Committee on Disciplinary Rules and Referenda
Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct
Rule 1.00. Terminology

Public Comments Received
Through October 6, 2020

From: [redacted]
To: cdrr
Subject: CDRR Comment: Comment in support of Proposed changes to Rules 1.00, 1.18
Date: Tuesday, September 1, 2020 9:50:45 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	Nathan
Last Name	Block
Email	[redacted]
Member	Yes
Barcard	24005355

Feedback

Subject	Comment in support of Proposed changes to Rules 1.00, 1.18

Comments

I am very much in favor of adoption of the proposed changes to rules 1.00 and 1.18. They appear to codify what has always been the expectation of ethical practice and are entirely appropriate.

From: Kent Canada
To: cdrr
Subject: Comment to Proposed Rules -- 1.00 and 1.18
Date: Tuesday, September 1, 2020 10:03:13 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

How could a "screen" possibly work in today's electronic world?

These proposed changes are a bad idea.

Kent Canada

--
Kent Canada
Attorney at Law
1900 Preston Road #267 - PMB 238
Plano, Texas 75093

[redacted]
800-425-5059 telecopy

Twitter: LegalReason

From: [redacted]
To: cdrr
Subject: CDRR Comment: Rule 1.00
Date: Wednesday, September 2, 2020 9:31:39 AM

**** State Bar of Texas* External Message *** - Use Caution Before Responding or Opening Links/Attachments

Contact

First Name	robert
Last Name	schuwerk
Email	[redacted]
Member	Yes
Barcard	17855300

Feedback

Subject	Rule 1.00

Comments

I assume that the underlying text being edited is the Preamble section of our current rules. My comments are: (i) should the definition of "prospective client" currently contained in proposed Rule 1.18 be moved up here?; (ii) should we take a shot at defining "client," "represent" and "personally represent"? Many years ago, the drafting committee that assembled the TDRPC punted on defining those terms but it might be worth taking another run at doing that.

To: Texas State Bar CDRR
From: Roy Leatherberry (TSB# 00789441)
Re: Proposed Amendments to Rule 1.00 and New Rule 1.18
Date: October 6, 2020

I am writing the Committee to encourage the Committee to decline to press forward with the proposals regarding these rules.

ABA Model Rule 1.18 was initially proposed as part of the Ethics 2000 Commission of the ABA with the intent of incorporating the Restatement of the Law Governing Lawyers. However, as is often the case, the "Restatement" was not a restatement of law at all but, rather, the expression of a desire as to what the law ought to be.

Beginning in 2005 various states began adopting the Rule in one form or another.

Texas did not.

Multiple referendums have occurred in Texas and the consistent opinion of the Texas legal community is that this rule is not only not necessary, it is not desirable.

In a 2010 article[1], Kenno L. Peterson summarized what had occurred through that date and provided a nice chart comparing the ABA rule to the rule as proposed at that time (which was numbered 1.17). There were numerous differences that had been incorporated, which recognize the problems associated with the ABA Model Rule. Mr. Peterson stated:

> Both proposed Rule 1.17 and ABA Rule 1.18 recognize that, while it is important to protect a prospective client's interests, the protections afforded to a prospective client generally should not be as extensive as the protections afforded to an actual client to whom a lawyer owes the full range of fiduciary duties. But these rules, as well as other related rules, approach this balancing act in fairly divergent ways.

One of the additions to the proposed rule was the inclusion of a "good faith" requirement on the part of the prospective client.

> As explained in comment 3 to the proposed rule, "[t]he requirement in paragraph (a) that a lawyer's services be sought 'in good faith' is intended to preclude the tactical disclosure of confidential information to a lawyer so as to prevent the individual lawyer or the lawyer's firm from representing an adverse party."

Another point of deviation between the Model rule and the proposed rule was noted:

> In addition, proposed Rule 1.17(c), like other proposed rules, does not follow the ABA in referring to a "disqualified" lawyer. The concepts of discipline and disqualification, while related, are not the same. In that regard, paragraph 13 of the

[1] 23 App. Advoc. 268.

