



The Supreme Court of Texas

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June 3, 2019

Mr. Lewis Kinard, Chair
Committee on Disciplinary Rules and Referenda
American Heart Association
[REDACTED]

Re: Request to initiate rule-making & to draft comment language

Dear Lewis:

Pursuant to Section 81.0875(c) of the Government Code, the Supreme Court requests that the Committee on Disciplinary Rules and Referenda initiate the rule-proposal process on Rule 3.02, Texas Rules of Disciplinary Procedure.

When a respondent in a disciplinary proceeding elects to proceed in district court, Rule 3.02 requires the Court to appoint "an active district judge who does not reside in the Administrative Judicial District in which the Respondent resides" to preside over the case. Rule 3.03 sets the venue for a disciplinary trial in district court in "the county of Respondent's principal place of practice," "the county of Respondent's residence," "the county where the alleged Professional Misconduct occurred," or Travis County.

As a result, an assigned judge may be required to travel a substantial distance to preside over a disciplinary proceeding. This is burdensome and impedes the efficient resolution of cases. The Court asks the Committee to consider whether requiring the appointed judge to reside in a different county than the respondent or whether recusal or disqualification alone would satisfy the purpose of the rule.

In addition, the Court asks the Committee to study and make recommendations on a comment to Rule 3.06, Texas Disciplinary Rules of Professional Conduct, to address lawyer-access to juror social media activity.

In 2014, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 466, which addresses three categories of lawyer-review of a juror’s electronic social media (ESM) presence:

1. passive lawyer review of a juror’s website or ESM that is available without making an access request, so that the juror is unaware that a website or ESM has been reviewed;
2. active lawyer review where the lawyer requests access to the juror’s ESM; and
3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer.

The standing committee concluded that category 2 violates ABA Model Rule 3.5(b)’s prohibition of lawyer communications with a juror or potential juror—the equivalent to TDRPC 3.06(b)—but that categories 1 and 3 do not.

The Court solicited the recommendations of the Supreme Court Advisory Committee, which considered the matter on December 1–2, 2017 and September 28, 2018. The committee disagreed with the ABA position in part and drafted comment language for the Court’s consideration. Transcripts of and materials for those meetings are available on the Texas Judicial Branch website at <https://www.txcourts.gov/scac/meetings/2011-2020/>.

The Court asks your Committee for its independent recommendations. The Committee should consider the positions of the ABA standing committee, the Supreme Court Advisory Committee, and other states. The Committee should draft comment language reflecting its recommendations for the Court’s consideration.

As always, the Court is grateful for the Committee’s counsel and your leadership.

Sincerely,

A handwritten signature in black ink, appearing to read "Nathan L. Hecht", with a long horizontal flourish extending to the right.

Nathan L. Hecht
Chief Justice