

DRAFTING PRACTICES FOR DISCIPLINARY RULES OF PROFESSIONAL CONDUCT
APPLICABLE TO LAWYERS PRACTICING IN TEXAS

1. Rules should prohibit or dictate certain behavior by a lawyer; the mandatory words were to be “shall” or “shall not” and “must” or “must not.” Only if a lawyer did or did not do something could the lawyer be disciplined.
2. The word “may” is used to indicate an exception to a prohibition, whether within the same rule or elsewhere in the rules.
3. Avoid long narratives in favor of lists.
4. Avoid the passive voice; the rule should call for or prohibit action.
5. The ABA’s model rule language should be carefully evaluated before adoption; no one can be disciplined for violating a model rule. Texas’ disciplinary counsel as well as individual attorneys should be able to enforce the Texas language in their situations.
6. Practice pointers are not appropriate in the TDRPC. State Bar sections are free to issue and update guidance for Texas attorneys, but no one should be subject to discipline for actions that vary from such tips. In some cases, examples are appropriate in comments to the rules (such as when certain Ethical Considerations in the old Code of Professional Responsibility were incorporated into comment language for our rules).
7. Language should be consistent across all rules and comments whenever possible; a compelling reason is needed to use inconsistent terminology and that should be very rare.
8. Liability should be clearly on individual lawyers; law firms and other entities are not licensed and therefore cannot have their licenses threatened by disciplinary action.
9. Preserve the distinction between “disqualification” and “discipline” such as in rules relating to confidentiality and conflicts of interest.
10. Comments should not restate the rule language, but should illustrate or explain unclear concepts.