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State's Disciplinary Rules Now Allow for Subpoena of Lawyers Under Investigation

"The guidelines set forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct," said the rule change.

By **Angela Morris** | March 05, 2018

The Texas Supreme Court has changed the state's disciplinary procedural rules to give attorney disciplinary counsel the power to subpoena lawyers who are under investigation, and create new guidelines for imposing sanctions.

The Texas Legislature called upon those changes to the Texas Rules of Disciplinary Procedure last year when it passed the [State Bar of Texas' Sunset](https://www.law.com/texaslawyer/almID/1202787948691/state-bar-of-texas-bill-approved-by-legislature/) (<https://www.law.com/texaslawyer/almID/1202787948691/state-bar-of-texas-bill-approved-by-legislature/>)[review](#)



[\(https://www.law.com/texaslawyer/almID/1202787948691/state-bar-of-texas-bill-approved-by-legislature/\)](https://www.law.com/texaslawyer/almID/1202787948691/state-bar-of-texas-bill-approved-by-legislature/)bill

[\(https://www.law.com/texaslawyer/almID/1202787948691/state-bar-of-texas-bill-approved-by-legislature/\)](https://www.law.com/texaslawyer/almID/1202787948691/state-bar-of-texas-bill-approved-by-legislature/). The changes are slated to become effective for any grievance filed on or after June 1.

The high court is seeking public comments on the changes, and might amend them in response to feedback. Lawyers should email comments to rulescomments@txcourts.gov (<mailto:rulescomments@txcourts.gov>) by April 30.

The rules include a few minor changes, in addition to the two most substantive revisions regarding subpoena power and sanctions guidelines.

Earlier in the rule-making process, the subpoena issue drew [criticism from legal ethics lawyers](https://www.law.com/texaslawyer/sites/texaslawyer/2018/02/12/cdcs-proposed-changes-in-rules-of-disciplinary-procedure-raise-concerns/) (<https://www.law.com/texaslawyer/sites/texaslawyer/2018/02/12/cdcs-proposed-changes-in-rules-of-disciplinary-procedure-raise-concerns/>) who said that the bar's subpoena powers didn't come with appropriate standards, or procedures for challenging or reviewing the subpoenas. Jim McCormack, a legal ethics solo in Austin who was one of five lawyers who raised the matter, didn't immediately return a call seeking comment. Neither did Herring & Panzer partner Jason Panzer of Austin, another lawyer who raised the concerns.

The State Bar's Office of Chief Disciplinary Counsel supports the changes.

"The subpoena power during the investigation stage of the process and the sanction guidelines are legislative mandates as a result of recommendations from the Sunset Commission and CDC supports them," wrote Claire Mock, the office's spokeswoman, in an email. "The subpoena power will allow us to more efficiently resolve disciplinary matters earlier in the process, and the sanctions guidelines are aimed to provide increased consistency for disciplinary matters statewide."

When a client files a complaint against a lawyer, the disciplinary counsel's office investigates the complaint to determine whether there's just cause to believe a disciplinary rule violation occurred.

During this investigation, the rule changes give the disciplinary counsel the power to ask the chair of a district grievance committee, which operates investigatory panels, for approval to issue a subpoena of the lawyer's books, documents, papers, bank records and more. If the lawyer objects, the committee chair will decide whether the lawyer must produce the record.

When there's an investigatory hearing, the disciplinary counsel can also ask the investigatory panel's chair to issue subpoenas for the lawyer, and other witnesses, to attend the hearing to testify.

A district court in the county in question has the power to enforce a subpoena.

Hearings are confidential and their records can only be released for use in a disciplinary matter.

After an investigatory hearing, a complaint might be dismissed, or the lawyer might enter a negotiated sanction with disciplinary counsel. If so, the terms go into a written judgment with findings of fact and conclusions of law. If the sanction were any more serious than a private reprimand, the matter would be open to the public. If a lawyer didn't enter a negotiated sanction, the complaint would enter the normal grievance process.

The former disciplinary procedural rules included a list of things that an evidentiary panel had to consider when deciding the appropriate sanction to impose on a lawyer. That list is gone in these changes. Instead, there's a new, lengthy part in the rules that lay out guidelines for imposing sanctions.

“The guidelines set forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct,” said the rule change.

The disciplinary tribunal must take into account the duty the lawyer violated, how culpable the lawyer was, the actual injury to the client, and whether there are aggravating or mitigating factors—which the rules define.

If it's found that a case did include professional misconduct, the grievance committee or district court presiding over the case has the discretion to set a separate hearing and take evidence about the appropriate sanction.

The rule changes lay out the criteria for when it's appropriate to impose each of the sanctions in a very long list of professional misconduct situations. For example, the rule change says disbarment is appropriate when a lawyer caused serious injury to a client by: abandoning his or her practice; failing to perform services or communicate with a client, providing incompetent representation, or not following client decisions; or engaging in a pattern of neglect of client matters. It's appropriate to suspend a lawyer's law license when a lawyer caused an injury—perhaps not serious—by doing the same things.

Another major rule change makes it easier for the disciplinary counsel's office to send a grievance to the bar's Grievance Referral Program and Client Attorney Assistance Program, which are both diversion programs that address minor professional misconduct. The changes lay out criteria for a lawyer to participate in the Grievance Referral Program.

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