

# STATE BAR OF TEXAS

## Issue 1

*The Rulemaking Process at the State Bar Obstructs Changes Needed to Effectively Regulate Attorneys.*

### Change in Statute

**Rec. 1.1, Modified** In lieu of staff recommendations 1.1, 1.2, and 1.3, retain the referendum requirement for State Bar rules while also improving the overall rulemaking process. *(See attachment)*

**Rec. 1.2, Not Adopted** Require the Supreme Court to develop a standard rulemaking process for the State Bar ensuring ample opportunity for State Bar members and other stakeholders to vet changes to attorney regulation rules or membership dues.

### Management Action

**Rec. 1.3, Not Adopted** The State Bar should develop a consistent process for collecting membership input on proposed rule changes to inform Supreme Court rulemaking.

## Issue 2

*Texas' Attorney Discipline System Lacks Best Practices Needed to Ensure Fair, Effective Regulation to Protect the Public.*

### Change in Statute

**Rec. 2.1, Adopted** For new and recently licensed attorneys, authorize the State Bar to access criminal background information obtained by the Board of Law Examiners during initial licensure.

**Rec. 2.2, Adopted** For currently licensed attorneys without information on file with the Board of Law Examiners, require the State Bar to obtain new fingerprint-based criminal background checks, phased in over a two-year period.

**Rec. 2.3, Adopted** Require licensed attorneys to report criminal activity and discipline imposed by other jurisdictions to the Office of the Chief Disciplinary Counsel.

- Rec. 2.4, Not Adopted** Require overdraft notifications for attorney trust accounts so that the chief disciplinary counsel has an early warning system for possible misuse of client funds.
- Rec. 2.5, Adopted** Reinstate the chief disciplinary counsel's subpoena power during the investigative phase of the attorney discipline process.
- Rec. 2.6, Adopted** Require a process and criteria for conducting investigatory hearings to attempt earlier resolution for certain cases.
- Rec. 2.7, Adopted** Require a re-evaluation and adjustment of time frames governing the grievance process to ensure workability.
- Rec. 2.8, Adopted** Clearly establish the Grievance Referral Program in rule, and expand its use to any point in the attorney discipline process.
- Rec. 2.9, Adopted** Require comprehensive sanction guidelines in the Texas Rules of Disciplinary Procedure.
- Rec. 2.10, Modified** As a statutory instead of management action, require the Office of the Chief Disciplinary Counsel to query the national disciplinary database at regular intervals.
- Rec. 2.11, Modified** As a statutory instead of management action, require the chief disciplinary counsel to track and report disciplinary case outcomes in greater detail.
- Rec. 2.12, Modified** As a statutory instead of management action, require the State Bar to post more information on its website about disciplinary actions taken against attorneys. Also, as a related management action, direct the State Bar to post summary statistics and trend information regarding the attorney grievance system on the home page of the State Bar's website, including but not limited to data on the number of grievances received, their disposition, and the average time for resolution of each step of the grievance process.

#### Management Action

- Rec. 2.13, Adopted** Direct the Office of the Chief Disciplinary Counsel to more proactively provide assistance to complainants in understanding reasons for complaint dismissal.

## Issue 3

*The State Bar Does Not Maximize Informal Dispute Resolution to Most Effectively Resolve Grievances Against Attorneys.*

### Change in Statute

**Rec. 3.1, Adopted**      Require a referral process to divert minor issues from the formal grievance system to the Client-Attorney Assistance Program for informal dispute resolution.

**Rec. 3.2, Adopted**      Repeal the requirement to refer dismissed grievances to the Client-Attorney Assistance Program.

## Issue 4

*Texas Has a Continuing Need for the State Bar.*

### Change in Statute

**Rec. 4.1, Adopted**      Continue the State Bar for 12 years.

## Adopted New Issues

### ***Ombudsman's Office***

Establish an independent Ombudsman's office under the Supreme Court to help oversee the attorney grievance system. *(See attachment)*

### ***Update Across-the-Board Recommendation on Board Member Training***

In the State Bar Act, update the Sunset across-the-board recommendation on board member training (ATB 5) recently modified by the Sunset Commission, excluding the portion regarding travel reimbursement.

