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## What Attorneys Should Know: A Comprehensive Analysis of Proposed Rule 8a Third Annual Symposium on Legal Malpractice & Professional Responsibility: Recent Development.

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## RECENT DEVELOPMENT

### WHAT ATTORNEYS SHOULD KNOW: A COMPREHENSIVE ANALYSIS OF PROPOSED RULE 8a

KELLIE E. BILLINGS

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#### I. INTRODUCTION

In October 2003, the Texas Supreme Court ordered the addition of Rule 8a to the Texas Rules of Civil Procedure.<sup>1</sup> This rule was drafted to modify the law regarding the permissibility of referral fees in Texas,<sup>2</sup> currently governed by Texas Disciplinary Rule of Professional Conduct 1.04(f).<sup>3</sup> This addition to the rules met with a great deal of controversy,<sup>4</sup>

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1. *Proposed Rule 8a of the Texas Rules of Civil Procedure*, 66 TEX. B.J. 971, 971 (2003).

2. *Id.*

3. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

4. *See* Betsy Whitaker, *It Matters to You*, 66 TEX. B.J. 946, 946 (2003) (stating that "[p]roposed Rule 8a matters to all of us because our right to self-governance is at risk"); *see also* *Litigation Section and Others Request Court Delay Implementation of Rule 8a*, 66 TEX. B.J. 974, 975 (2003) (requesting that implementation of Rule 8a be deferred until

and as a result of the extensive comments received by the court, the effective date was postponed to permit the public to submit remarks and suggestions regarding its implementation.<sup>5</sup>

The American Bar Association (ABA) Model Rules of Professional Conduct define division of fees as “a single billing to a client covering the fee of two or more lawyers who are not in the same firm.”<sup>6</sup> The idea of referral fees, or “fee splitting,” is not new to the United States. Some commentators suggest this practice dates back to the English system of rural solicitors seeking to associate solicitors from London for their expertise.<sup>7</sup>

In traditional practice, the client sought advice from a solicitor, who in turn, sought advice from a barrister.<sup>8</sup> The referring solicitor would normally share in one-third of the fee that resulted from the client referral.<sup>9</sup> This practice of paying referral fees was then carried to the United States by Americans who would receive their legal education in England and return to practice law in the United States.<sup>10</sup> It soon became a customary practice for American attorneys, with the permission of their clients, to receive a one-third “finder’s fee” for forwarding a case to an attorney in another jurisdiction. The fee was paid regardless of how much or how little work the forwarding attorney had done for the client.<sup>11</sup>

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consideration can be given to the current referral system); *State Bar Asks Court to Delay Implementation*, 66 TEX. B.J. 972, 973 (2003) (proposing that implementation of Rule 8a be delayed so the State Bar can assign a task force to investigate the current rule and the effect of any amendments).

5. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 1 (Dec. 23, 2003). A copy of this order is reprinted in 67 TEX. B.J. 116 (2004).

6. MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. 7 (2003).

7. See Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 4 n.4 (Dec. 23, 2003) (claiming, “The genesis of such a referral or finder’s fee in America may well be traceable to the practice of countryside solicitors in England who, when faced with litigation, would associate London solicitors as agents.” (quoting Thomas J. Hall & Joel C. Levy, *Intra-Attorney Fee Sharing Arrangements*, 11 VAL. U. L. REV. 1, 2 (1976))).

8. Drake D. Hill, *Deconstructing the Prophylactic Ban on Lawyer Solicitation*, 62 TEMP. L. REV. 875, 878 (1989).

9. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 4 n.4 (Dec. 23, 2003) (citing JULIUS H. COHEN, *THE LAW: BUSINESS OR PROFESSION* 226 (1916)).

10. Drake D. Hill, *Deconstructing the Prophylactic Ban on Lawyer Solicitation*, 62 TEMP. L. REV. 875, 878 (1989).

11. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 4 n.4 (Dec. 23, 2003) (citing JULIUS H. COHEN, *THE LAW: BUSINESS OR PROFESSION* 226 (1916)).

Although referral fees are not new to the United States, the payment of these fees continues to be a highly debated topic of discussion for attorneys. The ABA has addressed concerns over the payment of referral fees several times over the last century.<sup>12</sup> Finally, this ongoing debate culminated in the enactment of Model Rule 1.5(e).<sup>13</sup> Several years after the ABA adopted the Model Rule, Texas responded with the adoption of Texas Disciplinary Rule 1.04(f).<sup>14</sup> Recently, the referral fee debate in Texas was reignited with the court's proposal of Rule 8a to the Texas Rules of Civil Procedure.<sup>15</sup> If implemented, this rule will drastically change the practice of paying and receiving referral fees in Texas.<sup>16</sup>

The purpose of this Recent Development is to discuss: (1) the historical development of referral fees, (2) the current rules for acceptance and payment of such fees in Texas, (3) proposed Rule 8a and its impact on Texas attorneys if implemented in its current form, and (4) to consider the reasons suggested for permitting attorneys to pay and receive referral fees.

