



HUMAN RIGHTS CLINIC

THE UNIVERSITY *of* TEXAS SCHOOL *of* LAW

Texas Bar Association – Bringing Human Rights and Business Principles to Texas
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1. Introduction

The University of Texas School of Law Human Rights Clinic sought to review the Texas Disciplinary Rules of Professional Conduct (“Rules”) to evaluate the Rules in light of what guidance they provide to attorneys impacted by international human rights issues, and comparing and contrasting the Rules with the United Nations Guiding Principles on Business and Human Rights (“UNGPs”).

The Human Rights Clinic brings together an interdisciplinary group of law and graduate students in a course that incorporates both classroom study and hands-on participation in human rights projects and cases. The Clinic has prepared this memo to suggest, recommend, and propose various revisions and other alternatives to the Texas Bar Rules to give greater guidance on human rights considerations.

2. UN Guiding Principles on Business and Human Rights (Ruggie Principles)

The UNGPs¹—also known as the Ruggie Principles, after UN Special Representative and drafter of the UNGPs John Ruggie—are based off of recognition of three foundational “pillars”:

- I. The state duty to protect against human rights abuses by third parties, including business (Principles 1 through 10)
- II. The corporate responsibility to respect human rights (Principles 11 through 24)
- III. The need to ensure access to effective remedy for victims of human rights abuses (Principles 25 thru 31)

The implementation of this “Protect, Respect, Remedy” framework is described by 31 guiding principles, with commentary. This work is the product of six years of research and consultation with various stakeholders.² Upon release in 2011, the UNGPs were unanimously adopted by the UN Human Rights Council.³ Since then, the UNGPs have enjoyed increasingly widespread support by state actors, civil organizations, and businesses interested in operationalizing the principles. This memo focuses on the second pillar of the UNGPs, and how the professional responsibilities of lawyers align with the human rights obligations of corporations and businesses. However, where business enterprises are owned, controlled, or substantially supported by the state, the first pillar—the state duty to protect against human rights abuses—may also be applicable.⁴

The UNGPs are not themselves binding law, and do not give rise to any international legal obligations not already in effect. Additionally, the UNGPs only offer guidance on human rights obligations in the context of business enterprises; they do not describe every area of life where human rights have relevance. Instead, the UNGPs are intended to

¹ United Nations Guiding Principles on Business and Human Rights, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

² The UN “Protect, Respect and Remedy” Framework for Business and Human Rights. Sept. 2010. <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf>

³ U.N. Human Rights Council Res. 17/4, U.N. Doc. A/HRC/Res/17/4 (June 16, 2011).

⁴ UNGP No. 4 (The State-Business Nexus).

clarify what obligations currently exist—at minimum, the human rights recognized in the International Bill of Human Rights and the fundamental principles in the ILO Declaration on Fundamental Principles and Rights at Work, though additional standards may apply⁵—and provide a normative foundation for improving compliance with those obligations.

3. Overview of the Corporate Responsibility to Protect Human Rights

The second foundational pillar of the UNGPs is stated in UNGP No. 11:

UNGP No. 11: Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

For businesses, meeting these obligations requires two commitments:

UNGP No. 13: The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Simply expressing a willingness to do so is insufficient. Businesses must implement policies and processes to ensure fulfillment of their responsibilities:

UNGP No. 15: In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Respecting human rights thus requires businesses to “know” what is expected of them in terms of respecting human rights, and publicly “show” that they are meeting these expectations.⁶ The first step towards meeting this standard is formulating a statement of policy on human rights to be embedded in all levels of the business enterprise.⁷ It further requires ongoing human rights due diligence—assessing actual and potential human rights

⁵ UNGP No. 12 and commentary.

⁶ Commentary to UNGP No. 15.

⁷ UNGP No. 16 and commentary.

impacts, integrating and acting upon the findings, and continuing to track and communicate the results of any actions taken.⁸ Where appropriate, businesses may need to provide for—or otherwise cooperate in—the remediation of adverse human rights impacts the business has caused or contributed to.⁹ The specific way in which businesses fulfill these obligations will vary depending on the operating context—for example, the character of a particular industry or location’s human rights risks, or the existence of conflicting domestic obligations—but the same responsibility to respect human rights applies to all businesses.¹⁰

UNGP No. 23: In all contexts, business enterprises should:

- (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
- (b) Seek ways to honor the principles of internationally recognized human rights when faced with conflicting requirements;
- (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

4. The Ruggie Principles for Lawyers: Relevance and Application

Law firms, as businesses in their own right, have a responsibility to respect human rights. The UNGPs also have relevance to lawyers when doing work on behalf of a client’s business—either as external legal counsel, or working in-house—where human rights risks are present, and the lawyer is in a position to offer professional advice or services to the client on the mitigation or remediation of that risk.

UNGP No. 14: The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.

While the responsibility to respect human rights applies universally to all businesses, the UNGPs acknowledge that responsibility may be discharged in different ways, depending on the particular enterprise and situation.¹¹ The practice of law is a unique sector and operational context, with special responsibilities. These responsibilities stemming from the legal right to independent counsel are internationally recognized, and in part contain binding human rights obligations in themselves.¹² The UNGPs were not intended to interfere with or override these duties as defined in various professional codes of conduct for

⁸ UNGP No. 17 and commentary.

⁹ UNGP No. 22, *see also* UNGPs Nos. 25-31 “Access to Remedy”

¹⁰ UNGP No. 23 and commentary.

¹¹ UNGPs Nos. 14 and 23.

