St. Mary's Law Journal

Volume 33 | Number 4 Article 7

1-1-2002

In the Interest of the Client: Why Reform of Texas's Rules Regarding Referral Fees Is Necessary.

Samuel V. Houston III

COMMENTS

IN THE INTEREST OF THE CLIENT: WHY REFORM OF TEXAS'S RULES REGARDING REFERRAL FEES IS NECESSARY

SAMUEL V. HOUSTON III

I. INTRODUCTION

The conflicts surrounding life in law firms often provide a background for best-selling novels and major motion pictures.[1] Many of these por-

1. *See* Michael Asimow, Comment, *Law and Popular Culture Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1342-61 (2001) (discussing the often negative portrayal of lawyers in motion pictures, television, and novels); *see also* Lawrence M. Friedman, *Popular Legal Culture: Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1580 (1989) (explaining that popular legal culture refers to songs, books, movies, and

trayals are based on the notion that lawyers and law firms are driven only by their self-interests.[2] The premise that law firms are only out for a dollar is partly due to the dichotomy that is inherent to their structure.[3] Law firms are both businesses driven by profit and professional organizations required to put their clients' interests before their own.[4] It is such internal conflict that makes for interesting tales. The case of *Brewer & Pritchard, P.C. v. Johnson*,[5] is an example which affirms the cliché that art imitates life.

The importance of *Brewer* is not solely in its holding. In this Texas case, the Brewer & Pritchard law firm alleged that its former associate,

---

television shows that allow lay people to form attitudes and ideas about the legal profession).

2. *See* Michael Asimow, Comment, *Law and Popular Culture Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1362 (2001) (demonstrating that while law firms can be viewed through both business and professional models, many large law firms have become more like businesses).

3. *See* Edward S. Adams & Stuart Albert, *Law Redesigns Law: Legal Principles As Principles of Law Firm Organization*, 51 RUTGERS L. REV. 1133, 1136 (1999) (noting the dual structure of the legal practice as a "profession" and a "business"); Michael Asimow, Comment, *Law and Popular Culture Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1362 (2001) (explaining what results from the profit-maximizing model, with the practice of law portrayed as only a business rather than also as a profession); *see also* Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professionalism Ideology Will Improve the Conduct and the Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1230 (1995) (concluding that the "loss of faith in the distinction between a business and a profession" is due in part to the fear of legal scholars that professionalism has been abandoned). Pearce indicates that there is now a perception that the practice of law is a business. *Id.* at 1232. The Supreme Court recognized the financial realities of the practice of law when discussing the ability of attorneys to advertise their services. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 368 (1977) (stating that the argument that advertising diminishes the professionalism of the legal profession is faulty in part because it "presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar").

4. *See* Michael Asimow, Comment, *Law and Popular Culture Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1361-62 (2001) (describing the different attributes of the business model and the professional model). The legal profession is defined by six core elements: "(1) specialized training, (2) knowledge inaccessible to a lay person, (3) protection against competition under state law, (4) an obligation to place the interests of the client ahead of the interests of the lawyer, (5) a binding code of ethics, and (6) self-regulation." *Id.*; *see also* Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professionalism Idealogy Will Improve the Conduct and the Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1231 (1995) (explaining that a professional paradigm was developed to respond to the fear that the "entrepreneurial aspects of law were undermining the profession's reputation" and allows lawyers to earn money practicing law in part because they place the interests of their clients and society ahead of their own).

5. 7 S.W.3d 862 (Tex. App.—Houston [1st Dist.] 1999), *aff'd by* 45 Tex. Sup. Ct. J. 470, 2002 WL 537684 (Mar. 21, 2002).

James Chang, breached a fiduciary duty to the firm.[6] The law firm claimed this duty was breached when Chang referred a case to another lawyer and profited from the three million dollar referral fee.[7] Although the court did not rule that Brewer & Pritchard was entitled to the referral fee, the court clarified the scope of the fiduciary duty that exists between law firms and their associates.[8] According to the court, an associate owes his employer a fiduciary duty to not realize a financial gain or other advantage from referring a case to another lawyer, absent the employer's consent.[9] Notwithstanding the court's holding, the case provides an opportunity to explore the future of referral fees in an era where law firms are seen as businesses. *Brewer* provides an opportunity to look beyond ownership and explore malpractice issues arising out of referrals.

Referrals, or fee-sharing agreements, not only carry the promise of profit, but may also expose the referring attorney to added malpractice liability.[10] Associate attorneys in many jurisdictions may find that a referral could be used to make them financially liable to both their employers and their clients. Moreover, a law firm that successfully asserts ownership over a referral fee may also be subject to added malpractice liability as a result of its relationship with the referring associate. In Texas, however, a referring attorney can not be held liable for a referred attorney's malpractice, unless the referring attorney has agreed to maintain responsibility for the case. Considering the treatment of referral fees in many other states, this discussion casts a critical view on Texas's atypical treatment of referral fees. More specifically, is this atypical treatment, which frustrates referral based negligence claims, good policy?

This Comment explores how Texas's rules concerning referral fees, or fee-splitting agreements, affect the relationship between associates, employer law firms, and clients. Part II discusses ownership of the three million dollar referral fee in *Brewer.* Included in this discussion is an

---

6. Johnson v. Brewer & Pritchard, P.C., 45 Tex. Sup. Ct. J. 470, 2002 WL 537684 (Mar. 21, 2002), at *2.

7. *See id.* (noting that Johnson received a three million dollar fee). The firm claims that "Chang directly or indirectly profitted by receiving or arranging to receive all or part of Johnson's referral fee." *Id.*

8. *See id.* at *7 (stating that a fiduciary relationship did exist between Chang and Brewer & Pritchard). According to the court, Chang owed the firm a fiduciary duty to not profit or gain from helping King retain other counsel. *Id.*; *see also* Bray v. Squires, 702 S.W.2d 266, 270 (Tex. App.—Houston [1st Dist.] 1985, no writ) (setting forth the rule that law firm associates owe fiduciary duties to their firms).

9. *Brewer*, 2002 WL 537684, at *1

10. *See* David A. Grossbaum, *Watch Your Back on Referrals*, A.B.A. J., May 1997, at 86 (explaining that "[r]eferring a case to another attorney can result in an unpleasant surprise down the road"). Grossbaum warns that "[i]nstead a thank you and a percentage of the award, you can be hit instead with liability if the other attorney mishandles the case").

analysis of the law and policy of referral fees and the duties imposed by the fiduciary relationship between associate and law firm. Part III analyzes a client's ability to pursue a legal malpractice claim based upon a referral. Further, Part III uses *Brewer* as an example to determine whether ownership of a referral fee would make the referring attorney or his law firm liable to a client for a negligent referral based upon the malpractice of the "referred" attorney. Finally, Part IV presents a criticism of Texas's current system which allows attorneys and law firms to collect referral fees without risking legal malpractice liability.

II. REFERRAL FEE OWNERSHIP THROUGH *BREWER & PRITCHARD, P.C. V. JOHNSON*

In the spring of 1995, several people were injured in a helicopter crash outside of Fort Worth.[11] Among the victims was the father of one of James Chang's friends, Henry King.[12] Following the crash, Chang began acting on King's behalf and contacted several attorneys about possible representation.[13] Eventually, King executed an attorney fee agreement with Nick Johnson with the understanding that the case would be referred to another personal injury attorney.[14] The case was referred to Joe Jamail and settled for fifteen million dollars.[15] Johnson received three million dollars, less expenses, as a referral fee.[16] According to Brewer & Pritchard, Chang personally profited from the referral fee.[17]

The facts in *Brewer* provide an excellent opportunity to explore ownership of a referral fee and the liability that is created by virtue of referral fee ownership. However, the question of referral fee ownership is not necessarily easily answered. An analysis of the Texas rules on referral fees, the law firm's profit-seeking dichotomy, and fiduciary duty is necessary to understand the issues associated with referral fees in the modern practice of law. Ultimately, the true owner of the referral fee may be exposed to increased malpractice liability.

---

11. Brewer & Pritchard, P.C. v. Johnson, 7 S.W.3d 862, 864 (Tex. App.—Houston [1st Dist.] 1999), *aff'd*, 45 Tex. Sup. Ct. J. 470, 2002 WL 537684 (Mar. 21, 2002).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Brewer*, 7 S.W.3d at 864.

17. *Brewer*, 2002 WL 537684, at *9.

A. *The Law of Referral Fees in Texas*

Texas is in the minority of jurisdictions[18] that allow one attorney to collect a fee for merely providing a referral to another attor-

---

18. *See* Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 326 (1994) (indicating that of the thirty-seven states that adopted the Model Rules, Texas is one of eight jurisdictions, including Alabama, Connecticut, Kansas, Michigan, Pennsylvania, Washington, and West Virginia, that have a liberalized treatment of referral fees); *see, e.g.*, ALA. RULES OF PROF'L CONDUCT 1.5(e) (Michie 1996) (stating that

> [a] division of fee between lawyers who are not in the same firm, including a division of fees with a referring lawyer, may be made only if: (1) [e]ither (a) the division is in proportion to the services performed by each lawyer, or (b) by written agreement with the client, each lawyer assumes joint responsibility for the representation, or (c) in a contingency fee case, the division is between the referring or forwarding lawyer and the receiving lawyer; (2) [t]he client is advised of and does not object to the participation of all the lawyers involved; (3) [t]he client is advised that a division of fee will occur; and (4) [t]he total fee is not clearly excessive);

CONN. RULES OF PROF'L CONDUCT 1.5(e) (West 1985) (permitting "[a] division of fee between lawyers who are not in the same firm . . . only if: (1) [t]he client is advised of the compensation sharing agreement and of the participation of all the lawyers involved, and does not object; and (2) [t]he total fee is reasonable"); KAN. SUP. CT. R. 1.5(g) (Furse 1995) (stating "a division of fee, which may include a portion designated for referral of a matter, between or among lawyers who are not in the same firm may be made if the total fee is reasonable and the client is advised of and does not object to the division"); MICH. RULES OF PROF'L CONDUCT 1.5(e) (Lexis 2001) (providing that "[a] division of a fee between lawyers who are not in the same firm may be made only if: (1) the client is advised of and does not object to the participation of all the lawyers involved; and (2) the total fee is reasonable); PA. RULES OF PROF'L CONDUCT 1.5(e) (West 2001) (stating that

> [a] lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm unless: (1) the client is advised of and does not object to the participation of all the lawyers involved, and (2) the total fee of the lawyers is not illegal or clearly excessive for all legal services they rendered the client);

WASH. RULES OF PROF'L CONDUCT 1.5(e) (West 2000) (indicating that

> [a] division of fee between lawyers who are not in the same firm may be made only if: (1) [t]he division is between the lawyer and a duly authorized lawyer referral service of either the Washington State Bar Association or of one of the county bar associations of this state; or (2) [t]he division is in proportion to the services provided by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; the client is advised of and does not object to the participation of all the lawyers involved; and the total fee is reasonable);

W. VA. RULES OF PROF'L CONDUCT 1.5(e) (Michie 2000) (stating the rule for division of fees between lawyers in different firms).

