



## MY OPINION

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### Your Vote Counts

**A**s you read this, we are halfway through the voting period for Referendum 2011. If you have not already done so, I hope you will take the time to study the issues and vote. The ballot is divided into six questions — six questions that will help define who we as Texas lawyers are as well as how we will practice law in an ever-changing legal environment.

Here are a few questions I have been asked as I have talked with Texas lawyers and citizens around the state about the Referendum and the proposed amendments to our disciplinary rules:

#### **Why should we update our Texas Disciplinary Rules of Professional Conduct?**

It has been 20 years since we, as a profession, looked at our rules. Twenty years is too long if we are really concerned about self-regulation and ensuring that our rules fit our practices.

#### **Was there enough public comment on these rules?**

Yes, I believe there was. These rules have been under consideration for at least seven years. Over the past year, the rules have been printed and open to comments twice. In addition, there were public hearings on the proposed rules as well as opportunities to seek clarifications and offer opinions to State Bar officers and directors and to the Supreme Court of Texas. People wrote the Court and the Bar. Numerous changes were made as a result of the public comment periods. The proposed rules are better because of that time and input.

#### **Why didn't Texas adopt the American Bar Association's model rules directly?**

The ABA has the luxury of adopting "model" rules. It does not have to enforce the rules. As of Nov. 3, 2010, the ABA reports that 46 states and the District of Columbia have modified their rules in response to the model rules — **NONE OF THEM HAVE ADOPTED THE RULES VERBATIM.** The proposed rules Texas lawyers are voting on are much closer to the ABA model rules and to other states' ethics rules than to our current rules. There are places where the proposed Texas rules are better. As Texans and as lawyers, we don't really believe that anybody knows what is right for us better than we do!

#### **What about all the emails I have received, both for and against the Referendum?**

The use of the Internet and email to communicate demonstrates one of the reasons it is important for us to update our rules. The State Bar of Texas Board of Directors voted to support these rules and the Supreme Court of Texas approved these rules for referendum. On the other hand, I have talked to several lawyers whom I greatly respect who have issues with one or more of the rules. Self-governance is not easy. I trust that each of us will study the proposals and vote on each ballot item independently. I have great confidence that, as Texas lawyers, we will work through these processes to ensure our rules best serve our clients and our profession.

#### **Why don't we vote on the comments?**

The preamble to the Texas Disciplinary Rules of Professional Conduct explains that only the rules are imperatives, cast in the terms "shall" or "shall not." The comments are generally cast in terms of "may" or "should" and are permissive — defining areas in which the lawyer has professional discretion. When a lawyer exercises such discretion, whether by acting or not acting, no disciplinary action may be taken. The comments also frequently illustrate or explain applications of the rules in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules. The comments do not, however, add obligations to the rules and no disciplinary action may be taken for failure to conform to the comments. One way to explain it is to say that it makes sense to vote on imperatives but it does not make sense to vote on suggestions.

If you have not voted, please do so today. As noted by Chief Justice Jefferson, these proposed amendments "will serve you and your clients well." Texas lawyers have had an open, robust debate regarding these proposed rules. That is how it should be. Now it is time to exercise your right to vote. It is easy — if you have your paper ballot, mark it and send it in or use the voter identification information and go online. If you don't have the ballot, go to [www.texasbar.com](http://www.texasbar.com) and click on the Referendum logo, which will take you to a page where you can enter personal information and vote. ✪