

Ethical Advertising and Practices under the New Disciplinary Rules- And Ethics Scenarios

Claude E. Ducloux

Board Certified- Civil Trial Law & Civil Appellate Law
Texas Board of Legal Specialization

State Bar Military and Veteran's Law Section CLE
October 15, 2022, San Antonio

LAWPAY[®]

AN AFFINIPAY SOLUTION



PART 1

A Quick Summary of the Advertising Rules



Are you asking for it?

FREE AUTO ACCIDENT PHONE CALL

1-800 ASK-GARY

275-4379



Ever Argued With A Woman?

Advocate Law Firm, P.A.

Divorce/Family • Criminal Defense • Personal Injury

863-644-5566

EverArguedWithAWoman.com



INJURED?

Don't pull **YOUR** hair out

MyBaldLawyer.com

770-982-1800



**When it comes
to litigation,
always go with a
VIRGIN.**

Because no one fights harder for clients than Virgin lawyers. If you have a tough lawsuit or business dispute, call us, we can help. Skills

Information About Legal Services (Lawyer Advertising and Solicitation)

HERE ARE THE BASICS ON ADVERTISING:

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 7.02

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.

Trade Names (cue the scary music)

Opinions are like [noses]:
Everyone's got one.

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.

Scenario sample:

Name That Firm – Trade Names

Attorney P.L. Wynne is a plaintiffs' personal injury attorney in Dallas. He is planning major marketing campaign that would include advertising on a variety of platforms, including television and social media. P.L. is aware that the new rules permit the use of trade names for law firms. The following is P.L.'s list from which he will choose the new name. Which of these are likely to be allowed under the new rules, and which are not?

- A. The Personal Injury Place
- B. The Wynning Law Firm
- C. We Wynne for You! Attorneys at Law
- D. The Certified Center for Personal Injury Law
- E. Institute for Court Masters
- F. Your Dallas Personal Injury Resource

Scenario 6 (Cont'd): Restrictions on Trade Names

- The new Rules remove strict prohibitions on law firm trade names. The new rule allows trade name provided the trade name is not “false or misleading.”
- Names likely to be misleading would include:
 - suggesting a connection to a person not in the firm;
 - suggesting a relationship to another entity or charitable institution;
 - suggesting a quality, credit or approval which the lawyer or firm does not have;
 - causing confusion as to the governmental affiliation;
 - falsely reporting accreditation or credentials or certification of specialized skills.

What About These Names

- “The Personal Injury Place” - Doesn’t appear to violate restrictions on its face.
- “The Wynning Law Firm” - Likely permitted.
- We Wynne for You! Attorneys at Law –Likely permitted.
- The Certified Center for Personal Injury Law - Likely misleading.
- Institute for Court Masters –Likely misleading.
- Your Dallas Personal Injury Resource – Likely misleading and confusing.

Reaching Out

Revisions making it easier to
reach out to people who hire
lawyers

New Rule 7.03(a, b, & c)

Solicitation and Other Prohibited Communications



IN PERSON STILL PROHIBITED, and Includes “live or interactive” methods (telephone, text, social media or email).

- 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.”

New Rule 7.03(a, b, & c)



**However, you can contact “experienced users of the
Type of legal services involved for business matters.”**

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.

But, the rules continue 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.

Reciprocal Referrals OK

And payments or gifts
to lawyers and clients

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.



Bloggging Your Way into Trouble

Accidentally turning
your blog into an ad.

Caveat – blogging your way (accidentally) into the advertising rules.

We love your blogs. Do NOT turn them into a communication subject to the advertising rules by adding a tag line:

“... and for more information on my legal services, call me at, 713- 555-4444.”

Please blog all you want, and let the blogosphere find you, as they will. If someone believes they want more advice, they'll find you on that Google thingy.

The Billion Dollar Billboard

Requiring more transparency
when bragging about big
numbers

A San Antonio Billboard advertised that this well-known firm had a “final judgment” for \$1.25 billion – But, in truth, the Client had collected -0- **Was that False and Misleading?**

Responding to the criticism of such ads, the CDRR recommended, and the Texas Supreme Court issued an ORDER January 31, 2022, amending Comment 10 to Rule 7.01 (Communications Concerning a Lawyers Services) TDRPC:

10. A communication about legal services may be misleading because it omits an important fact or tells only part of the truth. A lawyer who knows that an advertised verdict was later reduced or reversed, or never collected, or that the case was settled for a lesser amount, must disclose the amount actually received by the client with equal or greater prominence to avoid creating unjustified expectations on the part of potential clients. A lawyer may claim credit for a prior judgement or settlement only if the lawyer played a substantial role in obtaining that result. This standard is satisfied if the lawyer served as lead counsel or was primarily responsible for the settlement. In other cases, whether the standard is met depends on the facts. A lawyer who did not play a substantial role in obtaining an advertised judgment or settlement is subject to discipline for misrepresenting the lawyer’s experience and, in some cases, for creating unjustified expectations about the results the lawyer can achieve.

