

PROPOSED RULE 8A – LITIGATION SECTION RESOLUTION

RESOLUTION OF THE LITIGATION SECTION¹ OF THE STATE BAR OF TEXAS OPPOSING PROPOSED RULE 8A OF THE TEXAS RULES OF CIVIL PROCEDURE

WHEREAS, the Litigation Section of the State Bar of Texas has 7,337 members. Our members represent both plaintiffs and defendants.

WHEREAS, the Litigation Section of the State Bar of Texas is dedicated to the enhancement and improvement of our system of justice and the delivery of quality legal services to clients and the public. The Section strives to promote excellence in the profession through service to our members, through education of our members, and by insuring equal access to our honorable system of adversarial justice for all persons and entities regardless of station.

WHEREAS, The Texas Supreme Court has proposed new Rule 8a governing payment, disclosure and reporting of certain types of referral fees. Respectfully, the Litigation Section of the State Bar of Texas avers that proposed Rule 8a falls outside of the Court's rule-making authority. Rule 8a is not a rule of procedure; rather, it addresses an issue that is governed by the Texas Rules of Professional Conduct. There is an established mechanism in this State for amending the Rules of Professional Conduct. Indeed, no other state in the country regulates referral fees under the auspices of a rule of procedure.

WHEREAS, the work of resolving legal disputes goes on every day in thousands of courts in this country. Enshrined in our legal system are the ideals of liberty and equality. We the members of the Litigation Section of the State Bar must protect the sanctity of those ideals.

WHEREAS, to safeguard against the erosion of liberty and equality in our judicial system, the parties to a dispute in our legal system are entitled to seek the support of those lawyers who are best capable of protecting the parties' interests. The first lawyer a party contacts may not be the best lawyer suited to handle the case and protect that party's interest. By recognizing the limitations of one's own practice, a lawyer is able to refer the case to a lawyer who will more effectively represent the client. The fact that the likelihood of client's recovery will be increased due to the second lawyer's abilities, inures to the benefit of the client, even if it incidentally also provides a benefit to the referring lawyer, as well. Our litigation system should encourage, not discourage, lawyers to refer cases to other lawyers better able to handle a given case.

WHEREAS, the opponents of referral fees generally put forth two arguments. They say that such fees increase costs for clients; and they say that referral fees

¹ The members of the Section who are members of the judiciary have abstained from this Resolution. Further, members of the Section support this Resolution in their individual capacity and not in any representative capacity.

encourage solicitation of clients. Neither argument justifies a proposed rule that has the effect of depriving claimants of the most effective representation and the effect of discriminating among lawyers.

WHEREAS, the current system of referral fees promotes efficiency and improves the final result for the client. Proposed Rule 8a encourages lawyers to keep cases outside their areas of expertise rather than refer it to a specialist who knows the law and the best manner in which to handle such a case.

WHEREAS, specific rules of professional responsibility address solicitation of clients. Enforcing or modifying those rules is the appropriate method by which to deal with the issues raised by proposed Rule 8a.

WHEREAS, the proposed Rule 8a harms the very entities it is intended to protect -- clients. Under proposed Rule 8a, lawyers will have a greater incentive to retain clients, even to the point of practicing in a new and unfamiliar area of law. The harm in those circumstances is self-evident.

WHEREAS, there is wide disparity among the states on the issue of referral fees. Sixteen states have not adopted the ABA's Model Rules and permit referral fees with varying conditions on the reasonableness of such fees. Twenty states have adopted the ABA's Model Rule 1.5 which permits reasonable referral fees in proportion to the services rendered. Eight states (Alabama, Connecticut, Kansas, Michigan, Pennsylvania, Texas, Washington and West Virginia) have no formal restrictions on referral fees (although some states require such fees to be reasonable). Six states (Florida, Illinois, Minnesota, Nevada, Wisconsin and D.C.) moderately restrict referral fees. Three states (Colorado, Hawaii and Wyoming) effectively ban referral fees.

WHEREAS, we do not believe that the Supreme Court, the Bar Association, or the members of the Bar have had sufficient time to study and analyze this issue or alternative methods of addressing the issues raised by proposed Rule 8a.

NOW, THEREFORE, BE IT RESOLVED THAT, FOR THE FOREGOING REASONS, THE LITIGATION SECTION OF THE STATE BAR OF TEXAS OPPOSES PROPOSED RULE 8a, AND SAYETH FURTHER,

RESOLVED, the current system of professional responsibility adequately and effectively protects against the harm proposed Rule 8a seeks to safeguard against;

RESOLVED, the referral fee system currently in place provides claimants with the opportunity to secure the best counsel;

RESOLVED, the current referral fee system creates efficiency by facilitating relationships between claimants and specialists in the law;

RESOLVED, proposed Rule 8a is not a proper rule of civil procedure. The subject matter of the proposed rule should be addressed, if at all, by the Texas Rules of Professional Conduct.

BE IT FURTHER RESOLVED THAT proposed Rule 8a not be adopted at this time. Rather, the Texas Supreme Court should defer adoption of proposed Rule 8a until September 1, 2005 to give the State Bar's Litigation Section, the State Bar Association, local bar associations, and members of the Bar an opportunity to study and analyze the current referral system. Respectfully, the Litigation Section suggests that a committee be appointed comprised of representatives of the Court, leaders of the Bar and representatives of the Bar Association. This committee should be charged with the responsibility of determining whether and what changes should be made to our current system and to determine whether the proposed changes, if any, should be submitted to the Bar for a referendum and, if so, to implement such a referendum before September 1, 2005.

Approved and adopted this 6th day of Novmeber, 2003.

We, the undersigned, hereby certify that the foregoing Resolution was duly adopted by the Litigation Section of the State Bar of Texas.

Signed by: Talmage Boston, *Dallas, Chair*, Andy Tindell, *Tyler*, Daniel W. Bishop, *Austin*, Kim J. Askew, *Dallas*, John E. Simpson, *Lubbock*, Luther H. "Luke" Soules, III, *San Antonio*, Susan I. Nelson, *Waco*, Eduardo R. Rodriguez, *Brownsville*, Mack Barnhart, *Gainesville*, Paula W. Hinton, *Houston*, Joseph F. "Joe" Brophy, III, *Austin*, Fred Bowers, *Lubbock*, Alistair B. Dawson, *Houston*, Jan Woodward Fox, *Houston*, Walker Friedman, *Fort Worth*, Georffrey L. Harrison, *Houston*, Professor Lonny Hoffman, *Houston*, Jeffrey T. Lucky, *El Paso*, Elizabeth Mack, *Dallas*, Linda S. McDonald, *San Antonio*, Augustin Rivera, Jr., *Corpus Christi*, Michael Smith, *Marshall*