

# COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

2019 Annual Report



## COMMITTEE MEMBERS

M. Lewis Kinard - Chair

Timothy Belton

Amy Bresnen

Claude Ducloux

Hon. Dennise Garcia

Harold Frederick "Rick" Hagen

Dean Vincent Johnson

W. Carl Jordan

Karen Nicholson

# ABOUT

The Committee on Disciplinary Rules and Referenda was created by the 2017 Texas Legislature in Section 81.0872 of the State Bar Act. The committee consists of nine members: seven attorney members and two non-attorney public members. The committee is statutorily charged to:

1. Regularly review the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure;
2. At least annually issue to the Supreme Court of Texas and the State Bar of Texas Board of Directors a report on the adequacy of the disciplinary rules; and
3. Oversee the initial process for proposing a disciplinary rule.

Representing a broad range of perspectives, the committee consists of:

- Three attorneys appointed by the president of the State Bar;
- One non-attorney public member appointed by the president of the State Bar;
- Four attorneys appointed by the Supreme Court; and
- One non-attorney public member appointed by the Supreme Court.

The president of the State Bar and the chief justice of the Supreme Court alternate designating an attorney member of the committee to serve as the presiding officer of the committee for a term of one year. Committee members serve staggered three-year terms, with one-third of the members' terms expiring each year.

## **TERM EXPIRING DECEMBER 31, 2019**

Timothy Belton (Public Member) - Bellaire

Amy Bresnen - Austin

Harold Frederick "Rick" Hagen - Denton

## **TERM EXPIRING DECEMBER 31, 2020**

Claude Ducloux - Austin

Dean Vincent Johnson - San Antonio

M. Lewis Kinard, Chair - Dallas

## **TERM EXPIRING DECEMBER 31, 2021**

Hon. Dennise Garcia - Dallas

W. Carl Jordan - Houston

Karen Nicholson (Public Member) - Austin

# 2019 COMMITTEE

TERM EXPIRING DECEMBER 31, 2019



**Timothy Belton - Public Member (Bellaire)** is a retained executive search consultant with Preng & Associates and chairman of ZeoGas LLC. His search practice focuses on group hires in support of large transactions to which he brings a “client perspective” where search is part of the investment to drive an organization’s growth in value. Belton began his career at Andersen Consulting Strategic Services (Accenture) where he led major change, acquisition strategy, and growth agendas for billion-dollar revenue companies, culminating in his leadership of the firm’s post-merger integration practice in Texas. He later served as the restructuring officer and then COO of TRC Companies (NYSE: TRR, now private) leading the creation of a national management team to integrate the portfolio of 30+ acquired companies, as well as the chairman and CEO of TDECU Holdings, the for-profit subsidiary of the related \$3 billion credit union. He serves as a trustee and finance committee chair of the Texas Center for Legal Ethics and president of the Business Ethics Forum. Belton holds a BBA in Business and Technology Management from the University of Texas McCombs School of Business and an MBA from the Harvard Business School.



**Amy Bresnen (Austin)** is an attorney and lobbyist at Bresnen Associates, Inc. Bresnen's private sector representation of clients has included major corporate and small businesses, local governments, and nonprofits, with such diverse issues as ethics, civil justice, family law, public education, human rights, water, telecommunications, mental health care, regulation of various professions, eminent domain, the judiciary, gaming, pension systems, taxes and fees, technology, transportation, state appropriations, electric regulation, and issues affecting public safety personnel. She has recently published an article in the *Journal of the National Association of Administrative Law Judiciary* (“Ethical Choices: Contested Case Procedures and Judicial Review Applicable to Politicians Versus Other Regulated Actors”). Bresnen also serves as a member of the board of the St. Mary's University School of Law Alumni Association.



**Harold Frederick "Rick" Hagen (Denton)** is a past president of the Texas Criminal Defense Lawyers Association and is certified in criminal law by the Texas Board of Legal Specialization. He obtained his undergraduate degree from Austin College and worked as the legislative assistant for State Representative Jim Horn. Hagen graduated from law school at the University of Oklahoma in 1990, where he received the American Jurisprudence Award for Trial Techniques. He was hired by the Hon. Rusty Duncan as a briefing attorney on the Texas Court of Criminal Appeals and then served two years as a felony prosecutor. His practice is in Denton and is limited to criminal law.