## **State Bar**

*Modification – Do not adopt Staff Recommendations 1.1, 1.2, and 1.3. Instead, adopt the following modification to retain the referendum requirement for State Bar rules while also improving the overall rulemaking process.*

*Submitted by: Senator Watson*

*Fiscal Impact: The modification would not have a fiscal impact to the state, as the State Bar receives no state funds and operates outside of the appropriations process.*

### **Background & Purpose**

Under current law, changes to the substantive and procedural rules that govern attorney conduct must be approved by a majority of attorneys who vote in a referendum.<sup>1</sup> Changes to certain fees must go through this same process.<sup>2</sup> Although this requirement is fairly unique among licensing agencies, it is an important safeguard that has benefitted the state's legal system for decades.

Despite the referendum's long record of success, the latest one, which culminated in 2011, exposed serious flaws, not in the referendum itself, but in the process that leads up to a referendum. For example, the Supreme Court of Texas and the State Bar of Texas appointed two separate committees to study rule changes. These committees spent about six years developing and defending different proposals. Further, many attorneys complained that their voices were ignored and excluded throughout this process. Lastly, the referendum's final ballot created serious problems in part because it grouped completely unrelated topics together in a single proposal. Texas attorneys recognized these problems and soundly rejected the 2011 referendum as a result. Notably, this is the only referendum since 1985 that failed because Texas attorneys voted against it.

This modification preserves Texas attorneys' right to vote in rule referenda while addressing many of the underlying problems that led to the 2011 referendum's defeat. More specifically, this modification outlines a new rulemaking process that proposals must follow before they are submitted to attorneys in a referendum. This process incorporates best practices from other Texas agencies and is designed to encourage efficiency, collaboration, and expertise. Finally, this process also ensures interested individuals from the State Bar, the Supreme Court, and the public at large have ample opportunity to participate and make informed decisions. Lastly, this modification transfers the authority to change membership and related fees from the State Bar's members to the Supreme Court. The Supreme Court is a more appropriate decision-maker when it comes to fees since it already reviews and must approve the State Bar's budget.<sup>3</sup>

<sup>1</sup> Government Code § 81.024(g).

<sup>2</sup> Texas Government Code § 81.054.

<sup>3</sup> See Texas Government Code § 81.022.

## Talking Points

- The current system is broken, but not because attorneys have a right to vote. Instead, the 2011 referendum revealed that the process leading up to a referendum is seriously flawed.
- This modification serves several purposes:
  - It preserves Texas attorneys' right to vote in rule referenda;
  - It transfers the authority to change fees to the Supreme Court, which already has the authority to approve the State Bar's budget; and
  - It corrects many of the problems that led to the failed 2011 referendum.
- The proposed rulemaking process includes the following steps:
  - First, rule proposals may be submitted by various people/entities. These proposals all go to a new, standing committee of the State Bar for review.
    - The committee is made up of Supreme Court and State Bar appointees, as well as attorneys and non-attorneys.
    - Committee members serve staggered-three year terms.
    - The committee is charged with reviewing, developing, and receiving feedback on rule proposals.
    - This structure should create several benefits.
      - Having one, standing committee versus separate, ad hoc committees promotes efficiency.
      - Members serve long enough to develop expertise and relationships with interested stakeholders, but not so long as to slow down the process.
      - Finally, requiring public feedback towards the beginning of the process ensures different groups have a real opportunity to effectuate change.
  - Second, rule proposals must go through an approval process.
    - The State Bar Board, Texas attorneys, and the Supreme Court all have an opportunity to vote on rule proposals.
    - Further, each of these stages has deadlines, ensuring efficient and timely consideration of every proposal.
- Finally, this modification adds additional transparency protections to the rulemaking process. For example, referendum ballots must each be limited to one subject, and proposals must be printed in the *Texas Register* and the *Texas Bar Journal* for public review and comment. With the procedural changes, these protections should make for a much more responsible rulemaking process.