> A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representations; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable. (4) The requirements of "services

ney.[19] Texas does not require the forwarding lawyer to assume any added responsibility after the case has been referred to another attorney.[20] Moreover, the collection of a referral fee is not against state public policy, even when the referring attorney performs no actual services for the client.[21]

Generally, fee-splitting agreements are governed by Texas Disciplinary Rule of Professional Conduct 1.04(f).[22] This Rule sets out specific re-

---

performed" and "joint responsibility" shall be satisfied in contingent fee cases when: (1) a lawyer who is regularly engaged in the full time practice of law evaluates a case and forwards it to another lawyer who is more experienced in the area or field of law being referred; (2) the client is advised that the lawyer who is more experienced in the area or field of law being referred will be primarily responsible for the litigation and that there will be a division of fees; and, (3) the total fee charged the client is reasonable and in keeping with what is usually charged for such matters in the community.

Id.

19. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f)–(g), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9) (noting that there need only be an agreement between the lawyers, the requirement of client consent, and that the agreement not lead to illegal or unconscionable fees). The Texas rule states,

> (f) [a] division or agreement for division of a fee between lawyers who are not in the same firm shall not be made unless: (1) the division is: (i) in proportion to the professional services performed by each lawyer; (ii) made with a forwarding lawyer; or (iii) made, by written agreement with the client, with a lawyer who assumes joint responsibility for the representation; (2) the client is advised of, and does not object to, the participation of all the lawyers involved; and (3) the aggregate fee does not violate paragraph (a).
> (g) Paragraph (f) of this Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

Id.; *see also* Chachere v. Drake, 941 S.W.2d 193, 198 (Tex. App.—Corpus Christi 1996, writ ref'd) (noting that the disciplinary rules allow for the payment of referral fees where the referring attorney does not perform any legal services).

20. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f) (demonstrating that Texas does not absolutely require the referring attorney to assume responsibility for the case in order to receive a referral fee).

21. *See Chachere*, 941 S.W.2d at 198 (explaining that because the Texas Disciplinary Rules allow referral fees where no services have been performed, referral fee agreements cannot be considered contrary to public policy); *cf.* Polland & Cook v. Lehmann, 832 S.W.2d 729, 736 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (illustrating that violations of disciplinary rules may be used to declare fee-sharing agreements unenforceable on the ground that they are contrary to public policy).

22. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f). Fee-sharing agreements where the referring attorney assumes all costs and retains all responsibilities for the case, and do not involving the disclosure of confidential information, are not governed by Rule 1.04. *Id.* 1.04(f) cmt. 10. *See* Matlock v. Kittleman, 865 S.W.2d 543, 545 (Tex. App.—Corpus Christi 1993, no writ) (asserting that not all fee-sharing agreements fall under the purview of Rule 1.04).

quirements for fee-splitting agreements.[23] Rule 1.04(f) requires that the agreement between the two attorneys be in writing, be disclosed to the client, and that it not lead to the collection of an unconscionable fee.[24] Although fee-splitting agreements are governed by the Texas Disciplinary Rules of Professional Conduct, these rules are also subject to court interpretation. Texas courts have interpreted the disclosure requirement of Rule 1.04(f) to not require disclosure of the referral fee agreement to the client in all circumstances.[25] Disclosure is necessary only in circumstances where client confidences may be disclosed and where there will be a financial impact on the client.[26] Historically, Texas policy has allowed the client to have the final decision both in deciding who will represent him and in determining the nature of the legal fees he will pay.[27]

---

23. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f). *See id.* 1.04(f) cmt. 11 (explaining that Texas allows a division of fees between lawyers when the division is in proportion to the legal services performed, with a forwarding attorney, or when an attorney assumes responsibility for the client's case).

24. *Id.* at 1.04(f).

25. *See* Bond v. Crill, 906 S.W.2d 103, 106 (Tex. App.—Dallas 1995) (affirming the interpretation of the disclosure exception in comment 10 of Texas Disciplinary Rule of Professional Conduct 1.04(f)), *appeal after remand* Robert L. Crill, Inc. v. Bond, __ S.W. 3d __ (Tex. App.—Dallas 2001, no pet. h.), 2001 WL 1231865; *Matlock*, 865 S.W.2d at 546 (discussing comment 10 of Texas Disciplinary Rule of Professional Conduct 1.04(f), which sets out an exception to the general rule requiring disclosure to the client).

26. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f) cmt. 10 (stating the exception to the disclosure requirement).

> Because the association of additional counsel normally will result in a further disclosure of client confidences and have a financial impact on a client, advance disclosure of the existence of that proposed association and client consent generally are required. Where those consequences will not arise, however, disclosure is not mandated by this Rule.

Id. According to the comments of Texas Bar Rule 1.04(f), the use of consulting or advisory counsel need not be disclosed to the client. *Id.* Non-disclosure is not presumed to be in violation of public policy or as an infringement on the client's right to choose. *Id.*; *Matlock*, 865 S.W.2d at 546 (interpreting the language of the comment). The rule not mandating disclosure to the client reflects liberalization in Texas law. *See Polland & Cook*, 832 S.W.2d at 736 (comparing the new Rule 1.04(f) with the old DR 2-107, and explaining that full disclosure is no longer necessary). Under previous Texas Bar Rules, it was mandatory that the client be advised of the fee-splitting agreement. *See* Fleming v. Campbell, 537 S.W.2d 118, 119 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (explaining that under DR 2-107, a fee-splitting arrangement that was not revealed to the client would be unenforceable as a matter of law); *see also* Lemond v. Jamail, 763 S.W.2d 910, 913-14 (Tex. Civ. App.—Houston [1st Dist.] 1988, writ denied) (drawing a comparison between *Fleming* and the present case and finding the agreement unenforceable because the client was never informed of the fee-splitting agreement).

27. *See* Kuhn Collins, & Rash v. Reynolds, 614 S.W.2d 854, 857 (Tex. Civ. App.—Texarkana 1981, writ denied) (identifying the policy behind Rule 2-107 and the ABA's Ethical Considerations); *see also* MODEL CODE OF PROF'L RESPONSIBILITY EC 2-1 (1983)

Although the referral fee has long been accepted in Texas,[28] it is evident that the state's practices are part of a larger national debate between practitioners and the "governing bodies of the American legal community."[29] According to the American Bar Association (ABA) Model Rules of Professional Conduct, the division of fees between two lawyers can only occur if the lawyers assume joint responsibility for the case.[30] Most states that have adopted the Model Rules have also adopted the ABA's provision concerning referral fees.[31] Moreover, the Restatement

---

(proclaiming that a crucial function of the legal profession is to facilitate the selection of competent legal representation); *id.* EC 2-21 (asserting that the client should be aware of any payment the lawyer receives incident to the lawyer's employment relationship with the client).

28. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f) cmt. 11 (explaining that this provision codifies the Texas practice of dividing fees between attorneys); *see also* Altschul v. Sayble, 147 Cal. Rptr. 116 (Cal. Ct. App. 1978) (discussing that the referral fee has been accepted in Texas since at least the 1930s).

29. *See* Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 324 (1994) (explaining the history of the referral fee debate as one between practicing attorneys and legal scholars).

30. MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2001).

> A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable.

Id.

31. *See* Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 325 (1994) (recognizing that Alaska, Arizona, Arkansas, Delaware, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, and Utah conform with the American Bar Association policy regarding referral fees); *see, e.g.*, ARIZ. RULES OF PROF'L CONDUCT 1.5(e) (West 1997) (stating

> [a] division of fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable);

MD. RULES OF PROF'L CONDUCT 1.5(e) (Michie 2000) (stating

> [a] division of fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable);

OKLA. RULES OF PROF'L CONDUCT 1.5(e) (West 2001) (stating

(Third) of the Law Governing Lawyers reiterates the same language found in the ABA's rule concerning the division of fees by mandating that attorneys may only divide fees if the division "is in proportion to the services performed by each lawyer" or if the lawyers assume joint responsibility.[32]

B. *The Law Firm's Business and Professional Dichotomy*

The modern law practice is often seen as more of a business and less as a profession.[33] The continuing transformation of the traditional law practice into a business-oriented law practice is evidenced by the emphasis on profit maximization and the decline of institutional loyalty.[34] Legal scholars and the ABA have become increasingly concerned about the loss of professionalism among lawyers.[35] The ABA's Commission on Profes-

---

[a] division of fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all of the lawyers involved; and (3) the total fee is reasonable).

32. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 47 (2000) (providing that

[a] division of fees between lawyers who are not in the same firm may be made only if: (1) (a) the division is in proportion to the services performed by each lawyer or (b) by agreement with the client, the lawyers assume joint responsibility for the representation; (2) the client is informed of and does not object to the fact of division, the terms of the division, and the participation of the lawyers involved; and (3) the total fee is reasonable).

33. *See* Edward S. Adams & Stuart Albert, *Law Redesigns Law: Legal Principles As Principles of Law Firm Organization*, 51 RUTGERS L. REV. 1133, 1136 (1999) (presenting theories by legal scholars to explain why the practice of law has come to be seen as a business); Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31, 34 (1993) (chronicling changing economic needs which forced lawyers to "conduct[ ] their practices more like businesses and less like professions"); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.17 cmt. 1 (2001) (stating that "[t]he practice of law is a profession, not merely a business").

34. *See* Edward S. Adams & Stuart Albert, *Law Redesigns Law: Legal Principles As Principles of Law Firm Organization*, 51 RUTGERS L. REV. 1133, 1133-34 (1999) (discussing a dedicatory address by United States Supreme Court Justice William H. Rehnquist in which he discussed evidence of the legal profession's transformation into a business); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 17 (1984) (describing a professional ethic driving behavior that is not always concerned with furthering the common goals of the legal profession).

