THE PRACTICALITIES OF THE NEW REFERRAL FEE
TO REFER OR NOT TO REFER? THAT IS THE QUESTION.

JUDGE DAVID L. EVANS
48th Judicial District Court
401 W. Belknap, 8th Floor
Fort Worth, Texas  76196

State Bar of Texas
STATE BAR COLLEGE
“SPRING TRAINING” COURSE
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CHAPTER 11
Current Position
Judge 48th District Court, December 2003-Present

Certifications
Civil Appellate Law, Texas Board of Legal Specialization, 1987
Civil Trial Law, Texas Board of Legal Specialization, 1988

Admissions
United States Supreme Court; Fifth Circuit Court of Appeals; U.S. District Court, Northern, Southern and Western Districts of Texas; Supreme Court of Texas.

Education
Texas A & M University (B.B.A.), 1971;
Baylor University Law School (J.D.), 1979

Profession Activities
State Bar of Texas Board of Directors
Director, 1994-1997; Executive Committee, 1995-97; General Counsel Oversight Committee, Chair 1996-97; Policy Manual Committee, Chair 1995-96.

State Bar of Texas Committees & Sections:
Web Services Committee, Co-Chair 2003-present; Referral Fee Task Force, Member 2003-present; Texas Disciplinary Rules of Professional Conduct Committee, Member 2002; Technology Advisory Committee, Member 2000-2001; Appellate Law Section Council, 1999-2002; Lawyer Referral and Information Committee Chair 1995-97, Vice-Chair 1994-95; Annual Meeting Committee, Co-Chair 1993

Commission for Lawyer Discipline
Chair 1998-2000, Vice-Chair 1997-1998;

Texas Board of Legal Specialization
Member, Board of Directors 1999-present
Civil Trial Commission, Member 1995 - 2001

Texas Bar Foundation
Member, Board of Trustees 2000-2002; Sustaining Life Fellow

Tarrant County Bar Association
President, 1992-93; President Elect 1991-92; Director, 1989-91

Eldon B. Mahon Inn of Court, 1992-Present, Emeritus Status

Frequent Speaker at Continuing Legal Education Seminars

Honors and Awards
State Bar of Texas, Certificate of Merit, 1998
State Bar of Texas, Outstanding Third Year Director, 1997
State Bar of Texas, The Judge Sam Williams Local Bar Leadership Award, 1996
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I. INTRODUCTION

On March 1, 2005, the amendments to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct became effective. Failure to comply with these amendments can cause an attorney to forfeit his referral fee percentage and expose the attorney to disciplinary action. These are not just amendments to Rule 1.04. These amendments also include substantial changes to the comments to the Rule. The comments explain the terminology and provide guidance to the practitioner. The amendments to the rules will apply to an arrangement to divide fees made on or after March 1, 2005. The amendments will also apply to arrangements to divide fees made prior to March 1, 2005, if the client had not been advised of all lawyers participating in the client’s matter.

II. BACKGROUND AND ACKNOWLEDGMENT

It is difficult to imagine that there is a lawyer in Texas today that is not aware of the debate over referral fees, the Referral Fee Task Force (Task Force), and the referendum. The catalyst for these changes was a proposal by the Supreme Court to amend the Texas Rules of Civil Procedure by adding Rule 8a, “Referral Fees.” The response of lawyers to this proposal led to the creation of the Task Force chaired by Richard “Dickie” Hile. The Task Force conducted public hearings in six cities and returned its final report to the Board of Directors of the State Bar of Texas in May of 2004. The recommendations of the Task Force were ultimately promulgated in the new rule effective March 1, 2005. A more complete history may be found in the article, Richard C. Hile, An Analysis of the 2005 Changes to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, Ch. 18, State Bar of Texas, 12th Annual Advanced Medical Malpractice Course.

I want to thank Dickie for his help with this paper and for allowing me to borrow from his paper.

