DON’T BE A DEFENDANT: ATTORNEY FEES, CONTINGENCY FEES AND ATTORNEY ADVERTISING

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State Bar of Texas
CONSUMER AND COMMERCIAL LAW COURSE
September 20-21, 2007
Houston

CHAPTER 12
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I. INTRODUCTION

Like doctors, hospitals and drug companies, lawyer now regularly find themselves the subject of lawsuits alleging that they were negligent or breached various duties owed to the public. Unlike other professionals and businessmen, however, lawyers also face a very active disciplinary procedure that routinely disciplines lawyers for ethical violations. With new appellate decisions, statutes and ethics opinions coming out daily, the burden of staying current on the law has become increasingly difficult. The areas addressed in this paper, the 2005 amendments to the Advertising Rules and the referral fee rules, and the rules and case law on contingent fees each represent a minefield of potential traps for lawyers.

II. THE 2005 AMENDMENTS TO THE ADVERTISING RULES IN THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

A. Key Changes to the Rules in the 2005 Amendments.

The advertising rules (Part 7 of the Texas Disciplinary Rules of Professional Conduct) were substantially amended to be effective on June 1, 2005. The text of the amended rules and comments are attached hereto as Exhibit “1”.

Some of the most important changes to the advertising rules are as follows:

1. Actors may not be used to portray a lawyer – Rule 7.04(g).
2. Actors may not be used to portray a client – Rule 7.02(a)7
3. Past successes or results require the following disclosures as set forth in Rule 7.02(a)(2);
   a. 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;
   b. the amount involved was actually received by the client;
   c. 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
   d. if the gross amount received is stated, the attorneys’ fees and litigation expenses withheld from the amount must be stated as well.
4. Whenever the rules require that specific qualifications, disclaimers or disclosures of information accompany communication 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 – Rule 7.04(q).
5. 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 – Rule 7.02(c)
6. A lawyer may state that he or she has been awarded a certificate of special competence by the Texas Board of Legal Specialization in the area so advertised, so long as that is a true statement. (Rule 7.04(b)(2)
7. A lawyer or firm who advertises in the public media must disclosure the geographical location, by city or town, of the lawyer’s or firm’s principal office.— Rule 7.04(j)

B. Law Firm Websites

Websites need to be filed with the State Bar Advertising Review Committee. – Rule 7.07

Gene Major, State Bar Advertising Counsel, was a panelist on the State Bar Law Practice Management Webcast conducted on July 25, 2007 dealing with website advertising. The main points made by Mr. Major in the presentation were as follows:

1. Solicitation whether by mail or on the Internet is governed by the advertising rules. There are now email solicitations for traffic tickets, etc and infomercials.
2. When sending your website to the Advertising Review Committee, you only need to file the first page or home page. It is critical that the firm name and location be set out at the beginning of the home page. If the pages behind the home page are found to be in noncompliance, the Bar will send a letter of noncompliance and give you ten days to comply.
3. You can put up your website at the same time as you submit the website to the Bar for review and approval.
4. Advertising red flags:
   a. The “not board certified” language was removed in the 2005 amendments, but use of the word “specialist” will be scrutinized carefully. If the word “specialist” is used, all attorneys in the firm must specialize in that area.
   b. Actors or models to portray either attorneys or clients may not be used.
   c. If results are posted, then the disclaimers must be set out in the same manner and same type as the results. Net results may be published without disclaimers, but any type of gross
result must have a disclaimer connected with it.

d. Domain names may be used as long as they are not false or misleading. It must not look as through you were practicing under it. You cannot for example call yourself “www.Best@DallasCountylawfirm.com.

e. Out-of-state firms with Texas attorneys—those websites need to be in compliance with the Texas Rules. The results requirements under the Texas rules are different than those in the model rules in other states.

f. Nonfiling is a violation of the advertising rules.

5. Blogs are considered educational or informative, but if there is a solicitation involved, then they must be reviewed and approved by the State Bar.

III. REFERRAL FEES

A. The 2005 Amendments

Historically, Texas was one of the few states that permitted a “naked referral fee” (sharing fees among lawyers in different firms based solely on a referral). That changed, however, for fee splitting arrangements entered into after March 1, 2005, the effective date of the amended Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct.

Under new Rule 1.04, the “naked referral fee” became unethical, and the Rule states in material part as follows:

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

(1) the division is:

(i) in proportion to the professional services performed by each lawyer; or
(ii) made between lawyers who assume joint responsibility for the representation; and

(2) the client 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 agreement 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)”

Therefore, Rule 1.04(f) permits a division of fees among lawyers in different firms only if the division is:

1. in proportion to the professional services performed by each lawyer; or
2. between lawyers who are jointly responsible for the representation.

B. The “Proportion of Services Rendered” Requirement.

Comment 12 of Rule 1.04(f) elaborates on the proportion of services rendered requirement as follows:

“12. 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 through 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.”

As can be seen, the new rule requires each lawyer to perform substantial legal services beyond the initial meeting. The rule does not require an exact proportionate division, and it makes no attempt to quantify the value of different services (tendering a witness for deposition versus arguing a motion for summary judgment). There must be some reasonable correlation between the division of the fee and the amount/value of the services, but the agreement of the lawyers should control once that threshold is satisfied.
C. The “Joint Responsibility” Requirement

Comment 13 of Rule 1.04(f) further defines the joint responsibility requirement as follows:

“13. Joint responsibility for the representation entails ethical and perhaps financial responsibility of 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.”

Compliance with the joint responsibility aspect of the rule is more problematic. To satisfy “responsibility,” a referring lawyer must, at a minimum, make a reasonable investigation of the client’s legal needs prior to the referral, refer the matter to a competent lawyer, then monitor the matter throughout the representation and ensure that the client is adequately informed in accordance with the ethical rules. The referring lawyer however need not attend all depositions and hearings or be copied on all pleadings and correspondence, especially when those activities will unnecessarily increase the cost to the client.

D. The Consent Requirement.

The requirement that the client must consent in writing to the terms of the arrangement prior to the time of the association or referral is described in greater detail in Comment 15 as follows:

“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.”

As set forth in the comment, the client’s consent must occur prior to the association or referral. The consent will be valid only if all terms of the arrangement are revealed to the client, including the identity of the lawyers participating, whether fee splitting will be based upon proportion of services performed or by the lawyers being jointly responsible for the representation, and the exact basis on which the fee split will be calculated.

E. The Rule Applies to Transactional Matters As Well as Litigation.

Interestingly, comment 10 of Rule 1.04 acknowledges that the most common use of a referral fee is in connection with a contingent fee on litigation but the comments make clear that the rule applies to all fee sharing arrangements: litigation or transactional, hourly or contingent, other than a sharing with a former partner or associate pursuant to a separation or retirement agreement or a lawyer referral program certified by the State Bar.

F. Open Questions.

Two questions left unanswered by Rule 1.04 are:
1. whether the referring lawyer under a joint responsibility arrangement becomes jointly and severally liable for acts of malpractice of the handling lawyer; and

2. whether the referring lawyer can be subjected to discipline for acts of professional misconduct of the handling lawyer.

Clearly, the safer course is for the referring lawyer to assume that joint responsibility includes the potential for joint liability with the handling lawyer.

G. A Dangerous Referral Fee Case Even With the Amendments to Rule 1.04.

Even with the 2005 amendments to Rule 1.04(f), the case of Chang v. Brewer & Pritchard, P.C., 73 S.W. 3d 193 (Tex. 2002) presents dangers. This case addresses the issue of whether an associate attorney in a law firm owes a fiduciary duty to the firm and its partners. On a broader level, however, the case highlights a potential problem on how referral fees are paid.

The facts of the case are relatively simple. An associate attorney learns that the father of a good friend (and six others) were injured/killed in a helicopter crash. After visiting with several attorneys, the good friend signs a contract with a solo practitioner who is also a friend of the associate attorney with the advance agreement that the case will be referred to an aviation expert who agreed to pay a 50% referral fee to the solo practitioner. The case later settled for $15,000,000.00 and the solo practitioner received a $3,000,000.00 referral fee. There is an allegation that the associate attorney somehow shared in the $3,000,000.00 referral fee. Id. at 197-198

The law firm sued both the associate attorney and the solo practitioner on the theory that the associate attorney breached fiduciary obligations owed to the firm and its partners. On a broader level, however, the case highlights a potential problem on how referral fees are paid.

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The law firm sued both the associate attorney and the solo practitioner on the theory that the associate attorney breached fiduciary obligations to the firm and the solo practitioner conspired to assist in this breach. Among the issues before the court was whether the associate attorney owed a fiduciary duty to the law firm (note that there is no dispute that a fiduciary duty is owed to the firm by principals/partners of the firm). The Texas Supreme Court held,

“[A]n associate may participate in referring a client or potential client to a lawyer or firm other than his or her employer without violating a fiduciary duty to that employer as long as the associate receives no benefit, compensation, or other gain as a result of the referral. However, the associate owes a fiduciary duty not to accept or agree to accept profit, gain, or any benefit from referring or participating in the referral of a client or potential client to a lawyer or firm other than the associate’s employer.” Id. at 203

Significantly, the Court remanded to the trial court the issue of whether, as a factual matter, the attorney who received the case from the associate could be sued by the firm for assisting the associate in breaching his fiduciary duty. Id. at 204 Thus, for the attorney who receives or pays referral fees, the primary lesson to be learned is that the attorney who pays the referral fee to an associate of a law firm can be sued for conspiring to breach fiduciary duties that the referring lawyer owes to his/her own firm. If proven, this could result in both attorneys being liable to the firm of the referring attorney for the entire fee, not just the referral fee, as well as for punitive damages. The exact nature of the accusations would determine whether the referred attorney would have coverage for such a claim, but it is certainly within the realm of possibility that there would be no coverage for such a claim.

