AN ANALYSIS OF 2005 CHANGES TO RULE 1.04 OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

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May 26-27, 2005 - San Antonio

CHAPTER 6
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United States District Court, Eastern District of Texas, 1974-1975
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Chairman, Board of Directors, State Bar of Texas, 1990-1991
Chairman, Advertising Review Committee, State Bar of Texas, 1995-1996
Chairman, Referral Fee Task Force, State Bar of Texas, 2004
President, American Board of Trial Advocates, Austin Chapter, 1995-1997
President, Tex-ABOTA 2000-2001
President, First Judicial District Bar Association, 1983-1985
Member: State Bar of Texas
American Bar Association
Association of Trial Lawyers of America
Texas Trial Lawyer Association
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Board of Directors, Texas Center for Legal Ethics, 1998-2004
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ACADEMIC APPOINTMENTS AND HONORS:
Regent, Stephen F. Austin State University, 1982-1991
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Distinguished Alumnus Award, Texas Tech University School of Law, 1996
Presidents’ Award, State Bar of Texas, 2004

STATE AGENCY APPOINTMENTS:
Member, Texas Department of Housing and Community Affairs, 1991-1995
# An Analysis of 2005 Changes to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct

## Chapter 6

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AN ANALYSIS OF 2005 CHANGES TO RULE 1.04 OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

I. DIVISION OF FEES BY LAWYERS

Regulation regarding division of fees has been one of the most controversial issues to face the organized bar in Texas and bar associations in other jurisdictions. As Professor Geoffrey Hazard, Jr., the chief reporter for the American Bar Association’s Model Rules of Professional Conduct, noted in his treatise in law and ethics, “fee-splitting was one of the most contentious issues in the drafting of the model rules and their subsequent consideration by state rule makers.” See GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING § 508 (3d ed. 1999).

The controversy surrounding referral fees has only heightened with the advent of TV advertising. As a result of this new phenomenon, several states have begun an extensive review of their rules regarding division of fees. The following is an overview of the process which led up to the appointment of the State Bar of Texas Referral Fee Task Force and its proposed changes to Rule 1.04 and Part VII of the Texas Disciplinary Rules of Professional Conduct.

II. PROCEDURAL HISTORY OF THE 2005 AMENDMENTS TO RULE 1.04 AND PART VII OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT (“TDRPC”)

A. Tex. R. Civ. P. 8A (“Proposed Rule 8A”)

On October 9, 2003, the Supreme Court issued its Order, in Misc. Docket No. 03-9160, in which it proposed to amend the Texas Rules of Civil Procedure by adding Rule 8a, “Referral Fees.”\(^1\) The Court deferred implementation of the rule until January 1, 2004 so that the public could comment on the proposed rule. The Court ultimately received over 280 writings regarding Rule 8a, the overwhelming majority opposing such rule. Immediately after the proposed rule was published, members of the bar, various sections and special interest groups within the bar, and the State Bar leadership requested that the Court allow the bar to appoint a task force to review the issue of referral fees. The Court, by Order dated December 23, 2003, withdrew the proposed implementation of Rule 8a and authorized the State Bar to appoint a special task force to 1) review the issue of referral fees; 2) hold public hearings throughout the State of Texas; and 3) submit a final report and recommendations concerning changes to the proposed rule at least 30 days prior to the June 2004 State Bar board meeting.

B. Proposed Amendments to Texas Rule 1.04 and Part VII, TDRPC

The State Bar Board of Directors (the “Board”), at its January 2004 meeting, appointed a 19-person Task Force (“Referral Fee Task Force”). The Board authorized the Task Force to conduct 1) public hearings in Austin, Dallas, El Paso, Harlingen, Houston and San Antonio; and 2) a survey of Texas lawyers to better understand the referral fee practice in Texas. On May 23, 2004, the Task Force issued its Final Report and Recommendations (“Final Report”). At its June 23, 2004 meeting, the Board unanimously voted to 1) adopt the proposed amendments to the rules and comments to Rules 1.04, 7.02(a), 7.04q and Part VII of the TDRPC; and 2) request that the Supreme Court authorize the State Bar to conduct a referendum so that registered members of the Bar may vote on the proposed changes. This resolution was immediately referred to the Supreme Court who published such rules on its website and invited comments from the public and bar to be filed no later than September 15, 2004.

On September 17, 2004, the Board received reports from the Task Force and the Bar’s Referendum Committee. The Task Force recommended one change in Proposed Rule 7.02(a)(2) and the Referendum Committee submitted a proposed form of ballot and timeline for the fall referendum. The Board unanimously voted to 1) formally adopt proposed amendments to Rule 1.04 and Part VII, TDRPC; 2) request the Supreme Court to allow electronic transmission ballots for online voting; 3) allow electronic online voting to begin on November 5, 2004 and end at midnight on November 14, 2004; 4) prepare and mail, on November 20, 2004, a written ballot to each eligible member of the Bar who did not vote electronically, with such balloting to close at 5:00 p.m. on December 20, 2004; and 5) approve the form and content of the referendum ballot. Pursuant to the Board directive, the State Bar, on September 22, 2004, filed a Petition for Order of Referendum with the Supreme Court (Misc. Docket No. 04-9220) requesting that the Court submit the proposed revised rules and comments to registered members of the State Bar in November 2004. The Supreme Court, by Order dated October 1, 2004, approved the Petition and proposed schedule for the November referendum.

C. Referendum 2004

The State Bar of Texas, in accordance with the Supreme Court’s Order, conducted a referendum regarding the proposed changes to Rule 1.04 and Part VII, TDRPC, with on-line voting commencing on November 5, 2004 and ending on November 14, 2004.
Ballots were made available online to all eligible voters and 11,766 such members voted online. On November 20, 2004, 60,840 ballots were mailed to the eligible members of the State Bar who did not vote online, and 16,518 ballots were returned by the deadline, December 20, 2004. The result of the vote count was as follows:

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<th>PROPOSITION MEASURE</th>
<th>“YES” VOTE</th>
<th>“NO” VOTE</th>
<th>TOTAL VOTE</th>
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<tr>
<td>Division of Fees</td>
<td>15,257</td>
<td>12,847</td>
<td>28,104</td>
</tr>
<tr>
<td>Information of Legal Services</td>
<td>21,462</td>
<td>6,573</td>
<td>28,035</td>
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A Petition for Order of Promulgation of Changes to the Texas Disciplinary Rules of Professional Conduct was filed with the Supreme Court on January 5, 2005. The State Bar requested that the Court enter an order promulgating the amendments to Rule 1.04 and Part VII, TDRPC, as published in the November 2004 issue of the Texas Bar Journal, and further providing that such amendments become effective 90 days from the date of the order promulgating such rules. On January 28, 2005, the Supreme Court entered the Order Promulgating Amendments to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, Misc. Docket No. 05-9013. The Order provides that the amendments are effective March 1, 2005. The proposed amendments to Part VII, TDRPC are not promulgated by this Order and remain under consideration.

III. TEXAS RULES REGARDING DIVISION OF FEES

A. Texas Canon of Ethics

The State Bar and its predecessor, the voluntary Texas Bar Association, as a matter of practice, have generally followed the ABA model rules. In 1938, the Texas Bar Association adopted, in part, the provisions of ABA Canon 34. One year later, the Texas legislature created the State Bar of Texas as a mandatory bar, and in 1940, the Court first adopted Canons of Ethics as part of the State Bar rules that were approved in a referendum of Texas lawyers. Texas Canon 31 governed division of fees between non-lawyers. Texas Canon 31 included the ABA canon provision allowing division of fees based upon division of services or responsibility; however, Texas departed from the majority of jurisdictions by expressly permitting a pure forwarding fee. Texas Canon 31, as adopted, states “[n]o division of fees for legal services is proper, except with other lawyers, based upon a division of service or responsibility, or with a forwarding attorney . . . ” (emphasis added). This rule allowed a forwarding fee to be paid to a lawyer who neither rendered legal services nor assumed joint responsibility for the representation.


The State Bar, following in the footsteps of the ABA, proposed the adoption of the Texas Code of Professional Responsibility in 1970. Members of the bar approved the proposed Texas Code of Professional Responsibility by referendum in 1971, and the Supreme Court, by order dated December 20, 1971, promulgated these rules. Disciplinary Rule 2-107(A) of the Texas Code continued Texas’s departure from the model rule by allowing fee-splitting with a forwarding lawyer.


In 1983, the State Bar appointed a special task force chaired by Orrin Johnson to consider revisions to the Texas disciplinary rules in light of the ABA’s adoption of the Model Rules of Professional Responsibility (1983). The task force submitted its final report to the State Bar Board in late 1987. The task force expressly rejected the inclusion of the pure forwarding fee in proposed Rule 1.04 and recommended that the ABA model rule regarding division of fees be adopted in toto. This provision engendered a great deal of debate at the board level. Ultimately, the board rejected the task force’s recommendation and once again included the pure forwarding fee as part of Texas Rule 1.04(f). In 1990, the State Bar board petitioned the Supreme Court to approve the Texas Disciplinary Rules of Professional Conduct, including Texas Rule 1.4(f), and to call a referendum. Members of the bar approved the adoption of the Texas Disciplinary Rules of Professional Conduct, which included Texas Rule 1.04(f), regarding division of fees. These provisions became effective January 1, 1990 and have remained in effect since their promulgation.

IV. AMENDMENTS TO TEXAS RULE 1.04 (2005)

The Task Force, in its Final Report, recommended that the Board adopt modifications and additions to Texas Rules 1.04(f), (g) and (h) and the accompanying comments as set forth in Appendix B. The proposed changes include 1) the elimination of the pure forwarding fee; 2) the adoption of proposed Comment 11 to Texas Rule 1.04, which describes the minimum, ethical requirement for dividing a fee based on proportion of services, the extent of proportionality required, and the means for testing it; 3) proposed Comment 12 to Texas Rule 1.04 setting forth minimum standards of conduct that a lawyer must satisfy to assume joint responsibility; 4) proposed Comment 12(a) regarding civil liability; 5) additional requirements regarding client consent; 6) proposed Comment 13 regarding client consent; 7) penalties for
failure to comply with Texas Rule 1.04(f); 8) proposed Comment 14 and 15 regarding penalties for failure to comply with Rule 1.04(f); and 9) exceptions for qualified lawyer referral groups. These items will be discussed in more detail below.

