# Committee on Disciplinary Rules and Referenda

## Agenda

**Date and Time:** **Wednesday, February 3, 2021 – 10:00 a.m. CST**
**By Teleconference**

**Join by Meeting Link: https://texasbar.zoom.us/j/96506614651**

**Or Join by Telephone: 888-788-0099 (Toll Free); Meeting ID: 965 0661 4651**

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1. Call to Order; Roll Call

2. Comments from the Chair

3. Update on 2021 Rules Vote

4. Discussion and Possible Action: Approval of the Minutes of the Last Meeting (Pages 3 – 5)

5. Discussion and Possible Action: Proposed Comment to Proposed Rule 1.16, Texas Disciplinary Rules of Professional Conduct (TDRPC) (Pages 6 – 8)

   *Consider Amendments to the Proposed Comment*

6. Discussion and Possible Action: Proposed Rule 1.00. Terminology, TDRPC (Pages 9 – 14)

   *Consider Initiation of the Rule Proposal Process and Possible Publication of a Proposed Rule and Proposed Comment in the Texas Bar Journal and Texas Register*

7. Discussion and Possible Action: Proposed Rule 1.17. Sale of Law Practice, TDRPC (Pages 15 – 19)

   *Consider Initiation of the Rule Proposal Process and Possible Publication of a Proposed Rule and Proposed Comment in the Texas Bar Journal and Texas Register*

8. Discussion: Rules 5.08 (Prohibited Discriminatory Activities) and 8.04 (Misconduct), TDRPC

   *Discussion of Possible Proposed Amendments to Rules 5.08 and/or 8.04, TDRPC, Relating to Harassment or Discrimination Based on Certain Categories*

   *Possible Update on State Bar of Texas Board of Directors Consideration of Rule 8.4(g), American Bar Association Model Rules of Professional Conduct, and Rule 5.08, TDRPC*

9. Proposed Rule Timelines

10. Agenda Items for Next Meetings

11. Communications to the Committee from the Public (Time Permitting)

12. Adjourn

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**MEETING OF THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA**

December 2, 2020
By Teleconference

**MINUTES**

Members Present: Chair M. Lewis Kinard; Timothy D. 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: Seana Willing, Chief Disciplinary Counsel; Brad Johnson, Disciplinary Rules and Referenda Attorney; Cory Squires, Staff Liaison.

## A. CALL TO ORDER; ROLL CALL

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

## B. COMMENTS FROM THE CHAIR

Mr. Kinard congratulated Mr. Ducloux and Professor Johnson on their reappointments for another term on the Committee. Mr. Kinard noted that he was also reappointed to the Committee and designated to serve as chair for another year. Mr. Kinard explained that the Committee accomplished a significant amount of work in 2020, including the recommendation of seven rule proposals to the State Bar of Texas Board of Directors and the holding of nine public hearings. Mr. Kinard thanked all of the Committee members for their time and efforts. Mr. Kinard noted that the Committee is moving toward the first rules vote in a decade. Mr. Kinard thanked the Board of Directors and the Supreme Court of Texas for their thoughtful consideration, support, and action leading up to the February 2021 rules vote. Mr. Kinard emphasized that the Committee truly appreciates and values the important feedback provided by members of the Bar and the general public. Mr. Kinard encouraged members of the Bar and the general public to stay involved and to keep providing comments as the Committee publishes new proposals in the future.

Mr. Kinard noted that Committee members will be doing a significant amount of outreach over the next three months to help educate the Bar membership on the nature of the proposed rule changes. Mr. Kinard explained that he, Ms. Bresnen, Mr. Ducloux, Professor Vincent Johnson, and Mr. Brad Johnson recently filmed a CLE presentation, and that Committee members will take part in a number of other events. Mr. Kinard noted that more information is available at texasbar.com/rulesvote. Mr. Kinard explained that a free hour of ethics CLE credit is available for attorneys who register for certain State Bar events. Mr. Kinard also noted that Committee members will be giving presentations to local bar associations.

## C. APPROVAL OF THE MINUTES OF THE LAST MEETING

Mr. Kinard addressed the Committee on this agenda item. Ms. Bresnen made a motion to approve

the minutes of the November 4, 2020, meeting. Mr. Belton seconded the motion. The Committee voted in favor of the motion.

## D. COMMITTEE ANNUAL REPORT

Mr. Kinard addressed the Committee on this agenda item. Mr. Kinard explained that, if approved, the report would be submitted to the State Bar Board of Directors and Supreme Court of Texas in early January 2021. Mr. Ducloux made a motion to approve the report subject to any necessary statistical updates and incorporation of a Zoom photo from the meeting. Ms. Nicholson seconded the motion. The Committee voted in favor of the motion.

