



COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

2020 Annual Report



COMMITTEE MEMBERS

M. Lewis Kinard - Chair
Timothy D. Belton
Amy Bresnen
Claude Ducloux

Hon. Dennise Garcia
Harold Frederick "Rick" Hagen
Professor Vincent Johnson
W. Carl Jordan
Karen Nicholson

ABOUT

The Committee on Disciplinary Rules and Referenda was created by the 2017 Texas Legislature in Section 81.0872 of the State Bar Act. The committee consists of nine members: seven attorney members and two non-attorney public members. The committee is statutorily charged to:

1. Regularly review the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure;
2. At least annually issue to the Supreme Court of Texas and the State Bar of Texas Board of Directors a report on the adequacy of the disciplinary rules; and
3. Oversee the initial process for proposing a disciplinary rule.

Representing a broad range of perspectives, the committee consists of:

- Three attorneys appointed by the president of the State Bar;
- One non-attorney public member appointed by the president of the State Bar;
- Four attorneys appointed by the Supreme Court; and
- One non-attorney public member appointed by the Supreme Court.

The president of the State Bar and the chief justice of the Supreme Court alternate designating an attorney member of the committee to serve as the presiding officer of the committee for a term of one year. Committee members serve staggered three-year terms, with one-third of the members' terms expiring each year.

TERM EXPIRING DECEMBER 31, 2020¹

Claude Ducloux - Austin
Professor Vincent Johnson - San Antonio
M. Lewis Kinard, Chair - Dallas

TERM EXPIRING DECEMBER 31, 2021

Hon. Dennise Garcia - Dallas
W. Carl Jordan - Houston
Karen Nicholson (Public Member) - Austin

TERM EXPIRING DECEMBER 31, 2022

Timothy D. Belton (Public Member) - Bellaire
Amy Bresnen - Austin
Harold Frederick "Rick" Hagen - Denton

¹Reappointed for terms expiring December 31, 2023

2020 COMMITTEE

TERM EXPIRING DECEMBER 31, 2020¹



Claude E. Ducloux (Austin) is certified in both civil trial (1984) and civil appellate law (1987) by the Texas Board of Legal Specialization; licensed in Texas, Colorado, and California; and speaks regularly on legal ethics, law office management, and trial-related topics. He is a former president of the Austin Bar and former chair of the Texas Board of Legal Specialization, the Texas Bar Foundation, the Texas Bar College, and the Texas Center for Legal Ethics. Ducloux has written extensively on various legal education and disciplinary issues and is a U.S. Army Veteran.



Vincent R. Johnson (San Antonio) is the South Texas Distinguished Professor of law at St. Mary's University. He teaches and writes in the areas of torts, professional responsibility, legal malpractice law, government ethics, international law, and comparative law. Johnson has served as a Fulbright Scholar in Burma, China, and Romania. His articles have been cited in more than 210 law reviews and 60 federal and state court decisions. Johnson is an elected member of the American Law Institute. He received his J.D. from the University of Notre Dame, an LL.M. from Yale University, and a second LL.M. from the London School of Economics.



M. Lewis Kinard, Chair (Dallas) is executive vice president, general counsel, and assistant corporate secretary for the American Heart Association in Dallas. He was the last chair of the State Bar's Committee on Disciplinary Rules and Professional Responsibility and served on that committee for seven years. Kinard has over 30 years of legal practice in a range of substantive areas, is licensed to practice law in Texas and Arkansas, and formerly held a "single client" license in Colorado. At the AHA, he has focused on international commercial agreements, ground-breaking collaborative research programs, and growing the AHA's legal department to keep pace with the organization's evolving global legal needs. Kinard earned a bachelor's degree from the University of Arkansas and a J.D. from SMU Dedman School of Law.

¹Reappointed for terms expiring December 31, 2023

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TERM EXPIRING DECEMBER 31, 2021



Hon. Dennise Garcia (Dallas) was elected to the 5th District Court of Appeals in 2020 for a term beginning January 1, 2021. She previously served as judge of the 303rd District Court from 2004 to 2020. She is certified in family law (2000) and child welfare law (2020) by the Texas Board of Legal Specialization. She is a member of the State Bar of Texas Pattern Jury Charges—Family and Probate Committee, which she chaired from 2014 to 2017. She was a visiting professor of family law at SMU Dedman School of Law from 2015 to 2019. The Texas chapter of the American Academy of Matrimonial Lawyers awarded Justice Garcia its Jurist of the Year Award in 2016, and the Dallas Volunteer Attorney Program awarded her the Merrill Hartman Pro Bono Service Award in 2006 and 2020. Justice Garcia earned her B.S., B.A. in 1990 from Southern Methodist University and her J.D. in 1993 from SMU Dedman School of Law.



