

# THE POLITICS OF LEGAL ETHICS: CASE STUDY OF A RULE CHANGE

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*Despite its obvious importance to the content and legitimacy of a state's rules of legal ethics, the process by which these rules are made has received little scholarly attention. This Article undertakes a case study of the 2005 amendments to the Texas ethics rule governing referral fees and fee sharing among attorneys as a window through which to explore some larger questions about state supreme courts' regulation of the legal profession: what are (and should be) the goals and purposes of the process by which states' rules of legal ethics are made; and how might that rulemaking process be (re)structured in order best to achieve those goals and purposes?*

## INTRODUCTION

The regulation of the legal profession within the states has historically been the province of the state supreme courts. The state supreme courts, however, have typically delegated the bulk of the actual regulatory work to their state bar associations and, ultimately, to certain state bar committees. These committees study possible changes in the ethics rules, draft changes to the rules, provide authoritative "comments" on the rules, and hand down ethics opinions interpreting and applying the rules. Despite its obvious importance to the content and legitimacy of a state's rules of legal ethics, the process by which these rules are made has received strikingly little scholarly attention.<sup>1</sup>

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1. The most significant study to date of the process by which rules of legal ethics are made remains Ted Schneyer's pathbreaking article published more than twenty years ago, which focuses on the rulemaking process of the American Bar Association rather than the process of any particular state. See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989).

This Article begins to fill that gap by examining the changes adopted in 2005 to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, concerning referral fees and fee sharing among attorneys. I contend that the additional requirements imposed by the revised rule do not benefit the clients of the affected attorneys, who are disproportionately, perhaps exclusively, plaintiffs' attorneys. Indeed, these changes can be expected most greatly to benefit the defendants in those clients' cases, to the obvious disadvantage of the clients (and their attorneys).

Thus, this case study raises two larger questions about the process by which state rules of legal ethics are made—questions to which I offer only preliminary and tentative answers in this Article: (1) what are the goals and purposes of the rulemaking process by which state supreme courts regulate the legal profession; and (2) how might that rulemaking process be (re)structured in order best to reflect those goals and purposes? This Symposium in honor of my dear friend and former colleague, Ted Schneyer, seems a particularly apt occasion on which to discuss these two larger issues in the regulation of the legal profession, given his own pathbreaking contributions on these topics during a long and distinguished career.<sup>2</sup>

Part I of this Article describes the changes to the Texas ethics rule governing referral fees and fee sharing that took effect on January 5, 2005, and outlines the process by which those changes were crafted and then adopted. Part II examines the reasons given by the drafters for the changes to the rule's disclosure and consent requirements and contrasts these reasons with the likely effects of the changes. Part III.A offers some explanations for how these changes to Rule 1.04 came to be proposed and adopted despite imposing costs on clients that seem likely to exceed any benefits. Part III.B then proposes four ways in which the process by which rules of legal ethics are made in Texas and other states might be (re)structured in order better to reflect the larger purposes of the legal profession's regulation of itself.

## I. TEXAS RULE 1.04 AND THE 2005 AMENDMENTS

### A. *The Changes to the Rule*

From January 1, 1990 until March 1, 2005, the Texas ethics rule governing fee sharing between lawyers was one of the least restrictive in the country. In particular, the rule explicitly permitted fees to be shared with a "forwarding lawyer," and allowed client consent to attorneys' fee-splitting arrangements to be obtained via a low-transaction-cost "negative check-off" procedure. In relevant part, the rule stated:

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2. See, e.g., Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DEPAUL L. REV. 371 (1998); Schneyer, *supra* note 1; Ted Schneyer, *The Organizational Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 363 (2008); Ted Schneyer, *Reform of the Legal Profession in the Interest of Justice: The Danger of Privileging Public over Professional Values*, 70 FORDHAM L. REV. 1831 (2002); Ted Schneyer, *Who Should Define Arizona's Corporate Attorney-Client Privilege?: Asserting Judicial Independence Through the Power to Regulate the Practice of Law*, 48 ARIZ. L. REV. 419 (2006).

(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:
  - (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>3</sup>

The 2005 amendments to 1.04(f) effected important changes to paragraph (f). Most notably, the “negative check-off” disclosure and consent procedure authorized by paragraph (f)(2) was replaced by a procedure that is much more burdensome for attorneys and requires affirmative, written consent from clients:

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

...

- (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 . . . .<sup>4</sup>

In addition to the above requirements, the 2005 amendments explicitly prohibited attorneys from obtaining advance consent from their clients to any unspecified future sharing of attorneys’ fees determined to be in the client’s best interests, something that many plaintiffs’ attorneys had historically done regularly

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3. TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.04(f) (1989) (amended 2005). Paragraph (a) of Rule 1.04 stated that “[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.” *Id.* R. 1.04(a).

4. TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.04(f) (2005).

through language in the attorney–client contract.<sup>5</sup> The 2005 amendments added substantial language to paragraph (g) which, as revised, explicitly precluded subsequently retained attorneys from collecting a contingent fee in cases in which the client’s consent to the signing attorney’s fee split with the additional attorney(s) was not obtained through the detailed procedures set out in amended paragraph (f)(2).<sup>6</sup> In those cases, the attorney’s compensation was limited to “the reasonable value of legal services provided to that person” and reimbursement of “the reasonable and necessary expenses actually incurred on behalf of that person.”<sup>7</sup>

The 2005 amendments did not alter the requirement of paragraph (f)(3) that the aggregate fee not be illegal or unconscionable.<sup>8</sup> They did, however, eliminate the availability under former paragraph (f)(1)(ii) for fees to be shared with “a forwarding lawyer,” and restricted the sharing of fees to attorneys who are performing “professional services” and/or “who assume joint responsibility for the representation.”<sup>9</sup>

In addition to the changes to Rule 1.04 detailed above, the 2005 amendments included numerous, significant additions to the formal comments on the rule’s provisions regarding fee splitting. The formal comments are nearly as

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5. *Id.* R. 1.04(f) cmt. 15. Prior to the 2005 amendments, many attorney–client retainer agreements used by Texas contingent-fee attorneys included a provision under which the client authorized the attorney to retain, at the attorney’s expense, any additional counsel to assist with the client’s case whom the signing attorney believed to be in the client’s best interest. *See* various anonymized retainer agreements on file with Author.

6. *Id.* R. 1.04(g). It should be noted that paragraph (g) states that “[n]o attorney shall collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed [in conformance with the requirements of paragraph (f)(2)], except for (1) the reasonable value of legal services provided to that person; and (2) the reasonable and necessary expenses actually incurred on behalf of that person.” *Id.* (emphasis added).

It seems unambiguous that the attorney(s) with whom the signing attorney is undertaking to share fees is to be limited to the quantum meruit compensation specified in paragraph (g). It is not clear, however, whether the rule intends also to limit the signing attorney’s compensation in this way. To the extent that the signing attorney’s contingent-fee contract with the client is otherwise valid and proper, the signing attorney’s contractual contingent fee would not seem to be at risk. The signing attorney, after all, is collecting fees under the original contract’s contingent-fee provision; it is only the attorneys who are later retained pursuant to a fee-sharing agreement with the signing attorney who are arguably seeking to collect fees pursuant to the agreement that is prohibited by paragraph (g).

7. *Id.*; *see supra* note 6.

8. *Compare id.* R. 1.04(f)(3), with TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.04(f)(3) (1989) (amended 2005).

9. *Compare* TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.04(f)(1) (2005), with TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.04(f)(1) (1989) (amended 2005). The 2005 amendments eliminated the option of what is sometimes called the “pure” forwarding fee, which has been described as “a fee merely for forwarding a matter to another lawyer,” a fee to “a forwarding lawyer who neither renders legal services nor assumes joint responsibility for the representation of the client.” Richard C. Hile, *An Analysis of 2005 Changes to Rule 1.04 and Part VII of the Texas Disciplinary Rules of Professional Conduct*, in STATE BAR OF TEXAS 21ST ANNUAL ADVANCED PERSONAL INJURY LAW COURSE, ch. 18.2, at 3 (2005) (on file with Author).

significant as the rules themselves for purposes of both professional discipline and the civil liability of lawyers for professional misconduct. The Preamble to the rules states that the comments “frequently illustrate or explain applications of the rules, in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules.”<sup>10</sup> And although the “rules do not undertake to define standards of civil liability of lawyers for professional conduct,”<sup>11</sup> courts and plaintiffs frequently invoke the rules and the comments in breach-of-fiduciary-duty cases<sup>12</sup> and when seeking to disqualify opposing counsel.<sup>13</sup>

Prior to the 2005 amendments, there were only two formal comments to Rule 1.04 regarding the division of fees. Comment 10 defined a “division of fees” for purposes of the rule, and noted that a “division of fees facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well.”<sup>14</sup> The Comment went on to explain that “[b]ecause the association of additional counsel normally will result in a further disclosure of client confidences

10. See TEX. DISCIPLINARY R. PROF. CONDUCT pmb1., ¶ 10 (2005). This paragraph of the Preamble further notes that “[t]he Comments do not, however, add obligations to the rules and no disciplinary action may be taken for failure to conform to the Comments.” *Id.*

