

## What's That 'Fleck' on the Horizon?

Unified bars across the country are facing an uncertain future. Recent court rulings—most notably the U.S. Supreme Court's 2018 decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*—have raised questions regarding the future of the unified bar structure.<sup>1</sup>

In *Janus*, the court ruled 5-4 in favor of an Illinois union employee—Mark Janus—who had been forced to pay union dues despite refusing to be a member of the union and while disagreeing with the union's political ideology. The ruling overturned a 41-year-old decision that allowed states to require public employees to pay representation fees to collective bargaining units, even if the workers chose not to join.

In light of the *Janus* decision, the Supreme Court, in December, remanded a North Dakota case—*Fleck v. Wetch*—back to the 8th Circuit Court of Appeals for further review.

In *Fleck*, Arnold Fleck sued the State Bar Association of North Dakota, objecting to mandatory dues and mandatory membership because he argued his political interests deviated from those advocated by the bar.

At a minimum, the issue of mandatory versus voluntary payment of bar dues is now squarely before the 8th Circuit—having been placed there by the highest court in our land.

*Fleck* brings into focus, on free speech and freedom of association grounds, any requirement that a bar member follow an "opt out" procedure to seek a refund of partial mandatory dues tied to political activities with which the member disagrees. The

State Bar of Texas has had an "opt out" refund procedure for decades.<sup>2</sup>

These challenging and complex issues involve many years of "traditions" within unified bars on how they have conducted their regulatory activities within a structure of "self-governance." As president of the State Bar, I recently sought guidance from the Texas Attorney General in Opinion Request RQ-0265-KP regarding these issues as they may apply in Texas, as well as the method by which we conduct our annual statewide bar elections.<sup>3</sup>

The practice of the State Bar of Texas is to honor and protect the constitutional rights of our diverse membership base and carefully refrain from political statements and exclusionary activities that undermine unity . . . and erode our ability to "self-govern." My goal is a strong unified bar governed by *equal* inclusion of all members under the rule of law.

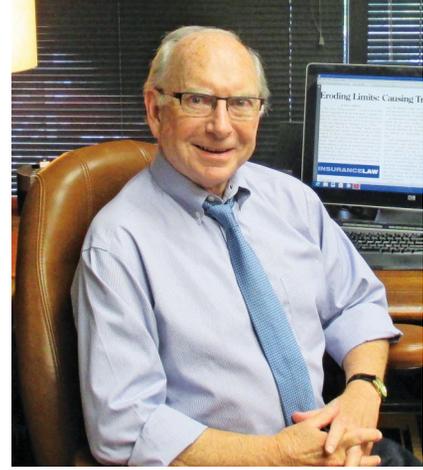
A unified bar's primary purpose is protection of the public, but following closely behind are the preeminent regulatory objectives of maintaining the integrity of the profession, development of the law, education of the public about legal issues and the rule of law, and promotion of equal access to justice.

Since 1939, we've retained the right to self-regulation, which depends upon the equal right to vote by all active bar members. If we are to keep our "self-governance," I believe we must constantly protect and preserve our equal rights to vote on those who govern the bar, on the rules that regulate our profession, and on the dues we are required to pay to practice our profession.

Right now, discussions about possible challenges to unified bars are occurring at regional and national conferences and have been the subject of various media reports. In January, Executive Director Trey Apffel updated the board of directors on these recent court developments.

As your president, I assure you that I will do everything within my power under the rule of law to preserve Texas lawyers' right of self-governance in the face of these challenges.

As always, your comments and remarks are welcome.



To read President Longley's letter to Texas Attorney General Ken Paxton and the State Bar's response, go to [texasbar.com/agrequest](https://texasbar.com/agrequest).

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### NOTES

1. *Janus v. Amer. Fed. State, Cty., and Mun. Emps.*, 585 U.S. --- (2018), available at [https://www.supremecourt.gov/opinions/17pdf/16-1466\\_2b3j.pdf](https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf).
2. The expenditure of funds by the State Bar of Texas is limited as set forth in both section 81.034 of the State Bar Act and in *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990). If any member thinks that any actual or proposed expenditure is not within such purposes of, or limitations on, the State Bar, then such member may object thereto and seek a refund of a pro rata portion of his or her dues expended, plus interest, by filing an objection with the executive director.
3. Opinion request from Joe K. Longley, State Bar of Texas president, to Ken Paxton, Tex. Att'y Gen., RQ-0265-KP (Jan. 22, 2019), available at <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2019/pdf/RQ0265KP.pdf>.