

MEETING OF THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

February 7, 2018

Texas Law Center Room 102

Austin, Texas

MINUTES

CALL TO ORDER

The meeting was called to order at 10:40 a.m.

Those in attendance at the meeting were: Chairman M. Lewis Kinard; Claude Ducloux; Vincent Johnson (via telephone); Timothy Belton (via telephone); Amy Bresnen; Rick Hagen; Hon. Dennise Garcia; and Jane King. Also present were: Linda Acevedo, Chief Disciplinary Counsel; Michelle Jordan, Staff Attorney; and Anne Davis, Executive Administrative Manager.

Not present was W. Carl Jordan.

A. HOUSEKEEPING

Anne Davis discussed housekeeping matters including travel issues, reimbursements and conference call information.

B. REPORT FROM DON JONES

Don Jones, Legal Counsel for the State Bar of Texas, joined the meeting. Don Jones and Linda Acevedo presented to the Committee information concerning different statutes or laws that may or may not apply to the operation of the Committee. After this discussion, Don Jones excused himself from the meeting.

C. POWERPOINT PRESENTATION AND OPERATING RULES AND PROCEDURES

Linda Acevedo presented a PowerPoint presentation outlining the statutory provisions that created and govern the Committee as well as a draft of the document entitled "Committee on Disciplinary Rules and Referenda Operating Rules and Procedures". The Committee discussed those materials including proposed changes to the Operating Rules and Procedures.

Mr. Ducloux made a motion that the Committee adopt the Operating Rules and Procedures as amended by the proposed changes. The motion was seconded by Judge Garcia. The Committee voted unanimously in favor of the motion. The adopted document is attached as Exhibit "A".

D. GUIDELINES FOR DRAFTING

Mr. Kinard presented the Committee with the document entitled "Guidelines for Drafting Disciplinary Rules of Professional Conduct Applicable to Lawyers Practicing in Texas" and the Committee discussed the document.

Ms. King made a motion that the Committee adopt the document for use in its work. The motion was seconded by the Mr. Hagen. The Committee voted unanimously in favor of the motion. The adopted document is attached as Exhibit "B".

E. MISCELLANEOUS MATTERS OF COMMITTEE OPERATION

Mr. Kinard brought to the attention of the Committee miscellaneous matters as to how the Committee could operate from an infrastructure perspective including the use of subcommittees and electronic sharing of documents, filing and calendaring systems.

Mr. Kinard also shared examples of prior reports which were created under the previous Disciplinary Rules of Professional Conduct Committee that might prove useful to this Committee in its work.

Mr. Kinard requested that Committee members copy him and Anne Davis on all important communications and documents to ensure proper retention.

F. FUTURE MEETINGS

The Committee discussed some strategies for the scheduling of future meetings. Mr. Kinard will work with Anne Davis to schedule future conference call and in person meetings. No dates for future meetings were set at this time.

G. POTENTIAL TOPICS

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

H. FUTURE ACTIONS

Mr. Kinard noted to the Committee that its work in the next meeting would be to prioritize setting future meetings and creating a specific topic list of future Committee work.

ADJOURNMENT

The Chairman made a Motion to Adjourn. The motion was seconded by the Mr. Hagen. The Committee voted unanimously in favor of the motion and meeting adjourned at 1:40 p.m.

MINUTES APPROVED BY:

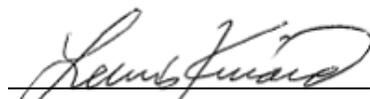

CHAIRMAN

Exhibit “A”

**COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
OPERATING RULES AND PROCEDURES**

In accordance with Tex. Gov't Code §81.0872, the Committee on Disciplinary Rules and Referenda (Committee) adopts the following operating rules and procedures:

SECTION 1: COMMITTEE COMPOSITION AND DUTIES

1.1 Composition. The Committee is composed of nine members. Seven members shall be attorneys of which four are appointed by the President of the State Bar of Texas and five are appointed by the Supreme Court of Texas. Two members shall be public members of which one is appointed by the President of the State Bar and one is appointed by the Supreme Court of Texas. The President of the State Bar and the Chief Justice of the Supreme Court of Texas shall alternate designating an attorney member of the Committee to serve as the presiding officer for a term of one year. Committee members serve staggered three-year terms, with one-third of the members' terms expiring each year.

1.2 Duties. The Committee shall regularly review the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure. The Committee shall at least annually issue a report on the adequacy of the rules to the Texas Supreme Court and the State Bar of Texas Board of Directors. The Committee shall oversee the initial process for proposing a disciplinary rule.

SECTION 2: INITIATION OF RULE PROPOSAL PROCESS

2.1 Request to Initiate the Rule Proposal Process. A request to initiate the rule proposal process may be made by: (1) A resolution of the State Bar of Texas Board of Directors; (2) a request by the Texas Supreme Court; (3) a request by the Commission for Lawyer Discipline; (4) a petition signed by at least 10% of registered members of the State Bar; (5) a concurrent resolution of the legislature; or (6) a petition signed by at least 20,000 people, of which at least 51% or 10,200 or more are Texas residents. In addition, the Committee can initiate the process for proposing a rule.