# 2019 COMMITTEE

TERM EXPIRING DECEMBER 31, 2020



**Claude E. Ducloux (Austin)** is certified in both civil trial (1984) and civil appellate law (1987) by the Texas Board of Legal Specialization; licensed in Texas, Colorado, and California; and speaks regularly on legal ethics, law office management, and trial-related topics. He is a former president of the Austin Bar, and chair of the Texas Board of Legal Specialization, the Texas Bar Foundation, the Texas Bar College, and the Texas Center for Legal Ethics. Ducloux has written extensively on various legal education and disciplinary issues and is a U.S. Army Veteran.



**Dean Vincent R. Johnson (San Antonio)** is Interim Dean and the Charles E. Cantu Distinguished Professor of Law at St. Mary's University. He teaches and writes in the areas of torts, professional responsibility, legal malpractice law, government ethics, international law, and comparative law. Johnson has served as a Fulbright Scholar in Burma, China, and Romania. His articles have been cited in more than 200 law reviews and 40 federal and state court decisions. Johnson is an elected member of the American Law Institute. He received his J.D. from the University of Notre Dame, an LL.M from Yale University, and a second LL.M. from the London School of Economics.



**M. Lewis Kinard, Chair (Dallas)** is executive vice president, general counsel, and assistant corporate secretary for the American Heart Association in Dallas. He was the last chair of the State Bar's Committee on Disciplinary Rules and Professional Responsibility and served on that committee for seven years. Kinard has over 30 years of legal practice in a range of substantive areas, is licensed to practice law in Texas and Arkansas, and formerly held a "single client" license in Colorado. At the AHA, he has focused on international commercial agreements, ground-breaking collaborative research programs, and growing the AHA's legal department to keep pace with the organization's evolving global legal needs. Kinard earned a bachelor's degree from the University of Arkansas and a J.D. from SMU Dedman School of Law.

# 2019 COMMITTEE

TERM EXPIRING DECEMBER 31, 2021



**Hon. Dennise Garcia (Dallas)** serves as presiding judge for the 303rd Judicial District Court. She became certified in family law by the Texas Board of Legal Specialization in 2000 and received her certification in family jurisprudence by the Texas College for Judicial Studies in 2012. She is a member of the State Bar of Texas Texas Pattern Jury Charge Committee (Family and Probate) and the Texas Academy of Family Law Specialists. She is also a Judicial Professor of family law at SMU Dedman School of Law. The Texas chapter of the American Academy of Matrimonial Lawyers awarded Judge Garcia its Jurist of the Year Award for 2016. Southern Methodist University's Women's Symposium has awarded her its Profiles in Leadership Award, and the Dallas Volunteer Attorney Program awarded Judge Garcia the Merrill Hartman Pro Bono Service Award. Judge Garcia earned her B.S., B.A. in 1990 from Southern Methodist University and her J.D. in 1993 from SMU Dedman School of Law. She is trained in family mediation and civil disputes and in collaborative law procedures.

