

STATE BAR OF TEXAS

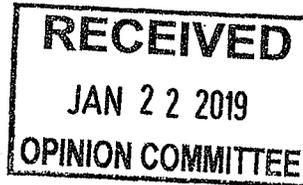
JOE K. LONGLEY
2018-19 PRESIDENT



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January 22, 2019

Honorable Ken Paxton
Attorney General of Texas
Office of the Attorney General
Attn: Opinion Committee
opinion.committee@oag.texas.gov



RQ-0265-KP
FILE # ML-48487-19
I.D. # 48487

Dear Attorney General Paxton:

As the current President of the State Bar of Texas,¹ I respectfully request your opinion as to the following matters:

1. Is the State Bar's current method of conducting statewide elections valid and constitutional, or does it unconstitutionally and/or unlawfully deny certain active members, on the basis of age or months of licensure, the right to vote on certain Texas Young Lawyers Association [TYLA] officials who sit on the Board of Directors and govern the State Bar of Texas for all Bar members?
2. Is it constitutional to require Bar members to pay compulsory Bar dues, including to support Bar programs (e.g., TYLA programs and Texas Opportunity & Justice Incubator (TOJI)) that Bar members object to on First Amendment grounds (e.g., free speech, freedom of association), including programs that are not within the regulatory functions of the State Bar?
3. Is it constitutional to require Bar members to pay compulsory Bar dues to support TYLA, but to deny active non-TYLA members the right to vote on TYLA officers who sit on the State Bar's governing Board of Directors?
4. Is the current manner of statewide elections conducted by the State Bar unconstitutional under the Equal Protection Clause of the United States Constitution or the 26th Amendment to the United States Constitution, in denying equal voting rights on the basis of age or years/months of licensure (that is, denying voting rights in statewide elections to active bar members who have "aged out" of TYLA membership through the passage of time)?
5. Is the current method of elections used by the State Bar invalid under the State Bar Act, Texas Government Code § 81.0242, which requires the state bar "promote . . . participation of members of the state bar in elections under this chapter"?

¹ Previous Attorney General Opinions have been issued on request of State Bar Presidents. See, e.g., Tex. Att'y Gen. Ops. H-340, H-974.

6. Does the current governance system of the State Bar fail to comply with the State Bar Act, § 81.053 in denying active members (who comprise approximately 75% of all bar members) the right to vote in the statewide election conducted by the state bar to determine the President-elect of TYLA (who will sit on the Board of Directors, the bar's governing body)?

Background

The present questions have arisen as a result of issues currently under discussion among State Bar members, in part because of the United States Supreme Court's recent decisions in *Janus v. State, County, and Municipal Employees*,¹ 138 S. Ct. 2448 (June 27, 2018), and *Fleck v. Wetch*, 868 F.3d 652 (8th Cir. 2017), *vacated and remanded*, 2018 WL 6272044 (Dec. 3, 2018). On Friday, January 18, 2019, the State Bar's Board of Directors, in a roll call vote, voted unanimously (with one abstention-myself) to continue the status quo manner of conducting statewide elections which excludes approximately 76,000 active non-TYLA members from voting in the statewide election for TYLA President-elect. Such an exclusion is not contained anywhere in the State Bar's "governing documents."

https://www.texasbar.com/AM/Template.cfm?Section=Governing_Documents1&Template=/CM/HTMLDisplay.cfm&ContentID=41821

State Bar of Texas and its Board of Directors. As provided in Chapter 81 of the Texas Government Code,² the State Bar of Texas is a state agency, a public corporation, and an agency of the judicial branch of government.³

² Chapter 81 is referred to as the State Bar Act. Tex. Gov't Code § 81.001. The State Bar Act is "in aid of the judicial department's powers under the constitution to regulate the practice of law and not to the exclusion of those powers." *Id.* § 81.011(b).

³ *See* Tex. Gov't Code § 81.011 ("General Powers (a) The state bar is a public corporation and an administrative agency of the judicial department of government."); *see also* Brief of Appellee Martha S. Dickie, in Her Official Capacity as President of the State Bar of Texas, in *Gilbert v. Perry*, 2008 WL 5869716 (March 31, 2008) ("The State Bar is a state agency. *See generally* Tex. Gov't Code, Ch. 81 [herein "State Bar Act"]; *see also, State Bar of Texas v. United States*, 560 F. Supp. 21 (N.D. Tex. 1983) (State Bar is an administrative agency of the judicial branch of government); Op. Tex. Atty Gen. No. 0-2785 (1940) (State Bar is an instrumentality of the State); Op. Tex. Atty Gen. No. V-480 (1948) (State Bar is an instrumentality of the State). The Eleventh Amendment protects from suit state officials acting under the authority of a state agency. *See Green v. State Bar of Texas*, 27 F.3d 1083, 1088 (5th Cir. 1994) (affirming dismissal and holding that the State Bar and its agents are immune from suit under the Eleventh Amendment); *see also, Fred v. State Bar of Texas*, 1999 WL 68643, *4 (N.D. Tex. 1999). Because the State Bar of Texas is an official governmental agency of the State of Texas, it is cloaked with Eleventh Amendment immunity. Texas Govt Code § 81.011; *see Bishop v. State Bar of Texas*, 791 F.2d 435, 438 (5th Cir. 1986) ("[T]he State Bar of Texas is a state agency such that an action for damages is barred by the Eleventh Amendment"); *Fred*, 1999 WL 68643 at *3.")

