



COMMITTEE ON DISCIPLINARY RULES AND REFERENDA

2022 Annual Report



COMMITTEE MEMBERS

M. Lewis Kinard - Chair

Timothy D. Belton

Amy Bresnen

Robert Denby

Claude E. Ducloux

Hon. Phyllis Martinez Gonzalez

Harold Frederick "Rick" Hagen

Professor Vincent R. Johnson

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, 2022

Timothy D. Belton (Public Member) – Bellaire¹
Amy Bresnen – Austin²
Harold Frederick “Rick” Hagen – Denton

TERM EXPIRING DECEMBER 31, 2023

Claude E. Ducloux – Austin
Professor Vincent R. Johnson – San Antonio
M. Lewis Kinard, Chair - Dallas³

TERM EXPIRING DECEMBER 31, 2024

Robert Denby - Houston
Hon. Phyllis Martinez Gonzalez - El Paso
Karen Nicholson (Public Member) – Austin

¹Reappointed for term expiring December 31, 2025

²Reappointed for term expiring December 31, 2025

³Reappointed as chair for term expiring December 31, 2023

A NOTE FROM THE CHAIR



This is the 5th Annual Report of the Committee on Disciplinary Rules and Referenda!

This report highlights the work that YOU have helped the committee accomplish in the past 12 months. We cannot be as effective without the countless comments, suggestions, recommendations, and critiques received over the course of evaluating the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure, as the committee is commissioned to do continuously. Every one of you is important to this work and we thank you all for participating. Some of you have gone even further by participating on a drafting subcommittee to ensure that the committee has additional perspectives that our small core committee may lack. It has been great to see that work and to observe the commitment to our profession on display.

Thank you all for another good year for the committee. Please continue to participate and let us know how we are doing.

Lewis Kinard
Chair

A handwritten signature in black ink, appearing to read "Lewis Kinard". The signature is fluid and cursive, with the first name "Lewis" and last name "Kinard" clearly distinguishable.

2022 COMMITTEE

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Timothy D. Belton - Public Member (Bellaire)¹ 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)² is an attorney and lobbyist at BresnenAssociates, 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, women's issues, 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 published an article about the latest 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") that has been downloaded over 4,400 times. Bresnen holds a J.D. from St. Mary's University, an MPA from Texas State University, and a BS in speech communication and a minor in political science from TCU.



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.

¹Reappointed for term expiring December 31, 2025

²Reappointed for term expiring December 31, 2025

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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 215 law reviews and 70 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)³ 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.

³ Reappointed as chair for term expiring December 31, 2023

2022 COMMITTEE

TERM EXPIRING DECEMBER 31, 2024



Robert Denby (Houston) is a member of Vinson & Elkins' Office of the General Counsel and a leading authority on legal ethics, professional responsibility, and risk management for law firms. Prior to joining V&E, Bob spent 16 years at the Attorneys' Liability Assurance Society (ALAS), the premier malpractice carrier for large law firms, including seven years as the head of ALAS' industry-leading Loss Prevention group. He is well-versed in the key risk management issues that law firms encounter and helps the firm and its lawyers navigate those issues. He is an accomplished speaker and nationally recognized as an expert in attorney well-being. Beyond his loss prevention skills, Bob is an experienced trial lawyer and litigation manager.

