

**UNDERSTANDING THE CHANGES TO THE TEXAS
DISCIPLINARY RULES
*RULES VOTE REFERENDUM 2024***

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State Bar of Texas
17TH ANNUAL
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CHAPTER 7

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EDUCATION

University of Texas, Austin, B.A., 1972
St. Mary's University, San Antonio, J.D., December 1976

BAR ADMISSIONS

Texas 1977; California 1978; Colorado 2003
Various U.S. District Courts and Circuit Courts of Appeal

EMPLOYMENT

Assistant General Counsel, State Bar of Texas: 1978-1980
Robinson, Felts, Starnes, Angenend & Mashburn; Civil Trial Attorney, 1980-1987
Wood, Lucksinger & Epstein; Civil Trial Attorney, 1987-1989
1989-2016 Hill, Ducloux, Carnes & de la Garza
2016 – pres. Attorney at Law, private practice, and National Director of Education, Ethics and Compliance, Affinipay-LawPay

PROFESSIONAL ACTIVITIES

President, Travis County Bar Association (now, Austin Bar Association); 1997-1998; every officer position 92-97;
Chair, Texas Board of Legal Specialization, 1997-1998, Trustee, 1994-1998
Board Certified: Civil Trial Law, 1984; Civil Appellate Law, 1987
Chair, Texas Bar Foundation 2005-2006; Secretary-Treasurer (04-05); Trustee 2004-2008
Chair, Texas Center for Legal Ethics and Professionalism: 2004-06, Trustee 2003-07
Chair, College of the State Bar of Texas; 1992-94; Vice-Chair 1990-92; Director, 1988-98,
Chair, State Bar of Texas Annual Meeting (Texas Bar Convention), 2001
Chair, United States Fifth Circuit Judicial Conference, Austin 2004
President, St. Mary's Law School Alumni Association, 2006-07, Trustee, 2001-2008.
President, Calvert Inn, American Inns of Court, 2021-2022
Associate, American Board of Trial Advocates, 1999- pres.
CLE Award, ABOTA, 2022
Director, State Bar of Texas; District 9, 1998-2001; Executive Committee 1999-2001
("Outstanding 3rd Year Director Award" - 2001)
Director, Austin Lawyers Care (now: Volunteer Legal Services of Central Texas), 86-89
Director, Austin Young Lawyers Association, 1984-1986
Editor, Travis County Practice Handbook, 1984, 1986
Trustee; St Mary's University, San Antonio, Texas 2007-08
Member and Founder *Bar & Grill Singers*, Lawyer Group performing musical parody across the country, and raising (through Jan 2008) \$300,000 for *pro bono* causes.
Member, Supreme Court Advisory Committee on Court-Annexed Mediation, 1996-1998
Distinguished Mediator, Texas Mediator Credentialing Association, 2010

Texas Supreme Court Appointee to Committee on Disciplinary Rules and Referenda (2x 3-year terms-Dec 2017-2023)

PROFESSIONAL HONORS

Pat Nester Award for Innovation in Continuing Legal Educations- March 2022 (Statewide Award by SBOT CLE Committee)

State Bar of Texas Presidential Citation for “Outstanding Service to Legal Profession” via Contributions to Disciplinary Rules Committee- 2021

ABOTA CLE Recognition for 11- year Course Direction of “Advanced Trial Strategies” 2012-March 2022,

St Thomas More Award- St Mary’s University School of Law- 2020 for Exceptional Contributions to Legal Education

“Distinguished Lawyer” Honoree – Austin Bar Association – Austin Bar Foundation 2019

State Bar College - Pat Nester Award for Outstanding Lifetime Achievement in CLE 2019 (Statewide Award – this is a different Award from Innovation Award above)

Luke Soules Award – Litigation Council Award for Outstanding Service to Practice of Law 2019 (Statewide Award)

Lola Wright Foundation Award for Promotion of Legal Ethics, 2013 (Statewide Award)