This is a very dangerous area and remains so even with the amendments to Rule 1.04(f). Also, the law is obviously still developing. As a general proposition, the handling attorney (who receives the referral) does not have an affirmative duty to enforce fiduciary obligations owed by the referring attorney to his/her law firm. The exact line between disinterested, non-enforcer and active participant/co-conspirator is, however, less than clear. Each handling attorney will have to decide what steps he/she will take to insure that they are not found to be a co-conspirator with a referring attorney in a breach of fiduciary obligations owed to the referring attorney’s law firm. Facts that might evidence active participation in a conspiracy could include referral checks being mailed to the homes of referring attorneys, since this could be evidence that the handling attorney knows that the referring attorney is hiding the payment from his/her firm and is actively participating with the referring attorney in hiding the referral fee from the law firm.

Attachments: Exhibit 2 Text of Texas Disciplinary of Professional Conduct 1.04 including comments.
Exhibit 3 – Form Language authorizing referral or association of counsel.

IV. CONTINGENT FEES

One State Bar survey estimated that 75 percent of Texas lawyers receive at least some income from contingent fees each year. If that is true, understanding the rules governing contingent fees should be important to every Texas lawyer.

A. Standard for Charging a Contingent Fee

As set forth in Rule 1.04:
1. Contingent fees are prohibited in criminal matters;
2. Contingent fee agreements must be in writing - oral agreements are voidable;
3. The contingent fee contract must state how expenses will be handled and whether they are deducted before or after the contingent fee is calculated; and
4. At the conclusion of the matter, the lawyer must provide the client with a written closing statement describing the method of calculating the contingent fee.

B. A Contingent Fee Must Not be Unconscionable.

The standard for charging a contingent fee is set forth in Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct as follows:

“(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent, on results obtained or uncertainty of collection before the legal services have been rendered.”

Comments 7 and 8 of the Rule elaborate on when a fee may be unconscionable, and clearly apply to contingent fees. These comments read as follows:

“7. Two principal circumstances combine to make it difficult to determine whether a particular fee is unconscionable within the disciplinary fee test provided by paragraph (a) of this Rule. The first is the subjectivity of a number of the factors relied on to determine the reasonableness of fees under paragraph (b). Because those factors do not permit more than an approximation of a range of fees that might be found reasonable in any given case, there is a corresponding degree of uncertainty in determining whether a given fee is unconscionable. Secondly, fee arrangements normally are made at the outset of representation, a time when many uncertainties and contingencies exist, while claims of unconscionability are made in hindsight when the contingencies have been resolved. The “unconscionability” standard adopts that difference in perspective and requires that a lawyer be given the benefit of any such uncertainties for disciplinary purposes only. Except in very unusual situation, therefore, the circumstances at the time a fee arrangement is made should control in determining a question of unconscionability.

8. Two factors in otherwise borderline cases might indicate a fee may be unconscionable. The first is overreaching by a lawyer, particularly of a client who was unusually susceptible to such overreaching. The second is a failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated. For example, a fee arrangement negotiated at arm’s length with an experienced business client would rarely be subject to question. On the other hand, a fee arrangement with an uneducated or unsophisticated individual having no prior experience in such matters should be more carefully scrutinized for overreaching. While the fact that a client was at a marked disadvantage in bargaining with a lawyer over fees will not make a fee unconscionable, application of the disciplinary test may require some consideration of the personal circumstances of the individual involved.”

Comment 7. to Rule 1.04 embraces the concept that the risk of non-payment is part of what justifies the contingent fee. The comment observes that fees are set when cases typically have “many uncertainties and contingencies,” and it, thankfully, rejects the hindsight method of determining the reasonableness of a fee. As a
result, Comment 7 seems to give good cover to the lawyer who undertook a risky case and got a quick and overly generous recovery. However, Comment 7 also seems to suggest ethical traps for the lawyer at the front end of the relationship.

What happens, for example, if a lawyer is offered a case that does not have Comment 7’s “many uncertainties and contingencies”? What is a reasonable fee when the client sitting across from the lawyer has a case with what appears to be clear liability and unassailable damages in the millions? Comment 7 seems to suggest that a lawyer should take these facts into consideration and, therefore, set a lower contingent fee because of the “circumstances at the time the fee arrangement was made.”

All lawyers know, of course, that what appears clear and certain in a first meeting may very well prove to be less than clear and certain at the courthouse. Is it fair to clients, however, to use the apparent lack of uncertainty and high risk in a case to justify a higher contingent fee, but then not use the apparent lack of uncertainty to justify a lower contingent fee? Comment 7 suggests to me that this would not be fair.

There is another practice that bears upon whether a contingent fee is unconscionable in the context of this risk and uncertainty evaluation. That is the practice of lawyers dropping any case where the risk factors do not end up supporting recovery. Imagine, for example, that a lawyer signs up two cases on a contingent fee, each with good facts and good damages. The standard justification for the contingent fee is that the lawyer might win one and lose one, so the winner has to pay for the time and expense invested in the loser.

In the real world, however, what happens when a lawyer learns that, for example, one of the cases turns out to be a case with no insurance? That case is usually kicked to the curb and the lawyer proceeds with the good case where the “uncertainties and contingencies” are controllable and favor recovery. These situations concern not only other members of the bar, but politicians interested in killing contingent fees in the next wave of tort reform.

**Unconscionability Issues**

1. Honestly evaluate the risks of the case. If you have a client injured by an uninsured drunk driver, whose only recovery will be on her own uninsured motorist policy, send a demand letter and secure the client that money without charging a fee.

2. Be wary of “ratcheting contingencies,” when you control the ratchet. If you agree to a lower fee if a case is settled before suit is filed, use reasonable efforts to settle the case before suit is filed and confer with the client before filing suit, as opposed to simply ratcheting your fee up unilaterally.

3. Explain the conflicts of both contingency and hourly fees to the client. Tell the client it is usually in their best interest to pay an hourly fee and encourage them to do so if they can. Remember, the case you want on a contingent fee is the very one on which the client should pay hourly: the client should know that before signing a contract with you.

4. If you are going to charge more than the “industry standard” of one-third, be prepared to defend your fee, both to the client and a court, by reference to the factors set out in Rule 1.04 of the Texas Rules of Professional Conduct.

5. Never take more than the client. Settlements which provide for a contingent fee plus expenses can result in the lawyer getting more money from the settlement than the client. It just violates some gut level instinct for the lawyer to get more money than the client out of a settlement and most juries agree.

6. At the time of closing, explain to your client that they have the right to challenge your fee as excessive. After all, your contract with the client is only enforceable if it is reasonable and you should tell the client so.

**C. The Remedy of Fee Forfeiture**

When the lawyer breaches his fiduciary duty, the lawyer may also be liable to the client for a forfeiture of all or part of all fees and compensation earned. *Burrow v. Arce*, 997 S.W. 2d 229 (Tex. 1999). This case arose out of the explosions at a Phillips 66 chemical plant in 1989 that killed twenty-three workers and injured hundreds of others. A number of wrongful death and personal injury lawsuits were filed, including one on behalf of some 126 plaintiffs filed by the Umphrey Burrow law firm in Beaumont. The case settled for approximately $190 million out of which the attorneys received a contingent fee of more than $60 million. *Id.* at 232

After the settlement, 49 plaintiffs sued the attorneys alleging professional misconduct and demanding forfeiture of all fees the attorneys received. The plaintiffs alleged that the attorneys in violation of rules governing their professional conduct, solicited business through a lay intermediary, failed to fully investigate and assess individual claims, failed to communicate offers received and demands made, entered into an aggregate settlement with Phillips of all plaintiffs’ claims without plaintiffs’ authority or approval, agreed to limit their law practice by not representing others involved in the same incident, and intimidated and coerced their clients into accepting the settlement.

The trial court granted summary judgment for the attorneys on the ground that the settlement of plaintiffs’ claims in the Phillips accident suit was fair and reasonable, so plaintiffs had therefore suffered no actual damages as a result of any misconduct by the attorneys, and absent actual damages plaintiffs were not entitled to a forfeiture of any of the attorneys’ fees. The trial court conceded that
factual disputes over whether the attorneys had engaged in any misconduct remained unresolved. \textit{Id.} at 233.

The Court of Appeals reversed the summary judgment and the Supreme Court affirmed that reversal. The Supreme Court held that forfeiture of fees is appropriate without regard to whether the breach of fiduciary duty resulted in damages to the client. It is the agent’s disloyalty, not any resulting harm that violates the fiduciary relationship and thus impairs the basis for compensation. An agent’s compensation is not only for specific results but also for loyalty. Removing the disincentive of forfeiture except when harm results would prompt an agent to attempt to calculate whether particular conduct, though disloyal to the principal, might nevertheless be harmful to the principal and profitable to the agent. The main purpose of forfeiture is not to compensate an injured principal, even though it may have that effect. Rather, the central purpose of the equitable remedy is to protect relationships of trust by discouraging agents’ disloyalty. \textit{Id.} at 238

The Supreme Court went on to say:

“Fee forfeiture for attorney misconduct is not a windfall to the client. An attorney’s compensation is for loyalty as well as services, and his failure to provide either impairs his right to compensation. While a client’s motives may be opportunistic and his claims meritless, the better protection is not a prerequisite of actual damages but the trial court’s discretion to refuse to afford claimants who are seeking to take unfair advantage of their former attorneys, the equitable remedy of forfeiture.” \textit{Id.} at 240

The Supreme Court adopted the standard set forth in §49 THE PROPOSED RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS as follows:

“The gravity and timing of the violation, its willfulness, its effect on the value of the lawyer’s work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.”