35. *See* Edward S. Adams & Stuart Albert, *Law Redesigns Law: Legal Principles As Principles of Law Firm Organization*, 51 RUTGERS L. REV. 1133, 1139 (1999) (pointing out the efforts of the ABA to bring attention to the loss of professionalism); W. Frank Newton, *Crisis in the Legal Profession,* 21 TEX. TECH L. REV. 897, 897 (1990) (opining that the

sionalism questioned, "[h]as our profession abandoned principle for profit, professionalism for commercialism?"[36] Scholars argue that law firms were forced to adopt the dichotomy in order to survive in an increasingly competitive environment.[37] Similarly, legal specialization is cited for encouraging such changes in the legal profession.[38]

The notion that referrals are necessary to the legal profession underscores the charge toward greater profit-seeking.[39] Proponents argue that referral fees are a legitimate business practice playing a role in the attorney's livelihood.[40] There are many strong arguments supporting the con-

---

"crisis in the legal profession" strikes at one or more of the foundations of the profession). "Lawyers base their claim of professional status on three grounds: first, special educational requirements; second, self-governance; and third, a singular and collective responsibility to execute the duty of assisting members of the public to secure and protect available legal rights and benefits." *Id.* Much of the criticism from nonlawyers about the legal profession comes from the view that it is all about making money. *Id.* at 897-98.

36. Deborah L. Rhode, *Ethics in Practice*, *in* ETHICS IN PRACTICE LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 1, 16-17 (Deborah L. Rhode ed., 2000).

37. *See* Edward S. Adams & Stuart Albert, *Law Redesigns Law: Legal Principles As Principles of Law Firm Organization*, 51 RUTGERS L. REV. 1133, 1141 (1999) (discussing how a limited number of clients and an abundance of lawyers have created a highly competitive market for legal services); *see also* Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 913-14 (1996) (asserting that the "commercialization of the practice of law" is due to increased competition brought about by increased accessibility to advertising for legal services and to an increasing number of lawyers).

38. *See* Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31, 34 (1993) (citing increased legal specialization as a contributor to the disappearance of professionalism because law schools have less time to devote to professional ethics); W. Frank Newton, *Crisis in the Legal Profession,* 21 TEX. TECH L. REV. 897, 899 (1990) (arguing that "the primary change in the legal profession is that it ceased to be small, collegial, and cohesive" and that "[t]oday the legal profession is large, diverse, and specialized"); *see also* Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 331-32 (1994) (arguing that referrals are legitimate business practices, which become necessary in light of increased legal specialization).

39. *See* Curtis L. Cornett, Comment, *Ohio Disciplinary Rule 2-107: A Practical Solution to the Referral Fee Dilemma*, 61 U. CIN. L. REV. 239, 239 (1992) (noting the increased acceptance of referral fees in the practice of law); Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 332 (1994) (proposing that referrals are necessary considering the practices of large law firms who often refer clients to the firm's other lawyers).

40. *See* Sean M. Carty, Note, *Money for Nothing? Have the New Michigan Rules of Professional Conduct Gone Too Far in Liberalizing the Rules Governing Attorney's Referral Fees?*, 68 U. DET. L. REV. 229, 239 (1991) (supporting referral fees by noting "the practice of law has become more specialized, thus prohibiting a lawyer from handling every case that comes his way, coupled with the fact that firms are getting bigger and lawyers are changing jobs more often thus creating potential conflicts of interest, provide the necessity

tention that referrals are part of the services offered by law firms.[41] First, a referring attorney will expend time and effort in seeking out the most appropriate specialist to handle the case.[42] This devotion of time and effort translates into a real cost for the lawyer or law firm.[43] Second, the client's interests are best served through the incentives created by referral fees.[44] For example, less qualified attorneys are encouraged to seek out the most qualified attorneys to handle cases.[45] At least one Texas court states that there is no conflict between referral fees and the selection of

---

to permit referral of cases"); Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 331 (1994) (indicating that referral fees are basic business elements of the practice of law and an attorney's livelihood).

41. *See* ROBERT L. ROSSI, ATTORNEY'S FEES § 4:2, at 221 (2d ed. 1995) (quoting *Moran v. Harris*, 182 Cal. Rptr. 519, 523 (Cal. Ct. App. 1982) in describing legal fees as "part of our legal culture" and supporting the claim that referring attorneys do perform services); *see also* Turner v. Donovan, 39 P.2d 858, 859 (Cal. Dist. Ct. App. 1935) (explaining that it was the custom in both Texas and California for a forwarding attorney to be entitled to one-third of the fees paid to the attorney to whom the client was forwarded).

42. Watson v. Pietranton, 364 S.E.2d 812, 817-18 (W. Va. 1987) (Neely, J., concurring) (explaining that referring attorneys often provide valuable services to both clients and specialist attorneys by sorting through the cases and seeking out the most appropriate specialist). Moreover, attorneys may be called upon to utilize their "expensive education" to know when they need to seek assistance in a case. *Id.* at 817 (relating the experiences of one attorney who had done research in a particular area and knew when and where additional assistance would be necessary).

43. *See id.* at 817 (noting the expenses associated with referrals). "The general practice lawyer devotes both time and attention to evaluating the abilities and qualifications of these specialists so that he can refer clients to exactly the right lawyer. That costs money and takes work; it is an office overhead expense." *Id.*

44. *See* Moran v. Harris, 182 Cal. Rptr. 519, 523 (Cal. Ct. App. 1982) (proposing that the economic incentives created by referral fees work to secure the best possible representation for clients by encouraging less capable attorneys to refer clients to experienced specialists); Sean M. Carty, Note, *Money for Nothing? Have the New Michigan Rules of Professional Conduct Gone Too Far in Liberalizing the Rules Governing Attorney's Referral Fees?*, 68 U. DET. L. REV. 229, 236-37 (1991) (explaining the argument that a provision for the payment of referral fees provides attorneys with an economic incentive to refer the case to a more competent attorney); *see also* Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 555 (1994) (noting both the lawyer incentive and the client benefit from "the expert information on selection of a lawyer that the client lacks").

45. *See* Mervin H. Needell, *Legal Ethics in Medicine: Are Medical Ethics Different from Legal Ethics?*, 14 ST. THOMAS L. REV. 31, 49 (2001) (affirming the principle that referral fees create an incentive to refer people with specific problems to specialists); Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 331 (1994) (explaining how the economic incentive will prompt an experienced attorney to refer a case).

qualified attorneys.[46] Third, proponents assert that referrals and referral fees are legitimate because the referral process is common within law firms.[47] To make a distinction between referrals occurring between different law firms and those that occur within one law firm would be unfair.[48]

Opponents use the Model Code to explain why the incentives created by referral fees are unnecessary.[49] The Model Code already requires attorneys to refer cases when the attorney would be incapable of providing competent representation.[50] Texas also prohibits a lawyer from repre-

---

46. Liebbe v. Floyd, No. 05-97-01272-CV, 1999 WL 993853, at *4 n.3 (Tex. App.—Dallas 1999, pet. ref'd) (not designated for publication).

47. *See* Sean M. Carty, Note, *Money for Nothing? Have the New Michigan Rules of Professional Conduct Gone Too Far in Liberalizing the Rules Governing Attorney's Referral Fees?*, 68 U. DET. L. REV. 229, 238 (1991) (discussing changes in the law of referral fees that have allowed smaller law firms to take advantage of referrals in the same manner as large firms); Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 332 (1994) (noting that an intra-firm referral was not prohibited under the previous versions of the Model Rules of Professional Conduct and that there is virtually no difference between the intra-firm referral and the referral between two lawyers not in the same firm).

48. *See* Curtis L. Cornett, Comment, *Ohio Disciplinary Rule 2-107: A Practical Solution to the Referral Fee Dilemma*, 61 U. CIN. L. REV. 239, 256 (1992) (explaining that even the ABA's old rule 2-107 approved the division of fees between lawyers in the same firm); *see also* Sheryl Zeligson, Note, *The Referral Fee and the ABA Model Rules of Professional Conduct: Should States Adopt Model Rule 1.5(e)?*, 15 FORDHAM URB. L.J. 801, 818 (1987) (citing the fact that referrals between lawyers within the same firm are not subject to the same levels of official regulation as those between lawyers not in the same firm).

49. *See* Curtis L. Cornett, Comment, *Ohio Disciplinary Rule 2-107: A Practical Solution to the Referral Fee Dilemma*, 61 U. CIN. L. REV. 239, 252-55 (1992) (arguing that the ABA's Model Code mandates that an incompetent attorney refer the case to a competent attorney irrespective of any referral fee); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2001) (stating that "[a] lawyer shall provide competent representation to a client" and defining competent representation as requiring "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); MODEL CODE OF PROF'L RESPONSIBILITY EC 2-8 (1983) (urging that the "[s]election of a lawyer by a layperson should be made on an informed basis"). More specifically, the Model Code emphasizes that:

> A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.

Id.

50. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 (2001) (stating "[i]n determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include . . . whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question"); *see also* Murray

senting clients in issues that are beyond his skills and abilities.[51] Further, critics contend that referring attorneys are likely to pursue the highest paying lawyers, rather than the best qualified.[52] A final argument against referral fees is that they tend to increase total legal costs, especially when the referring attorney has performed no legal service.[53]

Whatever the outcome of the referral fee debate, the legal community cannot ignore the attorney-attorney referral. As the referral fee has grown in prevalence, scholars argue that it has become part of the work of lawyers.[54] Whether or not a referral is considered "practicing law," it still affects an associate's fiduciary relationship with her firm.

C. *Fiduciary Duty*

Fiduciary duties are the product of an agency relationship.[55] The Restatement (Second) of Agency explains that an agency is created when two parties agree that one will act on the other's behalf and subject himself to the other's control.[56] Associates are "employees" of the law firms

---

H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 332-33 (1994) (explaining the code's provisions under Rule 1.1).

51. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01 cmt. 1 (stating "[a] lawyer generally should not accept or continue employment in any area of the law in which the lawyer is not and will not be prepared to render competent legal services").

52. *See* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 896 (1990) (arguing that in cases where there will not be a long-term relationship with the client, the referring attorney will be primarily motivated to make a referral to the attorney willing to pay the highest referral fee); *see also* Mervin H. Needell, *Legal Ethics in Medicine: Are Medical Ethics Different from Legal Ethics?*, 14 ST. THOMAS L. REV. 31, 49 (2001) (stating referral fees have been "condemned on the grounds that they lead to corruption, barratry, champerty, and subversion of professionalism").

