

LEWIS KINARD, CHAIR
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HON. PHYLLIS GONZALEZ
VINCENT JOHNSON
KAREN NICHOLSON

June 26, 2023

Ms. Kennon Wooten, Chair
State Bar of Texas Board of Directors
[REDACTED]

RE: Submission of Proposed Rule Recommendations – Rule 8.05, Texas Disciplinary Rules of Professional Conduct

Dear Ms. Wooten:

Pursuant to Section 81.0875 of the Texas Government Code, the Committee on Disciplinary Rules and Referenda initiated the rule proposal process for proposed Rule 8.05, Texas Disciplinary Rules of Professional Conduct, relating to the Jurisdictional reach of the Rules. The Committee published the proposed rule in the *Texas Bar Journal* and the *Texas Register*. The Committee solicited public comments and held a public hearing on the proposed rule. At its May 3, 2023, meeting, the Committee voted to recommend the proposed rule to the Board of Directors.

Included in this submission packet, you will find the proposed rule recommended by the Committee, as well as other supporting materials. Section 81.0877 of the Government Code provides that the Board is to vote on each proposed disciplinary rule recommended by the Committee not later than the 120th day after the date the rule is received from the Committee. The Board can vote for or against a proposed rule or return a proposed rule to the Committee for additional consideration.

As a reminder, if a majority of the Board approves a proposed rule, the Board shall petition the Supreme Court of Texas to order a referendum on the proposed rule as provided by Section 81.0878 of the Government Code.

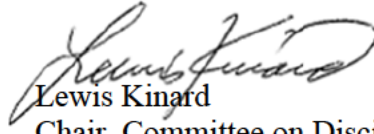
As always, thank you for your attention to this matter and for your service to the State Bar. Should the Board require any other information, please do not hesitate to contact me.

Committee on Disciplinary Rules and Referenda
P.O. Box 12487, Austin, TX 78711

cdr@texasbar.com

www.texasbar.com/cdr

Sincerely,

A handwritten signature in black ink, appearing to read "Lewis Kinard", written in a cursive style.

Lewis Kinard
Chair, Committee on Disciplinary Rules and
Referenda

cc: Cindy V. Tisdale: [REDACTED]

Steve Benesh: [REDACTED]

Laura Gibson: [REDACTED]

Trey Apffel

Ray Cantu

KaLyn Laney

Seana Willing

Chris Ritter

Ross Fischer

Committee on Disciplinary Rules and Referenda

Overview of Proposed Rule

Texas Disciplinary Rules of Professional Conduct

Rule 8.05. Jurisdiction

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda (Committee) related to proposed Rule 8.05 of the Texas Disciplinary Rules of Professional Conduct (TDRPC), relating to Jurisdiction. The Committee initiated the rule proposal process on January 4, 2023.

Actions by the Committee

- **Initiation** – The Committee voted to initiate the rule proposal process at its January 4, 2023, meeting.
- **Publication** – The proposed rule was published in the March 2023 issue of the *Texas Bar Journal* and the March 3, 2023, issue of the *Texas Register*. The proposed rule was concurrently posted on the Committee’s website. Information about the public hearing and the submission of public comments was included in the publications and on the Committee’s website.
- **Additional Outreach** – Email notifications regarding the proposed rule were sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices), Committee email subscribers, and other potentially interested parties on March 21, 2023, and April 4, 2023. An additional email notification was sent to Committee email subscribers on April 7, 2023.
- **Public Comments** – The Committee accepted public comments through April 13, 2023. The Committee received written public comments from seven individuals on the proposed rule.
- **Public Hearing** – On April 12, 2023, the Committee held a public hearing by Zoom teleconference. One individual addressed the Committee at the public hearing.
- **Recommendation** – The Committee voted at its May 3, 2023, meeting to recommend the proposed rule, as published, to the Board of Directors.

Overview

Proposed Rule 8.05, TDRPC, clarifies that a lawyer who is not admitted in Texas is subject to the disciplinary authority of Texas if the lawyer provides or offers to provide any legal services in Texas and that a lawyer may be subject to the disciplinary authority of both Texas and another jurisdiction for the same conduct. The proposed rule incorporates elements of American Bar Association (ABA) Model Rule 8.5(a) and retains portions of current Rule 8.05. The Committee has considered incorporation of other provisions of current Rule 8.05 into a separate rule that the

Committee may recommend as proposed Rule 8.06 (Choice of Law), TDRPC.¹ The Committee has also considered that the remote practice of law has become increasingly common, giving rise to a need for clarification of the jurisdictional rules that apply.²

Additionally, to clarify the duties enumerated by proposed Rule 8.05, the Committee recommends the revision of interpretive comments based in part on the comments to ABA Model Rule 8.5 and the current comments to Rule 8.05.³

Additional Documents

Included in the pages that follow this Overview of Proposed Rule are: 1) proposed Rule 8.05, as published in the March 2023 *Texas Bar Journal* (Bates Numbers 000005 – 000006); 2) proposed Rule 8.05, as published in the March 3, 2023, issue of the *Texas Register* (Bates Numbers 000007 – 000009); 3) public comments received in response to the publications (Bates Numbers 000010 – 000030); 4) the link to the video recording of the Committee’s public hearing on proposed Rule 8.05 conducted by Zoom teleconference on April 12, 2023,⁴ with the name of the speaker and time-stamp of the speaker’s oral comments (Bates Number 000031); and 5) a memorandum on proposed Rule 8.05 dated December 7, 2022, from Committee Member Vincent R. Johnson (Bates Numbers 000032 – 000036).

¹ The Committee held a public hearing on proposed Rule 8.06, TDRPC, on June 7, 2023, and designated the public comment period to end on June 8, 2023.

² The Committee voted to recommend proposed Rule 5.05 (Unauthorized Practice of Law; Remote Practice of Law), TDRPC, to the Board on June 7, 2023.

³ Interpretive comments are promulgated by the Supreme Court of Texas and are not subject to the rule proposal process set out in Subchapter E-1, Chapter 81, Texas Government Code.

⁴ The Committee also heard public comments on proposed Rules 1.08 3.09, 5.01, and 5.05, TDRPC, on April 12, 2023.