To the factors listed in the Restatement, the Supreme Court added another factor that must be given equal weight in applying the fee forfeiture: “the public interest of maintaining the integrity of the attorney-client relationship”. \textit{Id.} at 243

The Supreme Court went on to hold that when forfeiture of an attorney’s fee is sought, a trial court must determine from the parties whether factual disputes exist that must be decided by a jury before the court can determine whether a clear and serious violation of duty has occurred, whether forfeiture is appropriate, and if so, whether all or only part of the attorney’s fees should be forfeited. The factual disputes may include, without limitation, whether or when the misconduct complained of occurred, the attorney’s mental state at the time, and the existence or extent of any harm to the client. Once any necessary factual disputes have been resolved, the court must determine, based on the factors the court set out, whether the attorney’s conduct was a clear and serious breach of duty to his client and whether any of the attorney’s compensation should be forfeited, and if so, what amount. Most importantly in making these determinations, the court must consider whether forfeiture is necessary to satisfy the public’s interest in protecting the attorney-client relationship. \textit{Id.} at 246

Plainly, the Supreme Court has opened the door for parties to sue their attorneys for fee disgorgement when the lawyer’s fiduciary duty to the client has been breached.

D. The Terminated Attorney Under a Contingent Fee Contract—the Mandell & Wright Rule

Most Texas personal injury lawyers are familiar with \textit{Mandell & Wright v. Thomas}, 441 S.W.2d 841 (Tex. 1969). The case is, however, often misunderstood. The holding of the Court can be summarized as follows:

1. A client has the right to fire an attorney at any time in the representation;
2. When the client terminates an attorney without good cause, the discharged attorney can still recover on his contingent fee contract;
3. When the client terminates the attorney for good cause, the attorney cannot recover on the contingent fee contract but may be allowed to recover under \textit{quantum meruit}. \textit{Id.} at 847

There is nothing in the decision that addresses the issue of what constitutes good cause or what happens if the lawyer withdraws instead of being terminated. Many lawyers assume that they can fire the client for good cause and keep their right to a contingent fee, but the \textit{Mandell} decision does not say that.

The \textit{Mandell} decision also does not answer the question of what constitutes good cause for terminating a lawyer. Would it be good cause, for example, if the only lawyer familiar with the case leaves the firm for other employment? This is a common situation and law firms routinely claim that they have the right to assign another lawyer to the case. Is it good cause to fire a lawyer if the lawyer will not return phone calls or does not adequately explain the status of a case to a client? This is a complaint often heard by clients who fire their lawyers and who file grievances. The case law does not definitively answer these questions.

The \textit{Mandell} decision also fails to define what the lawyer fired for good cause would be entitled to receive under \textit{quantum meruit}. Is the lawyer, for example, only entitled to compensation on an hourly basis, even though the lawyer may not have kept time records? If the lawyer
did 90 percent of the work necessary to secure the settlement, would *quantum meruit* entitle the lawyer to 90 percent of the contingent fee, since *quantum meruit* recovery focuses on the benefit conferred on the client? These and other unanswered questions involving the *Mandell* decision would have to be answered in a second lawsuit between the client and the terminated lawyer. That second lawsuit may leave the client owing the terminated lawyer the full contingent fee, even after paying a full contingent fee to the second lawyer who finished the representation.

The second lawyer may also be sued for tortious interference, if he or she had some role in encouraging the client to fire the first lawyer. Somewhere along the way, the second lawyer should tell the client about the risk of having to pay two contingent fees; any lawyer who failed to do so might be subject to a malpractice case for having failed to properly advise the client prior to firing the first lawyer.

The *Mandell* decision came out at a time when lawyers were concerned that insurance companies would encourage a client to fire the first lawyer and then settle with the client without having to pay the contingent fee. The decision protects against that societal ill, but it does not provide much protection to the unsophisticated client who is dissatisfied with his or her lawyer. By fixing one problem, the *Mandell* decision created a whole new set of issues and problems for the client and the terminated lawyer.

**E. The Erosion of the Mandell & Wright Rule**

An example of one court’s dissatisfaction with the *Mandell* case is found in *Johnston vs. California Real Estate Investment Trust*, 912 F.2d 788 (5th Cir. 1990). The Court could barely conceal its disdain for the terminated personal injury attorney who sued for one-third of a $75,000 settlement awarded to a young boy for his injuries.

“As discussed above, *Mandell* will not necessarily preserve fees for attorney who withdraws without just cause. A much more detailed attack upon the *Mandell* decision is contained in *Augustson vs. Speiser, Krause, Madol, & Mendelsohn*, 76 F.3d 658 (5th Cir. 1996). In this case, the first firm agreed to represent the Augustson family in connection with a plane crash in which Mrs. Augustson was damaged and her grown daughter died. After the family had refused to accept a $475,000 settlement offer which the law firm had strongly recommended, and had refused to give the attorneys a final figure, on which they would agree to settle, the law firm filed a motion to withdraw. The family opposed the withdrawal but the court permitted the attorneys to withdraw. At the time of the withdrawal, the law firm had taken no depositions and had retained no expert witnesses.

The family promptly retained new counsel who hired expert witnesses, deposed the flight crew and prepared the case for trial. On the eve of trial, the airline agreed to pay the family $850,000 plus $5,000 in expenses to settle the case. Twelve days after the settlement, the trial judge conducted a lien hearing and entered an Order awarding the first firm approximately $110,000 in fees and expenses. The Court of Appeals reversed and entered an Order that the attorneys take nothing.

In analyzing Texas law, the Court points out that the *Mandell & Wright* rule had been the traditional rule, but it has become the minority rule, as more jurisdictions have departed and expressed disfavor with its results. In rejecting the lawyer’s claim for fees after their voluntary withdrawal, the Court placed significant emphasis upon the fact that the failure of a client to accept a settlement offer does not constitute just cause to permit an attorney to withdraw and still collect a fee.

“The objective [of the litigation] is for the client to choose. If the objective is neither illegal nor frivolous, then the attorney who is retained under a contingent fee contract and who withdraws because he disapproves of his client’s objectives may not receive compensation through the Court. Any other rule would impinge on the client’s rights to choose the objectives of his representation.” 76 F.3d at 664.

The Court makes it clear that the lawyer is the agent for the client and the client has an absolute right to reject settlement offers and have the matter resolved by a trial.

“Under the Augustsons’ contingent fee contract, the Augustsons had the right to refuse any settlement agreement, and Speiser, Krause agreed to prepare the case for trial. The
Augustsons also had the right to have their claim adjudicated in the federal courts. Under all of these sources, the Augustsons had the right to pursue litigation first and settlement later, if at all. Admittedly litigation contains risks, and may indeed have hurt the Augustsons’ claims. But that was the Augustsons’ risk to take.”

As the law evolves, lawyers should also consider the holdings of other jurisdictions on point. See, e.g., Ryan v. State, Wash. Ct. App., 1st Div., No. 48688-8-I, 8/5/02, where it was held that a lawyer who withdraws without good cause forfeits his right not only to contingent fee, but also to quantum meruit compensation. An unforeseen workload was held not to constitute good cause.

The underlying message of these cases is clear: attorneys who accept a case on a contingent fee are obligated to pursue the matter through trial and any necessary appeals or they risk losing their fees if they refuse to do so. Correspondingly, attorneys who threaten to withdraw if settlement offers are not accepted may be committing an ethical violation as well as breaching their fiduciary obligations to their clients, and forfeiting their right to any recovery.

F. **Whom to Sue For Lost Contingency Fees.**

What happens if the client fires the lawyer for what he (the client) thought was good cause, but in fact the client’s decision was based on false or misleading information communicated to the client by another lawyer soliciting the transfer of the case? What rights does the terminated lawyer have? Instead of suing the lawyer, that right does not prevent the fired attorney from exercising that right on the basis of his providing false information and misleading, self-serving legal advice. The bankruptcy court expressly based its ruling on what the Supreme Court of Texas said the law will become once the issue is placed squarely before a Texas state court: the attorney-client contract may be the subject of a claim for tortious interference (noting that is the law in many other jurisdictions).

His wrongful conduct notwithstanding, the court noted that Stone might have been entitled to quantum meruit compensation for the extensive (and successful) work he did for the clients, had he proven or even pleaded that theory. **Lesson for attorneys seeking to retain a disputed contingent fee interest: always plead quantum meruit and put on evidence to show the value of services rendered.**

Other jurisdictions do not suffer from the duplicate claims to contingent fees that can arise in Texas under the rule in Mandell. In Mager v. Bultena, Pa. Super. Ct., No. 2442EDA2000, 3/26/02, the Pennsylvania court held that once a client fires a lawyer, the contingent fee arrangement disappears, and it cannot be revived using a relative contribution theory of compensation, i.e., to receive a relative share of the contingent fee. Simple as that. Where the lawyer left his firm and took the contingent fee client with him, the fired firm was entitled to a fair hourly fee for the time spent on the case: Another way of saying quantum meruit.

Similarly, in Phil Watson, P.C. v. Peterson, Iowa, No. 36/00-1271, 9/5/02, the Iowa Supreme Court rejected the firm’s theory that the departing lawyer owed the firm "lost profits" derived from the clients he took with him (to be calculated as the total amount of fees, less costs and salary not paid to the departed lawyer). Such a theory, said the court, wrongly implies that a firm "owns" its clients. To the contrary, a client’s absolute right to terminate legal representation means that a law firm terminated by the client has no claim to "profits" from representation of the client. Instead, the firm is entitled to quantum meruit for actual services rendered.

