Committee on Disciplinary Rules and Referenda

Agenda

Date and Time: Wednesday, August 5, 2020 – 10:00 a.m. CDT
By Teleconference

Join by Meeting Link: https://texasbar.zoom.us/j/94538972079

Or Join by Telephone: 888-788-0099 (Toll Free); Meeting ID: 945 3897 2079

View Meeting Agenda and Materials: https://www.texasbar.com/cdrr/participate

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1. Call to Order; Roll Call

2. Comments from the Chair

3. Approval of the Minutes of the Last Meeting (Pages 3 – 6)

4. Discussion and Possible Action: Proposed Changes to Rule 8.03, Texas Disciplinary Rules of Professional Conduct (TDRPC), and Rules 1.06 and 9.01, Texas Rules of Disciplinary Procedure (TRDP) – Relating to Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline (Pages 7 – 9)

Consider Recommendation of and Possible Amendments to the Proposed Rule Changes

5. Rule Proposals Relating to Part XIII. Cessation of Practice, TRDP

   A. Discussion and Possible Action: Proposed Rule 13.05, TRDP – Relating to the Voluntary Appointment of a Custodian Attorney to Act During a Disability (Page 10)

   Consider Recommendation of and Possible Amendments to the Proposed Rule

   B. Discussion and Possible Action: Proposed Rule 13.05, TRDP – Relating to the Termination of a Custodianship (Page 11)

   Consider Publication of a Proposed Rule in the Texas Bar Journal and Texas Register

6. Discussion and Possible Action: Proposed Rule 1.17, TDRPC – Relating to the Sale of a Law Practice (Pages 12 – 16)

Consider Publication of a Proposed Rule in the Texas Bar Journal and Texas Register

7. Discussion and Possible Action: Proposed Amendments to TDRPC Terminology
(Pages 17 – 21)

Consider Publication of a Proposed Rule in the Texas Bar Journal and Texas Register

8. Discussion: Proposed Rule 1.18, TDRPC – Relating to Duties to a Prospective Client
(Pages 22 – 25)

9. Proposed Rule Timelines (Pages 26 – 31)

10. Agenda Items for Next Meetings

11. Adjourn

Under the Americans with Disabilities Act, an individual with a disability is entitled to have an equal opportunity for effective communication and participation in public meetings. Reasonable modifications and equal access to communications will be provided upon request. An individual with a disability who may need an accommodation is requested to notify Chielsey Barber at (800) 204-2222 or (512) 427-1463 at least two days before the scheduled meeting so that appropriate arrangements can be made; TTY users route through RELAY Texas at 7-1-1.

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.

Proposed Amendments to Proposed Rule Changes

Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline

Proposed Rules (New Proposed Amendments in Red)

Texas Disciplinary Rules of Professional Conduct

Rule 8.03. Reporting Professional Misconduct

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(f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, "discipline" by a federal court or federal agency ~~includes any action affecting the lawyer's ability to practice before that court or agency or any public reprimand~~ means a public reprimand, suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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Texas Rules of Disciplinary Procedure

1.06. Definitions:

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CC. "Professional Misconduct" includes:

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2. Attorney conduct that occurs in another ~~state or in the District of Columbia~~ jurisdiction, including before any federal court or federal agency, and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct.

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9.01. Orders From Other Jurisdictions: Upon receipt of information indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction, including by any federal court or federal agency, the Chief Disciplinary Counsel shall diligently seek to obtain a certified copy of the order or judgment of discipline from the other jurisdiction, and file it with the Board of Disciplinary Appeals along with a petition requesting that the attorney be

disciplined in Texas. A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action under this Part, subject to the defenses set forth in Rule 9.04 below. For purposes of this Part, "discipline" by a federal court or federal agency ~~includes any action affecting the lawyer's ability to practice before that court or agency or any public reprimand~~ means a public reprimand, suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 8.03. Reporting Professional Misconduct

Texas Rules of Disciplinary Procedure
Rule 1.06. Definitions
Rule 9.01. Orders From Other Jurisdictions (Reciprocal Discipline)

The Committee on Disciplinary Rules and Referenda, or CDRR, was created by Government Code section 81.0872 and is responsible for overseeing the initial process for proposing a disciplinary rule. Pursuant to Government Code section 81.0876, the Committee publishes the following proposed rules. The Committee will accept comments concerning the proposed rules through June 20, 2020. Comments can be submitted at texasbar.com/CDRR or by email to CDRR@texasbar.com. A public hearing on the proposed rules will be held at 10:30 a.m. on June 18, 2020, in Room 101 of the Texas Law Center (1414 Colorado St., Austin, Texas, 78701).