11. *Id.* ¶ 15. Thus, “[v]iolation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached. . . . [N]othing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.” *Id.*

12. In cases alleging a breach of a fiduciary duty, the ethics rules are sometimes invoked as a guide to the nature and extent of the attorney’s fiduciary obligations to the client. For example, in one of the most important civil liability cases decided by the Texas Supreme Court in the past two decades involving attorneys’ professional responsibilities, the plaintiff-clients (respondents on appeal) alleged that the defendant-attorneys violated seven different Texas ethics rules during the course of the representation. *Burrow v. Arce*, 997 S.W.2d 229, 232 (Tex. 1999) (alleging violations of TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.01, 1.02, 1.03, 1.08(f), 2.01, 5.06(b), and 7.03(b)). In remanding the case to the district court, the Texas Supreme Court underscored the significance of the defendant-attorneys’ alleged disciplinary rules violations to the plaintiff-clients’ civil liability claim that the attorneys breached their fiduciary obligations:

Even were we to address [the plaintiff-clients’ claim that the defendant-attorneys violated TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.08(f)], we could not render judgment for the Attorneys without considering whether the other alleged disciplinary rules violations might also justify forfeiture [of attorneys’ fees], an issue barely mentioned in all the parties’ briefing. All these issues must be considered by the district court on remand.

*Id.* at 246.

13. The Texas courts have held that “[a]lthough the Disciplinary Rules do not determine whether counsel is disqualified in litigation, they ‘provide guidance and suggest the relevant considerations.’” *Pollard v. Merkel*, 114 S.W.3d 695, 698 (Tex. Ct. App. 2003) (quoting *In re Users Sys. Servs., Inc.*, 22 S.W.3d 331, 334 (Tex. 1999)). In ruling on the motion to disqualify counsel at issue in *Pollard*, the Texas Court of Appeals discussed numerous Texas ethics rules as well as Comments 1, 8, and 14 to Rule 1.05, and Comments 4 and 7 to Rule 1.09. *Id.* at 698–703.

14. A “division of fees” was defined as “a sharing of a single billing to a client between two or more lawyers who are not in the same firm.” TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.04 cmt. 10 (1989) (amended 2005).

and have a financial impact on a client, advance disclosure of the existence of that proposed association and client consent generally are required.”<sup>15</sup> Underscoring the significance of those two bases for the rule’s disclosure and consent requirements, the Comment added that “[w]here those consequences will not arise, . . . disclosure is not mandated by this Rule.”<sup>16</sup> Comment 11 to the pre-amendment Rule 1.04 elaborated on the three bases for a division of fees that were permitted at that time and explicitly noted that “[p]aragraph (f) does not require disclosure to the client of the share that each lawyer is to receive.”<sup>17</sup>

The 2005 amendments significantly altered previous Comments 10 and 11 and added seven more comments regarding the division of fees. Deleted from Comment 10 were the reasons for paragraph (f)’s disclosure and consent requirements, as well as the conditions under which disclosure would not be required. Also deleted was the statement in Comment 11 that the share that each lawyer is to receive need not be disclosed to the client. These changes, as well as six of the seven new comments, seem to fall into one of two categories: elaborating on the substantially heightened disclosure and consent requirements of the amended rule,<sup>18</sup> or detailing the implications and effects of the elimination of the “pure forwarding fee” as a permissible type of fee sharing.<sup>19</sup>

Most striking among the changes effected to Rule 1.04 and its comments by the 2005 amendments are paragraph (g) and its companion Comment 15. Both of these explicitly preclude, among other things, clients from waiving their right to certain disclosures that were not even required to be made under the previous edition of the rule. Consider new Comment 15:

A client must consent in writing to the terms of the [fee-sharing] arrangement prior to the time of the association or referral proposed. For this consent to be effective, the client must have been advised of at least the key features of that arrangement. Those essential terms . . . are 1) the identity of all lawyers or law firms who will participate in the fee-sharing arrangement, 2) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and 3) the share of the fee that each lawyer or law firm will receive or the

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15. *Id.*

16. *Id.* Comment 10 gave the following example of when disclosure was not required under pre-amendment Rule 1.04:

[I]f a lawyer hires a second lawyer for consultation and advice on a specialized aspect of a matter and that consultation will not necessitate the disclosure of confidential information and the hiring lawyer both absorbs the entire cost of the second lawyer[’s] fees and assumes all responsibility for the advice ultimately given the client, a division of fees within the meaning of this Rule is not involved.

*Id.*

17. *Id.* cmt. 11.