See also Universal Acupuncture Pain Services P.C. v. State Farm Mutual Ins. Co., S.D.N.Y., No. 01 Civ. 7677 (SAS) 11/12/02 (firm that was hired on contingency, then later fired, cannot assert a quantum meruit claim as justification for withholding the client’s file while demanding payment for services rendered).
G. Problems With the Departing Attorney.

All these developments raise serious questions over the proper way for law firms to handle instances in which a lawyer leaves the firm’s employment and one of the firm’s client’s wishes to be represented by the departing lawyer instead of the firm. Assuming that the client has no “good cause” for firing the firm save for the fact that he or she wishes to be represented by the departing lawyer, Mandell creates problems for both the client and the lawyers. The client faces the possibility of having to pay the firm its full contingency fee in addition to whatever it agrees to pay the departing lawyer. The departing lawyer must be concerned that the aggregate fees charged to the client must not be “unconscionable” under Disciplinary Rule 1.04(a), and the law firm itself faces similar concerns, in addition to questions of sound business practice.

Further complicating the picture, Texas Ethics Opinion 459 precludes an easy, obvious solution. The Opinion states that it is not proper for a law firm to have an employment agreement with an associate which provides that, upon termination of employment, the associate would pay to the firm a percentage of fees earned from any client that the associate takes with him. According to Ethics Opinion 546, the safest way to address the issue is to enter into a separation agreement with associates, pursuant to which the firm would retain any employment agreement with an associate which provides that, upon termination of employment, the associate would pay to the firm a percentage of fees earned from any client that the associate takes with him.

Query if a firm could validly agree to “refer” the client to the departed associate in exchange for a referral fee that approximates a quantum meruit portion of the fee to be earned? This would probably not comply with the consent requirement of amended Rule 1.04(f).

H. Contingent Fee Problem Areas

Courts in recent years, including the Texas Supreme Court on at least two occasions, have construed several contingent fee agreements and struck down all or a portion of them. It is obviously important to make sure that your contingent fee agreements comply with Texas law to avoid the unpleasant prospect of litigating your fees with your clients.

1. In Hoover Slovacek, LLP v. Walton, 206 S.W. 3d 557 (Tex. 2006), the Texas Supreme Court initially struck the law firm’s entire contingent fee agreement, but on rehearing struck only a portion of it. The portion of the contingent fee agreement in controversy was as follows:

“You may terminate the Firm’s legal representation at any time. . . . upon termination by You, agree to immediately pay the Firm the then present value of the Contingent Fee described [herein], plus all Costs then owed to the Firm, plus subsequent legal fees [incurred to transfer the representation to another firm and withdraw from litigation].”

After becoming dissatisfied with the law firm’s tactics in settlement negotiations, the client fired the law firm. The law firm then sent the client a bill for $1.7 million representing the law firm’s purported contingent fee based on a settlement offer made by the defendant in the lawsuit. At trial, the jury did not find either that the client discharged the lawyers for good cause or that the lawyer’s fee was unconscionable. The trial court entered judgment on the verdict which awarded the lawyers $900,000. The Court of Appeals reversed and rendered a take-nothing judgment for the client concluding that the lawyer’s fee agreement was unconscionable as a matter of law. Id. at 560.

The Texas Supreme Court upheld the Mandell standard holding that if an attorney hired on a contingency fee basis is discharged without cause before the representation is completed, the attorney may seek compensation in quantum meruit or in a suit to enforce the contract by collecting the fee from any damages the client subsequently recovers. Both remedies are subject to the prohibition against charging and collecting an unconscionable fee. Id. at 561. Whether a particular fee or contingency percentage charged by the attorney is unconscionable under all relevant circumstances of the representation is an issue for the fact finder. Id.

The Supreme Court found that the lawyer’s termination fee provision purported to contract around the Mandell remedies in three ways. First, it made no distinction between discharges occurring with or without cause. Second, it assessed the attorney’s fee as a percentage of the present value of the client’s claim at the time of discharge, discarding the quantum meruit and contingent fee measurements. Finally, it required the client to pay the lawyer the percentage fee immediately at the time of discharge. Id at 562. As a result, the Supreme Court held that the lawyer’s termination fee provision violated public policy and was unconscionable as a matter of law. The Supreme Court remanded the case to the Court of Appeals to determine whether or not there was sufficient evidence to find that the client’s termination of the law firm was for good cause. Id at 566.

2. In Levine v. Bayne, Snell & Krause, Ltd., 40 S.W. 3d 92 (Tex. 2001), the Texas Supreme Court refused to construe a contingent fee contract as authorizing the attorney to compensate exceeding the client’s actual recovery. Id at 95. In the Levine case, the clients purchased a home containing foundation defects, and stopped making mortgage payments when the defects were discovered. Id. at
3. In a recent arbitration, Houston plaintiffs’ lawyer Don’t Be a Defendant Chapter 12

4. The panel found that Mr. O’Quinn’s fees, because it found that the class members may have benefited from the use of the Breast Implant General Expenses. Therefore forfeiture was ordered even though one of the arbitrators noted that “plaintiffs’ lawyers have been struggling for years” on how to handle general expenses in a mass tort case, and O’Quinn’s model for handling general expenses which called for a deduction of 1.5 percent from each settlement was “very close to perfect”. Obviously, very close to perfect is not good enough, and expenses have to be dealt with in a fair manner that is fully disclosed to the firm’s clients.

Lawyers sometimes charge nonrefundable retainers both in connection with complex contingent fee arrangements and with hourly billing arrangements. There can be problems with these arrangements as held in Cluck v. Commission for Lawyer Discipline, 214 S.W. 3d 736 (Tex. App. – Austin). In this case, the attorney agreed to represent a client in a divorce case and the attorney required that the client pay a nonrefundable retainer in the amount of $15,000. The retainer agreement provided that “lawyer fees are to be billed at $150 per hour, first against the nonrefundable fee, and then monthly thereafter. Additional non-refundable retainers as requested.” The contract states that “no part of the legal fee is to be refunded” should the case be discontinued, or settled in any other matter.” Id. at 737. The client paid the initial $15,000 nonrefundable retainer, and then the case was put in abeyance when it appeared that the client might reconcile with her husband. Subsequently, the client requested the lawyer to resume work on the divorce, and the lawyer requested an additional $5,000 nonrefundable fee, and an increase in his hourly rate to $200 per hour. The client paid the additional nonrefundable fee and the lawyer resumed work on the case. Subsequently, the client terminated the lawyer because she was dissatisfied with the progress made by the lawyer on her case. She also demanded that the lawyer refund the
portion of the $20,000 that had not been expended, but the lawyer refused. *Id.* at 738.

The court found that the $20,000 paid to the attorney was not a true retainer, because the fee had not been earned simply because it was designated as nonrefundable. *Id.* at 740. Advance fee payments must be held in a trust account until they are earned and the court found that the attorney violated Rule 1.14(a) of the Texas Disciplinary Rules of Professional Conduct, because he deposited an “advance fee payment”, which belonged at least in part to the client directly into his operating account. *Id.*

The court found that in accordance with opinion 431 by the Texas Committee on Professional Ethics that a nonrefundable retainer would be appropriate under the following circumstance:

“If the lawyer can substantiate that other employment will probably be lost by obligating himself to represent the client, then the retainer fee should be deemed earned at the moment it is received. If a fee is not paid to secure the lawyer’s availability and to compensate him for lost opportunities, then it is a prepayment for services and not a true retainer. “A fee is not earned simply because it is designated as non-refundable. If the (true) retainer is not excessive, it will be deemed earned at the time it is received, and may be deposited in the attorney’s account.” *Id.* (Internal citations omitted)

The lesson to be learned from the *Cluck* case is to be careful about the use of non-refundable retainers, and to set them at a reasonable amount that is based upon the loss of other opportunities for the lawyer as a result of accepting representation of the client’s case.

V. CONCLUSION

Without question, with every year that goes by, law practice grows more complicated and risky for the practitioner. Without a thorough knowledge of the rules related to advertising and referral fees, the practitioner can find himself defending grievances with the State Bar or forfeiting fees to a client. The rules and case law related to contingent fees contain numerous mine fields for the lawyer. It is imperative that the lawyer never forget that he or she has a fiduciary duty to the client, and the last thing any lawyer should want is to wind up in litigation with the client over fees. Appellate courts in particular, have been supportive of clients’ claims against their lawyers for overreaching on fees. Make it your goal to not be part of the next reported decision in this area.
EXHIBIT 1

VII. Information About Legal Services

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.," "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, the 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
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(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 any communication under a trade or fictitious name, except that a lawyer who practices under a firm name as authorized by paragraph (a) of this Rule may use that name in such advertisement or communication by placing the words "Law Offices of Smith and Jones" or "Smith and Associates" in the body of the advertisement. Trade names are generally considered inherently misleading. Other types of firm names can be misleading as well, such as a name that creates the appearance that lawyers are partners or employees of a single law firm when in fact they are merely associated for the purpose of sharing expenses. In such cases, the lawyers involved may not denominate themselves in any manner suggesting such an ongoing professional relationship as, for example, "Smith and Jones" or "Smith and Jones Associates." Such titles create the false impression that the lawyers named have assumed a joint professional responsibility for clients' legal affairs. See paragraph (d).