W. Carl Jordan (Houston) has been with the law firm of Vinson & Elkins LLP his entire career. For approximately 40 years he practiced in the field of employment and labor law while also serving in various leadership roles with the firm, including as a member of its management committee. He currently serves as the firm's general counsel. In that role he oversees compliance with professional responsibility rules in multiple jurisdictions. Jordan earned a B.A. with honors from Baylor University and a J.D. with honors from Harvard Law School.



Karen Nicholson - Public Member (Austin) recently stepped down from the League of Women Voters of the United States Board, where her eight years of service included work as vice president and chair of both the Advocacy and Litigation Committee and the Education Committee. Active in the LWV for many years, she has served as president of LWV Texas and LWV Midland and has served on the boards of the Richardson and Houston leagues. She has served as a public member of the Commission for Lawyer Discipline and the Grievance Oversight Committee and currently is a member of the Texas Legal Services Center Board. Education has long been a primary focus. Before recently retiring to Austin, Nicholson was vice president of the Midland ISD Board of Trustees. She taught in the Austin and Richardson ISDs and was adjunct professor of mathematics at Midland College. She has served in volunteer education positions and advisory committees, including president of the Midland Council PTA, a math tutor, bond elections committees, the Chamber of Commerce Education Committee, and many others.

2020 COMMITTEE

TERM EXPIRING DECEMBER 31, 2022



Timothy D. Belton - Public Member (Bellaire) is a retained executive search consultant with Preng & Associates and chairman of ZeoGas LLC. He began his career at Andersen Consulting Strategic Services (Accenture) where he led major change, acquisition strategy, and growth agendas for billion-dollar revenue companies, culminating in his leadership of the firm's post-merger integration practice in Texas. He later served as the restructuring officer and then COO of TRC Companies (NYSE: TRR, now private), leading the creation of a national management team to integrate the portfolio of 30+ acquired companies. As the chairman and CEO of TDECU Holdings, the for-profit subsidiary of the related \$3 billion credit union, he was responsible for forming the boards of directors and management teams for each of the four operating companies. He currently serves as a trustee and finance committee chair of the Texas Center for Legal Ethics and president of the Business Ethics Forum. He previously served as a public member of the State Bar of Texas Board of Directors, earning the Outstanding Third-Year Director Award and President's Commendation. Belton holds a BBA in Business and Technology Management from the University of Texas McCombs School of Business and an MBA from the Harvard Business School.

