

Understanding the Approved Changes to the Texas Disciplinary Rules *Rules Vote Referendum 2021: **Passed!***

**A look at the Process, and
the Texas Supreme Court Order
Approving Them.**

So, How Will Law Practice Change in Texas?

Presenter:

Claude E. Ducloux, Austin

**Member, Committee on Disciplinary Rules and
Referenda**



Process: How The “CDRR” was Created



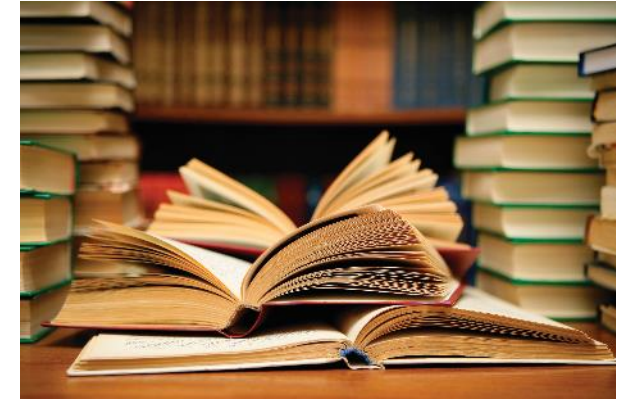
- **HISTORICAL FAIL:** The 2011 referendum required an “up or down” vote on several complex packages of amendments.
- The entire referendum failed.
- As part of the Sunset review process for the SBOT, the Legislature in 2017 passed Senate Bill 302, which created the CDRR.
- The CDRR is tasked with considering all ethics-reform proposals, and moving good proposals forward through an open process that welcomes comments from lawyers and members of the public.
 - CDRR proposals are submitted to the SBOT Board for possible approval.
 - Ultimately, each proposal approved by the SBOT Board is submitted to the lawyers of Texas through a referendum.

Objectivity and Perspectives



- Makeup of the Committee: lawyers and non-lawyers.
- Multiple perspectives and opinions on proposed changes.
- Each proposed rule is reviewed from the perspective of a busy practicing attorney:
 - Do I understand the rule?
 - Does this change make sense for the profession and the public?
 - Will the proposed rule unnecessarily complicate law practice?
 - And ... finally ... can we teach others what the rule means and how it applies?

Purpose of the Changes



- Modernize the ethics rules for the Digital Age.
- Review ethics-reform proposals from all sources:
 - Lawyers, the public, sections of the bar, the courts, and the SBOT.
- Improve, clarify, and simplify the ethics rules applicable to all Texas lawyers.
- Protect the interests of the public.
- Replace or eliminate provisions that are not working.
- Address the needs and issues faced by aging lawyers and clients.

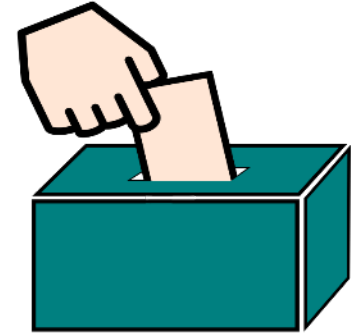
Robust Input From Texas Lawyers



During this process the CDRR benefited from:

- Extremely thoughtful input from the lawyers of Texas.
- Hundreds of comments received from the public.
- Detailed advice and insight offered by law professors and private practitioners.
- Numerous proposed edits from many sources, many of which were implemented to improve the drafts.

The Eight Ballot Items Lawyers Voted On



A: Scope and Objectives of Representation

- Clients with Diminished Capacity.

B: Confidentiality of Information

- Exception to Permit Disclosure to Secure Legal Ethics Advice.

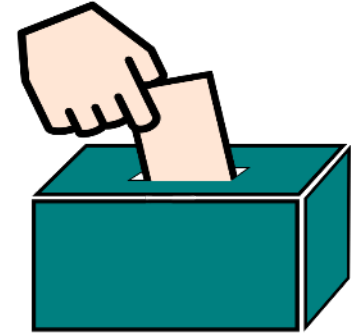
C: Confidentiality of Information

- Exception to Permit Disclosure to Prevent Client Death by Suicide.