> preamble to the proposed rules provides that "these Rules are not designed to be standards for procedural decisions, such as disqualification." And paragraph 20 of the preamble to the ABA rules provides similarly that "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation." To avoid any unintended blurring of the standards of disqualification and discipline, the proposed rules simply do not refer to disqualified lawyers or disqualification.

The rules proposed in 2020, tracking more closely the Model rule, do not seem to have considered the work that had been undertaken prior to the 2010 proposals.

Nevertheless, during the 2011 Referendum, as recognized in the March 2011 edition of the Texas Bar Journal, the proposed amendments "went down in flames."[2] More than 77% of the votes were *against* this rule.[3]

It is not clear why, under the circumstances, why anyone thinks that this rule should rise from those flames, especially in a format that was not even acceptable to the committee members and the Supreme Court in 2010, prior to the referendum.

This ABA Model Rule is and has always been an attempt to impose, on the legal community, *policy* concerns by an obvious *minority* in a manner that rejects the entirety of the common law in Texas.

In *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*,[4] the Texas Supreme Court observed: "It is by now axiomatic that legislative enactments generally establish public policy."[5]

The Legislature has *not* however, expressed any public policy suggesting an extension of a lawyer's duty to a non-client beyond that as already exists and which is well-reflected in the Formal Ethics opinions.

It is, and always has been the policy in Texas that the duty of an attorney is to the *client* and not some third party.[6] Texas Rule of Evidence 503(a)(1), of course, defines "client" as "a person … who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer."[7]

This is reflected in Opinion 651 by the Professional Ethics Committee for the State Bar of Texas in 2015.[8] The hypothetical presented involves a lawyer who invites the prospective client to send information and, despite warnings that the information would not be treated as confidential, the

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[2] 74 Tex. B.J. 192 (2010).
[3] 74 Tex. B.J. 195 (2010).
[4] *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494 (Tex. 2015).
[5] *Id.* at 504.
[6] *See e.g., Barcelo v. Elliot*, 923 S.W.2d 575, 577 (Tex. 1996).
[7] There seems to be a split of authority as to whether there is a presumption, including a conclusive presumption, as to whether confidential information was imparted. Compare *In re Gerry*, 173 S.W.3d 901 (Tex. App.—Tyler 2005, no pet.) and *In re Z.N.H.*, 280 S.W.3d 481 (Tex. App.—Eastland 2009, no pet.).
[8] 79 Tex. B.J. 44 (2016)

prospective client transmits such confidential information. Receipt of the information results in a determination that taking on of that prospective client would conflict with representation of a current client.

The Ethics opinion is that the individual submitting the information is *not* a client, although there may be a duty of confidentiality imposed that "may" create a conflict of interest with a current client.

The Ethics opinion then explicitly recognizes that *existing* Rules are sufficient to address the situation.

Under those rules, because the lawyer had previously provided notification to the prospective client that any communication would *not* be treated as confidential. Thus the committee concluded:

> [T]he law firm and its lawyers will not have an obligation to protect or refrain from using information received.

The rules currently proposed, however, would likely result in a very different conclusion which, thus, is not a conclusion that reflects *current* law but is, instead, reflective of a *policy* choice that has been rejected time and time again by the Texas legal community.

In drafting these comments I have done extensive multi-state research (both cases[9] and Ethics opinions[10]) into the situations involving this rule and it is clear that in those states where the Model Rule has been adopted, the rule is being used as a sword to prevent a party from having the representation that the party desires.

Thus, my major concern is that the rule will be interpreted in such a way as to deprive the *existing* client of the right to choose the attorney it desires. Attorneys are not fungible and the right to counsel of one's choice rests with the individual. It is, indeed, the constitutional right of an individual to have the attorney of its choice unless there are very strong reasons to not permit such.