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

Rule 8.05. Jurisdiction

The Committee on Disciplinary Rules and Referenda, or CDRR, was created by Government Code section 81.0872 and is responsible for overseeing the initial process for proposing a disciplinary rule. Pursuant to Government Code section 81.0876, the committee publishes the following proposed rule. The committee will accept comments concerning the proposed rule through April 13, 2023. Comments can be submitted at texasbar.com/CDRR or by email to cdrr@texasbar.com. The committee will hold a public hearing on the proposed rule by teleconference on April 12, 2023, at 10 a.m. CDT. For teleconference participation information, please go to texasbar.com/cdrr/participate.

Proposed Rule (Redline Version)

Rule 8.05. Jurisdiction

(a) A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined here for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04.

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority for:

(1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state; and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

Comment:

[1] This Rule describes those lawyers who are subject to the disciplinary authority of this state. It ~~includes~~ encompasses all lawyers licensed to practice here, as well as including lawyers admitted specially for a particular proceeding, as well as lawyers not admitted to practice in this state who provide or offer any legal services in this jurisdiction. This Rule is not intended to have any effect on the powers of a court to punish lawyers for contempt or for other breaches of applicable rules of practice or procedure.

~~[2] In modern practice lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. In doing so, they remain subject to the governing authority of this state. If their activity in another jurisdiction is substantial and continuous, it may constitute the practice of law in that jurisdiction. See Rule 5.05. It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.05 appoints an official to be designated by this court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.~~

~~[3] If the rules of professional conduct of this state and that other jurisdiction differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction and these jurisdictions impose conflicting obligations. A related problem arises with respect to practice before a federal tribunal, where the general authority of the state to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them. In such cases, this state will not impose discipline for conduct arising in connection with the practice of law in another jurisdiction or resulting in lawyer discipline in another jurisdiction unless that conduct constitutes professional misconduct under Rule 8.04. Lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. In doing so, they remain subject to the governing authority of this state. If their activity in another jurisdiction is improper, it may constitute grounds for criminal prosecution or discipline in that jurisdiction based on unauthorized practice of law. See Rule 5.05.~~

~~[4] Normally, discipline will not be imposed in this state for conduct occurring solely in another jurisdiction or judicial system and authorized by the rules of professional conduct applicable thereto, even if that conduct would violate these Rules. This Rule is not intended to have any effect on the powers of a court to punish lawyers for contempt or for other breaches of applicable rules of practice or procedure.~~

Proposed Rule (Clean Version)

Rule 8.05. Jurisdiction

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

Comment:

[1] This Rule describes those lawyers who are subject to the disciplinary authority of this state. It encompasses all lawyers licensed to practice here, including lawyers admitted specially for a particular proceeding, as well as lawyers not admitted to practice in this state who provide or offer any legal services in this jurisdiction.

[2] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of

this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.05 appoints an official to be designated by this court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[3] Lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. In doing so, they remain subject to the governing authority of this state. If their activity in another jurisdiction is improper, it may constitute grounds for criminal prosecution or discipline in that jurisdiction based on unauthorized practice of law. See Rule 5.05.

[4] This Rule is not intended to have any effect on the powers of a court to punish lawyers for contempt or for other breaches of applicable rules of practice or procedure. **TBJ**

ted by an ineligible applicant; the application is not submitted in the manner and form required by the Application Kit; the application is submitted after the deadline established in the Application Kit; or the application does not meet other requirements as stated in the RFA and the Application Kit.

How to Obtain Application Kit: The OAG will post the Application Kit on the OAG's website at <https://www.texasattorneygeneral.gov/divisions/grants>. Updates and other helpful reminders about the application process will also be posted at this location. Potential applicants are encouraged to refer to the site regularly.

Deadlines and Filing Instructions for the Grant Application:

Create an On-Line Account: Creating an on-line account in the Grant Offering and Application Lifecycle System (GOALS) is required to apply for a grant. *If an on-line account is not created, the Applicant will be unable to apply for funding.* To create an on-line account, the Applicant must email the point of contact information to Grants@oag.texas.gov with the following information:

--First Name

--Last Name

--Email Address *(It is highly recommended to use a generic organization email address if available)*

--Organization Legal Name

Application Deadline: The Applicant must submit its application, including all required attachments, to the OAG by the deadline and the manner and form established in the Application Kit.

Filing Instructions: Strict compliance with the submission instructions, as provided in the Application Kit, is required. The OAG will **not** consider an Application if it is not submitted by the due date. The OAG will **not** consider an Application if it is not in the manner and form as stated in the Application Kit.

Minimum and Maximum Amounts of Funding Available: Minimum and maximum amounts of funding are subject to change as stated in the Application Kit. The minimum amount of funding for all programs is \$20,000 per fiscal year. The maximum amount for a program is \$49,500 per fiscal year.

Start Date and Length of Grant Contract Period: The grant contract period (term) is up to two years from September 1, 2023 through August 31, 2025, subject to and contingent on funding and/or approval by the OAG.

No Match Requirements: There are no match requirements.

Award Criteria: The OAG will make funding decisions that support the efficient and effective use of public funds. Scoring components will include, but are not limited to, information provided by the applicant on the proposed project activities and budget. Funding decisions will be determined using a competitive allocation method.

Grant Purpose Area: All grant projects must address one or more of the purpose areas as stated in the Application Kit.

Prohibitions on Use of Grant Funds: OAG grant funds may not be used to support or pay the costs of lobbying; indirect costs; fees to administer a subcontract; any portion of the salary or any other compensation for an elected government official; the purchase of food and beverages except as allowed under Texas State Travel Guidelines; the purchase or lease of vehicles; the purchase of promotional items or recreational activities; costs of travel that are unrelated to the direct delivery of services that support the OAG grant-funded program; the costs for consultants or vendors who participate directly in writing a grant application; or for any unallowable costs set forth in applicable state or federal law, rules, regulations, guidelines, policies, procedures or cost principles. Grant funds may not be used to purchase any other products or services the OAG identifies as inappropriate or unallowable within this RFA or the Application Kit.

OAG Contact Person: If additional information is needed, contact the Grants Administration Division at Grants@oag.texas.gov, or (512) 936-0792.

