

Committee on Disciplinary Rules and Referenda

Supplement for September 17, 2020, Meeting

Additional Public Comments Received (Through September 15, 2020)

From: [REDACTED]
To: [cdrr](#)
Subject: CDRR Comment: Comment to proposed TDRPC 1.18
Date: Thursday, September 10, 2020 9:37:59 AM

*** State Bar of Texas External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	J.K.
Last Name	Leonard
Email	[REDACTED]
Member	Yes
Barcard	12209750

Feedback

Subject	Comment to proposed TDRPC 1.18
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Comments

There is no provision for "involuntary" or "unagreed" contact by a person who later claims to be a "prospective client". This concern is especially true in today's environment of mass emailing by persons seeking legal help, many of which are pure scams, but not always. If such a person chooses to disclose information in a cold-call email/voicemail/letter and the attorney declines to engage in even a discussion about that issue, the currently proposed rule might become a tactic for unilateral DQ efforts. While this may not be a widespread issue, it is a real one, in my opinion. It would seem that a section or comment that provides an exception to requiring waiver by the "prospective client" under these circumstances would be worth considering. If (d)(2) is intended to address this, it is certainly not clear and difficult to determine how to proceed.

From: [Jackson Walls](#)
To: [cdrr](#)
Subject: Proposed rule 1.18 Duties to Prospective Clients, Texas Disciplinary Rules of Professional Conduct
Date: Friday, September 11, 2020 2:05:36 AM

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To the Committee:

Comment

The problem with the proposed rule, section (C), is that it sets up a clear method for any lawyer or client to disqualify an adverse lawyer. Suppose a person, call him the Defendant: 1) has been sued, or 2) is subject to a demand letter, or 3) has knowledge that a person with an as yet unstated claim has at times used a particular lawyer with known expertise and ability, herein called Lawyer King Kong. Suppose that said Defendant or his lawyer wants to prevent King Kong from being involved in the dispute. Suppose further that to achieve this end said Defendant makes an appointment with King Kong and in the initial meeting makes statements that will disqualify King Kong, under this rule, from representing the claimant. In such a situation the Defendant will be able to prevent the claimant from using his lawyer of choice.

The proposed rule simply invites more gamesmanship and will substitute one bad outcome for another. It is, therefore, not advisable to enact this rule.

Yours truly,

Jackson Walls,
Amarillo, Texas
Bar Card: 20793500

From: [Derek Cook](#)
To: [cdrr](#)
Subject: FW: LABA- Action Request- Proposed Rule 1.18 of Texas Disciplinary Rules of Professional Conduce
Date: Tuesday, September 15, 2020 9:48:50 AM
Attachments: [image001.png](#)
Importance: High

*** State Bar of Texas External Message * - Use Caution Before Responding or Opening Links/Attachments**

Hello,

My name is Derek Cook, and I am the District 16 Director to the State Bar of Texas Board of Directors. Below are emails I received from a constituent expressing concern over proposed Rule 1.18. Upon reviewing these concerns and the proposed rule, I, too, have similar concerns. I believe the proposed rule, as drafted, is vague, unclear, and creates uncertainty for attorneys attempting to vet and maintain conflict-free representation of a client. I ask that CD RR decline to move forward with recommending this rule, as drafted.

Thank you,

Derek Cook

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From: Andrew Seger <[REDACTED]>
Sent: Thursday, September 10, 2020 3:39 PM
To: Derek Cook <[REDACTED]>
Cc: Tommy Ortloff <[REDACTED]>; Randy Rouse <[REDACTED]>
Subject: FW: LABA- Action Request- Proposed Rule 1.18 of Texas Disciplinary Rules of Professional Conduce
Importance: High

Dear Mr. Cook

I believe you are my State Bar Representative. In that regard, I would direct you to my e-mail to the Lubbock Area Bar Association regarding the Committee on Disciplinary Rules and Referenda proposed Rule 1.18 of the Texas Disciplinary Rules of Professional Conduct which can be found below. I believe that this Rule is ill conceived, and disproportionately disfavors small firm practitioners who lack the resources to log every unsolicited call, e-mail and contacts and at the risk of disqualification. It also institutionalizes the practice of Strategic Disqualification as set out below. This is without mention of the fact of imposing duties on an attorney towards third parties, and utterly without regard to that attorneys consent.