¹² UN Basic Principle 18. The Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990,

lawyers.¹³

However, the UNGPs may be relevant to—and in fact inform and enrich—a lawyer’s exercise of independent professional judgment, insofar as the scope and subject matter of the lawyer’s representation encompasses actual or potential human rights risks.¹⁴ In terms of the functions performed by a lawyer for a client, the UNGPs may have particular applicability to a lawyer’s representation when fulfilling the roles of:

- *Advisor*, rendering candid advice, and
- *Advocate*, providing competent representation for the client.

The next two sections discuss these roles in terms of the professional responsibilities possessed by Texas lawyers. While discussed separately, these roles—just as in actual practice—are interdependent and should be read together, as part of the totality of a lawyer’s professional responsibilities.

4.1 The Responsibility to Advise Clients on Business and Human Rights

Lawyers are well-positioned in their role as a client’s advisor to implement the UNGPs. Texas Disciplinary Rule of Professional Conduct 2.01 reads:

Rule 2.01. Advisor

In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

A lawyer’s advice to a client may involve unpleasant truths the client would rather not face.¹⁵ Discussing the consequences of potential adverse human rights impacts with clients—whether legal, financial, or ethical—may often fit that description. Lawyers are also at times required to go beyond giving purely technical legal advice when doing so is in the client’s interest.¹⁶ In cases where liability or jurisdiction under international human rights law is opaque, it may still be appropriate for lawyers to note the existence of a human rights risk.¹⁷ This alignment of the Rules and the UNGPs is acknowledged in the ABA endorsement of the UNGPs.¹⁸

It should also be noted that the modern growth of international human rights law’s application both in subject matter and scope has created an increased risk of liability for

¹³ IBA Practical Guide on Business and Human Rights for Business Lawyers, pg. 28. June 2016. <https://www.ibanet.org/Document/Default.aspx?DocumentUid=d6306c84-e2f8-4c82-a86f-93940d6736c4>

¹⁴ *Id.*

¹⁵ Tex. Disciplinary Rules Prof'l Conduct R. 2.01 cmt. 1, *reprinted in* Tex. Gov’t Code Ann., tit.2, subtit. G, app. A (West 2017) (Tex. State Bar R. art. X, § 9).

¹⁶ *Id.* R. 2.01 cmt. 2, 3, and 4

¹⁷ UNGP No. 23.

¹⁸ ABA House of Delegates Res. 109 (2012), n.16, citing ABA Model Rules Prof'l Conduct R. 2.1, which TDRPC 2.01 is modeled after.

businesses that fail to respect human rights.¹⁹ As a result, a lawyer's role as advisor is perhaps most aligned with the goals of the Ruggie Principles when assisting with human rights due diligence.²⁰ Human rights due diligence is the process of

- 1) Assessing actual and potential human rights impacts,
- 2) Integrating and acting upon those findings,
- 3) Tracking responses, and
- 4) Communicating how impacts are addressed.²¹

This is an ongoing process of "knowing and showing": Understanding the relevant human rights risks a business enterprise may cause or contribute to, and demonstrating how the business enterprise is addressing those risks. Lawyers are uniquely capable of assisting in this process. John Sherman, one of the lawyers involved in formulating the UNGPs, suggests that ABA Model Rule 2.1 be read in harmony with UNGP No. 19, in that lawyers' advice to clients should not be confined solely to communicating what the law requires, but should take into account all relevant human rights impacts and assist the client in furthering their interests while still respecting human rights.²²

4.1.1 Growing International Recognition of the Need to Advise Clients on Human Rights

A number of bar associations have taken steps to assist their lawyers in advising clients on respecting human rights. The International Bar Association ("IBA") has created a number of resources for individual lawyers and law firms to assist in understanding and implementing the UNGPs.²³ The IBA identifies a number of areas in which advising a client on human rights matters is often in the best interest of the client, ranging from corporate governance and enterprise risk management, to contractual language to increase leverage in addressing human rights impacts.²⁴

The IBA has also suggested that individual bar associations "may wish to consider drawing to their members' attention the ethical considerations which a lawyer should take into account in the field of business and human rights when advising clients."²⁵ This includes, where appropriate, examining how professional codes of conduct in their respective

¹⁹ Commentary to UNGP No. 23. Information on human rights abuses by businesses, as well as related litigation, is further available from the Business and Human Rights Resource Centre <https://business-humanrights.org/en/>

²⁰ UNGP Nos. 15(b) and 17 through 21

²¹ UNGP No. 17

²² John Sherman, *The UN Guiding Principles for the Corporate Legal Advisor: Corporate Governance, Risk Management, and Professional Responsibility*, pg. 17. April 4, 2012. https://www.americanbar.org/content/dam/aba/administrative/human_rights/sherman_legal_advisors_paper.authcheckdam.pdf

²³ Includes the IBA Practical Guide on Business and Human Rights, The Reference Annex to the Practical Guide, and the IBA Handbook for Lawyers on Business and Human Rights <https://www.ibanet.org/Handbook-for-lawyers/Contents.aspx>

²⁴ IBA Practical Guide on Business and Human Rights (2016). pp. 23-26. See UNGP No. 19(b)(ii) and commentary for discussion of leverage.

