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Inside Texan Attorney Ethics: Referendum Breakdown

Law360, New York (March 17, 2011) -- Between Jan. 18 and Feb. 17, 2011, the State Bar of Texas conducted a referendum on significant amendments to the Texas Disciplinary Rules of Professional Conduct. The Texas Disciplinary Rules govern attorney ethics, "stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action."

Texas lawyers overwhelmingly voted down the proposed amendments, which did include a new rule prohibiting sexual relations with clients, which likely failed because it was grouped in with other proposed rules on the referendum ballot.

Texas lawyers need to understand and reflect on the referendum to ensure appropriate professional standards in the future that continue to protect and preserve the legal system in Texas.

Lead Up to the Referendum

The referendum topped off a process that began nearly eight years ago in 2003, when the Texas Supreme Court appointed a task force to study changes made to the American Bar Association Model Rules of Professional Conduct in 2002. The Texas Supreme Court charged the Task Force with comparing the changes to the ABA Model Rules with the existing Texas Disciplinary Rules and making recommendations for improvements to the Texas Rules, which were last overhauled more than 20 years ago in 1990.

Thomas H. Watkins, a partner at Brown McCarroll LLP in Austin, chaired the Task Force, which according to Texas Supreme Court Justice Wallace B. Jefferson was composed of attorneys from diverse backgrounds and expertise, and included lawyers from small, mid-sized and large firms, in-house counsel, governmental attorneys, academics and representatives of disciplinary authorities.

The State Bar Committee on the Texas Disciplinary Rules of Professional Conduct, composed of a similarly diverse group and chaired by Lillian Hardwick at the time of the referendum, also reviewed the rules and made their own recommendations to the Texas Supreme Court.

The Task Force and the Rules Committee did not agree on what changes should be made to the Disciplinary Rules, and the two panels presented separate recommendations to the Texas Supreme Court on how the rules should be modified.

In 2008 and 2009, the Texas Supreme Court studied the proposed recommendations of the Task Force and the Rules Committee. In October 2009, the Texas Supreme Court published proposed rules for public comment. In April 2010, the court published a revised version of the amended rules for additional comment, requesting additional recommendations or comments by Oct. 6, 2010.

The state bar sought feedback from lawyers and the public through a variety of methods. In particular, the bar conducted public hearings between Aug. 30, 2010, and Sept. 10, 2010, in Lubbock, El Paso, Houston, Tyler, Dallas, Corpus Christi, McAllen, San Antonio and Austin.

After receiving strong feedback on the proposed amendments to the conflicts of interest rules, which galvanized opponents in the referendum, the bar board of directors asked the court for more time to continue to vet those changes. With the exception of the conflict of interest rule proposals, the board voted to send all of the proposed recommendations to the Texas Supreme Court in October 2010.

Following additional public comment, on Nov. 5, 2010, the state bar board of directors adopted the remaining proposed rules and forwarded them to the court along with a petition for a referendum.

On Nov. 16, 2010, the Texas Supreme Court signed an order directing the state bar to conduct a referendum on the proposed amendments to the Texas Disciplinary Rules, as finally published by the court with the order, in accordance with a ballot form attached to the order, and ordering voting to be conducted between Jan. 18, 2011, and Feb. 17, 2011.

Significantly, the order specified that the vote would only be on the proposed rules, and not on the lengthy rule comments, designed to provide "interpretive guidance" to the rules and apparently comprising two thirds of the total of the rules and comments published for the vote.

The Learning Curve Falls Flat and Opponents Go Viral

The Texas Bar Journal published the proposed rules and comments and commentary concerning the rule amendments in its December 2010 edition. The Texas Bar had information on the referendum and the amendments on its website and also conducted seminars to help practitioners study up before the vote.

Many Texas lawyers just did not take well to the bar throwing its resources behind the amendments, which more than a few lawyers interpreted as the bar telling its constituents how to vote. Additionally, lawyers were overwhelmed by the extent of the rule changes and time needed to fully understand the extent of the amendments, the new comments, and the implications of these changes, which all had to be digested in approximately eight weeks before the vote.

Opponents of the proposed rule changes also blasted Texas lawyers, seemingly daily, with e-mails and blog entries about why they should vote against the proposed rule amendments. The state bar, in turn, blasted attorneys with e-mail retorts and a redoubled effort to dispel deemed misinformation about the proposed rule amendments.

By the time the referendum rolled around in mid-January, many Texas lawyers were wondering how their e-mails were added to these lists in the first place and many were already fatigued by blistering debate, which did not stop until the referendum was over.

The opponents of the referendum made use of blogs and social media as bullhorns for their multiple complaints about the proposed rules. One member of the Task Force thought that the opponents' blogs went "viral," whipping up practitioners into an unjustified panic over the changes, which the Task Force member explained were actually designed to lessen existing burdens on attorneys under the current rules, a point that may have been lost in the heat of the moment for some lawyers.

The proposed changes to the conflict of interest rules particularly riled opponents, who were dissatisfied with proposed "safe harbor" conflict of interest disclosures they contended harmed lawyers instead of protecting them and were uneasy with a system of multiple conflict of interest rules that overlapped.