Proposed Rules (Redline Version)
Texas Disciplinary Rules of Professional Conduct
Rule 8.03. Reporting Professional Misconduct

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(f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, "discipline" by a federal court or federal agency includes any action affecting the lawyer's ability to practice before that court or agency or any public reprimand; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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9.01. Orders From Other Jurisdictions: Upon receipt of information indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction, including by any federal court or federal agency, the Chief Disciplinary Counsel shall diligently seek to obtain a certified copy of the order or judgment of discipline from the other jurisdiction, and file it with the Board of Disciplinary Appeals along with a petition requesting that the attorney be disciplined in Texas. A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action under this Part, subject to the defenses set forth in Rule 9.04 below. For purposes of this Part, "discipline" by a federal court or federal agency includes any action affecting the lawyer's ability to practice before that court or agency or any public reprimand; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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Proposed Rules (Clean Version)
Texas Disciplinary Rules of Professional Conduct
Rule 8.03. Reporting Professional Misconduct

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(f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, "discipline" by a federal court or federal agency includes any action affecting the lawyer's ability to practice before that court or agency or any public reprimand; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

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Texas Rules of Disciplinary Procedure
1.06. Definitions:

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CC. "Professional Misconduct" includes:

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*** **TBJ**

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Rules of Disciplinary Procedure
Rule 13.05. Voluntary Appointment of Custodian Attorney to Act During Disability

The Committee on Disciplinary Rules and Referenda, or CDRR, was created by Government Code section 81.0872 and is responsible for overseeing the initial process for proposing a disciplinary rule. Pursuant to Government Code section 81.0876, the Committee publishes the following proposed rule. The Committee will accept comments concerning the proposed rule through July 6, 2020. Comments can be submitted at texasbar.com/cdrr or by email to cdrr@texasbar.com. The Committee will hold a public hearing on the proposed rule by teleconference at 10:30 a.m. CDT on June 18, 2020. For teleconference participation information, please go to texasbar.com/cdrr/participate.

Proposed Rule (Redline Version)

13.05. Voluntary Appointment of Custodian Attorney to Act During Disability: In lieu of the procedures set forth in Rules 13.02 and 13.03, and in addition to the appointment of a custodian attorney to assist with the closure of an attorney's practice as provided in Rule 13.04, an appointing attorney planning for a possible temporary cessation of practice may voluntarily designate a Texas attorney licensed and in good standing to act as custodian attorney to assist in the disposition of active client matters for a period of time not to exceed 120 days without closing the appointing attorney's practice, but only: (1) when the appointing attorney experiences a Disability, as defined in Rule 1.06; and (2) if the custodian attorney has a reasonable expectation the appointing attorney will resume the practice of law when the Disability ceases. The terms of the appointing documents, which shall be signed and acknowledged by the appointing attorney and custodian attorney, may include any of the following duties assumed by the custodian attorney during the period of the Disability:

A. Examine the client matters, including files and records of the appointing attorney's practice, and obtain information about any matters that may require attention.

B. Notify persons and entities that appear to be clients of the appointing attorney of the cessation of the law practice, and suggest that they obtain other legal counsel.

C. Apply for extension of time before any court or any administrative body pending the client's employment of other legal counsel.

D. With the prior consent of the client, file such motions and pleadings on behalf of the client as are required to prevent prejudice to the client's rights.

E. Give appropriate notice to persons or entities that may be affected other than the client.

F. Arrange for surrender or delivery to the client of the client's papers, files, or other property.

If the appointing attorney's Disability does not cease before the end of the 120-day period, or if the appointing attorney otherwise does not return to the practice fully competent to provide the legal services necessary to protect the interests of the appointing attorney's clients before the end of the 120-day period, then the custodian attorney shall proceed to assist thereafter only in the final resolution and closure of the appointing attorney's practice in accordance with Rule 13.04, unless the custodian attorney seeks and obtains a court order extending the period under which the custodian attorney can continue to act as custodian for a specified duration under this Rule.

