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HON. PHYLLIS GONZALEZ
VINCENT JOHNSON
KAREN NICHOLSON

August 9, 2023

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

RE: Submission of Proposed Rule Recommendations – Rule 8.06, 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 8.06, Texas Disciplinary Rules of Professional Conduct, relating to Choice of Law. 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 August 2, 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.

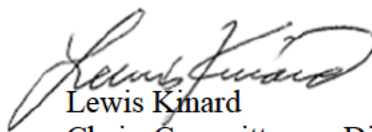
As always, thank you for your attention to this matter and for your service to the State Bar. Should the Board require any other information, please do not hesitate to contact me.

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

cdrr@texasbar.com

www.texasbar.com/cdrr

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 8.06. Choice of Law

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda (Committee) related to proposed Rule 8.06 of the Texas Disciplinary Rules of Professional Conduct (TDRPC), relating to Choice of Law. The Committee initiated the rule proposal process on February 1, 2023.

Actions by the Committee

- **Initiation** – The Committee voted to initiate the rule proposal process at its February 1, 2023, meeting.
- **Publication** – The proposed rule was published in the April 2023 issue of the *Texas Bar Journal* and the April 7, 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 April 25, 2023, and May 8, 2023. An additional email notification was sent to Committee email subscribers on June 2, 2023.
- **Public Comments** – The Committee accepted public comments through June 8, 2023. The Committee received written public comments from six individuals on the proposed rule.
- **Public Hearing** – On June 7, 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 August 2, 2023, meeting to recommend the proposed rule, as published, to the Board of Directors.

Overview

Proposed Rule 8.06, TDRPC, is intended to operate in conjunction with proposed Rule 8.05 (Jurisdiction), TDRPC.¹ The two proposed rules would replace current Rule 8.05. By amending the current Rule 8.05 and adding a new Rule 8.06, the proposed rules together would clarify that a lawyer who is admitted to practice in Texas would be subject to the disciplinary authority of Texas regardless of where the lawyer's conduct occurs, a lawyer who is not admitted in Texas is subject to the disciplinary authority of Texas if the lawyer provides or offers to provide

¹ The Committee held a public hearing on proposed Rule 8.05 (Jurisdiction) on April 12, 2023, and designated the public comment period to end on April 13, 2023. The Committee voted to recommend proposed Rule 8.05 to the Board of Directors on May 3, 2023, and submitted proposed Rule 8.05 to the Board on June 26, 2023.

any legal services in Texas, and a lawyer may be subject to the disciplinary authority of Texas and another jurisdiction (or multiple other jurisdictions) for the same conduct.

Section (a) of proposed Rule 8.06 explains how the rules of professional conduct would apply in any exercise of the disciplinary authority of Texas. Section (b) states the circumstances in which a lawyer admitted to practice in Texas would be subject to the disciplinary authority of Texas regarding communications for advertising and solicitation.

The Committee has considered that the remote practice of law has become increasingly common, requiring clarification of how the disciplinary rules on jurisdiction and choice of law apply to lawyers who are not admitted to practice and/or not physically present in Texas.² Additionally, the Committee recommends interpretive comments based on the comments to American Bar Association (ABA) Model Rule 8.5.³

Additional Documents

Included in the pages that follow this Overview of Proposed Rule are: 1) proposed Rule 8.06, as published in the April 2023 *Texas Bar Journal* (Bates Numbers 000005 – 000006); 2) proposed Rule 8.06, as published in the April 7, 2023, issue of the *Texas Register* (Bates Numbers 000007 – 000010); 3) public comments received in response to the publications (Bates Numbers 000011 – 000025); 4) the link to the video recording of the Committee’s public hearing on proposed Rule 8.06 conducted by Zoom teleconference on June 7, 2023,⁴ with the name of the speaker and time-stamp of the speaker’s oral comments (Bates Number 000026); and 5) a memorandum on proposed Rule 8.06 dated December 7, 2022, from Committee Member Vincent R. Johnson (Bates Numbers 000027 - 000031).

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, and submitted proposed Rule 5.05 on July 6, 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 4.03 and 4.04, TDRPC, on June 7, 2023.