TRD-202300842

Austin Kinghorn

General Counsel

Office of the Attorney General

Filed: February 22, 2023



State Bar of Texas

Committee on Disciplinary Rules and Referenda Proposed Rule Changes, Rules 1.08, 5.01, 5.05, 8.05, Texas Disciplinary Rules of Professional Conduct

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

Rule 8.05. Jurisdiction

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Proposed Rule (Redline Version)

Rule 8.05. Jurisdiction

(a) A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined here for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04.

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority for:

(1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state; and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

Comment:

[1] This Rule describes those lawyers who are subject to the disciplinary authority of this state. It ~~includes~~ encompasses all lawyers licensed to practice here, ~~as well as~~ including lawyers admitted specially for a particular proceeding, as well as lawyers not admitted to practice in this state who provide or offer any legal services in this jurisdiction. ~~This Rule is not intended to have any effect on the powers of a court to punish lawyers for contempt or for other breaches of applicable rules of practice or procedure.~~

~~[2] In modern practice lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. In doing so, they remain subject to the governing authority of this state. If their activity in another jurisdiction is substantial and continuous, it may constitute the practice of law in that jurisdiction. See Rule 5.05. It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.05 appoints an official to be designated by this court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.~~

~~[3] If the rules of professional conduct of this state and that other jurisdiction differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction and these jurisdictions impose conflicting obligations. A related problem arises with respect to practice before a federal tribunal, where the general authority of the state to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them. In such cases, this state will not impose discipline for conduct arising in connection with the practice of law in another jurisdiction or resulting in lawyer discipline in another jurisdiction unless that conduct constitutes professional misconduct under Rule 8.04. Lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. In doing so, they remain subject to the governing authority of this state. If their activity in another jurisdiction is improper, it may constitute grounds for criminal prosecution or discipline in that jurisdiction based on unauthorized practice of law. See Rule 5.05.~~

~~[4] Normally, discipline will not be imposed in this state for conduct occurring solely in another jurisdiction or judicial system and authorized by the rules of professional conduct applicable thereto, even if that conduct would violate these Rules. This Rule is not intended to have any effect on the powers of a court to punish lawyers for contempt or for other breaches of applicable rules of practice or procedure.~~

Proposed Rule (Clean Version)**Rule 8.05. Jurisdiction**

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

Comment:

[1] This Rule describes those lawyers who are subject to the disciplinary authority of this state. It encompasses all lawyers licensed to practice here, including lawyers admitted specially for a particular proceeding, as well as lawyers not admitted to practice in this state who provide or offer any legal services in this jurisdiction.

[2] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of

this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.05 appoints an official to be designated by this court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[3] Lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. In doing so, they remain subject to the governing authority of this state. If their activity in another jurisdiction is improper, it may constitute grounds for criminal prosecution or discipline in that jurisdiction based on unauthorized practice of law. See Rule 5.05.

[4] This Rule is not intended to have any effect on the powers of a court to punish lawyers for contempt or for other breaches of applicable rules of practice or procedure. **TBJ**

TRD-202300812

Andrea Low

Disciplinary Rules and Referenda Attorney

State Bar of Texas

Filed: February 17, 2023

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Capital Area Rural Transportation System

CARTS Request for Proposal

Capital Area Rural Transportation System (CARTS) invites qualified proposers to submit proposals for the redesign/redevelopment of the existing CARTS website. An RFP will be available for download on the CARTS Website beginning at 5:00 p.m., Tuesday, February 21, 2023. Go to: <http://ridecarts.weebly.com/procurement.html>, and follow the instructions.

The following are the required timeframes for the procurement:

Release of RFP: February 21, 2023

Responses due at 2:00 p.m.: March 21, 2023

Interviews (if necessary): March 29, 2023

Award Anticipated: April 4, 2023

Work Begins: May 1, 2023

Website Launch: August 1, 2023

TRD-202300802

David L. Marsh

CARTS General Manager

Capital Area Rural Transportation System

Filed: February 17, 2023

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Comptroller of Public Accounts

Certification of the Average Closing Price of Gas and Oil--January 2023

The Comptroller of Public Accounts, administering agency for the collection of the Oil Production Tax, has determined, as required by Tax Code, §202.058, that the average taxable price of oil for reporting period January 2023 is \$54.70 per barrel for the three-month period beginning on October 1, 2022, and ending December 31, 2022. Therefore, pursuant to Tax Code, §202.058, oil produced during the month of January 2023, from a qualified low-producing oil lease, is not eligible for credit on the oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined, as required by Tax Code, §201.059, that the average taxable price of gas for reporting period January 2023 is \$3.78 per mcf for the three-month period beginning on October 1, 2022, and ending December 31, 2022. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of January 2023, from a qualified low-producing well, is not eligible for credit on the natural gas production tax imposed by Tax Code, Chapter 201.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of West Texas Intermediate crude oil for the month of January 2023 is \$78.16 per barrel. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall not exclude total revenue received from oil produced during the month of January 2023, from a qualified low-producing oil well.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of gas for the month of January 2023 is \$3.42 per MMBtu. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall exclude total revenue received from gas produced during the month of January 2023, from a qualified low-producing gas well.

Inquiries should be submitted to Jenny Burleson, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

**Committee on Disciplinary Rules and Referenda
Proposed Rule Changes**

**Texas Disciplinary Rules of Professional Conduct
Rule 8.05. Jurisdiction**

**Public Comments Received
Through April 13, 2023**

From: [REDACTED]
To: [cdrr](#)
Subject: Moss Comments on the Proposed Revisions to TDRPC 1.08, 5.01, 5.05 and 8.05
Date: Thursday, March 16, 2023 1:04:55 PM
Attachments: [Moss Comments on proposed TDRPC 1.08.1.docx](#)
[Moss Comments on Proposed TDRPC 5.05.1.docx](#)
[Moss Comments on Proposed TDRPC 5.01.1.docx](#)
[Moss Comments on proposed TDRPC 8.05.1.docx](#)

Dear Rules and Referendum Committee:

I appreciate your hard work in bringing forward these important and necessary changes to the TDRPC, and the opportunity to submit comments.

I have attached, separately, my comments on the four rules. I have very few suggestions about the Rules themselves. Most of my observations and suggestions concern the proposed Comments.

In reading my suggestions, I hope you will not view them as mere pedantic quibbling with the language of the proposed comments, most of which are taken verbatim from the Model Rules. That many of the Comments that I complain about are from the Model Rules does not, I think, make them sacrosanct. Several are flawed. The Model Rules drafters were fallible, and I think that we (you) can do better.