The custodian attorney shall observe the attorney-client relationship and privilege as if the custodian were the attorney of the client and may make only such disclosures as are necessary to carry out the purposes of this Rule. Except for intentional misconduct or gross negligence, no person acting as custodian attorney under this Rule shall incur any liability by reason of the actions taken pursuant to this Rule.

The privileges and limitations of liability contained herein shall not apply to any legal representation taken over by the custodian attorney.

Proposed Rule (Clean Version)

13.05. Voluntary Appointment of Custodian Attorney to Act During Disability: In lieu of the procedures set forth in Rules 13.02 and 13.03, and in addition to the appointment of a custodian attorney to assist with the closure of an attorney's practice as provided in Rule 13.04, an appointing attorney planning for a possible temporary cessation of practice may voluntarily designate a Texas attorney licensed and in good standing to act as custodian attorney to assist in the disposition of active client matters for a period of time not to exceed 120 days without closing the appointing attorney's practice, but only: (1) when the appointing attorney experiences a Disability, as defined in Rule 1.06; and (2) if the custodian attorney has a reasonable expectation the appointing attorney will resume the practice of law when the Disability ceases. The terms of the appointing documents, which shall be signed and acknowledged by the appointing attorney and custodian attorney, may include any of the following duties assumed by the custodian attorney during the period of the Disability:

A. Examine the client matters, including files and records of the appointing attorney's practice, and obtain information about any matters that may require attention.

B. Notify persons and entities that appear to be clients of the appointing attorney of the cessation of the law practice, and suggest that they obtain other legal counsel.

C. Apply for extension of time before any court or any administrative body pending the client's employment of other legal counsel.

D. With the prior consent of the client, file such motions and pleadings on behalf of the client as are required to prevent prejudice to the client's rights.

E. Give appropriate notice to persons or entities that may be affected other than the client.

F. Arrange for surrender or delivery to the client of the client's papers, files, or other property.

If the appointing attorney's Disability does not cease before the end of the 120-day period, or if the appointing attorney otherwise does not return to the practice fully competent to provide the legal services necessary to protect the interests of the appointing attorney's clients before the end of the 120-day period, then the custodian attorney shall proceed to assist thereafter only in the final resolution and closure of the appointing attorney's practice in accordance with Rule 13.04, unless the custodian attorney seeks and obtains a court order extending the period under which the custodian attorney can continue to act as custodian for a specified duration under this Rule.

The custodian attorney shall observe the attorney-client relationship and privilege as if the custodian were the attorney of the client and may make only such disclosures as are necessary to carry out the purposes of this Rule. Except for intentional misconduct or gross negligence, no person acting as custodian attorney under this Rule shall incur any liability by reason of the actions taken pursuant to this Rule.

The privileges and limitations of liability contained herein shall not apply to any legal representation taken over by the custodian attorney. **TBJ**

13.05. Termination of Custodianship:

A custodianship conducted by an appointed custodian under Rule 13.04 shall terminate upon one or more of the following events:

1. The transfer of all active client files to attorneys who take responsibility for the representation or upon distribution of such files and any client property to the client in accordance with the custodian agreement and in compliance with applicable Disciplinary Rules of Professional Conduct;

2. Entry of an order terminating the custodianship from a court with jurisdiction over the practice under Rules 13.02 and 13.03.

3. The return of the appointing attorney to his or her practice prior to completion of the custodianship and resumption of representation of active client matters with the competence to conduct such representation.

In the event there is disagreement about whether the appointing attorney is competent to resume representation of a client matter upon return to the practice, either the appointed custodian or the appointing attorney may petition for a determination and order of a court under Rules 13.02 and 13.03 concerning the resumption of the practice by the appointing attorney and termination of the custodianship. An appointed custodian may also petition the court for an order concerning the proper disposition of dormant or closed client files, distribution of active files for which a client is nonresponsive or cannot be located, and for proper disbursement of any client property, including client funds held in an IOLTA account.

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.