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

Comment:

1. A lawyer or law firm may not practice law using a name that is misleading as to the identity of the lawyers practicing under such name, but the continued use of the name of a deceased or retired member of the firm or of a forerunner firm is not considered to be misleading. Trade names are generally considered inherently misleading. Other types of firm names can be misleading as well, such as a name that creates the appearance that lawyers are partners or employees of a single law firm when in fact they are merely associated for the purpose of sharing expenses. In such cases, the lawyers involved may not denominate themselves in any manner suggesting such an ongoing professional relationship as, for example, "Smith and Jones" or "Smith and Jones Associates." Such titles create the false impression that the lawyers named have assumed a joint professional responsibility for clients' legal affairs. See paragraph (d).

2. The practice of law firms having offices in more than one state is commonplace. Although it is not necessary that the name of an out-of-state lawyer be the name of any lawyer not licensed in Texas must indicate the lawyer is not licensed in Texas.

3. Paragraph (e) is designed to prevent the exploitation of a lawyer's public position for the benefit of the lawyer's firm. Likewise, because it may be misleading under paragraph (a), a law firm may not claim to have "a greater number of lawyers than any other firm" or "a greater number of clients than any other firm." For example, a firm that has only one lawyer may not call itself "the largest law firm in the state." Such statements are misleading because they are calculated to influence the public's perception of the quality or quantity of the firm's services.

4. With certain limited exceptions, paragraph (a) renders an advertisement misleading if it contains any false material information. Paragraph (d) sets out this same prohibition with respect to advertising in public media or communications seeking professional employment and contains additional restrictions on the use of trade names or fictitious names in those contexts. In a largely overlapping measure, paragraph (e) forbids the use of any such name or designation if it would amount to a "false or misleading advertisement" under Rule 7.02(a).

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;

(3) 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;

(4) compares the lawyer's services with other lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data;

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

(6) designates one or more specific areas of practice in an advertisement in the public media or in a 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)(6) 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)(6) 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 those rules shall be made in each language used in the advertisement or 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 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 non-deceptive.

3. Sub-paraphraph (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. Sub-paraphraphs (a)(2) and (3) recognize that truthful statements may create "unjustified expectations." 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 unique circumstances would ordinarily preclude advertisements in the public media and 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.

5. Sub-paraphraph (a)(4) recognizes that comparisons of lawyer's services may also be misleading unless those comparisons "can be substantiated by reference to verifiable objective data." Similarly, an unsubstantiated comparison of the 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. Statements comparing a lawyer's services with those of another where the comparisons are not susceptible to 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 7.06(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 so does not violate sub-paraphraph (a)(4). Similarly, a lawyer making a referral to another lawyer may 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, firm name, address, and telephone number, 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 solicitation communication, the lawyer should consult Rules 7.05 and 7.06 for further guidance and restrictions.

9. Sub-paraphraph (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)(4), (5) and (6) of Rule 7.02 regulate communications concerning a lawyer's fields of practice and about he consorted together with Rule 7.04 or 7.05, as applicable. If a lawyer in a public media advertisement or in a solicitation communication 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)(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)(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. Lawyers who wish to assert a specialty in a solicitation communication should refer to Rule 7.05.

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's law firm. Other rules prohibit the use of actors to portray lawyer's in the advertising or soliciting lawyer's firm. See Rules 7.04(g), 7.05(a). The truthfulness of such portrayal 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

14. 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.

(Comment amended by the State Bar Board of Directors Jan. 30, 1999, Apr. 8, 2005, eff. June 1, 2005.)

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 Occupational Code Title 5, Subtitle B, Chapter 922.

(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 Occupational Code Title 5, Subtitle B, Chapter 922.

(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
Rule 7.08

Communication initiated by or on behalf of a lawyer or firm.

Comment:

1. In many situations, in-person, telephone, or other prohibited electronic solicitations by lawyers involve well-known opportunities for prospective clients. Traditionally, the principal concerns presented by such contacts are that they can overbear the prospective client's will, lead to hasty and ill-advised decisions concerning choice of counsel, and be very difficult to police. The approach taken by this Rule may be found in paragraph (f), which prohibits such communications if they are initiated by or in behalf of a lawyer or law firm and result in the person contacted communicating with any person by telephone or other electronic means. Thus, forms of electronic communications are prohibited that pose comparable dangers to face-to-face solicitations, such as soliciting business and "chat rooms" or transmitting an unsolicited, interactive communication to a prospective client that the recipient has not accepted in direct contact with another person. Those that do not present such opportunities for abuse, such as pre-recorded telephone messages requiring a separate return call to speak to or retain an attorney or websites that must be accessed by an interested person and thus provide relevant and truthful information concerning a lawyer or law firm, are permitted.

2. Nonetheless, paragraph (a) and (f) unconditionally prohibit those activities only when they are a significant motive and the solicitation concerns matters arising out of a particular occurrence, event, or series of occurrences or events. The reason this outright ban is so limited is that there are circumstances where the danger of such contacts can be reduced by less restrictive means. As long as the conditions of sub-paragraphs (a)(1) through (a)(3) are not violated by a given contact, a lawyer may engage in in-person, telephone, or other electronic solicitations when the solicitation is unrelated to a specific occurrence, event, or series of occurrences or events. Similarly, subject to the same restrictions, in-person, telephone, or other electronic solicitations are permitted where the prospective client either has a family or past or present attorney-client relationship with the lawyer or where the potential client had previously contacted the lawyer about possible employment in the matter.

3. In addition, Rule 7.08(a) does not prohibit a lawyer for a qualified non-profit organization from in-person, telephone, or other electronic solicitation of prospective clients for purposes related to that organization. Historically and by law, nonprofit legal aid agencies, unions, and other qualified nonprofit organizations and their lawyers have been permitted to solicit clients in-person or by telephone, and more modern electronic means of communication pose no additional threats to consumers justifying more restrictive treatment. Consequently, Rule 7.08(a) is not in derogation of those organizations' constitutional rights to employ such methods. Attorneys for such nonprofit organizations, however, remain subject to this Rule's general prohibitions against undue influence, intimidation, overreaching, and the like.

Pay for Solicitation

4. Rule 7.08(b) does not prohibit a lawyer from paying standard commercial fees for advertising or public relations services rendered in accordance with these Rules. In addition, a lawyer may pay the fees required by a lawyer referral service that meet the requirements of the Code of Ethics Title 5 Subtitle A Chapter 922. However, paying, giving, offering to pay or give anything of value to persons not licensed to practice law who solicit prospective clients for lawyers has always been considered to be against the best interest of both the public and the legal profession. Such actions circumvent these Rules by having a non-lawyer do what a lawyer is ethically proscribed from doing. Accordingly, the practice is forbidden by Rule 7.08(b). As to payments or gifts of value to licensed lawyers for soliciting prospective clients, see Rule 1.04(d).

5. Rule 7.08(c) prohibits a lawyer from paying or giving value directly to a prospective client or any other person as consideration for employment by that client except as permitted by Rule 1.08(c).

6. Paragraph (d) prohibits a lawyer from agreeing to or charging for professional employment obtained in violation of Rule 7.03. Paragraph (e) further requires a lawyer to decline business generated by a lawyer referral service unless the lawyer knows or reasonably believes that service is operated in conformity with statutory requirements.

7. References to "a lawyer" in this and other Rules include lawyers who practice in law firms. A lawyer associated with a firm cannot circumvent these Rules by soliciting or advertising in the name of that firm in a way that violates these Rules. See Rule 7.04(e).

(Comment amended by the State Bar Board of Directors Jan. 20, 1995; April 8, 2005, eff. June 1, 2005.)

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 the Code of Ethics Title 5 Subtitle A Chapter 922, 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.
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(a) 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, television, the Internet, or electronic, or digital media.

(b) 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.

(c) 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.

(d) In advertisements 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.

(e) 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.

(f) 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.

(i) 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.

(2) 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 Occupational Code Title 5, Subtitle H, Chapter 902.

(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 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.

(g) 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.

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


Comment:

1. Neither Rule 7.04 nor Rule 7.05 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Advertising Areas of Practice and Special Competence

2. Paragraphs (a) and (b) permit a lawyer, under the restrictions set forth, to indicate areas of practice in advertisements about the lawyer's services. See also paragraph (d). The restrictions are designed primarily to prevent that accurate information be conveyed. These restrictions recognize that a lawyer has a right protected by the United States Constitution to advertise publicly, but that the right may be regulated by reasonable restrictions designed to protect the public from false or misleading information. The restrictions contained in Rule 7.04 are based on the experience of the legal profession in the State of Texas and are designed to curtail what experience has shown to be misleading and deceptive advertising. To ensure accountability, sub-paragraph (b)(1) requires identification of at least one lawyer responsible for the content of the advertisement.

3. Because of longstanding tradition a lawyer admitted to practice before the United States Patent Office may use the designation "patent," "patent attorney," or "patent lawyer" or any combination of those terms. As recognized by paragraph (a)(1), a lawyer engaged in patent and trademark practice may hold himself out as concentrating in "intellectual property law," "patents, or trademarks and related matters," or "patent, trademark, copyright and unfair competition" or any combination of those terms.

4. Paragraph (a)(2) recognizes the propriety of listing a lawyer's name in legal directories according to the areas of law in which the lawyer will accept new matters. The same right is given with respect to lawyer referral service offices, but only if those services comply with statutory guidelines. The restriction in paragraph (a)(5) does not prevent a legal aid agency or prepaid legal services plan from advertising legal services provided under its auspices.