53. *See* Curtis L. Cornett, Comment, *Ohio Disciplinary Rule 2-107: A Practical Solution to the Referral Fee Dilemma*, 61 U. CIN. L. REV. 239, 251 (1992) (explaining how referral fees lead to inflated standard fees, thus raising the cost of legal services); Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 334 (1994) (relaying the argument that referral fees raise the cost of legal service for both the client and society).

54. *See* Dennis J. Tuchler, *Unavoidable Conflicts of Interest and the Duty of Loyalty*, 44 ST. LOUIS U. L.J. 1025, 1040 (2000) (explaining that the referral is part of services that a lawyer can provide to clients). Referrals can qualify as legitimate work for attorneys in part because the attorney incurs costs as a result of the search for a competent attorney. *Id.* at 1035.

55. RESTATEMENT (SECOND) OF AGENCY § 1 (1958) (defining agency as a fiduciary relationship resulting "from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act").

56. RESTATEMENT (SECOND) OF AGENCY § 1 cmt. a (1958).

where they work.[57] The employment and agency relationships mean that a law firm may assert control over the associate in the same manner that a "principal" would over an "agent."[58] Thus, the relationship between the associate and the law firm constitutes an agency.[59] These principles indicate that an associate owes specific duties to her law firm, even where there is no express contract creating the duties.[60]

In Texas, the fiduciary relationship between associate attorneys and their law firms is based upon an existing confidence between the law firm and its associate.[61] This fiduciary relationship is governed not by legal obligations, but by fair dealing and good faith.[62] Therefore, associates

---

57. *See* Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 260 (1985) (defining the associate as an employee because the law firm pays the associate a salary and bears the associate's overhead costs); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 9(1) (2000) (explaining that the associate could be an "employee" of a number of business entities).

58. *See* Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 261 (1985) (providing that because an associate is generally under a law firm partner's control, she may be classified as both an "agent" and a "servant"); *see also* RESTATEMENT (SECOND) OF AGENCY § 1 (1958) (defining the relationship between a principal and an agent); *id.* § 2 (stating "[a] servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master").

59. *See* Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 261 (1985) (contending that the relationship between law firm and associate meets the definition set out in the Restatement (Second) of Agency); *see also* RESTATEMENT (SECOND) OF AGENCY § 1 (1958) (defining what constitutes an agency relationship); *id.* § 1 cmt. a (explaining that an agency relationship results when one consents to act under another's control).

60. *See* Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 261 (1985) (indicating that an associate's duties are implied in law through the relationship to the firm); *see also* RESTATEMENT (SECOND) OF AGENCY § 376 (1958) (stating "[t]he existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made").

61. *See* Bray v. Squires, 702 S.W.2d 266, 270 (Tex. App.—Houston [1st Dist.] 1985, no writ) (acknowledging the existence of an ethical relationship in Texas); *see also* Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509, 512 (1942) (providing a general definition of fiduciary). The term 'fiduciary' applies "to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction." *Id.*

62. *See* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (asserting that the fiduciary relationship should not be measured by "honesty alone, but [by] the punctilio of an honor the most sensitive"); *see also* Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 264 (1985) (providing a general discussion of the duties owed); Vincent Robert Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 99 (1988) (discussing agency principles that create the fiduciary relationship).

are obligated to deal openly and make full disclosure to their employers.[63] Generally, such obligations may be categorized as a duty of loyalty.

The duty of loyalty owed to the firm requires the associate to place the firm's interests before her own.[64] This precludes a law firm associate from competing with her law firm.[65] However, the bar on competition is limited to the scope and purpose of the employment relationship between the associate and the law firm.[66] Agency principles dictate that the law firm associate should not practice law simultaneously for two employers who are effectively in competition with one another.[67] The associate's acquisition of an interest adverse to that of her law firm constitutes a breach of fiduciary duty, which is actionable in Texas.[68] Therefore, the law will not allow an employee to keep any gain or benefit that rightfully belongs to her employer by means of the employer-employee relationship.[69] Fiduciary duty requires that employees disclose business opportu-

---

63. *Kinzbach*, 160 S.W.2d at 513; *see also* United States v. Carter, 217 U.S. 286, 306 (1910) (holding that unless the agent makes full disclosure to the principal, the acquisition of interest adverse to the principal constitutes a violation of one's fiduciary duty).

64. Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 264 (1985) (extending this obligation to all matters connected with the employment relationship); RESTATEMENT (SECOND) OF AGENCY § 393 cmt. b (1958) (concluding that it is usually the duty of the agent to further the goals of the principal, even to the detriment of her own goals).

65. *See* Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 264 (1985) (asserting that because the relationship is a fiduciary one, the associate is barred from competing with the employer law firm); *see also* RESTATEMENT (SECOND) OF AGENCY § 393 (1958) (stating that "[u]nless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency"); Parks-Davis Auctioneers, Inc. v. Verna Drilling Co., 589 S.W.2d 168, 170 (Tex. Civ. App.—El Paso 1979, writ dism'd w.o.j.) (applying the Restatement (Second) of Agency § 393 to an agent and principal relationship).

66. *See* RESTATEMENT (SECOND) OF AGENCY § 393 cmt. a (1958) (commenting that "an agent can properly act freely on his own account in matters not within the field of his agency and in matters in which his interests are not antagonistic to those of the principal, except that he cannot properly thus use confidential information").

67. *See id.* (assuming that the associate would be barred under the Restatement from competing with the employer law firm by providing legal services to members of the public); Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 293 (1985) (explaining that many firms prohibit "moonlighting" by associates to keep them from diverting business away from the firm).

68. *See Carter*, 217 U.S. at 306 (interpreting a breach as "a betrayal of his trust and a breach of confidence" resulting from the acquisition of interests adverse to the principal and the nondisclosure of such an interest); *Kinzbach*, 160 S.W.2d at 513 (explaining that there was a breach when the defendant failed to give full disclosure to his fiduciary).

69. *See Carter*, 217 U.S. at 306 (holding that when an agent receives something of value in violation of her fiduciary duty, then she must account to the principal for all that was gained); *Kinzbach*, 160 S.W.2d at 514 (concluding that it would be unjust to allow an agent to violate his fiduciary duty and retain benefits resulting from the breach).

nities falling within the employer's scope of activity to the employer before taking the opportunity for personal gain.[70] If there is a finding that the fiduciary duty has been breached, the employee is required to make an accounting to the employer of all benefits received.[71]

Defining the associate's duties and the scope of the law firm's "business" is crucial to determining whether there has been a breach of fiduciary duty.[72] The existence of an employment relationship means that the associate has agreed to use his "energies, time, efforts, and talents" to perform a job.[73] However, in most cases, the employee does not surrender his ingenuity, general experience, or individual skills.[74] Considering these opposing viewpoints, what "job" are associates hired to do? Arguably they are hired to "practice law." Texas defines the practice of law as those activities occurring both in and out of court requiring the exercise of legal skill or knowledge.[75] Does this definition include the referring of clients and collecting of fees? The answer is unclear because the statu-

---

70. *See* Imperial Group, Inc. v. Scholnick, 709 S.W.2d 358, 363 (Tex. App.—Tyler 1986, writ denied) (suggesting that the defendant in that case would have avoided a breach of fiduciary duty finding if he could have proven that he had disclosed the opportunity to his fiduciary and the fiduciary refused the opportunity); *Kinzbach*, 160 S.W.2d at 514 (stating that "if the fiduciary 'takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of this trust and a breach of confidence, and he must account to his principal for all he has received'").

71. *See Carter*, 217 U.S. at 306 (requiring the breaching agent to account to the principal for all that was gained).

72. *See generally* Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 260-67 (1985) (discussing the role of the associate as an employee of the firm).

73. Pat K. Chew, *Competing Interests in the Corporate Opportunity Doctrine*, 67 N.C. L. REV. 435, 448-49 (1989); *see also* Note, *Fiduciary Duty of Officers and Directors Not to Compete with the Corporation*, 54 HARV. L. REV. 1191-92 (1941) (stating that "[w]here the officer is an agent to perform a particular task for the corporation, he is subject to the disability of a special agent to act for himself" and when "an officer is also a general agent for the corporation he should be disqualified from doing those things individually which his general authority empowers him to do for the corporation").

74. *See* Pat K. Chew, *Competing Interests in the Corporate Opportunity Doctrine*, 67 N.C. L. REV. 435, 449 (1989) (elaborating that these extra items could be bargained away if they were part of the employment agreement).

75. TEX. GOV'T CODE ANN. § 81.101(a) (Vernon 1998) (defining the "practice of law").

> [T]he "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

Id.

tory definition of the "practice of law" is not exhaustive.[76] Although not specifically included in the statutory definition, legal commentators suggest that referral fees are a part of the work of lawyers and law firms.[77]

D. *Breach of Fiduciary Duty Between Law Firm and Associate*

The Texas Supreme Court set its own rule in *Brewer & Pritchard, P.C. v. Johnson* for determining whether an associate has breached a fiduciary duty to her employer law firm.[78] The court's analysis focused on whether the associate received compensation for making the referral.[79] It determined that a breach will only occur when the associate has received a "benefit, compensation, or other gain."[80] Ultimately, the court found that the Brewer & Pritchard law firm could not recover the referral fee paid to Johnson.[81] Brewer & Pritchard was unable to prove a breach due to lack of evidence that Chang had actually received any part of the three million dollar referral fee.[82]

For a law firm to prevail in its claim of breach of fiduciary duty, it must first prove two elements. First, the law firm must establish that the associate was acting as an agent when obtaining the referral.[83] The opinion solidifies that the referral is included within the scope of the agency rela-

---

76. *Id.* § 81.101(b) (warning that "[t]he definition . . . is not exclusive and does not deprive the judicial branch of the power and authority . . . to determine whether other services and acts not enumerated may constitute the practice of law").

77. *See* Dennis J. Tuchler, *Unavoidable Conflicts of Interest and the Duty of Loyalty*, 44 ST. LOUIS U. L.J. 1025, 1040 (2000) (explaining that the referral process is part of a lawyer's services); Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 331-32 (1994) (supporting the contention that referral fees are part of the practice of law).

78. *See generally*, Johnson v. Brewer & Pritchard, P.C., 45 Tex. Sup. Ct. J. 470, 2002 WL 537684 (Mar. 21, 2002), at *4-7 (discussing the scope of the fiduciary relationship).

79. *Id.* at *5.

80. *Id.* at *7.

81. *See id.* at *13 (stating that Brewer & Pritchard failed to prove the existence of an agreement that would indicate that Chang profited directly or indirectly from the referral fee).