The opposition argued against the proposed changes because, among other things: 1) the current rules, as adopted in 1990, continued to work just fine and the new rules were confusing and unclear; 2) a major overhaul of the rules as proposed would have resulted in the loss of nearly 20 years of case law precedent and ethics opinions interpreting the existing rules, resulting in uncertainty for Texas lawyers and the public, and as such the cost of making major changes to the rules outweighed any benefit; 3) the years and resources spent developing the rule amendments did not justify voting for the changes; 4) the proposed rules deviated from national standards; 5) the proposed rules lowered standards of professionalism; 6) the amendments would have substantially altered practice procedures at a great cost to Texas lawyers; 7) the interpretive comments were not voted on; and 8) the referendum ballot was poorly worded or structured.

The bar and proponents argued that the amendments should be passed because, among other things: 1) the rules needed updating, as Texas has fallen behind the ABA in other jurisdictions that have updated their ethics rules in light of changes in the law, technology and the practice; 2) the Texas rules needed to be aligned with the ABA Model Rules; 3) the amendments clarified and made the rules easier to understand and implement; 4) the amendments provided more protections for clients and for lawyers; and 5) the amendments were fully vetted by the Task Force, the Rules Committee and the Texas Supreme Court.

Referendum No Go

Rather than voting on the proposed rules individually, the ballot posed a "Yes or No" vote to six categories and questions. Forty-four percent of licensed attorneys eligible to vote participated in the referendum and crushed the proposed amendments:

A. Terminology, Competent and Diligent Representation, Scope of Representation and Allocation of Authority, Communication, Fees, Confidentiality, Safekeeping Property, and Declining or Terminating Representation:

Do you favor the adoption of Proposed Rules 1.00-1.05 and 1.15-1.16 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the Texas Bar Journal?

Yes: 7,688 or 20 percent

No: 30,748 or 80 percent

B. Conflicts of Interest: Multiple Clients in the Same Matter:

Do you favor … Proposed Rule 1.07 …?

Yes: 7,312 or 19.02 percent

No: 31,128 or 80.89 percent

C. Other Conflicts of Interest:

Do you favor … Proposed Rules 1.06 and 1.08-1.12 …?

Yes: 7,153 or 18.68 percent

No: 31,138 or 81.32 percent

D. Prohibited Sexual Relations, Diminished Capacity, and Prospective Clients:

Do you favor … new Proposed Rules 1.13, 1.14, and 1.17 …?

Yes: 10,617 or 27.69 percent

No: 27,731 or 72.31 percent

E. Advocate, Law Firms and Associations, Public Service, and Maintaining the Integrity of the Profession:

Do you favor … Proposed Rules 3.01-3.10, 5.01-5.07, 6.01-6.03, and 8.01-8.05 ...?

Yes: 8,563 or 22.33 percent

No: 29,787 or 77.67 percent

F. Counselor, Non-Client Relationship, Information About Legal Services, and Severability of Rules:

Do you favor … Proposed Rules 2.01-2.02, 4.01-4.04, 7.01-7.07, and 9.01 …?

Yes: 8,788 or 22.90 percent

No: 29,582 or 77.10 percent

Other than streamlining the vote, it is not clear why the ballot was structured with groups of rules, which may have been designed to ensure passage of the amendments, but potentially aided in producing the opposite result. Case in point is new Rule 1.13, prohibiting sexual relations with clients — certainly a no-brainer, but this rule was grouped in with two unrelated rules governing diminished capacity of clients and prospective clients. The ballot made the vote all or nothing.

It was also never fleshed out ahead of time what would happen if some of the proposed rules, which were entwined with one another, passed and others did not. It was also never clear how the interpretive comments would work if only some of the proposed rules passed. Obviously, the bar never had to contend with these questions, but they undoubtedly were playing on voters' minds.

What is Next?

As Texas State Bar President Terry Tottenham has noted, "We expect that this [referendum] will not be the end of the Supreme Court's interest in making revisions to these rules."

This referendum is not the first to fail, and it surely will not be the last. It is back to the drawing board for the state bar and the Texas Supreme Court. It is unclear what the next steps will be on reforming the rules, but it is unlikely that reformation will fade away, not when the practice of law and the world that shapes it are so rapidly changing. Targeted changes to the existing rules may be more palatable to Texas lawyers, but there are certainly pros and cons to be considered with respect to patchwork amendments.

The referendum and the process leading up to it demonstrated that Texas lawyers were engaged and concerned about setting appropriate standards of practice, even if that meant rejecting the rules the bar and the Texas Supreme Court presented to them. The referendum was a display of the democratic process, as imperfect as it may be, and a healthy debate is necessary in that process to help ensure beneficial results.

As the debate continues after the referendum, Texas lawyers will hopefully produce better Disciplinary Rules, better attorneys and a better legal system that Texans can continue to trust and be proud of.

Texas lawyers, who were able to sit back and criticize the proposed changes to the Disciplinary Rules, mostly anonymously in the vote, must also realize that they have a responsibility to meaningfully contribute to the process. Lawyers cannot afford to stagnate and resist change solely because change is difficult, expensive, uncomfortable or uncertain. Change is inevitable, and the bar and all Texas lawyers must plan for it accordingly to preserve and protect their most precious asset, the very legal system that gives them purpose and meaning.

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