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

Rule 8.06. Choice of Law

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 June 8, 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 June 7, 2023, at 10 a.m. CDT. For teleconference participation information, please go to texasbar.com/cdrr/participate.

Proposed Rule (Redline Version)

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

(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 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. 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.

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.

Proposed Rule (Clean Version)

Rule 8.06. Choice of Law

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

(1) an advertisement 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

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Comment:

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.

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IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Animal Health Commission

Executive Director Order Declaring Quarantine for the State of Pennsylvania Due to Highly Pathogenic Avian Influenza

The Texas Animal Health Commission (the "Commission") is authorized to establish a quarantine against all or a portion of a state in which an animal disease exists to protect livestock, exotic livestock, domestic fowl, and exotic fowl in this state from the disease.

Pursuant to Texas Agriculture Code §161.054, the Commission by rule may regulate the movement of animals and may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate commerce. Under Texas Agriculture Code §161.061, the Commission may establish a quarantine against a state to protect livestock, exotic livestock, domestic fowl, and exotic fowl from diseases the Commission determines require control or eradication under the Commission's disease control authority under Texas Agriculture Code §161.041.

As specified in Title 4, Texas Administrative Code §45.3, the Commission is required to protect all livestock, exotic livestock, domestic fowl, and exotic fowl from avian influenza. Under Title 4, Texas Administrative Code §51.5, if the Executive Director of the Commission determines that avian influenza exists in another state and deems it necessary to protect livestock in this state, the Executive Director may establish a quarantine against all of the state. A quarantine established by the Executive Director will be acted on by the Commission at the next appropriate meeting.

Highly Pathogenic Avian Influenza (HPAI) is an influenza virus that may cause illness and death in domestic poultry, fowl, and birds. HPAI is extremely infectious, and can spread rapidly from flock to flock and is often fatal to chickens. In domestic poultry HPAI can cause morbidity and mortality rates between 90-100 percent, leading to detrimental economic consequences.

HPAI can spread easily through airborne transmission or indirectly through contaminated material. Due to the highly contagious nature of HPAI, rapid response to outbreaks is required. Movement control of animals, animal products, and other potentially contaminated materials is critical to prevent transmission of HPAI.

Currently, Pennsylvania is facing a widespread outbreak of HPAI. The Pennsylvania Department of Agriculture and the United States Department of Agriculture are actively working to control the outbreak of HPAI in Pennsylvania. Despite the measures taken in that state, the incidents of HPAI are increasing in Pennsylvania.

The Executive Director of the Commission finds that the widespread outbreak of HPAI in Pennsylvania creates a high probability that domestic poultry and birds in Pennsylvania will have, develop, or be exposed to HPAI.

The Executive Director further finds that the risk of disease exposure from the movement of animals, equipment, vehicles and other fomites from Pennsylvania to Texas could lead to disease exposure across Texas.

The Executive Director, therefore, has determined that an outbreak of HPAI in the State of Pennsylvania poses a threat to animal health in Texas.

To protect animal health in this state, the Executive Director imposes a quarantine for the State of Pennsylvania due to HPAI.

The Executive Director hereby orders the following quarantine:

All live poultry, unprocessed poultry, hatching eggs, unprocessed eggs, egg flats, poultry coops, cages, crates, other birds, and used poultry equipment originating from Pennsylvania must not enter Texas without express written consent from the Executive Director.

In accordance with Title 4, Texas Administrative Code §51.5 this quarantine order will be acted on by the Commission at the next appropriate meeting.

This order is issued pursuant to Texas Agriculture Code §§161.041, 161.054, and 161.061 and Title 4, Texas Administrative Code §51.5 and is effective immediately.

This order shall remain in effect pending further epidemiological assessment by the Texas Animal Health Commission.

Signed March 23, 2023.

Andy Schwartz, D.V.M.

Executive Director

TRD-202301164

Jeanine Coggeshall

General Counsel

Texas Animal Health Commission

Filed: March 23, 2023

State Bar of Texas

Committee on Disciplinary Rules and Referenda Proposed Rule Changes, Rules 4.03, 4.04, 8.06, Texas Disciplinary Rules of Professional Conduct

COMMITTEE ON DISCIPLINARY RULES AND REFERENDA PROPOSED RULE CHANGES

Rule 8.06. Choice of Law

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 June 8, 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 June 7, 2023, at 10 a.m. CDT. For teleconference participation information, please go to texasbar.com/cdrr/participate.