Encouraging More Pro Bono

Exempting Pro Bono from
the Advertising Rules

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.

Posting Review on Social Media

This is Not **Yelpful**

Paul Presser, plaintiff's lawyer, has decided to go to the internet for help with his practice, so he take the following actions:

1. **Blast email** to all current and former clients asking for them to post glowing reviews on as many platforms as they can, including his website
2. **Post** the same message asking for reviews **on his Facebook** Page
3. Gets a **Yelp** Listing, and **encourages Yelp reviews**.

It works, and the reviews come in!

Paul sees Sarah's Glowing Review

A former client, Sarah, posts this review BOTH on his website and on Yelp:

"Paul is a rock star! He did a great job on my small case, but I know he has obtained multi-million dollars judgments for many of his clients!"

Paul is concerned because he has only had one Judgment in excess of a million dollars, and wonders what duty he has to clear that up....

He comes to you and you say...



You look at the situation and tell Paul:

1. First of all, you breached lawyer confidentiality by soliciting reviews
2. “You need to correct the review on **both** his website and Yelp because they are untruthful.”
3. “You need to correct the comment on your website, but not Yelp- Yelp is not in your control.”
4. “You only need to correct the comment on Yelp – it’s a public platform.”
5. “You have no duty to correct inaccurate statements which are by third persons that you did not direct them to write.”

Which of the above statements give the correct advice?

HERE'S the Correct Advice-

ANSWER: TEXAS PROF ETHICS OPINION 685 (Jan 2020)

1. You are NOT prohibited from soliciting ratings or online reviews*.
2. **PAUL DOES needs to correct the review on both his website and Yelp because they are untruthful."**
3. You need to encourage Sarah to correct her Yelp post herself. You can't change it.

When a lawyer becomes aware of a favorable false or misleading statement, the lawyer must take "reasonable steps" to correct or remove the misstatement.

When the lawyer does not control the platform that means "addressing the matter with the author" or if that fails, addressing it with the website or platform administrator.

*Claude's Caveat: advise clients that they are under no obligation to post and may fully maintain the protections of the attorney-client relationship.

Lawyer Posts On Social Media

Stay within the guidelines,
and post freely!

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.”

In Firm Training on Social Media

Do you need to know
social media?

Modernizing big firm

Biggus & Smooth has hired 10 new associates who have formed their own committee to modernize the “presence” of the firm, including the use of various online resources, including their website and social media (Twitter, Facebook, and Instagram).

The Senior Partner, Stanley Biggus, is all for it, and already uses a private Facebook page and publishes a blog. Stanley asks the committee:

1. Will my personal blog be subject to the lawyer advertising rules, and
2. Will the firm need to train every lawyer on those social media platforms, or just the lawyers using it.

37 Whom do you train?

- a. Only the lawyers using the technology are required to learn it, and Stanley's FB page and blog are exempt of the advertising rules.
- b. Every lawyer must be trained on all the firm's chosen social media but Stanley's private page is exempt.
- c. Only the lawyers using the technology are required to learn it, but if there is a link to Stanley's blog, it must clear the advertising rules;
- d. Every lawyer must be trained in firm's use of social media, and any linkage to Stanley's FB page or blog invokes advertising rules.

D. Every lawyer must be trained in firm's use of social media, and any linkage to Stanley's FB page or blog invokes advertising rules.

There is a duty to maintain a working knowledge of the firm's use of social media and keep abreast of changes (ABA Rule 1.1, comment 8; see also, Texas Rule 1.01, 2019 revision to Comment 8).

Comment 8 Revised. Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, **including the benefits and risks associated with relevant technology**. To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances. Isolated instances of faulty conduct or decision should be identified for purposes of additional study and instruction.



D

Stanley's Facebook page:
Is it private or used to solicit business?

