

# MEETING OF THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

August 5, 2020  
By Teleconference

## MINUTES

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

State Bar of Texas Staff Present: Ray Cantu, Deputy Executive Director; 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 10:03 a.m. Mr. Squires called the roll and a quorum was present.

### B. COMMENTS FROM THE CHAIR

Mr. Kinard thanked those joining the meeting and those who have provided comments or other feedback to the Committee. Mr. Kinard emphasized the importance of public input in the rule proposal process and encouraged those listening to submit comments by visiting [texasbar.com/cdr](http://texasbar.com/cdr). Mr. Kinard thanked Brad Johnson and the State Bar staff for their work to support the Committee.

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

Mr. Kinard addressed the Committee on this agenda item. Ms. Bresnen responded with comments. Ms. Bresnen made a motion to approve the minutes from the July 8, 2020, meeting. Mr. Ducloux seconded the motion. The Committee voted in favor of the motion.

### D. 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

Mr. Kinard addressed the Committee on this agenda item. Mr. Ducloux briefed the Committee on the proposal and on proposed amendments to the proposal. The proposed amendments specifically define “discipline” by a federal court or federal agency to mean a public reprimand, suspension, or disbarment for purposes of Rule 8.03, TDRPC, and Part IX, TRDP. In response to a question from Mr. Kinard, Brad Johnson addressed the Committee’s procedural options. Mr. Johnson also discussed the proposed amendments. Mr. Ducloux made a motion to adopt the proposed amendments and to recommend the proposal, as amended, to the State Bar Board of Directors. Mr. Jordan seconded the motion. The Committee voted in favor of the motion.

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

- 1. PROPOSED RULE 13.05, TRDP – RELATING TO THE VOLUNTARY APPOINTMENT OF A CUSTODIAN ATTORNEY TO ACT DURING A DISABILITY**
- 2. PROPOSED RULE 13.05, TRDP – RELATING TO THE TERMINATION OF A CUSTODIANSHIP**

Mr. Kinard addressed the Committee regarding the two parts of this agenda item. Mr. Kinard discussed the background of the two alternate proposals and the Committee's procedural options. Mr. Ducloux provided additional background related to the proposals and discussed proposed revisions to the draft regarding the termination of a custodianship conducted pursuant to proposed Rule 13.04, TRDP. In response to a question from Mr. Ducloux, Brad Johnson addressed the Committee regarding its procedural options to move forward with the revised draft regarding the termination of a custodianship. The Committee further discussed the subject, including a timeline for possible action given the proposal's dependence on proposed Rule 13.04, which was previously approved by the State Bar Board of Directors and is expected to be included in a 2021 rules vote by State Bar membership. Mr. Belton made a motion to publish the revised draft regarding the termination of a custodianship for public comment. Judge Garcia seconded the motion. The Committee further discussed the timeline relating to the proposal. The Committee voted in favor of the motion. The proposal will be published in the September issue of the *Texas Bar Journal* and in an August issue of the *Texas Register*.

The Committee took no action regarding the previously published proposal, which related to the voluntary appointment of a custodian attorney to act during a disability, and Committee members expressed the intent to let that proposal expire.

## **F. PROPOSED RULE 1.17, TDRPC – RELATING TO THE SALE OF A LAW PRACTICE**

Mr. Kinard addressed the Committee on this agenda item. Professor Johnson briefed the Committee on background regarding the sale of a law practice, as well as on draft proposed Rule 1.17, TDRPC, which addresses the sale of a law practice and is based on Rule 1.17 of the American Bar Association (ABA) Model Rules of Professional Conduct. Professor Johnson responded to questions from Mr. Kinard and the Committee further discussed the subject. In response to a question from Mr. Kinard, Brad Johnson addressed the procedural history and options related to the proposal. The Committee further discussed the draft proposed rule and draft proposed comments. Mr. Cantu and Brad Johnson responded with comments. The Committee did not take action on the proposal and will take the matter up again at its September 17, 2020, quarterly meeting.

