

## APPENDIX B

### LETTER FROM STATE BAR TO SUPREME COURT

[State Bar of Texas letterhead]

November 6, 2003

The Honorable Thomas R. Phillips  
Chief Justice, Supreme Court of Texas  
201 W. 14th Street, Room 104  
Austin, Texas 78701

*Re: Proposed Rule 8a of the Texas Rules of Civil Procedure  
Misc. Docket No. 03-9160*

Dear Justice Phillips:

The State Bar of Texas submits this letter concerning proposed Rule 8a of the Texas Rules of Civil Procedure that will become effective on Jan. 1, 2004. On Nov. 4, 2003, the Executive Committee<sup>1</sup> of the Board of Directors of the Bar voted unanimously to request that the Supreme Court of Texas suspend the effective date of proposed Rule 8a, and allow the Bar a reasonable period of time to undertake a process that would include public hearings, written comments, and a proposal to the Court for a possible referendum in accordance with Section 81.024 of the Texas Government Code.

Proposed Rule 8a concerns itself with the conduct of lawyers that has historically, both in Texas and in virtually all other states, been addressed through rules regulating professional conduct. As such, we believe the provisions of Texas Government Code, Section 81.024 are properly invoked. While we recognize that the Court has some inherent power to regulate the practice of law, we applaud the Court for having exercised that power historically in a manner that has protected the self-governance of our profession, has respected the rights afforded lawyers by our Legislature in our State Bar Act, and has appreciated the wisdom of allowing lawyers to fully debate and participate in the rules that govern our professional conduct.

While it is true that Texas has been in the minority of states that allow a pure forwarding fee, proposed Rule 8a would not bring Texas in line with the majority of states or with the Model Rules of the American Bar Association. To the contrary, the proposed rule substantially departs from the rules of virtually all other states and from the ABA Model Rules. For example, the proposed Rule would: (a) impose a cap that has not been adopted by any other state or

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<sup>1</sup> The Executive Committee consists of Betsy Whitaker, Kelly Frels (Bracewell & Patterson, LLP), Guy N. Harrison, Kim J. Askew (Hughes & Luce, LLP), Charles W. Schwartz (Skadden, Arps, Slate, Meagher & Flom, LLP), W. Mike Baggett (Winstead Sechrest & Minick, PC), Mina A. Brees (Munsch Hardt Kopf & Harr, PC), Linda R. Butter (Public Member), William D. Elliott (Kane, Russell, Coleman & Logan, PC), Paula W. Hinton (Vinson & Elkins, LLP), Jarvis V. Hollingsworth (Bracewell & Patterson, LLP), David R. McAtee II (Haynes & Boone, LLP), Mark N. Osborn (Kemp Smith, PC), Jeff Parsons (Beirne, Maynard & Parsons, LLP), Vianei Lopez Robinson (Robinson Law Firm), Mark A. Shank (Hughes & Luce, LLP), Andrew Strong (Campbell, George & Strong, LLP) and Marshall C. Wood (Norton & Wood LLP). Tony Alvarado, the Bar's Executive Director is an *ex officio* member.

by the ABA; (b) require public disclosure of a client's contract with its lawyer without regard to whether the client objected to the public disclosure; (c) limit referral fees even when a client consented with full knowledge and the lawyer assumed responsibility for the case; and (d) measure the value of a lawyer's contribution using terms that are not defined and are subject to various interpretations.

Given the fact that proposed Rule 8a differs from that of any other state, has not been reviewed by the Texas Disciplinary Rules of Professional Conduct Committee of the State Bar of Texas or the Board of Directors of the State Bar of Texas, and was not supported by the Supreme Court Advisory Committee, we believe additional debate and input from the lawyers of Texas and the public is not only wise, but necessary. We believe this conclusion is supported by the fact that the Court and the Bar are receiving an unprecedented number of comments and concerns from lawyers across the State. We also believe that, if this Court permits the Bar to engage in the process we propose below, a proper proposal will be developed related to these rules, and we will also have a record that will provide a strong defense if the rules enacted are challenged in court. Finally, we believe that a series of unintended consequences will result from the proposed language and that the process we propose will identify and eliminate those unintended consequences.

We propose the following:

Bar leadership will appoint a special task force that will review Rule 8a and possible changes to Rule 1.04 and Part VII of the Texas Disciplinary Rules of Professional Conduct related to referral fees and advertising. This task force will include representatives of the Court's Task Force on Civil Litigation, the Court's Rules Advisory Committee, the Texas Disciplinary Rules of Professional Conduct Committee, and other members of the public and profession. Bar leadership will serve as *ex-officio* members of the task force.

The Bar, under the leadership of the task force, will conduct public hearings in January and February 2004 in Austin, Dallas, El Paso, Houston and San Antonio.

The Bar will obtain input and feedback through surveys, written comments, and the *Texas Bar Journal*.

The task force will present a preliminary report to the Board of Directors at its Board meeting to be held on April 16, 2004.

Not later than thirty days prior to the June 2004 Annual Meeting, the task force will submit to the Board of Directors a final report and recommendations to be voted on by the Board at the June 24, 2004 Annual Meeting. The Bar will then forward to the Court any rule recommendations with the request that the Court authorize the Bar to hold a referendum in accordance with Rule 81.024.

In their report to the Executive Committee, Justice Schneider and Chris Giesel apprised the Executive Committee of the tremendous amount of work already done by the Court in considering this issue. We appreciate the leadership the Court has demonstrated in proposing Rule 8a. The Bar also shares the Court's concerns regarding reports of unusual referral fee situations that involved overreaching, fees that would never be consented to by a properly informed client, that result from lawyers advertising to clients with no intention of representing them, or that would drive up the total fees charged to the client.

We are equally concerned, however, about the process for adopting rules. The process that we have outlined is consistent with the manner in which the Court has traditionally adopted disciplinary rules. This process allows the Court the opportunity to review the proposed rules and make changes where necessary, yet reaffirm the principle of self-governance by allowing the Bar membership to have the final approval on rules that govern the profession. In the recent Sunset process, the Bar and the lawyers of Texas successfully worked with diligence and commitment to preserve and protect that right. Our primary concern is that this right be preserved and that the process embodied in our State Bar Act, and historically honored by the Court, be followed with proposed Rule 8a.

Finally, we are concerned that the Court's approach addresses only a part of the problem and then only in the context of referral fees in state courts. Our suggested approach allows a comprehensive review not only of referral fees, but also issues of lawyer advertising that will result in the adoption of rules governing the ethical obligation of lawyers across the board.

Accordingly, we respectfully request that the Court favorably consider our request to postpone the implementation of Rule 8a so that the Bar can conduct the comprehensive study of the issue and make appropriate recommendations. This is an important issue for our members, and we look forward to working with the Court.

Sincerely,

s/ Betsy Whitaker  
President

s/ Kim J. Askew  
Chair of the Board of Directors

s/ Kelly Frels  
President-Elect

s/ Guy N. Harrison  
Immediate Past President

cc: The Honorable Nathan L. Hecht  
The Honorable Michael H. Schneider  
The Honorable Priscilla R. Owen  
The Honorable Harriet O'Neill  
The Honorable Wallace Jefferson  
The Honorable Steven W. Smith  
The Honorable Dale Wainwright  
Supreme Court of Texas  
Chris Griesel, Esq., Rules Attorney