



COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

2024 ANNUAL REPORT



COMMITTEE MEMBERS

M. Lewis Kinard—Chair
Timothy D. Belton
Amy Bresnen
Scott Brumley

Robert L. Denby
Hon. Phyllis Martinez Gonzalez
Jennifer A. Hasley
April Lucas
Karen J. Nicholson

ABOUT

The 2017 Texas Legislature created the Committee on Disciplinary Rules and Referenda 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, 2024

Robert L. Denby – *Houston*
Hon. Phyllis Martinez Gonzalez – *El Paso*
Karen J. Nicholson (Public Member) – *Austin*

TERM EXPIRING DECEMBER 31, 2025

Timothy D. Belton (Public Member) – *Bellaire*
Amy Bresnen – *Austin*
Scott Brumley – *Amarillo*

TERM EXPIRING DECEMBER 31, 2026

Jennifer A. Hasley – *Houston*
M. Lewis Kinard, Chair – *Dallas*
April Lucas – *Austin*

A NOTE FROM THE CHAIR

2024 was another great year for the Committee on Disciplinary Rules and Referenda (CDRR)! We have now worked from start to finish on two batches of changes to the Texas Disciplinary Rules of Professional Conduct and Rules of Disciplinary Procedure. Every item on the 2024 ballot passed overwhelmingly (as in 2021).

Our committee worked hard and yet we know we didn't do it alone. In fact, we credit the successful referendum in large part to the broad range of contributors, comments, and other support. One of those rule changes took several years, in fact, and a lot of effort from current and former CDRR members and others who assisted through subcommittees that worked between the public comment periods to get the language right for Texas.



As we prepared this report on the committee's activities in 2024, it was great to reflect on the opportunity given to the CDRR to continuously and carefully consider how the disciplinary rules support our profession while protecting both lawyers and their clients. We make this report to the Supreme Court of Texas and State Bar Board of Directors each year to summarize those efforts. Our bar is fortunately large enough and sufficiently determined to do more than simply adopt every model rule¹ without evaluating the impact on our diverse members and their practices.

Our committee accepts its responsibility soberly and proudly and we appreciate your support and contributions.

Thank you!

A handwritten signature in black ink, appearing to read "M. Lewis Kinard".

M. Lewis Kinard
Chair



1. Referring to the American Bar Association Model Rules of Professional Conduct.

2024 COMMITTEE

TERM EXPIRING DECEMBER 31, 2024



Robert L. Denby (Houston)* is a member of Vinson & Elkins's Office of the General Counsel and is a leading authority on legal ethics, professional responsibility, and risk management for law firms. Prior to joining V&E, Denby spent 16 years at the Attorneys' Liability Assurance Society (ALAS), the premier malpractice carrier for large law firms, including seven years as the head of ALAS' industry-leading Loss Prevention Group. He is well versed in the key risk management issues that law firms encounter and helps the firm and its lawyers navigate those issues. He is an accomplished speaker and is also nationally recognized as an expert in attorney well-being. Beyond his loss prevention skills, Denby is an experienced trial lawyer and litigation manager.



Hon. Phyllis Martinez Gonzalez (El Paso)* currently presides over Texas Title IV-D Court #44 (2013). As the only Texas Title IV-D judge with an enhanced service docket (2018), her court links representatives from various community services with individual parties to meet underlying needs. Using an enhanced service docket enables her to assist families in a meaningful way. Gonzalez presents on the national, state, and local levels to educate parents, children, and the legal community. Some of the topics she covers include the role of a judge, using an enhanced service docket, parental rights, court processes, best practices, modeling a trauma informed courtroom, and legal updates. Prior to her appointment, Gonzalez served as assistant attorney general and

managing attorney for the Office of the Texas Attorney General (2000-2005, 2010-2013) and held a dual position as a special assistant U.S. attorney and assistant attorney general in the Major Crimes Division with the U.S. Attorney's Office for the Western District of Texas (2005-2009). Gonzalez sits on various advisory boards and boards of directors, as well as the National Council of Juvenile and Family Court Judges committees. Gonzalez received her B.A. with a double major in Mathematics and Political Science in 1996 from Houston Christian University (formally Houston Baptist University) and her J.D. in 1999 from Texas Tech University School of Law.



Karen J. Nicholson - Public Member (Austin)* has been active in the League of Women Voters for many years, having served on the LWVUS Board, where her eight years of service included work as vice president and chair of both the Advocacy and Litigation and the Education committees. She has also served as president of LWV Texas and LWV Midland and on the boards of the Richardson and Houston leagues. Currently, she is advocacy director for LWVAustin Area. Contributions to the legal community include being a public member of the Commission for Lawyer Discipline and the Grievance Oversight Committee and currently the Texas Legal Services Center Board and the Texas Access to Justice Commission. Education has long been a primary focus.

Before retiring to Austin, Nicholson was vice president of the Midland ISD Board of Trustees. She taught in the Austin and Richardson ISDs and was an 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.