A. Elimination of the “Pure” Forwarding Fee

Texas and Pennsylvania are the only states that currently allow fee splitting with a forwarding lawyer who neither renders legal services nor assumes joint responsibility for the representation of the client. The pure forwarding fee has been the most controversial portion of the Texas rule, and one which commentators have continually attacked. The Task Force concluded that a lawyer should not recover a fee merely for forwarding a matter to another lawyer.

B. Division of Fees Based on Proportion of Services Rendered

A majority of the states, including Texas, have long recognized the practice of allowing lawyers to divide fees in proportion to the services performed. This provision has existed for over 60 years; however, the courts in Texas have never been asked to address the extent of proportionality required and/or the means of testing the agreed allocation. Moreover, the comments to Texas Rule 1.04(f) provide little, if any, true guidance in determining either of these issues. The Task Force therefore recommended the adoption of proposed Comment 11 to Texas Rule 1.04, which describes the minimum, ethical requirements for dividing a fee based on proportion of services, the extent of proportionality required and a means of testing it.

The Task Force adopted the majority rule regarding proportionality. This rule assumes that each lawyer will have performed services beyond those involved in initially being engaged by the client. Merely forwarding a matter to another lawyer is insufficient. A lawyer’s agreed allocation of fees will control where there is “a substantial, good faith division of services or responsibility.” See McCurdy v. Sikov & Love, P.A., 894 F.2d 818 (6th Cir. 1990). As the Task Force noted in its report

[[this approach requires that there be a reasonable correlation between the amount of services rendered and responsibility assumed and the share of the fee received. See In re: Potts, 718 P.2d 1363, 1369 (Or. 1986). It does not mean that the attorney must ‘correlate each minute spent on a case to each penny earned therefrom in order to achieve proportionality between ‘the responsibility assumed and services performed’ on the one hand and each attorney’s share of the fee on the other.’ McNeary v. American Cyanide Co., 105 Wash.2d 136, 712 P.2d 845 (1986) (en banc).’]

Final Report at p. 28. It is important to note that the interpretation adopted by the Task Force does not require a quantitative-type analysis. Rather, factors, such as the “value” of services provided, division of work and responsibility, and the reasonable and proportionate value of services provided, are to be considered. Absent a showing of bad faith, the agreed allocations should control where the lawyer has substantially performed. See Rutenbeck v. Grossenbach, 867 P.2d 36 (Colo. Ct. App. 1993).

As a general rule, courts have held that the reasonableness of a contract, including an attorney-fee agreement, is to be evaluated at the time it was made. The application of this premise to agreements to divide legal fees may significantly impact the test or standard of review applied by a court. The Task Force adopted the reasoning set forth in the RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS, which suggests that the proper standard of review for determining proportionality will vary, depending on whether allocation occurs at the outset of representation or at the conclusion of representation. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 47 comment (c), p. 333. An agreement entered into “at the outset of the representation will be upheld if it reasonably forecasts the amount and value of effort to be expended. If allocation is not made until the end of representation, it must reasonably correspond to services actually performed.” Id.

It is apparent that lawyers who agree to divide fees based on proportion of services rendered should ensure that there is 1) a good faith effort to allocate the services to be provided; and 2) a reasonable relationship between the value of the services rendered and the work to be performed. The better practice would be to enter into such an agreement at the outset of representation, as the courts will, in all likelihood, give greater latitude to a good faith allocation of services which attempts to reasonably forecast the future division of work to be performed.

C. Each Lawyer Assumes Joint Responsibility for the Representation

Since adopting the disciplinary rules in 1938, Texas, like a majority of jurisdictions, has allowed a referring lawyer who agrees to assume “joint responsibility” to share in a fee without regard to work actually performed. After carefully analyzing the current Texas rule and the ABA Model Rules, the Task Force concluded that the comments regarding this provision should clearly define the ethical and financial duties of a lawyer who assumes joint responsibility in a manner that would establish meaningful, minimal standards of professional conduct and support effective
disciplinary prosecutions when those standards were not met rather than seeking to impose standards of civil liability. A brief discussion of the varying standards applied by the model rules, the current rule and the amended rule is below.

1. ABA Model Rule

ABA Model Rule 1.5(e) (1983) and (2003) allows a division of fee if “each lawyer assumes joint responsibility for the representation . . . .” The question that remains unanswered is what liability, if any, flows from the assumption of joint responsibility. The commentary to ABA Model Rule 1.5(e) (1983) states that “joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.” ABA Model Rule 5.1 (1983) addresses the responsibilities of a partner or supervising lawyer. This provision does not indicate that any financial responsibilities flow from the ethical obligations imposed on the partner or supervising lawyer. However, ethics committees who have interpreted such provision have generally asserted that a lawyer who assumes joint responsibility is jointly and severally liable or is obligated to accept vicarious liability for acts of malpractice occurring during the representation. The comment to ABA Model Rule 1.5(e) (2003), regarding joint responsibility, expressly states “joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership . . . .” (emphasis added). Professor Margaret Colgate Love, in The Revised ABA Model Rule of Professional Conduct: Summary of the Work of Ethics 2000, states that the “[n]ew commentary explains more precisely what ‘joint responsibility’ entails, replacing a vague reference to Rule 5.1 in existing commentary with a clear requirement that each lawyer receiving part of a fee retain ‘financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.’” Id. at p. 11. Professor Love further states “the reporter’s explanation of changes states that the new explanation of ‘joint responsibility’ reflects the interpretation of the term in ABA Informal Opinion 85-1514, as well as a number of state ethics opinions.” Id. at n.16.²

The preamble to ABA Model Rule (1983) and (2003) both state that the disciplinary rules are not rules of civil liability and do not give rise to a cause of action nor create any presumption that a legal duty has been breached. See ABA Model Rule preamble: scope ¶ 18 (1983) and ABA Model Rule preamble: scope ¶ 20 (2003). To clarify the relevance of ethics rules in malpractice actions, the ABA Commission on Model Rules modified the preamble in the 2003 rules by stating “. . . since the rules do establish standards of conduct of lawyers, a lawyer’s violation of a rule may be evidence of breach of the applicable standard of conduct.” See ABA Model Rule preamble: scope ¶ 20. Professor Love indicates that this statement was added to the ABA model rules (2003) “to recognize the weight of judicial opinion in malpractice litigation that a violation of the rules may be admissible as evidence of a breach of the duty of care.” See Professor Margaret Colgate Love: The Revised ABA Model Rule of Professional Conduct: Summary of the Work of Ethics 2000 at p. 11. The statement in the preamble of the disciplinary rules, which states that the rules are not to define the standards of civil liability, remained unchanged in the 2003 revision. One therefore must assume that the drafters did not intend to alter the longstanding tradition that rules of professional conduct provide only a public remedy for an attorney’s professional misconduct and does not create a private cause of action.

² The ABA’s Committee on Ethics and Professional Responsibility has held that joint responsibility implies both financial and ethical responsibilities. See ABA Comm. on Ethics and Professional Responsibility, Opinion 85-1514, which states, in part:

acceptance of a referral fee and assumption of ‘joint responsibility for the representation’ includes assumption of responsibility [to the client] comparable to that of a partner in a law firm under similar circumstances, including
2. **Current Texas Rule 1.04**

To determine what obligations flow from a lawyer assuming joint responsibility of representation under current Texas Rule 1.04, Texas lawyers must look to Comment 11 of such rule. Comment 11 discusses the duties owed by a lawyer who assumes joint responsibility. It provides that “a lawyer may satisfy his or her obligation of ‘joint responsibility’ for the representation either by being an attorney of record in the matter or by discharging the responsibilities imposed on a ‘supervised lawyer’ under these rules. See Texas Rule 5.02.” Neither the model rule nor the Texas rule directly states that the assumption of joint responsibility includes financial liability for the acts or omissions of the other lawyer.

The preamble to the Texas rules, like the ABA model rules, expressly states that “these rules do not undertake to define standards of civil liability of lawyers for professional conduct.” TEX. DISCIPLINARY R. PROF. CONDUCT preamble: scope ¶15. The preamble to the Texas rules, like the ABA model rules, further states that “violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached.” While no Texas court has interpreted what is meant by “assuming joint responsibility” under Texas Rule 1.04(f), a number of Texas courts have expressly rejected the proposition that the Texas Code of Professional Conduct, “created a private remedy against an attorney’s professional conduct.” See Howell v. Hecht, 821 S.W.2d 627, 632 (Tex. App.–Dallas 1991, writ denied); Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App.–Corpus Christi 1978, writ ref’d n.r.e.) (Texas Code of Professional Conduct provides only a public remedy for an attorney’s professional misconduct and does not create a private cause of action). Moreover, Texas courts have allowed disciplinary rules to be used as evidence of a violation of an existing duty of care. See Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 905 (Tex. App.–Dallas 2001, rev. granted). In Joe, the court of appeals stated that “the preamble does not comment on and is not inconsistent with the use of the rules as evidence of a violation of an existing duty of care, as provided for by the Restatement (Third) of the Law Governing Lawyers.” See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52(2), comment (f) (2000). Id. at 905.

In most jurisdictions, including Texas, a lawyer’s liability for malpractice is traditionally predicated on negligence – that is, the failure to do that which a reasonable attorney practicing in the same locality would do, or not do, under the same or similar circumstances. See Cook v. Irion, 409 S.W.2d 475 (Tex. Civ. App.–San Antonio 1966, no writ). The elements of a legal malpractice claim are (1) duty; (2) a breach of duty; (3) the breach proximately caused the injury; and (4) resulting damages. [“Citations omitted”]. Id. at 904. Where lawyers have agreed to divide a fee based on assumption of joint responsibility and a client asserts a claim against both lawyers, TEX. CIV. PRAC. & REM. CODE, ch. 33, Proportionate Responsibility, should determine the percentages of responsibility between the claimant and the defendants. See TEX. CIV. PRAC. & REM. CODE § 33.003. To impose joint and several liability on a referring lawyer merely because the lawyer assumed joint responsibility is contrary to the provisions in the preamble of both the Texas and ABA Model Rules. Any civil liability which flows from the respective acts or omissions of the referring and/or handling lawyer should be determined in accordance with tort law principles and Chapter 33 of the Texas Civil Practice & Remedies Code. This would not prevent the trier of fact from considering the construction of a relevant rule of professional conduct that is designed for the protection of persons in the position of the claimant as evidence of the standard of care and breach of the standard. See Two Thirty Nine Joint Venture, 60 S.W.3d at 905. However, the assumption of responsibility would not impose joint and several liability as a matter of law.

