

## **Referral Fees**

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Texas has long allowed the payment of referral fees to lawyers. These fees encourage legal services of the best available quality to a client because they remove the temptation of a less experienced or overloaded lawyer to retain a matter in order to receive a fee rather than refer it to a more qualified lawyer or trial specialist who is better able to handle it.

### **What do I need to disclose to my client to be in compliance with the rules of professional conduct?**

Attorney's conduct in relation to referral fees is governed by Rule 1.04 of the Texas

Disciplinary Rules of Professional conduct, which state:

- (a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.
  
- (f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:
  - (1) the division is:
    - (i) in proportion to the professional services performed by each lawyer; or
    - (ii) made between lawyers who assume joint responsibility for the representation; and
  - (2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including
    - (i) the identity of all lawyers or law firms who will participate in the fee-sharing arrangement, and
    - (ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and
    - (iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and
  - (3) the aggregate fee does not violate paragraph (a)

TEX. DISCIPLINARY R. PROF'L CONDUCT §1.04(f) (2008). This recent change in the rule represents a significant strengthening of the requirements and obligations that a referring attorney has to the client. In a recent opinion by the Bankruptcy Court for the Southern District of Texas, the Court held that a written agreement with the client was required for a fee splitting arrangement where contract, which debtor signed, did not mention the local attorney by name; it only stated that the out-of-state law firm would contact and use the services of local counsel. *In re Zuniga*, 332 B.R. 760 (Bankr. S.D. Tex. 2005).

Simply put, the client must consent in writing, such as a contract, to the terms of the arrangement prior to the time of the proposed referral. The disclosed terms that the client must consent to include the identity of all lawyers or firms participating, whether the fees will be divided based on proportion of services performed or by lawyers agreeing to assume joint responsibility, and the share of the fee that each lawyer will receive. Further, the referral fee aggregate may not be unconscionable or illegal.

For your convenience, we have provided sample forms that are provided by the State Bar within this CD which comply with the rules as stated above.

### **How do I satisfy my joint responsibility for representing the client?**

As stated above in Rule 1.04(f)(1)(ii), the referring attorney has a joint responsibility for representing the client. The comments to the rule explain the nature and extent of this obligation as follows:

13. Joint responsibility for the representation entails ethical and perhaps financial responsibility for the representation. **The ethical responsibility assumed requires that a referring or associating lawyer make reasonable efforts to assure adequacy of representation and to provide adequate client communication. Adequacy of representation requires that the referring or**

**associating lawyer conduct a reasonable investigation of the client's legal matter and refer the matter to a lawyer whom the referring or associating lawyer reasonably believes is competent to handle it.** See Rule 1.01. **Adequate attorney-client communication requires that a referring or associating lawyer monitor the matter throughout the representation and ensure that the client is informed of those matters that come to that lawyer's attention and that a reasonable lawyer would believe the client should be aware.** See Rule 1.03. Attending all depositions and hearings, or requiring that copies of all pleadings and correspondence be provided a referring or associating lawyer, is not necessary in order to meet the monitoring requirement proposed by this rule. These types of activities may increase the transactional costs, which ultimately the client will bear, and unless some benefit will be derived by the client, they should be avoided. **The monitoring requirement is only that the referring lawyer be reasonably informed of the matter, respond to client questions, and assist the handling lawyer when necessary. Any referral or association of other counsel should be made based solely on the client's best interest.**

14. In the aggregate, the minimum activities that must be undertaken by referring or associating lawyers pursuant to an arrangement for a division of fees are substantially greater than those assumed by a lawyer who forwarded a matter to other counsel, undertook no ongoing obligations with respect to it, and yet received a portion of the handling lawyer's fee once the matter was concluded, as was permitted under the prior version of this rule. Whether such activities, or any additional activities that a lawyer might agree to undertake, suffice to make one lawyer participating in such an arrangement responsible for the professional misconduct of another lawyer who is participating in it and, if so, to what extent, are intended to be resolved by Texas Civil Practice and Remedies Code, ch. 33, or other applicable law.

TEX. DISCIPLINARY R. PROF'L CONDUCT §1.04 & cmt. (2008).

In other words, the referring lawyer is required to do two things to comply with his joint responsibility for the client (1) make reasonable efforts to investigate the client's legal matter and refer the case to a lawyer that he believes is competent to handle it, and (2) be reasonably informed on the matter, respond to client questions and assist the handling lawyer when necessary.