* Reappointed for term expiring December 31, 2027

2024 COMMITTEE

TERM EXPIRING DECEMBER 31, 2025



Timothy D. Belton - Public Member (Bellaire) is chairman and CEO of ZeoGas LLC, a development stage company pursuing a \$2.7 billion-financed clean methanol project in the Port Arthur area. He also serves as an independent director of the Buckingham Senior Living Community, where he chairs the Audit Committee, as an independent director of Thesis Capital Partners, and as president of the Business Ethics Forum. He has served as chairman, independent director, CEO, COO, and restructuring adviser for nearly a dozen companies, including public and sponsor-backed companies. 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. Belton previously served as a trustee and Finance Committee chair of the Texas Center of Legal Ethics, director and chairman of the Finance Committee of Texas Legal, Inc. (a State Bar of Texas affiliated entity), as a public member of the Board of Directors of the State Bar of Texas, where he was named the Outstanding Third Year Director, and was honored with the Liberty Bell Award by the Houston Young Lawyers Association. Belton is not a lawyer, but he 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 BresnenAssociates, Inc. Her 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, women's issues, 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. Bresnen published an article, which has been downloaded 5,000 times, about the latest 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 holds a JD from St. Mary's University, an MPA from Texas State University, and a BS in Speech Communication with a minor in Political Science from Texas Christian University.



Scott Brumley (Amarillo) is the county attorney of Potter County, a position in which he has served since January 2005. From 1995 until he took office, he was the Civil Division chief of the Potter County Attorney's Office. Brumley has been, and continues to be, responsible for handling and litigating a variety of civil issues involving Potter County and its officials, including employment and civil rights claims, Tort Claims Act suits, removal and quo warranto litigation, gambling law enforcement actions, Open Meetings/Public Information Act compliance, and general county law matters. He graduated from Texas Tech University in 1989 with a bachelor's degree in journalism (where he was editor-in-chief of the university's daily newspaper) and from the Texas

Tech University School of Law in 1992. During his career, Brumley has served as chair of the Government Law Section Council of the State Bar of Texas, president and board chair of the Texas District & County Attorneys Association, and chair of the Texas Association of Counties Risk Management Pool Board. He frequently writes and speaks on ethics and county-related legal issues for the State Bar of Texas, the Texas Association of Counties, and the Texas District & County Attorneys Association.

2024 COMMITTEE

TERM EXPIRING DECEMBER 31, 2026



Jennifer A. Hasley (Houston) is a partner at Hasley Scarano. She maintains a statewide practice focused on attorney disciplinary issues, professional liability claims, and character and fitness requirements for admission to the Texas bar. Early in her career, Hasley spent more than eight years as an assistant disciplinary counsel for the State Bar of Texas. Hasley is certified in civil trial law by the Texas Board of Legal Specialization and is frequently called upon to speak on legal ethics and professionalism. She is a former president of the Houston Bar Association and currently serves on the Executive Committee of the Garland R. Walker American Inn of Court and as a board member of the Texas Association of Civil Trial and Appellate Specialists (TACTAS) and the Houston

Bar Foundation. Throughout her legal career, Hasley has been an active volunteer and leader on community projects, events, and partnerships. Hasley earned a J.D. from the University of Arizona James E. Rogers College of Law and an LL.M. (Health Law & Policy) from the University of Houston Law Center.



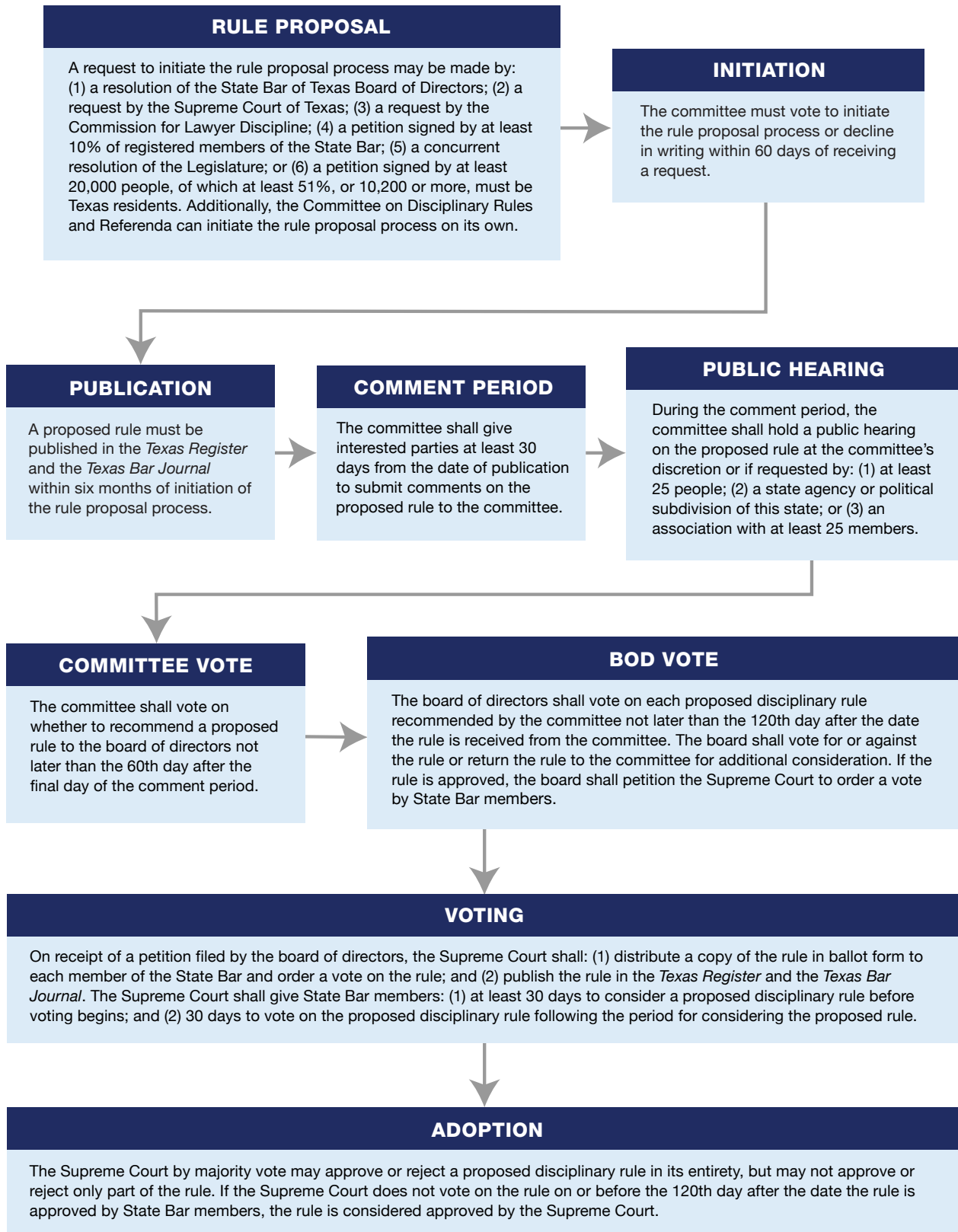
M. Lewis Kinard, Chair (Dallas) is executive vice president, general counsel, and assistant corporate secretary for the American Heart Association (AHA) in Dallas. He was the last chair of the State Bar Committee on Disciplinary Rules and Professional Responsibility and served on that committee for seven years. Kinard has over 30 years of legal practice in a wide 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 J.D. from SMU Dedman School of Law.