Gene Cavin Award for Lifetime Excellence in CLE, State Bar of Texas, 2011 (Statewide Award)

Professionalism Award, Austin Bar Association, 2007

Outstanding Mentor of the Year Award, Austin Young Lawyers Association, 2007

Presidential Citations; State Bar of Texas, 2001, 2006 and 2021

SBOT- "Stars of the Bar" Award for Best Article Series "*Entre Nous*", 2003

Annual Professionalism Award, College of the State Bar of Texas, 2002 (Statewide Award)

W. Frank Newton Award (Annual Pro Bono Award given by State Bar of Texas), 2000 (Statewide Award)

Outstanding Young Lawyer Award, 1987 (Awarded by Austin Young Lawyers Association)

Pro Bono Award, Volunteer Legal Services of Central Texas, 1991, 1993, 1997, 1999

LEGAL PUBLICATIONS

“Entre Nous” Bar Journal commentary columns, (123 columns published Apr 1992- Sept 2022)

CLE Publications,- more than 100 Continuing Education articles presented.

CLE Speeches and Presentations – Approximately 508 CLE presentations nationwide from 01-01-2016 to 12-31-2021 (6 years)

Outstanding Program Award (National Award) -- American Inns of Court –“What? Me? Biased?” – 2018

MILITARY SERVICE United States Army; 1st Cavalry Division, 1972-1974;
Awarded Army Commendation Medal for Meritorious Service, 1974

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Understanding the Changes to the Texas Disciplinary Rules *Rules Vote Referendum 2024:*

Presenter:

Claude E. Ducloux, Member

Committee on Disciplinary Rules & Referenda
State Bar of Texas -

Advanced Real Estate Strategies Course

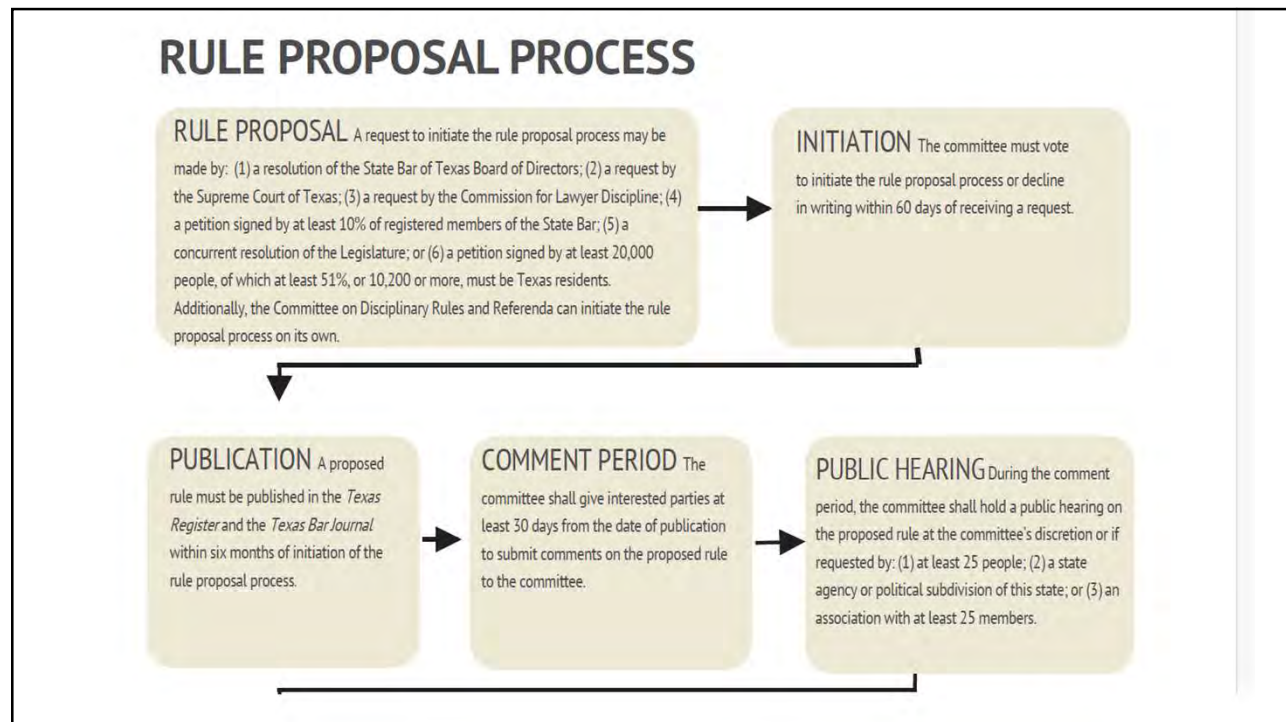
December 15, 2023 – Fredericksburg Texas