As a practitioner in Midland, this Rule will also uniquely disfavor you and your law firm as well. Here is an example: Say Lynch Chapel has a long standing relationship with Henry Petroleum, and Randy Rouse (who is cc'd with this email) needs to file a quiet title suit against parties whom claim to be

unleased co-tenants. The third parties are aware of this fact, and send an unsolicited e-mail to Randy containing "information", which they later claim is "significantly harmful" to their position in litigation. As I interpret this new Rule, that would require the disqualification of not only Mr. Rouse, but your entire law firm as well, unless an arduous screening process is followed. Thus with a mere email, a non-client is able to significantly disrupt a relationship your firm has had with a client over the span of several decades.

My position on this matter is explained in greater length in my e-mail to the Lubbock Area Bar Association below. As my State Bar Representative, I would implore you to take action to oppose this measure. I feel that this is extreme overreach on the part of the Committee on Disciplinary Rules and Referenda, and certainly a rule which no one has asked for. Thanks so much, and please feel free to reach out with any questions you may have

Andy

Andrew R. Seger
Key Terrell & Seger, LLP
P.O. Box 98433 (Mail)
Lubbock, Texas 79499
4825 50th St., Ste A
Lubbock, Texas 79408
Telephone: (806) 793-1906
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E-mail: [REDACTED]



From: Andrew Seger
Sent: Thursday, September 10, 2020 11:44 AM
To: 'Levi Siebenlist' <[REDACTED]>
Cc: [REDACTED]; Dustin Burrows <[REDACTED]>; Ted Liggett <[REDACTED]>; [REDACTED] <[REDACTED]>; 'Andrew Curtis' <[REDACTED]>; [REDACTED] <[REDACTED]>; Ryan Bigbee <[REDACTED]>; [REDACTED]; [REDACTED]; Brad Odell <[REDACTED]>; [REDACTED]; [REDACTED] <[REDACTED]>; 'Dub Wade' <[REDACTED]>; [REDACTED] <[REDACTED]>; [REDACTED] <[REDACTED]>; 'Jeff R. Lashaway' <[REDACTED]>; Don C. Dennis ([REDACTED]) <[REDACTED]>; [REDACTED] <[REDACTED]>; [REDACTED] <[REDACTED]>; [REDACTED] <[REDACTED]>
Subject: LABA- Action Request- Proposed Rule 1.18 of Texas Disciplinary Rules of Professional Conduce

Levi,

Thanks for fielding my call today. I am writing to you in your capacity as an Officer of the Lubbock Area Bar Association and regarding the proposed Rule 1.18 of the Texas Disciplinary Rules of Professional Conduct involving a lawyer's purported duties to "prospective clients". I believe that this

proposed rule will multiply operations costs and overhead for all attorneys in a financially significant manner. Further the proposed Rule will adversely impact attorneys practicing in smaller markets such as Lubbock. And it would be particularly devastating to attorneys practicing in small towns such as Plainview, Levelland, Brownfield, etc. A link to the proposed rule can be found on the email forwarded below. I am writing to request action by the LABA's to oppose this proposed rule and for the reasons set forth below.

My Understanding Of Proposed Rule 1.18

My reading of the proposed rule is as follows: Under the proposed rule anyone who "consults" with a lawyer regarding a prospective matter is a prospective client. Moreover, if the lawyer "receives information" from the prospective client, he or she is prohibited from undertaking representation adverse to that client if he has received information that could be "significantly harmful" to that person in the matter. Furthermore, and absent a rigorous screening process, every lawyer in the same firm is similarly prohibited from undertaking said representation. No definition or guidance is given as to what constitutes "consultation" or what information might be considered "significantly harmful" to the prospective client with regard to the matter. As I read this rule, a party unilaterally sending an e-mail to an attorney, without that attorney's consent, could potentially constitute a consultation and an ensuing disqualification.