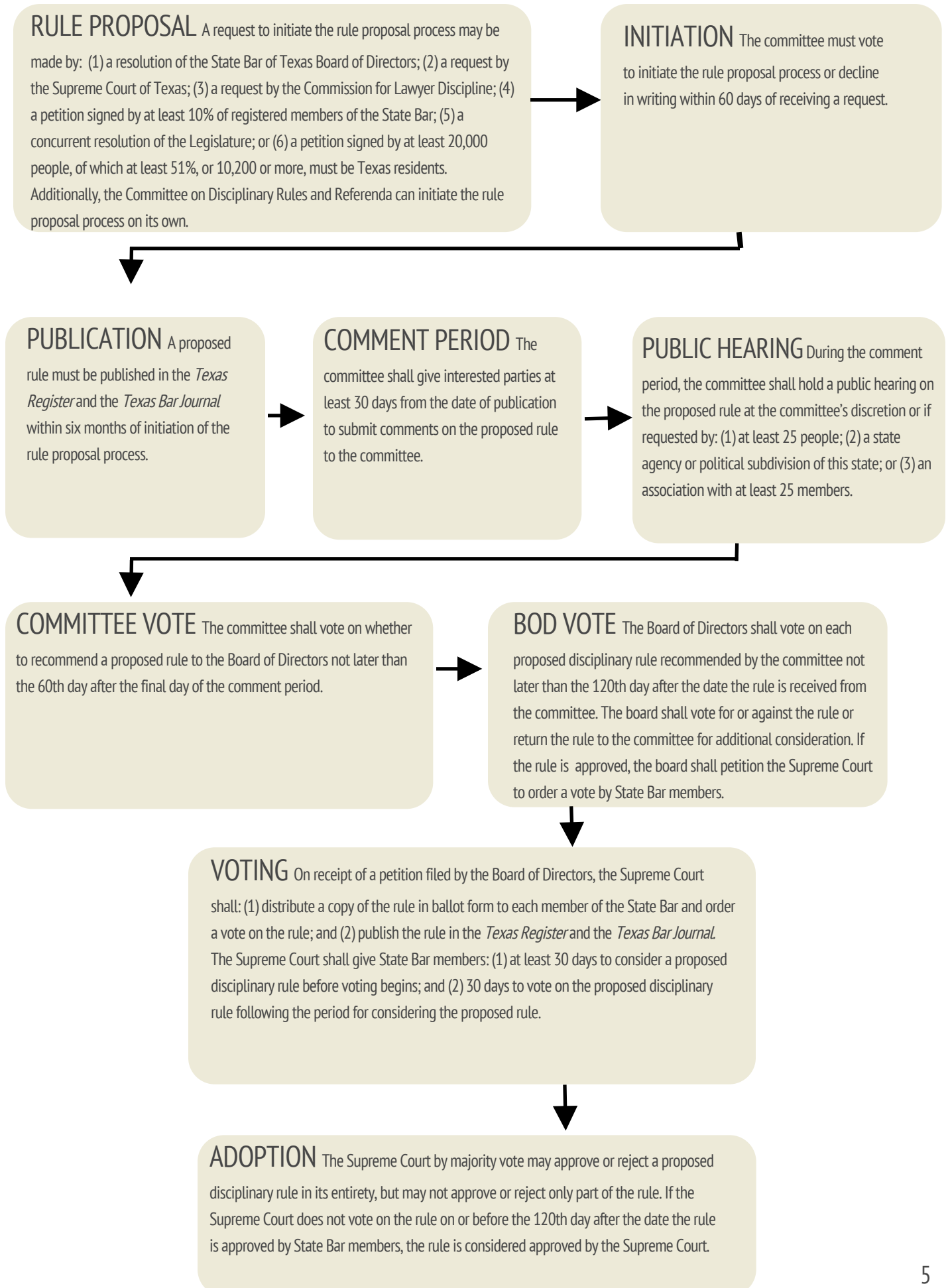


Amy Bresnen (Austin) is an attorney and lobbyist at Bresnen Associates, Inc. Bresnen's private sector representation of clients has included major corporate and small businesses, local governments, and nonprofits, with such diverse issues as ethics, civil justice, family law, public education, human rights, water, telecommunications, mental health care, regulation of various professions, eminent domain, the judiciary, gaming, pension systems, taxes and fees, technology, transportation, state appropriations, electric regulation, and issues affecting public safety personnel. She has recently published an article about the recent changes to the Texas anti-SLAPP law in the St. Mary's Law Journal ("Targeting the Texas Citizen Participation Act: The 2019 Texas Legislature's Amendments to a Most Consequential Law"). Bresnen also serves as a member of the board of the St. Mary's University School of Law Alumni Association.



Harold Frederick "Rick" Hagen (Denton) is a past president of the Texas Criminal Defense Lawyers Association and is certified in criminal law by the Texas Board of Legal Specialization. He obtained his undergraduate degree from Austin College and worked as the legislative assistant for State Representative Jim Horn. Hagen graduated from law school at the University of Oklahoma in 1990, where he received the American Jurisprudence Award for Trial Techniques. He was hired by the Hon. Rusty Duncan as a briefing attorney on the Texas Court of Criminal Appeals and then served two years as a felony prosecutor. His practice is in Denton and is limited to criminal law.