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[9] *Sturdivant v. Sturdivant*, 241 S.W.3d 740 (Ark. 2006); *ADP, Inc. v. PMJ Enterprises, LLC*., 2007 WL 836658 ((D.N.J. Mar. 14, 2007); *Phase II Chin, LLC v. Forum Shops, LLC*, 2009 WL 10709796, D.Nev. (Feb. 19, 2009); *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, Cal.App. 2 Dist., Apr. 07, 2010, as modified (May 06, 2010), review denied (Jun 23, 2010); *O Builders & Assoc. v. Yuna Corp.*, 19A3d 966 (N.J. 2011); *State ex rel. Thompson v. Dueker*, 346 S.W.3d 390 (Mo.App. E.D. 2011); *In re Marriage of Perry*, 293 P.3d 170 (Mont. 2013); *In re Carpenter*, 863 N.W.2d 223 (N.D. 2015); *Keuffer v. O.F. Mossberg & Sons, Inc.*, 373 P.3d 14 (Mont. 2016); *Xiao Hong Liu v. VMC East Coast LLC*, No. 16 CV 5184 (AMD)(RML), 2017 WL 4564744 (E.D.N.Y. Oct. 11, 2017); *Mt. Hebron District Missionary Baptist Association of AL, Inc. v. Sentinel Insurance Company, Limited*, 2017 WL 3928269, M.D.Ala. (Sep. 07, 2017); *Kidd v. Kidd*, 219 So.3d 1021 (Fla.App. 5 Dist 2017); *Lopez v. Flores*, 223 So.3d 1033 (Fla.App. 3 Dist 2017); *Skybell Tech., Inc. v. Ring Inc.*, No. SACV 18-00014 JVS (JDEx), 2018 WL 6016156 (C.D. Cal. Sept. 18, 2018); *Dahleh v. Mustafa*, 2018 WL 1167675, (N.D.Ill. Mar. 05, 2018); *In re Onejet, Inc*., 614 B.R. 522 (Bkrtcy.W.D.Pa. 2020); *Zalewski v. Shelroc Homes, LLC*, 856 F.Supp.2d 426 (N.D.N.Y 2020); *Ocean Thermal Energy Corp. v. Coe*, 2020 WL 5237276, C.D.Cal. (July 29, 2020).

[10] Formal Opinion 2006-2 (The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics); Iowa State Barr Association Opinion 07-02 (2007); Wisconsin Formal Ethics Opinion EF-10-03 (2010); Formal Opinion 2013-1 (The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics); ABA Formal Opinion 492 (June 9, 2020)

As explained by the U.S. Supreme Court in *Whole Woman's Health v. Hellerstedt*,[11] even if there were a legitimate state interest in a particular policy, a rule that has "the effect of placing a substantial obstacle in the path" of the consumer of the constitutionally protected service "cannot be considered a permissible means of serving its legitimate ends."

But, given that two decades has passed since the Model Rule was proposed, and given the overwhelming rejection of the rule by the legal community in Texas in 2011, it is clear that no legitimate state interest in passing this rule exists. If it did, then we would already have it.

In short, in light of the rule having already been rejected by the legal community in Texas, and in the absence of a clearly public policy rationale articulated by the legislature, there is simply no sound basis for proposing this rule at all.

Thank you for your attention to these comments.

[11] *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2309 (2016)

Committee on Disciplinary Rules and Referenda

Transcript of Public Hearings on
Proposed Rules 1.00 (Terminology) and 1.18 (Duties to Prospective Client)
Texas Disciplinary Rules of Professional Conduct

September 17, 2020 – By Zoom Teleconference

Video of the full Committee meeting, including the public hearings, is available at texasbar.com/CDRR.

Brad Johnson:
And we are set.

Lewis Kinard:
All right, are we waiting on anyone else?

Lewis Kinard:
Looking to see who's there.

Lewis Kinard:
Looks like we have-

Brad Johnson:
I believe everyone's on.

Lewis Kinard:
All right. Cory, would you please call the roll?

Cory Squires:
Sure. Mr. Belton.

Tim Belton:
Here.

Cory Squires:
Ms. Bresnen.

Amy Bresnen:
Here.

Cory Squires:
Mr. Ducloux.

Claude Ducloux:
Here.

Cory Squires:
Judge Garcia.

Dennise Garcia:
Here.