18. *See, e.g., id.* cmts. 10–12, 15–17.

19. *See, e.g., id.* cmts. 12–14. The lone exception is Comment 18 to amended Rule 1.04, which states that “[s]ubparagraph (f)(3) requires that the aggregate fee charged to clients in connection with a given matter by all of the lawyers involved meet the standards of paragraph (a) — that is, not be unconscionable.” *Id.* cmt. 18.

basis on which the division will be made if the division is based on proportion of services performed. *Consent by a client or prospective client to the referral to or association of other counsel, made prior to any actual such referral or association but without knowledge of the information specified [above] does not constitute sufficient client confirmation within the meaning of this rule.*<sup>20</sup>

In addition, although the pre-2005 comments made clear that client disclosure and consent were needed only in situations in which the splitting of fees would “result in a further disclosure of client confidences and have a financial impact on a client,”<sup>21</sup> the 2005 amendments effected many changes, including those set out in 1.04(g) and in Comment 15 above, that were inconsistent with those stated policy concerns.<sup>22</sup> No explanation was given for why the previously stated concerns were abandoned. Their explicit statement was simply deleted from the comments by the 2005 amendments.

Notwithstanding the absence of any articulated policy concern, the 2005 amendments further underscored the importance of the heightened disclosure and consent requirements of Rule 1.04 by adding paragraph (g)’s fee sanctions,<sup>23</sup> as elaborated in Comments 16<sup>24</sup> and 17.<sup>25</sup> The effect of these changes was that a contingent-fee attorney whose actions were clearly in compliance with the requirements of the pre-2005 Rule 1.04(f) might be subject to severe financial sanctions after the 2005 amendments for taking the very same actions.

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20. *Id.* cmt. 15 (emphasis added).

21. *See* TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.04 cmt. 10 (1989) (amended 2005); *see also supra* note 11 and accompanying text.

22. *See, e.g.,* TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.04(g) & cmts. 12, 15–17 (2005).

23. *Id.* R. 1.04(g). Rule 1.04(g) states:

No attorney shall collect or seek to collect fees or expenses in connection with any such agreement [in which the client has not received all of the information specified in subparagraph (f)(2) prior to giving written consent to the fee split], except for: (1) the reasonable value of legal services provided to that person; and (2) the reasonable and necessary expenses actually incurred on behalf of that person.

*Id.*

24. Comment 16 states in relevant part that “[p]aragraph (g) facilitates the enforcement of the requirements of paragraph (f),” and underscores the requirement that the fee split “must be presented to and agreed to by the [client] before the referral or association between the lawyers involved occurs.” *Id.* cmt. 16. That Comment also confirms that paragraph (g) provides “for recovery in quantum meruit in instances where its requirements are not met” by the attorneys seeking to split a fee. *Id.*

25. Comment 17 states that “[w]hat should be done with any otherwise agreed-to fee that is forfeited in whole or in part due to a lawyer’s failure to comply with paragraph (g) is not resolved by these rules.” *Id.* cmt. 17. Comment 15 states that “[t]he referring or associating lawyer or any other lawyer who employs another lawyer to assist in the representation has the primary duty to ensure full disclosure and compliance” with Rule 1.04. *Id.* cmt. 15.

### *B. The Rulemaking Process*

How did the 2005 amendments to Rule 1.04 come about? The triggering event turns out to have had nothing at all to do with the Texas ethics rules.

On October 9, 2003, the Texas Supreme Court issued an order proposing to amend the Texas Rules of Civil Procedure by adding Rule 8a regarding “Referral Fees.”<sup>26</sup> The proposed rule would have capped referral fees paid “to an attorney who does not, and is not reasonably expected to, provide professional services in the case” at “\$50,000 or 15% of the attorney fees for the party in the case, whichever is less.”<sup>27</sup> In addition, the proposed rule required the “attorney in charge for a party” to file a notice with the court within thirty days of either the attorney’s first appearance or the payment or agreement to pay a referral fee, disclosing the amount of every referral fee paid or agreed to be paid and affirming that the client had approved each such payment or agreement.<sup>28</sup> The proposed rule also authorized the court to impose various sanctions on attorneys who either “intentionally failed to make” the required disclosures to the court or who engaged in improper division of fees, with the available sanctions ranging from disqualification of the attorney from further representation of the party to forfeiture of all attorneys’ fees in the case.<sup>29</sup>