## II. HISTORICAL DEVELOPMENT

### A. *Canon of Professional Ethics 34*

Prior to the 1880s, states maintained attorney ethical standards through essays and treatises rather than by codes and statutes.<sup>17</sup> These governing doctrines were generally regarded as aspirational and encouraged attorneys to strive for a "gentleman-lawyer ideal."<sup>18</sup> It was not until the 1880s that state bar associations began to implement ethical standards to govern attorney conduct.<sup>19</sup>

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12. *See, e.g.*, Model Rules of Prof'l Conduct R. 1.5(e) (2003) (allowing fee splitting only when the fee received is reasonable and proportionate to the amount of work done or when each attorney shares joint responsibility and the client accepts the arrangement, including each lawyer's proportional share, in writing); MODEL CODE OF PROF'L RESPONSIBILITY Canon 34 (1983) (prohibiting fee splitting unless the fees were split with another attorney and were based on the division of work or responsibility shared); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-107 (1983) (prohibiting referral fees unless: (1) the client consents, (2) the fees are split in proportion to the amount of work done and the responsibility accepted, and (3) the total amount of attorney's fees is not clearly unreasonable).

13. MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2003).

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

15. *Proposed Rule 8a of the Texas Rules of Civil Procedure*, 66 TEX. B.J. 971, 971 (2003).

16. *See id.* (outlining the new procedural requirements for obtaining referral fees).

17. *See* James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 787 (1997) (documenting the history of ethics regulation within the legal profession).

18. *Id.*

19. *Id.* at 788.

In 1905, in response to the introduction of ethical codes in various states, the ABA began working on its own code of professional conduct.<sup>20</sup> This code was set forth in the 1908 Canons of Ethics<sup>21</sup> and remained the guide for acceptable attorney conduct for many years.<sup>22</sup> However, similar to the pre-1880 standards, the Canons were aspirational, moral ideals rather than mandatory requirements.<sup>23</sup>

In 1928, after years of unethical referral fee practice according to the American Bar Association, the ABA amended the 1908 Canons of Ethics and added Canon 34,<sup>24</sup> which directly addresses referral fees. Canon 34 states that “[n]o division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.”<sup>25</sup> The ABA Committee on Professional Ethics interpreted this canon to preclude a division of fees among attorneys when one attorney provided no other service to the case beyond the referral itself.<sup>26</sup>

Canon 34, while intended to clarify permissible attorney conduct with regard to the acceptance of referral fees, created a new ambiguity. The canon failed to provide a guide as to how much time invested in a case constituted sufficient representation to meet the canon’s requirement.<sup>27</sup> This ambiguity was not specific to Canon 34, but was a problem for the entire Canons of Ethics since it served as a general guide to attorneys rather than providing specific provisions to regulate attorney conduct.<sup>28</sup> Because the Canons were perceived as aspirational, the practice of accepting referral fees continued and was an accepted practice among attor-

20. *Id.* at 789 (recognizing the initial involvement of the ABA in professional ethics regulation).

21. *Id.*

22. See James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 792 (1997) (noting that from 1908 until 1969, the Canons remained the sole guide for attorney ethics regulation).

23. See *id.* (documenting the shortcomings of the Canon system as an impetus for the adoption of the Model Code of Professional Responsibility).

24. *Id.*

25. MODEL CODE OF PROF'L RESPONSIBILITY Canon 34 (1983).

26. Curtis L. Cornett, Comment, *Ohio Disciplinary Rule 2-107: A Practical Solution to the Referral Fee Dilemma*, 61 U. CIN. L. REV. 239, 241 (1992) (discussing the ABA's Committee on Professional Ethics interpretation of Canon 34).

27. *Id.* at 241-42.

28. ABA CANONS OF PROFESSIONAL ETHICS preamble (1928); see also Curtis L. Cornett, Comment, *Ohio Disciplinary Rule 2-107: A Practical Solution to the Referral Fee Dilemma*, 61 U. CIN. L. REV. 239, 242 (1992) (acknowledging that ambiguities, such as those present in Canon 34, were present throughout the former Canons of Professional Ethics).

neys.<sup>29</sup> In fact, a 1951 report suggested over one-quarter of attorneys surveyed believed that division of fees “was either a common practice or was not unprofessional,” as set forth in Canon 34.<sup>30</sup> In response to the general confusion and ambiguity created by the Canons as they existed, the ABA adopted a new code in 1969: the Code of Professional Responsibility.<sup>31</sup>

#### B. *Disciplinary Rule 2-107*

The Code of Professional Responsibility, unlike the Canons, imposed sanctions for ethical misconduct and provided attorneys with a clearer picture of the ethical standards expected of them.<sup>32</sup> The ABA again addressed the issue of referral fees, previously considered under Canon 34, and adopted Disciplinary Rule (DR) 2-107.<sup>33</sup> Specifically, DR 2-107(A) states:

- (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
- (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
  - (2) The division is made in proportion to the services performed and responsibility assumed by each.
  - (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.<sup>34</sup>

DR 2-107 differs from Canon 34 by requiring that referral fees or fee divisions be grounded both in the amount of responsibility taken by the

29. See Curtis L. Cornett, Comment, *Ohio Disciplinary Rule 2-107: A Practical Solution to the Referral Fee Dilemma*, 61 U. CIN. L. REV. 239, 242 (1992) (discussing the legal profession’s historical acceptance of disproportionate referral fees).