I fear that revising the Comments at this point may entail some delay and complications, and that this may inhibit the Committee's willingness to revisit and revise Comments. In any event, I hope the Comments can be revised by you or the Court without too much difficulty.

Thank you for your attention and consideration.

Prof. Fred C. Moss (Emeritus)
 Dallas

 One does not ask of one who suffers: What is your country and what is your religion? One merely says: You suffer, that is enough for me. –Louis Pasteur, chemist and bacteriologist (27 Dec 1822–1895)

Moss comments on proposed revisions to TDRPC 8.05

1. Critically, this proposal makes subject to Texas discipline a Texas lawyer who personally or through branch offices engages in professional conduct in another state that is improper in this state but is proper in the other state. I am, of course, thinking of the Texas firm that is headquartered in D.C. where it is permissible to have non-lawyer partners/shareholders. Are the firm's Texas lawyers subject to discipline in Texas because they are partners or shareholders in that firm and that firm has non-lawyer partners in its D.C. office? I see no exemption of the Texas lawyers in the proposed revision. There are many differences in the ethics rules across the nation. Hypothetically, what if State X's rules do not require a 30-day waiting period before a lawyer may contact an accident victim by mail, but the Texas Rules do. Will a Texas lawyer be disciplined if she contacts a victim in State X before 30 days have passed since the accident? If a lawyer's or a firm's conduct is limited to the jurisdiction where it is permitted, it should be of no concern here. Texans do not need to be protected from professional conduct that does not touch them.

This "it's ok if it is permitted where it happened" exemption ("Normally"?) is currently in Comment [4]. Has the TCRR undone this on purpose? This Rule should not only keep current Comment [4] but elevate it to be in the Rule itself as it does not belong in a Comment. Or, the Committee should adopt Model Rule 8.5's "choice of law" provision which states, in effect, that if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominate effect of the lawyer's conduct will occur, the lawyer is not subject to discipline in this jurisdiction.

Without this exemption, this proposal is blind to the realities of modern multi-jurisdictional law practice.

2. Regarding Comment [2], the sentence, "A lawyer who is subject to the disciplinary authority of this jurisdiction under ~~Rule 8.05~~ [this Rule] appoints an official to be designated by this court to receive service of process in this jurisdiction," is puzzling. What court is "this court"? Is this a typo? Shouldn't "by this court" simply be deleted? And as for "appoints," should this read, "and who is required to appoint . . . ?" Also, there should be a reference to whatever law or rule that requires every Texas and out-of-state lawyer authorized to practice in Texas to designate an agent for service of process. This requirement is not in the TDRPC.

From: [REDACTED]
To: [cdrr](#)
Subject: CDRR Comment: Comment on Proposed Rule 8.05
Date: Tuesday, March 21, 2023 10:22:55 AM

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

Contact

First Name	Jason
Last Name	Van Dyke
Email	[REDACTED]
Member	Yes
Barcard	24057426

Feedback

Subject	Comment on Proposed Rule 8.05
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Comments

It is my opinion that this rule should clarify that a lawyer who is licensed in more than one jurisdiction, and subject to discipline in more than one jurisdiction, cannot be disciplined twice for the same misconduct. Example: A lawyer is licensed to practice in Texas, Oklahoma, and Louisiana. He is convicted of misdemeanor theft in Texas. The state bar of Texas punishes the lawyer with a 1 year suspension. Oklahoma imposes reciprocal discipline. Louisiana, however, rather than imposing reciprocal discipline, initiates its own disciplinary process and disbars the lawyer in Louisiana. Under the current rules, the lawyer could theoretically be subject to disbarment as reciprocal discipline in Texas for based on the disbarment in Louisiana even though it could constitute a second punishment for the same misconduct. The rules need to clarify that a lawyer subject to discipline in both Texas and a foreign jurisdiction may only be disciplined in Texas a single time for a single act of misconduct.

From: [Austin Kinghorn](#)
To: [cdrr](#)
Cc: [GeneralCounsel](#)
Subject: OAG comment to proposed Rule 8.05
Date: Thursday, April 13, 2023 10:02:28 PM
Attachments: [image001.png](#)
[OAG Comment to proposed Rule 8.05.pdf](#)

To whom it may concern:

Please see the attached comment on proposed Disciplinary Rule of Professional Conduct 8.05 submitted by the Office of the Attorney General.

Respectfully,



Austin Kinghorn
General Counsel
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KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 13, 2023

State Bar of Texas
Committee on Disciplinary Rules and Referenda
Texas Law Center
1414 Colorado Street
Austin, Texas 78701
Submitted by email: cdrv@texasbar.com

Re: Proposed Disciplinary Rule of Professional Conduct 8.05

To whom it may concern:

The State Bar of Texas currently exercises limited disciplinary jurisdiction over a lawyer's out-of-state conduct. Without justification, proposed Disciplinary Rule of Professional Conduct 8.05 pushes the Bar's jurisdiction to its maximum possible reach while erasing all existing limitations and commentary that is supportive of a more measured approach. Proposed Rule 8.05 should be rejected.

Rule 8.05 currently provides that a Texas lawyer is subject to discipline for conduct "occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04" or if the out-of-state conduct relates to certain types of out-of-state advertisements or solicitations. Proposed Rule 8.05 disregards these limitations entirely, opting instead for the expansive position that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless where the lawyer's conduct occurred." Similarly, current comment 3 to Rule 8.05, which articulates several policy-based rationales for limitations on the Bar's out-of-state disciplinary authority, would be replaced with a new comment that makes no attempt to explain the rationale of the rule it supports. New comment 3 would instead flatly declare that Texas lawyers who practice in other states "remain subject to the governing authority of this state."

The Bar has not articulated any justification for this dramatic expansion of its authority. Rather, it seeks to bestow upon itself the broadest jurisdiction its drafters can contemplate. Similarly, the commentary to proposed Rule 8.05 is more notable for what it erases than what it says. Without providing any meaningful explanation or rationale for doing so, the takeaway is simply that the Bar intends to exercise jurisdiction wherever and however it pleases.