**Modification Language**

**1. In statute, create the Committee on Disciplinary Rules and Referenda (the "Committee") as a standing committee of the Bar.**

- a. *Basic Functions.* The Committee shall:
  - i. Regularly review the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure (the "Rules");
  - ii. Issue a report on the adequacy of the Rules to the Supreme Court and the Bar Board at least once annually;
  - iii. Oversee the initial stages of the rulemaking process, as described below.
- b. *Organization.*
  - i. The Committee shall consist of the following appointments, with three-year, staggered terms<sup>4</sup>:
    1. Four attorneys and two non-attorney public members, appointed by the Bar President; and
    2. Two attorneys and one non-attorney public member, appointed by the Supreme Court.
  - ii. The Bar President shall designate an attorney member to serve as the chairperson for an annual term.<sup>5</sup>
  - iii. The Bar may hire a staff attorney to assist the Committee.

**2. Repeal Government Code § 81.024(b)-(g), and replace it with the following rulemaking process.**

- a. *Initiation.*
  - i. The Committee may initiate rulemaking independently or as part of its regular review.
  - ii. In addition, the Committee shall either (a) initiate rulemaking or (b) issue a written explanation regarding why it declined to do so within 60 days of receiving any of the following items requesting a rulemaking:
    1. A Bar Board resolution;
    2. A Supreme Court request;
    3. A request from the Commission for Lawyer Discipline;
    4. A petition signed by at least 10% of the Bar's members;<sup>6</sup>
    5. A concurrent resolution of the Legislature; or
    6. A petition signed by at least 20,000 people.<sup>7</sup>
- b. *Phase 1: Proposal Development.*
  - i. After the Committee initiates rulemaking, it shall study the issue, hold public hearings, and draft rule proposals. As part of this process, the Committee shall take reasonable efforts to solicit feedback from different parts of the state and from different groups of attorneys and non-attorneys. The Committee

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<sup>4</sup> The initial appointments would not all have three-year terms in order to create the staggered effect.

<sup>5</sup> This provision is modeled after the Commission for Lawyer Discipline. See Texas Government Code § 81.076(d).

<sup>6</sup> These first three methods are similar to current law. See Government Code § 81.024(b).

<sup>7</sup> See Government Code § 2001.021 for an analogous procedure applicable in the Executive Branch.

shall conclude this work and publish draft proposals in the *Texas Register* and in the *Texas Bar Journal* within 6 months or the proposal is defeated.

- ii. After the draft proposals are published, the public (including attorneys) shall have at least 30 days to submit public comments to the Committee. During this time, the public may petition for a public hearing on any draft proposal.<sup>8</sup> Lastly, the Committee may amend any public proposal in response to feedback received during this time.
- iii. Within 60 days of the public comment period closing, the Committee shall vote on whether to recommend each proposal to the Bar Board. If any proposal receives an affirmative vote of at least 5 members of the Committee, it shall be considered by the Bar Board.

c. *Phase 2: Proposal Approval.*

- i. Within 180 days, the Bar Board shall vote on each proposal that it received from the Committee. For each proposal, the Board shall vote to (1) approve the proposal, (2) reject the proposal, or (3) send the proposal back to the Committee for further consideration. If any proposal receives an affirmative vote of the majority of the Board, then the Board shall petition the Supreme Court to order a referendum for the relevant proposals.
- ii. After receiving a petition from the Bar Board, the Supreme Court shall order a referendum, much like they do today. Again the proposals shall be published in the *Texas Register* and the *Texas Bar Journal*, and the Bar's members shall have at least 30 days to consider the referendum before voting begins. Voting shall last for 30 days. Then, the results shall be determined as they are today: on each proposal individually by a simple majority of those members who voted.
- iii. Finally, the Supreme Court may "veto" any approved proposal in its entirety with a majority vote (but the Court may not veto only part of a proposal). If the Court fails to act w/in 60 days, the proposal is deemed approved.
- iv. A rule may not be promulgated unless it is approved at each of these steps (with the Committee, the Bar Board, the Bar's members, and the Supreme Court).

**3. Codify additional transparency protections and efficiency measures.**

- a. All meetings/hearings of the Bar Board and Supreme Court where proposals are deliberated shall be advertised and open to the public. Also, all votes shall be recorded and made public.
- b. Each proposal shall be limited to one subject. Although multiple proposals may appear on one referendum ballot, they shall each pass or fail individually.
- c. As mentioned above, proposals shall be printed in the *Texas Register* and in the *Texas Bar Journal*. Currently they are only published in the *Texas Bar Journal*, which non-lawyers are unlikely to read.
- d. The Committee, the Bar, and the Supreme Court shall maximize technology to reduce delay and increase financial efficiency and stakeholder feedback throughout this process.