30. *Id.*

31. *Timeline: Reviewing the Development of Professional Conduct Rules in Texas*, 66 TEX. B.J. 980, 980 (2003); see also Curtis L. Cornett, Comment, *Ohio Disciplinary Rule 2-107: A Practical Solution to the Referral Fee Dilemma*, 61 U. CIN. L. REV. 239, 242 (1992) (recognizing that the Code of Professional Conduct was an attempt to remedy the problems of organization and practicality that plagued the Canons).

32. Curtis L. Cornett, Comment, *Ohio Disciplinary Rule 2-107: A Practical Solution to the Referral Fee Dilemma*, 61 U. CIN. L. REV. 239, 242 (1992). See generally MODEL CODE OF PROF’L RESPONSIBILITY (1983) (specifying attorney conduct rules and updating language previously addressed by the Canons of Ethics).

33. MODEL CODE OF PROF’L RESPONSIBILITY DR 2-107 (1983).

34. *Id.*

attorney *and* on the services actually performed.<sup>35</sup> Canon 34 also included these requirements, but an attorney was not required to satisfy both.<sup>36</sup> DR 2-107 also requires the client's consent before attorney's fees can be split and requires that the total fee paid to all attorneys not be clearly unreasonable in comparison to the services provided.<sup>37</sup>

The purpose behind the adoption of DR 2-107 was to more clearly define the acceptable situations in which an attorney may receive and pay referral fees and to place limitations on when such fees could be taken legitimately.<sup>38</sup> Once again, however, ambiguity in the language of the Code created a host of inconsistent rulings and controversy as to what constituted "services performed and responsibility assumed" by each lawyer.<sup>39</sup> This ambiguity, and the resulting inconsistencies, remained until 1983 when the ABA replaced the Model Code with the Model Rules of Professional Conduct.<sup>40</sup> The Model Rules of Professional Conduct offered a new regulation, Model Rule 1.5(e), to govern referral fees for attorneys.<sup>41</sup>

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35. Compare MODEL CODE OF PROF'L RESPONSIBILITY Canon 34 (1983) (stating that "[n]o division of fees . . . is proper, except with another lawyer, based upon a division of service or responsibility"), with MODEL CODE OF PROF'L RESPONSIBILITY DR 2-107(A)(2) (1983) (requiring that the division be "in proportion to the services performed and responsibility assumed by each" attorney); see also Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 7 (Dec. 23, 2003) (discussing the differences between Canon 34 and DR 2-107).

36. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 7 (Dec. 23, 2003); see also MODEL CODE OF PROF'L RESPONSIBILITY Canon 34 (1983) (imposing a vague proportionality requirement that allowed referral fees even when no additional work was done by the referring attorney, as long as he or she assumed responsibility).

37. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-107 (1983); see also Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 7 (Dec. 23, 2003) (contrasting the former Canon 34 with its replacement DR 2-107).

38. See Alistair B. Dawson & Mo Taherzadeh, *Regulating Referral Fees: An Evolutionary Process*, 66 TEX. B.J. 982, 982 (2003) (documenting the history of referral fee regulation in Texas).

39. Curtis L. Cornett, Comment, *Ohio Disciplinary Rule 2-107: A Practical Solution to the Referral Fee Dilemma*, 61 U. CIN. L. REV. 239, 245 (1992).

40. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 10 (Dec. 23, 2003); see also *Timeline: Reviewing the Development of Professional Conduct Rules in Texas*, 66 TEX. B.J. 980, 980 (2003) (highlighting the periodic changes to the rules governing attorney conduct in Texas).

41. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2003).

C. *Model Rule 1.5(e)*

The introduction of Model Rule 1.5(e) substantially lessened the requirements for the acceptance of referral fees.<sup>42</sup> Essentially, Rule 1.5(e) permits referral fees as long as the referring attorney accepts a portion of the responsibility for the case.<sup>43</sup> Specifically, Model Rule 1.5(e) states:

- (e) 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 each lawyer assumes joint responsibility for the representation;
  - (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
  - (3) the total fee is reasonable.<sup>44</sup>

Model Rule 1.5(e) differs from DR 2-107 in three essential ways. First, before a referral fee is permissible, the referring attorney must either accept some responsibility for the case or “perform a proportional amount of work.”<sup>45</sup> Second, Model Rule 1.5(e) requires that attorneys reveal to their clients the specific agreement regarding referral fees and obtain written consent.<sup>46</sup> Under DR 2-107, attorneys needed only to reveal that a fee splitting agreement existed, but were not required to provide details of the agreement to the client.<sup>47</sup> Finally, the ABA now defines the term “assuming responsibility” as the responsibility required of “a partner in a law firm under similar circumstances.”<sup>48</sup>

42. See *id.* (permitting referral fees when responsibility of the case is retained, but no additional work is performed, by the referring attorney).

43. *Id.*; see also Curtis L. Cornett, Comment, *Ohio Disciplinary Rule 2-107: A Practical Solution to the Referral Fee Dilemma*, 61 U. CIN. L. REV. 239, 247 (1992) (emphasizing that Model Rule 1.5(e) does not require both service and responsibility).

44. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2003).

45. 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, 325-26 (1994) (discussing the differences between Model Rule 1.5(e) and DR 2-107).

46. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2003); 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, 325-26 (1994).

47. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-107 (1983); 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, 325-26 (1994).

48. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2003); 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, 325-26 (1994).



#### D. Referral Fees Today

Since the enactment of Model Rule 1.5(e), a number of states have adopted the ABA Model Rule outright or some variation of it. Twenty-one states follow Model Rule 1.5(e),<sup>49</sup> and eleven others and the District of Columbia have adopted various versions of the rule.<sup>50</sup> However, twelve states require neither the division of fees based on a performance basis nor joint responsibility.<sup>51</sup>

Five states essentially prohibit referral fees.<sup>52</sup> Colorado, Hawaii, and Wyoming have all but precluded the use of referral fees.<sup>53</sup> Colorado prohibits them explicitly, while Hawaii and Wyoming make the requirements for referral fees "conjunctive rather than disjunctive."<sup>54</sup> Iowa and Nebraska continue to follow the requirements set forth under DR 2-107(A), and in Arizona, attorneys who accept referral fees are not required to perform any service, but must accept joint responsibility for the client's representation.<sup>55</sup>

#### E. Referral Fees in Texas

The Texas Supreme Court chose not to adopt the exact language of Model Rule 1.5(e). Instead, on January 1, 1990, the court adopted Rule 1.04(f) of the Texas Disciplinary Rules of Professional Conduct. The rule states the following:

- (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:

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(citing Curtis L. Cornett, Comment, *Ohio Disciplinary Rule 2-107: A Practical Solution to the Referral Fee Dilemma*, 61 U. CIN. L. REV. 239, 247 (1992)).

49. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 14 & n.42 (Dec. 23, 2003) (listing the twenty-one states that follow the Model Code as: Alaska, Arkansas, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, and Vermont).

50. See *id.* at 14-15 (naming Florida, Illinois, Minnesota, Nevada, New Hampshire, New York, North Carolina, Ohio, Washington, West Virginia, and Wisconsin as states that have adopted various versions of Model Rule 1.5(e)).

51. See *id.* at 15-16 (claiming that Alabama, California, Connecticut, Delaware, Kansas, Oregon, Maine, Massachusetts, Michigan, Pennsylvania, and Virginia have no requirement for services performed or joint acceptance of responsibility).

52. See *id.* at 13 (noting that Colorado, Hawaii, Iowa, Nebraska, and Wyoming essentially prohibit referral fees).

53. See *id.* (stating that while Colorado expressly prohibits referral fees, Hawaii and Wyoming have imposed additional conditions).

54. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 13 (Dec. 23, 2003).

55. *Id.* at 14.

- (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).<sup>56</sup>

Rule 1.04(f) contains the same permissibility requirements in sections (i) and (iii) as Model Rule 1.5(e).<sup>57</sup> However, the Texas rule is substantially broader through the addition of section (ii). The Texas Supreme Court stated, "It appears from our review of the rules of other states and the District of Columbia that none is as permissive of referral fees as Texas."<sup>58</sup> Through section (ii), a "forwarding attorney" can receive a referral fee without accepting any responsibility for the representation and without performing any legal service for the client.<sup>59</sup> Another important difference between the Texas Disciplinary Rule and the Model Rule is that the Model Rule requires the total amount of the fee to be reasonable.<sup>60</sup> In contrast, the only requirement in Texas is that the fee not be unconscionable.<sup>61</sup> Unconscionability is found "if a competent lawyer could not form a reasonable belief that the fee is reasonable."<sup>62</sup> Although referral fee agreements are controlled by the Texas Disciplinary

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

57. Compare MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2003) (permitting fee division only if it is in proportion to each attorney's services, each assumes joint responsibility, the client agrees in writing to the division, and the total fee amount is reasonable), with TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f) (requiring that the division of fees be in proportion to the services rendered or that both attorneys assume joint responsibility and the client agree to the fee division in writing).

58. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 16 (Dec. 23, 2003) (citing Samuel V. Houston III, Comment, *In the Interest of the Client: Why Reform of Texas's Rules Regarding Referral Fees Is Necessary*, 33 ST. MARY'S L.J. 875 (2002)).

59. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f); see also Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 13 (Dec. 23, 2003) (comparing Texas referral fee rules with those of other states).

60. MODEL RULES OF PROF'L CONDUCT R. 1.5(e)(3) (2003).

61. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f)(3) (prohibiting attorneys from collecting unconscionable or illegal fees).

62. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 13 (Dec. 23, 2003).

Rules of Professional Conduct, the disciplinary rules themselves are also subject to court interpretation.<sup>63</sup>

In 1997, in response to the nationwide and state level concern about the practice of accepting referral fees, the Texas Supreme Court requested that the Texas Disciplinary Rules of Professional Conduct Committee of the State Bar of Texas investigate the current procedures in place in Texas for fee splitting.<sup>64</sup> The report from the Committee stated:

The proper resolution of those issues [raised by payment of referral fees] involves both political and public policy questions that go well beyond the ethical concerns that are the purview of this Committee. Those broader questions need to be debated at length in a more open and more representative forum than our Committee provides.<sup>65</sup>

In December 1998, the court sent this report to the Board of Directors of the State Bar of Texas for further consideration.<sup>66</sup> However, the board took no further action.<sup>67</sup>