April Lucas (Austin) is a litigation partner at McGinnis Lochridge LLP, where she has practiced since 2005, in civil litigation and appellate matters. A significant portion of her practice is devoted to fiduciary litigation, including family and business disputes, trust and probate suits, and defending attorneys and law firms against legal malpractice claims or in disciplinary proceedings. Lucas is the general counsel of McGinnis Lochridge and has performed various loss prevention roles for the firm for a number of years. She previously worked as a briefing attorney to Justice David Puryear at the 3rd Court of Appeals in Austin. She holds a J.D. from the University of Texas School of Law and a BA in International Studies and Political Science from Texas A&M University.

RULE PROPOSAL PROCESS



2024 SUMMARY

In 2024, the committee continued its careful review of the Texas Disciplinary Rules of Professional Conduct (TDRPC) and the Texas Rules of Disciplinary Procedure (TRDP). Throughout the review, the committee maintained its commitment to transparency and public participation in the rule proposal process. The committee held 10 meetings during 2024, and for each, the committee provided public notice in the *Texas Register* and on its website.

In its deliberations in early 2024, the committee considered, but decided not to publish, three rule proposals initiated in 2023. The committee primarily focused on providing public education on the 12 rule proposals set for the State Bar members to vote in a referendum during April 2024.

After the voting concluded and resulted in the membership's approval of the 12 rule proposals, the committee shifted its focus to providing

information on the proposed rules and recommendations on the interpretive comments to the Supreme Court of Texas at the court's request. The court asked for the committee's expertise to assist the court with its decision to adopt or reject the proposed rules within 120 days following the approval by the State Bar membership. During the same period, the committee continued to respond to inquiries from the State Bar membership, disciplinary authorities of other jurisdictions, the media, and the public regarding the pending rule proposals.

Throughout 2024, the committee reviewed disciplinary rules that it identified as obsolete, inconsistent, or unclear. Keenly aware of rapid changes in technology, access to legal services, and patterns of legal employment, the committee considered new rules to address such changes. The committee invited, welcomed, and received public input for its discussion and action in the rule proposal process.

To learn more, go to texasbar.com/CDRR.

2024 Committee on Disciplinary Rules and Referenda. Pictured top row from left: Haksoon Andrea Low (Committee on Disciplinary Rules and Referenda attorney); Timothy D. Belton; Judge Phyllis Martinez Gonzalez; middle row from left: Jennifer A. Hasley; M. Lewis Kinard (chair), Scott Brumley; bottom row from left: Robert L. Denby; Amy Bresnen; Karen J. Nicholson. Note: April Lucas is not pictured.



GENERAL OUTREACH AND PUBLIC COMMUNICATIONS

To maximize public participation in the rule proposal process, the committee’s website includes: a schedule of meeting dates; methods of participation; meeting materials, including agendas, as published in the *Texas Register*, and minutes; video recordings of meetings; current and archived rule proposals; written public comments; a timeline of committee action on each rule proposal during the rule proposal process; a flowchart of the rule proposal process; and links to the TDRPC, TRDP, Committee Operating Rules and Procedures, and Rule Drafting Guidelines.

Members of the public may submit requests for initiation of rule proposals or comments on proposed rules through the website or directly to the committee’s email address. They may subscribe to email notifications for frequent updates on the committee’s public meetings and hearings. The committee uses videoconference technology to facilitate public participation in proceedings and to maintain transparency in its deliberations.

