



COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

2021 Annual Report



COMMITTEE MEMBERS

M. Lewis Kinard - Chair

Timothy D. Belton

Amy Bresnen

Claude Ducloux

Hon. Dennise Garcia

Harold Frederick "Rick" Hagen

Professor 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, 2021¹

Hon. Dennise Garcia - Dallas

W. Carl Jordan - Houston

Karen Nicholson (Public Member) – Austin¹

TERM EXPIRING DECEMBER 31, 2022

Timothy D. Belton (Public Member) – Bellaire

Amy Bresnen – Austin

Harold Frederick “Rick” Hagen – Denton

TERM EXPIRING DECEMBER 31, 2023

Claude Ducloux – Austin

Professor Vincent Johnson – San Antonio

M. Lewis Kinard, Chair - Dallas²

¹Reappointed for term expiring December 31, 2024

²Reappointed as Chair for term expiring December 31, 2022

2021 COMMITTEE

TERM EXPIRING DECEMBER 31, 2021



Hon. Dennise Garcia (Dallas) has served as a Justice on the 5th District Court of Appeals since January 1, 2021. She previously served as judge of the 303rd District Court from 2004 to 2020. She is certified in family law (2000) and child welfare law (2020) by the Texas Board of Legal Specialization. She is a member of the State Bar of Texas Pattern Jury Charges—Family and Probate Committee, which she chaired from 2014 to 2017. She was a visiting professor of family law at SMU Dedman School of Law from 2015 to 2019. The Texas chapter of the American Academy of Matrimonial Lawyers awarded Justice Garcia its Jurist of the Year Award in 2016, and the Dallas Volunteer Attorney Program awarded her the Merrill Hartman Pro Bono Service Award in 2006 and 2020. Justice 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.



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 with 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)¹ recently stepped down from the League of Women Voters of the United States Board, where her eight years of service included work as vice president and chair of both the Advocacy and Litigation Committee and the Education 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 Center 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.

¹Reappointed for term expiring December 31, 2024

2021 COMMITTEE

TERM EXPIRING DECEMBER 31, 2022



Timothy D. Belton - Public Member (Bellaire) is a retained executive search consultant with Preng & Associates and chairman of ZeoGas LLC. He 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 the chairman and CEO of TDECU Holdings, the for-profit subsidiary of the related \$3 billion credit union, he was responsible for forming the boards of directors and management teams for each of the four operating companies. He currently serves as a trustee and finance committee chair of the Texas Center for Legal Ethics and president of the Business Ethics Forum. He previously served as a public member of the State Bar of Texas Board of Directors, earning the Outstanding Third-Year Director Award and President's Commendation. 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 about the recent changes to the Texas anti-SLAPP law in the St. Mary's Law Journal ("Targeting the Texas Citizen Participation Act: The 2019 Texas Legislature's Amendments to a Most Consequential Law"). 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.

2021 COMMITTEE

TERM EXPIRING DECEMBER 31, 2023



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 former 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.