82. *See id.* at *12 (indicating that Chang, Johnson, and King testified that Chang had not received or ever expected to receive a part of the referral fee). Yet, according to the affidavit of a summer associate of the firm, Chang "bragged . . . that he had something working outside of his employment which was going to make him so rich that he would probably be able to retire within a year." *Brewer*, 2002 WL 537684, at *12. According to the court, "[a] jury could only speculate that the 'something working outside [Chang's] employment was related to the Kings' personal injury claims." *Id.*

83. *See id.* at *8 (finding that Chang acted as an agent of the firm and that any compensation received is related to his employment).

tionship. Second, the law firm must establish that the associate received something of value.[84]

Irrespective of whether or not Brewer & Pritchard was actually able to prove a breach of fiduciary duty and collect a multi-million dollar fee, the facts surrounding *Brewer* provide an opportunity to explore the effect of referral fees on clients. The main concern is that the current system encourages attorneys to chase money. Naturally, the law firm would pursue this case only if there were money to be made. But has the client, who serves as the basis for legal fees, been forgotten? Who can be held liable for any subsequent malpractice by the referred attorney? The next section explores how a law firm's haste to chase after referral fees comes at little or no cost to it.

III. THE REFERRAL FEE AS A BASIS FOR MALPRACTICE

The ability to assert ownership over a referral fee should not come without costs.[85] If a firm asserts ownership over a referral fee, could it also be exposed to liability for any subsequent malpractice by the referred attorney? The client's success in malpractice, *i.e.*, negligence, actions will depend upon the existence of an attorney-client relationship.[86] Thus, a firm's liability depends heavily upon proof of an attorney-client relationship between the associate and the client. If this connection can be proven, then the general rule, that retention of an individual attorney in a firm is retention of the entire firm, would expose the firm to liability.[87]

---

84. *See id.* at *11-12 (discussing whether Chang actually received any part of the referral fee).

85. *See* Mark CS. Bassingthwaighte, *Negligent Referral: Yes It's Still an Issue—And in Ways You May Not Have Guessed*, W. VA. LAW., Feb. 2001, at 24 (indicating that acceptance of a referral fee implies liability, regardless of whether it was a gift or an expected fee).

86. *See* Byrd v. Woodruff, 891 S.W.2d 689, 700 (Tex. App.—Dallas 1994, writ dism'd by agr.) (stating that "[t]he existence of an attorney-client relationship gives rise to corresponding duties on the attorney's part to use the utmost good faith in dealings with the client, to maintain the confidences of the client, and to use reasonable care in rendering professional services to the client").

87. *See* Jennifer F. Zeigler, Comment, *Firm Arrangements, Including Fee-Sharing Agreements, with the Imposition Malpractice Liability*, 24 J. LEGAL PROF. 537, 537-38 (2000) (providing a general discussion of liability for malpractice when attorneys form organizations); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 58 (2000) (outlining rules under vicarious liability). Section 58 states:

> (1) A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority. (2) Each of the principals of a law firm organized as a general partnership without limited

Generally, there are two causes of action that a client can bring against a referring attorney.[88] First, the client can attempt to bring an action for legal malpractice based upon the referred lawyer's conduct.[89] In many states this cause of action requires an express agreement to divide the fee between two lawyers.[90] However, the ability of a client to pursue this cause of action in Texas is limited because the Texas rules do not require

---

liability is liable jointly and severally with the firm. (3) A principal of a law firm organized other than as a general partnership without limited liability as authorized by law is vicariously liable for the acts of another principal or employee of the firm to the extent provided by law.

Id.; 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 5.9, at 531 (5th ed. 2000) (explaining further that "unless there is an agreement to the contrary, an attorney has the inherent authority to delegate aspects of the client's representation to other members or employees of the firm"). Within a law firm, "a delegating attorney can be liable vicariously for wrongs by employed-attorneys and can be liable directly for negligent supervision." *Id.*

88. *See* Andrew W. Martin, Jr., Comment, *Legal Malpractice: Negligent Referral As a Cause of Action*, 29 CUMB. L. REV. 679, 696 (1998) (providing a list of the required elements to establish a legal malpractice claim and a claim for a negligent referral). The key word here is "client," because a cause of action for legal malpractice requires an attorney-client relationship. *Id.* at 688. In Texas, an attorney-client relationship is created by an express agreement or may be implied through the conduct of the parties. McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 790 (Tex. 1999). The relationship does not depend upon the payment of a fee. *Id.*

89. *See* Jennifer F. Zeigler, *Firm Arrangements, Including Fee-Sharing Agreements, with the Imposition Malpractice Liability*, 24 J. LEGAL PROF. 537, 543 (2000) (quoting the ABA Committee on Ethics and Professional Conduct Informal Opinion 85-1514 to explain that under the ABA's rules, referrals also involve assumption of shared responsibility between the attorneys, giving rise to the same type of liability that exists between partners in the same firm). The agreement to divide the attorney's fee can be proven under an express or implied agreement. *Id.*

90. *See* Noris v. Silver, 701 So. 2d 1238, 1241 (Fla. Dist. Ct. App. 1997) (per curiam) (holding that because the Florida rules require shared responsibility, an agreement to split fees between two attorneys would make the referring attorney liable for the referred attorney's malpractice). *Compare* FLA. RULES OF PROF'L CONDUCT 4-1.5(g) (West 2001) (explaining that:

a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and: (1) the division is in proportion to the services performed by each lawyer; or (2) by written agreement with the client: (A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and (B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made),

with TEX. DISCIPLINARY R. PROF'L CONDUCT § 1.04(f) (indicating that a written agreement is only necessary when the referring attorney is agreeing to assume joint responsibility for the case, but there is no requirement of a written agreement when the division of fees is made "in proportion to the professional services performed by each lawyer" and when the division of fees is "made with a forwarding lawyer").

that the referring attorney retain responsibility for the case.[91] Also limiting the legal malpractice cause of action is the fact that the Texas Disciplinary Rules of Professional Conduct do not prohibit the collection of a referral fee by an attorney who is not actually employed by the client.[92] The client's second alternative is to pursue a cause of action for a negligent referral against the referring attorney.[93]

A. *Challenges of a Legal Malpractice Cause of Action*

The decision to pursue a malpractice action is often based on economics. Malpractice actions are difficult to win because of the high standards of proof that must be met in order to prevail.[94] An action for malpractice invariably means that there will be a trial within a trial.[95] The client must

---

91. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT § 1.04(f) cmt. 11 (explaining that an attorney may "satisfy his . . . obligations of 'joint responsibility' . . . by discharging the responsibilities imposed on a 'supervised lawyer'").

92. *See id.* § 1.04(f) (indicating that the collection of a referral fee by an attorney who is not actually employed by the client is also not prohibited); *see also* Robert L. Crill, Inc. v. Bond, __ S.W.3d __ (Tex. App.—Dallas Oct. 17, 2001, no pet. h.), 2001 WL 1231865, at *6-7 (choosing not to hold that an attorney-client relationship is a prerequisite to being considered a "forwarding lawyer" under Texas Disciplinary Rule 1.04(f)); Musslewhite v. State Bar of Tex., 786 S.W.2d 437, 443 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (expressing that under the old Rule 2-107, which is now Rule 1.04, that the referring attorney does not have to be employed by the client in order to collect a referral fee).

93. *See* Dennis J. Tuchler, *Unavoidable Conflicts of Interest and the Duty of Loyalty*, 44 ST. LOUIS U. L.J. 1025, 1038 (2000) (indicating that even if the client was precluded from pursing a standard malpractice claim, there may still be a claim if the referral was negligent). The negligent referral cause of action encompasses the idea that the "liability for malpractice in making a referral need not turn on the civil liability of the service provider." *Id.* at 1040. Liability for a negligent referral does not require that the referring attorney act as the guarantor of the attorney receiving the fee, but it does mean that "the attorney would be responsible for the service provider's suitability to the referred client's needs." *Id.*; Andrew W. Martin, Jr., Comment, *Legal Malpractice: Negligent Referral As a Cause of Action*, 29 CUMB. L. REV. 679, 696 (1998) (explaining that a negligent referral action could arise within the context of legal malpractice).

94. *See* Deborah L. Rhode, *Ethics in Practice*, *in* ETHICS IN PRACTICE LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 1, 15-16 (Deborah L. Rhode ed., 2000) (pointing out that half of all claims filed are unsuccessful); Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2601 (1996) (acknowledging that only those clients with large claims would find "lawyers willing to take on the delays and expenses involved with litigation against other lawyers").

95. Deborah L. Rhode, *Ethics in Practice*, *in* ETHICS IN PRACTICE LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 15-16 (Deborah L. Rhode ed., 2000) (concluding that the trial within a trial is necessitated by the plaintiff's burden to "show not only that their lawyer's performance fell below prevailing practices, but also that it was the sole cause of quantifiable damages"); John W. Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 774 (1959) (arguing that

prove that "but for" the attorney's negligence, he would have prevailed.[96] Complicating the matter is the fact that, in many jurisdictions, a violation of the state's disciplinary rules will not support a malpractice allegation.[97] Indeed, a violation of the Texas Disciplinary Rules does not constitute a private cause of action.[98] Finally, considering the time and effort required to prevail in a malpractice case, there is little financial incentive to pursue an action against an attorney who does not carry malpractice insurance.[99]

> [i]f the charge is negligence in regard to the conduct of litigation the client is required to win two cases; he must show both that the defendant was negligent and that [the] plaintiff was entitled to win the original suit and would have won it except for the defendant's negligence).

An added hurdle for the client to overcome in his malpractice action is the possibility of finding the court "sympathetic to the defendant as a colleague at the Bar." *Id.* However, "a court which is convinced of the incompetence or chicanery of a fellow lawyer may feel that one way of vindicating the integrity of the Bar is to allow the plaintiff to recover." *Id.* at 774 n.136.

96. Deborah L. Rhode, *Ethics in Practice*, *in* ETHICS IN PRACTICE LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 16 (Deborah L. Rhode ed., 2000); John W. Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 774 (1959).

97. Deborah L. Rhode, *Ethics in Practice*, *in* ETHICS IN PRACTICE LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 16 (Deborah L. Rhode ed., 2000); *see also* MODEL RULES OF PROF'L CONDUCT R. scope 6 (2001) (warning that violations of the rules do not constitute civil liability). A

> [v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis of civil liability. . . . Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating a duty.

Id.