Moreover, proposed Rule 8.05 deletes the existing reference to "professional misconduct" as the only basis for disciplinary action and replaces this standard with reference to mere "conduct"

without connection to any standard imposed by the Texas Disciplinary Rules of Professional Conduct. In addition to implicitly admitting the validity of OAG's jurisdictional argument made in disciplinary proceedings the Bar has brought against Attorney General Ken Paxton relating to this office's decision to file *Texas v. Pennsylvania* in the United States Supreme Court, this alteration imposes an unworkably vague standard with respect to the Bar's jurisdiction over out-of-state disciplinary matters.

This office has previously argued in a motion to dismiss disciplinary proceedings filed against Attorney General Paxton that Texas Rule of Disciplinary Procedure 1.06 limits the Bar's jurisdiction over out-of-state disciplinary matters. Specifically, Rule 1.06 defines "professional misconduct" in part to include "[a]ttorney conduct that occurs in another jurisdiction, including before any federal court or federal agency, and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct." Tex. R. Disciplinary P. 1.06(CC)(2). Thus, Rule 1.06 provides that disciplinary action taken by another jurisdiction must precede disciplinary action brought by the Texas Bar for the same out-of-state conduct. Accordingly, the omission of a reference to "professional misconduct" raises the concern that the new proposed standard is a tacit admission that the Bar's current disciplinary proceedings against Attorney General Paxton are jurisdictionally flawed.

Proposed Rule 8.06—which is closely related to proposed Rule 8.05 but not listed for consideration at the Bar's April 12 public hearing—would attempt to set guidance in resolving conflicts of laws when the Bar attempts to discipline Texas attorneys for out-of-state conduct. Notably, comment 3 to current Rule 8.05 addresses the pitfalls and policy concerns that follow attempts to resolve conflict-of-law issues in the attorney-discipline context. Proposed rules 8.05 and 8.06 entirely ignore these concerns. Moreover, proposed rule 8.06's framework for choosing which State's disciplinary rules to apply belies its position that it intends to enforce the disciplinary rules of *other* jurisdictions to discipline Texas lawyers for violations in other states—including conduct that might be permissible under Texas's rules as well as standards imposed by other states that were considered and expressly rejected in Texas. *See* proposed Rule 8.06(a)(2) (" . . . for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct"). It is presumptuous of the Bar to designate itself the enforcer of fifty states' and additional territories' disciplinary rules, both because the Bar lacks the expertise to do so and because each of those states and territories has its own disciplinary process and procedures for regulating the practice of law within its respective jurisdiction.

This proposed rewrite of Rule 8.05, and the pending addition of new Rule 8.06, cannot be read in isolation from the Bar's current politically charged litigation against Attorney General Paxton. It is well-known that the Bar is already attempting to establish new jurisdictional precedent by bringing disciplinary action against the duly elected attorney general for exercising the constitutional authority vested in him by the people of Texas. We remain confident that these proceedings—both of which are under review by appeals courts for jurisdictional concerns—will ultimately be thrown out of court as extra-jurisdictional abuses of the Bar's disciplinary rules and procedures.

Nonetheless, the parallels are noteworthy—the Bar is doing its level best to dramatically expand its control over the exercise of the legal profession in Texas, both through unprecedented enforcement of existing rules in the courtroom and through the development of new rules that would drastically expand the Bar’s jurisdiction. It is not the response one might have hoped for after the United States Fifth Circuit Court of Appeals concluded that the Bar engages in political and ideological activities in violation of the First Amendment. *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021).

Sincerely,



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(512) 477-2348 (fax)

From: [Peter Lomtevas](#)
To: [cdrr](#)
Subject: Re: Seeking Comments on Proposed Rules 1.08, 3.09, 5.01, 5.05, 8.05, TDRPC
Date: Tuesday, March 21, 2023 11:26:47 AM

To The CDRR,

As For Rule 3.09 Special Responsibilities of a Prosecutor

In (f): What puzzles me is that the rule must specify in writing that a prosecutor cannot fake a case. Was faking a case the norm before this rule? Is this newly included paragraph a reaction to all the innocent people imprisoned falsely?

In General: Why are missing any specified sanctions and punishments of prosecutors who fake cases? We have these rules, so what if a prosecutor breaks any?

In the Comments Section: What puzzles me is that in a government that must be open and in cases where proceedings are public, what "privileged" information can a prosecutor have that is not subject to disclosure? Who makes that call among prosecutors that something possibly exculpatory can be deemed "privileged?"

As for Rule 1.08 - Conflicts of Interest

Comments: I completely disagree with the underlying assumption contained within this comment that lawyers are tricky, evil geniuses and businessmen who want to enter into business with a lawyer are idiots. The reality is the opposite: the businessman is crafty, and the lawyer is perfectly naive given the weak legal education (focused on federal law) he has received in law school compounded by the weak preparation afforded by bar review (focused on state law). Businessmen learn by daily experience while lawyers study the test.

Hence, the various statement made as to how clients are at risk without careful and independent guidance is a mind fake that places at risk the attorney who may want to leave private practice because of all the risk that entails.

As for Rule 5.01 - Responsibilities of a Supervisory Lawyer

I do not care what amendments take place that pertain to large attorney organizations. I only care about the solo practitioner and all the pitfalls in the rules that face him.

However, lawyers make awful leaders, and imposing upon them a duty to spot misconduct can be overwhelming.

Rule 5.05 - As For Unauthorized Practice of Law

I oppose state-level licensure of lawyers. This rule, whether in its old form or its new form, supports the isolation and protection of groups of lawyers and judges who are without public review and scrutiny. These groups become comfortable with each other and can rip off innocent citizens who believe there is justice in those courts.

This isolation from view mutates into appellate court complacency characterized by affirming every order entered by the trial court. Municipalities can be made immune from suit by a judge who is elevated, paid and promoted by the municipality. Lawyers stay quiet so they can win cases before such a judge. Judges can use any political fad in their orders, and no one can question them.

In recent years, political fads are now baked into statutes that judge cannot question. So, a parent who loses a child because of domestic violence has no recourse: has no defense, has no appeal. How about the child? We have unexplained school shootings around this nation. Are groups of lawyers and judges implementing federal family legislation at the root of these? An outsider cannot come without a year-long delay because of licensure?