D: Conflict of Interest

- Exceptions for Nonprofit and Limited Pro Bono Legal Services.

Eight Ballot Items Lawyers Voted On



E: Information About Legal Services ← *complete rewrite part 7*

- Lawyer Advertising and Client Solicitation.

These last 3 items are Rules of Disciplinary Procedure

F: Reporting Professional Misconduct

- Reciprocal Discipline Based on Discipline by a Federal Court or Agency.

G: Assignment of Judges in Disciplinary Complaints and
Related Matters

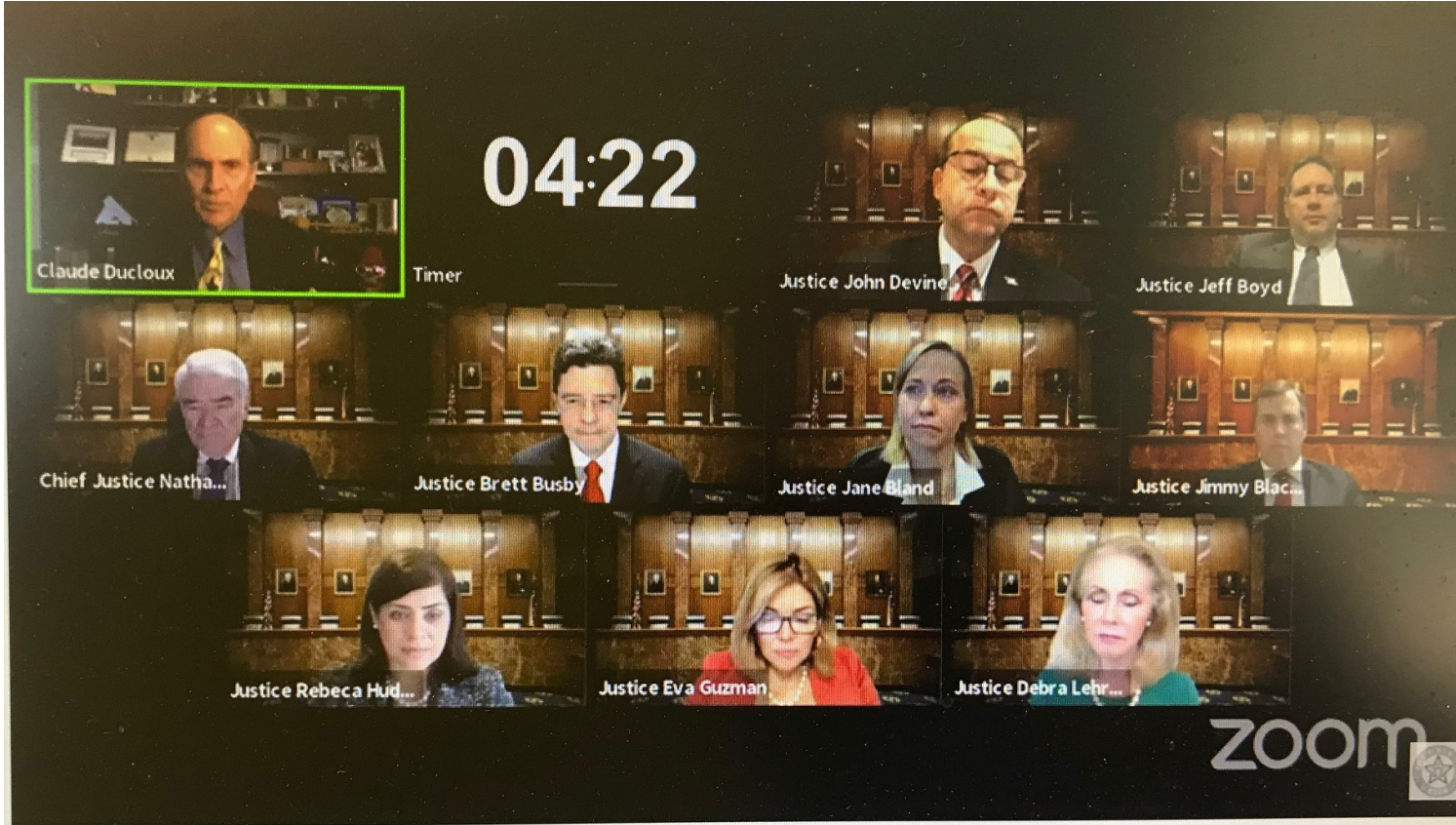
H: Voluntary Appointment of Custodian Attorney for
Cessation of Practice