## E. 2021 COMMITTEE MEETING SCHEDULE

Mr. Kinard explained that the Committee previously approved the 2021 meeting schedule. Mr. Kinard noted that the Committee originally voted not to hold a January 2021 meeting due to the significant amount of outreach and education that will be taking place related to the 2021 rules vote, but subsequently decided to revisit whether to hold a January 2021 meeting. Mr. Kinard noted that the February 2021 meeting could be considered the Committee's quarterly meeting. Ms. Bresnen responded with comments. The Committee did not take action on this agenda item. The Committee will not hold a January 2021 meeting due to the significant outreach efforts by Committee members during that timeframe. The Committee will schedule its September 2021 meeting at a later date.

## F. PROPOSED RULE TIMELINES

Mr. Kinard asked Brad Johnson whether there were any timeline issues that needed to be discussed. Mr. Johnson addressed the Committee regarding proposed rule timelines. Mr. Johnson noted that the Committee previously discussed revisiting the subjects of the Texas Disciplinary Rules of Professional Conduct (TDRPC) terminology, the sale of a law practice, and possible proposed amendments to Rules 5.08 and 8.04, TDRPC, at its next meeting, which is scheduled for February 2021.

## G. AGENDA ITEMS FOR NEXT MEETINGS

Mr. Kinard explained that the rules vote will be underway when the Committee meets in February 2021. Mr. Kinard noted that the Committee will take up the subjects just described by Mr. Johnson at that meeting. Mr. Kinard asked whether anyone had additional items to add to the February 2021 meeting agenda. Mr. Ducloux suggested a report of the number of bar associations that the Committee has reached out to and the number of informational articles published. Mr. Ducloux explained that he is looking forward to presenting to lawyers around the state and that he is proud of the quality of the 2021 rules vote package. Mr. Kinard expressed his agreement. Mr. Kinard noted the significant number of requests for presentations and that he expects there will be additional requests. Ms. Nicholson asked a question about presentations and Mr. Kinard responded with comments.

## H. ADJOURNMENT

Mr. Kinard thanked everyone for joining the meeting. Mr. Ducloux made a motion to adjourn. Group photos were taken. Mr. Belton seconded the motion to adjourn. The Committee voted in favor of

the motion. The meeting adjourned at 10:19 a.m.

**Proposed Amendments to Proposed Rule 1.16 Comment**
**(Proposed Amendments Shown in Red)**

**Proposed Rule 1.16, Texas Disciplinary Rules of Professional Conduct**

**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.

**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. 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. If it appears to be necessary to disclose confidential information to a third person to protect the client's best interests, a lawyer should consider whether it would be prudent to ask for the client's consent to the disclosure. Only in compelling cases should the lawyer disclose confidential client information if the client has expressly refused to consent.

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. A disclosure of confidential information may be inadvisable if the third person's involvement in the matter is likely to turn confrontational.

**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.

**Proposed Rule 1.00. Terminology, Texas Disciplinary Rules of Professional Conduct**

**Rule 1.00. Terminology**

(a) "Adjudicatory Official" denotes a person who serves on a Tribunal.

(b) "Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.

(c) "Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(d) "Client." A person is a client when:

(1) the person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(i) the lawyer manifests to the person consent to do so; or

(ii) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

(e) "Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

(f) "Consult" or "Consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(g) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (j) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(h) "Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

(i) "Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

(j) "Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or negligent failure to apprise another of relevant information.

(k) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about material risks of and reasonably available alternatives to the proposed course of conduct. If a rule calling for informed consent requires specific disclosures (*see, e.g.*, Rule 1.06(c)(2)), consent is not informed unless those disclosures have been made.

(l) "Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(m) "Law firm": see "Firm."

(n) "Partner" denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.

(o) "Person" includes a legal entity as well as an individual.

(p) "Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(q) "Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(r) "Represent," "Represents," or "Representation." A lawyer represents a person if the person is a client of the lawyer. *See* "Client." If the relationship of client and lawyer terminates, the lawyer's representation of the client terminates.

(s) "Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

(t) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(u) "Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

(v) "Tribunal" denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. "Tribunal" includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters,

referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

(w) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

**Comment:**

**Client**

1. An attorney-client relationship is created only three ways: by judicial appointment, by express agreement, or by mistake. Two of the three ways of establishing a lawyer-client relationship—court appointment and express agreement—are relatively formal and easy to recognize. For an attorney-client relationship to arise by mistake, three things are necessary. First, the person must manifest an intent that the lawyer provide legal services. Second, the lawyer must fail to manifest lack of consent to do so. Third, the lawyer must know, or reasonably should know, that the person reasonably relies on the lawyer to provide legal services. By itself, a unilateral belief on the part of a person that the lawyer will provide legal services is insufficient to create a lawyer-client relationship.

**Confirmed in Writing**

2. If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

3. Whether two or more lawyers constitute a firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

4. With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of

the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

5. Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

**Fraud**

6. When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under applicable substantive or procedural law and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. Silence may be fraudulent if there is a duty to speak and intent to deceive. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

**Informed Consent**

7. Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person. The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

8. Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter.

