THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 688
May 2020

QUESTIONS PRESENTED

1. When a lawyer retained under a contingent fee agreement withdraws from the representation due to a nonconsentable conflict of interest discovered shortly after he filed plaintiff's lawsuit, is it a violation of the Texas Disciplinary Rules of Professional Conduct for the withdrawing lawyer to refer his client to a lawyer in another law firm and arrange for a division of fees between the withdrawing lawyer and the lawyer to whom the matter is referred?

2. Is it a violation of the Rules for the withdrawing lawyer to reach an agreement with his former client that provides for the withdrawing lawyer to be reimbursed for costs and compensated for attorneys' fees incurred before the lawyer realized he had a nonconsentable conflict?

STATEMENT OF FACTS

A lawyer signed a contingent fee agreement with a plaintiff who sustained serious injuries in a car accident. Soon thereafter, the lawyer filed a lawsuit for the plaintiff against the defendant driver. The defendant filed an answer and a third-party action against a third-party defendant, who was a long-time client of the plaintiff's lawyer.

The lawyer determined that to protect the plaintiff's interests he would need to amend the petition to assert a claim against the third-party defendant and aggressively prosecute that claim. As a result, the lawyer concluded he had a conflict of interest under Rule 1.06(b)(2), in that his representation of the plaintiff appeared to be adversely limited by both his responsibilities to his long-time client and by his own interests in continuing a harmonious attorney-client relationship with that long-time client. Additionally, because the lawyer believed that his representation of the plaintiff would in fact be materially affected by his relationship with the third-party defendant, the lawyer concluded the conflict of interest was "nonconsentable," that is, he could not continue the representation even if he obtained the informed consent of the affected clients. *See* Rule 1.06(c)(1). Thus, he decided he was obligated to withdraw from representation of plaintiff.

Before the conflict was identified, the withdrawing lawyer had prepared, filed, and served the original petition. He had spent less than ten hours on the case, and the only costs he had incurred were filing fees and fees related to service of process.

Although he was withdrawing from the representation due to a conflict, the withdrawing lawyer wanted to retain a significant fee interest in the case and proposed a division of fees with the successor lawyer. Specifically, the withdrawing lawyer proposed that he receive 75% of the fees on the first $1 million of any recovery and that the successor lawyer receive 25% of the fees,

and he proposed that he and the successor lawyer divide the fees on any recovery above $1 million on a 50-50 basis.

Alternatively, the withdrawing lawyer wanted to recoup case expenses and the reasonable value of the legal services performed before the conflict was discovered.

The lawyer sought guidance as to whether he could refer the case to another lawyer and agree to the proposed division of fees provided for by a contingent fee agreement or, alternatively, whether he could be reimbursed for his expenses and the reasonable value of the services he had provided as of the date the conflict was discovered.

DISCUSSION

Rule 1.04(f) of the Texas Disciplinary Rules of Professional Conduct addresses the division of fees between lawyers who are not in the same firm. Rule 1.04(f)(1) provides that a division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if 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. . ." Thus, "fee divisions between lawyers not in the same firm must be made either in proportion to the professional services performed by each lawyer or based on the lawyers' assumption of joint responsibility for the representation." Professional Ethics Opinion 568 (April 2006). Any such agreements must comply with the requirements of Rule 1.04(f)(2), which include the requirement of written client consent prior to the proposed association or referral.

The adoption of Rule 1.04(f) abolished the pure referral fee—a fee paid to a referring lawyer simply because he referred the case and not because the referring lawyer performed work on or assumed any joint responsibility for the matter. Opinion 568.

Division of Fees "In Proportion to the Professional Services Performed." The Rules allow for a division of fees "in proportion to the professional services performed by each lawyer." Rule 1.04(f)(1)(i). "A division of a fee based on the proportion of services rendered by two or more lawyers contemplates that each lawyer is performing substantial legal services on behalf of the client with respect to the matter" and requires that "each lawyer who participates in the fee have performed services beyond those involved in initially seeking to acquire and being engaged by the client." Comment 12 of Rule 1.04.

Thus, if a referring lawyer does not perform substantial legal services before withdrawing from the representation, the referring lawyer may not agree to a division of fees in proportion to the professional services performed. In the present case, one could argue that the lawyer did not perform substantial legal services because (1) the lawyer spent fewer than ten hours on the case before identifying the conflict, and (2) the case involves serious personal injuries and will probably require much more work before it is resolved. But whether a lawyer has performed "substantial legal services" is a question of fact that depends on all the circumstances of the particular representation. In some instances, a qualitative assessment of "substantial legal services" may be more appropriate than a purely quantitative assessment. Based on the limited facts presented, the

Committee cannot conclude that the lawyer did (or did not) provide substantial legal services before deciding to withdraw.

The Committee nevertheless concludes that the fee division proposed by the referring lawyer cannot reasonably be considered a division "in proportion to the professional services performed." The proposed fee division is a predetermined formula whereby the referring lawyer is to receive 75% of the fees earned on the first $1 million of recovery and 50% thereafter. In order to divide fees in proportion to the professional services performed under Rule 1.04(f)(1)(i), "[t]here must be a reasonable correlation between the amount or value of service rendered and responsibility assumed, and the share of the fee to be received." Comment 12 of Rule 1.04. In the opinion of the Committee, there is no "reasonable correlation" between the amount or value of services rendered in merely filing a petition and a predetermined 75% or 50% share of all fees earned from future recovery in a serious personal injury case.