3. **Interpretation of “Joint Responsibility” – Comment 12**

After carefully analyzing the preamble to both the ABA Model Rule and the Texas Disciplinary Rules of Professional Conduct, the Task Force concluded that imposing civil liability on lawyers who assume joint responsibility is not only inconsistent with the preamble for these rules, but also contrary to the legislative scheme that governs the allocation of fault between responsible parties. Instead, the Task Force recommended Proposed Comment 12, which sets out in some detail the ethical responsibilities assumed by a lawyer who wishes to participate in a division of fees by assuming joint responsibility for representation. The Task Force concluded that this ethical responsibility includes obligations with respect to both the adequacy of client representation and the adequacy of lawyer-client communications.

The adequacy of representation obligation requires that the referring lawyer conduct a reasonable investigation into the client’s legal matter and then refer the matter to, or associate with, a lawyer whom the referring or associating lawyer reasonably believes is competent to handle it. See TEX. DISCIPLINARY R. PROF. CONDUCT 1.01. The adequacy-of-communication obligation typically requires the referring lawyer to monitor the matter throughout the representation and ensure that the client is
reasonably informed about the status of matter so that the client can make informed decisions regarding the representation. See TEX. DISCIPLINARY R. PROF. CONDUCT 1.03.

Final Report at p. 34. The Task Force’s proposed interpretation of joint responsibility reflects what it considered to be the “best practices” proffered by lawyers who testified at the public hearings. While this approach requires a referring lawyer to monitor the case throughout the representation, the Task Force expressly rejected any requirement which would result in “make do” work by a lawyer, as Comment 12 expressly states

attending all depositions and/or hearings or requiring that copies of all pleadings and correspondence be provided a referring or associating lawyer is not necessary in order to meet the monitoring requirements proposed by this rule. These types of activities may increase the transactional costs which, ultimately, the client will bear and unless some benefit will be derived by the client, they should be avoided.

See Final Report at p. 34 n.11. It should be further noted that the ultimate goal of this proposed comment is to ensure adequate communication between attorney and client. “The monitoring requirement only requires that the referring lawyer be reasonably informed of the matter, respond to questions, and assist the handling lawyer when necessary.” Whether the forwarding or the handling lawyer makes the actual communication with the client is irrelevant, so long as the communication link is established and the flow of information occurs.

4. Client Consent
a. Current Texas Rule 1.04(f) and ABA Model Rule 1.5(e)

Texas Rule 1.04(f) and ABA Model Rule 1.5(e) (1983) currently contain the same provisions regarding client consent. If the division of fees is made by a lawyer who assumes joint responsibility, then there must be a written agreement with the client; otherwise, the client must be advised of and not object to the participation of all lawyers involved. Thus, where a division is proportionate to services rendered or made with a forwarding lawyer, there is no obligation to have such agreement reduced to writing. Moreover, the client’s agreement is of a passive nature – “that he not object to” participation of the lawyers once he is advised of the participation of all lawyers. Neither rule requires disclosure to the client of the share of the fee that each lawyer is to receive. ABA Model

Rule 1.5(e)(2) (2003) is more restrictive in that lawyers seeking to divide a fee (either in proportion to services performed or by a lawyer assuming joint responsibility) must not only inform the client, but must also obtain the client’s agreement to the arrangement, including the share each lawyer will receive, and such agreement must be confirmed in writing.

There is one exception to the consent requirement set forth in Texas Rule 1.04(f): This exception is carved out in Comment 10 to the rule and states, because the association of additional counsel normally will result in further disclosure of client confidences and have a financial impact on a client, advance disclosure of the existence of that proposed association and client consent generally are required. Where those consequences will not arise, however, disclosure is not mandated by this rule. For example, if a lawyer hires a second lawyer for consultation and advice on a specialized aspect of a matter and that consultation will not necessitate the disclosure of confidential information and the hiring lawyer both absorbs the entire cost of the second lawyer’s fees and assumes all responsibility for the advice ultimately given the client, a division of fees within the meaning of this rule is not involved.

This exception to the rule was supposedly included to address situations where a lawyer’s advice might be needed for a very limited issue, such as a tax matter. If that lawyer was not to be provided with client confidential information and the referring lawyer was to be responsible for all fees and liability flowing from such acts, then neither lawyer was obligated to disclose and/or obtain client consent.

b. Amendments to Texas Rule 1.04(f)(2) Regarding Client Consent

The Task Force has recommended that there be full and complete disclosure of all agreements regarding division of fees, including the actual share each lawyer is to receive and such be in writing and signed by the client. To ensure full and complete disclosure, the Task Force eliminated the exception set forth in Comment 10, where client-confidential information was not disclosed to the handling lawyer. Additionally, the amendments to Rule 1.04(f)(2) require that a client consent in writing, prior to the time of the association or referral proposed, to the terms of any arrangement regarding a division of fee, including 1) the identity of all lawyers or law firms who will participate in the fee sharing arrangement; 2) whether fees will be divided based on proportion of services
performed or by the lawyers agreeing to assume joint responsibility for the representation; and 3) the share of the fee that each lawyer will receive or, if the division is based on the proportion of services performed, the basis on which division will be made. See Comment 13, Proposed Texas Rule 1.04.

Several lawyers have argued that the requirement of Rule 1.04(f)(2), that a client consent in writing to the terms of the arrangement “prior to the time of the association or referral,” precludes a referring lawyer from having a client meet with the lawyer that the case may be referred to before the arrangement is approved by the client. It does not have that effect. The amendments regarding client consent are not intended to interfere with the negotiations between the lawyers regarding a possible association or referral nor do they preclude a client from meeting with a lawyer to which the case may be referred prior to agreeing to the referral. A referring lawyer should always try to ensure that a client is comfortable with the lawyer to whom the case may be referred. It would not be unreasonable for a client to want to meet the lawyer who may become primarily responsible for handling the client’s matter. The amendments only mandate that certain material information be disclosed to a client before the actual referral occurs and that the client’s consent be in writing. As discussed below, obtaining the client’s consent can take place in one of several different ways.

In typical referrals, such as auto accident cases, it is anticipated that the referring lawyer’s power of attorney or contingent fee contract will include a general provision authorizing the referral to, or association of, additional counsel. An example of such a provision is included in Paragraph 1, Appendix C. This provision restates the lawyer’s right to refer a matter to or associate with additional counsel by complying with the provisions of Rule 1.04(f)(2). If the referring or associating lawyer is able to disclose the required information and obtains the client’s consent, a second provision similar to Paragraphs 1a, 1b, or 1c, Appendix C, must also be included in the power of attorney or contingent fee contract.

In complex matters it will often take time to identify the lawyer or law firm that has the requisite skill and ability to handle the client’s matter. In this situation, once the lawyer or law firm that the matter will be referred to or associated is identified, the referring or associating lawyer can disclose the terms of the arrangement to the client and, if acceptable, have the client execute a separate, written consent similar to that in Paragraph 2, Appendix C.

Several lawyers testified during the Task Force public hearings that, in complex matters they typically had clients execute the proposed handling lawyer’s power of attorney rather than their own contract. The reason given was that the referring lawyer often does not know what type of financial arrangement the handling lawyer might require. Some have questioned whether this practice is now prohibited in light of the amendments to Rule 1.04(f)(2) & (g), and the statements in Comment 16. The amendments to Rule 1.04(f) and (g) do not preclude this practice. As noted in Comment 16, Paragraph (g) was included to facilitate the enforcement of Paragraph (f). This paragraph reiterates that a lawyer who refers any person to another lawyer not in that lawyer’s firm, whether it be a client or prospective client, with the intention of dividing the fee, must confirm that arrangement in a document complying with Paragraph (f)(2). If the requisite information is included in the handling lawyer’s power of attorney or contingent fee contract, such as provided in Paragraph 3, Appendix C, and the client consents to such, the requirements of the rule have been met. There is no attempt to evade the requirements of this rule.

Finally, the Task Force sought to eliminate any question concerning which lawyer has the obligation to ensure compliance with the amendments to Rule 1.04(f). See Comment 13, Texas Rule 1.04.

Existing Rule 1.04(f)(2) requires that the client be advised of, and not object to, the participation of all the “lawyers” involved. Rule 1.04(f)(2), as amended, requires that the client consent in writing to the referral which, among other things, requires that “the identity of all lawyers or law firms who will participate in the fee-sharing agreement…” be disclosed. This change recognizes that cases are often referred to a law firm that assigns the matter to a particular lawyer to handle.

Comment 16 states, in part, “[b]ecause paragraph (g) refers to the party whose matter is involved as a ‘person’ rather than as a ‘client,’ it is not possible to evade its requirements by having a referring lawyer not formally enter into an attorney-client relationship with the person involved before referring that person’s matter to other counsel…” This sentence was included as the Task Force was concerned that lawyers might seek to evade the requirements of Rule 1.04(f)(2) by arguing that because the person had not executed a power of attorney or contingent fee contract, no attorney-client relationship existed and thus, there was no obligation to comply with the rule once the person was referred to another lawyer.

3 While a lawyer is required to indicate whether fees will be divided based on proportionality or joint responsibility, the lawyer is not required to set forth the actual responsibilities that each lawyer proposes to assume. The Task Force noted that such requirement is not imposed under Model Rule 1.5(e)(2) (2003), and “would pose practical problems, given that the required disclosure will occur at the inception of the relationship, when the precise division of responsibilities may not be known.”

4 Existing Rule 1.04(f)(2) requires that the client be advised of, and not object to, the participation of all the “lawyers” involved. Rule 1.04(f)(2), as amended, requires that the client consent in writing to the referral which, among other things, requires that “the identity of all lawyers or law firms who will participate in the fee-sharing agreement...” be disclosed. This change recognizes that cases are often referred to a law firm that assigns the matter to a particular lawyer to handle.
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(2005) (“The referring or associating lawyer or any other lawyer who employs another lawyer to assist in the representation has the primary duty to ensure full disclosure and compliance with this rule…” (emphasis added)). That duty can be discharged, however, either by 1) including the required disclosures in the referring or associating lawyer’s power of attorney or fee agreement with a client or prospective client and thereafter obtaining the client’s or prospective client’s consent to that arrangements, or by 2) verifying that the handling lawyer has made the necessary disclosures and obtained the requisite consent.

c. Failure to Obtain Required Client Consent

Proposed Texas Rule 1.04(g) is intended to facilitate the enforcement of the requirements of Paragraph (f). A referral fee agreement between a lawyer and client that authorizes the client to associate other counsel, and that results in association with other counsel, must be confirmed by an arrangement conforming to Proposed Texas Rule 1.04(f)(2). Merely including a provision in the attorney-client agreement which authorizes the referral of a matter to another lawyer will no longer suffice. Failure to comply with the provisions of Proposed Texas Rule 1.04(f)(2) will result in the attorney only being entitled to recover the reasonable value of legal services provided to that person, and reasonable and necessary expenses actually incurred on behalf of that person.

d. Lawyer Referral Service Exemption

The Task Force also codified the current interpretation of the disciplinary rules which exempt certified lawyer referral services from complying with the provisions of TDRPC 1.04. Proposed Texas Rule 1.04(h) expressly provides that the provisions regarding division of fees do not apply to lawyer referral services.