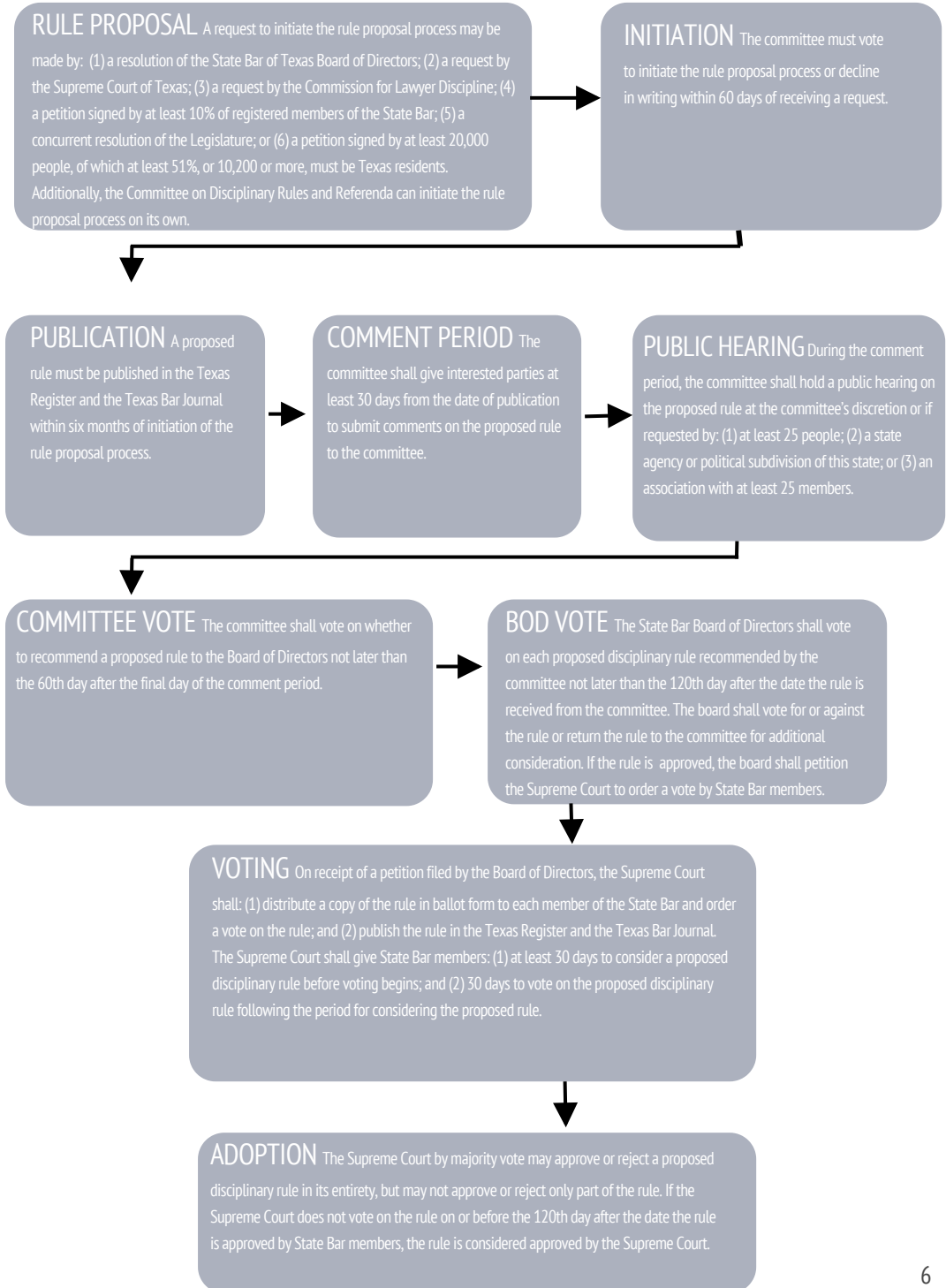


Judge Phyllis Martinez Gonzalez (El Paso) presides over Texas Title IV-D Court #44 (2013). As the only Texas Title IV-D judge with an Enhanced Service Docket (2018), her court links representatives from various community services with individual parties to meet underlying needs. Using an Enhanced Service Docket enables her to assist families in a meaningful way. Judge Gonzalez presents on the national, state, and local levels to educate parents, children, and the legal community. Judge Gonzalez has also served as assistant attorney General and managing attorney for the Texas attorney general and held a dual position as a special assistant United States Attorney and Assistant Attorney General in the Major Crimes Division with the United States Attorney's Office for the Western District of Texas. Judge Gonzalez sits on various advisory boards and boards of directors, as well as National Council of Juvenile and Family Court Judges committees.



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 and the Education Committees. Active in the LWV for many years, she has served as president of LWV Texas and LWV Midland and 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.