RULE PROPOSAL PROCESS

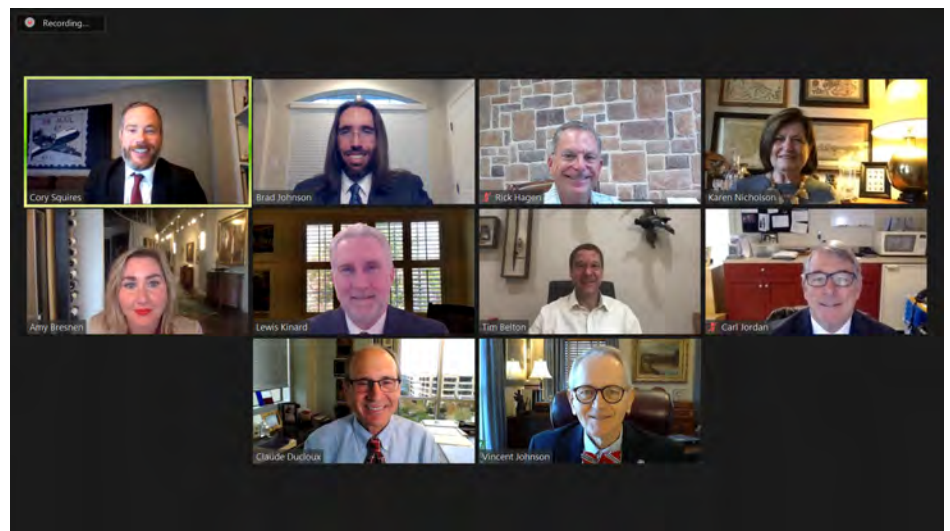


2020 SUMMARY



Like the rest of the world, the committee pushed forward in 2020. Despite a local power outage during its January meeting and the global pandemic, the committee recommended seven rule proposals to the State Bar Board of Directors during the year.

The committee continues to effectively encourage and facilitate public participation in the rule proposal process. The committee has utilized videoconference technology to continue to meet on a monthly basis, as well as to hold public hearings. While the committee was able to hold a January 2020 public hearing in person (in the dark), eight additional public hearings were held by videoconference.



Not Pictured: Hon. Dennise Garcia

The effort proved to be a success, as members of the public continued to have their voice heard throughout the process.

Of special note, in September 2020, the Supreme Court of Texas ordered a rules vote by bar membership on eight rule proposals that were recommended by the committee and approved by the board. Voting will take place between February 2 and March 4, 2021. This marks the first rules vote in a decade and a significant opportunity for Texas lawyers to exercise their right of self-governance. The committee thanks the board and the Supreme Court for their thoughtful consideration and action in the rule proposal process. The committee also thanks members of the public who provided feedback during the process.

To learn more, go to texasbar.com/CDRR.

OUTREACH AND COMMUNICATIONS

To maximize public participation in the rule proposal process, the committee's website includes meeting materials and agendas, a schedule of meeting dates and participation methods, rule proposals and timelines, audio and/or video of meetings, and other information related to the rule proposal process. Members of the public can submit comments on proposed rules through the website and can also sign up for committee e-mail updates. The committee has also utilized videoconference technology to facilitate public participation in meetings and hearings. For more information, go to texasbar.com/CDRR. In 2020 the website received 13,215 visits.

During the year, the Committee published eight rule proposals for public comment in the *Texas Bar Journal* and *Texas Register*, held nine public hearings on rule proposals, and received 75 written public comments on rule proposals. Information about rule proposals and public hearings was also emailed to Texas lawyers, committee e-mail subscribers, and other interested parties.

COMMITTEE ACTIVITY	2018	2019	2020	TOTAL
Rule Proposals Initiated	4	3	9	16
Rule Proposals Published	3	4	8	15
Rule Proposals Recommended	2	3	7	12
Rule Requests from Supreme Court	0	1	0	1
Rule Requestes from Board	1	0	1	2
Rule Requests from Commission for Lawyer Discipline	0	2*	0	2
Self-Initiated Rule Proposals**	3	1	6	10
Comment Requests from Supreme Court ***	1	2	0	3
Comments Recommended**	0	2	0	2
Formal Rule Requests Denied	0	0	0	0

COMMUNICATIONS	2018	2019	2020	TOTAL
Written Public Comments on Rule Proposals	13	213	75	301
Email Notices Sent	1	22	20	43
Public Hearings Held	1****	6	9	16

*The two requests were received in late December 2019.

**This item refers to initiated proposals not based on a formal third-party request.

***This item refers to interpretive comments separate from proposed rule changes.

****This public hearing covered two proposals.

RULE REVIEW

INFORMATION ABOUT LEGAL SERVICES

Lawyer Advertising and Solicitation Rules

In 2018, the State Bar Board of Directors requested that the committee initiate the rule proposal process with regard to all of Part VII of the Texas Disciplinary Rules of Professional Conduct, which includes rules related to lawyer advertising and solicitation. In response, the committee carefully drafted a comprehensive set of proposed amendments to Part VII. As part of the process, the committee conducted multiple public hearings and considered more than 160 public comments. In September 2019, the committee voted to recommend the proposal to the board.

In January 2020, the board voted to return the proposal to the committee for additional consideration, including specifically regarding the use of trade names. In February 2020, the committee reinitiated the rule proposal process for proposed changes to Part VII. As part of its continuing review, the committee solicited additional public feedback and held an additional public hearing on the subject.