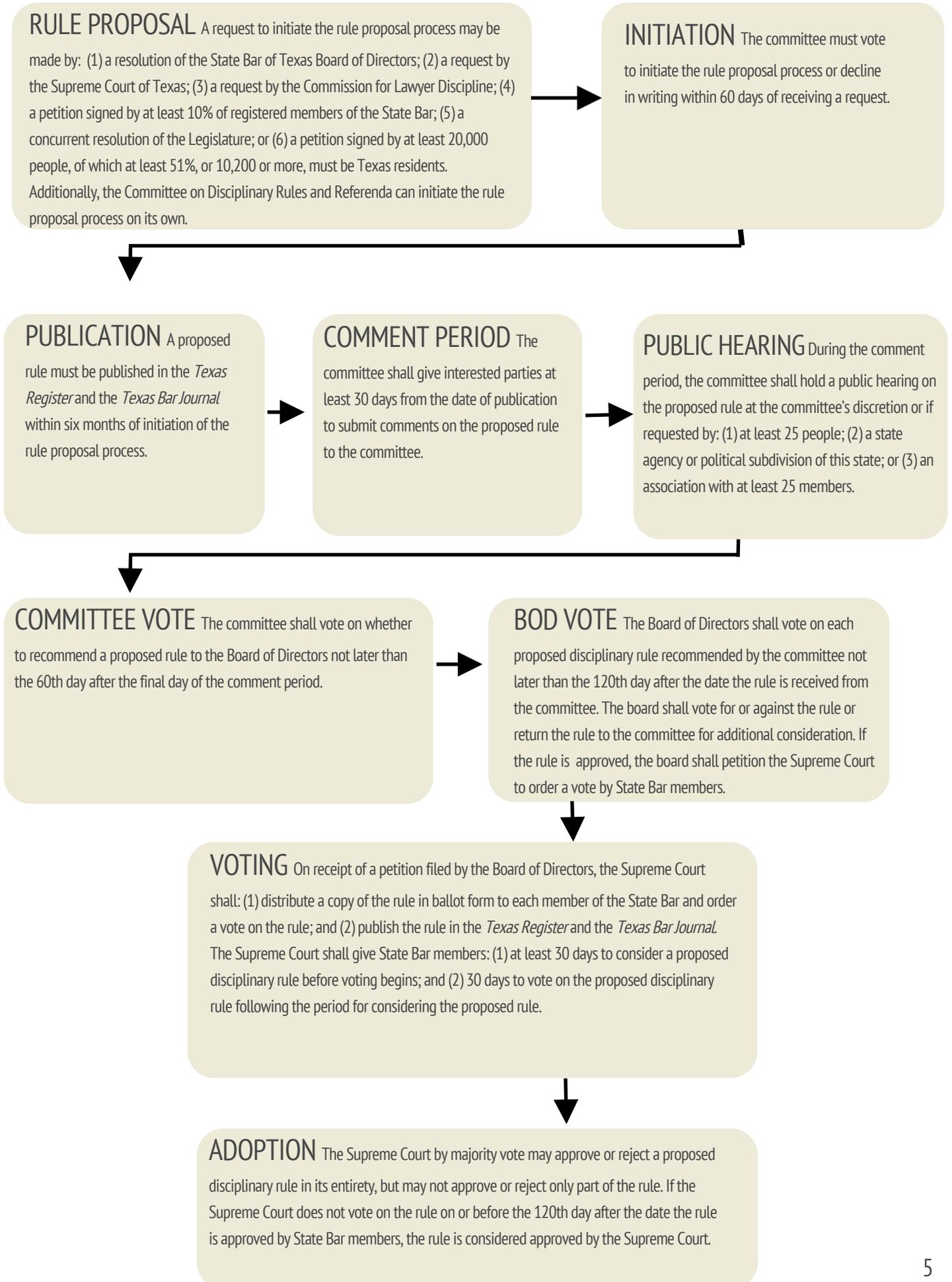


**W. Carl Jordan (Houston)** has been with the law firm of Vinson & Elkins LLP his entire career. For approximately 40 years he practiced in the field of employment and labor law, while also serving in various leadership roles of the firm, including as a member of its management committee. He currently serves as the firm's general counsel. In that role he oversees compliance with professional responsibility rules in multiple jurisdictions. Jordan earned a B.A. *with honors* from Baylor University and a J.D. *with honors* from Harvard Law School.



**Karen Nicholson - Public Member (Austin)** is vice president of the League of Women Voters of the United States. As a member of the LWVUS board, she chairs the Advocacy and Litigation Committee. Active in the LWV for many years, she has served as president of LWV Texas and LWV Midland and has served on the boards of the Richardson and Houston leagues. She has served as a public member of the Commission for Lawyer Discipline and the Grievance Oversight Committee and currently is a member of the Texas Legal Services board. Education has long been a primary focus. Before recently retiring to Austin, Nicholson was vice president of the Midland ISD Board of Trustees. She taught in the Austin and Richardson ISDs and was adjunct professor of mathematics at Midland College. She has served in volunteer education positions and advisory committees, including president of the Midland Council PTA, a math tutor, bond elections committees, the Chamber of Commerce Education Committee, and many others.

