

SHARING FEES THE NEW-FASHIONED WAY

How to get paid and avoid violating Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct when sharing fees.

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Fee sharing did not always require client consent. And when one attorney forwarded a client to another attorney, there was often no expectation of further involvement. The referring attorney in certain significant personal injury cases could expect a payment for the referral. Millions of dollars changed hands this way. The practice was very common with certain attorneys who had enormous television advertising budgets and handled cases in a wholesale manner.

But a few years ago, the rules governing fee sharing changed. And with new requirements on a referring attorney's involvement came an increase in responsibility for the referred client's case, as well as a potential increase in the referring attorney's liability to the client for mistakes in the course of legal representation.

It would seem that many attorneys have become well versed in the new fee sharing requirements since the new rule went into effect on March 1, 2005. According to Jed Molleston, Regional Counsel for the Chief Disciplinary Counsel's Office of the State Bar of Texas, he has not seen an increase in either complaints or in filings against attorneys regarding fee sharing since the new Rule 1.04 has taken effect.

But regardless of Texas attorneys' ability to adapt to the new rules, a quick refresher certainly cannot hurt, and may be especially helpful to those who do not share fees regularly. Additionally, for those who have current representation dating back to before the rule

change of March 1, 2005, understanding the nuances surrounding the transition is important to avoid unnecessary complication and possibly even disciplinary investigation.

Under the new Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct (hereinafter “TDRPC”), fees between lawyers not in the same firm may be divided (1) if the division is proportionate to the services performed by each lawyer or (2) if the division is made between lawyers who assume joint responsibility for the representation. TEX. DISCIPLINARY R. PROF’L CONDUCT, 1.04(f). In either case, the sharing attorneys must obtain the consent of the client. *Id.*

Rule 1.04 of the TDRPC only applies to fee sharing between separate firms or practices. The catch here is that certain “of counsel” associations might fall under Rule 1.04. TEX. DISCIPLINARY R. PROF’L CONDUCT, 1.04(f). While it has not addressed the current incarnation of the fee sharing rule, the Texas Committee on Professional Ethics has answered this question in regards to the old Texas Code of Professional Responsibility’s Disciplinary Rule (“DR”) 2-107(A):

The requirements of DR 2-107(A) of the Texas Code of Professional Responsibility do not apply with respect to a law firm’s sharing legal fees with a lawyer designated as “of counsel” to the firm and having a regular, continuing and substantial relationship with the law firm. Tex. Comm. on Prof’l Ethics, Op. 450, V. 51 Tex. B.J. 165 (1988).

This opinion highlights the importance of the nature of the “of counsel” relationship: fee sharing with an attorney associating only for the purpose of one case for a few months is more likely to fall under Rule 1.04 of the TDRPC than fee sharing with an attorney who has been “of counsel” for years on a number of cases and who regularly associates with the firm in legal matters. Such a requirement for a “regular, continuing and

substantial relationship” prevents attorneys from forming an “of counsel” arrangement solely for the purpose of avoiding the fee sharing rules.

Like other states, Texas allows an attorney to be “of counsel” to more than one firm at a time. *See* State Bar of Texas, Op. 402 (1982). Unfortunately, no court has ruled whether Rule 1.04 of the TDRPC could potentially view each of these “of counsel” relationships equally so as to allow unfettered fee sharing by the “of counsel” attorney.

CONSENT

Client consent is the lynchpin holding together the new Rule 1.04 of the TDRPC. Whether it be for the assumption of joint responsibility, or for the performance of legal services, the initially retained attorney has an obligation to obtain the client’s consent before forging an agreement with another attorney to share services, responsibility or fees. TEX. DISCIPLINARY R. PROF’L CONDUCT, 1.04(f). This is for two reasons: first, clients have the right to select their own counsel; and second, clients have the right to control the dispensation of their personal information.

The client must consent to (1) the identities of all lawyers and firms who will participate in fee-sharing arrangement and (2) the manner in which fees will be divided. TEX. DISCIPLINARY R. PROF’L CONDUCT, 1.04(f)(2). The client must consent in writing. TEX. DISCIPLINARY R. PROF’L CONDUCT, 1.04(f). Consent cannot be retroactive, according to Comments 15 and 16 to Rule 1.04 of the TDRPC: A client must consent “to the terms of the arrangement prior to the time of the association or referral proposed.” Comment 15 to TEX. DISCIPLINARY R. PROF’L CONDUCT, 1.04. Specifically, the arrangement “must be presented to and agreed to by the person before the referral or association between the lawyers involved occurs.” Comment 16 to TEX. DISCIPLINARY R. PROF’L CONDUCT, 1.04.

ARRANGEMENTS ENTERED INTO BEFORE THE DEADLINE

Fee-sharing arrangements entered into prior to March 1, 2005, the date when the amended Rule 1.04 became effective, are not subject to the amended rule so long as prior to March 1, 2005 the client “has been advised of all the lawyers that will be participating in the client’s particular matter.” Order Promulgating Amendments to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, Texas Supreme Court Misc. Docket No. 05-9013, Jan. 28, 2005.