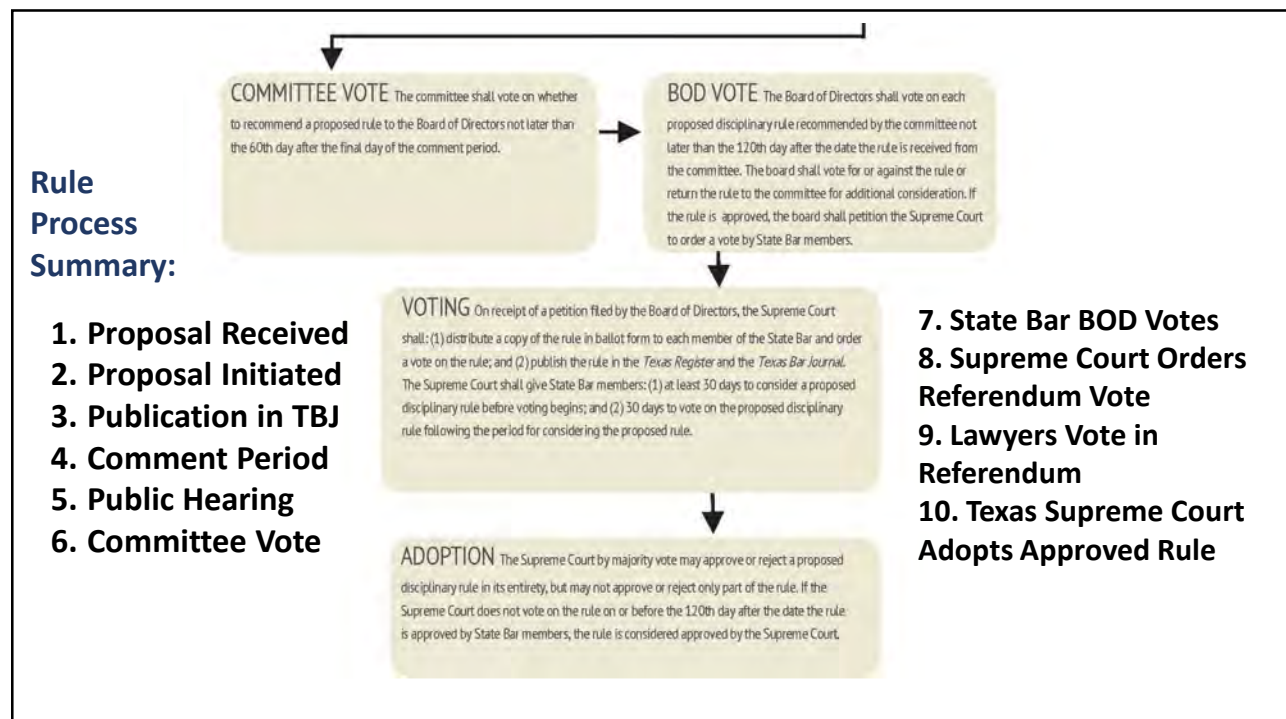
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Part I: Overview of the Disciplinary Rules Process

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2024 Proposed Rules:

Question: Who Initiated the Proposed Rules we are Voting on in April 2024?