RULE PROPOSAL PROCESS

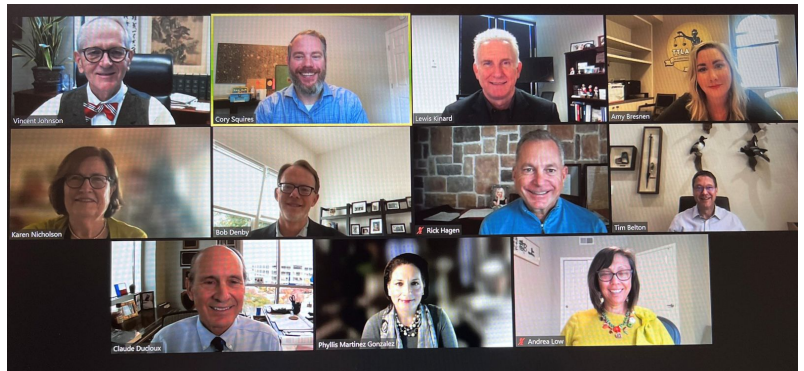


2022 SUMMARY



In 2022, the committee continued its careful review of the Texas Disciplinary Rules of Professional Conduct (“TDRPC”) and the Texas Rules of Disciplinary Procedure (“TRDP”). Throughout the review, the committee maintained its commitment to transparency and public participation in the rule proposal process. The committee held 10 meetings during 2022, which included one public hearing on four proposed rules. The committee used videoconference technology for the meetings and public hearings, which facilitated public participation throughout the rule proposal process. The committee initiated four rule proposals in 2022 and studied and made recommendations regarding interpretive comments.

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



2022 Committee on Disciplinary Rules and Referenda. Pictured Top row, left to right: Professor Vincent R. Johnson, Cory Squires (Staff Liaison), M. Lewis Kinard - Chair, Amy Bresnen. Middle row, left to right: Karen Nicholson, Robert Denby, Harold Frederick “Rick” Hagen, Timothy D. Belton. Bottom row, left to right: Claude E. Ducloux, Hon. Phyllis Martinez Gonzalez, Haksoon Andrea Low (Disciplinary Rules and Referenda Attorney)

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. Members of the public can submit comments on proposed rules through the website and can also sign up for committee email updates. In 2022, the website received 10,280 visits.

During the year, the committee published four rule proposals for public comment in the *Texas Bar Journal* and *Texas Register*, held four public hearings on rule proposals, and received 102 written public comments on rule proposals. Information about rule proposals and public hearings was also emailed to Texas lawyers, committee email subscribers, and other interested parties. The committee used videoconference technology to facilitate public participation in meetings and hearings.

COMMITTEE ACTIVITY	2018	2019	2020	2021	2022	TOTAL
Rule Proposals Initiated	4	3	9	5	5	26
Rule Proposals Published	3	4	8	2	4	21
Rule Proposals Recommended	2	3	7	1	3	16
Rule Requests from Supreme Court	0	1	0	0	0	1
Rule Requests from Board	1	0	1	0	0	2
Rule Requests from Commission for Lawyer Discipline	0	2	0	0	0	2
Self-Initiated Rule Proposals*	3	1	6	5	5	20
Comment Requests from Supreme Court **	1	2	0	2	0	5
Recommendations on Comments	0	2	0	2	1	5
Formal Rule Requests Denied	0	0	0	0	0	0

COMMUNICATIONS	2018	2019	2020	2021	2022	TOTAL
Written Public Comments on Rule Proposals	13	213	75	42	102	403
Email Notices Sent	1	22	20	14	12	54
Public Hearings Held	1	6	9	2	4	20

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

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

RULE REVIEW

CLIENT - LAWYER RELATIONSHIP: TERMINOLOGY

Proposed Rule 1.00, TDRPC, incorporates the current Terminology as a rule, adds five new definitions, and clarifies a current definition. Proposed Rule 1.00 adds defined terms for: 1) “Confirmed in writing;” 2) “Informed consent;” 3) “Represent,” “Represents,” or “Representation;” 4) “Screened;” 5) “Writing” or “Written.” Additionally, proposed Rule 1.00 clarifies the current definition of “Fraud” or “Fraudulent.”