Eight Ballot Items Lawyers Vote Result – 3/04/2021

All Proposals Passed
with Overwhelming
Majority Votes from Texas
Lawyers
(although turnout @20%)



SUPREME COURT CONSIDERATION –



A screenshot of a Zoom video conference titled "Deliberation on Proposed Disciplinary Rule Amendments". The screen shows a grid of participants, including several justices and a clerk. A timer in the top center indicates 04:22. The participants are:

- Claude Ducloux (top left, highlighted with a green border)
- Justice John Devine
- Justice Jeff Boyd
- Chief Justice Nathan
- Justice Brett Busby
- Justice Jane Bland
- Justice Jimmy Black
- Justice Rebeca Hud...
- Justice Eva Guzman
- Justice Debra Lehr...

The Zoom interface at the bottom shows 132 views, a "Streamed live 7 hours ago" status, and interaction buttons for LIKE, DISLIKE, SHARE, and SAVE. The Supreme Court of Texas logo and name are in the bottom left, and a red "SUBSCRIBE" button is in the bottom right.

Deliberation on Proposed Disciplinary Rule Amendments

132 views • Streamed live 7 hours ago

LIKE DISLIKE SHARE SAVE

Supreme Court of Texas
2.3K subscribers

SUBSCRIBE



May 4, 2021

SUPREME COURT CONSIDERATION

May 4, 2021: The Texas Supreme Court Held Public Deliberations to Consider the Adoption of the new rules

- During the deliberations, the Justices considered the rules and the proposed comments.
- The Justices were attentive, asked good questions, and requested that the CDRR submit additional clarifications in proposed comments.
- Additional Comments were drafted by CDRR immediately and sent to Court May 10

Remember: The Lawyers approved the Rules, but the Court promulgates the Comments to explain the rules.

SUPREME COURT REQUESTED COMMENTS

New Comments adopted by the Supreme Court included:

New Disciplinary Rule 1.16: DIMINISHED CAPACITY EXCEPTION TO CONFIDENTIALITY: Clarification that diminished capacity rule aimed at existing client relationships:

- Comment 5: “Paragraph (b) *[of the rule]* contains a non-exhaustive list of action a lawyer may take to protect an **existing client** who does not have a guardian or other legal representative...”
- Comment 6: *[Summary]* Duties of court-appointed attorneys for clients with disabilities unaffected;
- Comment 6: “Nothing in this rule modifies or reduces a lawyer’s obligations under other law.”

SUPREME COURT REQUESTS:

Comments sent to, and adopted by Supreme Court included:

New Rule Disc Conduct 1.05 (c)(9) Authorizing disclosure of confidences to receive ethics advice:

Revised Comment 23: [last sentence:] “A lawyer who receives confidential information for the purpose of rendering legal advice to another lawyer or law firm under this Rule is subject to the same rules of conduct regarding disclosure or use of confidential information received in a confidential relationship.”

New Rule of Disciplinary Procedure 13.04 Authorizing Appointment of Custodian:

Comment: “Performing the duties of a custodian under this Rule of Disciplinary Procedure does not create a client-lawyer relationship. If a lawyer serving as custodian assumes representation of a client, the lawyer’s role as custodian terminates, and the lawyer’s actions are subject to the Rules of Professional Conduct regarding the client-lawyer relationship.”

Advertising Special Competence :

New Disciplinary Rule 7.02 (b) *(Advertising special competence)*

Revisions to Comment 3: Paragraph (b) of this Rule permits a lawyer to communicate that the lawyer practices, focuses, or concentrates in particular areas of law. Such communications are subject to the “false and misleading” standard applied by Rule 7.01 to communications concerning a lawyer’s services and must be objectively based on the lawyer’s experience, specialized training, or education in the area of practice.