The response to the proposed new rule of civil procedure was negative, with “the overwhelming majority [of over 280 written public comments to the Court] opposing such rule.”<sup>30</sup> After requests by “members of the bar, various sections and special interest groups within the bar, and the State Bar leadership,” the Texas Supreme Court issued an order in December 2003 withdrawing the proposed Rule 8a and authorizing the State Bar to appoint a special task force.<sup>31</sup> The Court “commend[ed] to the Bar for study, among others that may be raised,” various questions regarding the regulation of referral fees.<sup>32</sup> In January 2004, the State Bar Board of Directors appointed a nineteen-person Task Force on referral fees.<sup>33</sup> The Task Force, chaired by Richard Hile, was authorized to hold public hearings in various cities across the state and to conduct a survey in order “to

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26. Supreme Court of Texas, Order, Amendments to the Texas Rules of Civil Procedure, Misc. Docket No. 03-9160 (Oct. 9, 2003); *see also* Hile, *supra* note 9, at 1, 13–15, app. A; RICHARD PENA, THE NEW REFERRAL FEE LANDSCAPE IN TEXAS 1, 4 (2005), available at [http://www.utcle.org/eLibrary/preview.php?asset\\_file\\_id=3271](http://www.utcle.org/eLibrary/preview.php?asset_file_id=3271).

27. Hile, *supra* note 9, at 14.

28. *Id.*

29. *Id.* at 14–15.

30. *Id.* at 1.

31. *Id.*; *see also* Supreme Court of Texas, Order, Proposed Rule 8a of the Texas Rules of Civil Procedure, Misc. Docket No. 03-9207 (Dec. 23, 2003) (per curiam) [hereinafter “Order 03-9207”].

32. Order 03-9207, *supra* note 31, at 24, 24–29.

33. Hile, *supra* note 9, at 1. The “Final Report and Recommendations” of the Task Force did not list Mary Evans Sias as a Task Force Member, although she appears to have been one of the 19 individuals originally appointed to the Task Force. Compare PENA, *supra* note 26, at 37–38, with STATE BAR OF TEX. REFERRAL FEE TASK FORCE, FINAL REPORT AND RECOMMENDATIONS (2004) [hereinafter REFERRAL FEE TASK FORCE REPORT].



better understand the referral practice in Texas.”<sup>34</sup> In May 2004, the Task Force issued its sixty-page “Final Report and Recommendations,” which addressed the questions posed by the Texas Supreme Court in its December 2003 order and recommended various changes to Rule 1.04.<sup>35</sup> In addition, the Task Force Report proposed various changes to the Texas ethics rules regarding advertising.<sup>36</sup>

On June 23, 2004, the State Bar Board of Directors unanimously voted to adopt the various amendments proposed by the Referral Fee Task Force, and to request that the Texas Supreme Court authorize the State Bar to conduct a referendum of its members regarding the proposed changes.<sup>37</sup> The Court subsequently published the proposed amendments and invited comments from the public and the bar over the next two months.<sup>38</sup> On September 17, 2004, the State Bar Board of Directors “received reports from the Task Force and the Bar’s Referendum Committee,” and unanimously voted to formally adopt the proposed amendments to Rule 1.04.<sup>39</sup> Pursuant to the Board’s directive, the State Bar filed a Petition for Order of Referendum with the Supreme Court on September 22, 2004, requesting that the Court submit the proposed amendments to a vote of the registered members of the State Bar in November 2004.<sup>40</sup>

In an order dated October 1, 2004, the Texas Supreme Court declared that “[h]aving studied the State Bar’s recommendations, the Court has concluded that the amendments to the Texas Disciplinary Rules of Professional Conduct drafted and proposed by the State Bar should be submitted to a referendum of the membership of the bar . . . .”<sup>41</sup> The Court added, however, that its “approval of this referendum is not a predetermination of any legal issues regarding the proposed rules,” and that it “continues to welcome written comment on the proposed amendments.”<sup>42</sup> The Court ordered that a referendum on the proposed amendments be conducted by the State Bar between November 5 and December 20, 2004, and concluded that “if the proposed amendments are approved, the Court’s order adopting proposed Rule 8a of the Texas Rules of Civil Procedure should be withdrawn.”<sup>43</sup>

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34. Hile, *supra* note 9, at 1; *see also* STATE BAR OF TEX., DEP’T OF RESEARCH & ANALYSIS, TEXAS REFERRAL PRACTICES SURVEY REPORT 1 (2004).

35. *See* REFERRAL FEE TASK FORCE REPORT, *supra* note 33, at 2–37.

36. *See id.* at 37–49.

37. Hile, *supra* note 9, at 1. The amendments proposed were to Rules 1.04, 7.02(a), 7.04(q) and Comments thereto, and Part VII of the Texas Disciplinary Rules of Professional Conduct.