III. THE JARGON—ARE YOU CONFUSED YET?

A. Forwarding Fees - Forwarding Lawyers

B. Referral Fees - Referring Lawyer a/k/a the Jointly Responsible Lawyer

C. Proportionate Fee Division - Co-Counsel Fee Division

It is difficult to understand the rules concerning referral fees unless you make a distinction between the different types of arrangements that allow a division of fees between lawyers who are not members of the same firm. Terminology used commonly when talking about division of fees include: forwarding fees, forwarding lawyers, referral fees, referring lawyer, a jointly responsible lawyer, proportional fee division, and division of fees between co-counsel.

When a lawyer is contacted about handling a case, the lawyer has three basic choices:

- He can handle the case within his firm;
- He can refer it to another lawyer to handle and receive a referral fee; or
- He can get another lawyer to co-counsel it with him and divide the fee proportionately.

Cases are most often referred to another lawyer to handle when a specialist is needed or when the case would be prepared and tried in a different forum. Other lawyers are often brought in as co-counsel in cases where special skills are needed, risk and work load need to be shared, or local knowledge is needed in trying the case.

In the real world, the boundary between a referral arrangement and co-counsel arrangement is not always clear. But under the prior rule and the new rule, these two types of arrangements, referral and proportionate division, have different ethical responsibilities and use different methodologies to divide fees. They also differ from the ethical standards and fee division rules applicable to lawyers in the same firm.

If a lawyer handles the case within a firm, Rule 104 (f) does not apply because Rule 104 (f) only applies to the division of fees between lawyers who are not in the same firm. When lawyers are members of the same firm, their ethical responsibilities are determined by the Rules of Professional Conduct concerning members of law firms. For instance, a partner can be disciplined for knowingly permitting another member of the firm to violate a rule of professional conduct or for failing to take corrective action to avoid or mitigate a partner’s violation of the Rules of Professional Conduct. The financial responsibilities for the acts of a partner are determined, generally, by the law of partnership. The liability for associates and non-lawyer employees is vicarious.

That, of course, raises the question of the ethical responsibility and financial responsibility when a case is referred to another lawyer or when an outside lawyer is brought in to co-counsel the case. But before addressing those duties, it is necessary to mention the elimination of the forwarding lawyer and the forwarding fee.

IV. WHAT WAS A FORWARDING FEE AND A FORWARDING LAWYER?

The right of a forwarding lawyer to receive a forwarding fee has been recognized in Texas since 1938 when the Texas Bar Association adopted the
Canon of Ethics. The TBA Canon of Ethics was based upon the American Bar Association (ABA) Canon of Ethics. There was one significant difference in the area of division of fees between lawyers who were not members of the same firm. Texas allowed a forwarding fee to be paid to a forwarding lawyer. In 1939 the State Bar of Texas was created and duplicated the fee division scheme adopted the year before by the TBA.

The State Bar of Texas has continued to base its rules of professional conduct on those of the ABA and continued to take the minority position of permitting forwarding fees. In fact, Pennsylvania was the only state besides Texas that recognized the payment of a forwarding fee to a forwarding lawyer. The other jurisdictions permitted a referral fee only in those situations where the referring lawyer was jointly responsible for the client’s matter.

The term “forwarding lawyer” was never defined in the Canons of Ethics or in the Rules of Professional Conduct. No duties were ever defined for the forwarding lawyer. It was not even clear from the rules or the commentary whether or not an attorney-client relationship needed to exist between the forwarding lawyer and the client for a forwarding lawyer to receive the forwarding fee. Thus, it could be argued, especially in a disciplinary context, that the forwarding lawyer had no responsibility to:

- Investigate the claims of the client;
- Investigate and determine who was the lawyer best suited to handle the client’s claims;
- Respond to the client’s request;
- Communicate with the client;
- Communicate with handling lawyer; or
- Respond to requests from the handling lawyer.

It was a term without definition and, consequently, there was no disciplinary action that could be taken with regard to a forwarding lawyer because the duties of a forwarding lawyer were not defined. If disciplinary action were to be taken against a forwarding lawyer, the basis for the disciplinary action would have to be found in another rule, such as neglect.

There were justifications offered for forwarding fees. It was often asserted that forwarding fees reflected the reality of the arrangement between the referring lawyer and the handling lawyer and avoided the hypocrisy of a lawyer attempting to qualify as a referring lawyer under vague and meaningless standards found in the Canons of Ethics, and, later the Code of Professional Responsibility.