Cory Squires:
Mr. Hagen.

Rick Hagen:
Here.

Cory Squires:
Professor Johnson.

Vincent Johnson:
Here.

Cory Squires:
Mr. Jordan.

Carl Jordan:
Here.

Cory Squires:
Mr. Kinard.

Lewis Kinard:
Here.

Cory Squires:
Ms. Nicholson.

Karen Nicholson:
Here.

Cory Squires:
We have a quorum.

Lewis Kinard:

All right, thank you. Uh, we have three public hearings today as listed on the agenda, but first I wanna say once again how much we appreciate the input and comments from the Bar and the public. We read each and every one of the submissions and we take them into consideration. In addition to what we hear during these public hearings, a- and as the Legislature intended that we should. As we, and we deliberate on those as we draft the rule language, uh, to recommend to the Bar's Board of Directors and explanatory comments that we propose to the Supreme Court. So thank you, thank you, and keep those comments coming. You can find the page on how to participate by going to texasbar.com/cdrr.

Lewis Kinard:

So we'll now move to i- item a-, uh, agenda item three, we have these public hearings. We're gonna just take them one at a time. For each hearing, we'll first call on those who have signed up in advance to speak then we'll call anyone else who has joined the meeting who wants to speak on a public hearing item. You can raise your hand in Zoom. We have, uh, Brad and Cory watching for those hands going up. If you're just on the telephone you can press star 9 to raise your hand and we'll unmu- mute you when it's your turn. We ask that you limit your comments to three minutes, we may extend that time as necessary if we have follow up questions so please stay on until we thank you and prepare for the next person.

Lewis Kinard:

So I now call to order the public hearing on proposed Rule 1.0 of the Texas Disciplinary Rules of Professional Conduct which would incorporate terminology into a rule numbered 1.00 and add additional defined terms. This was recently published in the Texas Bar Journal and Texas Register, and as a reminder the Committee will accept public comments through October 6th. Do we have anyone who's signed up in advance to speak on this?

Brad Johnson:

No, Chair, we don't have anyone in advance that signed up.

Lewis Kinard:

All right, is there anyone who's joined the meeting who would like to speak on this item?

Brad Johnson:

I'm not, I'm not seeing any hands right now, Chair.

Lewis Kinard:

We have received a few public comments on this, um, while we're waiting to see if people are still looking for where star 9 is or, or how to raise their hand. Uh, and they're beginning at page 10 of the materials and the packet that was posted, the Committee next meets October 7th at which time we'll have the option to vote on any possible amendments to the proposal or to recommend it to the Board of Directors. Our deadline to take action is December 5th, so we have until our December 2nd meeting to vote.

Lewis Kinard:

Uh, while we're, while we're waiting, Professor Johnson you led the subcommittee, is there anything you'd like to add regarding this proposal or any response to any public comments?

Vincent Johnson:

Not at this time.

Lewis Kinard:

All right, anybody else on the Committee? Okay, this will conclude our public hearing on proposed Rule 1.00. Item, uh, the next public hearing is on, uh, 1.18 proposed rule to Texas Rules of Professional, Disciplinary Rules of Professional Conduct. I'll call that public hearing to order now. Uh, this proposed rule addresses duties to prospective clients. This was recently published in the Texas Bar Journal and the Texas Register. We also have until October 6th, uh, to accept public comments that haven't come in yet. Has anyone signed up to speak in advance on this item?

Brad Johnson:

No, Lewis, no one has on this item.

Lewis Kinard:

All right, do you, is anyone who's joined the meeting would like to speak on this item? Just raise your hand through Zoom or do star 9 through the phone. We wanna give everybody a chance to, uh, speak and participate. We have received a bunch of comments on this, uh, several of them appear starting at page 19 of your materials. A couple, uh, came through even after the packet was posted. Before we turn to those, I wanna see if there was anybody who wanted to speak orally today.

Brad Johnson:

No, Chair, I'm still, there's no hands raised currently.

Lewis Kinard:

All right, um-

Brad Johnson:

[crosstalk] listening, um, you know, go ahead and raise your hand please or press star 9.