I also oppose the law examiner's board review of lawyers seeking admission from state to state. Even the most trouble-free attorney must have all his complaints and arbitration re-litigated before each subsequent review board. In one state, client suits against the lawyer must be picked through. In other states, a lawyer's suits against clients must be picked through. Full faith and credit of one state's adjudications of a lawyer's misconduct mean nothing. This must stop.

I support a universal law license that is in force throughout the nation in any court. No state's laws are unique especially those preempted by federal legislation. The question is what has not been preempted by federal legislation? Which attorney cannot learn quickly a state's variations in the law and properly represent the public.

I do not subscribe to the idea that law licensure protects the hapless client from a bad lawyer. I submit that the lawyer needs better protection from the bad client. But that is a topic for a different discussion because we do not have a code of conduct for clients.

As for Rule 8.05 - Jurisdiction

Lawyers understand they have lost very many of the civil rights over the years. We cannot speak freely. We have to watch how we assemble in protests. I was a litigant in a contract dispute with an auto dealer where the imbecile judge yelled out, "You're a lawyer! This case cries out for a number," meaning I had no case and I had to settle while the dealer faked his case with no contractual terms giving rise to the suit. A well placed judicial complaint caused a judicial recusal, and a different judge decided the case on its merits.

Now comes multiple jeopardy again the lawyer. I am admitted in four states and like a game of dominoes, if a client fakes a charge against me that one state sustains, I lose all four state licenses. Violence including rape makes for sensational disbarments.

The language of your proposal, as the language in all your previous proposals, tightens the noose around the neck of the lawyer. The word, "may" is now replaced with "is subject to." What was a possibility is now a definite. Attorney discipline is becoming a turkey shoot.

The impact upon the public is devastating. Lawyers who leave practice cause a drop in supply which elevates counsel fees for the remaining population. If the idiot client made the complaint, then that client cut the branch upon which he sat. Disciplinary committees of non-practicing lawyers end up incorrectly deciding the lawyer's discipline, and another lawyer leaves practice.

There is also the loss of subject matter expert attorneys who leave. One area well publicized as enduring the most attorney discipline complaints is family law. Non-family practitioners discipline family law lawyers, and when those leave practice, clients have even fewer family lawyers from whom to hire.

This highly concentrated batch of practitioners does not operate in the client's best interests, but rather in their own best interests. Cases are decided with discipline in mind (heavy stippling), and the outcomes rarely match the facts and the law. A judge only needs to say "boo" at the lawyer, and the stipulation of settlement comes right away selling out the lawyer's client.

Comment: This statement is vague: *as well as lawyers not admitted to practice in this state who provide or offer any legal services in this jurisdiction*. What is a "legal service?" Is it advice online? Is it what?

Comment: This is not true - *lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction*. Lawyer discipline has nothing to do with protecting clients; it has everything to do with protecting groupings of local judges and their local lawyers from exposure. Clients are not stupid and lawyers are not geniuses.

Comment: *The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters*. This is also ridiculous. A law license, like a driver license, does not make a lawyer an agent of the state. Lawyers are supposed to be independent of the state, and operate on both sides of a controversy. Here, the state has taken up a superior role as if the state is command headquarters and the lawyer is a soldier on the front. Personal service of process cannot be to the state because lawyers are not agents of the state; instead service of civil process must remain "personal" and not artificial.

Ultimately, the crossed off portions of the Comment section provided better protections for lawyers. I do not understand why the state has taken up arms against lawyers, but that is something we should be asking the voters in this state.

Peter

www.lomtevas.com

On Tuesday, March 21, 2023 at 10:03:29 AM CDT, State Bar of Texas - CDRR <cdr@texasbar.com> wrote:

State Bar of Texas



Proposed Rules Published

Public Comments Sought

Proposed Rules 1.08 (Conflict of Interest: Prohibited)

Transactions), 3.09 (Special Responsibilities of a Prosecutor), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), 8.05 (Jurisdiction), TDRPC

The Committee on Disciplinary Rules and Referenda published [Proposed Rule 3.09 \(Special Responsibilities of a Prosecutor\)](#) of the Texas Disciplinary Rules of Professional Conduct in the January issue of the Texas Bar Journal and the January 13 issue of the Texas Register. The Committee on Disciplinary Rules and Referenda published [Proposed Rules 1.08 \(Conflict of Interest: Prohibited Transactions\), 5.01 \(Responsibilities of a Partner or Supervisory Lawyer\), 5.05 \(Unauthorized Practice of Law; Remote Practice of Law\), and 8.05 \(Jurisdiction\)](#) of the Texas Disciplinary Rules of Professional Conduct in the March issue of the Texas Bar Journal and the March 3 issue of the Texas Register.

The Committee will accept comments concerning Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05, TDRPC, through April 13, 2023. Comments can be submitted [here](#), or by email to cdr@texasbar.com.

The Committee will hold a public hearing on Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05 by teleconference at 10:00 a.m. CDT on April 12, 2023. For teleconference participation information, please go to texasbar.com/cdr/participate. If you plan to address the Committee at the public hearing, it is requested that you email cdr@texasbar.com in advance of the hearing stating on which rule(s) you will comment.

Additional Information

The Committee is responsible for overseeing the initial process for proposing a change or addition to the disciplinary rules (Gov't Code § 81.0873). For more information, go to texasbar.com/cdr.

To subscribe to email updates, including notices of public hearings and published rules for comment, click [here](#).

Committee on Disciplinary Rules and Referenda

State Bar of Texas | 1414 Colorado | Austin, Texas 78701 | 800.204.2222

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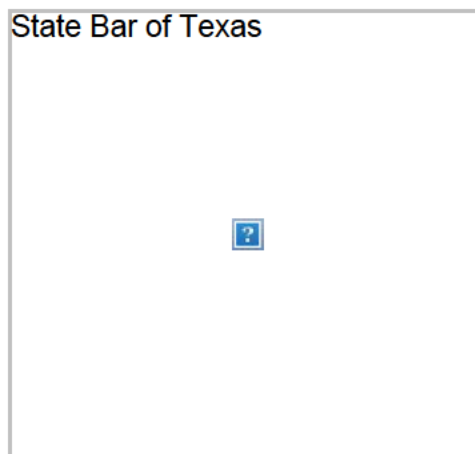
Higher Logic



From: [John McIntyre](#)
To: [cdrr](#)
Subject: Re: Seeking Comments on Proposed Rules 1.08, 3.09, 5.01, 5.05, 8.05, TDRPC
Date: Tuesday, March 21, 2023 11:27:08 AM

OVERBROAD , VIOLATE FREEDOM OF SPEECH, AND FREEDOM OF CONTRACT ! DUPLICITY TOO!