COMMUNICATIONS PER STATUTORY DUTIES

	2018	2019	2020	2021	2022	2023	2024	TOTAL
Rule Proposals Initiated	4	3	9	5	5	9	0	35
Rule Proposals Published	3	4	8	2	4	8	0	29
Rule Proposals Recommended	2	3	7	1	3	13	0	29
Rule Requests from Supreme Court	0	1	0	0	0	1	0	2
Rule Requests from Board	1	0	1	0	0	0	0	2
Rule Requests from Commission for Lawyer Discipline	0	2	0	0	0	0	0	2
Self-Initiated Rule Proposals ¹	3	1	6	5	5	9	0	29
Comment Requests from Supreme Court ²	1	2	0	2	0	0	12	17
Recommendations on Comments	0	2	0	2	1	9	12	26
Formal Rule Requests Denied	0	0	0	0	0	0	0	0

OUTREACH AND COMMUNICATIONS TO THE PUBLIC

	2018	2019	2020	2021	2022	2023	2024	TOTAL
Written Public Comments on Rule Proposals	13	213	75	42	102	103	0	548
Email Notices to Subscribers Sent	1	22	20	14	12	15	10	94
Public Hearings Held	1	6	9	2	4	2	0	24

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

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

REFERENDUM IN 2024

BACKGROUND

From 2020 to 2023, the committee initiated rule proposals, published those proposals in the *Texas Register* and *Texas Bar Journal*, accepted written public comments, and held public hearings on each published rule proposal. For some proposed rules, the committee re-initiated and repeated the rule proposal process multiple times before recommending the rule proposals to the State Bar board for approval.

On October 2, 2023, the board petitioned the Supreme Court to submit 12 rule proposals to members of the State Bar for a referendum. On October 6, 2023, the court issued its Approval of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure, Misc. Docket No. 23-9080. The court order set April 1, 2024, to April 30, 2024, as the period for State Bar members to vote.

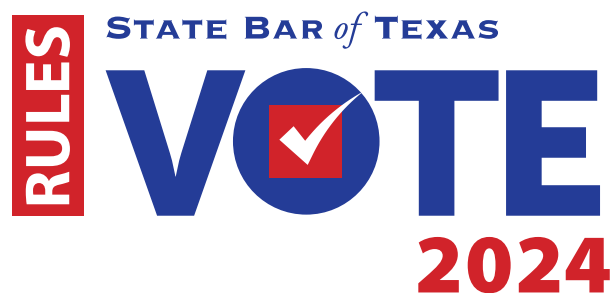
THE PROPOSED RULES ON THE REFERENDUM BALLOT WERE:

TDRPC 1.00. Terminology
TDRPC 1.08(a). Conflict of Interest: Prohibited Transactions
TDRPC 1.09. Conflict of Interest: Former Client
TDRPC 1.10. Imputation of Conflicts of Interest: General Rule
TDRPC 1.18. Duties to Prospective Client
TDRPC 3.09. Special Responsibilities of a Prosecutor
TDRPC 4.03. Dealing With Unrepresented Persons
TDRPC 5.01. Responsibilities of a Partner or Supervisory Lawyer
TDRPC 5.05. Unauthorized Practice of Law; Remote Practice of Law
TDRPC 8.05. Jurisdiction
TDRPC 8.06. Choice of Law
TRDP 13.05. Termination of Custodianship

OUTREACH AND PUBLIC COMMUNICATIONS FOR 2024 REFERENDUM

INFORMATION ON VOTING FOR STATE BAR MEMBERS

In preparation for the referendum voting period set for April 1, 2024, to April 30, 2024, the committee undertook extensive outreach and communications. The committee aimed to encourage participation in the rule proposal process, educate the State Bar membership on the purpose of each rule proposal appearing on the ballot, publicize the dates and methods of voting critical to the rule proposal process, and respond to inquiries from State Bar members.



PUBLICATION OF EXPLANATORY COMMENTS

The outreach included the publication of information in the *Texas Bar Journal* and on the committee's website to explain each proposed rule, the rule proposal process, and the role of the committee, State Bar board, State Bar membership, and Supreme Court in the referendum. Additionally, the committee's website, reports, and visual presentations contained the flow chart (see page 6 above) to illustrate the progressive steps in the rule proposal process.

The April 2024 issue of the *Texas Bar Journal* published an explanation of the history, process, and substance of the disciplinary rule changes under consideration, as contributed by the chair of the committee. In the same publication, five current or former committee members contributed comments on one or more of the 12 proposed rules. The commentators expressed individual opinions that were not official statements of the committee. Readers had the opportunity to compare the comments written by current or former committee members to comments submitted by other members of the State Bar and published in the April 2024 issue of the *Texas Bar Journal*.

THE PROPOSED RULES EXPLAINED
MEMBERS AND FORMER MEMBERS OF THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA WEIGH IN ON THE HISTORY, PROCESS, AND SUBSTANCE OF THE DISCIPLINARY RULE CHANGES UNDER CONSIDERATION.

THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA CONSISTS OF: M. LEWIS KINARD (CHAIR), THOMAS D. BRIDEN, AUSTY BRIDEN, SCOTT BRIDEN, ROBERT DEWINE, HENK, PHILIP MARSHALL GONZALEZ, JONATHAN HANLEY, APRIL LUCAS, AND KAREN NECHOSKIN.

TO LEARN MORE ABOUT THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA, GO TO TEXASBAR.COM/CDR.

READY FOR ROUND TWO
WRITTEN BY M. LEWIS KINARD

From 1984 to 1988, Texas developed its own version of the American Bar Association's 1981 Model Rules of Professional Conduct. The most significant changes were adopted six years later, in 1994. Another 30 years passed before more changes were adopted in 2024. The new effort to make significant changes failed in 2011.