SUPREME COURT CONSIDERATION

May 25, 2021

Miscellaneous Docket No. 21-9061

*Supreme Court Order approves
all the Rules Changes, and
issues the interpretive
comments*

EFFECTIVE DATE: July 1, 2021

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9061

FINAL APPROVAL AND ADOPTION OF AMENDMENTS TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT AND THE TEXAS RULES OF DISCIPLINARY PROCEDURE

ORDERED that:

1. On September 29, 2020, in Misc. Dkt. No. 20-9114, the Court submitted proposed amendments to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure ("Proposed Rules") to the State Bar of Texas members for a referendum. The referendum occurred between February 2, 2021, and March 4, 2021.
2. On March 5, 2021, the State Bar of Texas Executive Director certified that the Proposed Rules were approved by a majority of the votes cast, and, on March 11, 2021, submitted a Petition for Order of Promulgation ("Petition") requesting the Court's adoption of the Proposed Rules effective July 1, 2021.
3. On March 15, 2021, in Misc. Dkt. No. 20-92114, the Court provided notice of public deliberations on the Proposed Rules and invited public comment until April 15, 2021. No comments were received.

Ballot Item A: Passed 89.74%

Clients with Diminished Capacity



What has Changed in the Disciplinary Rule?

- We have deleted Current Rule 1.02(g) and added Disc. Rule 1.16.

Goal: To provide improved guidance to lawyers representing clients with diminished capacity.

Key Provision: The new rule makes clear that a “lawyer may take reasonably necessary protective action . . . [that] may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client,” such medical providers or even family members.

Permissive— not mandatory!

Ballot Item B: Confidentiality – Securing Legal Ethics Advice

93.34% Approved



What Has Changed?

- This Ballot Item adds a NEW provision to **Disc. Rule 1.05(c)(9)** to the rule on confidentiality to make clear that a lawyer is permitted to disclose confidential information to secure legal advice about the lawyer's compliance with the Texas Disciplinary Rules of Professional Conduct.
- This amendment removes all doubt about what is permitted by making clear that "A lawyer may reveal confidential information *** (9) To secure legal advice about the lawyer's compliance with these Rules."

Revised Comment 17: "A lawyer who receives confidential information for the purpose of rendering legal advice to another lawyer or law firm under this Rule is subject to the same rules of conduct regarding disclosure or use of confidential information received in a confidential relationship."

Ballot Item C: Confidentiality Exception to Permit Disclosure to Prevent Client Death by Suicide - Passed with 91.55% of vote



What Has Changed in the Disciplinary Rules?

- This Ballot Item adds a provision (Rule 1.05(c)(10)) to the rule on confidentiality to make clear that a lawyer is permitted to disclose confidential information when that is reasonably necessary to prevent a client from dying by suicide.

Goal:

- To allow lawyers to act reasonably in extreme circumstances to protect the life of a client.
- When a lawyer has reason to believe it is necessary to reveal confidential information in order to prevent the client from dying by suicide, the lawyer shall have the option of making that disclosure.

Again: Permissive– not mandatory!

Ballot Item D: Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services – Passed 89.58%



What Has Changed in the Disciplinary Rules?

- A new **Disciplinary Rule 6.05** deals with pro bono-related conflicts.

Goal: To promote pro bono services by narrowing the range of conflicts of interest.

Key Definition: “‘Limited pro bono legal services’ means legal services that are:

- (1) provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, or nonprofit legal services program;
- (2) short-term services such as legal advice or other brief assistance with pro se documents or transactions, provided either in person or by phone, hotline, internet, or video conferencing; and
- (3) provided without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter.”

New Rule 6.05: Conflict of Interest Exceptions for Nonprofit and Limited Pro Bono Legal Services



Key Provisions:

- Paragraph (a) exempts the pro bono lawyers from compliance with the conflict of interest rules governing current and former clients, and lawyers serving as intermediaries, **unless the lawyer actually knows that the representation presents a conflict of interest** for the lawyer or for another lawyer in the lawyer's firm.
- Paragraph (b) provides that the pro bono lawyer's personal conflict of interest arising from the pro bono representation will not be imputed to the lawyers in the pro bono lawyer's firm if certain steps are taken to protect the pro bono client's confidential information.