## **G. 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, TDRPC, and three additional definitions would be added. Professor Johnson responded to a question from Ms. Bresnen regarding the proposed additional definitions. The Committee discussed the draft proposed amendments, as well as draft

proposed comments. The Committee discussed amending paragraph six of the proposed comments to insert the word “person” in one place. Mr. Kinard discussed the Committee’s procedural options. Professor Johnson and Brad Johnson responded with comments. In response to a question from Mr. Ducloux, Brad Johnson addressed the Committee’s option to publish the proposal for public comment in the *Texas Bar Journal* and *Texas Register*. Judge Garcia made a motion to publish the proposal for public comment. Mr. Ducloux seconded the motion. Judge Garcia clarified that the motion also included amending paragraph six of the proposed comments as discussed. Mr. Jordan asked a question related to the proposed definition of “Informed consent.” The Committee discussed the issue and agreed to strike the word “the” from one place in the definition. Judge Garcia amended the motion accordingly. Brad Johnson addressed how the individual paragraphs might be listed in the proposed rule and Professor Johnson responded with comments. The Committee voted in favor of the motion, as amended. The proposal will be published in the September issue of the *Texas Bar Journal* and in an August issue of the *Texas Register*.

The Committee discussed the timeline for public comments and a public hearing on the proposal. Ms. Bresnen made a motion to hold a public hearing at the Committee’s September 17, 2020, quarterly meeting. Professor Johnson seconded the motion. The Committee voted in favor of the motion. Mr. Kinard addressed the period for public comments. Brad Johnson and Mr. Ducloux responded with comments. Judge Garcia made a motion to accept public comments through October 6, 2020. Ms. Nicholson seconded the motion. The Committee voted in favor of the motion.

#### **H. PROPOSED RULE 1.18, TDRPC – RELATING TO DUTIES TO A PROSPECTIVE CLIENT**

Mr. Kinard addressed the Committee on this agenda item. Mr. Kinard explained that the Committee previously voted to publish proposed Rule 1.18, TDRPC, and that it was scheduled to appear in the September 2020 issue of the *Texas Bar Journal* and the August 21, 2020, issue of the *Texas Register*. Mr. Kinard noted that the public hearing on the proposal will be held via Zoom at 10:30 a.m. on September 17, 2020, and that the Committee will accept public comments through October 6, 2020.

#### **I. PROPOSED RULE TIMELINES**

Mr. Kinard asked Brad Johnson whether there were any timeline issues that needed to be addressed. Mr. Johnson explained that the Committee had yet to set a public hearing date and public comment period for proposed Rule 13.05, TRDP, relating to the termination of a custodianship. The Committee discussed holding a public hearing on the proposal at its September 17, 2020, quarterly meeting, and accepting public comments through October 6, 2020. Mr. Johnson responded with comments. Mr. Kinard further addressed the subject. Mr. Squires responded with comments. At Mr. Kinard’s request, Mr. Cantu addressed the prospective timeline for a possible February 2021 rules vote by State Bar membership. Mr. Kinard and Judge Garcia responded with comments.

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

Mr. Kinard addressed the Committee on this agenda item. Mr. Kinard noted that Judge Garcia had submitted an item, and Judge Garcia confirmed she would like to include it on the September 17, 2020, quarterly meeting agenda. Judge Garcia explained that the item is a proposal to add a subparagraph (a)(13) to Rule 8.04, TDRPC, which would essentially adopt ABA Model Rule 8.4(g).

Judge Garcia noted that the State Bar Board of Directors is also considering the subject, but that she wanted to start the process for the Committee to look at it as well. Mr. Kinard asked whether there were any other agenda items to add for the next meeting. No other items were suggested.

**K. PROPOSED RULE 13.05, TRDP – RELATING TO THE TERMINATION OF A CUSTODIANSHIP [CONTINUED]**

Brad Johnson addressed whether the Committee had voted to set a public hearing date and public comment period for proposed Rule 13.05 (relating to the termination of a custodianship), TRDP, which the Committee discussed earlier in the meeting. Mr. Ducloux made a motion to publish the proposal in the September issue of the *Texas Bar Journal*. Judge Garcia seconded the motion. The Committee voted in favor of the motion. The Committee will hold a public hearing on proposed Rule 13.05 at its September 17, 2020, quarterly meeting and will accept public comments through October 6, 2020.

**L. ADJOURNMENT**

Mr. Kinard thanked everyone for participating. Mr. Belton made a motion to adjourn. Mr. Hagen seconded the motion. The Committee voted in favor of the motion. The meeting adjourned at 11:21 a.m.