Answer: The CDRR Proposed and Initiated the Rules included in the 2024:

- **Reviewing other jurisdictions**
- **Issues of ambiguity requiring clarification**
- **Experiences with Grievance System**
- **Receiving input from Chief Disciplinary Counsel**



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Objectivity and Perspectives

- **Makeup of the Committee: lawyers and non-lawyers.**
- **Multiple perspectives.**
- **Each proposed rule is reviewed from the perspective of a busy practicing attorney**



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Robust Input From Texas Lawyers, Law Professors, and the Public



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Purpose of the Changes

- Modernize ethics rules for Digital Age.
- Improve, clarify, and simplify the ethics rules applicable to all Texas lawyers.
- Protect the public.
- Replace or eliminate provisions that are not working.
- Address issues surrounding aging lawyers and clients.



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Part 2: Overview of The Ballot Proposals

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The Twelve Ballot Items that Lawyers Will Vote On



A: **Terminology** (Rule 1.00)

- Improved explanations and definitions- including
 - “informed consent” “screened” “writing” “substantial”

B: **Conflict of Interest: Doing Business w/Client** (Rule 1.08)

- Better, clearer explanations concerning disclosure and agreements

C: **Conflict of Interest: Former Client** (Rule 1.09)

- Clearer explanations of duties to former clients, defining “substantial relationships,” and duties of lawyers moving between firms.

D: **Imputation of Conflict of Interest** (Rule 1.10)

- Explanations improved defining when a lawyer is disqualified due to “substantial” relationship of another lawyer in firm.

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Twelve Ballot Items Lawyers Will Vote On (Cont'd)



E: Duties To Prospective Client (Rule 1.18)

- Defines “Prospective Client” and when such prospective client’s disclosures must be protected. Also contains protections for lawyers against intentional attempts to disqualify firms.

F: Special Duties of a Prosecutor (Rule 3.09)

- Duty to Report “new and credible” evidence creating “reasonable likelihood” that convicted defendant did not commit the crime.

G: Dealing with Unrepresented Persons (Rule 4.03)

- Confirms duty not to give advice to unrepresented party which reasonably creates conflict with lawyer’s client.

H: Responsibility of a Partner or Supervisory Lawyer (Rule 5.01)

- Clarifies and confirms duties of managerial attorneys to make reasonable efforts that lawyers supervised comply with the disciplinary rules.

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Twelve Ballot Items to Be Voted On (Cont'd)



I: Unauthorized Practice of Law (Rule 5.05)

- Defines which jurisdiction’s disciplinary rules prevail when misconduct is alleged in another jurisdiction against a Texas lawyer, and when a lawyer licensed elsewhere is alleged to have committed misconduct in Texas.

J: Jurisdiction (Rule 8.05)

- Confirms that a Texas lawyer is always subject to potential disciplinary action in Texas regardless of where the alleged misconduct occurs.

K: Choice of Law (Rule 8.06)

- Provides consideration of the “predominant effect” of lawyer’s conduct when choosing which jurisdiction’s rules should be applied. But Texas lawyers advertising or soliciting from out of state seeking Texas employment are still subject to Texas Advertising Rules.

This last item is a Rule of Disciplinary Procedure

L: Termination of Custodianship (New Section 13.05)

- Guides lawyers on how to terminate a Custodianship created under 13.03 or 13.04.

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Part 3: Specific Rule Proposal Explanations and Analysis

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Ballot Item A: Terminology (Rule 1.00)



CDRR Commentary:

The definitions for terms and concepts used in the Disciplinary Rules constantly need review and updating. Technology and custom often influence the way parties communicate and interact. These updated and clarified definitions take custom and usage into account. New terms and definitions include:

(f) **Confirmed in writing** – relates to informed consent and can give or confirm what was previous “oral consent” and must be given in a reasonable time. *This eliminates confusion whether consent was given.*

...