**Screened**

9. This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules that expressly permit screening.

10. The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

11. In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Comment 1 to Rule 1.00 (d) (definition of “Client”)
Vincent R. Johnson
December 2, 2020

OLD Version:

An attorney-client relationship is created only three ways: by judicial appointment, by express agreement, or by mistake. Two of the three ways of establishing a lawyer-client relationship—court appointment and express agreement—are relatively formal and easy to recognize. For an attorney-client relationship to arise by mistake, there must have been a request for representation which manifested the putative client’s intent that the lawyer provide legal services. Under the mistake theory of attorney-client relationship, it is not enough that the person seeks legal services and even reasonably believes that services will be rendered. In addition, the lawyer must know, or have reason to know, that the person relies on the lawyer to provide services, and must fail to manifest lack of consent to do so.

NEW Version:

An attorney-client relationship is created only three ways: by judicial appointment, by express agreement, or by mistake. Two of the three ways of establishing a lawyer-client relationship—court appointment and express agreement—are relatively formal and easy to recognize. For an attorney-client relationship to arise by mistake, three things are necessary. First, the person must manifest an intent that the lawyer provide legal services. Second, the lawyer must fail to manifest lack of consent to do so. Third, the lawyer must know, or reasonably should know, that the person reasonably relies on the lawyer to provide legal services. By itself, a unilateral belief on the part of a person that the lawyer will provide legal services is insufficient to create a lawyer-client relationship.

June 19, 2020

TO: Sale of Law Practice Subcommittee (Claude Ducloux and Amy Bresnen)

FROM: Vincent R. Johnson, ***VRJ***

RE: Adding a "Sale of Law Practice" Rule to the Texas Disciplinary Rules

"Until the late twentieth century, it was considered unethical to sell a law practice. . . . [I]t was said to violate rules against disclosing confidences, compensating someone for securing legal business, and sharing fees with nonlawyers."[1] Thus, "[u]ntil 1990, lawyers were unable to sell any part of a law practice except for the physical assets such as furniture, office equipment, and books."[2]

In 1990, the American Bar Association adopted Model Rule 1.17 (later revised), which expressly permits the sale of a law practice, if certain requirements are met. Texas never adopted any version of Model Rule 1.17. Apparently, no such rule was proposed in the 2011 State Bar Referendum.

In late 2015, an article in the *Houston Lawyer* lamented:

> [T]he American Bar Association has a rule that allows a lawyer to sell the practice, but after diligent search in the Texas Disciplinary Rules of Professional Conduct ("DR"), a rule like that is nowhere to be found. Further research reveals that all of the states have such a rule except for Texas, Alabama, and Louisiana.[3]

The same article discussed the difficulties of identifying and resolving the ethical uncertainties related to the sale of a law practice in the absence of a comprehensive provision similar to Model Rule 1.17. The author concluded that:

> It is time for Texas to join the majority and adopt a workable and practical rule for the benefit of not only the lawyers, and their families, but also for the benefit of the clients that Texas lawyers are privileged to serve.[4]

The following paragraphs show in redlined format how I would propose to change Model Rule 1.17 for addition to the Texas ethics rules (perhaps as Texas Disciplinary Rule 1.17):

> **Rule 1.17 Sale of Law Practice**
>
> A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

[1] 1.17 *Sale of Law Practice*, ANN. MOD. RULES PROF. COND. § 1.17 (9th ed. 2019).
[2] *Facilitating the Sale of a Law Practice*, ABA Formal Op. 14-468.
[3] James E. Brill, *Sale of a Practice: When It's Time, It's Time*, 53 HOUS. LAW. 10, 10 (November/December 2015).
[4] *Id*. at 13.

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, ~~[in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version)~~ in the geographic area in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

**Comment**

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.04 (Professional Independence of a Lawyer) and 5.06 (Restrictions on Right to Practice).

*Termination of Practice by the Seller*

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in ~~a contested or a retention~~ an election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice ~~attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice~~ when the lawyer leaves the geographical area of the practice.~~rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).~~

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.04(f)~~5(e)~~. For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

*Sale of Entire Practice or Entire Area of Practice*

[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

*Client Confidences, Consent and Notice*

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.05~~6~~ than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. ~~See Rule 1.6(b)(7).~~ A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.[5] Providing the purchaser access to

[5] The Texas Disciplinary Rules do not contain a provision similar to the language found in Model Rule 1.6(b)(7). Therefore, the reference to that provision has been eliminated. However, the substance of the rule, which is consistent with Texas law, has been written into the Comment.

detailed information relating to the representation, such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered *in camera*. ~~(A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist).~~

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

*Other Applicable Ethical Standards*

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.01); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.067 regarding conflicts and Rule 1.00~~(e)~~ for the definition of informed consent)[6]; and the obligation to protect information relating to the representation (see Rules 1.056 and 1.09).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.156).

[6] The following definition of "informed consent," borrowed from Model Rule 1.0(e), should be added to Rule 1.00 Terminology:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

*Applicability of the Rule*

[13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.