When the Texas Legislature created a structure and standard process for making changes to the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure in 2017, it was an effort to turn the annual rule-making process. Texas should not get into its more years between every referendum to keep up with the changing aspects of our profession.

Just three years after we voted to make the first changes since 2004, there are now 14 full-time proposed changes that the Texas Committee on Disciplinary Rules and Referenda, or CDRE, submitted to the State Bar of Texas Board of Directors, which then petitioned the Supreme Court of Texas to direct the bar to conduct a referendum for Texas lawyers to vote on the proposals.

The submission in this issue explains the "what" and "why" for each proposal. We put it in a grid so that you can see the "how" part. And that, fundamentally, is our strength: Read the proposed changes and vote on each one, either on paper or online.

Use all of the process. Every vote matters, and every referendum cycle helps us all keep our rules in line with the changing world in which we practice. Please vote!

M. LEWIS KINARD
is a member and immediate past president and corporate secretary for the American Heart Association. He has been chair of the State Bar of Texas Committee on Disciplinary Rules and Referenda for 10 years. He is a member in practice law in Texas and an active lawyer in a "single-jurisdiction" state in Colorado.

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PROPOSED RULE 1.00: TERMINOLOGY
WRITTEN BY VINCENT R. JOHNSON

Note: This article addresses the rule proposed appearing in ballot form.

Five new definitional sections have been added to the Terminology section to address the meanings of, "Confidential in writing," "Informal contact," "Reprimand," "Suspend," "Withdraw," "Waive," and "Waiver."

Further demands that the disciplinary rules must be applied in a manner that is clear and consistent. In furtherance of those objectives, proposed Rule 1.00 (Terminology) defines important terms that occur throughout the rules. Most definitions deal with a single term, but others deal with multiple related terms. See, e.g., proposed Rule 1.00 discussing "Reprimand," "Reprimand," and "Reprimanded." Several of the definitions simply restate and restate without substantive change, material that now appears in an unnumbered "Terminology" section near the beginning of the present rules. These definitions are now found in sections (a)-(i), (g)-(h), (k)-(l), (m), and (n)-(o).

Another common definition and comment, dealing with fraud, has been amended to make clear that negligent misrepresentation is not sufficient to constitute fraud, but that choice can constitute fraud if there is a duty to speak and

STATE BAR OF TEXAS
RULES VOTE
APRIL 1-30, 2024
CAST YOUR BALLOT IN THE STATE BAR RULES VOTE AND BOARD ELECTION

Texas attorneys will be called on to put their self-governance to work by voting on proposed changes to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure. The 2024 rules vote referendum will be held in conjunction with the State Bar TYLA president-elect and district director elections. Attorneys can vote online or by paper ballot from April 1 to April 30, 2024.

- On April 1, 2024, attorneys eligible to vote will be mailed a paper ballot along with instructions on how to cast their vote. An email will also be sent to attorneys giving them instructions on how to vote online. **BE SURE TO CHECK YOUR SPAM FOLDER AND JUNK MAIL.** Election emails are sent from the State Bar's election provider, Election Services Corporation, and will be sent from sanbar@texasbar.com.
- The paper ballot and email will contain a voter authorization number (VAN) with instructions on how to vote online. Attorneys may use this VAN and their bar card number to log on to the election website to cast their ballot. If attorneys do not have their VAN, they can also go to the State Bar website, texasbar.com, to obtain their VAN and cast their vote.
- Attorneys may either submit their paper ballot via mail or vote online using the information provided. The secure election system will not allow duplicate votes.

Detailed information about the proposed rules can be found at texasbar.com/rulesvote. Information about State Bar Board and TYLA Board elections can be found at texasbar.com/elections.

THE DEADLINE TO CAST BALLOTS IS 9 P.M. CDT APRIL 30, 2024

CONTINUING LEGAL EDUCATION WEBINARS

On March 13, 2024, March 20, 2024, and March 27, 2024, current and former committee members presented educational information on the rule proposals for three one-hour webinars, produced by the State Bar and certified for Minimum Continuing Legal Education (CLE) ethics credit. The panelists described the rule proposals on the ballot and the preceding three-year process of developing the rule proposals presented to and approved by the State Bar board for the referendum.

Following a pre-recorded video of committee panelists, a different panel of current or former committee members responded live to speakers during each of the three webinars. Three different moderators interviewed a total of seven committee panelists, who shared their knowledge

and perspective in the three CLE webinars.

Upon registration, State Bar members had the opportunity to sign up to speak at the end of each webinar. Some registrants asked questions of the panel, whereas others expressed opinions on specific proposed rules or commented on the rule proposal process itself. During the time allotted toward the end of each webinar, seven registrants spoke on March 13, eight registrants spoke on March 20, and 12 registrants spoke on March 27. The maximum capacity of 1,000 registrants attended each webinar.

Members of the State Bar and the public could stream the CLE webinars from the State Bar website for one year after the live broadcasts.

PUBLIC PRESENTATIONS ON THE RULE PROPOSALS

Current and former committee members, with their unique expertise, gave 31 educational presentations on the referendum and the rule proposals before and during the voting period from April 1, 2024, to April 30, 2024. During the voting period, committee members remained available to answer questions and provide informational material to any State Bar member eligible to vote or any other interested party.