Lewis Kinard:

And then like the other proposed rule, the Committee meets next October 7th. We'll have the option to vote on any amendments to the proposal then or go ahead and recommend it. Our deadline is, uh, December 5th. We won't take any further action until after public comment period closes October 6th. Um, but I know Professor Johnson, you've been looking at some of the comments and thinking about some ways to address some of those concerns.

Lewis Kinard:

I also note, uh, and I think it was your, your, your comment actually, that some of the concerns are addressed or will be addressed in the draft comments that our Committee will suggest to the Supreme

Court along with the eventual rule proposal. Uh, Professor Johnson anything you'd like to speak to, um, at this meeting?

Vincent Johnson:

Yes, uh, I, I went through everything, uh, yesterday again, reread all of the comments and, um, considered ways in which we could respond to, to some concerns. Uh, uh, in part it seems, uh, essential that we move certain material out of the, um, comments and up into the rule because we're, we're just getting clobbered on, on, um, issues that should not exist because we- we've taken a position in the comments. But, uh, it would be much better, uh, moving forward with a proposal that would go to Texas, uh, lawyers to vote on to get these, uh, points clarified as, as early in the, in the black letter rule as, as possible.

Vincent Johnson:

So, uh, there wa- uh, so la- late last evening I gave, uh, Brad a, uh, document that I think he has shared with you. Which, uh, is, um, shows how, um, I would make certain redline changes to the, um, the rule. So they, uh, Rule 1.18 section (a) starts off with the, the usual definition that is found in the model rules and in the codes of other states. And it says that, "A person who consults with a lawyer about the possibility of forming a lawyer-client relationship with respect to a matter is a prospective client."

Vincent Johnson:

I would do two things to improve this rule. One, and I think we've talked about this in a prior meeting, uh, I would put the words "in good faith", uh, "consults in good faith", uh, right in that first sentence. And then I would add a second sentence that addresses the issue that has, uh, disturbed so many of the, uh, attorneys who, who submitted public comments. The second sentence would s-, would say that, "A person who communicates with a lawyer for the purpose of disqualifying the lawyer or for some other purpose that does not include a good faith intention to seek representation by the lawyer, is not a 'prospective client' within the meaning of this Rule."

Vincent Johnson:

We had very similar language that was part of comment two, but, uh, it would be very helpful to get that language right up at the top so that, uh, lawyers are placed at ease about, um, the, uh, the taint shopping issue and, uh, and it will be clear that this la- lawyer doesn't protect anyone who, uh, acts in bad faith and who is trying to, um, uh, choreograph a, um, uh, uh, a disqualification w- with never having a, uh, a good faith intention to hire the lawyer. So I think those changes would be very wise, I think they would put us in a stronger position as the proposal moves forward, uh, with the, uh, State Bar Board of Directors and then ultimately with the, the Texas, uh, lawyers who will vote in the referendum.

Vincent Johnson:

And the, uh, the second paragraph, um, I, I have thought about the, uh, the question of what information is protected. Um, so if there has been a pro-, a prospective client relationship, um, what information is the lawyer required to hold confidential going forward? The, um, and, um, uh, one of the comments, you know, wa- was very helpful, it did force me to think about the way this was worded and, and it ultimately became clear to me that there was an inconsistency between section (b) which deals with revelation of information learned from a prospective client, and section (c) which deals with not representing later on somebody in the same or substantially related matter, um, whose interests are adverse to the former prospective client.

Vincent Johnson:

In, as originally worded in section (b), the standard was that the lawyer could not, uh, reveal information, um, uh, could reveal information that was generally known or would not be disadvantageous to the client. And in subsection (c) it didn't speak in terms of this, this weak requirement of disadvantageous, it said that there was only a disqualification from representing the new client in the same or substantially related matter if the lawyer, um, uh, if the information received by the lawyer could be significantly harmful. The, and so, so there was this difference between disadvantageous and significantly harmful. Significantly harmful seems to provide a lot more breathing room for what a, um, uh, a lawyer, uh, can say, uh, or take into account, uh, in representing a client.