²⁵ IBA Business and Human Rights Guidance for Bar Associations (2015). p. 13. <https://www.ibanet.org/Document/Default.aspx?DocumentUid=B9719C7C-212B-4717-8C66-FD028ABD6C6A>

jurisdictions align with the UNGPs.²⁶ The IBA is clear, however, that nothing in the UNGPs should be read to abridge a lawyer's obligation to provide independent services, or a client's right to seek such services.²⁷

The Council of Bars and Law Societies of Europe (CCBE) has issued guidance on "Corporate Social Responsibility and the Role of the Legal Profession," including discussion of the UNGPs and its implications for bar rules.²⁸ The CCBE guidance suggests that there is an ongoing discussion in the legal profession "whether bar rules should provide that lawyers should advise on CSR issues where they are relevant," in the face of increased expectations from clients—as well as society at large—to contribute to the advancement of social wellbeing.²⁹ As soft law on human rights "hardens," or otherwise becomes intertwined with binding legal obligations, advising on CSR or human rights risks may be unavoidable—part and parcel of legal advice and implementing risk management systems.³⁰

In regard to actions taken by specific jurisdictions, The Law Society of England and Wales has been an international leader in this area. The Law Society's Business and Human Rights Advisory Group issued recommendations on the implications of the Principles for British lawyers.³¹ Its recommendations note that lawyers have a responsibility to respect human rights in accordance with the UNGPs, and that this ought to be reflected as appropriate in the advice provided to clients.³² The Law Society has also created a Business and Human Rights guide for its practitioners.³³ Section Four of the guide discusses the relation of business and human rights for solicitors in the United Kingdom. Similar to the IBA and CCBE guidance, while solicitors in the UK do not possess a specific obligation to advise clients on human rights risks, a lawyer may decide in the course of his or her professional judgment that doing so also furthers their obligations under the UK's Solicitors Regulation Authority Code of Conduct.³⁴ The guide further notes that when a lawyer learns of obvious risks to a client that fall outside the scope of the engagement letter or retainer agreement,

The solicitor is required to do more than merely advise within the strict limits of the retainer. There is a duty to call attention to and advise on those risks. In doing so, the solicitor will not be going beyond the scope of his or her instructions but merely reporting back to the client on issues of concern

²⁶ *Id.*

²⁷ IBA Practical Guide on Business and Human Rights (2016). p. 29.

²⁸ CCBE Practical Issues for Bars and Law Societies on Corporate Social Responsibility, I-III. 2013, 2014, and 2017. Available under CCBE Publications' "Practical Guides" section <http://www.ccbe.eu/documents/publications/>

²⁹ CCBE Practical Issues for Bars and Law Societies on CSR Guidance III (2017), p. 4.

³⁰ *Id.*, p. 5.

³¹ Business and Human Rights Advisory Group Recommendations. The Law Society of England and Wales. January 2014. <http://communities.lawsociety.org.uk/Uploads/i/v/c/BHRAGfinalRecommendations.pdf>

³² *Id.*, p.7

³³ Business and Human Rights: A Practical Guide. December 2016. Law Society of England and Wales. <http://www.lawsociety.org.uk/support-services/documents/business-and-human-rights-a-practical-guide/>

³⁴ *Id.*, p. 9.

which he or she has learned of in the course of carrying out express instructions.³⁵

Finally, the Japan Federation of Bar Associations (JFBA) has issued guidance for Japanese lawyers and corporations on conducting human rights due diligence, as part of meeting the responsibility to respect human rights.³⁶

4.2 The Need to Provide Competent Representation to Clients Regarding Human Rights Risks

Competency is a critical aspect of the practice of law. The need to maintain standards of quality in legal representation is globally recognized.³⁷ Texas lawyers share this responsibility.

Rule 1.01. Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

As noted throughout **Section 4.1** above, the scope of human rights law is constantly expanding. "Soft law" on human rights obligations is increasingly "hardening," whether through state practice becoming customary international law or the ratification of human rights treaties. Private and civil actors are also increasingly considering human rights, both in terms of corporate social responsibility as well as risk management. Increasingly, it may be proper for a lawyer in his or her professional judgment to determine that competent and diligent representation for a client includes advice or services relating to human rights impacts.

³⁵ *Id.*

³⁶ Guidance on Human Rights Due Diligence. Jan. 2015. Japan Federation of Bar Associations (Eng. trans. By Asia-Pacific Human Rights Center and Sustainability Japan Forum). https://www.nichibenren.or.jp/library/en/document/data/150107_guidance.pdf

³⁷ UN Basic Principles 9 and 14, The Basic Principles on the Role of Lawyers (1990).

4.2.1 The Potential for Conflicting Obligations

A concern might arise here: That a lawyer's obligation to provide competent representation could conflict with the obligations under the UNGPs, if the lawyer is not an expert in the latest developments in international human rights law, or even human rights law broadly. Since the UNGPs do not create any new legal obligations—instead only clarifying existing ones—lawyers are not subject to any new obligations not already present. While there may be situations in which human rights expertise is required, lawyers and clients both enjoy the right to mutually agree on the goals and limits of representation.³⁸ Lawyers may however need to exercise caution when accepting a letter of engagement or retainer agreement requiring acceptance of a client's Code of Conduct (a corporate social responsibility practice becoming increasingly popular), if the contractual provisions in the Code of Conduct demand conduct from the lawyer prohibited by bar rules.³⁹

4.2.2 Competency and Professional Development

The corporate responsibility to respect human rights can also be thought of in terms of professional development. An analogy can be made to the American Bar Association ("ABA") Model Rules language on technological competency.⁴⁰ The ABA suggests that part of competent representation is remaining up-to-date on changes in the field, "including the benefits and risks associated with relevant technology."⁴¹ If familiarizing oneself with encryption standards or database management can be considered part of competency in legal representation, it seems reasonable to think that a similar obligation might attach to developments in the recognition and advancement of human rights.