Ballot Item E: Information About Legal Services (Lawyer Advertising and Solicitation)

- Passed 78.93% of Vote

What Has Change in the Advertising Rules? *Everything!*

Current Rules 7.01 to 7.07 are deleted and now replaced by new rules 7.01 to 7.06 will be added. The rules on advertising and solicitation have been completely overhauled.

Goals:

- Simplify, modernize, and clarify the rules governing communications about legal services in the Digital Age.
- Reduce burdens related to law practice websites, use of social media, pro bono programs, and communications with experienced business clients.

NEW Rule 7.01(a)

False and Misleading Statements

The Key Provision in the Advertising and Solicitation Rules

- Front and center, the first provision in this part of the disciplinary rules states the basic rule that is the cornerstone in this area of the law: namely, a lawyer shall not make a false or misleading statement about legal services.
- This rule, which is rooted in Constitutional jurisprudence, applies to all communications offering legal representation.

New Rule 7.01 (b)

Advertisement Versus Solicitation

What is the Difference? Why Does It Matter?

- The terms “advertisement” and “solicitation communication” are defined in the new rules.
- An advertisement is a communication directed to the public at large...
- In contrast, a solicitation communication is a communication directed to a specific person, “which reasonably can be understood as offering to provide legal services that the lawyer knows or reasonably should know the person needs in a particular matter. ”
- A communication falls into neither category unless it is “substantially motivated by pecuniary gain.”
 - This means that lawyers promoting various forms of non-profit legal services, such as legal aid for the poor, do not need to worry about complying with the disclosure and filing requirements that are applicable to advertisements and solicitation communications. (Of course, they must still comply with the rule against false or misleading statements.)

New Rule 7.01 (c)

Trade Names

What Has Changed in the Disciplinary Rules?

- Because statements that are truthful and not misleading are constitutionally protected, this rule abandons the traditional prohibition against the use of trade names.
- Unless it is false or misleading, use of a trade name is permitted.

CDRR Commentary:

- The traditional ban on trade names is constitutionally dubious.
- Today, most states allow the use of non-misleading trade names.

New Rule 7.02

RULE 7.02 Advertisements

The requirements of this rule will feel familiar because they are rooted in earlier law. An advertisement:

- Must identify a lawyer responsible for its content (and the lawyer's primary practice location);
- May disclose that the lawyer has been certified or designated as possessing special competence, including by the Texas Board of Legal Specialization, if certain requirements are met; and
- Must disclose whether a client who is represented on a contingent fee basis will be obligated to pay for other expenses, such as costs of litigation.
- The rule also addresses how long a lawyer must conform to a specific fee or range of fees promoted in an advertisement.

New Rule 7.02

RULE 7.02 (b) Advertising special competence or certifications

May disclose that the lawyer has been certified or designated as possessing special competence, including by the Texas Board of Legal Specialization, if certain requirements are met;....

[Sup. Court Revisions to Comment 3](#): Paragraph (b) of this Rule permits a lawyer to communicate that the lawyer practices, focuses, or concentrates in particular areas of law. Such communications are subject to the “false and misleading” standard applied by Rule 7.01 to communications concerning a lawyer’s services and must be objectively based on the lawyer’s experience, specialized training, or education in the area of practice.

New Rule 7.03(a, b, & c)

Solicitation and Other Prohibited Communications



- This rule continues traditional prohibitions against in-person solicitation but now makes clear that the anti-solicitation ban applies not just to in-person contact, but to “telephone, social media, or electronic communication initiated by a lawyer . . . that involves communication in a live or electronically interactive manner.”
- For the first time in Texas, this rule allows solicitation communications with “a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.” There is little risk of abuse.
- The rule continues to prohibit any communication that involves “coercion, duress, overreaching, intimidation, or undue influence.”

New Rule 7.03(d & e)



More on Solicitation...

- A written solicitation communication must not be “misleadingly designed to resemble a legal pleading or other legal document” and, with limited exceptions, must be “plainly marked” ADVERTISEMENT.
- This provision continues the traditional rule that a lawyer may not pay or give anything of value to another person for soliciting or referring prospective clients, except that now “nominal gifts given as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services” are permitted.

