

An open letter to the Supreme Court of Texas, and the State Bar of Texas:

March 2, 2011

Ladies and Gentlemen:

Recently, the membership of the State Bar of Texas firmly rejected the referendum on the proposed disciplinary rules, by an approximate 4 to 1 margin. Given that it is hard to get four out of five attorneys to agree on *anything*, this was nothing short of an astonishing mandate. **The questions you now pose to us are: (1) “why did it fail?” and (2) “what should the Bar and Supreme Court do next?”**

**I. Why did the referendum fail?**

Proponents of the proposed rules suggest that the vote had nothing to do with the rules themselves, and was instead a political commentary on the Supreme Court or a result of members not understanding the proposed rules. Opponents suggest that the rules failed on their merits, or lack thereof.

It seems to me that a few poorly conceived proposed rules combined with the poor structure of the ballot questions and the tenor and intensity of lobbying by the Bar resulted in the wholesale rejection of the referendum.

I believe the following factors played a role in the outcome of the referendum:

1. Attorneys do not perceive a pressing need to discard the existing ethical code. The argument that 20 years without amendment and the resulting variance from the current ABA rules mandated sweeping changes to our rules was not persuasive. The general criticism (recently echoed by Chief Justice Jefferson) that the rules are “outdated” was insufficiently precise to generate a groundswell of support for changing the existing system. While most lawyers agree that the rules could use some updating, they don’t believe the rules need replacing. The proposals were seen as overkill.
2. The form of the ballot was confusing and poorly conceived. The fact that the individual proposed rules were not quoted on the ballot made it difficult to identify and reject or approve specific rules. A few objectionable rules were discussed at length, while other less controversial rules were largely ignored. Because the ballot did not separate the proposed rules, the easiest solution for voters was to reject the entire slate. Had the ballot allowed for approval or disapproval of each separate rule, the result may have been quite different.
3. The lobbying effort of the Bar in support of the proposed rules was counterproductive. The flood of e-mails from rules proponents was sometimes perceived as “harassing” and intolerant of criticism. Lawyers were offended by the use of Bar resources and data, and the offers of free CLE, promoting the proposed rules. (I heard the CLE offers described as “unethically trying to buy votes with ethics hours.”)

4. The tenor of the Bar's e-mails polarized the voters. I believe the intense promotional campaign of the Bar caused a backlash that contributed to the failure of the entire referendum. E-mails from the Bar implied that no one who "understood" the rules could vote against them – a message guaranteed to offend. There was no tolerance of dissent, which was declared to be based on "misinformation." Critics were vilified – some by name. I believe these tactics united the Bar membership in its opposition, taking the focus off the proposed rules, and instead placing it upon the *proponents* of the rules.

In my opinion, this was not a mandate against the concept of updating the rules; it was a mandate against the comprehensive overhaul in the referendum and the way it was presented and promoted. If, as Bar leadership implies, the individuals in the profession could not understand the problems with the current rules and the wisdom of the proposed changes, it could also be said that the Court and the Bar did not understand the perspective of the individual lawyers. Proponents of the referendum seemed genuinely shocked by the response of the membership, and the e-mail battle that ensued was destructive to the process.

## **II. What should the Supreme Court and State Bar of Texas do next?**

This is the crucial question. The Court has several options: (1) do nothing, (2) impose the rules despite the vote, or (3) open a dialog with the Bar and its membership to reevaluate its position and attempt to find a consensus.

The third option seems best. The Bar and the Texas Supreme Court feel strongly that the rules need to be updated, but they should not ignore the clear message from the legal profession whom they purport to serve. If the profession better understood what problems the Court seeks to address, and what rules, *specifically*, are a concern, a productive dialog could take place. Smaller steps may be needed, if progress is to be made. And certainly, better communication is a must.

I believe that our profession wants to be responsive to the Court and to the public. The Bar membership and its leaders need to work together as a unified profession to address these issues of governance. Dictatorial imposition of the entire slate of proposed rules after the sweeping rejection would be counterproductive and harmful to our profession.