98. TEX. DISCIPLINARY R. PROF'L CONDUCT scope 15. The Rules state that "[t]hese rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached." *See Bond*, 906 S.W.2d at 106 (stating that the Rules will not support a private cause of action). *But see* David J. Beck, *Legal Malpractice in Texas: Second Edition*, 50 BAYLOR L. REV. 697, 698-99 (1998) (explaining that although Texas courts have repeatedly held that violations of the disciplinary rules do not constitute private causes of action, they have used the same rules "as standards of conduct for attorneys in legal malpractice cases").

99. Deborah L. Rhode, *Ethics in Practice*, *in* ETHICS IN PRACTICE LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 15-16 (Deborah L. Rhode ed., 2000); *see also* Manuel R. Ramos, *Legal and Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 871-72 (1996) (arguing that because forty to ninety percent of attorneys carry no malpractice insurance, there is no point in wasting time and money pursuing a judgment that will be discharged in bankruptcy).

When malpractice occurs incident to a referral, the client may be left searching for a "deep pocket."[100] A client may use the referral agreement as a basis to assert a malpractice action against the referring attorney, and the referring attorney's law firm, based upon vicarious liability.[101] Moreover, a client could also seek recompense by proving that the referral was in itself negligent.[102]

B. *Legal Malpractice and a Cause of Action for a Negligent Referral*

In Texas, an attorney malpractice claim is based in negligence.[103] Successful legal malpractice claims require a plaintiff to prove she was owed a duty, the duty was breached, that the breach was the proximate cause of her injury, and she suffered damages.[104] Moreover, a claim for a negli-

---

100. *See* Mark CS. Bassingthwaighte, *Negligent Referral: Yes It's Still an Issue–and in Ways You May Not Have Guessed*, W. VA. LAW., Feb. 2001, at 24 (warning that a referring attorney risks being pursued as a "deep pocket" should the referred attorney make a mistake and carry no malpractice insurance); *see also* Manuel R. Ramos, *Legal and Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 866 (1996) (proclaiming that of the attorneys who potentially face malpractice suits, generally only those with malpractice insurance are sued). Legal malpractice reform is advocated because some attorneys have found that they can avoid potential legal malpractice lawsuits by not purchasing malpractice insurance. *Id.* at 873 (applying information from attorneys in Texas).

101. *See* 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 5.9, at 532 (5th ed. 2000) (discussing the possibility of vicarious liability when attorneys share representation and fees). "An association for a legal matter can be a joint venture, the effect being a partnership for the particular transaction." *See id.* (citing cases from several different jurisdictions to provide an example of a situation in which vicarious liability would arise); *see also* DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 18:9, at 280 (1980) (discussing vicarious liability).

> Several jurisdictions recognize that attorneys who jointly undertake a client's cause, even if not technically partners, may incur liability *inter se* as if they were partners. That is not to say that an attorney who is retained by a client is necessarily responsible to that client for the negligent acts of the subsequent attorney to whom the assignment may be eventually referred.

Id.

102. *See* 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 5.9, at 537 (5th ed. 2000) (stating that a referral must be done within the standard of care that defines the attorney-client relationship). In Texas, attorneys do not owe duties of care to third parties without privity. McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 790 (Tex. 1999). Thus, a non-client cannot bring a malpractice action against an attorney. *Id.*

103. Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989).

104. *Id.* at 665; *see* McKinley v. Stripling, 763 S.W.2d 407, 409 (Tex. 1989) (applying "[t]raditional notions of liability in negligence").

gent referral may lie within a legal malpractice suit.[105] A claim for a negligent referral would require the plaintiff to prove the referring attorney had a duty to use reasonable care in selecting another attorney to whom to refer the case, that the attorney breached his duty when he selected the referred attorney, that there was a causal relationship between the alleged negligent referral and the plaintiff's injury, and that there was an actual loss resulting from the referring attorney's alleged negligence.[106]

The duty to exercise reasonable care in a referral arises out of an attorney-client relationship between the referring attorney and the client.[107] An attorney who refers a client should only refer clients to attorneys who possess the requisite skill and knowledge.[108] In order for the client to

---

105. *See* Andrew W. Martin, Jr., Comment, *Legal Malpractice: Negligent Referral As a Cause of Action*, 29 CUMB. L. REV. 679, 696 (1998) (indicating that a negligent referral action can be shaped within the context of legal malpractice).

106. *Id.*; *see also* Scoggin v. Henderson, No. 05-92-01103-CV, 1993 WL 15496, at *4 (Tex. App.—Dallas 1993, no writ) (not designated for publication) (providing some indication of what is required to prevail on a negligent referral claim in Texas). The elements of an action for a negligent referral in Texas are similar to the four standard elements required for Texas negligence claims. *See Cosgrove*, 774 S.W.2d at 665 (listing the four requirements of negligence as duty, breach, causation, and damages).

107. *See* Byrd v. Woodruff, 891 S.W.2d 689, 700 (Tex. App.—Dallas 1994, writ dism'd by agr.) (citing generally the Texas Disciplinary Rules of Professional Conduct when stating that "[t]he existence of an attorney-client relationship gives rise to corresponding duties on the attorney's part to use the utmost good faith in dealings with the client, to maintain the confidences of the client, and to use reasonable care in rendering professional services to the client"); 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 5.9, at 537 (5th ed. 2000) (suggesting that a referral must comport with the standard of care that attorneys owe to their clients); *see also* Dennis J. Tuchler, *Unavoidable Conflicts of Interest and the Duty of Loyalty*, 44 ST. LOUIS U. L.J. 1025, 1040 (2000) (stating that "[t]he lawyer's duty of care would assume that the lawyer has sufficient information about the services to be rendered and the needs of the client with respect to those services to make a reasonably informed judgment as to the best person to whom to refer the client").

108. *See* Tormo v. Yormark, 398 F. Supp. 1159, 1170 (D.N.J. 1975) (asserting that an attorney is under "a duty to exercise care" when referring his clients to make sure that these attorneys are "competent and trustworthy"); *see also* 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 5.9, at 537 (5th ed. 2000) (urging that "an attorney declining the client's representation because of a lack of a special skill or knowledge should be wary of referring the client to counsel or associating counsel who also does not possess such skill or knowledge"); Andrew W. Martin, Jr., Comment, *Legal Malpractice: Negligent Referral As a Cause of Action*, 29 CUMB. L. REV. 679, 701 (1998) (warning that "[o]ne of the greatest protections against liability is ensuring that the referred attorney is competent to handle the client's case"); David A. Grossbaum, *Watch Your Back on Referrals*, A.B.A. J., May 1997, at 86 (urging referring attorneys to follow his advice to minimize risk of a malpractice suit). Attorneys are advised to

> [c]heck with the local professional conduct committee to make certain there are no complaints against the lawyer. Ask how much liability insurance the attorney has, and whether he or she has been sued for malpractice. Confirm that the attorney has some

demonstrate that the attorney's conduct fell below the standard of care, she must produce evidence that the referring attorney knew or should have known that the referral was inappropriate.[109] For example, inappropriateness may be demonstrated by referring a client to an attorney who is not licensed to practice law.[110] Ultimately, the client must prove that the defendant acted negligently in making the referral.[111]

Although the negligent referral as a legal cause of action has not been imposed in many jurisdictions,[112] it has been recognized by at least one Texas court.[113] Furthermore, Texas recognizes a cause of action for a negligent referral in the medical field.[114] The rationale for recognizing a negligent medical referral should be used to justify a negligent legal referral.[115] In referring a patient to another physician, the referring physician does not become liable for the negligence of the other physician by virtue

---

experience handling the type of matter being referred, and has the time and staff to handle the matter. Establish in writing a clear division of responsibility between yourself and the working attorney and make sure the client is aware of this division of labor. Be sure that your name is not on pleadings that you have not reviewed and for which you cannot vouch. Lawyers who are permitted to collect a fee based only on the referral, and who will not be working on the case, should tell the client they will not be involved and will not be exercising any oversight.

Id.

109. 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 5.9, at 537 (5th ed. 2000) (citing Noris v. Silver, 701 So. 2d 1238 (Fla. Dist. Ct. App. 1997)). The court in *Noris* upheld the dismissal of a negligent referral claim because no evidence was presented to demonstrate that the referring attorney knew that the subsequent attorney would have committed malpractice. Noris v. Silver, 701 So. 2d 1238, 1241 (Fla. Dist. Ct. App. 1997).

110. *See Tormo*, 398 F. Supp. at 1170-71 (implying that to meet the standard of care, it would be sufficient for an attorney to refer a client to an attorney who was licensed by the state).

111. *See Scoggin*, 1993 WL 15496, at *4 (ruling against the plaintiffs because the defendants proved that they did not act negligently).

112. *See* Andrew W. Martin, Jr., Comment, *Legal Malpractice: Negligent Referral As a Cause of Action*, 29 CUMB. L. REV. 679, 684 (1998) (drawing a comparison to the number of states that have adopted the negligent referral cause of action in the medical field as opposed to the negligent legal referral claim).

113. *See Scoggin*, 1993 WL 15496, at *4 (recognizing the negligent referral claim, but ruling against the plaintiff because the defendants had conclusively proven that they were not negligent in making the referral).

114. *See* Moore v. Lee, 211 S.W. 214, 216-17 (1919) (discussing the ability of a patient to pursue a doctor in court based upon the negligent referral to another doctor).

115. *See* Andrew W. Martin, Jr., Comment, *Legal Malpractice: Negligent Referral As a Cause of Action*, 29 CUMB. L. REV. 679, 687 (1998) (pointing out that because the medical profession and the legal profession have similar standards of care for their clients, the law should be applied in the same manner to both professions). One argument in favor of extending the negligent referral cause of action is that both legal malpractice and medical malpractice share the same basic elements. *Id.* at 685.

of the referral.[116] Rather, the physician is required to exercise reasonable care and act in good faith in selecting a physician to whom to refer his patient.[117] The focus in this cause of action is on the referral itself, and not on the negligent acts of the referred physician.[118] Selection of an unqualified individual is the negligent act. Liability for such negligence should similarly be imposed on attorneys.