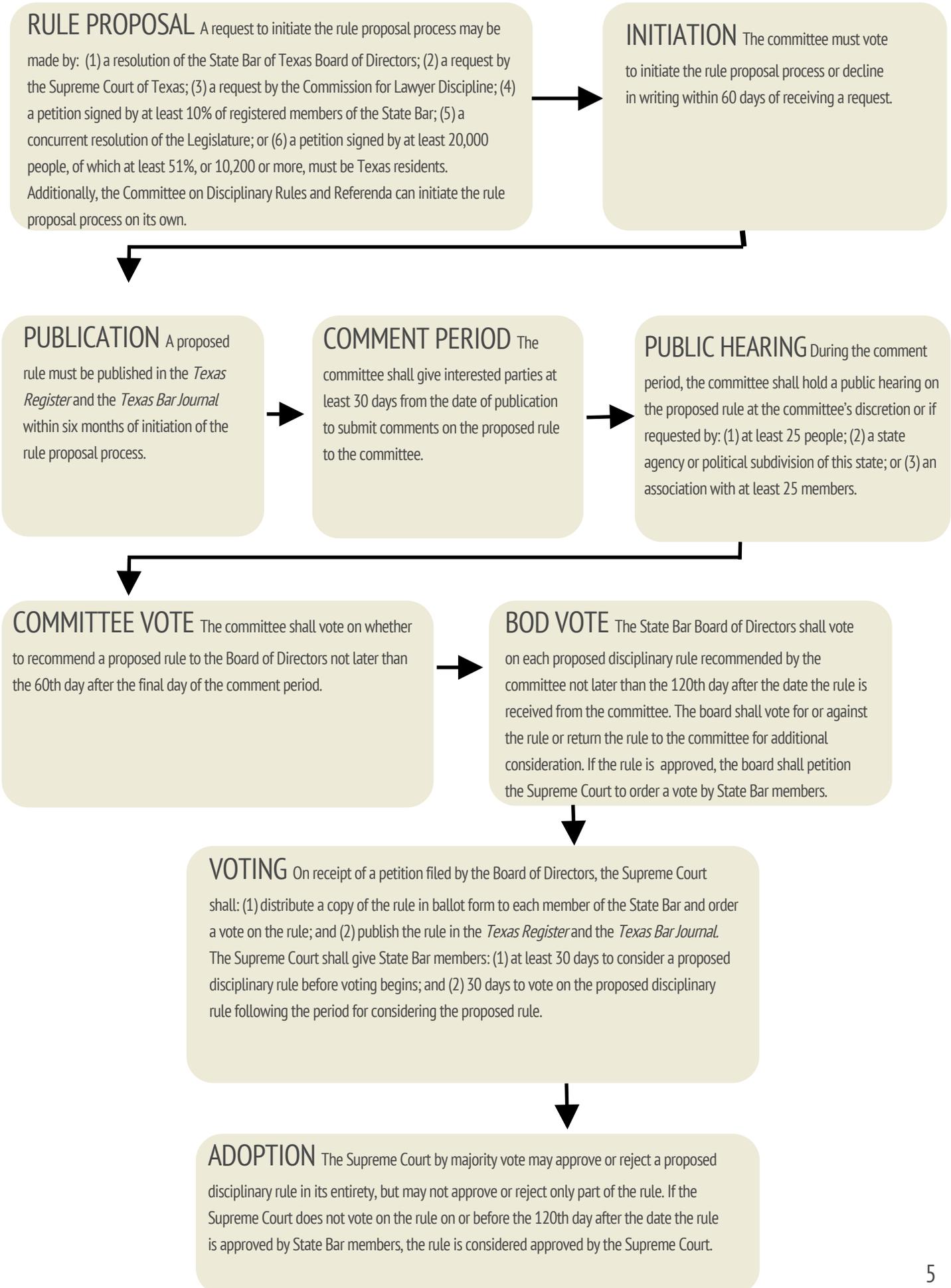
Vincent R. Johnson (San Antonio) is the South Texas Distinguished Professor of Law at St. Mary's University. He teaches and writes in the areas of torts, professional responsibility, legal malpractice law, government ethics, international law, and comparative law. Johnson has served as a Fulbright Scholar in Burma, China, and Romania. His articles have been cited in more than 215 law reviews and 70 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)² 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.

²Reappointed as Chair for term expiring December 31, 2022

RULE PROPOSAL PROCESS



2021 SUMMARY



In 2021, the committee had the opportunity to put their boots on and test the new rules review process created in the 2017 Texas Legislature. The first rules vote under the committee took place between February 2 and March 4, 2021. In September 2020, the Supreme Court of Texas ordered a rules vote by bar membership on eight rule proposals that were recommended by the committee and approved by the board.

This marked the first rules vote in a decade and a significant opportunity for Texas lawyers to exercise their right of self-governance. Following approval by bar members, the Supreme Court held public deliberations and ultimately issued an order approving and adopting the proposed rules, as well as interpretive comments, effective July 1. Substantial work was put into educating Texas attorneys on the proposals.



Not Pictured: Rick Hagen

Between October 2020 and February 2021, committee members took part in 27 presentations on the rules vote proposals, as well as one podcast. This included four public forum webinars where participants could make comments and ask questions. Approximately 5,325 individuals attended the public forums, which were recorded and made available for on-demand viewing on the State Bar's website. Committee members also took part in the Texas Supreme Court's public deliberations by presenting and answering questions on the proposed rules. Additionally, three committee members contributed articles in the *Texas Bar Journal* discussing the proposed amendments.

The rules vote didn't stop the committee's review of the Texas Disciplinary Rules of Professional Conduct, or "TDRPC", and the Texas Rules of Disciplinary Procedure, or "TRDP". The committee held four quarterly meetings and six monthly meetings during 2021, which included two public hearings on proposed rules. The Committee initiated five rule proposals in 2021 and studied and made recommendations regarding interpretive comments.