Vincent Johnson:

So I would suggest in subsection (b) that, that that be reworded, uh, re- reworded, uh, to say that a lawyer shall not use information to learn from a prospective client quote, "except as these Rules would permit or require with respect to a client, or if the information has become generally known or would not be significantly harmful to the former prospective client." Uh, and so I, I think that pro- provides a lot more breathing room, um, uh, in that role and, and so, um, um, I thi-, I think that would make it more likely that we would be able to pass this in the end. And, and it makes sense to me that if significantly harmful is the standard that's connected to the subsequent representation rule that, that that same standard should work with regard to the, the revelation rule and in part, um, (b). And then, um, and then in comment two to the rule I, I thought, uh, the more I read it the more I could see why, why lawyers might be troubled with the way it was worded. The, uh, and so, in addition to taking out the language that would now move up to subsection (a) of the black letter rule, uh, I would reword, um, uh, section 2 so that it would, um, read like this.

Vincent Johnson:

So and, and just starting with the whole rule. "A, a person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." So that stays the same. Then the changes begin. "A communication by a person to a lawyer does not constitute a consultation unless the lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation that is not generally known."

Vincent Johnson:

And so thi- this is, this would be saying that you only trigger a prospective client relationship when you invite the revelation of personal information, information that is not generally known. And so this would, um, address the concern that was expressed in the comments, uh, about, um, uh, persons who, um, uh, tried to conflict out all the lawyers in town by sending them, um, uh, information about a case. If the lawyer, under this change, if the lawyer did not invite or request the submission of the information it wouldn't count as a consultation, it wouldn't be a prospective client relationship, it wouldn't lead to disqualification.

Vincent Johnson:

And I, I, I think that reading is consistent with the model rule standard, I think it's just clearer. Uh, and, um, and so that would be the, the final change. So, so that, these, uh, this is what I'd be proposing to, to tighten it up and make it, uh, ready to, to go onto the next stage.

Lewis Kinard:

All right good a- and I know that today we, we aren't scheduled to debate or deliberate on this but we definitely want, you know, to, to take these into consideration and it'll be on our agenda for next month when we will deliberate. Um, and before I move on I saw Claude had a question but, uh, Brad, anybody raise their hand? Anybody else indicate they need to speak?

Brad Johnson:

Uh, not currently, Chair. Again if anyone who... We just had a few people join the meeting, if anyone would like to speak on this agenda item regarding duties to prospective clients you can raise your hand on Zoom or if you're on the phone press star 9.

Lewis Kinard:

So, so if anybody on the Committee want to at least log some points that you want to, uh, deliberate upon, uh, next month and yes, Claude.

Claude Ducloux:

Oh, I was just going to say, um, uh Br- I was going to ask Brad because this is something that, that the Committee has thought about. And for those of you, this is our one chance if you're here for a public hearing to know, um, that we, how seriously we take this in trying to improve these rules. Um, I, you know, I've been what they call a bar rookie for 43 years and this has been the hardest working committee I've ever been on. We, you know, are constantly consulting and trying to improve, listening to your comments, and really want this to be a, a modern improvement to the rules and, and I wanna thank Professor Johnson who has really taken the lead on a lot of these things, bringing us what's going on.

Claude Ducloux:

Uh, but we co- are constantly thinking about this, and especially those of us who have practiced law for 40 years know how hard it is to teach this area. And we see from the quality of the, of the it feedback we're getting from the public, they are concerned about what is now becoming the word taint shopping, or that we want to somehow taint the lawyer if we don't him or, want him or her to be on the other side of that case by trying to divulge information that will conflict her and her firm out, and we're trying to address that by adding these, these gates, these steeple chases like, "No, no, no, no, you're not really here for any purpose."

Claude Ducloux:

And then, uh, the other part is the educating the lawyers don't accept information. Have a click tab on your, uh, website and things like that so people can't try to do this intentionally. But, um, I, Brad, I wanted to ask you, if we wanted to accept those improvements, which I think, uh, we've been talking about a long time and I know that, uh, (laughs) at least Professor Johnson's probably been sleepless on this because we talked about it so much. Do we need a motion or are we just, you know, uh, what, what should have we do but we don't need that today. All right thank you very much.