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TRD-202301152
Haksoon Andrea Low
Disciplinary Rules and Referenda Attorney
State Bar of Texas
Filed: March 23, 2023

Central Texas Council of Governments

Request for Proposal for Audit Services

The Central Texas Council of Governments (CTCOG) is soliciting proposals from qualified firms to audit financial statements of CTCOG and the Central Texas Workforce Development Board, Inc. (CTWDB) for the fiscal year ending June 30, 2023, with the option of auditing its financial statements for each of the four (4) subsequent fiscal years.

The audit shall be conducted in accordance with generally accepted accounting standards and other guidelines as presented in CTCOG's request for proposal.

The proposal packets may be obtained by downloading the RFPs at www.ctcog.org. For proposals to be considered, they must be received by Friday, April 14, 2023.

TRD-202301169
Michael Irvine
Director of Administration
Central Texas Council of Governments
Filed: March 23, 2023

Coastal Bend Workforce Development Board

Request for Proposal for Management and Operation of Career Center System (Including Youth Services) RFP No. 23-05

The Coastal Bend Workforce Development Board, dba Workforce Solutions Coastal Bend (WFSCB) is soliciting responses from qualified individuals or firms for the Management and Operation of the Career Center System (Including Youth Services) for Fiscal Year 2023-24. The contract may be renewed for three (3) additional one-year periods beyond the original acceptance award for a total not to exceed four (4) years.

WFSCB serves the eleven (11) county Coastal Bend Region consisting of the following counties: Aransas, Bee, Brooks, Duval, Jim Wells, Kenedy, Kleberg, Live Oak, Nueces, Refugio, and San Patricio. The Workforce Services Delivery System operates one-stop centers in the Cities of Alice, Beeville, Corpus Christi, Kingsville, and Sinton. WFSCB also operates satellite offices in the Cities of Falfurrias and Rockport. Services provided include general workforce information and referral; customer, employer, and job seeker services; customer intake, program eligibility and assessment; case management; enrollment into education and training programs; job placement; career counseling; support services; follow-up and retention services as funded by the Workforce Innovation and Opportunity Act (WIOA) Youth, Adult, and Dislocated Worker, Temporary Assistance to Needy Families (TANF)/Choices, Supplemental Nutrition Assistance Program (SNAP), Employment and Training, and Wagner-Peyser.

The RFP will be available on Monday, April 3, 2023 at 2:00 p.m. Central Time and can be accessed on our website at: <https://www.workforcesolutionscb.org/about-us/procurement-opportunities/> or by contacting Esther Velazquez at (361) 885-3013 or esther.velazquez@workforcesolutionscb.org.

000010
A Pre-Proposal Conference will be held on Monday, April 10, 2023 at 10:00 a.m. Central Time in the Main Conference Room at WF-SCB's Administrative Offices located at 400 Mann Street, Suite 800, Corpus Christi, Texas 78401. The purpose of the meeting is to review the RFP requirements and answer any questions related to the RFP. While this meeting is not mandatory, attendance is strongly recommended. Parties unable to attend in person may participate virtually from a computer, tablet, or smart phone via Zoom:

Join Zoom Meeting

<https://us02web.zoom.us/j/87570695931?pwd=ZGw5ZkZkQzQlVlSF-BmRmZvdTIHeUIRQT09>

US Toll-Free: (888) 475- 4499

Meeting ID: 875 7069 5931

Passcode: 576836

The RFP process consists of the submission of an Application and a Proposal. **Applications are due on Monday, May 22, 2023 at 4:00 p.m. Central Time and Proposals are due on Monday, June 26, 2023 at 4:00 p.m. Central Time.** Responses should be submitted via email to esther.velazquez@workforcesolutionscb.org or may be hand delivered or mailed to: Workforce Solutions of the Coastal Bend, 400 Mann Street, Suite 800, Corpus Christi, Texas 78401.

Workforce Solutions Coastal Bend is an Equal Opportunity Employer/Program. Auxiliary aids and services are available upon request to individuals with disabilities. Relay Texas: 1 (800) 735-2989 (TDD) and 1 (800) 735-2988 or 711 (Voice). Historically Underutilized Businesses (HUBs) are encouraged to apply.