In response to public feedback and after further consideration, the committee made a number of improvements to the previous proposal. In May 2020, the committee voted to recommend the revised proposal, and in June 2020, it was approved by the board. The proposal will be included in the 2021 rules vote.

The comprehensive proposal simplifies, modernizes, and clarifies Part VII. Among other changes, the proposal: 1) permits a lawyer to practice law under a trade name that is not false or misleading; 2) defines “advertisement” and “solicitation communication”; 3) simplifies disclaimer and filing requirements; 4) adds exemptions to certain solicitation restrictions for communications directed to lawyers, persons with whom the lawyer has a close personal or prior business or professional relationship, and persons known by the lawyer to be experienced users of the type of legal services involved for business matters; 5) expands exemptions to filing requirements; and 6) expressly addresses social media communications. The proposal maintains the prohibition on false or misleading communications about the qualifications or services of a lawyer or law firm.



ASSIGNMENT OF JUDGES

Assignment of Judges in Disciplinary Complaints and Related Provisions

In response to a request from the Supreme Court of Texas, the committee proposed rule changes relating to the assignment of judges in disciplinary complaints.

The proposed rule changes simplify the assignment of judges, as well as address 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, 3.02, and 3.03 of the Texas Rules of Disciplinary Procedure by: 1) transferring judicial assignment duties from the Supreme Court of Texas 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.

In March 2020, the committee voted to recommend the proposal, and in April 2020, it was approved by the board. The proposal will be included in the 2021 rules vote.



CESSATION OF PRACTICE - VOLUNTEER CUSTODIAN ATTORNEY

Voluntary Appointment of Custodian Attorney for Cessation of Practice

In June 2019, the board adopted a resolution requesting the Supreme Court of Texas consider adoption of a comment to Part XIII of the Texas Rules of Disciplinary Procedure to extend a limitation of liability, as well as the attorney-client privilege, to volunteer custodian attorneys designated to assist with the cessation of practice without court involvement. Subsequently, the Supreme Court requested that the committee study and make a recommendation on the matter.

Due to the substantive nature of the issues involved, the committee responded by initiating the rule proposal process for a proposed new rule.

Proposed Rule 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. Proposed Rule 13.04 also provides that the custodian attorney shall observe the attorney-client privilege.



In May 2020, the committee voted to recommend the proposal, and in June 2020, it was approved by the board. The proposal will be included in the 2021 rules vote.

CONFIDENTIALITY OF INFORMATION

Exception to Permit Disclosure to Prevent Client Death by Suicide

In December 2019, the Commission for Lawyer Discipline requested the committee initiate the rule proposal process regarding the subject of confidentiality of information and clients contemplating suicide. The request was based, at least in part, on the frequent calls to the State Bar's ethics helpline from attorneys seeking guidance regarding a lawyer's professional obligations when a client is contemplating suicide.

Proposed Rule 1.05(c)(10) of the Texas Disciplinary Rules of Professional Conduct permits a lawyer to disclose confidential information when the lawyer has reason to believe it is necessary to do so in order to prevent a client from dying by suicide.

In July 2020, the committee voted to recommend the proposal, and in September 2020, it was approved by the board. The proposal will be included in the 2021 rules vote.

REPORTING PROFESSIONAL MISCONDUCT AND RECIPROCAL DISCIPLINE

Federal Court or Federal Agency Discipline

In December 2019, the Commission for Lawyer Discipline requested the committee initiate the rule proposal process to consider extending current self-reporting and reciprocal-discipline provisions to cover discipline by a federal court or federal agency.

The proposal amends Rule 8.03 of the Texas Disciplinary Rules of Professional Conduct and Rules 1.06 and 9.01 of the Texas Rules of Disciplinary Procedure by extending existing self-reporting and reciprocal-discipline provisions to cover certain professional discipline by a federal court or federal agency. The proposal specifically defines "'discipline' by a federal court or federal agency" as meaning 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."

In August 2020, the committee voted to recommend the proposal, and in September 2020, it was approved by the board. The proposal will be included in the 2021 rules vote.



DUTIES TO PROSPECTIVE CLIENT

Proposed Rule 1.18 of the Texas Disciplinary Rules of Professional Conduct expressly addresses the duties owed by a lawyer to a prospective client, including a former prospective client. The proposal is generally based on Rule 1.18 of the American Bar Association (ABA) Model Rules of Professional Conduct. The proposal is intended to provide clarity on the subject.

In October 2020, the committee voted to recommend the proposal to the board.