June 19, 2020

TO: Terminology Subcommittee (Claude Ducloux and Amy Bresnen)

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

RE: Amending the Terminology Provisions of the Texas Disciplinary Rules

In the course of making revisions to the Texas ethics rules that sometimes reflect terminology used in the Model Rules, we have begun to use words that are defined in the Terminology section of the Model Rules. Some of those defines terms should be incorporated into the Texas rules.

The interlineations below show how I think the current Texas terminology section should be changed.

> Rule 1.00 Terminology [the paragraphs below should be numbered (a), (b), etc., once the list is final}
>
> "Adjudicatory Official" denotes a person who serves on a Tribunal.
>
> "Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.
>
> "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.
>
> "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.
>
> "Consult" or "Consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.
>
> "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 (___e) 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.[1]
>
> "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.
>
> "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

[1] "Confirmed in writing" is a term used in the proposed rule on Duties to Prospective Clients, tentatively numbered proposed Texas Rule 1.18(d)(1).

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.

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

"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.[2]

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

"Law firm": see "Firm."

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

"Person" includes a legal entity as well as an individual.

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

"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.

"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.

"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.[3]

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

"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,

[2] The term "informed consent" is used in various provisions in the current Texas ethics rules (*see, e.g.*, TDRPC Rule 1.01(a)(1) & cmts. 4 & 5; Rule 1.06 cmts. 2, 7, 8, & 9), as well as in the proposed rules on Sale of a Law Practice and Duties to Prospective Clients.

[3] The term "screened" is used in the proposed rule on Duties to Prospective Clients, as well as in the current rules on Successive Government and Private Employment (Rule 1.10) and Adjudicatory Official or Law Clerk (Rule 1.11).

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.

"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.[4]

Comment

Confirmed in Writing

[1] 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.

[2] 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.

[3] 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.

[4] 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

[4] The terms "writing" or "written" are used at various points in the current Texas ethics rules (e.g., the rule on contingent fees) and in the proposed rules (e.g. the proposed rule on sale of a law practice).

[5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. 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

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other ~~person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b)~~. 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.

[7] 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

[8] 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.

[9] 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.

[10] 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.

June 16, 2020

TO: Prospective Clients Rule Subcommittee (Claude Ducloux and Amy Bresnen)

FROM: Vincent R. Johnson

RE: Adding a "Duties to Prospective Client" Rule to the Texas Disciplinary Rules

In 2002, the ABA House of Delegates promulgated Model Rule 1.18, entitled "Duties to Prospective Client." That rule was based on § 15 of the *Restatement (Third) of the Law Governing Lawyers* (2000), which states that a lawyer owes a prospective client a duty to: protect confidential information; avoid adverse representation in a substantially related matter; safeguard property entrusted to the lawyer; and exercise care in giving preliminary advice.[1] The ABA made minor changes to Model Rule 1.18 in 2012. The current version of the rule is set forth in Appendix A (page 1).

A vast majority of states have adopted a prospective client rule based on Model Rule 1.18, often in terms identical to the ABA language (e.g., AK, DE, IN, IA, KS, KY, LA, ME, MA, MI, NE, OK, RI, SD, UT, WV, WI). State variations are shown in Appendix A (pages 2-9). There is a high degree of consensus that a rule addressing the duties owed by lawyers to prospective clients is an appropriate, if not essential, component of a state ethics code.

Texas is one of only five states that have not adopted any disciplinary rule on duties to prospective clients (AL, GA, MS, TX, and VA). Yet questions about the duties owed by Texas lawyers to prospective clients have long confronted members of the bar.[2] A proposed rule on the duties owed by lawyers to prospective clients was defeated in the failed 2011 State Bar Referendum. *See* Appendix B.

I recommend that we propose the adoption of a rule patterned as closely as possible on ABA Model Rule 1.18. The reason for taking this approach is that the ABA Model Rule is what has been taught in law schools and tested on the Multistate Professional Responsibility Examination for nearly a full generation. Unless there is good reason for variation, we should minimize confusion about whether Texas differs from the Model Rule.

The following paragraphs shows in redlined format how I would propose to change Model Rule 1.18 for addition to the Texas Rules (presumably as Texas Disciplinary Rule 1.18):

> Rule 1.18 Duties to Prospective Client
>
> (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except ~~as Rule 1.9 would permit with respect to information of a former client.~~as these Rules would permit or require with

[1] GEOFFREY HAZARD, *et al*., THE LAW OF LAWYERING § 23.02 (4th ed., 2017 Supp.).