There were definitely problems with the prior standards for qualifying as a referring lawyer a/k/a jointly responsible lawyer. Those problems and the solutions found by the Referral Fee Taskforce will be discussed in greater detail in the next section.

The status of forwarding lawyer was also a safety net for referring lawyers who had substantially or partially performed the duties of a referring lawyer or that of a co-counsel. It allowed the payment of a percentage fee in those situations where the lawyer had not met all the requirements to qualify as a referring lawyer or all of the obligations of a lawyer serving as co-counsel. This is true at least from the standpoint of disciplinary actions although it did not necessarily protect the lawyer serving as co-counsel from a fee dispute with his co-counsel.

V. WHO IS A REFERRING LAWYER? - WHAT IS JOINT RESPONSIBILITY?

A. Joint Responsibility – The Old Version & Other Options

To understand the current definition of joint responsibility, it is necessary to understand the problems with the prior definition of joint responsibility. In order to earn a referral fee under the prior rules, an attorney also was required to be jointly responsible. An attorney, under the prior rule, could be jointly responsible either by appearing as an attorney of record or performing those duties of a supervised lawyer under Rule 5.02 of the Texas Disciplinary Rules of Professional Conduct.

In other words, a attorney could earn a referral fee by merely having his name put on the pleadings. There was no duty to investigate, no duty to determine who was the best suited lawyer, and no duty to respond to the client—not even a responsibility for monitoring the case. There was no requirement to provide services.

The requirement of being listed as attorney of record only applied to cases which were actually filed and would never apply to those cases which were settled without litigation. Many were critical of this rule and its potential abuse. It was clearly a requirement that placed form over substance.

The other way to earn a referral fee under the prior rule was to perform those duties and to assume those responsibilities of a supervised lawyer under Rule 5.02 of the Texas Disciplinary Rules of Professional Conduct. A review of the text of Rule 5.02 reveals that it does not set out any ethical duties to a supervised lawyer, notwithstanding the fact it is entitled “Responsibilities of a Supervised Lawyer.” Rather, the rule provides a supervised lawyer with a defense to a rule violation by providing that a supervised lawyer does not violate the Rules of Professional Conduct if the supervised lawyer “acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional conduct.”
Arguably, the comment was guidance that the referring lawyer was to perform services requested by the handling lawyer. If the handling lawyer did not direct the referring lawyer to perform any services, the referral fee was still earned and payable. Those familiar with referral arrangements recognized that this was usually meaningless since referring lawyer often provided only minimal services, if any services at all.

Neither requirement defined the duties of the referring lawyer to the client. The Task Force was also confronted with a trend in ethical opinions and new proposed ABA Rules which sought to impose on the referring lawyer the ethical and financial responsibilities of a partner.\textsuperscript{12}

Under such a rule, the referring lawyer could be disbarred for failing to undertake the ethical duties of a partner and would be subjected to vicarious liability for the negligence of the handling lawyer. Such an imposition was considered to be unwarranted because it placed upon the referring lawyer unrealistic responsibilities and liabilities. If this burden was placed on the referring lawyer it was feared that it would lead to unwarranted interference by the referring lawyer with the affairs and conduct of the handling lawyers.

A referral arrangement is not a partnership relationship. It is a relationship between two independent lawyers. There is no right of control that one can exercise over another and, therefore, none of the management safeguards available in partnerships. The attempt to impose partnership liability was seen by a majority of the Task Force as an attempt to legislate financial responsibility in a disciplinary code as opposed to ethical duties of lawyer to the client.

Because of the problems with past definition of joint responsibility and the trend toward imposing a new definition imposing partnership liability, the Task Force spent much of its effort in defining joint responsibility- that is the ethical duties of the referring lawyer.