# RULE PROPOSAL PROCESS



# 2019 SUMMARY



In 2019, the committee took significant steps in the rule proposal process and continued its efforts to maximize transparency and increase public participation.

As part of its commitment to transparency, the committee utilized its website to post meeting materials, rule proposals, proposed rule comments, public comments, rule timelines, and requests for rule proposals. The website also includes a schedule of committee meetings, methods for public participation, audio or video of committee meetings, and a link to sign up for e-mail updates. In 2019, the website received 15,063 visits.

In 2019, the committee published four rule proposals in the *Texas Bar Journal* and *Texas Register*. Each publication included information on how to submit public comments and participate in public hearings. Information about rule proposals and public hearings was also e-mailed to Texas lawyers and subscribers to committee updates.

During the year, the committee held six public hearings and received more than 200 public comments on published rule proposals. The committee initiated three rule proposals and voted to recommend three rule proposals to the State Bar Board of Directors. In response to requests from the Supreme Court of Texas, the committee also drafted and recommended changes to rule comments.

To learn more, visit [texasbar.com/CDRR](http://texasbar.com/CDRR).

# OUTREACH AND COMMUNICATIONS

The committee has made significant efforts to encourage public participation in the rule proposal process. The committee's website includes meeting materials and agendas, a schedule of meeting dates, participation methods, rule proposals and timelines, audio or video of meetings, and other information related to the rule proposal process. Members of the public can submit comments on proposed rules through the website and can also sign up for committee e-mail updates.

In 2019, the committee published four rule proposals for public comment in the *Texas Bar Journal* and *Texas Register*, held six public hearings on rule proposals, and received more than 200 public comments on rule proposals. Information about rule proposals and public hearings was also e-mailed to Texas lawyers, committee e-mail subscribers, and other interested parties. Additionally, the State Bar has regularly posted social media updates regarding rule proposals and other committee activities.

COMMITTEE ACTIVITY	2018	2019	TOTAL
Rule Proposals Initiated	4	3	7
Rule Proposals Published	3	4	7
Rule Proposals Recommended	2	3	5
Rule Requests from Supreme Court	0	1	1
Rule Requestes from Board	1	0	1
Self-Initiated Rule Proposals*	3	1	4
Comment Requests from Supreme Court **	1	2	3
Comments Recommended**	0	2	2
Formal Rule Requests Denied	0	0	0

COMMUNICATIONS	2018	2019	TOTAL
Written Public Comments on Rule Proposals	13	213	226
Public Hearings Held	1***	6	7
E-mail Notices Sent	1	22	23
Social Media Posts	3	10	13

\*This item refers to initiated proposals not based on a third-party request.

\*\*This item refers to interpretive rule comments separate from proposed rule changes.

\*\*\*This public hearing covered two proposals.

# RULE REVIEW

## Texas Disciplinary Rules of Professional Conduct

### LAWYER ADVERTISING AND SOLICITATION

#### Part VII. Information about Legal Services

In 2018, the State Bar Board of Directors requested that the committee initiate the rule proposal process with regard to all of Part VII of the Texas Disciplinary Rules of Professional Conduct, which includes rules related to lawyer advertising and solicitation. In late 2018, the committee published proposed changes to the advertising and solicitation rules, and in January 2019, the committee held a public hearing on the proposal.

The committee received more than 140 public comments on the original proposal. Based on the large volume of feedback and the committee's significant changes to the proposal, the committee voted at its April 18, 2019, meeting not to recommend the original proposal to the Board of Directors and instead to reinstate the rule proposal process for a revised proposal.

The committee published a revised proposal on the advertising and solicitation rules in the May 31, 2019, issue of the *Texas Register* and the June 2019 issue of the *Texas Bar Journal*. The committee held two public hearings and received 24 public comments on the revised proposal. In response to public comments and after significant deliberation, the committee made additional amendments to the proposal. At its September 3, 2019, meeting, the committee voted to recommend the proposal to the Board of Directors. The committee also proposed comments to accompany the proposal.

The recommended proposal would significantly streamline and modernize the lawyer advertising and solicitation rules. In particular, the proposal would simplify the restrictions on misleading communications, create new exceptions to the list of items required to be filed with the Advertising Review Committee, and authorize certain non-exclusive reciprocal referral arrangements. The recommended proposal would maintain the current prohibition on the use of lawyer trade names.