5. Paragraph (a)(3) continues the historical exception that permits advertisements by lawyers to other lawyers in legal directories and legal newspapers (whether written or electronic), subject to the same requirements of truthfulness that apply to all other forms of lawyer advertising. Such advertisements traditionally contain information about the name, location, telephone number, and general availability of a lawyer to work on particular legal matters. Other information may be included so long as it is not false or misleading. Because advertisements in these publications are not available to the general public, lawyers who list various areas of practice are not required to comply with paragraph (b).
6. Some advertisements, sometimes known as tombstone advertisements, mention only such matters as the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, dates of admission to bar, the acceptance of credit cards, and fees. The content of such advertisements is not the kind of information intended to be regulated by Rule 7.04(b). However, if the advertisement in the public media mentions any area of the law in which the lawyer practices, then, because of the likelihood of misleading material, the lawyer must comply with paragraph (b).

7. Sometimes lawyers choose to advertise in the public media the fact that they have been certified or designated by a particular organization or that they are members of a particular organization. Such statements normally lead the public to believe that the lawyer possesses special competence in the area of law mentioned. Consequently, in order to ensure that the public will not be misled by such statements, sub-paragraph (b)(5) and paragraph (c) place limited but necessary restrictions upon a lawyer’s basic right to advertise those affiliations.

8. Rule 7.04(b) gives lawyers who possess certification of specialization from the Texas Board of Legal Specialization or other meritorious credentials from organizations approved by the Board the option of stating that fact, provided that the restrictions set forth in subparagraphs (b)(2)(A) and (b)(3)(B) are followed.

9. Paragraph (c) is intended to ensure against misleading or material variations from the statements required by paragraph (b).

10. Paragraphs (a) and (b) provide the advertising lawyer, the Bar, and the public with requisite records should questions arise regarding the propriety of a public media advertisement. Paragraph (a), like paragraph (b)(1), ensures that a particular attorney accepts responsibility for the advertisement. It is in the public interest and in the interest of the legal profession that the records of those advertisements and approvals be maintained.

Examples of Prohibited Advertising

11. Paragraphs (g) through (i) regulate conduct that has been found to be misleading or likely to be misleading. Each paragraph is designed to protect the public and to guard the legal profession against those documented misleading practices while at the same time respecting the constitutional rights of any lawyer to advertise.

12. Paragraph (g) prohibits lawyers from misleading the public into believing a non-lawyer portraitor or narrator in the advertisement is one of the lawyers prepared to perform services for the public. It does not prohibit the narration of an advertisement in the third person by an actor, as long as it is clear to those hearing or seeing the advertisement that the actor is not a lawyer prepared to perform services for the public.

13. Contingent fee contracts present unusual opportunities for deception by lawyers or for misunderstanding by the public. By requiring certain disclosures, paragraph (h) safeguards the public from misleading or potentially misleading advertisements that involve representation on a contingent fee basis. Affirmative requirements of paragraph (h) are not triggered solely by the expression of “contingent fee” or “percentage fee” in the advertisement. To the contrary, they encourage advertisements in the public media where the lawyer or firm expresses a mere willingness or potential willingness to render services for a contingent fee. Therefore, statements in an advertisement such as “the fee if no recovery or “fees in the event of recovery only” are clearly included as a form of advertisement subject to the disclosure requirements of paragraph (h).

14. Paragraphs (i), (j), (k) and (l) jointly address the problem of advertising that has been found misleading to the public concerning the fees that will be charged, the location where services will be provided, or the attorney who will be performing these services. Together they prohibit the same sort of “bait and switch” advertising tactics by lawyers that are universally condemned.

15. Paragraph (f) requires a lawyer who advertises a specific fee or range of fees in the public media to honor those commitments 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 itself specifies a shorter period. In no event, however, is a lawyer required to honor an advertised fee or range of fees for more than one year after publication.

16. Paragraph (i) prohibits advertising the availability of a satellite office unless the requirements of subparagraphs (1) or (2) are satisfied. Paragraph (i) does not require, however, that a lawyer or firm specify which of several properly advertised offices is its “principal” one, as long as the principal office is among those advertised and the advertisement discloses the city or town in which that office is located. Experience has shown that, in the absence of such regulation, members of the public have been misled into employing a lawyer in a distant city who advertises that there is a nearby satellite office, only to learn later that the lawyer is merely available to the client because the nearby office is seldom open or is staffed only by lay personnel. Paragraph (j) is not intended to restrict the ability of legal services programs to advertise satellite offices in remote parts of the program’s service area even if those satellite offices are staffed irregularly by attorneys. Otherwise low-income individuals in and near such communities might be denied access to the only legal services truly available to them.

17. When a lawyer or firm advertises, the public has a right to expect that lawyer or firm to perform the legal services. Experience has shown that attorneys out of the same firm may create a relationship wherein one will finance advertising for the other in return for referrals. Nondisclosure of such a referral relationship is misleading to the public. Accordingly, paragraph (k) prohibits such a relationship between an advertising lawyer and a lawyer who finances the advertising unless the advertisement discloses the nature of that unusual relationship between the two lawyers.

Paraphrased from the original document, focusing on the key points regarding advertisements and their regulatory requirements.
Rule 7.04

18. Paragraph (m) protects the public by forbidding mot- 
tos, slogans, and jingles that are false or misleading. There 
are, however, motos, slogans, and jingles that are informa-
tive rather than false or misleading. Accordingly, paragraph 
(m) recognizes an advertising lawyer's constitutional right to 
include appropriate motos, slogans, and jingles in advertising. 

19. Some lawyers choose to band together in a coopera-
tive or joint venture to advertise. Although those arrange-
ments are lawful, the fact that several independent lawyers 
have joined together in a single advertisement increases the 
risk of misrepresentation or other forms of inappropriate 
expression. Special care must be taken to ensure that 
cooperative advertisements identify each cooperating lawyer, 
since that each cooperating lawyer is paying for the adver-
tisement, and accurately describe the professional qualifica-
tions of each cooperating lawyer. See paragraphs (a). Fur-
thermore, each cooperating lawyer must comply with the 
filling requirements of Rule 7.07. See paragraph (p).

20. The use of disclosures, disclaimers and qualifying in-
formation is necessary to inform the public about various 
 aspects of a lawyer or firm's practice in public media adver-
tising and solicitation communications. In order to ensure 
that disclosures required by these rules are conspicuously 
displayed, paragraph (q) requires that such statements be 
presented in the same manner as the communication and 
with prominence equal to that of the matter to which it 
refers. For example, in a television advertisement that 
necessitates the use of a disclaimer, if a statement or claim is 
made verbally, the disclaimer should also be included verbally 
in the commercial. When a statement or claim appears in 
print, the accompanying disclaimer must also appear in print 
with equal prominence and legibility.

(Comment amended by the State Bar Board of Directors 
Jan. 20, 1996; April 2, 2003, eff. June 2, 2005.)

Rule 7.05. Prohibited Written, Electronic, Or 
Digital Solicitations

(a) A lawyer shall not send, deliver, or transmit or 
 knowingly permit or knowingly cause another person 
 to send, deliver, or transmit 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, duresis, 
 fraud, overreaching, intimidation, undue influence, 
 or harassment;

(2) the communication contains information pro-
hibited by Rule 7.02 or fails to satisfy each of the 
 requirements of Rule 7.04(a) through (c), and (g) 
 through (q) that would be applicable to the commu-
nication if it were an advertisement in the public 
 media; or

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

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

(1) shall, in the case of a non-electronically trans-
mitted written communication, be plainly marked 
 "ADVERTISEMENT" on its first page, and on the 
 face of the envelope or other packaging used to 
 transmit the communication. If the written commu-
nication 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 mes-
 sage, 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 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 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 tele-
 phone 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 "ADER-
 TISEMENT."

(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 tele-
 phone 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.

(d) 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.

(e) 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, 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.

(f) The provisions of paragraphs (b) and (c) of this Rule do not apply to a written, audio, audio-visual, 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:

1. Rule 7.06 deals with in-person, telephone, and other prohibited electronic contact between a lawyer and a prospective client wherein the lawyer seeks professional employment. Rule 7.04 deals with advertisements in the public media by a lawyer seeking professional employment. This Rule deals with solicitations between a lawyer and a prospective client. Typical examples are letters or other forms of correspondence (including those sent, delivered, or transmitted electronically), recorded telephone messages, audiotapes, videotapes, digital media, and the like, addressed to a prospective client.

2. Written, audio, audio-visual, and other forms of electronic solicitations raise more concerns than do comparable advertisements. Being private, they are more difficult to monitor, and for that reason paragraph (a) requires retention for four years of certain information regarding all such solicitations. See also Rule 7.07(a). Paragraph (a) addresses such concerns as well as problems stemming from exceptionally outrageous communications such as solicitations involving fraud, intimidation, or deceptive and misleading claims. Because receipt of multiple solicitations appears to be most pronounced and vexatious in situations involving accident victims, paragraphs (b)(1), (b)(2), (c)(1), (c)(4) and (c)(5) require that the envelope or other packaging used to transmit the communication, as well as the communication itself, plainly disclose that the communication is an advertisement, while paragraphs (c)(5) and (c)(6) require disclosure of the source of information if the solicitation was prompted by a specific occurrence.

3. Because experience has shown that many written, audio, audio-visual, electronic mail, and other forms of electronic solicitations have been intrusive or misleading by reason of being personalized or being disguised as some form of official communication, special prohibitions against such practices are necessary. The requirements of paragraph (b) and (c) greatly lessen those dangers of deception and harassment.

4. Newsletters or other works published by a lawyer that are not circulated for the purpose of obtaining professional employment are not within the ambit of paragraph (b) or (c).

5. This Rule also regulates audio, audio-visual, or other forms of electronic communications being used to solicit business. It includes such forms as recorded telephone messages, movie, audio or audio-visual recordings or tapes, digital media, the Internet, and other comparable forms of electronic communications. It requires that such communications comply with all of the substantive requirements applicable to written solicitations that are compatible with the different forms of media involved, as well as with all requirements related to approval of the communications and retention of records concerning them. See paragraphs (c), (g), (e).

