

# **Committee on Disciplinary Rules and Referenda**

## **Supplement for June 1, 2022, Meeting**

- Public Comments on Proposed Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct Received through May 31, 2022. (Bates Numbers 000002-000004)

**From:** [Stacey Soule](#)  
**To:** [cdr](#)  
**Subject:** SPA's Second Statement on Proposes Rule 3.09 Amendments  
**Date:** Tuesday, May 31, 2022 2:20:56 PM  
**Attachments:** [SPA Letter RE Proposed Rule 3.09 Johnson Amendments Final.pdf](#)

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Andrea,

Here is an additional statement for the committee to consider before tomorrow's meeting.

Thanks for your help.



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May 31, 2022

Via Email at [cdr@texasbar.com](mailto:cdr@texasbar.com)

To Chairman Kinard and Members of the Committee on Disciplinary Rules and Referenda:

In addition to the SPA's May 18, 2022, statement, this statement responds to Professor Johnson's May 23, 2022, proposed changes to Rule 3.09.

**1. The meaning of "prosecutor" in proposed subsection (f) is still unclear.**

For the same reason stated before, it is not clear who has the status of "prosecutor" in this context.

Additionally, *sans* the originally proposed subsection (g), is a "prosecutor" limited to a person who currently practices law as a prosecutor? A natural and commonly understood meaning of the term would exclude ex-prosecutors who now have no current state agency association. Once an attorney leaves a prosecutor's office, that person is no longer a "prosecutor."

Next, is a special prosecutor—appointed, deputized, or contracted—a prosecutor under proposed subsection (f)? Does their status as "prosecutor" last only during the period in which he or she was appointed, deputized, or contracted? Should the "prosecutor" designation apply to all potential cases in a given jurisdiction when the appointed, deputized, or contracted "prosecutor" represents the State in a single case or a few cases?

Prosecutors come in many forms. The committee needs to be direct about which ones will be bound by the proposed rules.

**2. “Remedy the conviction” in proposed subsection (f) is not facially synonymous with disclosure and is unclear.**

“Remedy the conviction” implies a greater duty than disclosure but what it means is unclear. Comment 7<sup>1</sup> is vague yet leans towards disclosure: “Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.”

Is disclosure to the defendant (*i.e.*, the convicted person who is no longer a defendant) enough to satisfy the “remedy the conviction” duty? Or must a prosecutor disclose to the convicted person, inquire about indigency, and request appointed counsel for an unrepresented indigent defendant? Or does the “and” before the final clause require notification to the court “when appropriate” in all cases?

More fundamentally, do any of the proposed comment options for compliance actually “remedy the conviction?” The choice of wording used to impose a duty is important, and “remedy the conviction” may be read to transgress the jurisdiction or authority of prosecutors.

The committee should fix the vagueness if this latest amendment moves forward. The committee should also ask who should determine indigency for a request for appointed counsel. A trial court or prosecutor? And the committee should consider whether a trial court is an appropriate venue for *ex parte* disclosure about a non-present party.

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<sup>1</sup> The next comment, designated as 9, should be labeled 8.