A growing concern over the future of referral fees continued to surface among attorneys, which prompted the Texas Supreme Court to reconsider the issue in 2001.<sup>68</sup> At this time the court appointed a task force, headed by Houston attorney Joseph Jamail, to study and evaluate the current practice of accepting referral fees, particularly in reference to civil

63. Samuel V. Houston III, Comment, *In the Interest of the Client: Why Reform of Texas's Rules Regarding Referral Fees is Necessary*, 33 ST. MARY'S L.J. 875, 881 (2002); see also *Bond v. Crill*, 906 S.W.2d 103, 106 (Tex. App.—Dallas 1995, no writ) (stating that “disciplinary rules may be used to determine whether a contract violates public policy” (quoting *Polland & Cook v. Lehmann*, 832 S.W.2d 729, 736 (Tex. App.—Houston [1st Dist.] 1992, writ denied)); *Liebbe v. Floyd*, No. 05-97-01272-CV, 1999 WL 993853, at \*3 (Tex. App.—Dallas Nov. 2, 1999, no pet.) (not designated for publication) (interpreting Rule 1.04(f) to determine whether a contract violates public policy).

64. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 17 (Dec. 23, 2003) (chronicling the evolution of Texas referral fee rules).

65. *Id.* at 18.

66. *Id.*

67. *Id.*

68. See *id.* at 18-20 (explaining the various commentaries on the issue of referral fees which arose at that time). The court cited to an article in the March 1999 issue of the *Texas Lawyer* which provided in depth commentary from various Texas attorneys. One attorney explained that “[a]t times . . . the clients are like cattle being auctioned off to the highest bidder.” *Id.* at 19 (quoting Nathan Koppel, *Referrals Get Rough Around the Edges; Referral Fees Are Big Business for the Highest Bidder, But What About the Client?*, TEX. LAW., Mar. 29, 1999 at 1).

litigation.<sup>69</sup> The task force did not recommend that a new rule be adopted, as was eventually decided by the court, but instead suggested provisions which should be added if a new rule were to be adopted.<sup>70</sup> On October 9, 2003, after considering the recommendations of the task force, the Texas Supreme Court issued an order to adopt Rule 8a to the Texas Rules of Civil Procedure effective January 1, 2004.<sup>71</sup>

### III. PROPOSED RULE 8a

Rule 8a was the Texas Supreme Court's answer to what it saw as the unethical use of referral fees in Texas.<sup>72</sup> The rule, if adopted in its current form, will offer a much more rigid set of standards for attorneys to follow in reference to accepting or making payment of referral fees.<sup>73</sup> Rule 8a.2 sets forth new disclosure requirements for attorneys. The proposed rule's disclosure requirements are as follows:

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

- (a) state the amount and date of each payment made or agreed to be made;
- (b) state the name, address, telephone number, and state bar identification number of each attorney to whom a payment has been made or is to be made; and
- (c) state that the client has approved each such payment or agreement.<sup>74</sup>

The new rule also sets forth a time limit in which a person must disclose a referral fee agreement to the court. The rule states that an "attorney in charge" must provide the required disclosure within thirty days of that

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69. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 20 (Dec. 23, 2003) (discussing the process used to investigate the current referral fee system).

70. *Id.*

71. Order, Texas Supreme Court, Amendments to the Texas Rules of Civil Procedure, No. 03-9160 at 1 (Oct. 9, 2003) (providing final order adding Rule 8a to the Texas Rules of Civil Procedure, effective Jan. 1, 2004).

72. *See* Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 21 (Dec. 23, 2003) (explaining that the rule was drafted after considering the recommendations of the committee as well as the task force).

73. *See Proposed Rule 8a of the Texas Rules of Civil Procedure*, 66 TEX. B.J. 971, 971 (2003) (providing new procedural requirements for attorney conduct such as disclosure of referral fee agreements to the court, as well as setting forth specific sanctions for violation of the rule).

74. *Id.*

attorney's first appearance in the capacity of attorney in charge.<sup>75</sup> Furthermore, if an attorney in charge later makes a payment of a referral fee or institutes an agreement to pay a referral fee not previously disclosed, that attorney must disclose this agreement within thirty days of either the date the payment is made or the date of the agreement.<sup>76</sup> Some argue that these procedural additions are the reason the rule was adopted as a rule of civil procedure rather than a disciplinary rule.<sup>77</sup>

Rule 8a.4 also imposes mandatory sanctions on an attorney who either intentionally did not make the required disclosure or who violated Texas Disciplinary Rule of Professional Conduct 1.04.<sup>78</sup> If the court determines a ground for sanction exists, the court must disqualify the attorney, unless doing so would cause unfair prejudice to the client.<sup>79</sup> The court may allow the client to void the agreement in existence to retain the attorney.<sup>80</sup> It is also permitted to order a forfeiture of all attorneys' fees and "may impose other appropriate sanctions in addition."<sup>81</sup> The rule also provides definitions for what the court considers to be referral fees,<sup>82</sup> as well as what fees are considered unconscionable.<sup>83</sup>

75. *Id.*

76. *Id.* (imposing additional disclosure requirements on the attorney in charge).

