTICE, TEXAS RULES OF DISCIPLINARY PROCEDURE (TRDP)

Mr. Kinard explained that at its June 24, 2020, meeting, the State Bar Board of Directors approved the proposed advertising and solicitation rules recommended by the Committee. Mr. Kinard thanked the full Committee for its work on the proposed rules. Mr. Kinard specifically recognized the subcommittee of Professor Johnson, Ms. Bresnen, and Mr. Ducloux for its efforts. Mr. Kinard explained that the Board also approved proposed Rule 13.04, TRDP. Mr. Kinard explained that the Board will hold both proposals for submission to the Supreme Court of Texas until a later date, as the Board has done with other rule proposals. Mr. Kinard explained that the Board may vote in September to petition the Supreme Court for a rules vote by Bar membership, and that a rules vote could take place as early as February 2021.

#### **D. APPROVAL OF THE MINUTES OF THE LAST MEETING**

Mr. Kinard and Mr. Ducloux addressed the Committee on this agenda item. Mr. Ducloux made a motion to approve the minutes from the June 18, 2020, meeting. Mr. Belton seconded the motion. The Committee voted in favor of the motion.

#### **E. PROPOSED CHANGES TO RULE 1.05, TDRPC – RELATING TO THE DISCLOSURE OF CONFIDENTIAL INFORMATION AND CLIENTS CONTEMPLATING SUICIDE**

Mr. Kinard addressed the Committee on this agenda item. Mr. Kinard noted that the Committee has continued to receive public comments on the proposal and thanked the subcommittee of Ms. Bresnen, Mr. Ducloux, and Mr. Belton for its efforts. Mr. Ducloux addressed the Committee on the rule proposal, including proposed amendments recommended by the subcommittee. Ms. Bresnen, Mr. Kinard, and Mr. Belton responded with comments. Ms. Bresnen, Mr. Belton, and Mr. Ducloux emphasized that the proposed rule was a permissive exception to the rule on confidentiality. Mr. Ducloux and Brad Johnson responded to a question from Mr. Kinard. Mr. Kinard briefed the Committee on its procedural options. Mr. Ducloux made a motion to adopt the proposed amendments recommended by the subcommittee, which would renumber the proposed rule to be 1.05(c)(10) and amend certain language in the proposal. Ms. Bresnen seconded the motion. The Committee voted in favor of the motion. Mr. Ducloux made a motion to recommend the amended proposal to the State Bar Board of Directors. Ms. Bresnen seconded the motion. The Committee voted in favor of the motion.

#### **F. 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 this agenda item. Mr. Kinard noted that the Committee has continued to receive public comments on the proposal. Mr. Ducloux addressed the Committee on the proposal and on certain public comments received. Ms. Nicholson responded with comments. At Mr. Ducloux' request, Brad Johnson briefed the Committee on its procedural options. Mr. Ducloux made a motion to recommend the proposal to the State Bar Board of Directors. Mr. Jordan responded with comments and questions relating to the language of the proposal. Mr. Ducloux and Ms. Willing responded with comments. The Committee further discussed the subject. Ms. Willing responded to questions from Mr. Kinard. Professor Johnson responded with comments about the proposed language. Mr. Ducloux withdrew his motion. No action was taken on the proposed rule. The Committee will consider possible amendments to the proposal at the next meeting. Mr. Kinard recognized that Mr. Hagen joined the meeting.

#### **G. RULE PROPOSALS RELATING TO PART XIII. CESSATION OF PRACTICE, TRDP**

##### **A. PROPOSED RULE 13.05, TRDP – RELATING TO THE VOLUNTARY APPOINTMENT OF A CUSTODIAN ATTORNEY TO ACT DURING A DISABILITY**

##### **B. PROPOSED TRDP RULE RELATING TO THE TERMINATION OF A CUSTODIANSHIP UNDER PART XIII, TRDP**

Mr. Kinard addressed the Committee regarding the two parts of this agenda item. Mr. Kinard explained the Committee's procedural options. Mr. Kinard discussed the published proposal, as well as a substitute version of proposed Rule 13.05, TRDP, that was submitted by Greg Sampson before the last meeting, and which Laura Gibson and Dean Schaffer also worked on. Mr. Kinard explained that the substitute version changed the focus from the appointment of a custodian to assist during a disability to the termination of a custodianship. Mr. Kinard explained that because the substitute version was a complete overhaul from the published proposal, moving forward on the substitute version would likely require initiating the process for that proposal and publishing it for public comment. Mr. Ducloux addressed the Committee on the background of the subject. Mr. Ducloux expressed his preference for the substitute version submitted by Mr. Sampson before the last meeting, which addresses the termination of a custodianship. Mr. Ducloux explained that he also believes moving forward on the substitute version would require publication for public comment. Mr. Belton expressed his agreement with Mr. Ducloux. Mr. Kinard responded with comments, including to again express his appreciation for this sort of public feedback. At Mr. Kinard's request, Brad Johnson addressed the Committee's procedural options. The Committee discussed a third version of proposed Rule 13.05, which Ms. Gibson and Mr. Sampson submitted the prior day. Mr. Ducloux expressed his preference for the previously submitted substitute version that addresses termination of a custodianship. Brad Johnson responded with comments regarding the Committee's procedural options. Mr. Squires and Mr. Kinard responded with comments. The Committee further discussed the subject. Mr. Ducloux made a motion to initiate the rule proposal process regarding a new proposed Rule 13.05 addressing termination of a custodianship. Mr. Belton seconded the motion. The Committee voted in favor of the motion. Mr. Kinard explained that there would be two Rule 13.05 items on the agenda for the next meeting. Mr. Kinard thanked the subcommittee of Mr. Ducloux and Mr. Belton, and also thanked Ms. Gibson, Mr. Sampson, and Mr. Schaffer.