On Tuesday, March 21, 2023 at 10:02:49 AM CDT, State Bar of Texas - CDRR <cdrr@texasbar.com> wrote:



Proposed Rules Published

Public Comments Sought

Proposed Rules 1.08 (Conflict of Interest: Prohibited Transactions), 3.09 (Special Responsibilities of a Prosecutor), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), 8.05 (Jurisdiction), TDRPC

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hearing, it is requested that you email cdrr@texasbar.com in advance of the hearing stating on which rule(s) you will comment.

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Committee on Disciplinary Rules and Referenda

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From: [Louis Leichter](#)
To: [cdrr](#)
Subject: RE: Public Hearing Reminder - Proposed Disciplinary Rule Changes
Date: Tuesday, April 4, 2023 10:29:40 AM
Attachments: [image001.png](#)

Good luck

Very truly yours,

Louis Leichter, Principal/Attorney




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***Meetings with lawyers are by appointment only at these locations.**

www.LeichterLaw.com » Video conferencing: 3000452@lifesizecloud.com

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From: State Bar of Texas - CDRR <cdrr@texasbar.com>
Sent: Tuesday, April 4, 2023 10:04 AM
To: Louis Leichter 
Subject: Public Hearing Reminder - Proposed Disciplinary Rule Changes

State Bar of Texas

Public Hearing Reminder

April 12 Public Hearing on Proposed Rules 1.08 (Conflict of Interest: Prohibited Transactions), 3.09 (Special Responsibilities of a Prosecutor), 5.01 (Responsibilities of a Partner or Supervisory Lawyer), 5.05 (Unauthorized Practice of Law; Remote Practice of Law), 8.05 (Jurisdiction), TDRPC

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The Committee will continue to accept comments concerning Proposed Rules 1.08, 3.09, 5.01, 5.05, and 8.05 through April 13, 2023. Comments can be submitted [here](#), or by email to cdrr@texasbar.com.

Additional Information

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Committee on Disciplinary Rules and Referenda

State Bar of Texas | 1414 Colorado | Austin, Texas 78701 | 800.204.2222

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From: [Seana Willing](#)
To: [cdrr](#)
Cc: [Andrea Low](#)
Subject: Re: Written Comments from CDC on Proposed Rule Changes
Date: Tuesday, April 11, 2023 4:40:48 PM
Attachments: [CDC Comments \(041123\).docx](#)
[Administering Justice Maryland Interprets Rule 3.8\(d\).pdf](#)

Andrea, I received feedback from our Ethics Helpline Attorneys as well as from CDC Regional Counsel regarding some of the proposed rule changes. We hope these written comments will prove helpful for the committee.

I will see you tomorrow at the Public Hearing; however, I do not intend to address the committee or make any public comments at the hearing. If asked, I can try to answer questions but we hope the memo speaks for itself.

Thank you!

Seana

STATE BAR OF TEXAS

*Office of Chief Disciplinary Counsel*

Date: April 11, 2023

To: Andrea Lowe, Rules Attorney

From: Seana Willing, Chief Disciplinary Counsel

Re: CDC Comments on Proposed Rules

Andrea,

Please accept these comments from the Office of Chief Disciplinary Counsel regarding some of the proposed rule changes being considered at the Public Hearing on April 12, 2023. The comments and recommendations are the result of consultation with CDC Regional Counsel and the Bar's Ethics Attorneys, who are happy to provide additional information is needed.

Regarding proposed TDRPC Rule 1.08:

We understand that the CDRR is substantively following the ABA Model Rule in its revisions of 1.08(a) and that the proposed comments are the same verbatim.

We would point out that the use of the words "or" and "adverse" in the first paragraph of the proposed rule may be problematic. For example, a fee agreement that includes stock in a start-up company to pay for the lawyer's services requires compliance with Rule 1.08(a) under Comment 1; however, is such an arrangement *adverse* to a client who has no other means to afford legal services? If it is not an adverse acquisition of stock, why does Comment 1 say it has to follow the rule?

Suggestion: Instead of saying "adverse to a client" substitute "prohibited by Rule 1.06." It is stronger than Comment 3 since not all conflicts can be waived under 1.06.

With regard to Comment 1 to Rule 1.08, which specifically states that the rule does not apply to "ordinary fee agreements," we would raise a concern with regard to *renegotiated* fee

agreements during the course of representation. Despite the conclusion in Ethics Opinion 679, the case law is clear about the presumption of unfairness to the client under these circumstances leading to the need for an additional requirement of fairness to the client if they negotiate a *new* fee agreement during the course of the representation. In such a situation, the attorney would still be able to rebut the presumption of unfairness.

We would like to see the Comment to 1.08 clarified to address that the rule *does* apply to renegotiated fee agreements; it should only exclude the original fee agreement which is negotiated before the creation of the attorney-client relationship.

Finally, Comment 1 talks about a lawyer being able to loan a client money. Depending on the fact pattern, such a loan may violate Rules 1.08 (d), (h) and, or 7.03(f). Comment 1 does not reference these rules.

Regarding proposed TDRPC Rule 3.09:

Our concern is that the added obligations to notify defendants or defense attorneys of the new information will be difficult to enforce when considering paragraph (g): *“A prosecutor who concludes in good faith that information is not subject to disclosure under paragraph (f) does not violate this rule even if the prosecutor’s conclusion is subsequently determined to be erroneous.”* It would be helpful to include a requirement that the prosecutor document in the State’s file that s/he has knowledge of the new information and the reason(s) why the prosecutor determined that the information is not subject to disclosure. Having to create and maintain such a written record may prevent situations where prosecutors have allegedly ignored new information that does not support their theory of the case.

We also have a concern to the extent that the proposed changes require the CDC and grievance committee panels to make the determination that the new and credible information creates a likelihood that the convicted defendant did not commit the offense. We would prefer that we not have to make that determination in a disciplinary case.

We have also attached an article, *Attorney Grievance Commission of Maryland v. Cassilly*, which demonstrates the need for the CDRR’s proposed rule changes.