The Committee does not reach the question of whether a lawyer may ever enter into a fee division "in proportion to the professional services performed" if the lawyer will not be representing the client at all after entering into a fee division agreement. *Compare* Rule 1.04(f)(i), which does not specifically require continuing representation by both lawyers who agree to divide fees based on the proportion of services provided, *with* comment 12 to Rule 1.04, which provides that a proportional services fee division agreement "contemplates that each lawyer *is* performing substantial legal services on behalf of the client with respect to the matter." (emphasis added). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 487 (2019) ("Fee Division with Client's Prior Counsel") (addressing division of a contingent fee by client's prior counsel and successor counsel when prior counsel was terminated without cause and observing that ABA Model Rule 1.5(e), which is similar to Texas' Rule 1.04(f), "is limited to situations where two or more lawyers are working on a case simultaneously—not sequentially").

Division of Fees Based on Assumption of Joint Responsibility. The Rules also allow for a division of fees between lawyers who assume joint responsibility for the representation. Rule 1.04(f)(1)(ii). Joint responsibility entails ethical responsibility for the representation, including making efforts to assure the adequacy of the representation by a lawyer whom the referring lawyer believes is competent to handle the matter. *See* Comment 13 of Rule 1.04. It also requires that the referring lawyer "monitor the matter throughout the representation and ensure that the client is informed of those matters that come to the lawyer's attention and that a reasonable lawyer would believe the client should be aware." *Id.* While the monitoring requirement does not mean that the lawyer must attend every proceeding or review every document, it does require that the "referring lawyer be reasonably informed of the matter, respond to client questions, and assist the handling lawyer when necessary." *Id.*

It is impossible for a lawyer who withdraws from an ongoing representation due to a conflict of interest to exercise joint responsibility for the representation after the withdrawal. The very conflict that prevents the lawyer from continuing the initial representation of the plaintiff also prevents the lawyer from meeting the joint responsibility requirements outlined in Comment 13 to Rule 1.04. *See, e.g.*, New York State Bar Association Committee on Professional Ethics, Opinion No. 745 (July 18, 2001) (concluding that "where a lawyer is unable to assume *sole* responsibility for a matter due to a conflict of interest, that lawyer is also disqualified from assuming *joint*

responsibility"). Accordingly, a lawyer who withdraws from an ongoing representation due to a conflict of interest may not enter into an agreement to divide fees based on the acceptance of joint responsibility for the representation with client's new lawyer.

Pure Referral Fee. As mentioned above, a pure referral fee is no longer allowed under the Rules. Determination of whether a proposed fee division agreement calls for a pure referral fee depends on the facts and circumstances, including the intent of the parties. A fee division agreement may be characterized as an impermissible pure referral fee agreement even though the lawyer provided some services before withdrawing from the representation due to a nonconsentable conflict. Here, given the relatively limited services provided before the discovery of the nonconsentable conflict, it is possible that the withdrawing lawyer's proposed division of fees is based entirely on the referral of the case. If so, any agreement to divide the fees between the two lawyers is impermissible, whether or not the agreement otherwise appears to be in compliance with Rule 1.04(f).

Quantum Meruit. The lawyer also asks whether a lawyer who withdraws due to a conflict of interest violates the Rules by seeking recovery in quantum meruit for services provided before the conflict was discovered.

Texas common law often does allow a lawyer to recover in quantum meruit after the representation terminates prematurely, but ordinarily does not allow a lawyer to recover in quantum meruit if the lawyer terminated the representation without "just cause." *Augustson v. Linea Aerea Nacional-Chile S.A. (LAN-Chile),* 76 F.3d 658, 662 (5th Cir. 1996). Whether Texas law allows a lawyer to recover in quantum meruit on the facts described in this Opinion is a question of law beyond the authority of this Committee.

Nevertheless, assuming there is no common law prohibition, the Committee concludes that a lawyer who withdraws due to a conflict of interest does not violate the Disciplinary Rules merely by seeking quantum meruit relief regarding the services provided before the conflict was discovered. Further, in such a circumstance, a lawyer may also attempt to reach an agreement with the client pertaining to compensation for the reasonable value of legal services provided to the client before withdrawal and the reasonable and necessary expenses actually incurred on behalf of the client.

A lawyer should be mindful that courts "scrutinize with jealousy" all modifications to a client fee agreement during the representation. *Archer v. Griffith,* 390 S.W.2d 735, 739 (Tex. 1964). "There is a presumption of unfairness or invalidity attaching to the contract, and the burden of showing its fairness and reasonableness is on the attorney." *Id. See also* Opinion 679 (September 2018) (renegotiating fee during representation) and ABA Formal Opinion 11-458 (2011) ("Changing Fee Arrangements During Representation").

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, lawyers who are not in the same firm may divide fees either on the basis of the proportion of services they render or if the

lawyers assume joint responsibility for the representation. But, a lawyer who withdraws from the representation based upon a nonconsentable conflict of interest may not enter into an arrangement to divide fees based on joint responsibility. Further, a lawyer may not enter into an agreement to divide fees based on the proportion of services when the lawyer has not performed substantial legal services on behalf of the client, or when there is no reasonable correlation between the amount or value of service rendered and responsibility assumed and the share of the fee to be received. Finally, regardless of how the fee division is characterized, a lawyer may not enter an agreement for a pure referral fee. The Rules do not prohibit a lawyer from recovering or seeking to recover the reasonable value of services provided to the client and the reasonable expenses actually paid by the lawyer before the representation ended, assuming such recovery is permissible under Texas common law.