Burdensome And Higher Overhead Costs For Practitioners

The primary problem with this rule is that keeping track of conflicts of interest is difficult as is. Many firms pay vendors thousands and thousands of dollars every year for software systems to track actual conflicts. Under this rule, this process will be **Exponentially Expanded**, attorneys and law firms will now be ethically bound to track every errant email and stray phone call, so as to avoid a prospective disqualification. Our recordkeeping requirements are already onerous as is and this, quite simply, is a bridge too far for a small firm practitioner such as myself. However, there is no question that enacting this prospective Rule will multiply operating costs considerably for large and small firms alike.

Problem of Strategic Disqualification And Disproportionate Impact On Attorneys Practicing In Smaller Markets

A secondary problem arises for attorneys practicing in smaller markets. In that regard, most attorneys on the civil side are familiar with the practice employed by certain parties known as "Strategic Disqualification". This occurs when a putative litigant will call an attorney, without having any intention of retaining him or her, and speak with that attorney on a matter for the **sole** purpose of disqualifying that attorney from representing the other side of the dispute. This happens frequently in Family Law cases, but I have also seen it on the commercial side as well.

As written, proposed Rule 1.18 institutionalizes this practice. It penalizes lawyers who do nothing more than receive an email, or who happen to take an unexpected phone call and are unable to cut off the "prospective client" before "information" is revealed.

Think about it in the context of the following hypothetical: I live in Pampa (population 17,235) and I know my wife wants to file for divorce, which I do not want. So I preemptively and unilaterally send out emails to every family law attorney in town which contains "information". Now every firm in town is automatically disqualified from representing my wife. And as such, my wife must now go to Amarillo or some

larger market to seek representation, and at a significantly higher price.

This problem of Strategic Disqualification is not necessarily present for practitioners in larger communities that have so many lawyers as to make this strategy impracticable. However, what it does do, is benefit attorneys in larger markets by driving business away from small town lawyers to larger cities.

Request For Action By LABA

I am writing to request action on the part of the Lubbock Area Bar Association to oppose this prospective rule as being adverse to the interests of its constituents. To this end there is a hearing scheduled at 10:30 a.m. and as outlined in the email immediately below. The Committee on Disciplinary Rules and Referenda will accept written comments through and until October 6 and at the contact information set forth in the email below. I would therefore respectfully request that you forward this e-mail on to the LABA board for a prompt determination of whether or not it will take action. Thanks so much and I appreciate your taking the time to review this e-mail

Andy

Andrew R. Seger
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From: State Bar of Texas - CDRR [<mailto:cdrr@texasbar.com>]
Sent: Thursday, September 10, 2020 9:14 AM
To: Andrew Seger <[REDACTED]>
Subject: [MARKETING] Public Hearing Reminder - Proposed Rules

State Bar of Texas



Public Hearing Reminder

September 17 Public Hearings on Proposed Rules

The Committee on Disciplinary Rules and Referenda recently published the following proposed rules for public comment:

- [Rule 1.00. Terminology](#), Texas Disciplinary Rules of Professional Conduct
- [Rule 1.18. Duties to Prospective Client](#), Texas Disciplinary Rules of Professional Conduct
- [Rule 13.05. Termination of Custodianship](#), Texas Rules of Disciplinary Procedure

The Committee will hold a public hearing on each of the proposed rules by teleconference at 10:30 a.m. CDT on September 17, 2020. For teleconference participation information, please go to [texasbar.com/cdrr/participate](https://www.texasbar.com/cdrr/participate). If you plan to participate in a scheduled public hearing, it is requested that you email cdrr@texasbar.com in advance of the hearing with your name and the public hearing item you wish to speak on so the Committee can group speakers by topic during the hearings.

For additional information, including to view proposed interpretive comments, please go to the Committee's [Docketed Requests](#) page.

The Committee will continue to accept written comments concerning the proposed rules through October 6, 2020. Comments can be submitted [here](#), or by email to cdrr@texasbar.com.

Additional Information

The Committee is responsible for overseeing the initial process for proposing a change or addition to the disciplinary rules (Gov't Code § 81.0873). For more information, go to [texasbar.com/cdrr](https://www.texasbar.com/cdrr).

To subscribe to email updates, including notices of public hearings and published rules for comment, click [here](#).

Sincerely,

Committee on Disciplinary Rules and Referenda

Committee on Disciplinary Rules and Referenda

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[Unsubscribe](#)