77. *See Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 23 (Dec. 23, 2003)* (addressing the limited applicability of a Rule of Civil Procedure in regulation of attorney conduct). Critics point out that a Rule of Civil Procedure would have no effect on suits filed in federal court or on settlements that take place before the petition is filed. *Id.*

78. *Proposed Rule 8a of the Texas Rules of Civil Procedure*, 66 TEX. B.J. 971, 971 (2003).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* The court defines referral fees as follows:

A referral fee is a payment of money or anything of value:

- (a) made by any person in consideration of:
  - (1) the referral of a client or case, or
  - (2) the solicitation of a client or case by any means that does not include the name of lead counsel or lead counsel's law firm; and
- (b) made to an attorney who does not, and is not reasonably expected to, provide professional services in the case:
  - (1) that are substantial; and
  - (2) for which the payment would be a reasonable fee apart from the referral.

*Id.*

83. *Proposed Rule 8a of the Texas Rules of Civil Procedure*, 66 TEX. B.J. 971, 971 (2003). The court defined an unconscionable referral as follows:

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

When the court issued the order to enact Rule 8a, it received a great number of comments from attorneys and other interested persons regarding the effect of the rule.<sup>84</sup> After consideration of these comments and letters from organizations such as the State Bar of Texas Executive Committee, the court decided to delay implementation of the rule to allow interested parties to submit additional comments.<sup>85</sup>

#### A. *Opposition to the Enactment of Rule 8a*

Those opposed to the implementation of Rule 8a have offered a variety of concerns and reasons as to why it should not be implemented. One of the earliest voices of opposition was Justice O'Neil, joined by Justice Schneider, who offered a dissenting opinion to its adoption. Justice O'Neil suggested that the main purpose behind Rule 8a was to oversee attorney conduct, and under Section 81.024(a) of the Government Code, if a rule is to be disseminated, the court should do so as a rule of professional conduct, not a rule of civil procedure.<sup>86</sup> Section 81.024(a) of the Government Code states, "The supreme court shall promulgate the rules governing the state bar."<sup>87</sup> Section (g) of this same rule states, "A rule may not be promulgated unless it has been approved by the members of the state bar in the manner provided by this section."<sup>88</sup>

Justice O'Neil's argument has been supported by some Texas attorneys as well. Betsy Whitaker, President of the State Bar of Texas, explained in a recent *Texas Bar Journal* article that Texas governs referral fees under Disciplinary Rule 1.04(f), and even though Rule 8a is titled a rule of civil procedure, its effect is to amend the current disciplinary rule.<sup>89</sup> Whitaker believes that "[i]n exchange for the mandatory obligation to belong to the State Bar of Texas, you should have a right to be heard in shaping and molding your profession."<sup>90</sup>

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*Id.*

84. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 1 (Dec. 23, 2003) (discussing the various concerns the court received regarding the proposed implementation of Rule 8a).

85. *Id.*; see also *State Bar Asks Court to Delay Implementation*, 66 TEX. B.J. 972, 972 (2003) (urging the court to delay implementation of Rule 8a until "additional debate and input from the lawyers of Texas and the public" can be considered).

86. Order, Texas Supreme Court, Amendments to the Texas Rules of Civil Procedure, No. 03-9160 (Oct. 9, 2003).

87. TEX. GOV'T CODE ANN. § 81.024(a) (Vernon Supp. 2004).

88. *Id.* § 81.024(g).

89. Betsy Whitaker, *It Matters to You*, 66 TEX. B.J. 946, 946 (2003) (urging Texas lawyers to voice their opinions and contribute to the search for a solution to the referral fee debate).

90. *Id.*

The State Bar Act was passed by the Texas Legislature in 1939.<sup>91</sup> The Act made it mandatory that each attorney join the State Bar of Texas, pay annual dues, and be subject to discipline under the rules of professional conduct.<sup>92</sup> The Act in turn provides Texas attorneys with the “right of self governance.”<sup>93</sup> One of the rights included in self-governance is the right to offer an opinion of the rules of conduct which govern attorney behavior.<sup>94</sup> This is a right which Whitaker argues has been in place for attorneys for over six decades, the right of referendum, and Rule 8a is important to all attorneys because it impacts the right to self-governance.<sup>95</sup>

In a letter from the State Bar Executive Committee to the Texas Supreme Court, the members explained that even though Texas is among a minority of states that permit a “pure forwarding fee,” the adoption of Rule 8a will not bring Texas in line with other states.<sup>96</sup> It will have the opposite effect and swing the state into a different minority.<sup>97</sup> The committee stated that the proposed rule is significantly different from both the ABA Model Rules and the laws governing referral fees in other states.<sup>98</sup>

There are a variety of changes the Texas rule will implement, which are not practiced in other states. For example, the rule will place a cap on referral fees that has not been adopted by any other state.<sup>99</sup> A client will be required to publicly disclose the content of his or her agreement with their attorney, even if it is not the desire of the client to do so.<sup>100</sup> Attorney's fees will be limited, even if the client gives consent and the lawyer accepts full responsibility for the case. And, finally, the method for determining the value of a referring lawyer's contribution to the case is left undefined and will be subject to a variety of interpretations.<sup>101</sup>

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91. *Id.* (documenting the history of the referendum process as a way to ensure self-regulation of the legal profession).