Section 81.020(b) of the Government Code prescribes the composition of the State Bar Board of Directors and expressly includes as Board Members the President, President-elect, and Immediate Past President of TYLA:

(b) The board is composed of:

(1) the officers of the state bar;

(2) *the president, president-elect, and immediate past president of the Texas Young Lawyers Association;*

(3) not more than 30 members of the state bar elected by the membership from their district as determined by the board;

(4) six persons appointed by the supreme court and confirmed by the senate who are not attorneys and who do not have, other than as consumers, a financial interest in the practice of law; and

(5) four at-large directors appointed by the president as provided by Subsections (d) and (e).

(Emphasis added.)⁴

TYLA. On its website, TYLA claims it is a department of the State Bar of Texas. All Bar members who are 36 years old or younger, or who have been licensed for five years or less, are automatically members of TYLA.⁵

⁴ See also State Bar Rules, Art. 4, § 3 (“The board shall be composed of the officers of the State Bar, the *president, president-elect, and immediate past president of the Texas Young Lawyers Association*, not more than thirty (30) members of the State Bar elected by the membership from their district as may be determined by the board, six (6) persons who are not licensed attorneys, known as public directors, who do not have, other than as consumers, a financial interest in the practice of law, and four (4) at-large directors appointed by the president and confirmed by the Board. The Board may, in its discretion, also include other members who shall be ex officio or non-voting board members.”) (emphasis added). Section 9 of Article 4 of the State Bar Rules also makes the TYLA President a member of the Bar Board’s Executive Committee.

⁵ <https://tyla.org/about/> (“The Texas Young Lawyers Association . . . is a department of the State Bar of Texas. All licensed Texas lawyers *36 years old or younger* or in their first five years of practice, regardless of age, are automatically members of TYLA. TYLA’s funding comes directly from the State Bar and grants from various not-for-profit entities, so there are no additional dues to pay to be a member.”) (emphasis added.)

Members of TYLA may vote for the position of TYLA President-elect, as well as for non-TYLA positions, such as for State Bar Directors and the Bar President-elect, but the reverse is not true.⁶ Non-TYLA members may not vote in the statewide election for TYLA President-elect.

As explained above, the TYLA President-elect becomes both a member of the Bar Board and a member of the Board's Executive Committee. After the one-year term of the TYLA President-elect, that person becomes TYLA President for a year and then serves as Immediate Past President of TYLA for another year.

Thus, TYLA members have three members of the Bar Board while Non-TYLA members are not allowed to run for TYLA positions nor serve as TYLA officers.

The 2018-2019 State Bar Membership Statistical Profile shows 103,342 active members—with 26,555 being TYLA members. Accordingly, 76,787 active bar members 74% are not TYLA members.

https://www.texasbar.com/AM/Template.cfm?Section=Content_Folders&Template=/CM/ContentDisplay.cfm&ContentID=43800. See Exhibit 1.⁷

Greenstein Letter. On October 10, 2018, an active non-TYLA member of the State Bar, Mr. Malcolm Greenstein, sent a letter to me and to State Bar Executive Director Trey Apffel, challenging the constitutionality of the State Bar's governance structure and elections.⁸

⁶ While the State Bar has four membership classes—active, inactive, emeritus, associate—those do not address TYLA or TYLA's participation in Bar governance. See Tex. Gov't Code §§ 81.052-.053. However, important to note is that while an emeritus member is "either an active or inactive member in good standing who is at least 70 years old" and has filed a written notice requesting enrollment as an emeritus member, and is entitled to "all the privileges of" Bar membership, the State Bar does not allow emeritus members to vote in TYLA elections or hold TYLA offices. See *id.* §§ 81.052(e), 81.053(b). Only two classes of membership are barred from participating in elections conducted by the state bar: (1) inactive members and (2) associate members. Active Non-TYLA members are not barred from voting in any election "conducted by the state bar". See § 81.053, State Bar Act.