Brad Johnson:

[inaudible] I think next meeting would-

Lewis Kinard:

Next meeting would-

Claude Ducloux:

And I wanted to thank Professor Johnson for putting that time into this.

Lewis Kinard:

Yeah, yeah, no it will be on our agenda next month. Um, I do want to note, uh, Professor Johnson, that when we do talk I'll, I will ask about this concept of significantly harmful and how it fits into, uh, the scheme of definitions, uh, there and, and other definitions on that continuum, I guess, of harm. So not today but just, if you don't mind noting, where, where does that fit? How will it, uh, affect anything else or play into, um, other standards?

Vincent Johnson:

All right, good.

Lewis Kinard:

All right, if there's anybody else on the Committee with any questions, notes, comments... Yes, Karen.

Karen Nicholson:

Well, I just wanted to also say thank you very much, uh, from a lay standpoint, uh, I think you have taken the comments very well but, and this is the lay standpoint, it's just clearer. You've just worded it really well so that you can, when one reads it, it just makes a lot more sense so thank you for all the work that you've done on that Professor Johnson.

Brad Johnson:

And Lewis, we do have, um, one hand raised on the hearing now if you'd like me to...

Lewis Kinard:

Yes, let's recognize that person please.

Brad Johnson:

All right, I'm gonna, um, Mr. Panzer, I'm gonna go ahead and change you over to a participant so give me just one second here.

Brad Johnson:

And it may take just one second for him to...

Lewis Kinard:

That's fine.

Jason Panzer:

Okay, can you all hear me?

Lewis Kinard:

We can. Thank you, and thanks for joining and we have a, a three minute, uh, initial time slot so if you don't mind just talk to us about your, your comments and thoughts on this proposed rule.

Jason Panzer:

Very briefly, first I want to commend you all for your, uh, hard work. It is evident, uh, in, in the product that you are putting out, um, and I think as I've previously commented to the Committee and writing with regard to other rules, I welcome, um, the Committee's adoption of, uh, rules that have otherwise been adopted, um, in the ABA Model Rules. My only question, and I have not heard all of the meeting and I apologize, uh, I was not able to, uh, prepare adequately and, and hope to maybe follow up with something more thorough in writing, is with regard to the proposed amendments to the terminology in order to, um, clarify the proposed Rule 1.18, specifically informed consent.

Jason Panzer:

And my question is, I think, uh ... uh, cutting in there. Um, my question is with regard to the proposed definition of informed consent, to the effect that could have on other, uh, rules, specifically 1.06(c)(2), and whether or not the definition of informed consent, uh, conflicts with or will cause confusion as to what proper consent is under 1.06(c)(2) and what is consent under Rule 1.09(a)? Frequently when you talk to the ethics counsel at the Bar as to what does prior consent mean, under 1.09(a) they will refer you to 1.06(c)(2). So my question is if the... our concern is if the Committee is going to adopt or propose the definition of informed consent, uh, is to at least ... consistent throughout the, or to, uh, include some clarification as to, uh, what informed consent, uh, means. If it just, the definition of informed consent, if it just applies to rule, proposed Rule 1.8 and not other rules or if it's broader.

Jason Panzer:

So with that I'll stop and thank you all again for your hard work.

Lewis Kinard:

Sure, Mr. Panzer. Hang on one second, uh, anybody have further questions or responses to Mr. Panzer's questions?

Vincent Johnson:

Without informed consent-

Brad Johnson:

I think I [crosstalk]-

Lewis Kinard:

Uh, yes, Professor Johnson.

Vincent Johnson:

Yes, uh, so, uh, as f-, uh, as far as I recall the definition of informed consent that we, we have proposed is the exact, uh, ABA definition. I, I don't think there was any tweaking of it or, or changes. We can double check that but, um-

Jason Panzer:

You're, you're-

Vincent Johnson:

... I, I, I think that's correct.