OUTREACH AND COMMUNICATIONS

To maximize public participation in the rule proposal process, the committee’s website includes meeting materials and agendas, a schedule of meeting dates and participation methods, rule proposals and timelines, audio and/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 email updates. The committee has also utilized videoconference technology to facilitate public participation in meetings and hearings. For more information, go to texasbar.com/CDRR. In 2021, the website received 17,339 visits.

During the year, the Committee published two rule proposals for public comment in the *Texas Bar Journal* and *Texas Register*, held two public hearings on rule proposals, and received 42 written public comments on initiated rule proposals. Information about rule proposals and public hearings was also emailed to Texas lawyers, committee email subscribers, and other interested parties.

COMMITTEE ACTIVITY	2018	2019	2020	2021	TOTAL
Rule Proposals Initiated	4	3	9	5	21
Rule Proposals Published	3	4	8	2	17
Rule Proposals Recommended	2	3	7	1	13
Rule Requests from Supreme Court	0	1	0	0	1
Rule Requests from Board	1	0	1	0	2
Rule Requests from Commission for Lawyer Discipline	0	2	0	0	2
Self-Initiated Rule Proposals*	3	1	6	5	15
Comment Requests from Supreme Court **	1	2	0	2	5
Recommendations on Comments**	0	2	0	2	4
Formal Rule Requests Denied	0	0	0	0	0

COMMUNICATIONS	2018	2019	2020	2021	TOTAL
Written Public Comments on Rule Proposals	13	213	75	42	301
Email Notices Sent	1	22	20	14	42
Public Hearings Held	1	6	9	2	16

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

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

RULE REVIEW

RULES VOTE 2021

Pursuant to an order of the Supreme Court of Texas, a rules vote by the membership of the State Bar of Texas was held in 2021.

The ballot included eight separate rule proposals on the following subjects:

- A. Scope and Objectives of Representation; Clients with Diminished Capacity
- B. Confidentiality of Information – Exception to Permit Disclosure to Secure Legal Ethics Advice
- C. Confidentiality of Information – Exception to Permit Disclosure to Prevent Client Death by Suicide
- D. Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services
- E. Information About Legal Services (Lawyer Advertising and Solicitation)
- F. Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline
- G. Assignment of Judges in Disciplinary Complaints and Related Provisions
- H. Voluntary Appointment of Custodian Attorney for Cessation of Practice

State Bar members voted to approve the eight rule proposals. Subsequently, the Supreme Court adopted the proposed rules, as well as interpretive comments, effective July 1, 2021. The committee thanks the State Bar Board of Directors, Supreme Court of Texas, and members of the State Bar of Texas for their thoughtful consideration and action in the rule proposal process. The committee also thanks members of the public who provided feedback during the process.



FEBRUARY 2 - MARCH 4 2021

CLIENT - LAWYER RELATIONSHIP: TERMINOLOGY

Proposed Rule 1.00, TDRPC, adds defined terms for “Confirmed in writing,” “Informed consent,” “Represent,” and “Screened.”

On August 4, 2021, the committee voted unanimously to recommend proposed Rule 1.00 to the Board of Directors of the State Bar of Texas for review and consideration.



CONFLICT OF INTEREST INVOLVING A FORMER CLIENT AND USE OF SCREENING

Proposed Rules 1.09 and 1.10, TDRPC, address conflicts of interest when a lawyer moves from one firm to another. These proposed rules are based on Model Rules 1.9 (Duties to Former Clients) and 1.10 (Imputation of Conflicts of Interest: General Rule) of the American Bar Association, or “ABA”, Model Rules of Professional Conduct. Proposed Rule 1.09 describes the duties of a lawyer who has formerly represented a client or whose present or former law firm has previously represented a client. Proposed Rule 1.10 endorses the use of screening to manage former-client conflicts of interest and other conflicts arising under Rule 1.06 (Conflict of Interest: General Rule), TDRPC. Screening also would be used to avoid conflicts of interest occurring with prospective clients, if proposed Rule 1.18 (Duties to Prospective Client), TDRPC, were to be adopted.

On October 6, 2021, the committee voted to initiate the rule proposal process for proposed Rule 1.09. On November 3, 2021, the committee voted to initiate the rule proposal process for proposed Rule 1.10. On December 8, 2021, the committee voted to publish the two proposed rules to solicit comments from the public.