V. EFFECTIVE DATE – AMENDMENTS TO RULE 1.04

The Order promulgating the amendments to Rule 1.04 provides that such rules become effective March 1, 2005. The Order further states:

The existing version of Rule 1.04 governs only fee-splitting arrangements between lawyers not in the same firm entered into before the effective date of these amendments, provided that, by that date, the client has been advised of all the lawyers that will be participating in the client’s particular matter.

If a fee-splitting arrangement is entered into before March 1, 2005, and the client is advised of the participation of all lawyers involved prior to that date, the arrangement is governed by the existing version of Rule 1.04. This will not prevent the client from objecting to the fee-splitting arrangement after March 1, 2005 as the existing version of Rule 1.04 expressly gives the client this right. The best course of action, and one which will eliminate any confusion would be to advise the client of the participation of all of the lawyers who will be involved and obtain the client’s consent prior to March 1, 2005.

VI. AMENDMENTS TO RULE 7.02(a)(2), COMMUNICATION OF LAWYER SERVICES

The Task Force recommended a change to existing Rule 7.02(a). First, it proposed the adoption of Proposed Rule 7.02(a)(2), concerning advertisements in the public media that include results obtained or prior successes. Second, it proposes a new provision, Proposed Rule 7.02(a)(7), which prohibits actors or models from portraying clients in public media advertisements.

A. Misrepresentation Regarding Amount Recovered and Role of Advertising Lawyers

Proposed Rule 7.02(a)(2) requires that a communicating lawyer whose ad contains past recoveries or prior successes either be the lawyer primarily responsible for the settlement and/or lead counsel in the litigation in which the settlement was obtained in order to advertise such success. Absent this requirement, advertising lawyers who often play little or no part in achieving the recovery often touts it as his or her own work. The Task Force concluded that this was inherently misleading. Proposed Rule 7.02(a)(2) also requires that the amount of verdict or judgment referenced in the advertisement actually be recovered by the client. Judgments or verdicts which have either been reduced or overturned by the trial or appellate court, or which were later compromised for a reduced amount are inherently false and misleading.

Finally, Proposed Rule 7.02(a)(2) requires that a lawyer who advertises the gross amount recovered by a client in a media advertisement to also state the amount of attorney’s fees and litigation expenses which the client is obligated to pay. If the advertisement only contains the net amount received by the client, there is no obligation to indicate the amount of fees or expenses.

B. Prohibition on Use of Actors and Models Who Portray Clients in Public Media Advertisements

The amendments to Rule 7.02(a) (2) (7) prohibit an actor or model from portraying the client in a public media advertisement if such contains an endorsement by the client. The Task Force suggested this rule to
eliminate concerns where actors or models touted huge recoveries, yet appeared to be perfectly healthy.

VII. PROPOSED RULE 7.04(q)
The Task Force reviewed a number of television advertisements which contained disclosures or other required information as required existing disciplinary rules. A number of these advertisements involved claims of success or prior result by individuals portraying themselves as having been clients of the communicating lawyer. In these advertisements, the amount recovered is flashed on the screen in large numbers while tag lines in small print scroll across the bottom of the television screen. Testimony at the public hearings indicated that the ordinary consumer pays little, if any, attention to written disclaimers or their contents when included in visual advertisements. These tag lines convey information which both the Texas Rules and ABA Model Rules have deemed necessary to eliminate the misleading effect of such advertisements. The Task Force proposes that in instances where disciplinary rules require specific qualifications, disclaimers or disclosures of information to accompany communications concerning a lawyer’s services, “the required qualifications, disclaimers or disclosures must be presented in the same manner as the communication and with equal prominence.” See Proposed Rule 7.04(q). This will ensure that all pertinent and relevant information necessary to eliminate the misleading effect of the advertisement is presented in such a manner that consumers will be aware of all information deemed pertinent and relevant in the disciplinary rules.

VIII. 1998 PROPOSED CHANGES TO PART VII OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT
In November 1998 the State Bar held a referendum regarding proposed amendments to 1) the Texas Rules of Disciplinary Procedure; 2) Texas Rule 1.04 regarding forwarding fees and the prohibition of unauthorized fees; 3) Texas Rules 7.04(a) and 7.04(b)(3), regarding the deletion of board certification disclaimer requirement for advertisement and solicitation communications; 4) delete Texas Rule 7.04(b)(3), regarding a non-lawyer’s obligation to state “not certified by the Texas Board of Legal Specialization” in all advertisements; 5) Texas Rule 7.06, regarding the prohibition against acceptance or continuation of employment procured in violation of the advertising and solicitation rules; 6) Texas Rule 7.07, clarifying the filing requirements for public media advertisement and solicitation communications; and 7) proposed amendments to Texas Rules 7.01, 7.02, 7.03, 7.04, 7.05 and 7.07, regulating advertising and solicitation through electronic media. While all of these proposed rule changes received a majority of the votes cast, the Supreme Court subsequently refused to promulgate such rules, finding that less than fifty-one (51%) percent of the registered State Bar membership voted in the referendum. The Task Force, in its Final Report, recommended that most of these matters be included in the November 2004 referendum. These items will only be discussed briefly, as the proposed referendum items were previously published in the Texas Bar Journal along with articles discussing the pros and cons of such proposals.7

A. Amendments Regulating Advertising and Solicitation Through Electronic Media
The vast majority of proposed changes to Part VII of the Texas Disciplinary Rules of Professional Conduct are designed to make the rules comport with the ever-evolving technological age in which we live. Since Part VII was adopted in 1995, the use of electronic media, including communication through various media such as websites, electronic mail, CD-ROM, recorded telephone messages, and audio or visual means, has become common methods for lawyers to communicate with members of the public concerning legal services. The proposed changes are intended to ensure that the use of internet advertisements, infomercials, and electronic and digital communications is properly addressed in our rules.

B. Revision to 7.04(b) – Board Certification
The Task Force again proposed the deletion of Rule 7.04(b)(3), which requires a lawyer who is not board certified to state “not certified by Texas Board of Legal Specialization” or no designation has been made. The current rule which only allows board certified lawyers to advertise that they are “specialists” or have special expertise in a particular area of law, continues. The change affects non-board certified lawyers who presently are required to state “not certified by Texas Board of Legal Specialization” from having to include such statements in written solicitations and public media advertisements. This provision will not preclude a lawyer from stating those areas to which he or she may limit their practice.

6 Matters not in this referendum but included in the 1998 referendum were proposed amendments to 1) the Texas Rules of Disciplinary Procedures; 2) Texas Rule 1.04; 3) creating the position of chair-elect to the Board; and 4) the timing of State Bar Section officer elections.

C. Revisions to Rule 7.06.

Rule 7.06 presently prohibits continued representation by a lawyer who violates any disciplinary rule, even if the lawyer did not commit or contribute to the violation, or even become aware of it until long after the fact. The rule was originally intended to address violations involving prohibited in-person or written solicitations, or public media advertisements. As written, a lawyer who violates any of the rules of disciplinary conduct could be forced to withdraw from the representation and precluded from recovering any fees. The proposed amendment to Rule 7.06 would 1) only apply where “employment was procured by conduct prohibited by Rules 7.01 - 7.05, 8.04(a)(2), or 8.04(a)(9)”; 2) apply to a lawyer who engaged in such conduct personally or by any other person whom the lawyer ordered, encouraged or knowingly permitted to engage in such conduct; and 3) allow a lawyer who learns that employment was procured in violation of Rule 7.06(a) or (b) to obtain a fee for services rendered provided that the lawyer does not divide such fee with the person who improperly procured the employment.

IX. EFFECTIVE DATE FOR AMENDMENTS TO PART VII

The Supreme Court’s in its Order of February 7, 2005 that promulgates the Amendments to Part VII states

The amendments to Part VII of the Texas Disciplinary Rules of Professional Conduct, as published in the November 2004 issue of the Texas Bar Journal, are effective June 1, 2005. Public media advertisements and written, electronic, or digital solicitations published, mailed, transmitted, or disseminated after that date are governed by these amended rules.

See Misc. Docket No. 05-9013-A. The amendments to Part VII apply prospectively. Advertisements or written solicitations that are approved by the Advertising Review Committee prior to the effective date are not “grandfathered” and if published or disseminated after June 1, 2005 must comply with the amended rules. Lawyers who are currently negotiating contracts for Yellow Page Advertisements or other advertisements which may not be published for several weeks or months should pay close attention to the proposed date of publication to ensure that any advertisement published after June 1, 2005 complies with the amendments to Part VII.

X. CONCLUSION

The referral fee process has historically played a critical role in ensuring that cases are referred from the less qualified lawyer to the more qualified lawyer. The impact of the 2005 amendments to Rule 1.04 will vary, depending upon the role that referral plays in a particular lawyer’s practice. The Referral Fee Task Force and the State Bar conducted a survey of referral fee practices to assist in preparing and recommending changes to Rule 1.04. The survey results indicate that the average lawyer in Texas is not making a significant number of formal referrals on an annual basis.

Lawyers who typically refer cases to other lawyers or associate lawyers to assist in the handling or prosecution of a particular matter or case should carefully consider the implications of the amendments to Rule 1.04. Clients should not only be fully apprised of any fee-splitting arrangements, but must also consent in writing to the arrangement with the appropriate disclosure of information required in the amendments to Rule 1.04. Failure to do so will result in significant penalties, as the referring or associating lawyer will only be entitled to recover fees based on quantum merit. Lawyers should carefully review engagement letters, powers-of-attorney, or contingent fee agreements to ensure that they comply with the requirements of Rule 1.04.