This meant the Task Force also sought to draft the new rule and the comments that were consistent with the purposes stated in the Preamble of the Texas Disciplinary Rules of Professional Conduct. The rules are supposed to “define conduct for purpose of professional discipline.”\textsuperscript{13} The comments, on the other hand, are used to explain the rules and provide guidance for compliance.\textsuperscript{14} \textit{Id.} Further, the rules do not define the standards for civil liability for lawyers.\textsuperscript{15} However, the rules have been used as evidence of standard of care.\textsuperscript{16}

\textbf{B. Joint Responsibility — The Texas 2005 Version.}

All of us know that terms which are not commonly understood must be defined for juries. Surely, if the term “joint responsibility” were ever to be submitted to a jury, it would have to be defined. But there is a bigger problem than the fact the term is not being commonly understood by lay persons. It is an inherently confusing term which is prone to subjective or personal interpretations. It became clear that the term “joint responsibility” did not have a commonly accepted meaning in the profession.

Thus, the Task Force set out to define and explain the term “joint responsibility” in the context of fee division. I believe, the Referral Fee Task Force spent more hours debating and drafting the term “joint responsibility” than it did on anything else, with the exception of actual receipt of testimony and the collection of information.

The comments which have been adopted specify the ethical duties of a jointly responsible lawyer. They are not the vague duties found in previous versions of the Texas and ABA rule, nor are they duties of a partner. The duties of the referring lawyer are not the same as a co-counsel who required to provide substantial services in the prosecution of the client’s case.

Based on the voluminous testimony taken, the Task Force was able to articulate the duties assumed by professional and ethical referring lawyers. Those duties are now found in Comment 13 to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct.

To meet the requirement of being jointly responsible, the referring lawyer must:

- Make a reasonable investigation of the claims of the client;
- Refer the case to someone who the lawyer reasonably believes is competent to handle the case;
- Monitor the matter throughout the representation; and
- Communicate information to the client that the client needs to know.

Under Comment 13, the extent of the duty to monitor is clarified by giving examples of what is not required and of what is required. The duty to monitor the case does not require the referring lawyer to:

- Attend depositions;
- Attend hearings; or
- Require that copies of pleadings or correspondence be provided to him.

These activities are to be avoided because they may increase the transaction cost borne by the client, unless some benefit may derived by the client. From this comment it is clear that the referring lawyer is not required to serve as an attorney of record or participate
as co-counsel in order to monitor the case, except in very unusual situations.

Comment 13 also provides guidance on how an attorney will fulfill the duty to monitor the case. To fulfill the duty of monitoring the case, the referring lawyer should:

- Keep reasonably informed of the matter;
- Respond to client questions; and
- Assist the handling lawyer when necessary.

What about those situations where the arrangement is not one of referring lawyer and handling lawyer? How are fees to be divided between two handling lawyers?

VI. WHEN IS A PROPORTIONAL FEE DIVISION PROPER?

A lawyer who has signed up a client and who needs additional help has another option besides referring the case to a handling lawyer. A lawyer can bring in another lawyer to work the case with him. In one sense, the original lawyer is a referring lawyer because the original lawyer is the source of the business. However, the responsibilities and the division of fees is different when two lawyers decide to work a case together.

When two lawyers agree to work a case together and to divide their fees proportionally, their relationship becomes one of co-counsel and is not one of referring lawyer and handling lawyer. However, this proportional division of fees will not apply in every case where two lawyers represent one client.

The comments place an emphasis on whether or not there is a single bill presented to the client or whether there are two bills presented to the client. Thus, Rule 1.04 (f) should not apply to those cases where the client enters into two separate fee agreements with two lawyers in different firms and is billed separately. This is common in hourly work. It sometimes occurs when a sophisticated client hires more than an attorney on a contingency fee basis to handle different but related proceedings. If there is no linkage between the two proceedings Rule 1.04 may not apply. However the more prudent course is to comply with Rule 1.04 even if the client initiates the second engagement. It is clear that the rule and comments is intended to cover those situations where the original lawyer desires to refer the case or associate co-counsel.

Proportional fee division will apply in those cases where there is a single fee agreement and two or more lawyers who are not members of the same firm agree to divide the fee payable “in proportion to the professional service performed by each lawyer.”

The comment for proportionate division was found at Comment 11 in the prior version and is now found at Comment 12. In order divide fees on a proportionate basis the attorneys must:

- Perform substantial legal services in the handling of the case. This involves more than the minimal services involved in being hired by the client; and
- Reasonably divide the fee based either on:
  - The amount of services rendered and responsibility assumed; or
  - The value of the services rendered and responsibility assumed.