Regarding proposed TDRPC Rule 5.01:

We support this rule change but suggest moving paragraphs (a) and (b) to comments since it is not clear whether and to what extent it would be a rule violation if an attorney did not comply with these provisions. Instead, these provisions could be factors to use to prove a violation of paragraph (c), which provides a clearer violation.

Nevertheless, we support the language providing the following preventative measure: *“...shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to these Rules.”* This is a subtle but important difference from the rule as it currently reads.

Additionally, we suggest the use of “Texas Disciplinary Rules of Professional Conduct” in Comments 1 and 8, as opposed to a generic reference.

Regarding proposed TDRPC Rule 5.05:

Including information and guidance regarding the remote practice of law is a welcome and overdue clarification to Rule 5.05 and will provide guidance to many attorneys calling for assistance on the Ethics Helpline. However, the comments provided by the UPLC regarding the proposed changes to Rule 5.05 also deserve serious consideration.

Regarding proposed TDRPC Rule 8.05:

As we pointed out earlier, Section 81.071 of the Texas Government Code controls jurisdiction in disciplinary proceedings and actions. According to statute, “[e]ach attorney admitted to practice in this state and each attorney specially admitted by a court of this state for a particular proceeding is subject to the disciplinary and disability jurisdiction of the supreme court and the Commission for Lawyer Discipline, a committee of the state bar.” Although clarification of Rule 8.05 is welcome since the Ethics Helpline Attorneys receive many calls from attorneys licensed outside of Texas who are interested in providing or offering legal services in Texas, it remains unclear to us whether the Court, by rule, can alter whether or to what extent attorneys who are not admitted to practice in this state would fall under the jurisdiction of the Court and the CFLD.

Additionally, it is unclear what this sentence in Comment 2 means: “A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.05 appoints an *official* to be designated by this *court* to receive service of process in this jurisdiction.” These terms could use clarification.

Suggestion: Define or explain “an official.” Use “a tribunal” instead of “this court” so that it applies to evidentiary hearings.

Thank you for your consideration of this request. Please let us know if we can provide any additional information to the Committee.

**Video of Public Hearing on Proposed Rule 8.05 of the Texas Disciplinary
Rules of Professional Conduct**

**Held on April 12, 2023, by the Committee on Disciplinary Rules and
Referenda**

Video of Public Hearing on April 12, 2023

<https://texasbar-wo4m90g.vids.io/videos/d39fd8b21c10e9c55a/cdrr-meeting-april-12-2023>

Comment on proposed Rule 8.05:

Jerry R. Hall at 1:38:52

Proposal: Delete Current TDRPC Rule 8.05 (Jurisdiction). Replace it with two new rules: Proposed TDRPC Rule 8.05 (Jurisdiction) and Proposed TDRPC Rule 8.06 (Choice of Law). The new proposed rules will be mainly based on Model Rule 8.5, but will incorporate valuable material from the current Texas DRPC. The footnotes below are for information only, and will be deleted prior to adoption.

Current TDRPC 8.05 now reads:

Rule 8.05. Jurisdiction

(a) A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined here for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04.

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority for:

(1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state; and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.

COMMENT:

1. This Rule describes those lawyers who are subject to the disciplinary authority of this state. It includes all lawyers licensed to practice here, as well as lawyers admitted specially for a particular proceeding. This Rule is not intended to have any effect on the powers of a court to punish lawyers for contempt or for other breaches of applicable rules of practice or procedure.

2. In modern practice lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. In doing so, they remain subject to the governing authority of this state. If their activity in another jurisdiction is substantial and continuous, it may constitute the practice of law in that jurisdiction. See Rule 5.05.

3. If the rules of professional conduct of this state and that other jurisdiction differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction and these jurisdictions impose conflicting obligations. A related problem arises with respect to practice before a federal tribunal, where the general authority of the state to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them. In such cases, this state will not impose discipline for conduct arising in connection with the practice of law in another jurisdiction or resulting in lawyer discipline in another jurisdiction unless that conduct constitutes professional misconduct under Rule 8.04.

4. Normally, discipline will not be imposed in this state for conduct occurring solely in another jurisdiction or judicial system and authorized by the rules of professional conduct applicable thereto, even if that conduct would violate these Rules.

Current TDRPC Rule 8.05 will be replaced by Proposed Rules 8.05 (Jurisdiction) and 8.06 (Choice of Law). The text of Proposed TDRPC is more complete than the current rule. For example, unlike current Texas Rule 8.05, it addresses and makes clear that “A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction”¹ and that “A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.”² The text of Proposed TCRPC Rules 8.05 and 8.06 follows:

Proposed TDRPC Rule 8.05 Jurisdiction

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.³

¹ MR 8.5(a)

² MR 8.5(a).

³ MR 8.5(a).

Comments

1. This Rule describes those lawyers who are subject to the disciplinary authority of this state. It encompasses all lawyers licensed to practice here, including lawyers admitted specially for a particular proceeding, as well as lawyers not admitted to practice in this state who provide or offer any legal services in this jurisdiction.⁴
2. It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.⁵
3. Lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. In doing so, they remain subject to the governing authority of this state. If their activity in another jurisdiction is improper, it may constitute grounds for criminal prosecution or discipline in that jurisdiction based on unauthorized practice of law. See Rule 5.05.⁶
4. This Rule is not intended to have any effect on the powers of a court to punish lawyers for contempt or for other breaches of applicable rules of practice or procedure.⁷

Proposed TDRPC Rule 8.06 Choice of Law

(a) In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise;
and

⁴ Based in part on TDRPC Rule 8.05(a).

⁵ MR Rule 8.5 cmt. 1.

⁶ Based in part on TDRPC Rule 8.05 cmt. 2.

⁷ TDRPC 8.05 cmt. 1.

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

(b) A lawyer admitted to practice in this state is subject to the disciplinary authority for:

(1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state;⁸ and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.⁹

Comments¹⁰

1. A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

2. Paragraph (a) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

⁸ TDRPC Rule 8.05(b)(1).

⁹ TDRPC Rule. 8.05(b)(2).

¹⁰ The comments below are taken verbatim from MR Rule 8.5 cmt. 2-7.

3. Paragraph (a)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of professional conduct of that tribunal. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (a)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

4. When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (a)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

5. If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

6. The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.