(j) **“Informed Consent”** is clarified to include the communication of adequate (or required information, if a rules describes requirements) and explanations, as to the proposed course of conduct.

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Ballot Item A: Terminology (Rule 1.00) - continued



CDRR Commentary:

(q) **“Represent,” “Represents” or “Representation”** is clarified to be associated with an active client. If the relationship ends, so does representation.

...

(s) **“Screened”** – this extremely important definition is necessary due to the active movement of Texas lawyers between firms, and relates to **“reasonably adequate”** procedures to isolate a lawyer through the timely imposition of procedures in the firm. *(this new definition is a helpful change for law firms.)*

...

(v) **“Writing” or “written”** is updated to denote a tangible or electronic record of a communication, and full including of all methods and technology by which informed is recorded, including sound recordings.

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Ballot Item B: Conflict of Interest: Doing Business w/Client (Rule 1.08)



What Will Change in the Disciplinary Rules?

This Ballot Item adds a provision - Proposed Rule 1.08(a) - to once and for all avoid “swearing matches” between attorney and client on alleged deals they made.

The rule gives clear direction to lawyers who seek to enter into a business transaction with a client, or knowingly acquire any ownership or other pecuniary interest adverse to the client. The rule requires:

- Terms fairly explained in a manner understandable to Client;
- Client must be told to seek independent counsel (and reasonable time to do so);
- Client thereafter provided informed consent in writing.

Goal: To promote ethical conduct by preventing confusion on “what the deal is” when doing business with client. Exceptions are provided for regular commercial transactions in a business conducted by client.

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Ballot Item C: Conflict of Interest: Former Client (Rule 1.09)



What Will Change in the Disciplinary Rules?

This re-write of Rule 1.09 modernizes the conflict-of-interest rules for lawyers and their previous clients, re-affirming the basic principle that a lawyer cannot represent interests adverse to a previous client, nor use information gained during the representation of the previous client, unless the former client gives informed consent. The rule divides this into three areas:

- (a) Knowingly representing a **party** with interests adverse to previous client;
- (b) Representing a party in the same **matter** in which the lawyers previous firm represented the client; and
- (c) Using **information** gained from previous client during the representation.

Goal: To provide a clearer guidance for lawyers as to what type of information and conduct is covered and prohibited, absent informed consent.

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Ballot Item C: Conflict of Interest: Former Client (Rule 1.09)



What About the New Comments to this rule? Will Comments change in the Disciplinary Rules?

Yes, this re-write of Rule 1.09 will also have re-written comments addressing:

- 1. What the continuing duties of lawyers are.
- 2. Defining the “scope” of a matter in the analysis of the application of this rule.
- 3. Defines “substantially related” matters as involving the same transaction, or having a risk that confidential info could be used against the previous client.
- 4. Has 6 more comments guiding lawyer who are moving between firms, including how to effect an appropriate waiver, requiring a writing.

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Ballot Item D: Imputation of Conflict of Interest (Rule 1.10)



What Will Change in the Disciplinary Rules?

This rule clarifies and assists lawyers and law firms who want to hire counsel from other firms to implement programs allowing “screening” and written notice to the incoming lawyer’s previous firm that the incoming lawyer will be appropriately screened from any exposure to the matter being handled between the firms.

NOTE: this does not change the rule that a lawyer who actively handled and participated in a legal matter at the lawyer’s previous firm will likely “conflict out” the new firm when the firms are on opposite sides.