Este documento contiene información importante sobre los requisitos, los derechos, las determinaciones y las responsabilidades del acceso a los servicios del sistema de la fuerza laboral. Hay disponibles servicios de idioma, incluida la interpretación y la traducción de documentos, sin ningún costo y a solicitud.

TRD-202301151
Esther Velazquez
Contract & Procurement Specialist
Coastal Bend Workforce Development Board
Filed: March 23, 2023

Comptroller of Public Accounts

Certification of the Average Closing Price of Gas and Oil - February 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 February 2023 is \$52.24 per barrel for the three-month period beginning on November 1, 2022, and ending January 31, 2023. Therefore, pursuant to Tax Code, §202.058, oil produced during the month of February 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 February 2023 is \$3.02 per mcf for the three-month period beginning on November 1, 2022, and ending January 31, 2023. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of February 2023, from a qualified low-producing well, is eligible for a 25% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

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

**Texas Disciplinary Rules of Professional Conduct
Rule 8.06. Choice of Law**

**Public Comments Received
Through June 8, 2023**

From: [Beesinger, Jason](#)
To: [cdrr](#)
Subject: Comment to Proposed Rule 8.06
Date: Tuesday, April 25, 2023 10:14:40 AM


Howdy,

I have two comments to proposed rule 8.06. Specifically:

- I believe the phrasing of 8.06(a)(2) is ambiguous in that it effectively states an either/or without clearly delineating which trumps the other: “[either] 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 . . .” A better way to phrase would be “if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction . . . else, the rules of the jurisdiction in which the lawyer’s conduct occurred.”
- Ambiguity aside, I believe this regime creates a morass for in-house counsel, who provide legal advice to large inter-state organizations.
 - Some conduct in service of a corporate headquarters will have consequences in jurisdictions which cannot reasonably be anticipated. For some conduct, the lawyer will not know whether or where the predominant effect of the conduct will occur. Is the lawyer to be judged retroactively?; and
 - Pretending that the lawyer does know specifically what jurisdictions in which the predominant effects of their conduct will occur, is the lawyer to become an expert in the disciplinary rules of each of those jurisdictions? What does the lawyer do about conflicts between the various rules?

I spent a little over 8 years as a litigator, and these rules are fine and well for that crowd, but they create a square peg/round hole situation for in-house counselors. I hope the Committee will consider either: (1) requiring that holders of a Texas Bar Card adhere to the Texas Rules [sensible, given the enforcement tie between the rules and licensure]; or (2) modifying 8.06(a)(2) to require Texas lawyers to adhere to the rules of the jurisdiction in which the conduct occurs.

Kind regards,
Jason

Jason E. Beesinger
Texas State Bar No. 24092107
Corporate Counsel
SCI Shared Resources, LLC
1929 Allen Parkway
10th Floor
Houston, Texas 77019
Tel: 713.525.2810



From: [Moss, Fred](#)
To: [cdrr](#)
Subject: Moss Comments on Proposed TDRPC 8.06
Date: Wednesday, March 29, 2023 4:49:20 PM
Attachments: [Comments on proposed TDRPC 8.06.docx](#)

Dear TDRRC,

Attached please find my comments on the proposed Rule 8.06.

Well done.

Fred Moss

Prof. Frederick C. Moss (Emeritus)
S.M.U. Dedman School of Law
Box 750116
3315 Daniel Ave.
Dallas, Tx 75275-0116
(c) 214-405-8438


The hands that help are better far / Than lips that pray.. -Robert Green Ingersoll, lawyer and orator (1833-1899).

TO: Texas Disciplinary Rules and Referenda Committee

FROM: Prof. Fred Moss

DATE: March 29, 2023

RE: Comments on Proposed TDRPC 8.06

1. Regarding section (b), *advertisements* are subject to the Texas Rules if intended to be received by persons in Texas AND intended to secure employment in Texas, whereas *written solicitations* are subject to the Texas Rules if mailed to Texas OR intended to secure employment in Texas. The comments do not enlighten us on the reason for the different treatment.