6. In addition to addressing these special problems posed by solicitations, Rule 7.06 regulates the content of those communications. It does so by incorporating the standards of Rule 7.02 and those of Rule 7.04 that would apply to the solicitation were it instead a comparable form of advertisement in the public media. See paragraphs (a)(2) and (3). In brief, this approach means that, except as provided in paragraph (f), a lawyer may not include or omit anything from a solicitation unless the lawyer could do so were the communication a comparable form of advertisement in the public media.
Rule 7.05

7. Paragraph (f) provides that the restrictions in paragraph (b) and (c) do not apply in certain situations because the dangers of deception, harassment, vexation, and overreaching are quite low. For example, a written solicitation may be directed to a family member or a present or a former client, or in response to a request by a prospective client without stating that it is an advertisement. Similarly, a written solicitation may be used in seeking general employment in commercial matters from a bank or another corporation, when there is neither concern with specific existing legal problems nor concern with a particular past event or series of events. All such communications, however, remain subject to Rule 7.02 and paragraphs (b) through (e) of Rule 7.04. See sub-paragraph (a)(3).

3. In addition, paragraph (f) allows such communications in situations not involving the lawyer's pecuniary gain. For purposes of these rules, it is presumed that communications made on behalf of a nonprofit legal aid agency, union, or other qualified nonprofit organization are not motivated by a desire for pecuniary gain, or by the possibility of obtaining pecuniary gain, but that presumption may be rebutted.

(Comment amended by the State Bar Board of Directors Jan. 20, 1998; April 8, 2005, eff. June 1, 2005.)

Rule 7.06. Prohibited Employment

(a) A lawyer shall not accept or continue employment in a matter that was procured by conduct prohibited by any of Rules 7.01 through 7.06, 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 7.06, 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 7.06, 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:
Selection of a lawyer by a client often is a result of the advice and recommendation of third parties—relatives, friends, acquainstances, business associates and other lawyers. Although that method of referral is perfectly legitimate, the client is best served if the recommendation is disinterested and informed. All lawyers must guard against unethical situations where referral from others is the consequence of some form of prohibited compensation or from some form of false or misleading communication, or by virtue of some other violation of any of Rules 7.01 through 7.06, 8.04(a)(2), or 8.04(a)(9). Paragraph (a) forbids a lawyer who violated these rules in procuring employment in a matter from accepting or continuing employment in that matter. This prohibition also applies if the lawyer ordered, encouraged, or knowingly permitted another to violate these rules. Paragraph (b) also forbids a lawyer from accepting or continuing employment in a matter if the lawyer knows or reasonably should know that a member or employee of his or her firm or any other person has procured employment in a matter as a result of conduct that violates these rules. Paragraph (c) addresses the situation where the lawyer becomes aware that the matter was procured in violation of these rules by an attorney or individual, but had no culpability. In such circumstances, the lawyer may continue employment and collect a fee in the matter as long as nothing of value is given to the attorney or individual involved in the violation of the rule(s). See also Rule 7.07(b), forbidding a lawyer to charge or collect a fee where the misconduct involves violations of Rule 7.03(a), (b), or (c).

(Comment amended by the State Bar Board of Directors Jan. 20, 1998; April 8, 2005, eff. June 1, 2005.)

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

(a) Except as provided in paragraphs (c) and (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, 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;

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 (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, no later than the first dissemination of an advertisement in the
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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 will 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 advertisement 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;

(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 solicitation communication or advertisement may submit to the Advertising Review Committee, not less than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a) or (b), 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. 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.

(c) 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 (e) and, where applicable. Rule 7.04(a) through (e):

(1) an advertisement in the public media that contains only part or all of the following information:

(i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, electronic addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as “attorney”, “lawyer”, “law office”, or “firm”;

(ii) the particular areas of law in which the lawyer or firm 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 bar 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 (e);

(viii) identification of prepaid or group legal service plans in which the lawyer participates;

(ix) the acceptance or nonacceptance of credit cards;
Rule 7.07

STATE BAR RULES

(x) any fee for initial consultation and fee schedule;

(xii) 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;

(xiii) in the case of a website, links to other websites;

(xiv) 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;

(xv) any disclosure or statement required by these rules; and

(xvi) 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) 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 sent, delivered, or transmitted only to:

(i) existing or former clients;

(ii) other lawyers or professionals; 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 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 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;

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

(f) If requested by the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media or solicitation communication by which the lawyer seeks or accepts professional employment.


Comment:

1. Rule 7.07 covers the filing requirements for public media advertisements (see Rule 7.04) and written, recorded, or other electronic solicitations (see Rule 7.08). Rule 7.07(a) deals with solicitation communication sent by a lawyer to one or more specified prospective clients. Rule 7.07(b) deals with communications in the public media. Rule 7.07(c) deals with websites. Although websites are a form of advertisement in the public media, they require different treatment in some respects and so are dealt with separately. Each provision allows the Bar to charge a fee for reviewing submitted materials, but requires that fee be set solely to defray the expenses of enforcing these provisions.

2. Copies of non-exempt solicitations communication or advertisements in public media (including websites) must be provided to the Advertising Review Committee of the State Bar of Texas either in advance or concurrently with dissemination, together with the fee required by the State Bar of Texas, to be filed. Presumably, the Advertising Review Committee will report to the appropriate grievance committee any lawyer whom it finds from the reviewed products has disseminated an advertisement in the public media or solicitation communication that violates Rules 7.07, 7.04, or 7.05, or, at a minimum, any lawyer whose violation raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.03(a).

3. Paragraph (a) does not require that a lawyer submit a copy of each and every written solicitation letter a lawyer sends. If the same form letter is sent to several people, only a representative sample of each form letter, along with a representative sample of the envelopes used to mail the letters, need be filed.

4. A lawyer wishing to do so may secure an advisory opinion from the Advertising Review Committee concerning any proposed advertisement in the public media (including a website) or any solicitation communication in advance of its first use or dissemination by complying with Rule 7.07(b). This procedure is intended as a service to those lawyers who
want to resolve any possible doubts about their proposed advertisements or solicitations' compliance with these Rules before utilizing them. Its use is purely optional. No lawyer is required to obtain advance clearance of any advertisement in the public media (including a website) or any solicitation communication from the State Bar. Although a finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding, a finding of compliance is binding in favor of the submitting lawyer as to all materials actually submitted for review, as long as the lawyer's presentation to the Advertising Review Committee in connection with that advisory opinion is true and not misleading.

5. Under its Internal Rules and Operating Procedures, the Advertising Review Committee is to complete its evaluations no later than 25 days after the date of receipt of a filing. The only way that the Committee can extend the review period is to: (1) determine that there is reasonable doubt whether the advertisement or solicitation communication complies with these Rules; (2) conclude that further examination is warranted but cannot be completed within the 25-day period; and (3) advise the lawyer of those determinations in writing within that 25-day period. The Committee's Internal Rules and Operating Procedures also provide that a failure to send such a communication to the lawyer within the 25-day period constitutes approval of the advertisement or solicitation communication. Consequently, if an attorney submits an advertisement in the public media (including a website) or a solicitation communication to the Committee for advance approval not less than 30 days prior to the date of first dissemination as required by these Rules, the attorney will receive an assessment of that advertisement or communication before the date of its first intended use.

6. Consistent with the effort to protect the First Amendment rights of lawyers while ensuring the right of the public to be free from misleading advertising and the right of the Texas legal profession to maintain its integrity, paragraph (e) exempts certain types of advertisements and solicitation communications prepared for the purpose of seeking paid professional employment from the filing requirements of paragraphs (b), (d), and (g). Those types or communications need not be filed at all if they were not prepared to secure paid professional employment.

7. For the most part, the types of exempted advertising listed in sub-paragraphs (e)(1) to (e)(6) are objective and less likely to result in false, misleading or fraudulent content. Similarly the types of exempted solicitation communications listed in sub-paragraphs (e)(6) to (e)(9) are those found least likely to result in harm to the public. See Rule 7.06(c), and comment 7 to Rule 7.06. The fact that a particular advertisement or solicitation made by a lawyer is exempted from the filing requirements under section 7.06 of this Rule does not exempt a lawyer from the other applicable obligations of these Rules. See generally Rules 7.01 through 7.06.

8. Paragraph (g) does not empower the Advertising Review Committee to seek information from a lawyer to substantiate statements or representations made or implied in advertisements or written communications that do not seek to obtain paid professional employment for that lawyer.

(Comment amended by the State Bar Board of Directors, Jan. 20, 1995; April 8, 2005, eff. June 1, 2005.)
EXHIBIT 2

Texas Disciplinary Rules of Professional Conduct

I CLIENT-LAWYER RELATIONSHIP

1.04 Fees (Amended March 1, 2005)

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

   (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

   (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

   (3) the fee customarily charged in the locality for similar legal services;

   (4) the amount involved and the results obtained;

   (5) the time limitations imposed by the client or by the circumstances;

   (6) the nature and length of the professional relationship with the client;

   (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

   (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(e) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.
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 (___ %), (___ %) 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 (___ %), (___ %) 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.

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.
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 (___%)², (___ %) will be paid to Attorneys and (___ %) will be paid to Associated Counsel. The fee to be paid 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 (___ %)², (___ %) 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.