## **H. PROPOSED TDRPC RULE RELATING TO DUTIES TO A PROSPECTIVE CLIENT**

Mr. Kinard addressed the Committee on this agenda item. Professor Johnson briefed the Committee on draft proposed Rule 1.18, TDRPC, which addresses duties to prospective clients and is based on Rule 1.18 of the American Bar Association (ABA) Model Rules of Professional Conduct. Ms. Bresnen and Professor Johnson explained that the draft proposal incorporated suggestions by Mr. Jordan. Mr. Ducloux responded with comments. Professor Johnson further discussed the proposal and responded to a question from Mr. Kinard. Brad Johnson addressed the Committee's procedural options. Mr. Ducloux made a motion to publish the proposal for public comment. Ms. Bresnen seconded the motion. The Committee voted in favor of the motion. The proposed rule will be published in the September issue of the *Texas Bar Journal* and in the *Texas Register*.

## **I. PROPOSED TDRPC RULE RELATING TO THE SALE OF A LAW PRACTICE**

Mr. Kinard addressed the Committee on this agenda item. Professor Johnson briefed the Committee on draft proposed Rule 1.17, TDRPC, which addresses the sale of a law practice and is based on ABA Model Rule 1.17. Mr. Kinard responded with comments, including regarding past consideration of such a rule by the State Bar and the Office of the Chief Disciplinary Counsel. At Mr. Kinard's request, Ms. Willing responded with comments regarding the subject. Professor Johnson further discussed the subject. Mr. Kinard responded with comments, including noting a resource published by the State Bar Law Practice Management Program. Mr. Ducloux responded with comments. Mr. Ducloux made a motion to initiate the rule proposal process for a proposed rule addressing the sale of a law practice.

Mr. Cantu responded with comments regarding the State Bar's previous consideration of the subject. Ms. Nicholson seconded the motion by Mr. Ducloux. Mr. Hagen asked a question regarding language in the draft proposed rule. Mr. Ducloux, Mr. Kinard, and Professor Johnson responded with comments. The Committee voted in favor of the motion.

#### **J. PROPOSED AMENDMENTS TO TDRPC TERMINOLOGY**

Mr. Kinard addressed the Committee on this agenda item. Professor Johnson briefed the Committee on draft proposed amendments to the TDRPC Terminology. Under the draft proposed amendments, the Terminology would be incorporated as Rule 1.00 and additional definitions would be added. Mr. Kinard and Ms. Bresnen responded with comments. Mr. Kinard explained that the Committee had the option to initiate the rule proposal process. Mr. Ducloux made a motion to initiate the rule proposal process. Brad Johnson asked a question about the anticipated scope of the proposed changes. Professor Johnson responded with comments. Ms. Bresnen seconded the motion by Mr. Ducloux. The Committee voted in favor of the motion. Mr. Kinard asked Ms. Bresnen and Brad Johnson to work with Professor Johnson to look into procedural issues related to changes to internal rule references. Professor Johnson and Ms. Bresnen responded with comments.

#### **K. PROPOSED RULE TIMELINES**

Mr. Kinard asked Brad Johnson whether there were any timeline issues that needed to be discussed. Mr. Johnson asked whether the Committee wanted to schedule a public hearing and set a timeline for public comments on proposed Rule 1.18, TDRPC, regarding duties to prospective clients. The Committee discussed the schedule for holding a public hearing and accepting public comments on the proposal. The Committee will hold a public hearing on proposed Rule 1.18 at its September 17, 2020, quarterly meeting and will accept public comments through October 6, 2020. Mr. Ducloux thanked Mr. Kinard and everyone else participating for a productive meeting.

#### **L. AGENDA ITEMS FOR NEXT MEETINGS**

Mr. Kinard asked whether anyone had any agenda items to suggest for the next meeting. No Committee members offered any new items for consideration. Mr. Kinard noted that the Committee will hold its August and September meetings via Zoom teleconference.

#### **M. ADJOURNMENT**

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