Moreover, the OR treatment of written solicitations could lead to anomalous results. For example, a citizen of Arkansas is injured in a car accident while visiting Texas. An Arkansas lawyer learns of it and sends a written solicitation of employment to the Arkansas citizen's home seeking to represent the citizen in an action to be brought in Texas. Hypothetically, assume the solicitation is proper in Arkansas but improper in Texas. Under 8.06(b)(2), the Arkansas lawyer was required to follow the Texas Rules and not the Arkansas rules because the employment was to be performed in Texas.

I think this is the wrong approach; the AND in (b)(1) ought to be similarly applied in (2). The solicitation was sent and received in Arkansas by an Arkansas citizen, and was ethical in Arkansas. The predominate effect of the solicitation (engagement of the client) was in Arkansas. Texas disciplinary authorities should not be concerned with how a client was recruited in Arkansas as long as the Arkansas lawyer followed Arkansas rules. What it is about written solicitations that justifies the dissimilar treatment? (As Justice Thurgood Marshall quipped, "It is a short trip between the mailbox and trash can.")

2. Regarding Comment 4, the last sentence is far from clear notwithstanding that it is taken directly from an ABA's comment to Rule 8.5. It states:

With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (a)(2), a written agreement between the lawyer and the 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.

The comment seems to envision a lawyer's employment in a multi-state or multi-national matter where the retainer agreement specifies which jurisdiction's disciplinary rules apply. (See the *Annotated Model Rules of Professional Conduct*, at 753 (A.B.A. 9th ed. 2019).

However, paragraph (a)(2) deals with the predominant effect of the representation as determinative of which jurisdiction's rules apply and the reasonableness of the lawyer's deciding where the predominant effect will be. A jurisdictional specification in the retainer

certainly could show where the lawyer believed the predominant effect would be. But how does that help determine whether the lawyer's belief was reasonable under (a)(2)? Simply specifying a jurisdiction in the agreement doesn't make it more reasonable. The lawyer may be trying only to avoid the more onerous conflicts rules. In short, I think the ABA's comment is misdirected and probably meant to say,

When a lawyer is reasonably uncertain as to which jurisdiction's conflict of interest rules would apply, a written agreement between the lawyer and client that reasonably specifies that the rules of a particular jurisdiction shall apply may be considered in determining which jurisdiction's rules apply if the agreement was obtained However, the agreement is not binding upon a disciplinary authority."

It is odd that this opt out applies only to conflicts of interests. What is the thinking behind this limitation? Some explanation would be appreciated.

Finally, while the language, "*a written agreement . . . that . . . specifies a particular jurisdiction within the scope of [paragraph (a)(2)] may be considered*", is, I realize, taken directly from the ABA's comment, it seems unduly opaque and awkward. At a minimum, and if the suggested rewrite above is not adopted, the comment could be redrafted to say something like,

With respect to conflicts of interest, in determining whether a lawyer's belief under paragraph (a)(2) was reasonable, a written agreement between the lawyer and client that reasonably specifies that the rules of a particular jurisdiction shall apply may be considered if?

See the final annotation to ABA Rule 8.5, in the *Annotated Model Rules of Professional Conduct*, at 753 (9th ed. 2019). Some of the language there might be added to the comment.

Again, thank you for considering these comment, and thank you especially for all the hard work you have done on updating the Texas Disciplinary Rules.

Prof. Fred Moss (Emeritus)



Bar Number 14583400

From: [REDACTED]
To: [cdrr](#)
Subject: CDRR Comment: Proposed Rule 8.06
Date: Tuesday, April 25, 2023 9:51:27 AM

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

Contact

First Name	Eric
Last Name	Nielsen
Email	[REDACTED]
Member	Yes
Barcard	15021625

Feedback

Subject	Proposed Rule 8.06
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Comments

This is a bad rule and would operate as a trap for lawyers who have a multistate practice. There is no need for this rule but if you want to make a rule just for the sake of making rules, the rule should be the opposite: if the advertisement complies with the rules of any state in which the lawyer is licensed, it cannot be the subject of discipline in this state

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Disciplinary Rules of Professional Conduct

Rule 4.03. Dealing With Unrepresented Persons

Rule 4.04. Respect for Rights of Third Persons

Rule 8.06. Choice of Law

Public Comments Received (Multiples Rules)

Through June 8, 2023

From: [Peter Lomtevas](#)
To: [cdrr](#)
Subject: Re: Seeking Comments on Proposed Rules 4.03, 4.04, and 8.06, TDRPC
Date: Tuesday, April 25, 2023 11:13:26 AM

Rule 4.03

I disagree with the redline changes. You are heaping on too much regulation that burdens the administration of justice.