## COMPETENT AND DILIGENT REPRESENTATION

### Rule 1.01. Competent and Diligent Representation

In response to a request from the Supreme Court of Texas, the committee recommended adding language to Comment 8 to Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct to address a lawyer's duty of competency with regard to relevant technology. On February 26, 2019, the Supreme Court issued an order amending the language as recommended.

In conducting its review, the committee identified deficiencies in Rule 1.01 and recommended changes to the rule. The proposal would amend Rule 1.01 by adding clear statements that a lawyer has a duty to act competently and a duty to act diligently in representing a client. The committee also proposed comments to accompany the rule change proposal.

## CONFLICTS AND LIMITED PRO BONO SERVICES

### Rule 6.05. Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services

The committee initiated and recommended proposed Rule 6.05 of the Texas Disciplinary Rules of Professional Conduct. The proposed rule would relax certain conflict of interest standards related to lawyers who provide short-term limited pro bono legal services. Application of current conflict of interest rules may deter lawyers from participating in pro bono legal service programs, which are often operated under circumstances where a full conflict screening is not feasible.



The proposal would create narrow exceptions to certain conflict of interest rules to facilitate the provision of free legal services to the public through pro bono or assisted pro se programs sponsored by a court, bar association, accredited law school, or nonprofit legal services program. The committee also proposed comments to accompany the proposed rule.

## ACCESS TO JUROR SOCIAL MEDIA

### Rule 3.06. Maintaining Integrity of Jury System

In response to a request from the Supreme Court of Texas, the committee studied the issue of lawyer-access to juror social media activity. Rule 3.06 of the Texas Disciplinary Rules of Professional Conduct addresses improper communications with jurors, but the Disciplinary Rules do not specifically address the issue of lawyer-access to juror social media.

The committee issued a report recommending the approach taken in American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility Formal Opinion 466. In its report, the committee proposed a comment to Rule 3.06, which would provide guidance that: 1) a lawyer's review of a juror's social media that is publicly available without making an access request is not an improper *ex parte* communication; 2) a request to access a juror's social media remains subject to the prohibitions of Rule 3.06; and 3) the fact that a juror may become aware of a lawyer's passive review of their social media through a network setting notification does not constitute an improper *ex parte* communication.

## CONFIDENTIALITY AND ONLINE LAWYER REVIEWS

### Rule 1.05. Confidentiality of Information

In response to a public comment, the committee addressed the subject of a lawyer's duty of confidentiality in responding to online reviews at its July 23, 2019, meeting. The committee discussed Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, as well as ethics opinions from Texas and other jurisdictions.



The committee determined that a rule change proposal was not warranted. Members of the committee expressed perspectives on how a lawyer may want to address the subject of online reviews given a lawyer's duty of confidentiality under Rule 1.05.

## POST-TRIAL COMMUNICATIONS

### Rule 3.06. Maintaining Integrity of Jury System

At its October 2019 meeting, the committee appointed a subcommittee to study the topic of post-trial communications with jurors under Rule 3.06 of the Texas Disciplinary Rules of Professional Conduct.