Both in person and virtually, committee members provided information on the rule proposals at forums tailored to State Bar sections and councils, local bar associations, associations of legal practitioners in particular areas of law, associations of legal academics and law schools, nonprofit legal organizations, and law firms. The presentations commenced shortly before the State Bar board voted to submit a petition to the

Supreme Court for a referendum, continued through the final days of voting, and covered the period of September 19, 2023, to April 19, 2024.



SUPREME COURT PUBLIC HEARING AND REQUEST FOR RECOMMENDATIONS

During the period that the State Bar members were voting, the Supreme Court provided notice of the date, time, and location of public deliberations on the proposed rules in its Order Setting Public Deliberations on Amendments to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure, Misc. Docket No. 24-9015, on April 16, 2024. The court stated that if one or more of the proposed rules were approved by a majority of the votes cast, the court would deliberate on those proposed rules. The court invited written public comments by May 1, 2024.

On May 1, 2024, the State Bar executive director certified that 12 proposed rules were approved by a majority of the votes cast and submitted a Petition for Order of Promulgation requesting the court to adopt the proposed rules.

On May 6, 2024, the chair and two members of the committee attended the Supreme Court

hearing to respond to questions about the proposed rules approved by the State Bar membership. The court requested that the committee submit recommendations for interpretive comments in response to concerns that the justices expressed. In particular, the court requested recommendations to clarify the application of the rules, the extent and breadth of the rules, and any limitations on the reach of the rules.

At the public hearing, the committee members confirmed that they would submit timely recommendations to assist the court's deliberations. The committee requested to review the written public comments that the court received from four individuals and entities during the court's public comment period. The committee reviewed the record to develop recommendations that addressed the court's concerns arising from the public comments.

RECOMMENDATIONS FOR INTERPRETIVE COMMENTS

The committee noted in all its publications and presentations that the Supreme Court exercises sole authority to add, amend, or delete interpretive comments to the disciplinary rules. However, prior to the referendum, the committee recommended the addition of new interpretive comments, amendment of existing interpretive comments, and/or renumbering of interpretive comments to clarify proposed TDRPC 1.00, 1.08, 1.09, 1.10, 1.18, 3.09, 4.03, 5.01, 5.05, 8.05, and 8.06. The committee did not recommend interpretive comments to proposed TRDP 13.05 at any stage of the rule proposal process.

Recommended interpretive comments accompanied the rule proposals throughout the rule proposal process. The committee accepted written and oral public comments on its

recommended interpretive comments as published in the *Texas Register* and *Texas Bar Journal*. Before they voted, State Bar members had the opportunity to review all interpretive comments that the committee recommended.

In response to the Supreme Court's questions and concerns at the hearing on May 6, 2024, the committee revised its earlier recommendations. The recommendations included minor revisions to the interpretive comments to Rules 1.00, 1.18, and 3.09 and more substantive revisions to the interpretive comments to Rules 1.08, 4.03, 5.01, 8.05, and 8.06. The committee then submitted recommendations for new and amended interpretive comments to the court on June 4, 2024.



DISSEMINATION OF PUBLIC INFORMATION WHILE RULES PENDING WITH SUPREME COURT

The committee continued to respond to numerous inquiries about the rule proposal process while the Supreme Court considered the proposed rules. The media, bar associations in other jurisdictions, federal agencies, and interested members of the

public from outside of Texas often contacted the committee to inquire about the referendum and the status of the proposed rules before the court issued its final order.

SUPREME COURT ORDER ADOPTING RULES

According to the statutory rule proposal process, the court may by majority vote approve or reject a proposed rule in its entirety but not in part. If the court does not vote on the rule on or before the 120th day after the date the rule is approved by State Bar members, the rule is considered approved.

On August 27, 2024, the Supreme Court issued its Final Approval and Adoption of Amendments to Texas Disciplinary Rules of Professional Conduct 1.08, 1.09, 3.09, 4.03, 5.01, and 5.05; of New Texas Disciplinary Rules of Professional Conduct 1.10 and 1.18; and of New Texas Rule of Disciplinary Procedure 13.05, Misc. Docket No.

24-9054. The court order stated that the court had considered the votes of the State Bar members, the State Bar's petition, the public comments received by the court, and the presentations and materials submitted at the court's public deliberations on May 6, 2024.

For the 2024 referendum, at the end of the voting period on April 30, 2024, State Bar members approved the 12 proposed rules on the ballot by a majority of the votes cast. When the court issued its order on August 27, 2024, that date was at the end of the statutory 120-day period to approve or reject the proposed rules.

APPROVED AND ADOPTED

The court approved TDRPC 1.08, 1.09, 1.10, 1.18, 3.09, 5.05 and TRDP 13.05 unanimously. The court approved TDRPC 4.03 and 5.01 by a vote of 8 to 1.

With respect to the TDRPC, the court adopted new and amended interpretive comments, certain renumbering amendments, and amendments to the Terminology section.

REJECTED

The Supreme Court rejected proposed TDRPC 1.00 by a unanimous vote. The court instead adopted amendments to the existing Terminology section of the TDRPC that incorporated the language of the rejected proposed rule. Although the court decided against adding new Rule 1.00, as approved by the State Bar members, the court included the same content in the unnumbered Terminology section.

The Supreme Court rejected proposed TDRPC 8.05 by a vote of 5 to 4. Similarly, the court rejected proposed TDRPC 8.06 by a vote of 5 to 4. Therefore, current Rule 8.05 remains in effect. Currently, there is no Rule 8.06.