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<sup>8</sup> See *Id.* at § 2001.029(b) for a comparable procedure.

- e. The Bar shall allow referendum opponents a substantially equal opportunity to speak when referendums are discussed in Bar-sponsored forums.

**4. Require State Bar membership fee changes to be approved through the State Bar's existing budget process, instead of through the referendum process.**

- a. Repeal the current requirement that subjects membership and other fee changes to the referendum process.<sup>9</sup>
- b. Instead, the State Bar shall submit and justify any fee changes as part of its existing annual budget process. These changes shall be clearly described, posted, and considered as part of the State Bar's annual public budget hearing. Finally, any fee change must be approved by the Supreme Court as part of the State Bar's budget.<sup>10</sup>

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<sup>9</sup> See Texas Government Code § 81.054.

<sup>10</sup> See Texas Government Code § 81.022.

## **State Bar**

*New Issue – Establish an independent Ombudsman’s office under the Supreme Court to help oversee the attorney grievance system.*

*Submitted by: Senator Watson*

*Fiscal Impact: The modification would not have a fiscal impact to the state, as the State Bar receives no state funds and operates outside of the appropriations process.*

### **Background & Purpose**

The State Bar of Texas oversees and enforces the Texas disciplinary system. Because the State Bar is also a professional association that all Texas attorneys are required to participate in, there is a legitimate concern regarding conflicts of interest. In particular, some advocates question if the State Bar is protecting its own attorneys, especially since data from the last ten years indicates that the number of grievance actions against attorneys has remained flat while the profession has significantly grown in size.

At the same time, it is important to note that the Sunset staff just completed a thorough review of the State Bar and did not find the kind of evidence that it typically looks for before recommending a significant, structural change. Instead, it found that the State Bar is administering its programs, including the disciplinary system, fairly well.

This proposal seeks to address the concerns of bias that legitimately stem from the State Bar’s unique structure without requiring a wholesale upheaval. More specifically, this modification requires the State Bar to fund one full-time position so that an Ombudsman can be created under the direct authority of the Texas Supreme Court. This Ombudsman can serve several key functions, each of which addresses a concern advocates have shared regarding the current disciplinary process. For example, the Ombudsman can help people access the system by answering questions and giving guidance about the grievance forms. In addition, the Ombudsman can review individual cases to ensure that the State Bar followed its own grievance procedures. And lastly, the Ombudsman can review trends and make recommendations to the Supreme Court and the State Bar Board regarding necessary changes. In summary, the Ombudsman can provide an independent review to help the State identify and correct problems within the State Bar’s disciplinary process.

### **Modification Language**

- (1) The State Bar of Texas shall fund one FTE position to serve as an Ombudsman for the Texas attorney discipline system (the “system”).

- a. Except for the source of the Ombudsman's salary, the Ombudsman shall be completely independent from the State Bar, including the State Bar Board of Directors, the Commission for Lawyer Discipline, and the Office of the Chief Disciplinary Counsel.
  - b. The Ombudsman shall report directly to the Supreme Court of Texas.
  - c. The Ombudsman shall have the same access to confidential case information and duty to protect confidential information as the grievance panel members.
- (2) The Ombudsman shall:
- a. Receive complaints about the system;
  - b. Receive and investigate complaints that the system's procedural rules were violated in a particular case;
  - c. Answer questions from the public about how the system works, how to access the system, and the availability of other Bar programs;
  - d. Help members of the public who wish to submit a lawyer grievance or inquiry by explaining what information is required and how best to present the information; and
  - e. At least once annually, make recommendations to the State Bar Board and the Supreme Court regarding possible improvements to the system, including ways to improve access to the system and revisions to the grievance form.
- (3) On request, any entity of the State Bar shall share information with the Ombudsman that is necessary to:
- a. Determine if the Bar adhered to the procedural rules in a particular case; or
  - b. Evaluate the system's overall efficacy and adequacy.
- (4) Notwithstanding any other provision, the Ombudsman shall have no authority to:
- a. Draft grievances or act as an advocate on behalf of members of the public;
  - b. Overturn specific case outcomes; or
  - c. Access privileged communications and information shared between the Office of the Chief Disciplinary Counsel and the Commission for Lawyer Discipline.