[2] *See, e.g.*, Texas Ethics Opinion 463 (1989) ("No provision of the Texas Code of Professional Responsibility prevents an attorney from using for the benefit of his client information obtained from a prospective client that is neither confidential nor secret.").

respect to a client, or if the information has become generally known or would not be disadvantageous to the former prospective client.[3]

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is not directly apportioned any ~~no~~ part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment

Client-Lawyer Relationship

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

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[3] The reference in Model Rule 1.18(b) to Model Rule 1.9 provides an easy cross-reference to language in the "Duties to Former Clients" rule, which states:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

However, there is no similar language in the parallel Texas rule (Rule 1.09, Conflict of Interest: Former Client). Therefore, the substance of the cross-reference in Model Rule 1.18 has been written into the text of the proposed Texas Rule.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client." A person who communicates information to a lawyer for purposes which do not include a good faith intention to retain the lawyer in the subject matter of the consultation is not a "prospective client" within the meaning of this Rule.[4]

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, ~~except as permitted by Rule 1.9~~with limited exceptions, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.06~~7~~, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. ~~See Rule 1.0(e) for the definition of informed consent.~~ If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[4] Similar to Nevada Rule 1.18(e).

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers ~~as provided in Rule 1.10~~, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. ~~See Rule 1.0(k) (requirements for screening procedures).~~ Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.01. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.14~~5~~.

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

Texas Disciplinary Rules of Professional Conduct
Rule 8.03. Reporting Professional Misconduct

Texas Rules of Disciplinary Procedure
Rule 1.06. Definitions
Rule 9.01 Orders From Other Jurisdictions
(Reciprocal Discipline)

Below is the timeline for proposed changes to Rule 8.03 of the Texas Disciplinary Rules of Professional Conduct, and to Rules 1.06 and 9.01 of the Texas Rules of Disciplinary Procedure, relating to reporting professional misconduct and reciprocal discipline.

INITIATED – **February 5, 2020**

PUBLICATION – A proposed rule is withdrawn if it is not published in (1) the Texas Register and (2) the Texas Bar Journal within six months of initiation of the rule proposal process.

- **Texas Register – March 27, 2020 (Complete)**
- **Texas Bar Journal – April 2020 (Complete)**

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

COMMENT PERIOD – The Committee shall give interested parties at least 30 days from the date a proposed rule is published to submit comments on the rule to the Committee.

The Committee accepted public comments through **June 20, 2020.**

PUBLIC HEARING – The Committee held a public hearing by teleconference on **June 18, 2020**.

FINAL VOTE BY COMMITTEE – The Committee shall vote on whether to recommend a proposed rule to the Board of Directors not later than the 60th day after the final day of the comment period. This vote must be held at a meeting open to the public and with notice to the public.

The deadline to vote is **August 19, 2020.** Therefore, the Committee must vote at its **July 8, 2020, or August 5, 2020,** meeting.

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

Texas Rules of Disciplinary Procedure

Rule 13.05. Voluntary Appointment of Custodian Attorney to Act During Disability

Below is the timeline for proposed Rule 13.05 of the Texas Rules of Disciplinary Procedure, pertaining to the voluntary appointment of a custodian attorney to assist during a temporary cessation of practice related to a disability.

INITIATED – **May 6, 2020**

PUBLICATION – A proposed rule is withdrawn if it is not published in (1) the Texas Register and (2) the Texas Bar Journal within six months of initiation of the rule proposal process.

- **Texas Register – May 22, 2020 (Complete)**
- **Texas Bar Journal – June 2020 (Complete)**

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

COMMENT PERIOD – The Committee shall give interested parties at least 30 days from the date a proposed rule is published to submit comments on the rule to the Committee.

The Committee accepted public comments through **July 6, 2020.**

PUBLIC HEARING – The Committee held a public hearing by teleconference on **June 18, 2020**.

FINAL VOTE BY COMMITTEE – The Committee shall vote on whether to recommend a proposed rule to the Board of Directors not later than the 60th day after the final day of the comment period. This vote must be held at a meeting open to the public and with notice to the public.