The Bar leadership needs to do a better job of listening to its members. For instance, many attorneys feel that the problem that most needs to be addressed is not the age of the existing rules, but the lack of enforcement of those rules. If the system is insufficient to enforce the existing rules despite decades of interpretive precedent, then how will it effectively enforce *and interpret* an entirely new ethical code? Before imposing a new set of ethical rules, the Court should reexamine the grievance system to ensure its effectiveness.

The Bar has lost the trust of its membership. Many people felt the Bar overstepped its bounds by pressing for straight-ticket passage of the referendum. The lobbying by the Bar was broadly interpreted as an insult to the intelligence of its members – a message that any opposition could only be the result of ignorance, or worse, stupidity. This begs the question: How, if you believe we cannot understand the rules despite a year of discussion, can you expect us to be able to comply with them if they are imposed upon us?

There is a growing sentiment among lawyers that the Bar as an institution has lost touch with its membership. Common perception is that the Bar does things *to* us, not *for* us. Obviously this perception is skewed by frustration over recent events. I believe that the Bar's response to the membership on this issue will determine in large part its effectiveness in meeting its statutory goals in the future. The membership and its leaders must learn not merely to coexist, but to *cooperate*. Without mutual trust and respect, all of the Bar's other initiatives could be met with skepticism and resistance from the membership. Condescension, disrespect, or simply ignoring its members' message could be disastrous.

Although the Supreme Court – elected from our ranks – is charged with overseeing our profession, we as a profession have the right to *reasonable self-governance*. “Self-governance” without the right to say “no” is merely illusory. (“Everyone has the right to my opinion.”) Was the referendum merely the presentation of a *fait accompli*? Was the Court merely seeking our endorsement, not our opinion, of the action it had already decided to take? Asking our opinion when the outcome is predetermined is a ruse. If the rules that were resoundingly rejected by the membership are imposed against the collective will by those we elected, then we are not being represented, we are being *governed*.

It has been suggested that the vote was a statement of opposition to the Supreme Court itself. I do not agree with that assessment. The voters seemed to have many other, overriding concerns with the ballot and the proposed rules. And until the February 23, 2011 Supreme Court Advisory, the Court stayed above the fray, merely asking lawyers to weigh in on the proposed revisions. As a result, the reactionary animosity has heretofore been focused on the Bar leadership, rather than the Supreme Court. The two recent issues presented by the Supreme Court to the Bar membership – PLI and this referendum – were poorly received, and the implication in last week's Texas Supreme Court Advisory that the Court is the only thing standing between our profession and its prey (the public), will not improve communications. If this trend continues, attorneys may begin to believe that the Court is out of touch with the profession in Texas, and seek to do some updating of their own. I would hope, instead, that everyone will take a step back and revisit the underlying issues in a more pointed, productive way. What are the real problems with the existing system? What is the most effective way to address them? And how can we improve communications and foster trust among the membership, the Bar, and the Court?

It was recently postulated by a proponent of the referendum that Bar leadership is elected to represent “the interests of lawyers,” not of the “individual lawyer.” But the term “lawyers” refers to a *collection of individuals*, and it is the individuals who cast the votes. And in this referendum, tens of thousands of individual lawyers spoke loudly and with a unified voice. **The questions I pose to you are: “Did you hear it?” and “Will you listen?”**

Thank you for your time, and for all you do for our profession.

Very truly yours,

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Immediate Past Chair –GPSOLO Section, State Bar of Texas

Joined in support:

Thelma Clardy – Chair, GPSOLO Section

Joyce Stevens – Incoming Chair, GPSOLO Section

Zollie Steakley – councilmember and Past Chair, GPSOLO Section

Hugh Lindsey – councilmember and Past Chair, GPSOLO Section

Charles Awalt – councilmember and Past Chair, GPSOLO Section, current member LPM Committee

Thomas P. Curtis – councilmember and Past Chair, GPSOLO Section; Past Chair District 12-B Grievance Committee (12 years total service)

John Rodes – councilmember and Past Chair, GPSOLO Section

Brandon S. Earp – councilmember, GPSOLO Section

James Mosley – councilmember, GPSOLO Section

Leigh B. Meineke – councilmember, GPSOLO Section

William B. Crout – councilmember, GPSOLO Section

Wayne A. Rohne – councilmember, GPSOLO Section