¹ See footnote 1.
² See footnote 1.
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

\(^5\) 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].
Understanding the New Rules Governing the Division of Fees

In 2004, the State Bar of Texas approved a referendum to amend the Texas Disciplinary Rules of Professional Conduct (TDRPC) pertaining to the division of fees between lawyers not in the same firm. Changes to Rule 1.04(f-h) TDRPC, effective March 1, 2005, provide specific requirements for lawyers who refer cases to other attorneys and divide the fees obtained. The changes establish minimum standards of conduct for an attorney to divide a fee on a case or matter with a lawyer not in the same firm. The “pure” forwarding fee has been eliminated. Lawyers who do not work on a case but only refer it to another attorney may no longer collect a referral fee. Additionally, the new rules establish a test for determining a reasonable correlation between the amount and value of services performed and the share of the fee received.

Main Components of the Referral Fee Rule

1. Lawyers not in the same firm may divide a fee either on the basis of the proportion of services they render or if each lawyer assumes joint responsibility for the representation.

Proportion of Services Performed

- Each lawyer performed substantial legal services on behalf of the client with respect to the matter;
- Each lawyer who participates in the division of the fee performed services beyond those involved in initially seeking to acquire and being engaged by the client;
- There must be a reasonable correlation between services performed and the share of the fee between the referring lawyer and handling lawyer.

Joint Responsibility

- Joint responsibility entails ethical and, perhaps, personal responsibility for the representation;
- The ethical responsibility assumed requires the referring or associating lawyer make reasonable efforts to assure adequacy of representation and to provide adequate client communication.

a. Adequacy of representation. Referring lawyer must make reasonable inquiries to a client, matter and matter to a lawyer reasonably believed to be competent to handle it.

b. Adequacy of communication. Referring or associating lawyer must monitor the matter through adequate representation by being fully and informed about the case, expending reasonable effort in assisting the client's lawyer when necessary to ensure that the client is informed of the progress of the case.

- Must obtain client consent that clients are informed of the terms and conditions of any agreement for lawyers to divide a fee.

- Requires client consent in writing prior to the time of the association or referral.

- Requires identification of all lawyers or law firms who will participate in the fee sharing.

- Specifies whether fees will be divided based on proportion of services performed or by the lawyers agreeing to assume joint responsibility for the representation.

- Specifies the share that each lawyer will receive.

- Specifies that the referring or associating lawyer has the primary duty to ensure full disclosure and compliance with this rule.
ORDER APPROVING AMENDMENTS TO STATE BAR RULES (ARTICLES I AND IV)

The State Bar of Texas petitions this Court for an administrative order to amend the State Bar Rules as follows:
1. Article I, definition of “Metropolitan County” be revised to delete the county of El Paso.
2. Article IV, sections 7 and 11, be revised to accommodate electronic voting in the State Bar members’ elections of its President-elect and District Directors by allowing more time for the voting to take place, and to replace the reference of “mailing” a ballot to “distributing” a ballot to the members.

The State Bar Board of Directors voted to adopt these changes at a regularly called and posted meeting on June 23, 2004. A quorum was present.

IT IS THEREFORE ORDERED that:
1. Article I of the State Bar Rules is amended as shown in Exhibit A; and
2. Article IV of the State Bar Rules is amended as shown in Exhibit B.

SIGNED AND ENTERED this 7th day of February, 2005.
Wallace B. Jefferson, Chief Justice
Nathan L. Hecht, Justice
Priscilla R. Owen, Justice
Harriet O’Neill, Justice
J. Dale Wainwright, Justice
Scott Brister, Justice
David M. Medina, Justice
Paul W. Green, Justice

Exhibit A

ARTICLE I — DEFINITIONS

5. “Metropolitan County” includes any of the counties of Bexar, Dallas, El Paso, Harris, Tarrant and Travis of the State of Texas, as well as any other county hereafter so designated by the board.

Exhibit B

ARTICLE IV — ADMINISTRATION

Section 7. Nominees for Office of Elected Director
(A) An active member’s name may be placed in nomination for the office of elected director by a written petition in form prescribed by the board and signed by the lesser of five percent (5%) of the active members whose principal place of practice is within the district to be represented by the nominee if elected, or one hundred (100) of such members, which petition must be received in the office of the executive director on or before March 15 of the year of election. The executive director shall promptly review the petition to verify the eligibility of the nominee. If from the petition it appears the nominee is eligible, that person’s name shall be listed upon the ballot. If from the petition the executive director finds the nominee to be ineligible, that fact shall immediately be communicated to the nominee. Any nominee desiring to appeal the findings of the executive director shall forthwith notify the executive director, who shall forthwith convene the executive committee to hear and determine the matter. The executive committee shall have final authority to determine questions of eligibility of the nominee and the validity of the nominating petition and shall do so within ten (10) days of the notice to the executive director.

(C) If no valid petition nominating an eligible person shall have been received by the executive director by March 15 in respect to a district in the year in which such district is to elect a director, or if all persons who have been nominated in the foregoing manner shall have died or become disqualified from serving at any time prior to the printing of the ballot in such election, then the president of the State Bar with the advice of the persons then serving as elected director from that district shall name a qualified person to stand for election as director from that district.

Section 11. President-Elect Nominations and Elections

(B) Any other member of the State Bar of Texas shall also be privileged to stand for election to the office of president-elect when a written petition in form prescribed by the board of directors, signed by no fewer than five percent (5%) of the active members of the State Bar of Texas in good standing, is filed with the executive director on or before March 15 next preceding the election to be held for the office of president-elect for the ensuing year.

(E) The ballot shall be mailed distributed to each member of the State Bar of Texas entitled to vote at the same time as ballots for the election of elected directors are mailed distributed. A combined ballot for the office of president-elect and for the office of director may be used in those bar districts in which an election for director is to be conducted.
The New Rules:

When do the new referral fee rules go into effect?
The Supreme Court ordered that the amendments to Rule 1.04 pertaining to the division of fees become effective on March 1, 2005.

How do the new rules affect referral fee arrangements entered into before the March 1, 2005, effective date?
The pre-March 1, 2005, version of Rule 1.04 applies to fee arrangements between lawyers not in the same firm entered into before March 1, 2005, so long as the client has been advised by that date of all lawyers participating in his or her case. All other fee arrangements entered into with a client that divide fees with lawyers not in the same firm should comply with the new rules after the effective date of the new rules.

Does joint responsibility mean that the referring attorney and handling attorney will each have joint control of the representation of the client?
No. Joint responsibility does not mean that each attorney will have joint control of the case. A referring lawyer who assumes joint responsibility is not required to attend depositions or hearings nor is he or she required to be copied on all pleadings or correspondence.

How does the new referral fee rule apply to contract attorneys employed by a law firm?
The application of the rule will depend on the specific arrangement between the contract attorney and the firm. If a contract attorney is retained to assist in the preparation or defense of a claim and receives a portion of the fee recovered by the law firm, the rule would apply to such arrangement. Any arrangement between the contract attorney and the law firm that will result in the fee being divided between the two, whether the division is based on a percentage of the handling lawyer's fee or a lump sum amount, must comply with the proposed rule. On the other hand, if the arrangement is such that the contract lawyer and the firm will submit separate statements to the client for work performed, then the rule would not apply.

Is there a cap on the amount of referral fees that may be divided between lawyers not in the same firm?
No. There is no cap on the amount of fees to be divided among lawyers not in the same firm. However, the division of fees must be in accordance with the provisions specified in Rule 1.04.

Does the new rule apply to cases referred to other attorneys not in the same firm where there is no division of fees?
No. The new rule only applies to referrals involving a division of fees between lawyers not in the same firm. It does not apply in situations where there is no division of fees.

Are there any exemptions to the requirements of the new rule?
Lawyer referral programs certified by the State Bar of Texas that meet the requirements of the Texas Lawyer Referral Service Quality Act, Tex. Occ. Code §572.001 et seq., are exempt.
President-elect candidates Dan M. Boulware of Cleburne and Martha S. Dickie of Austin share their perspectives on a variety of issues facing the State Bar of Texas. (Biographical information was included in the March issue, p. 198, and is available at www.texasbar.com.) For the first time, State Bar members will be able to vote online. Online voting runs from April 1 through April 10. Paper ballots will be mailed April 15 and must be returned by May 2 at 5 p.m.

Why do you want to be president of the State Bar of Texas?

BOULWARE:
I have practiced law for more than 35 years. I have loved the practice of law and want to give back to the profession that has been so good to my family and me. I have had the opportunity to serve the profession on numerous committees, boards, and commissions, but the greatest opportunity to serve is as president of the State Bar of Texas.

As a boy, I went to the courthouse and watched lawyers try their cases. I knew that someday I wanted to be a lawyer and represent my clients before court. Lawyers doing the right thing and representing their clients became my heroes. Years later, I passed the bar and had the privilege of representing clients in the same courtroom. I was proud to be a lawyer then, and I am proud to be a lawyer today.

At a time when lawyers are being unfairly criticized, I feel the State Bar of Texas must be the voice of the profession. The Bar has begun efforts to respond to the critics, and those efforts must be expanded and intensified. It is the responsibility of the president of the State Bar of Texas to speak to the public on behalf of the Bar. I want to have the opportunity to be a strong voice for the lawyers of Texas and to tell the public how lawyers serve their clients and their communities with honor and dignity every day.

DICKIE:
The most basic reason is because I care about the practice of law in Texas. I like lawyers. I like being a lawyer, and I want to be involved in making sure that the problems and issues facing Texas lawyers are clearly identified and effectively addressed. I have enjoyed working with a variety of lawyers over the years to solve problems facing our legal system and finding new ways for that system and attorneys to be of service to the public. I firmly believe that we should be proud of our profession and our legal system, but we should constantly explore ways for the legal system to work more efficiently and effectively.

I can be an effective State Bar president. I believe that I have the leadership skills to help ensure that the State Bar does