Goal: To provide a better analysis and instructions for lawyers moving between firms to avoid conflicting the new firm from conflicts of interest when the moving lawyer’s previous firm represents an opposing party in active legal matters. While re-affirming the rule that a lawyer actually involved in the legal matter will likely still conflict out the new firm, this rule applies to lawyers who were NOT involved in the client matters which cause the conflict. The rule provides that such lawyers may be “timely screened” Those terms promote ethical conduct by preventing confusion on “what the deal is” when doing business with client. Exceptions are provided for regular commercial transactions in a business conducted by client.

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Ballot Item E: Duties To Prospective Client (Rule 1.18)



What Will Change in the Disciplinary Rules?

Defines “Prospective Client” as well as when such prospective client’s disclosures must be protected. Clarifies when the client-lawyer relationship arises, and importantly, it contains protections for lawyers against intentional attempts to disqualify firms. The rule has improved explanations defining when a lawyer is disqualified due to “substantial relationship of another lawyer” in firm. The rule also authorizes “screening” a lawyer who unintentionally was exposed to disqualifying information (and notice of Screening must be given to prospective client).

Note: Texas is one of only five states that has not yet adopted any rule on duties to prospective clients.

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Ballot Item E: Duties To Prospective Client (Rule 1.18)



What Added Guidance to the Comments Offer Lawyers?

The Comments give us guidance on:

- a) How to handle initial consultations;
- b) Permit lawyers to condition consultation on the client's informed consent that NO information presented will conflict the lawyer from representing another client;
- c) Comments do not prohibit a consulted lawyer from representing an opposing interest unless the information reviewed during consultation is "significantly harmful" if used.
- d) Imputation of conflicts can be avoided by informed consent confirmed in writing, and/or screening imposed on disqualified lawyer(s).

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Ballot Item F: Special Duties of a Prosecutor - Rules 3.09(f)(g) and (h)



What Will Change in the Disciplinary Rules?

This rule affects the duties of prosecutors, whenever the prosecutor "knows of new and credible" evidence creating "reasonable likelihood" that a defendant did not commit an offense for which the defendant was convicted, the prosecutor has a duty (unless a Court authorizes a delay) to disclose that information to appropriate authorities and the defendant.

The rule provides step by step instructions as to whom should receive notice, and in what jurisdiction. *(Note: sections (a) through (e) of 3.09 are unchanged)*

Goal: To ensure that newly discovered evidence of innocence is passed on to the correct organization.

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Ballot Item F: Special Duties of a Prosecutor - Rules 3.09(g)



The Good Faith Exception Protection for Prosecutors

Also this rule change provides a **recognized exception** excusing disclosure if the prosecutor concludes in good faith that the information is not subject to disclosure (even if it is later determined that the prosecutor's conclusion was erroneous).

As proposed:

(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.

Goal: To ensure that newly discovered evidence of innocence is passed on to the correct organization.

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Ballot Item G: Dealing with Unrepresented Persons (Rule 4.03)

What Will Change in the Disciplinary Rules?

The amendment gives lawyers greater guidance on how to communicate with unrepresented parties whose interests are - or reasonably could be - in conflict with the lawyer's client. If in conflict the lawyer's only advice should be to secure counsel. (*Routine non-legal advice for things like location of hearing, etc. permitted*)

Key Point- Always clarify that you represent the adverse party.

Note: This rule does not prevent a lawyer from giving explanations, or explaining the meaning of documents, so long as the unrepresented person understands that the lawyer is not giving advice to the unrepresented party. The Comments also provide useful illustrations and guidance.

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Ballot Item H: Responsibility of a Partner or Supervisory Lawyer (Rule 5.01)

Texas is one of only three states that does not require lawyers or law firms to take steps to ensure that everyone in the firm follows the ethical rules.

What Will Change in the Disciplinary Rules?

Proposed TDRPC 5.01 would change the existing rule by providing that certain lawyers within a firm have an affirmative duty to supervise other lawyers under two circumstances.

First the proposed rule would require lawyers who manage a law firm to make reasonable efforts to see that the firm has firm-wide policies and procedures in place to ensure that all of its lawyers follow the ethical rules.