8 Texas lawyers refer a significant number of cases with no intention of receiving any compensation. The Task Force therefore focused on “formal” referrals in which the case was referred with the understanding that compensation would be paid to the referring lawyer.
Lawyers who advertise in the public media or who solicit through electronic or digital solicitations should carefully review their advertisements or solicitations to ensure that they comply with the amendments to Part VII, TDRPC. The amendments to Part VII take effect June 1, 2005 and advertisements or writing published or disseminated after that date are governed by the amended rules. Lawyers who plan to advertise after June 1, 2005 should have sufficient time to modify their existing advertisements or solicitations, submit them to the Advertising Review Committee, and obtain pre-approval of such advertisements prior to their being published, mailed or disseminated after the effective date. By obtaining pre-approval of advertisements, lawyers will have insulated themselves from complaints that the advertisement or solicitation failed to comply with the amended rules.
APPENDIX A

Texas Rules of Civil Procedure
Proposed Rule 8a
Referral Fees
8a.1 Referral Fee Defined. A referral fee is a payment of money or anything of value:

(a) made by any person in consideration of:

(1) the referral of a client or case, or
(2) the solicitation of a client or a case by any means that does not include the name of lead counsel or lead counsel’s law firm; and

(b) made to an attorney who does not, and is not reasonably expected to, provide professional services in the case:

(1) that are substantial; and
(2) for which the payment would be a reasonable fee apart from the referral.

8a.2 Disclosure. The attorney in charge for a party must file with the court a notice disclosing every referral fee paid or agreed to be paid with respect to the party. The notice must:

(a) state the amount and date of each payment made or agreed to be made;
(b) state the name, address, telephone number, and state bar identification number of each attorney to whom a payment has been made or is to be made; and
(c) state that the client has approved each such payment or agreement.

8a.3 Time for Disclosure. An attorney in charge must make the disclosure required by Rule 8a.2 within 30 days of the attorney’s first appearance as attorney in charge. Thereafter, an attorney in charge must disclose any previously undisclosed payment of a referral fee or agreement to pay a referral within 30 days of the date the payment or agreement is made.

8a.4 Sanctions.

(a) Grounds for sanctions. The court must impose just sanctions on an attorney if the court finds that:

(1) the attorney intentionally failed to make the disclosure required by Rule 8a.2; or
(2) the attorney divided or agreed to divide a fee in violation of Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct.

(b) Unconscionable referral fee. A referral fee is unconscionable within the meaning of Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct if it exceeds $50,000 or 15% of the attorney fees for the party in the case, whichever is less. A lesser referral fee may also be determined to be unconscionable in the circumstances in which it is paid.

(c) Sanctions imposed. If the court finds that grounds for imposing sanctions on an attorney exist, the court:

(1) must disqualify the attorney from representing the party in the case unless disqualification would unfairly prejudice the party;
(2) may permit the party to void the party’s agreement to retain the attorney;
(3) may order the forfeiture of all fees for the attorney in the case; and
(4) may impose other appropriate sanctions in addition.

8a.5 Hearing. The court must, on a party’s motion, and may, on its own initiative, conduct an evidentiary hearing to determine whether there has been a violation of this rule.
APPENDIX B

TEX. DISCIPLINARY R. PROF. CONDUCT 1.04(f) (g) & (h)
Texas Disciplinary Rule Professional Conduct - Rule 1.04(f) (g) (h)

Rule 1.04  Fees

[No changes in (a)-(e).]

(f) A division or agreement for division of a fee between lawyers who are not in the same firm shall not be made unless only if:

(1) the division is:
   (i) in proportion to the professional services performed by each lawyer;
   (ii) made with a forwarding lawyer; or
   (iii) made, by written agreement with the client, with a lawyer who assumes joint responsibility for the representation; and

(2) the client is advised of, and does not object to, the participation of all the lawyers involved consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including
   (i) the identity of all lawyers or law firms who will participate in the fee-sharing arrangement, and
   (ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and
   (iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

(3) the aggregate fee does not violate paragraph (a).

(g) Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, shall be confirmed by an arrangement conforming to paragraph (f). Consent by a client or a prospective client without knowledge of the information specified in subparagraph (f)(2) does not constitute a confirmation within the meaning of this rule. No attorney shall collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way, except for:

(1) the reasonable value of legal services provided to that person; and
(2) the reasonable and necessary expenses actually incurred on behalf of that person.

(gh) Paragraph (f) of this Rule does not prohibit application to payment to a former partner or associate pursuant to a separation or retirement agreement, or to a lawyer referral program certified by the State Bar of Texas in accordance with the Texas Lawyer Referral Service Quality Act, Tex. Occ. Code 952.001 et seq., or any amendments or recodifications thereof.

Comments:

[No changes in comments 1-9.]

Division of Fees

10. A division of fees is a sharing of a single billing to a client between covering the fee of two or more lawyers who are not in the same firm. A division of fees facilitates association of more than one
lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring or associating lawyer initially retained by the client and a trial specialist. Because the association of additional counsel normally will result in a further disclosure of client confidences and have a financial impact on a client, advance disclosure of the existence of that proposed association and client consent generally are required. Where those consequences will not arise, however, disclosure is not mandated by this Rule. For example, if a lawyer hires a second lawyer for consultation and advice on a specialized aspect of a matter and that consultation will not necessitate the disclosure of confidential information and the hiring lawyer both absorbs the entire cost of the second lawyer’s fees and assumes all responsibility for the advice ultimately given to the client, a division of fees within the meaning of this Rule is not involved. See also Comment 3 to Rule 5.04. Paragraph (f) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes joint responsibility for the representation.

11. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (d) of this Rule.

12. Paragraph (f) permits lawyers to divide a fee on one of three bases. The first is in proportion to the professional services performed by each. The second continues the Texas practice of permitting a division of fees with a forwarding attorney. The third permits fees to be divided with a lawyer who, by written agreement with the client, assumes joint responsibility for the representation. The second and the third methods permit the fees to be divided in any mutually agreeable proportion. If the third method is used, a lawyer may satisfy his or her obligations of “joint responsibility” for the representation either by being an attorney of record in the matter or by discharging the responsibilities imposed on a “supervised lawyer” under these rules. Paragraph (f) does not require disclosure to the client of the share that each lawyer is to receive. A division of a fee based on the proportion of services rendered by two or more lawyers contemplates that each lawyer is performing substantial legal services on behalf of the client with respect to the matter. In particular, it requires that each lawyer who participates in the fee have performed services beyond those involved in initially seeking to acquire and being engaged by the client. There must be a reasonable correlation between the amount or value of services rendered and responsibility assumed, and the share of the fee to be received. However, if each participating lawyer performs substantial legal services on behalf of the client, the agreed division should control even though the division is not directly proportional to actual work performed. If a division of fee is to be based on the proportion of services rendered, the arrangement may provide that the allocation not be made until the end of the representation. When the allocation is deferred until the end of the representation, the terms of the arrangement must include the basis by which the division will be made.

13. Joint responsibility for the representation entails ethical and perhaps financial responsibility for the representation. The ethical responsibility assumed requires that a referring or associating lawyer make reasonable efforts to assure adequacy of representation and to provide adequate client communication. Adequacy of representation requires that the referring or associating lawyer conduct a reasonable investigation of the client’s legal matter and refer the matter to a lawyer whom the referring or associating lawyer reasonably believes is competent to handle it. See Rule 1.01. Adequate attorney-client communication requires that a referring or associating lawyer monitor the matter throughout the representation and ensure that the client is informed of those matters that come to that lawyer’s attention and that a reasonable lawyer would believe the client should be aware. See Rule 1.03. Attending all depositions and hearings, or requiring that copies of all pleadings and correspondence be provided a referring or associating lawyer, is not necessary in order to meet the monitoring requirement proposed by this rule. These types of activities may increase the transactional costs, which ultimately the client will bear, and unless some benefit will be derived by the client, they should be avoided. The monitoring requirement is only that the referring lawyer be reasonably informed of the matter, respond to client questions, and assist the handling lawyer when necessary. Any referral or association of other counsel should be made based solely on the client’s best interest.
14. In the aggregate, the minimum activities that must be undertaken by referring or associating lawyers pursuant to an arrangement for a division of fees are substantially greater than those assumed by a lawyer who forwarded a matter to other counsel, undertook no ongoing obligations with respect to it, and yet received a portion of the handling lawyer’s fee once the matter was concluded, as was permitted under the prior version of this rule. Whether such activities, or any additional activities that a lawyer might agree to undertake, suffice to make one lawyer participating in such an arrangement responsible for the professional misconduct of another lawyer who is participating in it and, if so, to what extent, are intended to be resolved by Texas Civil Practice and Remedies Code, ch. 33, or other applicable law.

15. A client must consent in writing to the terms of the arrangement prior to the time of the association or referral proposed. For this consent to be effective, the client must have been advised of at least the key features of that arrangement. Those essential terms, which are specified in subparagraph (f)(2), are 1) the identity of all lawyers or law firms who will participate in the fee-sharing agreement, 2) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and 3) the share of the fee that each lawyer or law firm will receive or the basis on which the division will be made if the division is based on proportion of service performed. Consent by a client or prospective client to the referral to or association of other counsel, made prior to any actual such referral or association but without knowledge of the information specified in subparagraph (f)(2), does not constitute sufficient client confirmation within the meaning of this rule. The referring or associating lawyer or any other lawyer who employs another lawyer to assist in the representation has the primary duty to ensure full disclosure and compliance with this rule.

16. Paragraph (g) facilitates the enforcement of the requirements of paragraph (f). It does so by providing that agreements that authorize an attorney either to refer a person’s case to another lawyer, or to associate other counsel in the handling of a client’s case, and that actually result in such a referral or association with counsel in a different law firm from the one entering into the agreement, must be confirmed by an arrangement between the person and the lawyers involved that conforms to paragraph (f). As noted there, that arrangement must be presented to and agreed to by the person before the referral or association between the lawyers involved occurs. See subparagraph (f)(2). Because paragraph (g) refers to the party whose matter is involved as a “person” rather than as a “client,” it is not possible to evade its requirements by having a referring lawyer not formally enter into an attorney-client relationship with the person involved before referring that person’s matter to other counsel. Paragraph (g) does provide, however, for recovery in quantum meruit in instances where its requirements are not met. See subparagraphs (g)(1) and (g)(2).

17. What should be done with any otherwise agreed-to fee that is forfeited in whole or in part due to a lawyer’s failure to comply with paragraph (g) is not resolved by these rules.

18. Subparagraph (f)(3) requires that the aggregate fee charged to clients in connection with a given matter by all of the lawyers involved meet the standards of paragraph (a) — that is, not be unconscionable.