New Rule 7.03(e)(2) & (f)

Reciprocal Referrals

- Reciprocal referral agreements are now allowed provided “(i) the ... agreement is not exclusive; (ii) clients are informed of the existence and nature of the agreement; and (iii) the lawyer exercises independent professional judgment in making referrals.”

Payments or Gifts to Clients

- The rule continues the prohibition against paying or giving anything of value to clients (other than litigation expenses and other financial assistance permitted by the rules), except that now “ordinary social hospitality of nominal value” will be permitted.

New Rule 7.04

Filing Requirements for Advertisements and Solicitation Communications

- This rule continues the filing requirements for certain advertisements and solicitation communications.
- It also continues to allow lawyers to seek pre-approval of advertisements and solicitation communications.



New Rule 7.05

Communications Exempt from Filing Requirements

- This rule greatly expands the number of situations in which advertisements or solicitation communications are exempt from the filing requirements of Rule 7.04.
- In particular, “(a) any communication of a bona fide nonprofit legal aid organization that is used to educate members of the public about the law or to promote the availability of free or reduced-fee legal services” is exempt.

New Rule 7.05(e)

More Exemptions from Filing

- “Information and links posted on a law firm website, except the contents of the website homepage,” are exempt from filing.
- Professional newsletters are exempt if they are sent to:
 - (1) existing or former clients;
 - (2) other lawyers or professionals;
 - (3) persons known by the lawyer to be experienced users of the type of legal services involved for business matters;
 - (4) members of a nonprofit organization which has requested that members receive the newsletter; or
 - (5) persons who have asked to receive the newsletter.

New Rule 7.05(g)

Exemptions for Many Posting on Social Media and Other Media

A lawyer is not required to file “a communication in social media or other media, which does not expressly offer legal services, and that:

- (1) Is primarily informational, educational, political, or artistic in nature, or made for entertainment purposes; or
- (2) Consists primarily of the type of information commonly found on the professional resumes of lawyers.”

New Rule 7.06

Prohibited Employment

This rule clarifies when a violation of various rules dealing with communications about legal services, or general principles of misconduct, results in

- personal disqualification,
- imputed disqualification of other lawyers in a firm, or
- restrictions on referral-related payments.



Ballot Item F: Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline - **Approved by 83.65% of Voters**

Genesis: Request from the Commission for Lawyer Discipline to close a loophole, when the lawyer is discipline by a federal disciplinary system.

What Has Changed? The proposal amends TDRPC Rule 8.03, and Rules 1.06 and 9.01 of the Texas R. of Disc. Procedure by extending existing self-reporting and reciprocal-discipline provisions to cover certain professional discipline by a federal court or federal agency.

How is “Discipline” Defined? The proposal specifically limits “‘discipline’ by a federal court or federal agency” to mean a public reprimand, suspension, or disbarment.

- The proposal clarifies that the term **does not include** a letter of “**warning**” or “**admonishment**” or a similar advisory by a federal court or federal agency. The provisions also do not apply to mere procedural disqualification in a particular case.



Ballot Item G: Assignment of Judges in Disciplinary Complaints and Related Provisions – **Approved by 86.36% of voters**



Genesis: Request from the Texas Supreme Court.

What Has Changed? This rule change simplifies the assignment of judges, and addresses inconsistencies between current Rule 3.02 of the Texas Rules of Disciplinary Procedure and other statutes and rules already in place, whenever a respondent attorney in a disciplinary case chooses to have the matter heard by a district court.

- The proposal amends Rules 3.01 to, 3.02, and 3.03 of the Texas Rules of Disciplinary Procedure by:
 1. Transferring judicial assignment duties from the Supreme Court to the Presiding Judges of the Administrative Judicial Regions when a respondent in a disciplinary complaint elects to proceed in district court;
 2. Relaxing geographic restrictions on judicial assignments in disciplinary complaints; and
 3. Clarifying and updating various procedures involved in the assignment of judges in disciplinary complaints.