In many instances, during a civil action, an opponent discharges her lawyer perhaps because she can no longer afford him. This leaves the remaining lawyer, who has an interest in finishing the action as guided by his client, now has to maintain obstacles to finishing the matter by saying to the pro se opponent that she must secure new counsel.

The comment adds that the remaining lawyer is permitted to negotiate terms of a transaction with an unrepresented person, but how can that happen without the giving of legal advice as to the legal effect of any term. "Sorry ma'am, I cannot discuss that term with you. You must retain counsel." Nothing would ever be done and no such case would ever end.

Stop the burdening of the remaining lawyer.

Rule 4.04

I disagree with the redline changes as they empower the adversary to unilaterally withdrawing documents by simply asserting that the lawyer should have known the document was sent inadvertently.

You are setting up a system where the Texas lawyer has to walk on eggshells during every case. Here, every transmission becomes a hand grenade real to blow up in the lawyer's face when the adversary chooses to withdraw a transmission.

Stop setting trap for layers.

Rule 8.06

After muddling through this verbal Caesar salad, I think this version aims to impose a lex loci rule for attorney discipline. I do not like the verbose, poorly written way this rule appears, and only applies to advertising and client solicitations.

I practice in four states including Texas. After reading this, I do not know if I am safe or not advertising one thing or another in any state. Also notoriously missing is other multi-jurisdiction choice of law as to how to go inactive, how to retire, how to satisfy all states' CLE requirements, and what about activities in federal courts?

Peter

www.lomtevas.com

On Tuesday, April 25, 2023 at 08:44:27 AM CDT, State Bar of Texas - CDRR <cdrr@texasbar.com> wrote:

State Bar of Texas



Proposed Rules Published

Public Comments Sought

Proposed Rules 4.03 (Dealing With Unrepresented Persons), 4.04 (Respect for Rights of Third Persons), 8.06 (Choice of Law), TDRPC

The Committee on Disciplinary Rules and Referenda published [Proposed Rules 4.03 \(Dealing With Unrepresented Persons\)](#), [4.04 \(Respect for Rights of Third Persons\)](#), and [8.06 \(Choice of Law\)](#) of the Texas Disciplinary Rules of Professional Conduct in the April issue of the Texas Bar Journal and the April 7 issue of the Texas Register.

The Committee will accept comments concerning Proposed Rules 4.03, 4.04, and 8.06, TDRPC, through June 8, 2023. Comments can be submitted [here](#), or by email to cdrr@texasbar.com.

The Committee will hold a public hearing on Proposed Rules 4.03, 4.04, and 8.06 by teleconference at 10 a.m. CDT on June 7, 2023. For teleconference participation information, please go to texasbar.com/cdrr/participate. If you plan to address the Committee at the public hearing, it is requested that you email cdrr@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/cdrr.

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: [REDACTED]
To: [cdrr](#)
Subject: Comments on Proposed Rules 4.03 (Dealing With Unrepresented Persons), 4.04 (Respect for Rights of Third Persons), 8.06 (Choice of Law), TDRPC
Date: Tuesday, April 25, 2023 10:59:03 AM

To the Committee on Disciplinary Rules and Referenda,

I have reviewed the proposed Rules 4.03 (Dealing With Unrepresented Persons), 4.04 (Respect for Rights of Third Persons), and 8.06 (Choice of Law) and would like for the Committee to take the following opinion into consideration.

I see no reason to modify or change the existing Rules 4.03 or 4.04. The addition to these rules does not protect the public any more than the existing rule. If the addition is added to protect the public, it does so in only a de minimus manner. However, these additions will add another way for securing a conviction of discipline against lawyers, especially when there is no intent to deceive or harm the public.

For example, the change to Rule 4.03 comment includes the sentence "Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur." This sentence leaves the determination of guilt or innocence completely up to the investigator with no guidance for the lawyer.