Fee Disputes and Determinations

129. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by a bar association, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer’s fee, for example, in representation of an executor or administrator, or when a class or a person is entitled to recover a reasonable attorney’s fee as part of the measure of damages. All involved lawyers should comply with any prescribed procedures.
APPENDIX C

FORM LANGUAGE AUTHORIZING REFERRAL
OR ASSOCIATION OF COUNSEL
Form Language Authorizing Referral or Association of Counsel

1. General Provision which might be inserted in power of attorney or contingent fee contract. If the General Provision is included in the contract, paragraphs 1a, 1b or 1c must also be included either in the contract or in a separate written consent form executed by the client. Paragraphs 1a, 1b, and 1c may be used without the General Provision.

Referral or Association of Additional Counsel: Client agrees that Attorneys may refer this matter to another lawyer or associate additional lawyers to assist in representing Client and prosecuting the Client’s cause of action. Prior to the referral or association becoming effective, Client shall consent in writing to the terms of the arrangement after being advised of (1) the identity of the lawyer or law firm involved, (2) whether the fees will be divided based on the proportion of services rendered or by lawyers agreeing to assume joint responsibility for the representation, and (3) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made. The referral or association of additional attorneys will not increase the total fee owed by the Client.

1a. Referral Fee provision where referring lawyer agrees to assume joint responsibility.

Referral: Attorneys are authorized to refer this matter to [insert lawyer’s name or name of law firm] to [“represent Client’s interests in the matter” or “procure Client’s cause of action”]. Attorneys will assume joint responsibility for the [“representation of Client’s interest in the matter” or prosecution of Client’s cause of action”] with [insert lawyer’s name or name of law firm]. At the conclusion of the case, if a recovery is made on behalf of Client, of the total attorney’s fee of (___ %)\(^9\), (___ %) will be paid to Attorneys and (___ %) to [insert lawyer’s name or name of law firm]. The referral fee to be paid will not increase the total fee owed by the Client. Client’s signature at the end of this agreement indicates his/her understanding and consent to the division of fees and the referral fee which will be paid.

1b. Association of Counsel Provision where division of fee is based on assumption of joint responsibility.

Association of Additional Counsel: Attorneys are authorized to associate [insert lawyer’s name or name of law firm] (“Associated Counsel”) to assist Attorneys in [“representing client’s interest in the matter” or “prosecuting Client’s cause of action”]. Attorneys will assume joint responsibility for [“representation of Client’s interest in the matter” or prosecution of Client’s cause of action”] with Associated Counsel. At the conclusion of the case, if a recovery is made on behalf of Client, of the total attorney’s fee of (___ %)\(^10\), (___ %) will be paid to Attorneys and (___ %) will be paid to Associated Counsel. The fee to be paid to Associated Counsel will not increase the total fee owed by the Client. Client’s signature at the end of this agreement indicates his/her understanding and consent to the division of fees and the referral fee which will be paid.

1c. Association of Additional Counsel where division of fee based on proportion of services to be rendered.

Association of Additional Counsel: Attorneys are authorized to associate [insert lawyer’s or name of law firm] (“Associated Counsel”) to assist Attorneys in representing Client and/or in prosecuting Client’s cause of action. Attorney’s fees shall be divided based on the proportion of services to be performed by Attorneys and Associated Counsel. Attorneys agree that Associated Counsel will provide the following services: (describe how services will be divided). At the conclusion of the case, if a recovery is made on behalf of Client, of the total attorney’s fee of (___ %)\(^11\), (___ %) will be paid to Attorneys and (___ %) will be paid to Associated Counsel.

\(^9\) If the power of attorney provides that Attorney’s fees will vary depending on whether a case is settled before trial or otherwise (Ex. 33 1/3% if settled before suit filed, 40% after suit is filed and 45% after appeal) the following language can be inserted:

At the conclusion of the case, if a recovery is made on behalf of Client, of the total attorney’s fee conveyed to Attorneys in paragraph ___ of this Agreement, (___ %) will be paid to Attorneys and (___ %) to [insert lawyer’s name or name of law firm].

\(^10\) See footnote 1.

\(^11\) See footnote 1.
Chapter 6

2. Provision to be inserted in handling lawyer’s power of attorney or contingent fee contract when Client is referred and no power of attorney or contingent fee contract was executed with referring lawyer.

Referral: Client was referred to Attorneys by [insert lawyer’s name or name of law firm] “Referring Attorneys” to prosecute Client’s cause of action. Referring Attorneys will assume joint responsibility for the prosecution of Client’s cause of action with Attorneys. At the conclusion of the case, if a recovery is made on behalf of Client, of the total attorneys fee of (___ %), (___ %) will be paid to Attorneys (___ %) and (___%) will be paid to Referring Attorneys. The referral fee to be paid will not increase the total fee owed by the Client. Client’s signature at the end of this agreement indicates his/her understanding and consent to the division of fees and the referral fee which will be paid.

3. Separate Consent to Refer Form which must be used if referring lawyer only has general provision authorizing referrals or associations.

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12 See footnote 1.
CONSENT TO REFER

[Name of Client] (“Client”) has previously executed a Contingent Fee Agreement / Power of Attorney / Engagement Agreement dated month day, 2005 (“The Agreement”) retaining [insert lawyer’s name or name of law firm] (“Referring Attorneys”) to represent Client in regard to certain matters and/or causes of action identified in The Agreement. The Agreement also provides that Referring Attorneys, with Client’s written consent, may refer the Client’s matter to another attorney to prosecute the Client’s cause of action if it is in the best interests of the Client.

Referring Attorneys have recommended that the Client’s matter be referred to [name of lawyer or law firm] (“Associated Counsel”) to represent Client and to prosecute his/her cause(s) of action. Client agrees that Referring Attorneys may refer his/her matter to Associated Counsel to prosecute Client’s cause of action. It is further agreed and understood that:

a. the referral fee to be paid will not increase the total attorneys fee owed by Client;

b. the Referring Attorneys will assume joint responsibility for the representation of Client with Associated Counsel; and

c. if a recovery is made on behalf of the Client, of the total attorney’s fee of (___ %)13, (___ %) will be paid to Referring Attorneys and (___ %) will be paid to Associated Counsel.

Client’s signature indicates his/her understanding and consent to the referral of his/her matter and the referral fee to be paid in the event of a successful recovery on his/her part.

Signed this ___ day of ___________, 2005.

______________________________
Client

___________________________
Referring Attorney

____________________________
Associated Counsel

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13 If the power of attorney provides that Attorney’s fees will vary depending on whether a case is settled before trial or otherwise (Ex. 33 1/3% if settled before suit filed, 40% after suit is filed and 45% after appeal) the following language can be inserted:

At the conclusion of the case, if a recovery is made on behalf of Client, of the total attorney’s fee conveyed to Referring Attorneys in paragraph __ of The Agreement, (___ %) will be paid to Attorneys and (___ %) to [insert lawyer’s name or name of law firm].
APPENDIX D

PROPOSED CHANGES TO PART VII TDRPC
Proposed Revisions To TDRPC Article VII

[N.B.: Comments in Article VII are not revised or omitted except as noted under Rule 7.02.)

Rule 7.01 Firm Names and Letterhead

(a) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the names of a professional corporation, professional association, limited liability partnership, or professional limited liability company may contain “P.C.,” “P.A.,” “L.L.P.,” “P.L.L.C.,” or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Nothing herein shall prohibit a married woman from practicing under her maiden name.

(b) A firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer occupying a judicial, legislative, or public executive or administrative position shall not be used in the name of a firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) A lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.

(e) A lawyer shall not advertise in the public media or seek professional employment by written any communication under a trade or fictitious name, except that a lawyer who practices under a trade firm name as authorized by paragraph (a) of this Rule may use that name in such advertisement or such written communication but only if that name is the firm name that appears on the lawyer’s letterhead, business cards, office sign, fee contracts, and with the lawyer’s signature on pleadings and other legal documents.

(f) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.02(a).

Comment:

[No change.]

Rule 7.02 Communications Concerning a Lawyer’s Services

(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) contains any reference in a public media advertisement to past successes or results obtained unless

   (i) the communicating lawyer or member of the law firm served as lead counsel in the matter giving rise to the recovery, or was primarily responsible for the settlement or verdict,
   (ii) the amount involved was actually received by the client,
   (iii) the reference is accompanied by adequate information regarding the nature of the case or matter and the damages or injuries sustained by the client, and
   (iv) if the gross amount received is stated, the attorney’s fees and litigation expenses withheld from the amount are stated as well;

(23) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;
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(34) compares the lawyer’s services with other lawyers’ services, unless the comparison can be substantiated by reference to verifiable, objective data;

(45) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official;

(56) designates one or more specific areas of practice in an advertisement in the public media or in a written solicitation communication unless the advertising or soliciting lawyer is competent to handle legal matters in each such area of practice; or

(7) uses an actor or model to portray a client of the lawyer or law firm.

(b) Rule 7.02(a)(56) does not require that a lawyer be certified by the Texas Board of Legal Specialization at the time of advertising in a specific area of practice, but such certification shall conclusively establish that such lawyer satisfies the requirements of Rule 7.02(a)(56) with respect to the area(s) of practice in which such lawyer is certified.

(c) A lawyer shall not advertise in the public media or state in a solicitation communication that the lawyer is a specialist except as permitted under Rule 7.04.

(d) Any statement or disclaimer required by these rules shall be made in each language used in the advertisement or writing solicitation communication with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.

Comment:

1. The Rules within Part VII are intended to regulate communications made for the purpose of obtaining professional employment. They are not intended to affect other forms of speech by lawyers, such as political advertisements or political commentary, except insofar as a lawyer’s effort to obtain employment is linked to a matter of current public debate.

2. This Rule governs all communications about a lawyer’s services, including advertisements regulated by Rule 7.04 and solicitation communications regulated by Rules 7.03 and 7.05. Whatever means are used to make known a lawyer’s services, statements about them must be truthful and nondeceptive.

3. Sub-paragraph (a)(1) recognizes that statements can be misleading both by what they contain and what they leave out. Statements that are false or misleading for either reason are prohibited. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.

4. The prohibitions in sub-paragraphs (a)(2) of and (3) recognize that statements that may create an “unjustified expectation” and in sub-paragraph (a)(3) of comparisons of lawyers’ services unless those comparisons “can be substantiated by reference to verifiable objective data” are each designated to prevent lawyers from misleading members of the public as they seek legal services. For example, an advertisement that truthfully reports that a lawyer obtained a jury verdict of a certain amount on behalf of a client would nonetheless be misleading if it were to turn out that the verdict was overturned on appeal or later compromised for a substantially reduced amount, and the advertisement did not disclose such facts as well. Even an advertisement that fully and accurately reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Those provisions unique circumstances would ordinarily preclude advertisements in the public media and written solicitation communications that discuss the results obtained on behalf of a client, such as the amount of a damage award, the lawyer’s record in obtaining favorable settlements or verdicts, as well as those that contain client endorsements. Unless accompanied by appropriate, prominent qualifications and disclaimers, that information can readily lead prospective clients into believing that similar results can be obtained for them without reference to their specific factual and legal circumstances.