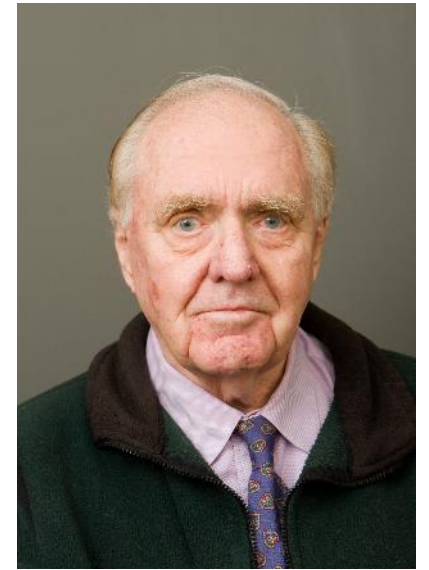
New Rules of Disciplinary Procedure 3.01, 3.02 and 3.03 -Assignment of Judges in Disciplinary Complaints



CDRR Commentary: This is a change to the Rules of Disciplinary Procedure, rather than the Texas Disciplinary Rules of Professional Conduct.

- When the Chief Disciplinary Counsel finds “just cause” to proceed with a Disciplinary Action, the respondent lawyer must choose to have the matter heard by a panel or to have the matter filed in District Court in the Respondent’s county of principal practice.
- In those few cases where the Respondent chooses to proceed in court, the existing Rule of Disciplinary Procedure has the Supreme Court sending an Order to a District Judge assigning him or her to hear the case.
- The purpose of this rule change is:
 - a) To make that process easier and more relevant.
 - b) To allow the Presiding Judge of the Respondent’s Administrative Judicial District to carefully choose an appropriate judge for the case, and softens the geographical requirements so that a nearer judge who is appropriate for the case can be appointed.
 - c) Ensure that the rules for objecting or recusal follow Texas law more consistently. The existing rule conflicts with established rules for such processes.

Ballot Item H: Voluntary Appointment of Custodian Attorney for Cessation of Practice **Passed 93.9% of vote.**



Genesis:

- Multiple requests, including State Bar of Texas.

CDRR Commentary:

- As lawyers continue to practice later into their senior years, the likelihood increases that there will not be proper planning cessation of law practice. This Rule helps to address that issue.

What Has Changed?

- **Rule Disc Procedure 13.04** of the Texas Rules of Disciplinary Procedure authorizes a lawyer to voluntarily designate a custodian attorney to assist with the designating attorney's cessation of practice and provides limited liability protection for the custodian attorney.

Guiding Texas Lawyers- *So, how do we learn how to use these rules?*

- **COMMENTS:** First read the **comments**... they will help lawyers understand the rules.
- **PRACTICE GROUPS HELP:** Further, it is likely that practice sections, and professional groups will likely want to assist lawyers with guidance via forms, proposed language etc, if the new rule affects that practice area
- **CLE's** teaching the new changes will likely be offered



SAMPLE FORM NEW RULE – Advising Clients of Option to designate a “trusted individual”



Voluntary designation of trusted person (incapacity):

“If, as your lawyer, I reasonably believe that you are at risk of substantial physical, financial, or other harm because you cannot protect your own interests, the disciplinary rules allow me to make limited disclosures to an appropriate person for the purpose of protecting your interests.

You are not required to designate a trusted person, but you may voluntarily do so below. That would help me to know whom to contact if the need arises. . . .”

FINAL THOUGHTS ON THE RULE-CHANGE PROCESS:



HELP US MAKE THESE IMPROVEMENTS A REGULAR EVENT:

As a profession, Texas Lawyers need to make the revision and improvements of their Disciplinary Rules of Conduct and Disciplinary Rules of Procedure, a routine and ongoing process.

- Get Involved
- Send the Committee on Disciplinary Rules and Referenda your thoughts
- **Vote in all Referenda on New Rules!**

LET'S VALUE AND EXERCISE OUR RIGHT TO SELF-GOVERNANCE!

Please Help!



**If your practice involves a new rule,
and you have ideas to help
Implement, or modify
Attorney-Client agreements,
Or even want to suggest another
rule change, please
help us improve the
practice of law in Texas!**

Thanks!

Look us up: texasbar.com/cdrr