Jason Panzer:

You're, you're, you're correct Professor Johnson but, but the language of informed consent, as you know, the, the language in 1.06(c)(2) is much broader than what's required for consent under the Model Rules and so I'm wanting to make sure there's no confusion if this rule is adopted.

Vincent Johnson:

Well, I, I think that if this were put in the definitional section of the, um, uh, of the, uh, Texas Disciplinary Rules then it would apply to whenever we use that term in the Texas Disciplinary Rules. It would, uh, inform, uh, 1.06 and 1.09 as, as well as, uh, any other, uh, provision using that language.

Vincent Johnson:

I don't, I don't see any tension between these. I, I, I think that, uh, uh, to the extent that 1.06 is more specific, it just builds on the, um, uh, the foundation laid by the basic definition of, of informed consent. So I, I don't see it as, uh, as creating confusion. Uh, I assumed that, uh, that the, uh, that the great body of, uh, precedent that has interpreted, uh, 1.06 and what, uh, informed consent means, uh, there would, would remain in place and would not be undercut in any way.

Jason Panzer:

I, I, I have not specifically researched this recently, but I seem to recall that when there was passage of 1.06(c)(2) there was a heated discussion as to not adopt the ABA's definition of informed consent. I'm not trying to weigh in on that, my thought is if it is the Committee's intention to adopt the ABA's definition of informed consent and have it apply across the rules, that that needs to be clarified. And I think the Bar would need to be informed about that 'cause that is a substantial change to the rules. I'm not, uh, advocating against that change. I'm just asking for clarification to avoid confusion, uh, in the future. And again I think that it... Uh, it may be even take out the word informed consent and just say consent but, uh, again that's a much broader, uh, amendment than an amendment addressing specifically proposed Rule 1.18 as I understand what Professor Johnson is, is, is stating.

Lewis Kinard:

Okay, good. Uh, we'll look at that, and, um, again this rule will be on our agenda next month so we'll have a little more deliberation over, uh, this, this point and others raised in comments. Uh, we thank you so much for your, uh, joining the call and giving comments. Yes, Brad?

Brad Johnson:

I was just gonna add to the, the question Mr. Panzer was asking. I think the part of the basis for the question may be when you look at Rule 1.06(c)(2) it, it doesn't include the word informed, it says consent and then describes, um, kinda what that means. So I think that may be part of the reason for the, the question.

Lewis Kinard:

Well, that doesn't mean that it's not a valid, you know, point of con- potential confusion. So it could be something that we need to address somewhere to at least make it clear that there's an issue or the court may need to clarify a comment under 1.06. So, um, but I think it's gla- it's good that someone raised this so we know that there is that potential point of confusion, and it's, it's like we were talking about the previous, uh, rule, um, the clearer we make it the easier we make it for lawyers to get it right. So, um, that, that's one of our goals.

Jason Panzer:

And I, I would add to that, um, Mr. Johnson, likewise Rule 1.09(a), which refers to without prior consent. Again it doesn't say informed consent, but if the term informed consent is to apply to 1.09(a) I think that needs to be, uh, clarified somewhere and informed to the Bar that if they're voting on that in a referendum the effect it's going to have throughout the rules. And just to make sure it's consistent.

Lewis Kinard:

All right, thank you very much.

Jason Panzer:

Thank you all again for your hard work.

Lewis Kinard:

All right, you're welcome. Uh, anyone else, Brad, that's, uh, ready to talk on, uh, this 1.18?

Brad Johnson:

Uh, no other hands are raised, Chair, and, and Mr. Panzer, just so you know I'm gonna move you back as an attendee, it may take just a second for you to swap over there but you shouldn't have to do anything on your end.

Jason Panzer:

Thank you.

Lewis Kinard:

All right, anybody else on the Committee have anything else to add in regards to proposed Rule 1.18?

Lewis Kinard:

All right, this will conclude our public hearing on 1.18 and we'll now move on to, uh, the public hearing on proposed Rule 13.05 of the Texas Rules of Disciplinary Procedure.