# RULE REVIEW

## Texas Rules of Disciplinary Procedure

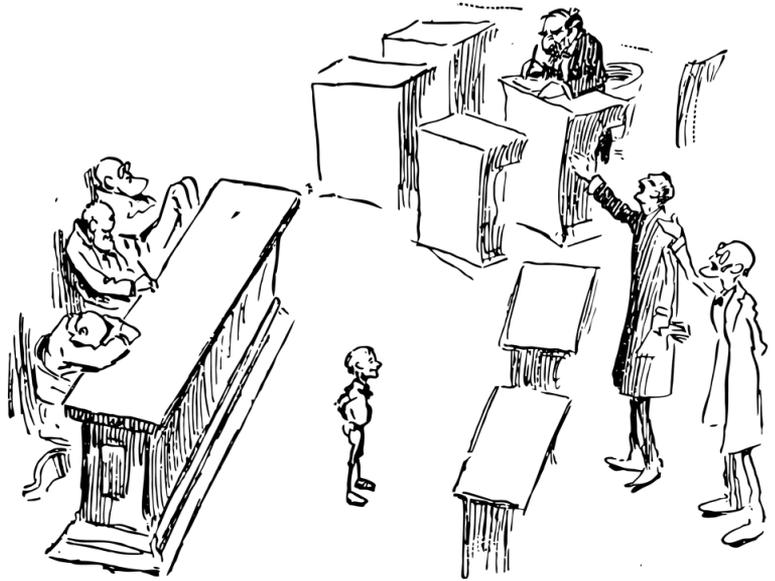
### ASSIGNMENT OF JUDGES

#### Rule 3.01. Disciplinary Petition

#### Rule 3.02. Assignment of Judge

#### Rule 3.03. Filing, Service and Venue

In response to a request from the Supreme Court of Texas, the committee initiated the rule proposal process related to the assignment of judges when a respondent in a disciplinary complaint elects to proceed in district court. Under the current rule, a judge appointed by the Supreme Court may be required to travel a significant distance to preside over a disciplinary case.



In November 2019, the committee voted to publish proposed changes to Rules 3.01, 3.02, and 3.03 of the Texas Rules of Disciplinary Procedure. The proposed changes would transfer assignment duties to the presiding judges of the administrative judicial regions and revise certain geographic restrictions for judicial assignments in disciplinary cases. The committee will hold a public hearing on the proposed changes on January 16, 2020, at the Texas Law Center, and will accept public comments on the proposed changes through January 31, 2020.

### CESSATION OF PRACTICE

#### Part XIII. Cessation of Practice

In June 2019, the State Bar Board of Directors adopted a resolution requesting that the Supreme Court of Texas consider adoption of a comment to Part XIII of the Texas Rules of Disciplinary Procedure to extend the limitation of liability and attorney-client privilege to custodian attorneys designated by attorneys in the course of succession planning. In September 2019, the Supreme Court requested that the committee study and make recommendations on a comment to Part XIII. At its October 2019 meeting, the committee appointed a subcommittee to begin work on the request.

# BOARD AND COURT



## BOARD ACTION

At its April 26, 2019, meeting, the State Bar Board of Directors voted to approve rule change proposals recommended by the committee relating to clients with diminished capacity and confidentiality in seeking legal ethics counsel.

The first proposal would delete current Rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct, which deals with a lawyer's duties when a client may lack legal competence, and replace it with new Rule 1.16, which is designed to give more guidance to lawyers when a client's mental capacity has diminished. The second proposal would amend Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct by adding a new exception that specifically permits a lawyer to reveal confidential information when securing legal advice on compliance with the Texas Disciplinary Rules. Both proposals are based on provisions found in the ABA Model Rules of Professional Conduct, though proposed Rule 1.16 includes some deviation from the corresponding Model Rule. The board voted to hold the rule change proposals for submission to the Supreme Court of Texas at a later date with additional proposed rules as deemed appropriate by the board. Ultimately, the board will petition the Supreme Court to order a vote by Texas lawyers on the rule proposals.

## COURT ACTION

In September 2018, the Supreme Court of Texas requested that the committee study and make recommendations regarding a possible amendment to Comment 8 to Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct, regarding a lawyer's duty of competency as related to relevant technology. In response, the committee issued a report recommending the adoption of language found in the ABA Model Rules.



On February 26, 2019, the Supreme Court issued an order amending the comment as recommended by the committee. As amended, the first sentence of Comment 8 to Rule 1.01 states, "Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology."

# LOOKING AHEAD

Although the rule proposal process is by design flexible, the committee anticipates that the State Bar Board of Directors may take action on one or more of the submitted proposals in time to submit rule proposals to the bar membership sometime in the fall of 2020. In the meantime, the committee continues to work on new rule change proposals and comments .



## CONTACT US

To review the committee's meeting schedule and for other information about the committee, please visit [texasbar.com/CDRR](http://texasbar.com/CDRR). Or Contact:

Brad Johnson, Disciplinary Rules and Referenda Attorney  
512-427-1404 or by e-mail at [Brad.Johnson@texasbar.com](mailto:Brad.Johnson@texasbar.com)