The committee previously initiated the rule proposal process for a version of Rule 1.00 on July 8, 2020, and initiated the process again for a different version of Rule 1.00 on March 3, 2021. On March 4, 2022, the committee re-published the version of the proposed rule published in 2021 because the committee on that date also published related proposed rules that could affect the content of proposed Rule 1.00. In response to feedback received from the public after each publication, comment period, and public hearing, the committee continued to consider and refine the changes to Rule 1.00 before submitting the proposed rule to the board.

On May 4, 2022, the committee voted unanimously to recommend proposed Rule 1.00 to the Board of Directors of the State Bar of Texas for review and consideration. The committee awaits the board's action.

CONFLICT OF INTEREST INVOLVING A FORMER CLIENT AND USE OF SCREENING

Proposed Rules 1.09 and 1.10, TDRPC, address conflicts of interest when a lawyer moves from one firm to another. These proposed rules are based on Model Rules 1.9 (Duties to Former Clients) and 1.10 (Imputation of Conflicts of Interest: General Rule) of the American Bar Association, or “ABA,” Model Rules of Professional Conduct. Proposed Rule 1.09 describes the duties of a lawyer who has formerly represented a client or whose present or former law firm has previously represented a client. Proposed Rule 1.10 endorses the use of screening to manage former-client conflicts of interest and other conflicts arising under Rule 1.06 (Conflict of Interest: General Rule), TDRPC. Screening also would be used to avoid conflicts of interest occurring with prospective clients, if proposed Rule 1.18 (Duties to Prospective Client), TDRPC, were to be adopted.

On May 4, 2022, after considering comments received during the comment period and at the public hearing, the committee voted unanimously to recommend proposed Rules 1.09 and 1.10 to the Board of Directors of the State Bar of Texas for review and consideration. The committee awaits the board's action.

ADVOCATE: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

Proposed Rule 3.09, TDRPC, imposes specific duties upon a prosecutor. Proposed Rule 3.09 adds the requirement that a prosecutor disclose information to the defendant, defense counsel, the tribunal, and an entity that examines and litigates claims of actual innocence in the prosecutor's jurisdiction, or the appropriate prosecutor in the jurisdiction where the conviction was obtained, when the prosecutor knows of new and credible information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted. Proposed Rule 3.09 also requires a prosecutor to take action to ensure the defendant is represented by counsel and to cooperate with defense counsel. The committee proposed interpretive comments to clarify the scope of obligations related to proposed Rule 3.09.

The committee initiated the rule proposal process for Rule 3.09 on October 6, 2021. After soliciting public comments during a comment period and a public hearing that lasted three hours, the committee voted not to recommend the proposed rule to the Board of Directors on June 1, 2022. The committee again initiated the rule proposal process for Rule 3.09 on June 1, 2022. The committee formed a subcommittee, which included four committee members, a non-member prosecutor, and a non-member defense attorney, to consider the rule proposal further. The subcommittee accepted oral and written comments from many parties and considered numerous alternative drafts of the proposed rule. On November 3, 2022, the committee voted not to publish the proposed rule and voted again to initiate the rule proposal process for proposed Rule 3.09.

On November 3, 2022, after initiating the rule proposal process, the committee voted to publish Proposed Rule 3.09 in the January 2023 issue of the *Texas Bar Journal*.



CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS



Proposed Rule 1.08, TDRPC, governs business dealings between a lawyer and a client. The proposed rule specifies and clarifies the actions that a lawyer must take before the lawyer claims to have acquired an ownership or business interest in property belonging to the client.

On November 3, 2022, the committee voted to initiate the rule proposal process for proposed Rule 1.08. Also on November 3, 2022, the committee voted to publish Proposed Rule 1.08 in the January 2023 issue of the *Texas Bar Journal*.