5. Sub-paragraph (a)(4) recognizes that comparisons of lawyers’ services may also be misleading unless those comparisons “can be substantiated by reference to verifiable objective data.” Similarly, an unsubstantiated comparison of a lawyer’s services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. Similarly, statements comparing a lawyer’s services with those of another where the
comparisons are not susceptible of precise measurement or verification, such as “we are the toughest lawyers in town”, “we will get money for you when other lawyers can’t”, or “we are the best law firm in Texas if you want a large recovery” can deceive or mislead prospective clients.

6. The inclusion of a disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client, but it will not necessarily do so. Unless any such qualifications and disclaimers are both sufficient and displayed with equal prominence to the information to which they pertain, that information can still readily mislead prospective clients into believing that similar results can be obtained for them without reference to their specific factual and legal circumstances. Consequently, in order not to be false, misleading, or deceptive, other of these Rules require that appropriate disclaimers or qualifying language must be presented in the same manner as the communication and with equal prominence. See Rules 7.04 (g) and 7.05(a) (2).

7. On the other hand, a simple statement of a lawyer’s own qualifications devoid of comparisons to other lawyers does not pose the same risk of being misleading and does not fall within this Rule so does not violate sub-paragraph (a)(4). See Rule 7.04. Similarly, a lawyer making a referral to another lawyer may, of course, express a good faith subjective opinion regarding that other lawyer.

8. Thus, this Rule does not prohibit communication of information concerning a lawyer’s name or firm name, address and telephone numbers; the basis on which the lawyer’s fees are determined, including prices for specific services and payment and credit arrangements; names of references and with their consent, names of clients regularly represented; and other truthful information that might invite the attention of those seeking legal assistance. When a communication permitted by Rule 7.02 is made in the public media, the lawyer should consult Rule 7.04 for further guidance and restrictions. When a communication permitted by Rule 7.02 is made by a lawyer through a written solicitation, the lawyer should consult Rules 7.03 and 7.05 for further guidance and restrictions.

9. Sub-paragraph (a)(5) prohibits a lawyer from stating or implying that the lawyer has an ability to influence a tribunal, legislative body, or other public official through improper conduct or upon irrelevant grounds. Such conduct brings the profession into disrepute, even though the improper or irrelevant activities referred to are never carried out, and so are prohibited without regard to the lawyer’s actual intent to engage in such activities.

Communication of Fields of Practice

10. Paragraphs (a)(5-6), (b) and (c) of Rule 7.02 regulate communications concerning a lawyer’s fields of practice and should be construed together with Rule 7.04 or 7.05, as applicable. If a lawyer in a public media advertisement or in a written solicitation designates one or more specific areas of practice, that designation is at least an implicit representation that the lawyer is qualified in the areas designated. Accordingly, Rule 7.02(a)(5-6) prohibits the designation of a field of practice unless the communicating lawyer is in fact competent in the area.

11. Typically, one would expect competency to be measured by special education, training, or experience in the particular area of law designated. Because certification by the Texas Board of Legal Specialization involves special education, training, and experience, certification by the Texas Board of Legal Specialization conclusively establishes that a lawyer meets the requirements of Rule 7.02(a)(5-6) in any area in which the Board has certified the lawyer. However, competency may be established by means other than certification by the Texas Board of Legal Specialization. See Rule 7.04(b).

12. Lawyers who wish to advertise in the public media that they specialize should refer to Rule 7.04(a), (b) and (c). Lawyers who wish to assert a specialty in a written solicitation should refer to Rule 7.05(a)(4) and (b)(1).

Actor Portrayal Of Clients

13. Sub-paragraph (a)(7) further protects prospective clients from false, misleading, or deceptive advertisements and solicitations by prohibiting the use of actors to portray clients of a lawyer or law firm. Other rules prohibit the use of actors to portray lawyers in the advertising or soliciting lawyer’s firm. See Rules 7.04(g), 7.05(a). The truthfulness of such portrayals is extremely difficult to monitor, and almost inevitably they involve actors whose apparent physical and mental attributes differ in a number of material respects from those of the actual clients portrayed.
Communication in a Second Language

Communication in a Second Language

The ability of lawyers to communicate in a second language can facilitate the delivery and receipt of legal services. Accordingly, it is in the best interest of the public that potential clients be made aware of a lawyer’s language ability. A lawyer may state an ability to communicate in a second language without any further elaboration. However, if a lawyer chooses to communicate with potential clients in a second language, all statements or disclaimers required by the Texas Disciplinary Rules of Professional Conduct must also be made in that language. See paragraph (d). Communicating some information in one language while communicating the rest in another is potentially misleading if the recipient understands only one of the languages.

Rule 7.03 Prohibited Solicitations and Payments

(a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f), seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer’s advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization’s members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in-person or telephone or other electronic contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

(2) the communication contains information prohibited by Rule 7.02(a); or

(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm, except that a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of Article 320d, Revised Statutes, Occupational Code Title 5, Subtitle B, Chapter 952.

(c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by Rule 1.04(f) or by paragraph (b) of this Rule.

(d) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a), (b), or (c).

(e) A lawyer shall not participate with or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Article 320d, Revised Statutes, Occupational Code Title 5, Subtitle B, Chapter 952.

(f) As used in paragraph (a), “regulated telephone or other electronic contact” means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.

Comment:

[No change.]

Rule 7.04 Advertisements in the Public Media

(a) A lawyer shall not advertise in the public media by stating that the lawyer is a specialist, except as permitted under Rule 7.04(b) or as follows:

(2) A lawyer may permit his or her name to be listed in lawyer referral service offices that meet the requirements of Article 320d, Revised Statutes Occupational Code Title 5, Subtitle B, Chapter 952, according to the areas of law in which the lawyer will accept referrals.

(3) A lawyer available to practice in a particular area of law or legal service may distribute to other lawyers and publish in legal directories and legal newspapers (whether written or electronic) a listing or an announcement of such availability. The listing shall not contain a false or misleading representation of special competence or experience, but may contain the kind of information that traditionally has been included in such publications.

(b) A lawyer who advertises in the public media:

(1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement; and

(2) shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:

(i) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, “Board Certified, [area of specialization] — Texas Board of Legal Specialization;” and

(ii) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence, may include a factually accurate statement of such membership or may include a factually accurate statement, “Certified [area of specialization] [name of certifying organization],” but such statements may be made only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar; and

(3) shall state with respect to each area advertised in which the lawyer has not been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, “Not Certified by the Texas Board of Legal Specialization,” however, if an area of law so advertised has not been designated as an area in which a lawyer may be awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, the lawyer may also state, “No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area.”

(c) Separate and apart from any other statements, the statements referred to in paragraph (b) shall be displayed conspicuously with no abbreviations, changes, or additions in the quoted language set forth in paragraph (b) so as to be easily seen or and in language easily understood by an ordinary consumer.

(d) Subject to the requirements of Rules 7.02 and 7.03 and of paragraphs (a), (b), and (c) of this Rule, a lawyer may, either directly or through a public relations or advertising representative, advertise services in the public media, such as (but not limited to) a telephone directory, legal directory, newspaper or other periodical, outdoor display, radio, or television, the internet, or electronic or digital media.

(e) All advertisements in the public media for a lawyer or firm must be reviewed and approved in writing by the lawyer or a lawyer in the firm.
(f) A copy or recording of each advertisement in the public media and relevant approval referred to in paragraph (e), and a record of when and where the advertisement was used, shall be kept by the lawyer or firm for four years after its last dissemination.

(g) In advertisements utilizing video or comparable visual images in the public media, any person who portrays a lawyer whose services or whose firm’s services are being advertised, or who narrates an advertisement as if he or she were such a lawyer, shall be one or more of the lawyers whose services are being advertised. In advertisements utilizing audio recordings, any person who narrates an advertisement as if he or she were a lawyer whose services or whose firm’s services are being advertised, shall be one or more of the lawyers whose services are being advertised.

(h) If an advertisement in the public media by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay all or any portion of the court costs and, if a client may be liable for other expenses, this fact must be disclosed. If specific percentage fees or fee ranges of contingent fee work are disclosed in such advertisement, it must also disclose whether the percentage is computed before or after expenses are deducted from the recovery.

(i) A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period; but in no instance is the lawyer bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication.

(j) A lawyer or firm who advertises in the public media must disclose the geographic location, by city or town, of the lawyer’s or firm’s principal office. A lawyer or firm shall not advertise the existence of any office other than the principal office unless:

1. that other office is staffed by a lawyer at least three days a week; or
2. the advertisement states:
   (i) the days and times during which a lawyer will be present at that office, or
   (ii) that meetings with lawyers will be by appointment only.

(k) A lawyer may not, directly or indirectly, pay all or a part of the cost of an advertisement in the public media for a lawyer not in the same firm unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.

(l) If an advertising lawyer knows or should know at the time of an advertisement in the public media that a case or matter will likely be referred to another lawyer or firm, a statement of such fact shall be conspicuously included in such advertisement.

(m) No motto, slogan or jingle that is false or misleading may be used in any advertisement in the public media.

(n) A lawyer shall not include in any advertisement in the public media the lawyer’s association with a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Article 320d, Revised Statutes Occupational Code Title 5, Subtitle B, Chapter 952.

(o) A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:

1. states that the advertisement is paid for by the cooperating lawyers;
2. names each of the cooperating lawyers;
3. sets forth conspicuously the special competency requirements required by Rule 7.04(b) of lawyers who advertise in the public media;
4. does not state or imply that the lawyers participating in the advertising cooperative or venture possess professional superiority, are able to perform services in a superior manner, or possess special competence in any area of law advertised, except that the advertisement may contain the information permitted by Rule 7.04(b)(2); and
5. does not otherwise violate the Texas Disciplinary Rules of Professional Conduct.
(p) Each lawyer who advertises in the public media as part of an advertising cooperative or venture shall be individually responsible for:

(1) ensuring that each advertisement does not violate this Rule; and
(2) complying with the filing requirements of Rule 7.07.

(q) If these rules require that specific qualifications, disclaimers, or disclosures of information accompany communications concerning a lawyer’s services, the required qualifications, disclaimers, or disclosures must be presented in the same manner as the communication and with equal prominence.