CESSATION OF PRACTICE - TERMINATION OF CUSTODIANSHIP

This proposal began as a response to a State Bar Board of Directors resolution requesting that the committee initiate the rule proposal process regarding the voluntary appointment of a custodian attorney to assist during a disabling circumstance, as well as based on feedback provided from members of a succession planning task force created by State Bar Immediate Past President Randy Sorrels. However, after publishing an initial proposal, the committee worked with task force members on a revised proposal, which is intended to function in conjunction with previously-recommended proposed Rule 13.04 of the Texas Rules of Disciplinary Procedure.

Proposed Rule 13.05 of the Texas Rules of Disciplinary Procedure expressly sets out ways in which a voluntary custodianship conducted under proposed Rule 13.04 shall terminate. Proposed Rule 13.05 specifically authorizes a court to address disagreements between an appointing attorney and an appointed custodian regarding the appointing attorney's ability to resume practice, as well as the termination of a custodianship conducted pursuant to proposed Rule 13.04.

In October 2020, the committee voted to recommend the proposal to the board.

TERMINOLOGY

This proposal incorporates the Texas Disciplinary Rules of Professional Conduct Terminology as proposed Rule 1.00. The proposal also adds defined terms for "Confirmed in writing," "Informed consent," and "Screened."

In October 2020, the committee discussed reinitiating and republishing the proposal with additional defined terms at a future date.

SALE OF A LAW PRACTICE

In July 2020, the committee initiated the rule proposal process to consider a proposed rule addressing the sale of a law practice. Drafted as proposed Rule 1.17 of the Texas Disciplinary Rules of Professional Conduct, the proposal is substantially based on Rule 1.17 of the ABA Model Rules.

As of the end of 2020, the committee had not published a proposal on the subject. In October 2020, the committee voted to table the subject until the committee's first meeting in 2021, at which time the committee could vote to reinstitute the rule proposal process.



RULES VOTE 2021

RULES VOTE 2021

On September 28, 2020, the State Bar Board of Directors petitioned the Supreme Court of Texas to order a rules vote by bar membership on proposed amendments to the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure. On September 29, 2020, the Supreme Court ordered that a rules vote take place between February 2 and March 4, 2021. Voting will take place via paper and electronic ballots.

In its order, the Supreme Court approved the form of the ballot, which will include eight separate rule proposals on the following subjects:

- 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
- E. Information About Legal Services (Lawyer Advertising and Solicitation)
- F. Reporting Professional Misconduct and Reciprocal Discipline for Federal Court or Federal Agency Discipline
- G. Assignment of Judges in Disciplinary Complaints and Related Provisions
- H. Voluntary Appointment of Custodian Attorney for Cessation of Practice

Each of the eight proposals was recommended by the committee after careful consideration and a significant opportunity for public input. In drafting and recommending the proposals, the committee considered hundreds of public comments, and, in response, made a number of improvements to the proposed rules. Each of the proposals was also approved by the board.

The 2021 rules vote marks a significant opportunity for Texas lawyers to exercise their right of self-governance. The committee believes that the proposed rules will assist lawyers, protect the public, and improve the overall functioning of the judicial system.

The committee expresses its appreciation to the Supreme Court of Texas and the State Bar Board of Directors for their thoughtful consideration and action during the rule proposal process. The committee also thanks members of the public who provided feedback during the process.



For more information about the 2021 rules vote, including to view clean and redlined versions of the proposed amendments, summaries of the proposed amendments, and dates for public forum events, go to texasbar.com/rulesvote.

LOOKING AHEAD

The 2021 rules vote will take place between February 2 and March 4, 2021. This will mark a significant milestone in the work that has taken place since the committee's creation in 2017. Texas lawyers will have a chance to exercise their right of self-governance as they cast their vote on each of the eight separate rule proposals. If a proposed rule is approved by bar membership, it will then go to the Supreme Court of Texas for approval or rejection.



In January and February 2021, committee members will take part in a series of public forum events related to the 2021 rules vote. The events will include an educational overview of the proposed amendments to the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure, as well as an opportunity for members of the public to ask questions or make comments related to the proposed amendments. Public forum events are currently scheduled to take place by videoconference on January 5, January 14, January 26, and February 9, 2021. For more information, including on how to register or view recordings, go to texasbar.com/rulesvote.

Moving forward, the committee will continue its review of the disciplinary rules, as well as its work on a number of rule proposals for potential future consideration by bar membership.

CONTACT US

To review the committee's meeting schedule and for other information about the committee, go to texasbar.com/CDRR.

Or Contact:

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