Other jurisdictions have recognized such an obligation. The Code of Conduct for European Lawyers requires practitioners to "maintain and develop their professional knowledge and skills taking proper account of the European dimension of the profession."⁴² The CCBE suggests that this should be read as including ongoing education on corporate social responsibility as part of a lawyer's professional duties.⁴³ While this 'European dimension' rationale is not directly applicable to Texas lawyers—the European Union has far more robust legal instruments and institutional support in regards to human rights, for example—there is something to be said for a "Texas dimension" of legal practice that merits consideration of business and human rights. In terms of GDP, Texas is the world's tenth

³⁸ Tex. Disciplinary Rules Prof'l Conduct R. 1.02, especially (b) and (f).

³⁹ CCBE Practical Issues for Bars and Law Societies on CSR Guidance III (2017), p. 7. The CCBE also notes that bar associations may wish to advise its lawyers not to accept such Codes of Conduct, to maintain the profession's independence.

⁴⁰ ABA Model Rules Prof'l Conduct R. 1.1 Competence, cmt. 8 (Maintaining Competence)

⁴¹ *Id.*

⁴² Charter of Core Principles of the European Legal Profession And Code of Conduct for European Lawyers (2013), § 5.8 Continuing Professional Development (Code of Conduct last amended May 19, 2006).

⁴³ CCBE Practical Issues for Bars and Law Societies on CSR Guidance I (2013), p. 10.

largest economy—for ease of comparison, the ninth-largest is Brazil.⁴⁴ Texas frequently conducts trade with nearby Central and South American nations, and possesses considerable ties to a number of global industries; perhaps most notable are the energy and extractive industries headquartered or in service here. Texas is a leader in business both in the United States and the world, and as the extent to which standards for human rights become increasingly less voluntary Texas lawyers should anticipate a need to educate themselves and their clients on how Texas can be a leader in this area as well.

5. Amending the Texas Disciplinary Rules of Professional Conduct

5.0.1 The “Disciplinary” Nature of the Rules Governing Texas Lawyers

While the Rules for Texas lawyers are written in such a way as to largely mirror the language of the ABA Model Code, Texas elected to diverge from the Model Rules in several respects when the State Bar adopted the Rules in 1990. One difference is particularly apposite when contemplating any amendments or additions to the Texas Rules: The Rules’ omission of any “hortatory, advisory, procedural, or discursive” standards.⁴⁵ The ABA Model Rules include both imperative rules (stated as “shall” or “shall not”) and permissive rules (“may”).⁴⁶ The latter denote areas where lawyers may exercise professional judgment in their actions—failure to act in accordance with a permissive rule is not grounds for disciplinary action.⁴⁷ The authors of Texas’ Rules rejected the inclusion of permissive black-letter rules as insufficient guidance for disciplinary standards, instead relegating all permissive language to the Rules’ Commentary.⁴⁸ This difference is why the code of conduct for Texas lawyers was entitled *Disciplinary* Rules—to emphasize the philosophical differences embodied in each code.⁴⁹

Since the majority of the ABA’s permissive rules are preserved in the Texas commentary, there is little consequential difference, as a textual matter, in how Texas lawyers interpret the standards governing their conduct. Both the ABA Model Rules and Texas’ Rules also note that their standards “do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.”⁵⁰ Instead, the choice is likely one of emphasis: In describing the bounds of acceptable conduct for what is largely a self-governing profession, the State

⁴⁴ Economic Output: If States Were Countries, California Would be France. Mark J. Perry. Newsweek. June 11, 2016. <http://www.newsweek.com/economic-output-if-states-were-countries-california-would-be-france-467614>

⁴⁵ Robert P. Schuwerk & John F. Sutton, Jr., A Guide to the Texas Disciplinary Rules of Professional Conduct, 27A HOUS. L. REV. 1, 5 and n. 23, (1990) (citing Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 10.)

⁴⁶ ABA Model Rules R. 1.1 Preamble and Scope ¶ 14.