(r) A lawyer who advertises on the internet must display the statements and disclosures required by Rule 7.04.

Comment:

[No change.]

Rule 7.05   Prohibited Written, Electronic, Or Digital Solicitations

(a) A lawyer shall not send, or deliver, or transmit, or knowingly permit or knowingly cause another person to send, or deliver, or transmit, on the lawyer’s behalf, a written, audio, audio-visual, digital media, recorded telephone message, or other electronic communication to a prospective client for the purpose of obtaining professional employment on behalf of any lawyer or law firm if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;
(2) the communication contains information prohibited by Rule 7.02 or fails to satisfy each of the requirements of Rule 7.04(a) through (c), and (h) through (o) that would be applicable to the communication if it were an advertisement in the public media; or
(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) Except as provided in paragraph (e) of this Rule, a written, electronic, or digital solicitation communication to prospective clients for the purpose of obtaining professional employment:

(1) shall conform to the provisions of Rule 7.04(a) through (c);
(2) shall, in the case of a non-electronically transmitted written communication, be plainly marked “ADVERTISEMENT” on the first page, of the written communication and on the face of the envelope also shall be plainly marked “ADVERTISEMENT,” however, or other packaging used to transmit the communication. If the written communication is in the form of a self-mailing brochure or pamphlet, the word “ADVERTISEMENT” shall be:

(i) in a color that contrasts sharply with the background color; and
(ii) in a size of at least 3/8" vertically or three times the vertical height of the letters used in the body of such communication, whichever is larger;

(2) shall, in the case of an electronic mail message, be plainly marked “ADVERTISEMENT” in the subject portion of the electronic mail and at the beginning of the message’s text;
(3) shall not be made to resemble legal pleadings or other legal documents;
(4) shall not reveal on the envelope or other packaging or electronic mail subject line used for to transmit the communication, or on the outside of a self-mailing brochure or pamphlet, the nature of the legal problem of the prospective client or non-client; and
(5) shall disclose how the lawyer obtained the information prompting such written the communication to solicit professional employment if such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s).

(c) Except as provided in paragraph (f) of this Rule, an audio, audio-visual, digital media, recorded telephone message, or other electronic communication sent to prospective clients for the purpose of obtaining professional employment:
(1) shall, in the case of any such communication delivered to the recipient by non-electronic means, plainly and conspicuously state in writing on the outside of any envelope or other packaging used to transmit the communication, that it is an “ADVERTISEMENT”;

(2) shall not reveal on any such envelope or other packaging the nature of the legal problem of the prospective client or non-client;

(3) shall disclose, either in the communication itself or in accompanying transmittal message, how the lawyer obtained the information prompting such audio, audio-visual, digital media, recorded telephone message, or other electronic communication to solicit professional employment, if such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s);

(4) shall, in the case of a recorded audio presentation or a recorded telephone message, plainly state that it is an advertisement prior to any other words being spoken and again at the presentation’s or message’s conclusion; and

(5) shall, in the case of an audio-visual or digital media presentation, plainly state that the presentation is an advertisement:

(i) both verbally and in writing at the outset of the presentation and again at its conclusion; and

(ii) in writing during any portion of the presentation that explains how to contact a lawyer or law firm.

(ed) All written, audio, audio-visual, digital media, recorded telephone message, or other electronic communications made to a prospective client for the purpose of obtaining professional employment of a lawyer or law firm must be reviewed and either signed by or approved in writing by the lawyer or a lawyer in the firm.

(de) A copy of each written, audio, audio-visual, digital media, recorded telephone message, or other electronic solicitation communication, the relevant approval thereof, and a record of the date of each such communication; the name, and address, telephone number, or electronic address to which each such communication was sent; and the means by which each such communication was sent shall be kept by the lawyer or firm for four years after its dissemination.

(e) The provisions of paragraphs (b) and (c) of this Rule do not apply to a written, audio, audiovisual, digital media, recorded telephone message, or other form of electronic solicitation communication:

(1) directed to a family member or a person with whom the lawyer had or has an attorney client relationship;

(2) that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client’s specific existing legal problem of which the lawyer is aware;

(3) if the lawyer’s use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or

(4) that is requested by the prospective client.

Comment:

[No change.]

Rule 7.06 Prohibited Employment

(a) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that the person who seeks the lawyer’s services does so as a result of conduct prohibited by these rules that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by any other person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.

(b) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by any other person or entity that is a shareholder, partner, or member of, an associate in, or of counsel to that lawyer’s firm; or by any other person whom any of the foregoing persons or entities ordered, encouraged, or knowingly permitted to engage in such conduct.

(c) A lawyer who has not violated paragraph (a) or (b) in accepting employment in a matter shall not continue employment in that matter once the lawyer knows or reasonably should know that the person procuring the lawyer’s employment in the matter engaged in, or ordered, encouraged, or knowingly permitted another to
engage in conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9) in connection with the matter unless nothing of value is given thereafter in return for that employment.

Comment:

[No change.]

Rule 7.07 Filing Requirements for Public Advertisements and Written, Recorded, Electronic, or Other Digital Solicitations

(a) Except as provided in paragraphs (d), (e), and (g) of this Rule, a lawyer shall file with the Lawyer Advertisement and Solicitation Advertising Review Committee of the State Bar of Texas, either before or concurrently with no later than the mailing or sending by any means, including electronic, of a written, audio, audio-visual, digital or other electronic solicitation communication:

(1) a copy of the written, audio, audio-visual, digital, or other electronic solicitation communication being sent or to be sent to one or more prospective clients for the purpose of obtaining professional employment, together with a representative sample of the envelopes or other packaging in which the communications are enclosed; and

(2) a completed lawyer advertising and solicitation communication application form; and

(3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such solicitations.

(b) Except as provided in paragraph (d) or (e) of this Rule, a lawyer shall file with the Lawyer Advertisement and Solicitation Advertising Review Committee of the State Bar of Texas, either before or concurrently with no later than the first dissemination of an advertisement in the public media, a copy of each of the lawyer’s advertisements in the public media. The filing shall include:

(1) a copy of the advertisement in the form in which it appears or is or will be disseminated appear upon dissemination, such as a videotape, audiotape, DVD, CD, a print copy, or a photograph of outdoor advertising;

(2) a production script of the advertisement setting forth all words used and describing in detail the actions, events, scenes, and background sounds used in such advertisement together with a listing of the names and addresses of persons portrayed or heard to speak, if the advertisement is in or will be in a form in which the advertised message is not fully revealed by a print copy or photograph;

(3) a statement of when and where the advertisement has been, is, or will be used; and

(4) a completed lawyer advertising and solicitation communication application form; and

(5) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such advertisements.

(c) Except as provided in paragraph (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas no later than its first posting on the internet or other comparable network of computers information concerning the lawyer’s or lawyer’s firm’s website. As used in this Rule, a “website” means a single or multiple page file, posted on a computer server, which describes a lawyer or law firm’s practice or qualifications, to which public access is provided through publication of a uniform resource locator (URL). The filing shall include:

(1) the intended initial access page of a website;

(2) a completed lawyer advertising and solicitation communication application form; and

(3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such websites.

(d) A lawyer who desires to secure an advance advisory opinion, referred to as a request for pre-approval, concerning compliance of a contemplated written solicitation communication or advertisement may submit to the Lawyer Advertisement and Solicitation Advertising Review Committee, not less than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a) or (b) of this Rule or the intended initial
access page submitted pursuant to paragraph (c), including the application form and required fee; provided however, it shall not be necessary to submit a videotape or DVD if the videotape or DVD has not then been prepared and the production script submitted reflects in detail and accurately the actions, events, scenes, and background sounds that will be depicted or contained on such videotapes or DVDs, when prepared, as well as the narrative transcript of the verbal and printed portions of such advertisement. An advisory opinion of the Lawyer Advertisement and Solicitation Review Committee. If a lawyer submits an advertisement or solicitation communication for pre-approval, a finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding or disciplinary action, but a finding of compliance is binding in favor of the submitting lawyer as to all materials actually submitted for pre-approval if the representations, statements, materials, facts, and written assurances received in connection therewith are true and are not misleading. The finding of compliance constitutes admissible evidence if offered by a party.

(d) The filing requirements of paragraphs (a), (b), and (c) do not extend to any of the following materials, provided those materials comply with Rule 7.02(a) through (c) and, where applicable, Rule 7.04(a) through (c):

1. an advertisement in the public media that contains only part or all of the following information, provided the information is not false or misleading:
   (i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, telephone numbers, office and telephone service hours, telex numbers, and a designation of the profession such as "attorney," "lawyer," "law office," or "firm";
   (ii) the fields—particular areas of law in which the lawyer or firm advertises specialization and the statements required by Rule 7.04(a) through (c) specializes or possesses special competence;
   (iii) the particular areas of law in which the lawyer or firm practices or concentrates or to which it limits its practice;
   (iv) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;
   (v) technical and professional licenses granted by this state and other recognized licensing authorities;
   (vi) foreign language ability;
   (vii) fields of law in which one or more lawyers are certified or designated, provided the statement of this information is in compliance with Rule 7.02(a) through (c);
   (viii) identification of prepaid or group legal service plans in which the lawyer participates;
   (ix) the acceptance or nonacceptance of credit cards;
   (x) any fee for initial consultation and fee schedule;
   (xi) other publicly available information concerning legal issues, not prepared or paid for by the firm or any of its lawyers, such as news articles, legal articles, editorial opinions, or other legal developments or events, such as proposed or enacted rules, regulations, or legislation;
   (xii) in the case of a website, links to other websites;
   (xiii) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;
   (xiv) any disclosure or statement required by these rules; and
   (xv) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;

2. an advertisement in the public media that:
   (i) identifies one or more lawyers or a firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event; and
   (ii) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, and the fact of the sponsorship or contribution;

3. a listing or entry in a regularly published law list;
4. an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card;
5. in the case of communications sent, delivered, or transmitted to, rather than accessed by, intended recipients, a newsletter, whether written, digital, or electronic, provided that it is mailed, sent, delivered, or transmitted mailed only to:
(i) existing or former clients;
(ii) other lawyers or professionals; and or
(iii) members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for, or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by a lawyer; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization;

(6) a written solicitation communication that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client’s specific existing legal problem of which the lawyer is aware;

(7) a written solicitation communication if the lawyer’s use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or

(8) a written solicitation communication that is requested by the prospective client.

(ef) If requested by the Lawyer Advertisement and Solicitation Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media and/or written solicitation communication by which the lawyer seeks paid professional employment.

Comment:

[No change.]