But after March 1, 2005, if an attorney is sharing fees under a pre-March 1, 2005 arrangement and has not at the very least informed his client about all the attorneys involved, then the attorneys not originally retained are left with only the ability to collect under quantum meruit. TEX. DISCIPLINARY R. PROF’L CONDUCT, 1.04(g). According to Robert Schuwerk, a professor of law at the University of Houston Law Center and co-author of *Handbook of Texas Lawyer and Judicial Ethics*, the disciplinary rules are “essentially saying we are giving you a limited period to transition over. You have got to give the clients this minimal notification if you want to take advantage of it. And if you don’t give it to them, you’re stuck with a Paragraph G, quando mero of recovery. That’s all you get.”

In short, if the client had not been informed of who was involved prior to the deadline, an attorney would only be able to rely on the value of the attorney’s services in order to recover any fees. TEX. DISCIPLINARY R. PROF’L CONDUCT, 1.04(g).

ARRANGEMENTS ENTERED INTO AFTER THE DEADLINE

For those arrangements entered into after March 1, 2005 (or for those not properly grandfathered in by notification), there arises another requirement for fee collection: proportionality. Gone are the days of forwarding attorneys who pass along a case, taking a cut of the fee.

After March 1, 2005, every fee must be justified by proportionate legal services or a proportionate assumption of joint responsibility for the client's matter. Comment 12 to TEX. DISCIPLINARY R. PROF'L CONDUCT, 1.04. This proportionality requirement is not, however, without flexibility. The new Rule 1.04 of the TDRPC allows for fee division to be allocated by agreement regardless of proportionality so long as the fee sharing attorneys each have performed "substantial legal services" and the client consented to the agreement. Comment 12 to TEX. DISCIPLINARY R. PROF'L CONDUCT, 1.04.

JOINT RESPONSIBILITY

Where fee sharing is based upon joint responsibility rather than performance of legal services, an attorney having joint responsibility must take certain actions and remain available to the client in addition to obtaining the client's consent to share responsibility. Such an attorney must make reasonable efforts to assure adequacy of representation by personally investigating the client's matter before referring the client elsewhere. Comment 13 to TEX. DISCIPLINARY R. PROF'L CONDUCT, 1.04. The attorney must also provide adequate client communication by monitoring the matter throughout representation and ensuring the client is kept properly informed. Comment 13 to TEX. DISCIPLINARY R. PROF'L CONDUCT, 1.04.

A "referring attorney" who justifies the fee through joint responsibility does not need to attend all depositions or hearings, or be provided with copies of all documents. In

fact, the new Rule 1.04 recognizes that such participation may only increase the cost of representation unnecessarily. *See* Comment 13 to TEX. DISCIPLINARY R. PROF'L CONDUCT, 1.04. However, such an attorney must stay reasonably informed of the matter, must respond to client questions, and must assist the handling lawyer when necessary. *See id.* This level of participation can most likely be shown best through extensive timeslip entries or some similar method of record-keeping.

All in all, not an overwhelming task. However, such involvement is considerably more burdensome than that of a forwarding attorney from the previous Rule 1.04 of the TDRPC who merely passed along the case and collected his share. *See* Comment 14 to TEX. DISCIPLINARY R. PROF'L CONDUCT, 1.04.

CONCLUSION

It must be noted that Rule 1.04 of the TDRPC is a disciplinary rule, and does not direct courts on how they should divide fees when a conflict arises between an attorney and her client or between attorneys sharing fees. Comment 17 to TEX. DISCIPLINARY R. PROF'L CONDUCT, 1.04. However, the Texas Disciplinary Rules of Professional Conduct can often serve as very persuasive authority for a civil court. And because there exists the potential that violating any disciplinary rule can potentially lead to minor sanctions, suspension, or even disbarment, attorneys should be careful to heed Rule 1.04 of the TDRPC. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT, 8.04(a)(1).

The easiest way to avoid improper fee sharing complaints is to obtain client consent up front and before any agreement is reached between the sharing attorneys. That consent must be in writing.

Any attorney involved in a fee sharing arrangement should keep detailed records of legal services performed using the Timeslips billing program or some similar program. This

practice is especially important where fee sharing involves contingency fees where attorneys may be less likely to document their every service. If the client's consent turns out to be incomplete or was not obtained properly, those records will serve two purposes: (1) they will allow the attorney to recover reasonable fees in the event of a fee dispute, and (2) they will add effect to the attorney's defense if faced with a disciplinary grievance.

While the client may forgive an attorney's failure to follow the Texas Disciplinary Rules of Professional Conduct, the prosecutor assigned by the State Bar may not be so magnanimous.

The Bennett Law Firm represents attorneys in grievance matters before the Office of Chief Disciplinary Counsel in all Texas venues. The firm has handled numerous matters before evidentiary panels and civil district courts. Matters before the Board of Disciplinary Appeals, the Texas Board of Law Examiners, and disability hearings comprise a majority of the firm's practice. The Bennett Law Firm is located at 515 Louisiana Avenue, Houston, Texas 77002 and can be reached by telephone at (713) 225-6000, by fax at (713) 225-6001, or by email at contactus@bennetlawfirm.com. Or visit The Bennett Law Firm on the web at <http://www.bennetlawfirm.com>.