38. *Id.*

39. *Id.* The Board also unanimously voted to formally adopt proposed amendments to Part VII of the Rules. *Id.*

40. *Id.*

41. Supreme Court of Texas, Order, Approval of Referendum on Proposed Changes in the Texas Disciplinary Rules of Professional Conduct, Misc. Docket No. 04-9220, at 2 (Oct. 1, 2004) [hereinafter Order 04-9220].

42. *Id.*

43. *Id.* at 2–3.

The referendum ballot gave bar members a single “yes” or “no” vote on the entire group of proposed amendments to Rule 1.04 and its comments.<sup>44</sup> Of the 72,606 eligible voters, 28,284 (38.96%) submitted a ballot on the changes to Rule 1.04, with 15,257 (53.94% of voters) voting in favor of the proposed changes, 12,847 (45.42% of voters) voting against, and 180 voting but indicating no preference.<sup>45</sup> The State Bar filed a petition on January 5, 2005 requesting the Court to enter an order promulgating the proposed amendments to Rule 1.04 and providing that the amendments become effective ninety days from the date of the order.<sup>46</sup> On January 28, 2005, the Texas Supreme Court issued an order finding “that all issues submitted to the lawyers of Texas in [the] referendum were approved by a majority vote,” and declaring the proposed changes to Rule 1.04 effective March 1, 2005.<sup>47</sup>

## II. THE CLAIMED REASONS FOR, AND LIKELY EFFECTS OF, THE CHANGES TO RULE 1.04

### A. *The Proclaimed Reasons for the Changes*

The 2005 amendments effected numerous changes to Rule 1.04 and its formal comments. In the remainder of this Article, however, I focus solely on the changes to the rule’s disclosure and consent requirements. As I discussed in Part I.A above, these changes were especially striking because they precluded clients from waiving their right to receive certain disclosures that attorneys were not even required to make under the pre-amendment version of Rule 1.04. One might therefore expect that substantial thought lay behind such a significant change, and that the drafters of the amendment would have been careful to articulate the policy concerns underlying it.

In fact, the fifty-four-page “Final Report and Recommendations” of the Referral Fee Task Force said surprisingly little about the concerns underlying the proposed changes to the disclosure and consent requirements of Rule 1.04.<sup>48</sup> In the section titled “Client Consent,” the Report stated that “[a]s one aspect of their duty to communicate with their clients, lawyers have a responsibility to ensure that clients are informed of the terms and conditions of any agreement to divide a

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44. *See id.* at 5.

45. *See Hile, supra* note 9, at 2.

46. *Id.*

47. Supreme Court of Texas, Order Promulgating Amendments to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, Misc. Docket No. 05-9013, at 1 (Jan. 28, 2005). The Order “grandfathered” fee-sharing arrangements entered into prior to March 1, 2005 so long as those arrangements complied with the previous version of Rule 1.04:

The existing version of Rule 1.04 governs only fee-splitting arrangements between lawyers not in the same firm entered into before the effective date of these amendments, provided that, by that date, the client has been advised of all the lawyers that will be participating in the client’s particular matter.

*Id.*

48. REFERRAL FEE TASK FORCE REPORT, *supra* note 33, at 3, 16–17, 35.

fee.”<sup>49</sup> The Report went on to observe that, under the pre-amendment version of Rule 1.04,

[a]n affirmative act of consent [by the client] is not required. Moreover, it is not clear that the present rule requires client non-objection or consent at the front end of the referral process rather than at some later point in time, and it also appears that lawyers need not disclose the terms of their fee division to the client.<sup>50</sup>

Without any further elaboration, the Report simply declares that the “Task Force believes that all of these aspects of the current rule are unacceptable.”<sup>51</sup>

In the following paragraph, the Report notes that the heightened disclosure requirement of the proposed amendment was not as comprehensive as it might have been:

The Task Force considered but decided not to require that the information conveyed to the client concerning the arrangement include the responsibilities that each lawyer proposes to assume. Such a requirement is not imposed in [ABA] Model Rule 1.5(e)(2) (2003) and would pose practical problems, given that the required disclosure will occur at the inception of the relationship, when the precise division of responsibilities may not be known.<sup>52</sup>

But nowhere does the Report discuss what policy concerns do or should underlie client disclosure and consent requirements in the context of fee sharing.