The deadline to vote is **September 4, 2020.** Therefore, the Committee must vote at its **July 8, 2020, or August 5, 2020,** meeting.

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

Texas Rules of Disciplinary Procedure

Rule 13.05. Termination of Custodianship

Below is the timeline for proposed Rule 13.05 of the Texas Rules of Disciplinary Procedure (TRDP), relating to the termination of a custodianship (pertaining to a custodian attorney appointed to assist with the cessation of practice under proposed Rule 13.04, TRDP).

INITIATED – **July 8, 2020**

PUBLICATION – A proposed rule is withdrawn if it is not published in (1) the Texas Register and (2) the Texas Bar Journal within six months of initiation of the rule proposal process.

- **Texas Register – TBD**
- **Texas Bar Journal – TBD**

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

COMMENT PERIOD – The Committee shall give interested parties at least 30 days from the date a proposed rule is published to submit comments on the rule to the Committee.

PUBLIC HEARING – TBD

FINAL VOTE BY COMMITTEE – The Committee shall vote on whether to recommend a proposed rule to the Board of Directors not later than the 60th day after the final day of the comment period. This vote must be held at a meeting open to the public and with notice to the public.

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

Texas Disciplinary Rules of Professional Conduct

Sale of Law Practice

Below is the timeline for a proposed rule relating to the sale of a law practice.

INITIATED – **July 8, 2020**

PUBLICATION – A proposed rule is withdrawn if it is not published in (1) the Texas Register and (2) the Texas Bar Journal within six months of initiation of the rule proposal process.

- **Texas Register – TBD**
- **Texas Bar Journal – TBD**

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

COMMENT PERIOD – The Committee shall give interested parties at least 30 days from the date a proposed rule is published to submit comments on the rule to the Committee.

PUBLIC HEARING – TBD

FINAL VOTE BY COMMITTEE – The Committee shall vote on whether to recommend a proposed rule to the Board of Directors not later than the 60th day after the final day of the comment period. This vote must be held at a meeting open to the public and with notice to the public.

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

Texas Disciplinary Rules of Professional Conduct

Terminology

Below is the timeline for proposed amendments to the Texas Disciplinary Rules of Professional Conduct Terminology.

INITIATED – **July 8, 2020**

PUBLICATION – A proposed rule is withdrawn if it is not published in (1) the Texas Register and (2) the Texas Bar Journal within six months of initiation of the rule proposal process.

- **Texas Register – TBD**
- **Texas Bar Journal – TBD**

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

COMMENT PERIOD – The Committee shall give interested parties at least 30 days from the date a proposed rule is published to submit comments on the rule to the Committee.

PUBLIC HEARING – TBD

FINAL VOTE BY COMMITTEE – The Committee shall vote on whether to recommend a proposed rule to the Board of Directors not later than the 60th day after the final day of the comment period. This vote must be held at a meeting open to the public and with notice to the public.

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

Texas Disciplinary Rules of Professional Conduct

Rule 1.18. Duties to Prospective Client

Below is the timeline for proposed Rule 1.18 of the Texas Disciplinary Rules of Professional Conduct, relating to duties to prospective clients.

INITIATED – **June 18, 2020**

PUBLICATION – A proposed rule is withdrawn if it is not published in (1) the Texas Register and (2) the Texas Bar Journal within six months of initiation of the rule proposal process.

- **Texas Register – August 21, 2020 (Scheduled)**
- **Texas Bar Journal – September 2020 (Scheduled)**

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

COMMENT PERIOD – The Committee shall give interested parties at least 30 days from the date a proposed rule is published to submit comments on the rule to the Committee.

The Committee will accept public comments through **October 6, 2020.**

PUBLIC HEARING – The Committee will hold a public hearing by teleconference at 10:30 a.m. CDT on **September 17, 2020**. For teleconference participation information, please go to texasbar.com/cdrr/participate.

FINAL VOTE BY COMMITTEE – The Committee shall vote on whether to recommend a proposed rule to the Board of Directors not later than the 60th day after the final day of the comment period. This vote must be held at a meeting open to the public and with notice to the public.

The deadline to vote is **December 5, 2020.** Therefore, the Committee must vote at its **October 7, 2020, or November 4, 2020,** meeting.