C. *The Effect of Referral Agreements on Malpractice and Negligent Referral Claims*

Referring attorneys are under an obligation to exercise reasonable care because they are acting as agents to their clients.[119] Lack of an attorney-client relationship could foreclose any possibility of pursuing an attorney in negligence because there would be no obligation to exercise reasona-

---

116. *See Moore*, 211 S.W. at 217 (stating that "in the absence of negligence in such selection [the referring physician] will not be liable for the negligence or lack of skill of the substitute practitioner"); *see also* Jennings v. Burgess, 917 S.W.2d 790, 795 (Tex. 1996) (Gonzalez, J., concurring) (citing a multitude of sources, both in Texas and other jurisdictions, to show that the referring physician is not responsible for the negligence of the substitute physician).

117. *See Jennings*, 917 S.W.2d at 795 (stating that "the referring physician can generally be held liable for his own negligence in failing to exercise reasonable care in making the recommendation"). If the physician or surgeon

> act[s] in good faith and with reasonable care in the selection of the physician or surgeon, and has no knowledge of the incompetency or lack of skill or want of ability on the part of the person employed, but selects one of good standing in his profession, one authorized under the laws of this state to practice medicine and surgery, he has filled the measure of his contract, and cannot be held liable in damages for any want of skill or malpractice on the part of the physician or surgeon employed.

Moore, 211 S.W. at 216-17 (quoting the Ohio Supreme Court in *Youngstown Park & Falls St. Ry. Co. v. Kessler*, 95 N.E. 511 (1911)).

118. *See* Andrew W. Martin, Jr., Comment, *Legal Malpractice: Negligent Referral As a Cause of Action*, 29 CUMB. L. REV. 679, 684 (1998) (asserting that by shifting the focus of the inquiry to the time of the referral, courts have created a new duty to use reasonable care when referring patients); *see also Jennings*, 917 S.W.2d at 796 (Gonzalez, J., concurring) (indicating that "[t]he common element among the cases, both from Texas and out of state, that recognize negligent referral as a cause of action is that the referral itself is not enough; there must be knowledge of incompetency or some other triggering factor which causes the negligence to manifest itself").

119. *See* 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 5.9, at 534 (5th ed. 2000) (identifying this as a principal-agent relationship because the referring attorney often contacts the receiving attorney on the client's behalf).

ble care.[120] Texas courts have allowed for attorney-client relationships to "be implied from the conduct of the parties."[121]

Generally, the existence of an agreement to split fees is critical to the negligence claims arising out of a referral.[122] Without such an express or implied agreement, the client does not have a cause of action against the referring attorney.[123] The agreement is necessary to expose the referring attorney to liability in states that have adopted the ABA's stance on referral fees, which requires the receiving attorney to maintain continued responsibility.[124] Independent attorney-client relationships demonstrate that the client made the decision to retain the referred attorney on his own; thus, the referring attorney could not be held liable for the referred attorney's malpractice.[125] If there is a division of a fee by agreement,

---

120. *See* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999) (emphasizing that Texas courts remain steadfast on the requirement of privity for malpractice cases). The court adheres to the general rule that a non-client cannot pursue an attorney in a malpractice action. *Id.*

121. *See* Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied) (implying that even if there were not an agreement establishing the attorney-client relationship, Texas law would allow for one to be implied).

122. *See generally* Jennifer F. Zeigler, Comment, *Firm Arrangements, Including Fee-Sharing Agreements, with the Imposition Malpractice Liability,* 24 J. LEGAL PROF. 537, 541-45 (2000) (discussing the interplay between fee-splitting and malpractice). A fee sharing agreement implies shared responsibility. *Id.*

123. *See* Noris v. Silver, 701 So. 2d 1238, 1241 (Fla. Dist. Ct. App. 1997) (per curiam) (explaining that in order to prevail, the plaintiff must prove that there was either an express or implied agreement to split the fee). This Florida court also stated that an implied agreement could be demonstrated through the attorneys' past course of dealing. *See id.* (providing that if the attorneys had an understanding that they would exchange referrals for fees, then an implied agreement existed).

124. *See id.* (holding that if there was an agreement to split the fee, then the referring attorney would be liable for the referred attorney's negligence because Florida's rules require that the attorneys in a fee-splitting agreement also share responsibility for the case). Florida's referral specifically states:

> a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and: (1) the division is in proportion to the services performed by each lawyer; or (2) by written agreement with the client: (A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and (B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

FLA. RULES OF PROF'L CONDUCT 4-1.5(g) (West 2001); MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2001) (requiring the referring attorney to accept continued responsibility for a case before collecting a referral fee); *id.* 1.5 cmt. 4 (clarifying that the rule "permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object").

125. *See* Christensen, O'Connor, Garrison & Havelka v. Dep't of Revenue, 649 P.2d 839, 842 (Wash. 1982) (en banc) (stating that because an independent attorney-client rela-

then the referring attorney still owes a duty to the client, depending on the local jurisdiction's rules of professional conduct.

In Texas, however, the existence of an agreement to split the fee or ownership of such a referral fee does not conclusively expose an attorney to liability in a legal malpractice action.[126] Although an attorney who accepts a referral fee in a state adhering to the ABA's Model Rule 1.5 can become liable for the malpractice of the referred attorney, the same is not true in Texas.[127] In Texas, there is no common law means through which the referring attorney can be held liable for the subsequent malpractice of the attorney who received the referral fee, unless the referring attorney has accepted continued responsibility for the case.[128] Thus, Texas law prevents a client from holding a referring firm, which does not maintain responsibility in the case, liable for malpractice. Although a client may still pursue a negligent referral claim, without a referral agreement, there is no negligent referral cause of action.[129]

IV. RETHINKING THE TEXAS RULE

Legal scholars argue that the modern legal profession is regulated through malpractice.[130] However, if the Texas rules on referral fees significantly restrain the ability of a client to pursue attorneys in malpractice, are clients in Texas assured adequate protection against negligent attorneys? The preceding analysis of the facts in *Brewer* indicates that an aggrieved client's only source of recourse against a referring attorney is a

---

tionship existed, the referring law firm could not be held liable for the negligence of the referred law firm); 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 5.9, at 532 (5th ed. 2000) (writing that "[a]n attorney is not liable for the malpractice of an associated counsel who is independently retained by the client").

126. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f) cmt. 11 (indicating that continued responsibility is not an absolute requirement of the rule).

127. *Compare* Mark CS. Bassingthwaighte, *Negligent Referral: Yes It's Still an Issue–And in Ways You May Not Have Guessed*, W. VA. LAW., Feb. 2001, at 24 (explaining the requirement of Model Rule 1.5), *and* Andrew W. Martin, Jr., Comment, *Legal Malpractice: Negligent Referral As a Cause of Action*, 29 CUMB. L. REV. 679, 692 (1998) (illustrating that "[t]he practical effect of this rule is that an attorney cannot receive a referral fee without escaping liability for the negligence of the referred attorney"), *with* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f) cmt. 11 (indicating that a fee can be divided without maintaining continued responsibility for the representation).

128. Dennis J. Tuchler, *Unavoidable Conflicts of Interest and the Duty of Loyalty*, 44 ST. LOUIS U. L.J. 1025, 1038 (2000).

129. *See id.* (acknowledging that when the referring attorney has not accepted the responsibility, the client may only pursue an action if the referral itself was negligent).

130. *See* Manuel R. Ramos, *Legal and Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 867 & n.10 (1996) (citing the statements of Rutgers law professor John Leubsdorf, Stanford law professor Deborah L. Rhode, and UCLA law professor Richard L. Abel).

suit for negligent referral. Although Texas law does seem to provide a client the opportunity to pursue a negligent referral claim against the referring attorney, this may be inadequate to safeguard the client's interests. Very simply, it is difficult for plaintiffs to prevail in negligent referral actions.[131] *Tormo v. Yormark*,[132] a leading case on the issue of the negligent referral, demonstrates the obstacles such a plaintiff faces.[133]

In *Tormo*, the plaintiff's attorney referred him to a second attorney in another state who subsequently embezzled money from the plaintiff.[134] In an effort to seek compensation, the plaintiff brought an action against the referring attorney for negligently referring him to the second attorney.[135] The plaintiff based his contentions on the failure of the referring attorney to discover that the referred attorney was under indictment for fraud at the time of the referral.[136] The plaintiff-client's claim was ultimately disposed through summary judgment.[137] An analysis of these issues demonstrates how it can be difficult for a plaintiff to prevail in his negligent referral cause of action.

The court in *Tormo* was especially concerned with isolating the negligent conduct. When considering discovery of the indictment, the court stated that it was unfair to place significant investigatory burdens on a referring attorney who is neither a "referral agent" nor a person whose business is primarily composed of referrals.[138] According to the court, it would be a significant burden to require a referring attorney not just to

---

131. *See generally* Deborah L. Rhode, *Ethics in Practice*, *in* ETHICS IN PRACTICE LAWYERS' ROLES, RESPONSIBILITIES AND REGULATION, 15-16 (Deborah L. Rhode ed., 2000) (discussing the obstacles of a malpractice claim). In the three negligent referral cases cited in this paper, no plaintiff has actually prevailed on their claim of a negligent referral. Tormo v. Yormack, 398 F. Supp. 1159, 1175 (D.N.J. 1975); *Noris*, 702 So. 2d at 1241; Scoggin v. Henderson, No. 05-92-01103-CV, 1993 WL 15496, at *4 (Tex. App.—Dallas 1993, no writ).

132. 398 F. Supp. 1159 (D.N.J. 1975).

133. *See* Tormo v. Yormark, 398 F. Supp. 1159, 1171 & n.16 (D.N.J. 1975) (finding via summary judgment that the referring attorney was not negligent in failing to make extensive inquiry into the referred attorney's background). The court noted that although summary judgment in negligence cases is rare, it was warranted in this case, where the facts were clear and undisputed. *Id.*

134. *Id.* at 1164.

135. *Id.* at 1165.

136. *Id.* at 1169 (presenting the referring attorney's argument in which he explained that there was no proof that he knew of the indictment). Apparently, the referred attorney's criminal activity was only reported in the press of the neighboring state. *Tormo*, 398 F. Supp. at 1170.

137. *Tormo*, 398 F. Supp. at 1174-75.

138. *Id.* at 1171. Because information regarding the indictment was not available in the referring attorney's home state, the court makes a distinction between in-state and out-of-state lawyers. *Id.* at 1170.

ensure that the attorney is licensed by the relevant state, but to make further inquires into the attorney's background.[139] It is the obligation of the relevant state to determine who is fit to practice law and who is not.[140] A referring attorney could not be found negligent for referring a client to a licensed attorney without conducting a more in depth investigation.[141]

Although there was no requirement that the referring attorney know of the indictment, the court stated that a fact-finder may still be allowed to determine whether the referring attorney's conduct was negligent.[142] The relevant issue is whether the referring attorney ought to have realized that the referred attorney would have embezzled funds from the client.[143] In rendering its decision in favor of the referring attorney, the court quoted prior precedent and stated that to rule in favor of the plaintiff would "burden a practicing attorney with 'hazards which he is not qualified either to anticipate or to prevent.'"[144] This language is indicative of the heavy burden that a plaintiff must bear in pursuing a negligent referral claim.