EFFECTIVE DATE OF ADOPTED RULES

The court ordered the adopted rules to take effect on October 1, 2024. On that date, the committee promptly posted the Supreme Court's

official version of the TDRPC and TRDP on the committee's website.

RULE REVIEW: TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

FEES AND SAFEKEEPING OF PROPERTY

The committee desired to clarify and resolve issues regarding the acceptance of flat fees and the definition of a retainer. The committee proposed amendments to TDRPC 1.04 and 1.14 to confirm that a lawyer may charge a flat fee in advance, although it may not be non-refundable, and to require that the lawyer disclose to the client in writing that fees should be deposited to a trust account, although the parties may waive that requirement.

On October 4, 2023, the committee voted to initiate the rule proposal process for Rules 1.04 and 1.14. After initiation, the committee received feedback from State Bar committees and members as well as the public. The committee continued to consider the rule proposals in 2024.

On February 7, 2024, the committee agreed not to publish the rule proposals. Therefore, proposed Rules 1.04 and 1.14 were withdrawn. The committee maintained its interest in clarifying Rules 1.04 and 1.14 and discussed possible action at its meetings on April 3, 2024, May 1, 2024, and June 5, 2024. The size of the subcommittee studying the rules increased over those months, as additional committee members desired to contribute to the review.

On June 5, 2024, the committee discontinued formal discussion of initiating the rule proposal process when the subcommittee expressed that it preferred to take additional time to consider the rules. The committee did not initiate a rule proposal for either Rule 1.04 or Rule 1.14 in 2024.

FEES REFLECTING VALUE OF TRADE NAMES, GOODWILL, AND OTHER INTANGIBLE ASSETS

The committee desired to clarify how the disciplinary rules apply to trade names, goodwill, and other intangible assets. The committee examined whether TDRPC 1.04 on Fees, TDRPC 7.01-7.06 on Information about Legal Services, and Opinion 266, issued by the Professional Ethics Committee for the State Bar of Texas in 1963, may conflict with one another. Opinion 266 concluded that the canons prohibited a lawyer from advertising the sale or purchase of a law practice including goodwill and established clientele.

Rule 1.04 offers guidance on the reasonableness or unconscionability of a fee. Section (h) permits payment to a former partner or associate pursuant to a separation or retirement agreement. The committee considered Rule 1.04 in light of the advertising rules adopted in the 2021 referendum.

Rule 7.01(c) expressly authorizes a lawyer to practice law under a trade name that is not false or misleading. Comment 9 to Rule 7.01 recognizes that a lawyer or law firm may be designated by a distinctive website address, email address, social media username, or comparable professional designation that is not misleading and does not otherwise violate the TDRPC.

On November 6, 2024, a subcommittee formed to review and study the application of the rules to fee agreements and financial transactions that reflect a value for trade names, goodwill, and other intangible assets. For the remainder of 2024, the subcommittee considered possible proposals for rules and/or recommendations for interpretive comments to the Supreme Court.

CONFLICT OF INTEREST INVOLVING A PUBLIC DEFENDER'S OFFICE AND USE OF SCREENING

In September 2021, the State Bar board voted to approve a proposed rule governing the use of screening to manage conflicts of interest involving prospective clients. In January 2023, the State Bar board voted to approve a proposed rule governing the use of screening to manage conflicts of interest involving former clients. Lawyers in a public defender's office requested that the committee consider a rule that applies screening specifically to public defenders.

On May 3, 2023, the committee voted to initiate the rule proposal process for proposed TDRPC

1.11, pending renumbering, to use screening to manage conflicts in a public defender's office. The committee did not vote to publish the rule proposal, and the rule was withdrawn. The committee again initiated the rule proposal process on October 4, 2023. The committee continued to consider the rule proposal into 2024.

On January 10, 2024, the committee agreed not to publish the rule proposal initiated on October 4, 2023. Therefore, the second rule proposal for Rule 1.11 was withdrawn.

DECLINING OR TERMINATING REPRESENTATION; DUTY TO INQUIRE

On May 1, 2024, the committee began its consideration of Model Rule of Professional Conduct (MRPC) 1.16 on Lawyers' Client Due Diligence Obligations, as adopted by the American Bar Association (ABA) in August 2023. Committee members discussed whether a similar rule would advance the domestic and international effort to combat money laundering and counter financing of terrorism in Texas, as the ABA intended.

As part of its consideration of whether existing Texas disciplinary rules regarding fraud, misconduct, and candor toward the tribunal are sufficient, the committee asked the Office of the Chief Disciplinary Counsel to present findings on grievances regarding lawyers who did not properly identify their clients.

On June 5, 2024, the committee agreed to monitor developments in other states and not to seek to adopt a rule.



MULTIJURISDICTIONAL PRACTICE OF LAW

On January 16, 2024, the ABA Working Group on MRPC 5.5 on Unauthorized Practice of Law; Multijurisdictional Practice of Law requested comment on its memorandum on regulatory issues associated with amendments to the model rule. The memorandum covered issues such as competence, continuing legal education, lawyer discipline, client protection funds, Interest on Lawyer Trust Accounts (IOLTA), and lawyers' professional liability insurance.

The committee first began considering similar issues before the committee initiated on September 7, 2022, then published, and subsequently recommended proposed TDRPC 5.05 on the Unauthorized Practice of Law; Remote Practice of Law. At its May 1, 2024, meeting, the committee discussed ABA MRPC 5.5 on the Multijurisdictional Practice of Law. Because proposed Rule 5.05 was set for a vote in the April 2024 referendum, the committee agreed to

discuss ABA Model Rule 5.5 again after the Supreme Court's hearing on proposed Rule 5.05 on May 6, 2024.