The formal comments to the pre-amendment Rule 1.04 stated that client disclosure and consent were needed only in situations where the splitting of fees would “result in a further disclosure of client confidences and have a financial impact on a client.”<sup>53</sup> The implication is that disclosures to the client are necessary when there is a substantive decision for the client to make within the realm of the client’s expertise: does the client want to release his confidential information to additional firm/attorney X? Does the client want to pay an additional amount to add firm/attorney X to his legal team? The related implication is that disclosures to the client are not necessary when there is no real decision to be made by the client. A fee-sharing arrangement that does not involve the disclosure of client confidences to the additional firm or attorney, and does not increase the total attorneys’ fees that the client must pay, does not obviously involve any decision within areas of the client’s expertise. The only substantive issue involved—whether the addition of the firm/attorney to the client’s legal team will enhance the prosecution of the client’s claim sufficiently that the signing attorney is willing to pay that firm/attorney a portion of the signing attorney’s contractual fee—seems to be one uniquely within the expertise of the client’s signing attorney.

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49. *Id.* at 35 (citation omitted).

50. *Id.*

51. *Id.*

52. *Id.* at 35–36.

53. TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.04 cmt. 10 (1989) (amended 2005).

Thus, it would be interesting to know why the Task Force thought it important for the client to have information about the fee-sharing arrangement—including the terms of the fee division—even in contexts in which neither disclosure of confidences nor additional financial risk to the client was involved. But the Report gives no explanation.<sup>54</sup> One would also like to know why the Task Force was explicitly concerned with denying clients the opportunity they previously had to delegate to their signing attorney the power to enter into whatever fee arrangements the attorney deemed to be in the client's best interests—especially if those arrangements did not involve the disclosure of client confidences or impose additional financial burdens on the client. What empirical or other evidence did the Task Force have that this historically available option was harming clients and that clients would benefit from its prohibition? Alas, the Report again offers no insights.<sup>55</sup>

The Report also does not set out why the Task Force thought it necessary to mandate a more burdensome form of disclosure and consent.<sup>56</sup> It did not cite to any empirical evidence that the previous requirement—that the client simply “be advised of, and not object to” a fee-sharing arrangement<sup>57</sup>—was insufficient to accomplish the rule's ends. Nor did it explain why an “affirmative act of consent” by the client was deemed both superior and necessary.<sup>58</sup>

The Report does undertake to explain the reason for the amendment of paragraph (g) of the rule, which limits an attorney to quantum meruit compensation if client consent to a referral arrangement is obtained without all of the rule's disclosure and consent requirements being met.<sup>59</sup> The Task Force observes, accurately, that the

Texas Supreme Court, in *Mandell & Wright v. Thomas*, held that an attorney may recover the full amount owed under the contract of employment when a client, without good cause, discharges the attorney before the attorney's engagement has been completed.<sup>60</sup>

The Task Force goes on to contend that “[t]he practical effect of this ruling, in the context of referrals, is that dissatisfied clients will not be able to discharge their lawyer, even though they object to the referral, because the forwarding lawyer will have already performed his or her obligation to the client.”<sup>61</sup>

The meaning of this statement is unclear. *Mandell & Wright* applies only in situations in which the client discharges the attorney without cause.<sup>62</sup> Under the pre-2005 version of Rule 1.04, a client was entitled to be advised of, and to have the opportunity to object to, any new attorney with whom the signing attorney was

54. See REFERRAL FEE TASK FORCE REPORT, *supra* note 33, at 35–36.

55. *See id.*

56. *See id.*

57. *See id.* at 35.

58. See text accompanying *supra* note 50.

59. See REFERRAL FEE TASK FORCE REPORT, *supra* note 33, at 35; TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.04(g) (2005).

60. REFERRAL FEE TASK FORCE REPORT, *supra* note 33, at 36 (citation omitted).

61. *Id.* (footnote omitted).

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

interested in sharing fees earned in the client's case. If the client objected to the proposed referral, but the contracting attorney went forward with it anyway, or if the attorney failed even to advise the client of the contemplated referral, the client surely would have had "cause" to dismiss both the referring attorney and the new attorney. Under *Mandell & Wright*, neither that referring attorney nor the new attorney would be entitled to the contractual contingent fee. This would also be true under the post-amendment version of the disclosure and consent requirements of Rule 1.04, even in the absence of the last sentence of 1.04(g).<sup>63</sup> Thus, it is difficult to understand what the Task Force considered problematic about the application of *Mandell & Wright* to pre-2005 Rule 1.04.