As for Stanley's FB page and blog:

While personal Facebook pages may be exempt from advertising and solicitation rules, if they are linked for work purposes (clearly suggesting or featuring the qualifications of the lawyer to be retained) they are subject to the advertising and solicitation rules (the rules suggest that blogging for "business" purposes would make the difference).

For a great discussion,

see California Standing Committee on Prof. Resp. Formal Opinion 2016-196

PART 2

Explaining More Rule Changes: Disclosures and Conflicts

SCENARIO 1: What Do I Do Now?

- Mary Jones is a 30-year practitioner with a good reputation in her mid-size Texas city. Like many lawyers, she has represented many people for decades.
- One day, her longtime-client Bob comes in for an appointment. Bob is agitated and tells her, “I need a new will, I want to cut my daughter out completely, and give everything to my son.”
- Mary is a bit startled, but asks good questions. When she asks, “What do you want to do with the acreage you received from your Mother?” Bob replies, “What acreage?”
- Mary is very concerned that Bob is showing signs of mental decline.

SCENARIO 1: What Do I Do Now?

- Mary's communications are governed by the attorney-client privilege, so -- Who can Mary talk to?
- What are the limitations on what she can say?
- Should she create a guardianship?
- Do the rules require Mary to reveal her fears learned during the attorney client communication?
- Would Mary's duties to Bob change if she were court-appointed to act for him?
- Finally, would Mary's rights or duties change if Bob were a brand new client showing signs of dementia or mental decline?

Clients with Diminished Capacity



What has Changed in the Disciplinary Rule?

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

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!

Does this rule apply to new prospective clients or just existing clients?

SUPREME COURT COMMENTS

Comments to New Disciplinary Rule 1.16: DIMINISHED CAPACITY

EXCEPTION TO CONFIDENTIALITY: Clarify that diminished capacity rule applies to 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.”

Clients with Diminished Capacity



- This rule helps you protect your client from errors resulting from his/her loss of mental abilities.
- If you reasonably fear your client is going to do something against his own interest, you may talk to a “trusted person” in that client’s life, and reveal ONLY what you need to.
- *Permissive– not mandatory!*

Scenario 2: What is my Ethical Duty?

- Chester has a high-profile real estate practice:
- He has learned that two of his major development clients are bidding against each other for a prime piece of downtown property. Lucy is a well-known expert in Ethics. Chester calls Lucy to get advice on the effect of this conflict of interest.
- What are Chester's limitations in communicating with Lucy?
- How does rendering ethics advice affect Lucy's own ethical obligations?

Securing Legal Ethics Advice



- New provision added to **Disc. Rule 1.05(c)(9)** to clarify 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.
- "A lawyer may reveal **confidential information** *** (9) To secure legal advice about the lawyer's compliance with these Rules."

Must the ethics expert treat the information from Lucy as privileged?

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

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.”

What Is Confidential Information?

- “Confidential information” includes **both** “privileged information” and “unprivileged client information.”
- “Unprivileged client information” means **all** information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.



Scenario 3: “I’m Worried About You!”

- Family Law and Bankruptcy lawyers frequently work with stressed clients.
- Danny’s client, Walter, is enduring a debilitating bankruptcy and has just been served with divorce papers. Danny is worried about Walter and calls him. Walter says, “Well this is pretty much the end of the trail, I guess. I’ve lost my business, and now my wife. I know how to make my problems go away. I’ve got a bottle of whiskey and a .44 at home, and I’m going to just relax tonight.”
- Danny believes Danny is in danger of self-harm.

Scenario 3 Who, if anyone, can Danny call?

Consider:

- Rule 1.05 (c) (7) allows lawyers to reveal confidences to prevent fraud
- Rule 1.05 (e) to prevent an act likely to result in death or serious bodily injury.

But can you disclose that you think a client is at risk of suicide?

Who can you call?

And . . . MUST you call someone?

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



- New Rule 1.05(c)(10)) added to the rule on confidentiality to clarify that a lawyer is permitted to disclose confidential information when that is reasonably necessary to prevent a client from dying by suicide.
- “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!