Second, it provides that a lawyer who directly supervises another lawyer must make reasonable efforts to ensure that that lawyer follows the rules as well.

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Ballot Item H: Responsibility of a Partner or Supervisory Lawyer (Rule 5.01)

Goal: To promote ethical conduct by providing guidance on the supervision of lawyers in multi-lawyer firms.

The proposed duty to ensure that a firm has appropriate policies and procedures would apply only to those lawyers who are in firm management.

This new TEXAS Rule 5.01 (unlike American Bar Association Model Rule 5.1), would not impose such a duty on all partners in a firm, as some partners and supervising lawyers may not have actual managerial responsibility.

The Comments also provide useful guidance on how the Rule should be applied in practice.



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Ballot Item I: Unauthorized Practice of Law: Remote Practice of Law (Rule 5.05)

This rule change simply acknowledges that technology allows us to practice from anywhere. But we should not mislead people to believe we're licensed in any jurisdiction other than authorized. Thus,

- You can't practice law or help someone practice where they're not licensed.
- You can't hold yourself out to be licensed where you're not.
- You can provide legal services to your out of state employer; unless that jurisdiction requires Pro Hac Vice admission.
- You can maintain and practice from a place outside Texas, provided: you don't improperly advertise; or provide legal services to citizens who require advice under a different jurisdiction's laws.
- Correct any misunderstandings of those who believe you're licensed.

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Ballot Item J: Jurisdiction (Rule 8.05)

This rule change is both a clarification and a modernization:

- A **Texas** lawyer is subject to disciplinary action in Texas, regardless of where the misconduct occurs, and
- A Lawyer **not-admitted** in Texas is also subject to Texas Disciplinary Action if the lawyer provides or offers to provide legal services in Texas.

Thus you can be subject to disciplinary action in both your state of licensure and the state where the misconduct allegedly occurred.

Because so many out of state lawyers are now practicing in Texas either in *pro hac vice* status or as unlicensed associates of Texas firms pending their admission to the Texas bar, we needed this rule clarification.

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Ballot Item J: Jurisdiction (Rule 8.05)

Simply stated, the state of Texas may prosecute misconduct represented by alleged Rule violations a) which is committed by Texas lawyers in Texas; and b) by a lawyer not licensed in Texas but who provides or offers legal services here.

In summary, this rule clarifies that misconduct may be (but may not also) be prosecuted in the jurisdiction of licensure or occurrence.

But what if the conduct is not grievable in that other state?

That leads us to the next ballot item -



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Ballot Item K: Choice of Law (Rule 8.06)

This proposed change to Rule 8.06 works hand-in-hand with Rule 8.05, acknowledging that many lawyers practice in multiple jurisdictions.

The question has always been (by way of hypothetical example):

If an Oklahoma lawyer commits misconduct in Texas, should the lawyer's conduct be subject primarily to his home state, or the venue where the alleged misconduct occurred? And...

What if a Texas Lawyer commits misconduct in Oklahoma?

Whose Disciplinary Rules and procedures apply?



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Ballot Item K: Choice of Law (Rule 8.06)

The clear statement is when Texas exercises disciplinary authority for conduct occurring before a court or tribunal, Texas will use the rules of the jurisdiction where that court or tribunal sits, unless that state's rule provide otherwise (i.e., refers back to the disciplinary rules of the home state of that lawyer).

Subpart (a) is about conduct by both Texas and foreign licensees. The rules applied will either be that jurisdictions or the jurisdiction where "the predominant effect of the conduct occurs." Lawyers also have the right to a defense that he reasonably believed his conduct conformed to the applicable rules of the jurisdiction.



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Ballot Item K: Choice of Law (Rule 8.06)

Subpart (b) of Rule 8.06 applies solely to Texas licensees. In two subsections, the rule provides that (1) an advertisement disseminated by a Texas law in another state is still subject to review under Texas Advertising rules if the purpose of the ad is intended to reach prospective clients in Texas and secure employment in the state of Texas.