Please do not make any changes to Rule 4.03, other than to include a comment or provision that requires tangible proof against the lawyer.

The comment section of Rule 4.04 includes the phrase "If a lawyer knows or reasonably should know..." Why the ambiguity? How is a lawyer to protect him/her self from discipline when the rule is ambiguous and subjective? There is either evidence of knowledge or not. And if not, there should be a presumption that there was no knowledge or intent.

Please make no changes to Rule 4.04, unless, again, the rule includes a provision that there must be actual evidence to convict the lawyer.

Rule 8.06, on the other hand, appears to provide additional guidance for lawyers. Please include this change to the Rules.

Sincerely,



/s/Thomas A. Nicol

The Nicol Law Firm, PLLC
9540 Garland Road
Suite 381-306
Dallas, Texas 75218
Telephone (214) 722-7400

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From: [Riley, Bria](#)
To: [cdrr](#)
Subject: Comments to Proposed Rules 4.04(c) Respect of Rights of Third Person and 8.06(a)(2) (Choice of Law)
Date: Thursday, May 11, 2023 12:11:15 PM

Hello,

Proposed Rule 4.04(c) Respect of Rights of Third Person:

In the comment section that addresses the proposed addition of part (c) to the aforementioned rule states as follows:

Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

I'm proposing that in addition to the above requirement for an obligation to be created that the lawyer also "know or reasonably should know that metadata is actually included in the document or electronically stored information."

- The reason is that metadata can be difficult to ascertain or detect within a document that may be presumed to *not* fall under the jurisdiction of this rule, but would otherwise if metadata were within a document or electronically stored information that was inadvertently sent. I believe the key here is whether the lawyer knows or reasonably should know whether inadvertent metadata was also inadvertently sent or embedded into a document or electronically stored information that was inadvertently sent to that lawyer.

Finally, what if the lawyer is notified that the document or electronically stored information was inadvertently sent by the opposing party or their lawyer without the lawyer having actually received or read it yet? Would they still have an obligation under this rule to confirm with the third party or their lawyer that in fact they did receive said information inadvertently? Or, has the notice obligation been resolved by the fact that the sender came forward first to the lawyer who inadvertently received said information or document?

- I don't think this question is clearly answered by the proposed comment changes that explain the proposed rule changes.

Proposed Rule 8.06(a)(2) Choice of Law:

I think the reasonable and prudent lawyer would believe that the jurisdiction in which their conduct occurred would be the jurisdictional rules that apply. This is because lawyers may not know of where the predominant effect of their conduct may occur outside of the jurisdiction where their conduct occurred. For this reason, a reasonable and prudent lawyer may not be concerned with (or know that they could be potentially violating) the jurisdictional rules of where the predominant effect of their conduct occurs especially where they reasonably believe that their conduct and its predominant effect will occur in the same jurisdiction with that jurisdiction's rules being applicable. For these reasons, I think the jurisdictional rules that should apply to a lawyer's conduct should only be the jurisdiction where the conduct takes place, not the jurisdiction where the predominant effect of their conduct may occur.

Regards,

BRIA RILEY

Director, Corporate Counsel
Advertising, Marketing,
Intellectual Property, Contracts

Office: (469) 644-5748



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From: [David Schafer](#)
To: [cdrr](#)
Subject: Regarding 4.03-4.04
Date: Tuesday, April 25, 2023 9:14:37 AM

Providing third parties an avenue to grieve attorneys is a horrible idea. I completely agree with the goal of these rules, however the exposure of attorneys to frivolous grievances by unhappy counter parties is not the way to accomplish this. My practice routinely involves negotiations with unrepresented litigants. This proposal adds layers of work to protect myself from unhappy litigants that may file a frivolous grievance.

**Video of Public Hearing on Proposed Rule 8.06 of the Texas Disciplinary
Rules of Professional Conduct**

Held on June 7, 2023, by the Committee on Disciplinary Rules and Referenda

Video of Public Hearing on June 7, 2023

<https://texasbar-wo4m90g.vids.io/videos/069fdab2131de8c58f/cdrr-meeting-june-7-2023>

Comment on proposed Rule 8.06:

Jerry R. Hall at 00:20:45

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.