On June 5, 2024, the committee agreed to resume discussion after the Supreme Court issued its order to approve or reject the proposed rules included in the referendum. The committee concluded that whether the Supreme Court approved or rejected Rule 5.05, neither a newly adopted rule nor the existing rule in Texas would preclude future discussion or action on the ABA proposal, as the proposal under consideration did not conflict with the TDRPC.

The committee took no further action on this matter in 2024. However, as the ABA Working Group on Model Rule 5.5 continues to solicit comments, the committee may discuss and take action on a rule proposal or provide comments on the multijurisdictional practice of law in the future.



SEVERABILITY

On May 1, 2024, the committee discussed whether TDRPC 9.01 on Severability may require amendment due to new regulations on artificial intelligence. At its June 5, 2024, meeting, the committee determined that it had no information

to indicate that Rule 9.01 was inadequate, and therefore, the committee would take no action unless new information arose. The committee discontinued consideration of this matter.

RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

The committee began its review and study of TDRPC 5.01-5.04 in the last quarter of 2022. The committee did not initiate the rule proposal process to amend Rule 5.04 before the referendum in 2024. The committee instead agreed to monitor developments in other jurisdictions and revisit consideration of the duties of lawyers regarding nonlawyer assistants when more data became available.

On August 6, 2024, the Supreme Court issued its Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants. The order invited public comments on proposed new and amended rules that allow licensed legal paraprofessionals and licensed court-access assistants to provide certain limited legal services to low-income individuals. The court accepted public comments submitted by November 1, 2024, with an expected effective date of December 1, 2024, for the approved rules.

The committee understood that the Supreme Court's order might implicate the disciplinary rules for lawyers, although the rules only directly

governed licensed legal paraprofessionals and licensed court-access assistants. On September 4, 2024, a subcommittee undertook the task of outlining the issues the committee could address in its comments. On October 2, 2024, the committee decided not to submit public comments to the court by the deadline of November 1, 2024, but the committee members agreed that each member of the committee, as an individual, may submit comments to the court while the committee continued to monitor the rules on paraprofessionals and court-access assistants.

On November 4, 2024, the Supreme Court issued its Order Delaying Effective Date of Proposed Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, which indefinitely delayed the rules until further order of the court. At the November 6, 2024, meeting, the subcommittee recommended that the committee closely monitor legislative action for proposed statutory changes and any related court orders that may relate to the purpose and authority of the committee.

RULE REVIEW: TEXAS RULES OF DISCIPLINARY PROCEDURE

In 2024, the members of an appointed subcommittee conducted a comprehensive review and study of the TRDP. The subcommittee began its review by identifying the rules that most urgently require updating and the rules that are adequate. The subcommittee met with the Office of the Chief Disciplinary Counsel on a regular basis to determine whether the existing rules of disciplinary procedure have presented burdens for enforcement and what proposals could address the burdens.

Based on initial findings shared by the subcommittee, the full committee discussed the limitations of the rule proposal process on amending the TRDP. The committee considered potential statutory changes it could recommend. The committee planned for its recommendations to inform the rule proposals for a future referendum. The committee intends to continue its comprehensive review and study in 2025 and beyond.

MODERNIZING THE DISCIPLINARY RULES: ARTIFICIAL INTELLIGENCE

On May 1, 2024, the committee agreed to consider amendments to rules and interpretive comments with reference to examples from ethics committees and courts in other jurisdictions regarding artificial intelligence (AI). The committee agreed to monitor the actions of the Texas Legislature and judiciary. The committee looked at research, findings, and recommendations from the State Bar Taskforce for Responsible Artificial Intelligence in the Law (TRAIL).

At its June 5, 2024, meeting, the committee invited the staff liaison for TRAIL to provide an overview of TRAIL's interim report to the State Bar board and the continuing work of TRAIL. The liaison answered the committee's questions as committee members sought facts that may warrant new or amended disciplinary rules.

Specifically, the committee inquired about TRAIL's recommendations regarding generative AI use that addressed compliance with attorney ethics and advertising regulations, which TRAIL articulated in the Ethical and Responsible Use Guidelines on AI in legal practice.

The committee later reviewed the TRAIL year-end recommendations submitted at the June 19, 2024, State Bar board meeting. After further discussion on August 7, 2024, the committee agreed to continue to monitor guidance on AI as it develops in various state courts and state bar associations.

On September 4, 2024, the committee agreed that the current disciplinary rules were sufficient to apply to the use of AI. The committee took no formal action in 2024.



TEXAS LAWYER'S CREED

In August 2023, the committee first received a request from a member of the public to consider incorporating portions of the Texas Lawyer's Creed into the disciplinary rules. Through the remainder of 2023, the committee discussed alternatives, including possible amendments to the preamble of the TDRPC, and decided to continue discussion in 2024.

At the beginning of 2024, the committee explained to the public that it needed to prioritize its engagements related to the referendum in April 2024. The committee informed members of the public that it had not terminated its consideration of this topic and continued to accept input from the public throughout 2024.

LOOKING AHEAD

The committee will continue its review of the disciplinary rules, its oversight of the process for proposing a disciplinary rule, and its work on rule proposals for possible future consideration by the bar membership.

CONTACT US

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

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