⁴⁷ *Id.*

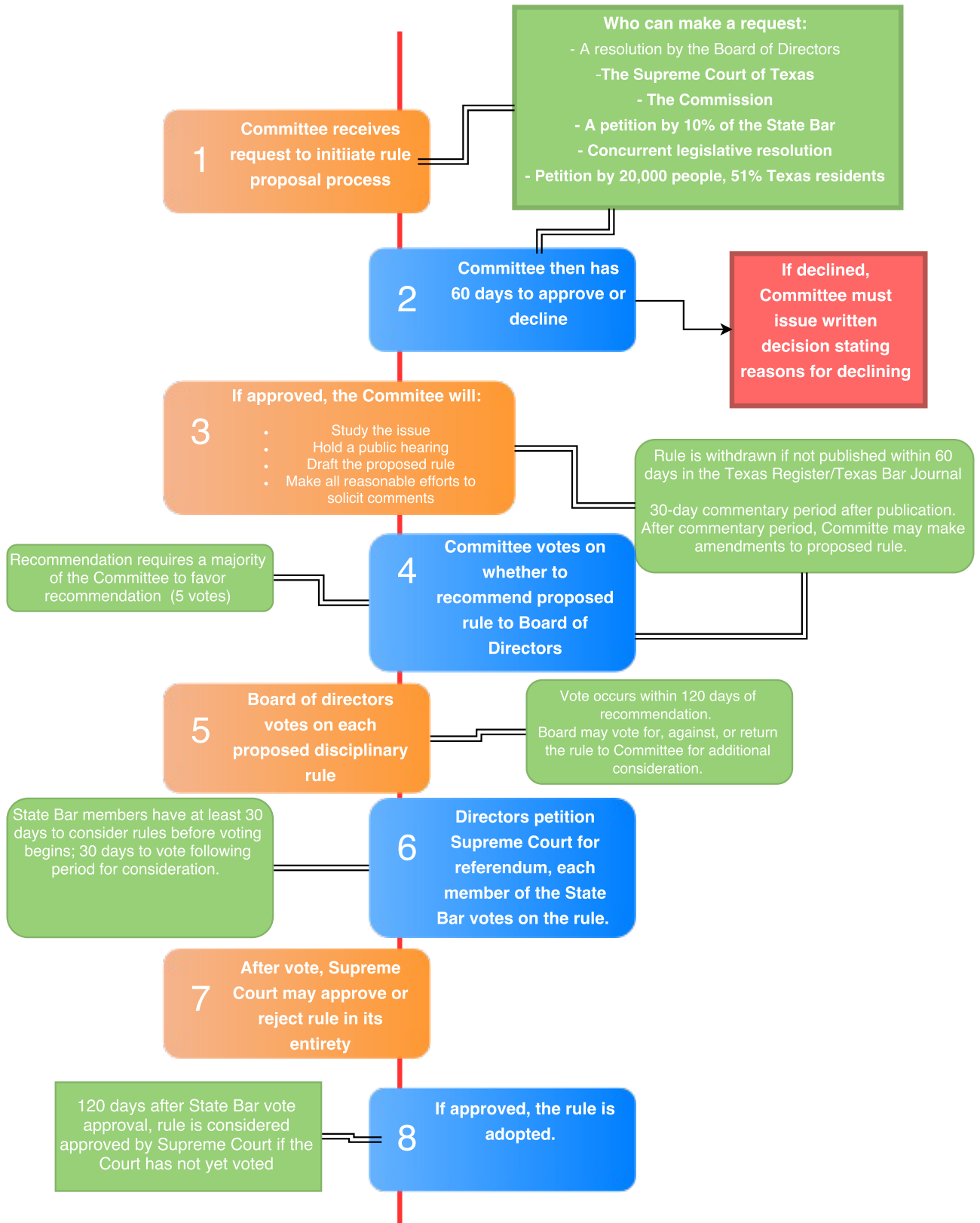
⁴⁸ Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 10 (“The Comments are cast in terms of “may” or “should” and are permissive, defining areas in which the lawyer has professional discretion.”)

⁴⁹ Robert P. Schuwerk & John F. Sutton, Jr *supra* n. 22 at 5.

⁵⁰ ABA Model Rules preamble ¶ 16 and Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 11, respectively. The Texas Rules preamble adds “...and Comments” to the Model Rules’ “The Rules do not...” language.

Bar reserves priority-of-place in the black-letter law for those standards that can be stated as categorical imperatives.

5.1 Amending the Texas Disciplinary Rules: Adoption and Process



The Committee on Disciplinary Rules and Reference and Disciplinary Rule Proposal Process is ingrained in Subchapter E-1, Section 81.0201, of the Government Code. The multi-step process begins with the establishment of a committee.

The committee consists of nine members including: three attorneys appointed by the President of the State Bar; one non-attorney public member appointed by the President of the State Bar; four attorneys appointed by the Supreme Court of Texas (“Court”); and one non-attorney public member appointed by the Court.

The President of the State Bar and the Chief Justice of the Court shall alternate designating an attorney member of the committee to serve as the presiding officer of the committee for a term of one year. Committee members serve staggered three-year terms, with one-third of the members’ terms expiring each year.

The committee has the responsibility to regularly review the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure and at least annually issue to the Court and the Board of Directors a report on the adequacy of the rules and oversee the initial process for proposing a disciplinary rule under Section 81.0875. The State Bar would also have the ability to hire a staff attorney to assist the committee.

Once the committee has been created, there can be an initiation of the Rule Proposal Process in order to make changes to the Rules. The committee may initiate the process for proposing a disciplinary rule for the State Bar as the committee considers necessary or in conjunction with the review of the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure under Section 81.0873(1). Not later than the 60th day after the date the committee receives a request to initiate the process for proposing a disciplinary rule, the committee shall initiate the process or issue a written decision declining to initiate the process and the reasons for declining.

A request to initiate the process for proposing a disciplinary rule may be made by: a resolution of the Board of Directors; a request of the Court; a request of the commission; a petition signed by at least 10 percent of the registered members of the State Bar; a concurrent resolution of the legislature; or a petition signed by at least 20,000 people, of which at least 51 percent, or 10,200 or more, must be residents of this state.

On initiation of the process for proposing a disciplinary rule, the committee shall: study the issue to be addressed by the proposed rule; hold a public hearing on the issue; draft the proposed rule, which may not address more than one subject; and make all reasonable efforts to solicit comments from different geographic regions in this state, non-attorney members of the public, and members of the State Bar.

A proposed disciplinary rule is withdrawn six months after the date the rule proposal process is initiated under Section 81.0875(b)(1) if the proposed disciplinary rule is not published on or before that date in the Texas Register and the Texas Bar Journal. The committee shall give interested parties at least 30 days from the date the proposed disciplinary rule is published to submit comments on the rule to the committee.

The committee shall hold a public hearing on the proposed disciplinary rule if, during the comment period, the hearing is requested by at least 25 people, a state agency or political subdivision of this state, or an association with at least 25 members.

On conclusion of the comment period, the committee may amend the proposed disciplinary rule in response to the comments. The committee shall vote on whether to recommend a proposed disciplinary rule to the Board of Directors not later than the 60th day after the final day of the comment period. The committee may not recommend a proposed disciplinary rule unless at least five members of the committee favor recommendation. The committee shall submit a proposed disciplinary rule that is recommended by the committee to the Board of Directors for review and consideration.

The process for approval of proposed disciplinary rule by the Board of Directors in one where the Board of Directors shall 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 shall vote for or against the rule or return the rule to the committee for additional consideration. If a proposed disciplinary rule is approved by a majority of the directors, the Board of Directors shall petition the Court to order a referendum as provided by Section 81.0878 on the rule by the members of the State Bar.