Scenario 4: Transition/Emergency Planning:

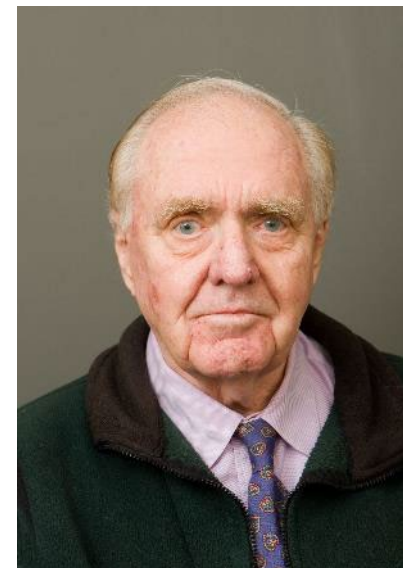
For more than 20 years, the Texas Rules of Disciplinary **PROCEDURE** (Specifically Rules 13.01, 13.02, and 13.03) Have allowed lawyers to be appointed as “custodians” by appointment of the District Court in the home county of the affected lawyer.

What’s the benefit of appointment? You get “Good Samaritan” protection of sorts: the custodian cannot be sued for your service except for “intentional misconduct or gross negligence.”

But why not have a right to non-judicial appointment and service as a Custodian?

Voluntary Appointment of Custodian Attorney for Cessation of Practice

New Rule 13.04



- **New 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.

Voluntary Appointment of Custodian Attorney for Cessation of Practice

New Rule 13.04

- What is the role of a custodian?
- Can you have more than one custodian?
- May a custodian take over the representation of the client?

SUPREME COURT REQUESTED COMMENT:

WHAT HAPPENS WHEN THE CUSTODIAN TAKES OVER REPRESENTING THE CLIENT:

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.”

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



Please Help!

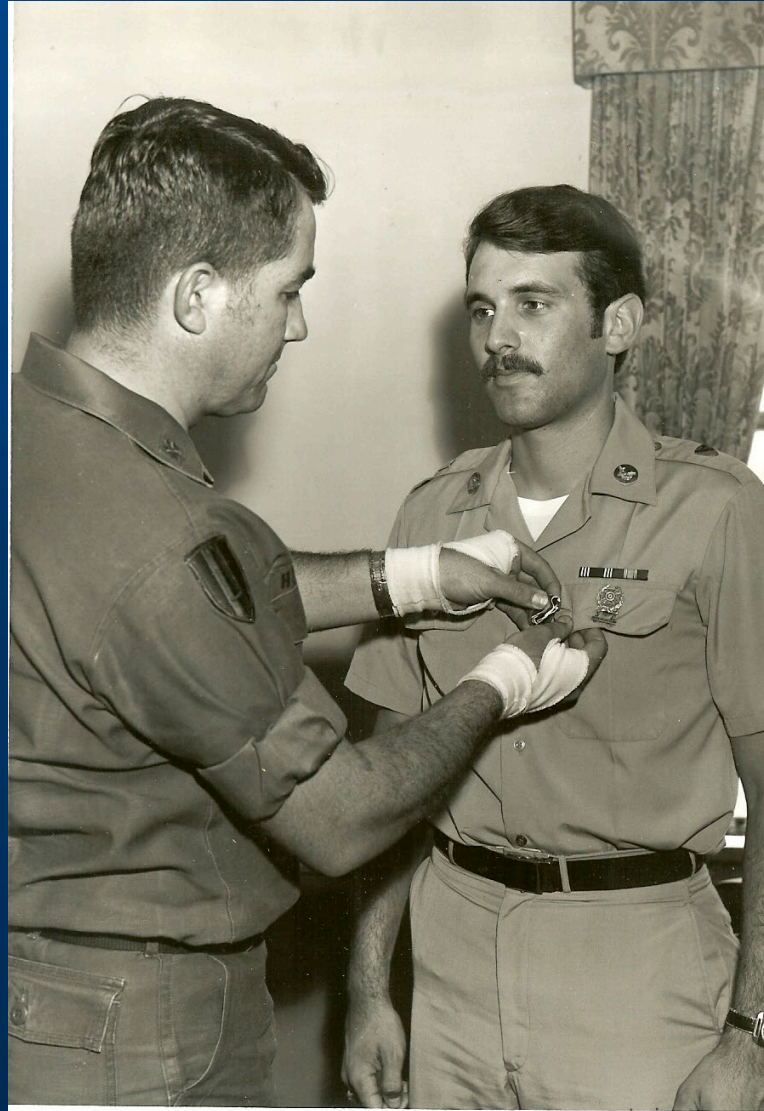


**If your practice involves a new rule,
and you have ideas to help
Implement, or modify
Attorney-Client agreements,
Or even want to suggest another
rule change, please
help us improve the
practice of law in Texas!**

Thanks!

Look us up: texasbar.com/cdrr





Claude@lawpay.com