2.2 Receipt of Request. Upon receipt of a request to initiate the rule proposal process, the Committee will screen the request for compliance with Rule 2.01. If the request does not comply with Rule 2.01, the Committee will notify the requestor and explain the requirements for proper submission. If the request complies with Rule 2.01, the Committee will notify the requestor and determine within 60 days of receiving the request, whether to initiate or decline to initiate the rule proposal process. If the Committee declines to initiate the rule proposal process, the Committee must issue a written decision as to its reason for declining and notify the requestor.

SECTION 3: RULE PROPOSAL PROCESS

3.1 Generally. During the rule proposal process, the Committee shall 1) study the issue to be addressed by a proposed rule; 2) draft a rule, which can only address one subject; 3) publish the rule and solicit comments statewide from the public and members of the State Bar of Texas; 4) hold a public hearing on a proposed rule at the Committee's discretion or when requested under Rule 3.02; 5) vote on a proposed rule; and 6) submit a recommended proposed rule to the State Bar of Texas Board of Directors.

3.2 Publication, Comment Period and Public Hearing. A proposed rule must be published in (1) the Texas Register and (2) the Texas Bar Journal within six months after the proposal process is initiated under Rule 2.01 and shall include a period of at least 30 days for interested parties to submit comments on the rule to the Committee. During the comment period, the Committee shall hold a public hearing on a proposed rule at the Committee's discretion or if requested by (1) at least 25 people; a state agency or political subdivision of this state, or (3) an association with at least 25 members. A proposed rule is considered withdrawn if not published in accordance with this section.

3.3 Amendment. The Committee may amend a proposed rule at the conclusion of the comment period provided in Rules 3.02.

3.4 Deliberation and Vote. The Committee shall vote whether to recommend a proposed rule to the Board of Directors not later than the 60th day after the comment period described in Rule 3.02 ends. The Committee may not recommend a proposed rule unless at least five Committee members favor recommendation. When the Committee meets to deliberate on a final draft of a proposed rule, the Committee will give notice of the meeting and the meeting will be open to the public.

3.5 Submission to the Board of Directors. The Committee shall submit a proposed rule recommended by the Committee to the Board of Directors.

SECTION 4: MISCELLANEOUS

4.1 Use of Technology. The Committee shall use technological solutions throughout the rule proposal process to promote (1) financial efficiency; and (2) comments from interested persons.

4.2 Expired Time and Defeated Rule Proposal. The Committee may reinstate the rule proposal process if either a time limit required expires or if a proposed rule is otherwise defeated. The Committee may petition the Supreme Court for an extension of any time limit. The petition must be made within 90 days after the original deadline.

4.3 Request for Public Information. Requests for public information will be governed by Rule 12 of the Rules of Judicial Administration.

4.4 Meetings. The Committee may meet in person or telephonically and may conduct business by electronic means.

Adopted 2-7-2018

Exhibit “B”

GUIDELINES FOR DRAFTING DISCIPLINARY RULES OF PROFESSIONAL CONDUCT APPLICABLE TO LAWYERS PRACTICING IN TEXAS

1. Overarching principles are protection of the public and notice to lawyers.
2. TDRPC should not restate other rules, statutes, opinions or case law.
3. Rules should prohibit or dictate certain behavior by a lawyer; the mandatory words “shall” or “shall not” are important to help lawyers know what is expected. Only if a lawyer does or does not do something should the lawyer be disciplined, so drafters should use the precision required of criminal statutes.
4. The word “may” is used only to indicate an exception to a prohibition, whether within the same rule or elsewhere in the rules, because lawyers may practice freely up to the point where prohibited by law or rules.
5. Clear scienter threshold should be stated. “No lawyer should be subject to disbarment or other discipline unless the lawyer is at fault.”
6. TDRPC should be easy to understand:
 - a. Use plain English.
 - b. Avoid long narratives in favor of lists.
 - c. Avoid the passive voice; the rule should call for or prohibit action.
7. Practice pointers and “best practices” are not appropriate in the TDRPC. State Bar sections are free to issue and update guidance for Texas attorneys, but no one should be subject to discipline for actions that vary from such tips. In some cases, examples are appropriate in comments to the rules (such as when certain Ethical Considerations in the old Code of Professional Responsibility were incorporated into comment language for our rules).
8. Language should be consistent across all rules and comments whenever possible; a compelling reason is needed to use inconsistent terminology and that should be very rare.
9. Liability should be clearly on individual lawyers; law firms and other entities are not licensed and therefore cannot have their licenses threatened by disciplinary action.
10. Preserve the distinction between “disqualification” and “discipline” such as in rules relating to confidentiality and conflicts of interest. The TDRPC are intended to be the substantive law for disciplinary proceedings.
11. Comments do not restate the rule’s language, but illustrate or explain unclear concepts.
12. Language from the ABA Model Rules and Comments, as well as other states’ rules and comments, may inform and guide Texas, but are frequently only a starting point, as they do not consistently follow the guidelines above.

Adopted: 2-7-2018