The agreed division will control even if it is not directly proportional to actual work preformed (time involved?) if each participating lawyer performs substantial legal services. If the division is based on the actual work performed, then the arrangement may provide that the allocation will not be made until the end of the case. However, the methodology for allocation must be specified at the beginning of the arrangement.

VII. CHECKLIST FOR EFFECTIVE AGREEMENTS

A. Dividing Fees or Profits

The lawyers need to understand their relationship with each other. This is fairly easy in the one client—one case fee division. However, arrangements between lawyers can evolve to a point that they are no longer dividing fees—instead they are dividing the profits of a joint venture or partnership. Unknowingly, they have become partners as to multiple cases or joint venturers with regard to a series of cases. While this latter circumstance is rare, it does occur.

B. Written Contract Required In Contingent Fee Cases

All contingent fee cases require a written fee contract that states the method by which the fee is to be determined. If the percentage will change based on future events, such as settlement before trial or appeal, then the different percentages for each event must be stated. The agreement must state whether expenses are deducted prior to or after calculation of the fee. Further, the client must be presented with a written statement describing the outcome, the amount to be paid the client, and the method for determination. These requirements are not changed by the new rule except to the extent the closing statement will definitely need to show the division of fees.
C. Effective Fee Division Arrangements after March 1, 2005

In order to have a valid fee division arrangement after March 1, 2005, the following are required:

- The client must consent in writing to the terms of the arrangement; and
- The client’s consent must be obtained before the arrangement is effective.\(^{23}\)

Consent is not effective if the client does not consent in writing to the essential terms of the arrangement. Therefore, the written consent must specify:

- The identity of all participating lawyers or law firms;
- Whether fees are divided on a proportional division of services or by lawyers assuming joint responsibility; and
- The share each jointly responsible lawyer will receive; or
- The basis on which a proportionate division will be made.\(^{24}\)

The lawyer who refers the case or who brings in co-counsel has the primary responsibility for full disclosure and compliance.\(^{25}\) Clearly, the second lawyer, whether he is a handling lawyer or a co-counsel, has a responsibility to the client to ensure full disclosure and compliance.

D. Arrangements Prior to March 1, 2005

The prior rule remains in effect as to arrangements entered into prior to March 1, 2005, provided the client has been informed of the identity of all participating lawyers.\(^{26}\) Therefore, the attorney should review the file as to existing arrangements and make certain there is written proof the client is aware of the identity of all participating lawyers. If the client is not aware, then the new rule will apply.

This order may be more of a problem than it would seem on first reading. On first reading it would seem to require that the client be aware of who is handling the case. However, the order also requires that the client be informed of the identity of everyone who is participating in the fee. You can not assume that because the client is aware of the fact that another lawyer is handling the case that the client understands that a referral fee is being paid. You must make certain that the client knew prior to March 1, 2005, the identity of lawyers who were going to participate in the fee as well as those who are handling the case. If the case is one that has been referred a second and third time you may have trouble documenting that the client is aware of everyone who is participating in the fee.

E. Fee Disputes, Fee Forfeiture and Civil Liability.

The failure to obtain the client’s consent in writing to the terms of the fee arrangement means that the attorneys can only recover the reasonable value of there services and the reasonable and necessary expenses incurred.\(^{27}\) This apparently will be applied to all attorneys involved since it states no attorney will try to collect on a fee arrangement that does not have the necessary consent of the client.\(^{28}\) To attempt to do so is a violation of the Rules of Professional Conduct.\(^{29}\)

There is at least one open question if the fee arrangement does not meet the requirement of Rule 1.04 (g). Comment 17 states that what should be done with any otherwise agreed to fee that is forfeited because of the failure to comply with the rule is not resolved. There is a strong risk that the failure to comply will work against all attorneys and that the client will reap the reward. It is true that the primary duty of compliance is upon the initial lawyer. However, this implies that the handling lawyer or associated lawyer also has a duty. This will be particularly true when the client signs a contract provided by the handling lawyer.