Once the Board of Directors made their determination, a referendum vote by the State Bar members occurs. On receipt of a petition filed by the Board of Directors under Section 81.0877(b), the Court shall distribute a copy of the rule in ballot form to each member of the State Bar and order a vote on the rule; and publish the rule in the Texas Register; and the Texas Bar Journal.

The Court shall give State Bar members at least 30 days to consider a proposed disciplinary rule before voting begins; and 30 days to vote on the proposed disciplinary rule following the period for considering the proposed rule. The State Bar shall provide proponents and opponents of a proposed disciplinary rule an equal opportunity to present their views at any bar-sponsored forum at which the rule referendum is discussed.

One or more proposed disciplinary rules may appear on a single referendum ballot. State Bar members shall vote for or against each rule. If a majority of the members who vote on the proposed rule vote in favor of the rule, the rule is approved by the members of the State Bar.

After the vote by the members of the State Bar, the Court has the ability to approve or reject the proposed disciplinary rule in its entirety, but may not approve or reject only part of the rule. If the Court does not vote on the rule on or before the 120th day after the date the rule is approved by bar members under Section 81.0878, the Court is considered to have approved the rule.

To make the decision, the Board of Directors and the Supreme Court of Texas would deliberate on the rule change. The committee, the Board of Directors, or the Court shall provide notice of any deliberation on a proposed disciplinary rule, and the deliberation must be open to the public. The Board of Directors and the Court shall record and make public each vote for or against a proposed disciplinary rule.

A proposed disciplinary rule may not be adopted by the Court unless the rule is approved by: the committee; the Board of Directors; the members of the State Bar; and the Court.

The Court, the committee, and the State Bar shall use technological solutions throughout the disciplinary rule proposal process to promote: financial efficiency; and comments from interested persons.

If a time limit provided by this subchapter expires or a disciplinary rule proposal is otherwise defeated, the process for initiating the proposed disciplinary rule may again be initiated in accordance with this subchapter. For good cause shown, the Court may grant a petition to extend any time limit provided by this subchapter until a date that is not later than the 90th day after the original deadline.

5.2 Amending the Commentary to the Rules

In order for the commentary to the Rules to be changed, an outside source has to petition the Court and request for a rule to be changed. Once the petition is received, the Court the responsibility to investigate the possible commentary change and determine whether to implement the commentary change. Once the Court has agreed to change the commentary, the Court would issue an order amending comments to the Rules.⁵¹ The order requires the signature of all eight Justices and the Chief Justice.⁵²

This process is not formally codified in the Texas Government Code. Additionally, this process is rarely used to amend the Rules because of how it only requires approval from the Court. More so, the reason why this process is rarely used is because it is considered a way to edit the Rules that usurps the system of checks and balances that exists for amending the rules.

It is important to keep in the mind the differences between these two processes when considering any potential amendments or additions to the Rules or Commentary. Amending the commentary to the Rules by direct petition of the Court is a much cheaper and quicker in comparison to amending the black-letter Rules. Similarly, the process of amending the Commentary in this way is not subject to the same frequency of points where the amendment can be defeated. On the other hand, this “shortcut” may raise concerns regarding democratic process and accounting for the input and interests of stakeholders.

⁵¹ E.g., Order Amending Comments to Tex. Disciplinary Rules Prof'l Conduct & Tex. Rules Disciplinary P. No. 16-9032 (Tex. 2016) <http://www.txcourts.gov/media/1332594/169032.pdf>

⁵² *Id.*

6. Recommendations

Recommendation 1: Amend or add commentary to the Rules to clarify that a lawyer's duty to give candid advice (Rule 2.01) encompasses human rights concerns.

Advising clients on human rights risks is the most important implication the UNGPs pose for the practice of law. Unfortunately, it may also be the area in which Texas's rules for lawyers is most lacking in terms of guidance. Below is a comparison of the ABA Model Code's rule on advising clients and Texas's equivalent (emphasis added):

ABA Model Rule 2.1	In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. <u>In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.</u>
Tex. Rule 2.01	In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Rule 2.01 omits the second half of Model Rule 2.1, decreasing the scope of considerations embodied in the black-letter law. It's difficult to state with certainty the practical consequences of this omission. The commentary to both rules notes—in identical language—the propriety of lawyers referring to moral and ethical considerations in giving advice, as well as the potential relevance of matters concerning other professions, such as social work or accounting.⁵³ Texas lawyers are not prohibited from advising clients on any matter that would be otherwise permitted under the ABA Model Rules. But the role of advisor is presented to Texas lawyers in a narrower light than what the role may encompass in fact. In the context of contemporary practice—an increasingly-interconnected and global legal environment; one in which human rights principles are increasingly embedded in standards, custom, and law—this does Texas lawyers a disservice⁵⁴.

Ideally, the Rules should serve to illuminate the relevance and moral urgency of human rights obligations—not obscure them. As such, the State Bar should reinsert the omitted second sentence of ABA Model Rule 2.1 into Texas's Rules. Given the “disciplinary” nature of the Rules, it may be necessary to do so as commentary rather than as black-letter law.⁵⁵ In doing so, the State Bar should also consider adding “human rights principles” as one of the enumerated factors a lawyer might consider in advising a client. This would clarify the responsibilities of lawyers in meeting their legal, professional, and ethical obligations. This accords with the IBA's suggestion that bar associations consider evaluating their codes of professional conduct in light of the UNGPs and lawyers' roles in advising clients on business and human rights.⁵⁶

⁵³ Respectively, ABA Model Rules Prof'l Conduct R. 2.1 cmts. 2 & 4; Tex. Disciplinary Rules Prof'l Conduct R. 2.01 cmts. 2&4.