In order to provide more protection for the referred client, rule makers should consider a change in Texas law. Texas Disciplinary Rule of Professional Conduct 1.04(f) simply allows a referral agreement to be made "with a forwarding lawyer."[145] To provide more protection, rule makers should look to those states, like Texas, that do not adhere to Model Rule 1.5, but offer more protection than is available in Texas. Eight states do not require the referring attorney to retain responsibility, nor be compen-

---

139. *See id.* at 1171 (indicating that such a burden would be "unfair").

140. *See id.* at 1171 (pointing out that the state is empowered to regulate the legal profession and has the power to eliminate unqualified candidates from the outset). Similar state regulation exists in Texas. In Texas, the Board of Law Examiners is empowered to "conduct an investigation of the moral character and fitness of each applicant for a license." TEX. GOV'T CODE ANN. § 82.028(a) (Vernon 1998). Furthermore, "[e]ach attorney admitted to practice in this state [Texas] and each attorney specially admitted by a court of this state for a particular proceeding is subject to the disciplinary and disability jurisdiction of the supreme court and the Commission for Lawyer Discipline." *Id.* § 81.071.

141. *See Tormo*, 398 F. Supp. at 1171 (opining that "the burden of these additional inquiries greatly exceeds the risk that a referring attorney may cause harm to his client by entrusting his affairs to a lawyer who is known to be licensed by the State").

142. *Id.*

143. *See id.* at 1172 (explaining that in order to survive a proximate cause analysis, the plaintiff must prove that when the defendant created the opportunity to commit a crime, the third party actor would have taken advantage of the opportunity).

144. *Id.* at 1174 (quoting Wildermann v. Wachtell, 267 N.Y.S. 840 (N.Y. Sup. Ct. 1933)).

145. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f).

sated in proportion to the work actually performed.[146] However, from these eight states, Washington, West Virginia, and Alabama provide additional regulation that the remaining five do not.[147] In Washington, for example, a referring attorney must be a member of the local bar referral service.[148] Both Alabama and West Virginia only allow the collection of referral fees without added responsibility in contingency cases.[149] Furthermore, West Virginia law mandates that the referring attorney be a full-time practitioner and the referred attorney have more experience with the legal issues raised by the client's case.[150]

The need for more official regulation may become apparent when viewing the Texas referral fee issue through the principles of law and economics. These principles present a justification as to why a change is needed in the current system. The payment of a referral fee to an attorney who has not assumed any increased risk for the case allows the referring attorney to externalize a cost of practicing law.[151] Texas Disciplinary Rule of Professional Conduct 1.04(f) forecloses the possibility of pursing a malpractice claim in two ways. First, Rule 1.04(f) does not require the

---

146. Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 327 (1994).

147. *Id.*

148. *Id.*; *see also* WASH. RULES OF PROF'L CONDUCT 1.5(e)(1) (West 2000) (stating that lawyers in different firms may divide fees if "[t]he division is between the lawyer and a duly authorized lawyer referral service of either the Washington State Bar Association or of one of the county bar associations of this state").

149. Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 327 (1994); *see also* ALA. RULES OF PROF'L CONDUCT 1.5(e)(1)(c) (Michie 1996) (providing for a no-strings attached referral in a contingency fee case, where the fee is divided between the referring lawyer and the receiving lawyer); W. VA. RULES OF PROF'L CONDUCT 1.5(e) (Michie 2000) (stating the circumstances under which a fee can be divided between lawyers in different firms). The fee can be divided if

> the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representations; . . . [t]he requirements of "services performed" and "joint responsibility" shall be satisfied in contingent fee cases when: (1) a lawyer who is regularly engaged in the full time practice of law evaluates a case and forwards it to another lawyer who is more experienced in the area or field of law being referred.

Id.

150. Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 327 (1994); W. VA. RULES OF PROF'L CONDUCT 1.5 (e) (Michie 2000).

151. *Cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 14.3, at 433 (arguing that limited liability allows businesses to "externalize the risk of failure").

referring attorney to retain responsibility for the case.[152] Second, Texas does not require an attorney-client relationship in order to collect a referral fee.[153] Thus, without the risk of a malpractice suit, the collection of a referral fee creates an externality, since the referring attorney does not bear the costs of his actions.[154] Legal commentators agree that the presence of externalities indicates a need for regulatory intervention.[155]

Texas should work to strike a balance between "free trade and client protection."[156] Obviously, referrals are important to the legal profession and should not be completely eliminated. However, a critical view should be cast on the referral business. Although the list of suggestions for reform is potentially infinite, two of the most obvious proposals would be to prohibit referrals to attorneys who do not carry malpractice insurance,[157] and prevent attorneys from collecting referral fees without first establishing an attorney-client relationship. In any event, such proposed reform should not be characterized as increasing liability, but as providing incentives.

V. CONCLUSION

It appears as though it has become more difficult to be a consumer of legal services. In today's profit driven society, it is difficult for law firms to balance the delicate dichotomy that is inherent to their structure. Ac-

---

152. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f) (permitting fee division without attaching responsibility when "made with a forwarding lawyer").

153. *See* Musslewhite v. State Bar, 786 S.W.2d 437, 443 (Tex. App.—Houston [14th Dist.] 1990) (noting that even under the old Rule 2-107, which has been replaced by Rule 1.04, it was not necessary that a referring attorney be employed by the client in order to collect the referral fee).

154. *Cf.* David D. Friedman, Law's Order What Economics Has to Do with Law and Why It Matters 313 (2000) (explaining that when an individual does not assume all of the costs of his actions, he has created an externality); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.9, at 81 (5th ed. 1998) (illustrating "externalities" within the context of incompatible land uses).

155. *See* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY ETHICS BY THE PERSUASIVE METHOD 102-03 (1994) (identifying the five problems that call for the regulation of professional competition as information barriers, adverse selection, free riders, and externalities).

156. Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 327 (1994) (describing the positive attributes of the Alabama rules).

157. Manuel R. Ramos, *Legal and Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 873 (1996) (comparing mandatory car insurance to the lack of mandatory legal malpractice insurance). Moreover, lawyers should not go without malpractice insurance as a means to deter legal malpractice claims. *Id.*

knowledging the difficulties of the firm structure should mean equal acceptance of the need to serve clients and the need to make a profit. In theory, referrals tend to meet both needs of the legal profession. First, proponents of referral fees argue that clients are better represented because of the economic incentives created to seek out more capable attorneys.[158] Second, the need to make a profit is served because referring attorneys are not forced to absorb their costs associated with the referral.[159]

At first glance, the *Brewer* issue is troublesome because it involves lawyers struggling over a multimillion dollar referral fee that was earned for little more than making a few phone calls.[160] Objections may be raised not only because the case serves to reinforce the notion that lawyers are greedy, but also because there seems to be little concern for the interests of the client. However, if we return to the need to make a profit, application of the Texas Supreme Court's rule concerning referral fees and fiduciary duty would bring an answer to the simple question of ownership. In many states the controversy would end here. However, when considering Texas's treatment of referral fees, questions about the welfare of the client reemerge. Throughout the referral process, how may the client safeguard her interests?

Texas is in the minority of jurisdictions that allow the payment of referral fees without requiring the referring attorney to retain any responsibility for the client's case.[161] This unique treatment of referral fees can be construed to show that legal consumers in Texas receive less protection than consumers in states adhering to the ABA's Model Rules. For example, in a state such as Florida, the existence of a referral fee agreement would work to make the referring attorney liable for the negligence of

---

158. *See* Sean M. Carty, Note, *Money for Nothing? Have the New Michigan Rules of Professional Conduct Gone Too Far in Liberalizing the Rules Governing Attorney's Referral Fees?*, 68 U. DET. L. REV. 229, 239 (1991) (summarizing many of the arguments in support of referral fees); Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 331 (1994) (stating that lawyers with an economic incentive will make referrals to more qualified attorneys).

159. *See generally* ROBERT L. ROSSI, ATTORNEY'S FEES § 4:2, at 221-22 (2d ed. 1995) (discussing generally the value of legal specialization and referrals).

160. *See* Brewer & Pritchard v. Johnson, 7 S.W.3d 862, 864 (Tex. App.—Houston [1st Dist.] 1999) (showing that Chang made phone calls to attorneys in the area), *aff'd*, 45 Tex. Sup. Ct. J. 470, 2002 WL 537684 (Mar. 21, 2002).

161. Murray H. Gibson, Jr., Comment, *Attorney-Brokering: An Ethical Analysis of the Model Rules of Professional Conduct and Individual State Rules Which Allow This Practice*, 19 J. LEGAL PROF. 323, 327 (1994) (dividing the states into groups based upon their stance on referral fees).

the referred attorney.[162] Thus, the person possessing the referral fee may face liability. Moreover, in Florida a client could pursue the referring attorney for negligently referring them to an attorney who subsequently commits malpractice.[163] However, a Texas client would be limited to pursing an action for a negligent referral.[164] Further, any negligence claim may be frustrated because it is not necessary that an attorney first be employed by a client before accepting a referral fee.[165]

If the future of regulation of the legal profession is through malpractice, Texas clients should be assured the same rights as clients in other states.[166] Ultimately, reform would help to create harmony within the business and professional dichotomy of law firms. Although not ignoring the financial realties of the legal profession, reform would work to ensure that the client's interest remains paramount.

162. *See* Noris v. Silver, 701 So. 2d 1238, 1241 (Fla. Dist. Ct. App. 1997) (explaining that liability would be predicated on the existence of either an express or implied agreement).

163. *See id.* (acknowledging the negligent referral cause of action).

164. *See* Scoggin v. Henderson, No. 05-92-01103-CV, 1993 WL 15496, at *4 (Tex. App. 1993, no writ) (recognizing a negligent referral claim).

165. *See* Musslewhite v. State Bar, 786 S.W.2d 437, 443 (Tex. App.—Houston [14th Dist.] 1990) (revealing that employment was not a requirement under the old Rule 2-107).

166. *See* Manuel R. Ramos, *Legal and Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 867 (1996) (citing the opinions of legal scholars).