92. *Id.*

93. *Id.*

94. See Betsy Whitaker, *It Matters to You*, 66 TEX. B.J. 946, 946 (2003) (agreeing with the Executive Committee of the State Bar of Texas that Rule 8a should be subject to open debate before implementation is considered).

95. *Id.*

96. *State Bar Asks Court to Delay Implementation*, 66 TEX. B.J. 972, 972 (2003).

97. See *id.* (discussing the practical effects that Rule 8a could have on the Texas legal profession).

98. See *id.* (discussing the unique aspects of Rule 8a as compared to both the laws of other states and the ABA Model Rules).

99. *Id.*

100. *Id.*

101. See *State Bar Asks Court to Delay Implementation*, 66 TEX. B.J. 972, 972 (2003) (acknowledging the ambiguity present in the proposed rule).

Another concern that has been expressed to the court is whether regulations on referral fees will cause an improper infringement on the rights of individuals to enter into contracts together, a right which some argue should be dependent on market forces between clients and attorneys.<sup>102</sup> In response to this concern, the court explained that its research found no American jurisdiction that has supported this argument, and that fee agreements, even in Texas, have always been subject to ethical rules.<sup>103</sup> Some argue that greater weight should be given to the opinions of the Advisory Committee and the task force set up by the court.<sup>104</sup> However, even when the court appoints a committee to consider a situation, it is not bound by that committee's findings.<sup>105</sup> Other critics are concerned with whether any rule regulating referral fees should be established as a Disciplinary Rule of Professional Conduct instead of a Rule of Civil Procedure.<sup>106</sup> In response, the court stated that although referral fees involve both procedural and ethical concerns, it would defer to the bar for further evaluation and recommendation.<sup>107</sup> The court also dismissed the claim that "proposed Rule 8a is nothing other than politically motivated tort reform" by emphasizing the diverse political affiliations of the task force that recommended the rule.<sup>108</sup> Opponents of Rule 8a have also argued that the rule will encourage attorneys to retain cases they are not prepared to deal with, rather than refer them to an attorney who specializes in that area of law.<sup>109</sup> They contend that this rule will harm clients, although the purpose of the rule is to protect them.<sup>110</sup>

The Texas Disciplinary Rules of Professional Conduct Committee suggested that rather than implementing Rule 8a as currently drafted, "[t]he Court might want to give consideration to adopting a disciplinary standard limiting attorneys discharged without just cause to the reasonable

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102. See Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 21 (Dec. 23, 2003) (addressing various issues raised in response to the court's request for public comment).

103. *Id.* at 22.

104. *Id.*

105. *Id.* at 23.

106. See *id.* (suggesting that a Rule of Civil Procedure that regulates ethical attorney conduct may be ill-suited because of its limited applicability).

107. See Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 23 (Dec. 23, 2003) (acknowledging the validity of such concerns).

108. *Id.*

109. See *Litigation Section and Others Request Court Delay Implementation of Rule 8a*, 66 TEX. B.J. 974, 974 (2003) (listing the concerns voiced by the Litigation Section of the State Bar of Texas).

110. See *id.* (describing the harm resulting from Rule 8a's implementation as "self-evident").



value of their services under a *quantum meruit* rationale.”<sup>111</sup> The committee suggested that the court should consider repealing the holding in *Mandell & Wright v. Thomas*,<sup>112</sup> which held that if an attorney is discharged prior to the end of the case or controversy for which he was retained without good cause, that attorney is entitled to recover the full amount owed under the employment contract.<sup>113</sup> The committee explained that *Mandell & Wright* allows attorneys to assert a credible threat against clients through the possibility that the client will have to pay full attorney fees in one case to two different attorneys if they discharge their original counsel without good cause.<sup>114</sup> Therefore, the committee argues that the repeal of *Mandell & Wright*, as well as a disciplinary standard which limits the attorney fees for an attorney discharged without just cause to a reasonable amount under quantum meruit rationale, may be a better alternative than adoption of Rule 8a.<sup>115</sup>

#### B. *The Ethics of Referral Fees*

The issue of whether and in what circumstances referral fees are ethical has been a topic of debate for a long time. One of the most frequently offered justifications for allowing referral fees is that they facilitate the goal of providing clients with quality legal services by encouraging an attorney, who may not be qualified to handle a case, to refer it to another attorney better equipped to represent the client.<sup>116</sup> Others suggest that referral fees encourage attorneys to refer clients to the best possible attorney so the recovery for the client will be larger, and in turn, so will the referral fee.<sup>117</sup> Commentators have argued that if attorneys are not permitted to receive referral fees, they will have an increased incentive to keep clients with cases in areas not within their field of expertise.<sup>118</sup> The American Bar Association explains in Comment 7 to Model Rule 1.5 that division of fees permits the association of another attorney in a situation

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111. *Considering Referral Fees: A Look Back in Recent History*, 66 TEX. B.J. 977, 979 (2003).

112. 441 S.W.2d 841 (Tex. 1969).

113. *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969).

114. *See Considering Referral Fees: A Look Back in Recent History*, 66 TEX. B.J. 977, 979 (2003) (illustrating how the *Mandell & Wright* holding can be used as a weapon against clients who seek to change their legal counsel).