⁵⁴ See generally Section 4.I. and 4.I.I, *supra*.

⁵⁵ Section 5.0.I, *supra*.

⁵⁶ IBA, *supra* n. 25.

Recommendation 2: Amend or add commentary to the Rules to clarify a lawyer’s duty of competent and diligent representation includes knowledge of international human rights principles, as applied to the territory and/or jurisdiction affected by the client’s business practices.

In terms of geographic, economic, and socio-cultural factors, Texas is one of—if not the most— “international” states in the US. As a result, the practice of law in Texas will likely be disproportionately affected by the ever-increasing scope and relevance of international human rights law. Texas lawyers need to understand what is expected of them in this field. Therefore, the State Bar should consider the addition of language to the Rules or Commentary describing the need for competence and diligence in this area.

There are several ways to accomplish this clarification. One approach would be to explicitly acknowledge the applicability of international human rights principles to the practice of law of Texas. For example, a number of bar associations and /or jurisdictions incorporate an affirmative duty to respect human rights in their respective codes of conduct, including Canada,⁵⁷ Japan,⁵⁸ and Sweden.⁵⁹

Texas could incorporate similar language into its rules—either as a new rule, or as commentary to Rule 1.01. Such an inclusion would draw attention to the binding character of international human rights law and the need for lawyers to act competently and diligently in complying with its principles.⁶⁰

Alternatively, or in addition, Texas could adapt a Rule or Commentary noting the existence of a ‘Texas dimension’ of legal practice, and the need for professional development reflecting this.⁶¹ The ABA Model Code’s language on technological competency could be adopted for this purpose; as could the CCBE’s professional conduct obligation.⁶²

⁵⁷ Model Code of Prof'l Conduct § 6.3-1 (“The principles of human rights laws and related case law apply to the interpretation of this rule” [regarding harassment and discrimination]). Federation of Law Societies of Canada; *see also* § 6.3 cmt. 1 (“A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honor the obligations enumerated in human rights laws.”) <http://flsc.ca/wp-content/uploads/2017/08/Model-Code-as-amended-March-2017-Final.pdf>

⁵⁸ Basic Rules on the Duties of Practicing Attorneys art. 1 Awareness of Mission (“An attorney shall be aware that his or her mission is to protect fundamental human rights and realize social justice.”) Japan Federation of Bar Associations. Effective April 2005. http://www.nichibenren.or.jp/library/en/about/data/basic_rules.pdf

⁵⁹ Code of Professional Conduct for Members of the Swedish Bar Association § 2.9 Upholding of Human Rights in the Practice of Law (“An advocate must not give advice with the purpose of counteracting or circumventing human rights or basic freedoms covered by the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (with protocols). An advocate should in his or her practice of law also otherwise work to uphold human rights and freedoms.”) Swedish Bar Association. Proposal entered into force June 2016. https://www.advokatsamfundet.se/globalassets/advokatsamfundet_eng/code-of-professional-conduct-with-commentary-2016.pdf

⁶⁰ UNGP No. 23 (*see p. 5 supra*)

⁶¹ Section 4.2.2 *supra*.

⁶² *Id.*

Recommendation 3: The State Bar of Texas Should Adopt and Implement a Human Rights Policy.

The State Bar of Texas should consider taking steps towards enacting a policy commitment to respect human rights, in accordance with the UNGPs.⁶³ As a public corporation, the State Bar is subject to the same responsibilities that all business enterprises share towards human rights.⁶⁴ Furthermore, as part of the administrative and regulatory apparatus of the Texas Judicial Branch, any adverse human rights impacts caused or contributed to by the State Bar are in part the responsibility of the state of Texas itself.⁶⁵ The State Bar therefore possesses a unique opportunity to lead by example and guide Texas law firms in adopting and implementing a policy on human rights.

Other bar associations have taken action in this regard. On June 16, 2017, the Law Council of Australia released a statement articulating its human rights commitments.⁶⁶ Since 2015, the Law Society of England and Wales' Business and Human Rights Programme has been involved in an ongoing process of engagement with stakeholders in formulating its human rights policies.⁶⁷ Its Business and Human Rights Advisory Group recommendations also call for the creation of such a policy.⁶⁸

In drafting policies and formulating procedures for respecting human rights, the State Bar may look to the OHCHR guidance, as well as the relevant UNGPs and commentary.⁶⁹

Recommendation 4: The State Bar should address the need for human rights education through training materials and CLEs. It should also investigate if there is a need to integrate human rights into the bar exam.

Annual training programs, such as the Bringing Human Rights Home Lawyers' Network Continuing Legal Education bring lawyers, law students, academics, and other international human rights experts together to discuss strategies for localizing human rights in the United States.⁷⁰ Given the international context in which Texas businesses operate, it would be beneficial for Texas lawyers to have increased opportunities for human rights training.

⁶³ UNGPs Nos. 15, 16.

⁶⁴ Tex. Gov't Code Ann., tit.2, subtit. G, § 81.011(a) (West 2017); see UNGP 14

⁶⁵ *Id.* at § 81.011 generally; see UNGP 4 (The State-Business Nexus).

⁶⁶ Policy Statement on Human Rights and the Legal Profession: Key principles and commitments (2017, adopted by Law Council's Directors June 2016.). Law Council of Australia. <https://www.lawcouncil.asn.au/policy-agenda/human-rights/human-rights-policy>

⁶⁷ Stakeholder Engagement – Business and Human Rights. Law Society of England and Wales. Accessed 19 November 2017. <http://communities.lawsociety.org.uk/human-rights/what-we-do/business-and-human-rights/stakeholder-engagement/>

⁶⁸ Business and Human Rights Advisory Group Recommendations, *supra* note 31, Recommendation I at 7.