UNAUTHORIZED PRACTICE OF LAW

In 2022, as the committee continued to regularly review the disciplinary rules, the committee considered Rule 5.05, TDRPC, as it relates to the multijurisdictional practice of law. In particular, because the committee found that Rule 5.05 does not provide clear guidance on what is permissible, the committee considered changes that would regulate lawyers who practice remotely from another jurisdiction. The committee continues its review of Rule 5.05 by examining ABA Formal Opinions, caselaw, developments, proposals, advisory opinions, and rules in other jurisdictions.

LAW FIRMS AND ASSOCIATIONS

In 2022, the committee continued to regularly review the disciplinary rules, including Rules 5.01-5.03, TDRPC, regarding supervision of other lawyers and law firm staff, and Rule 5.04, TDRPC, prohibiting the sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers. After its review, the committee determined that Rule 5.02, regarding a supervised lawyer, and Rule 5.03, regarding non-lawyer assistants, do not require amendment.

The committee wished to address the sufficiency of Rule 5.01, regarding the responsibilities of a partner or supervisory lawyer. Because Rule 5.01 does not currently impose a duty on any lawyer to ensure that a law firm has appropriate firm-wide policies and procedures in place, the committee considered a rule requiring that a lawyer with managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with all disciplinary rules. The committee also considered whether Rule 5.01 should impose the duty on all partners in a firm, regardless of whether they have actual managerial responsibility. The committee continues its review of Rule 5.01.

The Texas Access to Justice Commission was tasked with considering modifications to the disciplinary rules that would allow qualified non-attorney paraprofessionals to provide limited legal services directly to low-income Texans and non-attorneys to have economic interests in entities that provide legal services to low-income Texans while preserving professional independence. The committee decided to defer proposing any changes to Rule 5.04 until it can work with the Texas Access to Justice Commission on the rule proposal process and observe the effects of similar rule changes in other states.

NON-CLIENT RELATIONSHIPS

In 2022, the committee continued to regularly review the disciplinary rules, including Part IV, TDRPC, regarding Non-Client Relationships. The committee determined that no changes were needed to Part IV, but that revisions to the comments would clarify the current rules. The committee voted to propose amended comments to the Supreme Court of Texas.



LAWYERS' CLIENT DUE DILIGENCE OBLIGATIONS: CRYPTOCURRENCY

The committee examined the duty of a lawyer who knows that a client is seeking the lawyer's services to further criminal or fraudulent activity involving cryptocurrency under Rule 1.02, TDRPC. The committee considered multiple disciplinary rules that may impose a duty to inquire further about cryptocurrency transactions to avoid assisting criminal or fraudulent activity. Those rules specify the duty of competence and diligence under Rule 1.01, the duty of communication under Rule 1.03, the duty to protect the best interests of an organizational client under Rule 1.12, the duty to withdraw under Rule 1.15, and the duty of honesty and integrity under Rule 8.04.

The committee decided not to initiate the rule proposal process but to track the development of other states' rules and the ABA Model Rules.

INTERPRETIVE COMMENTS

On January 11, 2022, the committee recommended an amendment to Comment 10 to Rule 7.01, TDRPC, to the Supreme Court of Texas. The proposed amendment clarified the meaning of "a false and misleading communication" that is proscribed by Rule 7.01, TDRPC. With the proposed clarifying comment, the proscription in Rule 7.01 specifically applies to a lawyer who advertises the amount of a judgment or verdict, including a default judgment, that was awarded, but never collected or received, and who does not state the amount actually received by the client.

On January 31, 2022, the Supreme Court ordered the amendments, as proposed by the committee, to take effect immediately.



LOOKING AHEAD

The committee remains committed to its purpose. It has lost no momentum and credits its progress to the engagement and participation of State Bar members and the public.

Currently, proposed Rule 1.18, TDRPC, and proposed Rule 13.05, TRDP, have been approved by the Board of Directors of the State Bar of Texas. When deemed appropriate, the board will petition the Supreme Court of Texas to order a referendum vote by the bar membership.

The committee will continue its review of the disciplinary rules, its oversight of the process for proposing a disciplinary rule, and its work on rule proposals for possible future consideration by the 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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