⁷ Using the same gender and ethnic percentages as found in this latest active member statistical profile, the following percentages for racial/gender categories of non-TYLA members are excluded from voting for TYLA President-elect:

Women: 32% (11,993)
Black/African-American 6% (326)
Hispanic/Latino 10% (937)
Asian/Pacific Islander 4% (142)
Other Races 1% (238)

⁸ A copy of Mr. Greenstein's letter is attached as Exhibit 2.

In sum, Mr. Greenstein argued as follows:

[T]he current Board structure penalizes and discriminates against non-TYLA members of the Bar in three ways: they can't vote for TYLA President-elect, they can't run for TYLA President-elect, and they can't serve on the Bar Board in the three set-aside positions (TYLA President, TYLA President-elect, and TYLA Immediate Past President).

Percentage-wise, the dilution of voting rights is extreme. As noted above, all Texas Bar members "36 years old or younger" are "automatically members of TYLA." According to the State Bar's most recent statistical profile, 12% of Texas lawyers are 35 or younger; 88% are older than that. (The profile report does not use the TYLA cut-off age of 36.) The result is that while the young lawyers who have these enhanced voting rights comprise only 26% of State Bar members, the "senior lawyers" or non-TYLA members who have less voting rights comprise 74% of the Bar membership.

This dilution of the voting rights of "senior lawyers" of the Bar is unconstitutional and violates the equal participation right under the Fourteenth Amendment. As the United States Supreme Court has recognized, equal electoral participation "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the exercise of the franchise."⁹

Based upon his constitutional argument, Mr. Greenstein suggested three potential remedies: "(1) Reclassify the TYLA members who serve on the Bar Board as non-voting members. (2) Allow Bar members, regardless of age, to vote in TYLA elections and run for the position of TYLA President-elect. (3) Spin off TYLA from the Bar, so that it becomes an independent section, like other sections of the Bar, without Board representation. As the Bar did with *Gegenheimer*, the Bar has the option to request simple amendments to the Bar Act and the Bar Rules to remedy the problem."

Arguments opposing Mr. Greenstein's position. Since the TYLA voting-rights and Bar-governance issues arose, various TYLA members have submitted opposing arguments. Here is an example:

[T]he fundamental right to vote under the 14th Amendment—protected by the "one-person, one-vote" principle—extends only to legislative offices or those that exercise general governmental powers over the entire geographic area served by the

⁹ Exhibit 2 (footnotes omitted, and quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). Mr. Greenstein also cited *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 nn. 74, 78 (1973) ("[t]he constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted. . . . [We recognize a] protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population.").

body. Ball v. James, 451 U.S. 355, 362–63 (1981). But if a governmental body is far removed from normal governmental activities and disproportionately governs only a specific group of people, the “one-person, one-vote” principle does not apply. Id.

“The Supreme Court has held that malapportionment of representation on a state bar governing body is not a violation of fourteenth amendment rights.” Brady v. State Bar of Cal., 533 F.2d 502, 502–03 (9th Cir. 1976). In the context of state bar elections, the Supreme Court has reaffirmed that the “one-person, one-vote” principle generally has no relevance to non-legislative offices, and any malapportionment in non-legislative offices—such as state bar offices—can be corrected by the state legislature. See Sullivan v. Ala. State Bar, 394 U.S. 812 (1969) (per curiam) (affirming lower court’s decision, 295 F. Supp. 1216). A state bar like SBOT does not exercise general governmental powers, is far removed from normal governmental activities, and disproportionately affects lawyers.¹⁰

Constitutional Issues under Fleck v. Wetch. A broader set of issues that are critically important for the State Bar, its governance, and its compulsory dues relate to, but extend beyond, Mr. Greenstein’s specific arguments. As outlined above, those issues address the extent to which, under the United States Supreme Court’s recent decisions in Janus v. State, County, and Municipal Employees, 138 S. Ct. 2448 (June 27, 2018) and Fleck v. Wetch, 868 F.3d 652 (8th Cir. 2017), *vacated and remanded*, 2018 WL 6272044 (Dec. 3, 2018), the State Bar legally and constitutionally may require Bar members to pay compulsory dues.

Some Bar members have objected to the enhanced TYLA voting rights and governance rights under the First Amendment, citing Janus and Fleck. More broadly, some Bar members have objected to the Bar charging mandatory dues that support other activities and programs (e.g., various legislative programs and programs funded by the Bar) that the objecting members assert violate their First Amendment rights, including free-speech and associational rights.

Thus, I request guidance from you, as our state’s Chief Legal Officer, as to when the Bar may legally and constitutionally collect compulsory dues from Bar members under Janus and Fleck.