⁶⁹ Amis, Lucy. How to Develop a Human Rights Policy (2011). United Nations Global Compact and Office of the United Nations High Commissioner for Human Rights. http://www.ohchr.org/Documents/Publications/DevelopHumanRightsPolicy_en.pdf

⁷⁰ The Bringing Human Rights Home Lawyers' Network. Human Rights Institute, Columbia Law School. <http://www.law.columbia.edu/human-rights-institute/bhrh-lawyers-network>

This is in line with the IBA's recommendations on business and human rights, which include the devotion of resources to raise awareness of the importance of business and human rights.⁷¹ Increased CLE training would help provide context to and empower lawyers to have the appropriate knowledge to be both advocate and advisor to their clients. More importantly, CLE and sanctions levied against lawyers who refuse to comply with the CLE obligation helps to "protect the public and to preserve confidence in the legal profession and judicial system."⁷² CLE allows for students and licensed attorneys who do not have the experience, in law school or practice, to gain understanding of areas of law that are not commonly emphasized.⁷³

Additionally, CLE is also important for the paralegals who assist lawyers in fulfilling their obligations to their clients. For example, in the state of Utah, the Canons of Ethics of the Paralegal Division of the Utah State Bar See Appendix B of the Standing Rules of the Paralegal Division of the Utah State Bar Canon 7 states: "A paralegal must strive to maintain integrity and a high degree of competency through education and training with respect to professional rules, local rules and practice, and through continuing education in substantive areas of law to better assist the legal profession in fulfilling its duty to provide legal services."⁷⁴ This is analogous to paragraph 5 of the Preamble to the Texas Disciplinary Rules of Professional Conduct that states, "As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education."⁷⁵ And in Comment 7 of Rule 5.01 that states, when discussing the obligations of lawyers to their firms, "Lawyers may rely also on CLEs in professional ethics to guard against unintentional misconduct by members of their firm or organization."⁷⁶ CLE is important to every aspect of legal profession which is why increasing human rights education would be beneficial.

⁷¹ IBA pg. 10, *supra* n. 25.

⁷² See *Discipline of Attorney for Failure to Comply with Continuing Legal Education Requirements*, 96 A.L.R.5th 23 – In 1982, a lawyer was punished for failing to comply with a suspension order for failing to complete continuing legal education requirements. Here, the lawyer failed to properly comply with the sanctions placed by the court and the court justified its judgment based on the importance of sanctions and CLE training. *Matter of Yamagiwa*, 97 Wash. 2d 773, 650 P.2d 203 (1982).

⁷³ See *Celebrating Twenty Years Of Continuing Legal Education: The Art And Science Of Educating Attorneys: The Scope Of The Issue: Defining Continuing Legal Education: Law School Education And Liberal CLE*, 40 Val. U.L. Rev. 325 – "Thus, the importance of continuing legal education, both as means to further a lawyer's education and as means to assist individual initiative. Bridging the gap programs and other programs specifically for new lawyers can help facilitate the move from law student to practicing lawyer. Other continuing legal education programs compensate for limitations of law school education in the area of skills training and other subjects that, while offered in law school, are either not emphasized or are more effectively taught to those with at least a modicum of practice experience."

⁷⁴ Canons of Ethics of the Paralegal Division of the Utah State Bar See Appendix B of the Standing Rules of the Paralegal Division of the Utah State Bar

⁷⁵ Paragraph 5 of the Preamble: A Lawyer's Responsibilities of the Texas Disciplinary Rules of Professional Conduct

⁷⁶ Comment 7 to Rule 5.01. Responsibilities of a Partner or Supervisory Lawyer of the Texas Disciplinary Rules of Professional Conduct

Moreover, human rights should be part of everyone's education. However, certain groups have a particular need for human rights education: some because they are especially vulnerable to human rights abuses, others because they hold official positions and upholding human rights is their responsibility, still others because of their ability to influence and educate. In its guidance on business and human rights for bar associations, the IBA notes the need to foster "a common understanding of evolving developments and expectations in this field."⁷⁷ Ultimately, lawyers cannot advocate for or protect a right without an awareness of that right.⁷⁸ Texas tests on Oil & Gas even though a large majority of the examinees will not be practicing in Oil & Gas. Furthermore, the State Bar of Texas Oil, Gas & Energy Resources Law Section sponsors various CLE programs and also maintains efforts to educate its members which includes testing on the bar exam.⁷⁹ This fact demonstrates that even though not every examinee will be practicing in a single field it is necessary to test on the subject. Also, given the international practices of the state of Texas it is necessary for potential lawyers to have an understanding of human rights law.

Human rights law protects the legal rights of marginalized individuals and groups, including racial minorities, women, indigenous people, refugees, and members of the LGBTQIA community. Lawyers who are knowledgeable in human rights are able to advocate for rights to education, freedom of expression, life, housing, or medical treatment. By adding human rights law to the bar examination, the State Bar of Texas will not only give their examinees the requisite knowledge to function as lawyers in the state of Texas, but will also provide them with information to operate internationally as well.

⁷⁷ IBA pg. II, *supra* n. 25.

⁷⁸ See Nonprofits Have a New Role in Ensuring Human Rights in the United States, 30 U.S.F. L. Rev. 427

⁷⁹ See Feature: 2015-2016 State Bar of Texas: Section Reports, 79 Tex. B. J. 542