Subsection (2) promotes the same analysis for written solicitations: even if mailed from another state, it must comply with Texas advertising rules if the purpose is to obtain clients or employment to be performed in Texas.

Both parts ensure that lawyers can't "game" the rules of a different jurisdiction to avoid enforcement in Texas



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Ballot Item L: Termination of Custodianship (New Section 13.05)

New Rule of Disciplinary Procedure:

This new proposed Rule of Disc. P. 13.05 is the natural followup to 13.04 (adopted in 2021) it explains when and how a custodianship shall terminate.

In three easily understood sections, proposed Rule 13.05 explains that a custodianship ends A) when all the active files and property of the lawyer have been properly distributed to appropriate receivers, which are new attorneys taking over those cases; or B) the client's authorized (or appointed) representative; or C) the lawyer returns to practice prior to completion of the custodianship, with appropriate competence to conduct such representation.



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Ballot Item L: Termination of Custodianship (New Section 13.05)

What? Whaddaya mean “return to practice?” Isn’t custodianship to wind up and close down a practice?

Answer: Yes.

Indeed, the primary purpose for custodianship is to close practice, not continue the lawyer’s practice during a period of disability or convalescence. So, I do not see that “custodianship” will be often used in any case where the lawyer may “resume” practice.

But the rule contemplates that such may occur, and provides that if there is a question about the competency of the lawyer whose practice has been turned over to custodianship, the Custodian or appointing attorney who is attempting to return may petition the court for the court’s evaluation of the issue.



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Ballot Item L: Termination of Custodianship (New Section 13.05)

New Rule of Disciplinary Procedure :

Finally, if the closing the custodianship is only held up by inability to locate clients or questions about the distribution of unclaimed property (including funds in IOLTA accounts), the Custodian also has the right to petition the Court for an order of disposition of those matters.

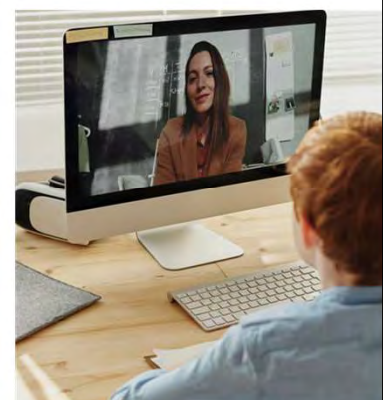
This rule is a needed explanation and clarification of the custodian's role and gives custodians, who are often doing a difficult job, additional guidance and tools to wind up their duties.



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

- **COMMENTS:** First read the **comments**... they will help lawyers understand the rules.
- **PRACTICE GROUPS HELP:** Further, it is likely that practice sections, and professional groups will likely want to assist lawyers with guidance via forms, proposed language etc, if the new rule affects that practice area
- **CLE's** teaching the new changes will likely be offered



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FINAL THOUGHTS ON THE RULE-CHANGE PROCESS:



HELP US MAKE THESE IMPROVEMENTS A REGULAR EVENT:

As a profession, Texas Lawyers need to make the revision and improvements of their Disciplinary Rules of Conduct and Disciplinary Rules of Procedure, a routine and ongoing process.

- Get Involved
- Send the Committee on Disciplinary Rules and Referenda your thoughts
- **Vote in all Referenda on New Rules!**

LET'S VALUE AND EXERCISE OUR RIGHT TO SELF-GOVERNANCE!

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Please Help!



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

Thanks!

Look us up: texasbar.com/cdrr



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REMEMBER TO VOTE!

The Statute Creating the
Committee on Disciplinary Rules
and Referenda Preserved YOUR
RIGHT to Vote on these proposals.

Please take the time to:

- Inform Yourself
- Vote in April 2024
- Encourage your Colleagues to Vote

Be an Active Part of Your profession!