In Fleck v. Wetch, 868 F.3d 652 (8th Cir. 2017), *vacated and remanded*, 2018 WL 6272044 (Dec. 3, 2018), a licensed attorney sued for declaratory and injunctive relief against a state’s integrated bar association that charged compulsory dues. The attorney asserted First Amendment claims concerning the bar association’s use of the compulsory fees to oppose a state ballot measure that would create a presumption that each parent was entitled to equal parental rights. The attorney alleged that the bar association’s opt-out procedure violated

¹⁰ The TYLA member who sent me this quoted argument has requested to remain anonymous and I will honor that request. The redacted brief is attached as Exhibit 3.

his right to affirmatively consent before subsidizing non-germane expenditures. The Eighth Circuit held that the bar association had implemented adequate procedures to protect First Amendment rights of licensed attorneys who opposed non-germane expenditures of compulsory bar fees. The United States Supreme Court vacated and remanded the Eighth Circuit's decision, "for further consideration in light of *Janus v. State, County, and Municipal Employees*," 138 S. Ct. 2448 (June 27, 2018).

In *Janus*, the Governor of Illinois challenged the Illinois statute allowing public-sector unions to assess "agency fees" by charging the proportionate share of union dues attributable to activities germane to the union's duties as collective-bargaining representative, from non-member public employees on whose behalf the union negotiated. The Supreme Court held that the Illinois agency-fee system violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

The current State Bar combined budget totals approximately \$49,779,077; of that total, \$927,418 goes to support TYLA.¹¹ Generally some \$600,000 of that TYLA total is for meetings, awards, travel (including for various conferences), and staff. Some members have objected to those expenditures as excessive and unnecessary for the Bar generally.

TYLA describes itself as the "public service arm" of the State Bar.¹² For example, TYLA operates programs that address homeless and the elderly.¹³ While many Bar members and TYLA members view those programs as worthy and important, other Bar members view those programs as inappropriate and as beyond the regulatory functions of the State Bar.

I have received similar objections to other Bar programs, such as the Texas Opportunity & Justice Incubator (TOJI).¹⁴ TOJI provides assistance to a group of new lawyers, selected through an application process, including financial assistance to "provide office space and training for a select group of new attorneys in Austin who want to build their own practices" during an 18-month "incubator" period in which the attorneys agree to represent low- and modest-income clients while receiving mentorship and training in how to run a law office with a focus on technology."¹⁵ Again, some Bar members approve and support the TOJI program, while other Bar members have objected that that type of subsidy program and targeted legal assistance is not part of core Bar activities for which mandatory Bar dues should be spent.

¹¹ See 81 Tex. B.J. 182-83 (March 2018). The proposed budget for TYLA in 2019-2020 \$1,010,999. See Exhibit 4.

¹² See <https://tyla.org/about/>.

¹³ *Id.*

¹⁴ See <https://txoji.com/about-us/>.

¹⁵ *Id.*

The State Bar, of course, desires to comply with the law and the Texas and United States Constitutions. However, given *Janus* and *Fleck*, at present the State Bar is in need of further guidance concerning the procedures and circumstances pertaining to the collection of compulsory Bar dues to support an array of programs on which Bar members may disagree as described above.

Twenty-sixth Amendment Argument. Mr. Greenstein's argument above focused solely on an equal-protection argument; however, additional legal research has been brought to my attention raising another important constitutional issue under the Twenty-sixth Amendment to the United States Constitution, which provides:

The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.

Thus far, I have not received, nor seen, any in-depth briefing addressing the applicability of the Twenty-sixth Amendment—which appears to be an “open question.”

Texas Government Code § 81.0242. Also subsequent to Mr. Greenstein's letter, I have received communications from other Bar members suggesting that the alleged voting-rights and Board-representation preferences accorded TYLA members is inconsistent with Texas Government Code § 81.0242, which requires that the state bar to “promote . . . participation of members of the state bar in elections under this chapter;”

Conclusion. Beginning with the passage of the State Bar Act in 1939, all active members of the bar had an equal “one member-one vote” form of self-governance through referenda and candidate elections. This was called the “unified” or “integrated” bar. The Bar departed from voting equality by generally splitting TYLA members away from non-TYLA members. As described above, the current manner of voting ensures that all active bar members will ultimately experience diminished voting status through the ordinary aging process—otherwise known as the passage of time.

I appreciate your attention to these questions. Your answers are most important to all Texas citizens who are served by the State Bar of Texas and to all of its members who have taken the oath to become officers of the Texas courts. Your answers also will assist in guiding State Bar decisions with the challenges that lie ahead.

Please let me know if I can provide any additional information or assistance.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Joe K. Longley". The signature is written in a cursive style with a prominent initial "J" and a long, sweeping underline.

Joe K. Longley
President-State Bar of Texas
2018-2019