115. *See id.* (advocating that the rule established in *Mandell & Wright* be repealed).

116. *See id.* at 977 (addressing the general benefits of the attorney referral system).

117. *Id.*

118. *Litigation Section and Others Request Court Delay Implementation of Rule 8a*, 66 TEX. B.J. 974, 974 (2003).

where neither attorney acting alone could serve the best interests of the client as well as could be done with another attorney.<sup>119</sup>

Those opposed to referral fees argue that providing adequate representation to clients is already a requirement of attorneys under the Model Rules of Professional Conduct.<sup>120</sup> Similarly, Texas Disciplinary Rule of Professional Conduct 1.01 states, "A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence. . . ."<sup>121</sup> Therefore, despite any additional monetary incentive, an attorney is required by the rules to refer the case to another attorney if he or she is not competent to take it. One commentator suggested that while this criticism at first glance seems to be legitimate, it assumes the only reason for referring a client would be due to the attorney's incompetence.<sup>122</sup> It does not take into account attorneys who refer a case, not because they are incompetent, but because their client would have a better chance of winning the case with an attorney whose specialty lies within that area of practice.<sup>123</sup>

Another argument behind limiting the use of referral fees is that referral fees encourage referrals to the attorney paying the highest referral fee, rather than the ones who can best represent the client.<sup>124</sup> This in effect means clients are being treated as commodities, sold to the highest bidder.<sup>125</sup> However, while it is true there is no way to ensure a client will receive the best representation, under the disciplinary rules, a client will always receive competent representation.<sup>126</sup>

119. MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. 7 (2003).

120. 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, 333 (1994) (reiterating that Model Rule of Professional Conduct 1.1 requires lawyers to decline or refer any case that they cannot competently handle).

121. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01.

122. 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, 333 (1994) (stressing that there are situations when a client's interests are best served by a competent practitioner referring the case to a more competent practitioner).

123. *Id.*

124. *Id.*

125. *Considering Referral Fees: A Look Back in Recent History*, 66 TEX. B.J. 977, 977 (2003) (addressing the three major critiques of the attorney referral system).

126. 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, 333 (1994) (interpreting Model Rule of Professional Conduct 1.1).

## IV. CONCLUSION

After the court received various requests from attorneys to postpone adoption of Rule 8a until further discussion and analysis, it issued an order to delay its implementation.<sup>127</sup> In doing so, however, the court invited comment from Texas attorneys and suggested that the bar consider the following seven questions:

- (1) Will restrictions on referral fees impair what has been viewed as their beneficial purpose of obtaining the best representation for clients? . . . .
- (2) Do referral fees harm clients? . . . .
- (3) Do referral fees adversely affect the profession? . . . .
- (4) Should referral fees be capped by rule? . . . .
- (5) Should referral fees be disclosed to the client and public? . . . .
- (6) What adverse collateral consequences will a referral fee rule have? . . . . [a]nd
- (7) What specific problems does proposed Rule 8a have?<sup>128</sup>

The State Bar submitted a proposal to the Texas Supreme Court that the court has accepted.<sup>129</sup> The bar announced that it would appoint a task force to conduct hearings in Austin, Dallas, Harlingen, Houston, and San Antonio throughout the months of January and February.<sup>130</sup> The task force will discuss and consider not only issues related to referral fees, but also issues which concern advertising in the legal community.<sup>131</sup> It will present a preliminary report of its findings on April 16, 2004, and a final report will be submitted at least thirty days prior to the board's meeting on June 23-24, 2004.<sup>132</sup> The task force will submit its recommendations to the court for any modifications it wishes to make, and then the rule will

127. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 1 (Dec. 23, 2003); *see also State Bar Asks Court to Delay Implementation*, 66 TEX. B.J. 972, 973 (2003) (requesting a task force be appointed to consider suggested changes to the rule).

128. *See generally* Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 (Dec. 23, 2003) (listing and discussing the questions related to Rule 8a that should be studied by the State Bar of Texas).

129. *Id.* at 29.

130. *Id.*; *see also State Bar Asks Court to Delay Implementation*, 66 TEX. B.J. 972, 973 (2003) (adding that input will also be received "through surveys, written comments, and the *Texas Bar Journal*").

131. *See State Bar Asks Court to Delay Implementation*, 66 TEX. B.J. 972, 973 (2003) (stating that the goal of this study is to regulate the ethical obligations of attorneys in all areas).

132. Order, Texas Supreme Court, Proposed Rule 8a of the Texas Rules of Civil Procedure, No. 03-9207 at 29 (Dec. 23, 2003).

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be tendered to a referendum of the bar's members in Fall of 2004.<sup>133</sup> If the issues that have been brought up are satisfactorily addressed through this process, "proposed Rule 8a will be withdrawn."<sup>134</sup> If proposed Rule 8a is adopted, it will bring about significant changes to the law of referral fees in Texas.<sup>135</sup> While a reform of the law governing these fees may be necessary, postponing the rule's implementation is an important step to ensure proper consideration is being given to the concerns of Texas attorneys.

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133. *Id.* at 30.

134. *Id.*

135. See generally *Proposed Rule 8a of the Texas Rules of Civil Procedure*, 66 TEX. B.J. 971 (2003) (setting forth new requirements for referral fees in Texas).

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