Attached at Appendix B is “Form Language Authorizing Referral or Association of Counsel”. This appendix was prepared by Dickie Hile and is also available at [http://www.texasbar.com/](http://www.texasbar.com/) in both PDF and Word format. This appendix includes provisions to be inserted in a power of attorney or contingent fee contract of the initial lawyer as well as Consent to Referral to be executed at the actual time of referral. See paragraphs 1 and 2 of Appendix B. Paragraph 3 of Appendix B is a provision to use when the client is going to execute the handling lawyer’s contract either because one has not been executed or because the handling lawyer desires to replace the existing contract with his own form.

Please note that Paragraph 1 of Appendix B closely resembles the right to associate additional counsel clause often found in contingent fee contracts. However, this clause is not enough anymore. You must also use the Consent to Referral found at Paragraph 2 of Appendix B.

As noted earlier the Task Force was concerned about the trend found in the ABA Model Rules to impose the ethical responsibilities and partnership liabilities on a referring lawyer. This was substantively dealt with by specifying the duties of a referring lawyer. The Task Force recognized liability for a breach of these duties was outside the scope of the Rules of Professional Conduct and would be “resolved by the Texas Civil Practice and Remedies Code. Ch. 33, or other applicable law.”\(^{30}\)
VIII. CONCLUSION.

The amendments to Rule 1.04 require each lawyer to carefully review each existing fee arrangement to insure that the client is aware of each lawyer’s participation. If the client is not aware, the attorney should obtain written consent in compliance with the rule.

An effort should be made now to change contract forms and draw the form(s) necessary to document the client’s consent to the fee division. Compliance with the rules will avoid fee disputes and possible grievances. Although the compliance will require more effort than was required to qualify as a forwarding lawyer, compliance does not require more than what most good lawyers already do except for documenting the client’s written consent.

2 Id.
3 Id.
5 Rule 5.01 Texas Disciplinary Rules of Professional Conduct.
6 Id.
10 Id.
11 Rule 5.02 Texas Disciplinary Rules of Professional Conduct.
12 ABA Model Rule 1.5 (e) (1983) and (2003).
13 Preamble § 10 Texas Disciplinary Rules of Professional Conduct.
14 Id.
17 Comment 10, Rule 1.04 Texas Disciplinary Rules of Professional Conduct. (Prior and current Rule)
18 Rule 1.04 (f) (i) Texas Disciplinary Rules of Professional Conduct, (Prior and current Rule).
19 Comment 12, Rule 1.04 Texas Disciplinary Rules of Professional Conduct. (Current Version)
20 Id.
21 Id.
22 Rule 1.04 (d) Texas Disciplinary Rules of Professional Conduct, (Prior and current Rule).
23 Rule 1.04 (f) (2) and Comment 15, Rule 1.04 Texas Disciplinary Rules of Professional Conduct. (Current Version)
24 Id.
25 Id.
27 Rule 1.04 (g) Texas Disciplinary Rules of Professional Conduct. (Current Version).
28 Id.
29 Id.
30 Comment 14, Rule 1.04 Texas Disciplinary Rules of Professional Conduct. (Current Version)
APPENDIX A

Texas Disciplinary Rule Professional Conduct - Rule 1.04(f)

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; and

(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 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.
Division of Fees

10. A division of fees is a sharing of a single billing to a client between covering the fees 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 the client, a division of fees within the meaning of this Rule is not involved. See also Comment 3 to Rule 5.04, but it applies in all cases in which two or more lawyers are representing a single client in the same matter, and without regard to whether litigation is involved. 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. See Rule 5.02. 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.

Comments:

[No changes in comments 1-9.]
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 B

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 “prosecute 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 (___ %)\(^1\), (___ %) 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 (___ %)\(^2\), (___ %) 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 prosecute\[ing 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 (___ %)\(^3\), (___ %) will be paid to Attorneys and (___ %) will be paid to Associated Counsel. The fee to be paid

\[^1\]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].

\[^2\]See footnote 1.

\[^3\]See footnote 1.
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.

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

(___ %)4, (___ %) 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.

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 (___ %)5, (___ %) 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

4 See footnote 1.
5 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].