SALE OF A LAW PRACTICE

Proposed Rule 1.17, TDRPC, allows a lawyer or a law firm to sell or purchase a law practice, or an area of law practice, including goodwill, if certain conditions are satisfied. Texas has not adopted any version of Model Rule 1.17 (Sale of Law Practice) of the ABA Model Rules of Professional Conduct, which expressly permits the sale of a law practice. The current method of selling a law firm in compliance with the Texas Disciplinary Rules of Professional Conduct requires the purchasing lawyer to join the law practice to be sold for some transitional period before the selling lawyer retires or relocates.

On April 7, 2021, the committee held a public hearing on proposed Rule 1.17. On June 10, 2021, the committee voted on whether to recommend proposed Rule 1.17 to the State Bar Board of Directors. There were not at least five members of the committee who favored recommendation of the proposed rule, and thus, the committee did not submit the proposed rule to the board.



DUTIES TO PROSPECTIVE CLIENT

Proposed Rule 1.18, TDRPC, states the duties owed by a lawyer to a prospective client, including a former prospective client. In 2020, the committee initiated, published, received public comment on, and voted to recommend proposed Rule 1.18 to the chair of the State Bar Board of Directors.

On June 3, 2021, the committee submitted proposed Rule 1.18 to the chair of the State Bar Board of Directors. On September 24, 2021, the Board of Directors of the State Bar of Texas voted unanimously to approve the proposed rule. At a future date, the board will petition the Supreme Court of Texas to order a referendum on the rule.

ADVOCATE: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

Proposed Rule 3.09, TDRPC, imposes specific duties upon a prosecutor. As currently drafted, proposed Rule 3.09 adds the requirement that a prosecutor disclose new evidence that a convicted defendant did not commit an offense of which the defendant was convicted to the defendant and the appropriate court. In addition, as drafted, proposed Rule 3.09 requires a prosecutor to undertake further investigation to determine whether the defendant was convicted of an offense that the defendant did not commit and to seek to remedy the conviction if clear and convincing evidence establishes that a defendant was convicted of an offense that the defendant did not commit.

On October 6, 2021, the committee voted to initiate the rule proposal process for proposed Rule 3.09. The committee is currently studying the issues to be addressed, drafting a proposed rule, and soliciting comments from the public.



CESSATION OF PRACTICE: TERMINATION OF CUSTODIANSHIP

Proposed Rule 13.05, TRDP, enumerates three ways in which a custodianship conducted under Rule 13.04, TRDP, terminates. In 2020, the committee initiated, published, received public comment on, and voted to recommend proposed Rule 13.05 to the chair of the State Bar Board of Directors.

On June 3, 2021, the committee submitted proposed Rule 13.05 to the chair of the State Bar Board of Directors. On September 24, 2021, the Board of Directors of the State Bar of Texas voted unanimously to approve the proposed rule. At a future date, the board will petition the Supreme Court of Texas to order a referendum on the rule.

INTERPRETIVE COMMENTS

In connection with the Supreme Court's consideration of the proposed disciplinary rule amendments that were approved by bar members during the 2021 rules referendum, the committee made numerous recommendations to the Supreme Court on interpretive comments. The Supreme Court, in its May 25, 2021, order, adopted most of those recommendations in the comments to the rules.

On April 22, 2021, the Supreme Court asked the committee to study and make recommendations on amendments to the interpretive comments to Rules 1.01 and 2.01, TDRPC, as proposed by the Human Rights Committee of the International Law Section of the State Bar, to incorporate certain human rights principles into the practice of law, particularly corporate law, in Texas. On September 21, 2021, the committee reported to the Supreme Court that, without information and guidance with respect to other jurisdictions, it recommended the court reject the proposed changes to the comments to Rules 1.01 and 2.01.



LOOKING AHEAD

With one successful rules vote under its belt, the committee continues to pound the keys in its review of the Texas Disciplinary Rules of Professional Conduct, or “TDRPC”, and the Texas Rules of Disciplinary Procedure, or “TRDP”. The committee maintains a commitment to transparency and public participation in the rule proposal process.



2021 saw two proposed rules be approved by the State Bar of Texas Board of Directors, proposed Rule 13.05, Termination of Custodianship, TRDP, and proposed Rule 1.18, Duties to Prospective Clients, TDRPC.

The committee enthusiastically thanks Texas attorneys for exercising their unique right of self-governance and the board and the Supreme Court for their thoughtful consideration and action in the rule proposal process. The committee also thanks members of the public who provided feedback during the process.

CONTACT US

To review the committee’s meeting schedule and for other information about the committee, go to texasbar.com/CDRR.

Or contact:

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