Similarly confusing is the remedy the Task Force proposed in paragraph (g). By limiting an attorney to quantum meruit compensation in any situation in which the attorney "shall collect or seek to collect any attorney's fee . . . in connection with any such [fee-sharing] agreement that is not confirmed [pursuant to 1.04(f)(2)]," the Task Force did not make it easier or less expensive for a contingent-fee client to discharge a contingent-fee attorney for cause. As was explained above, the pre-2005 regime did not obligate a client to pay more than quantum meruit compensation to a contingent-fee attorney who the client dismissed "for cause." Thus, the "remedy" provided by the Task Force seems to achieve nothing more than to provide clients an opportunity to seek a windfall if the signing attorney provides the disclosures required under the pre-2005 regime but does not comply with the heightened disclosure and consent requirements of the amended Rule 1.04. In those situations, a client who had no objections to the signing attorney's subsequent fee-sharing arrangements, but whose signing attorney did not timely obtain the client's written consent to those arrangements, could be relieved from the obligation to pay the contractual contingent fee and instead owe the attorney the potentially lesser quantum meruit compensation.<sup>64</sup>

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63. That sentence states in relevant part that "[n]o attorney shall collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed [pursuant to 1.04(f)(2)], except for . . . the reasonable value of legal services provided to that person." TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.04(g) (2005).

64. As discussed above, the text of 1.04(g) is not clear regarding whether the signing attorney, the newly associated attorney, or both is to be subject to that paragraph's compensation limitations. *See supra* note 6. The Task Force Report is also unclear on this issue:

[T]he Task Force proposes that a referral fee agreement between a lawyer and a person that allows the lawyer to associate other counsel, and that results in an association of other counsel, must be confirmed by an arrangement conforming to proposed Texas Disciplinary Rule 1.04 (f)(2). If that does not occur, *the attorney* may only recover the reasonable value of legal services performed . . . .

REFERRAL FEE TASK FORCE REPORT, *supra* note 33, at 37 (emphasis added). The Task Force Report, however, does go on to recommend that the referring attorney rather than the "handling lawyer" be primarily responsible for complying with the rule's disclosure and consent obligations:

Neither Model Rule 1.5(e) nor Texas Disciplinary Rule 1.04(f) indicates which lawyer (the referring lawyer or the handling lawyer, or both) is responsible for ensuring compliance with the rule. Texas courts have not

In summary, the Task Force Report surprisingly provides no information regarding: (1) why the Task Force concluded that the pre-2005 disclosure and consent requirements of Rule 1.04 needed to be changed; (2) whether any empirical data supported the proclaimed need for these changes; (3) the policy concerns at issue; (4) why and how the amended rule was thought likely to better effectuate those policies; or (5) why the benefits of the changes were expected to exceed the costs. The lack of discussion on all these issues is especially surprising because the changes to Rule 1.04(f) and (g) effected by the 2005 amendments resulted in Texas having a rule governing fee sharing that is uniquely stringent and burdensome (for both clients and attorneys). No other state's rules, nor the ABA Model Rules: (1) explicitly require that client consent be obtained prior to the time of the association or referral proposed; (2) explicitly preclude waiver by clients of their right to disclosure and consent prior to the time their signing attorney enters into a fee-sharing arrangement at that attorney's own expense; or (3) impose such potentially draconian financial penalties on attorneys who do not comply with the rule's disclosure and consent requirements.<sup>65</sup> Indeed, the Task Force explicitly observed that "[t]he disclosures required under [the proposed amendments] exceed those mandated by the ABA, and the up-front timing of those disclosures and of any client consent is clearer under the Task Force's proposal than under the Model Rule."<sup>66</sup> It is ironic that the 2005 amendments to Rule 1.04 have caused Texas to stand alone on various aspects of fee sharing since a central argument put forward by the Task Force for why the proposed amendments to Rule 1.04 should be adopted in lieu of the proposed Rule 8a of the Texas Rules of Civil Procedure was an express concern to "keep[] the Texas referral fee rule in the mainstream"<sup>67</sup>:

Texas presently "stands all alone in the country" in allowing attorneys to receive a referral fee for forwarding a case. If Proposed Rule 8a is adopted, Texas will again "stand all alone in the country."

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addressed this issue. The Task Force is of the opinion that the referring or associating lawyer, or any other lawyer who employs another lawyer to assist in the representation, has the primary duty to ensure full disclosure and compliance with this rule. See *King v. Housel*, 556 N.E.2d 501, 504 (Ohio 1990) ("We hold that an attorney who employs another to assist him in the representation of a client has a duty to fully disclose to his client the fee agreement with the employed attorney."). However, if the referral or association results in the client executing a new engagement letter with the additional counsel brought into the matter, that lawyer is also obligated to advise the client of the matters required by paragraph (f).

*Id.* at 36.

65. ABA Model Rule 1.5(e), for example, states only that: [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.

MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2007).

66. REFERRAL FEE TASK FORCE REPORT, *supra* note 33, at 3.

67. *Id.* at 24.

Texas will stand alone as the only state with a rule on referral fees in its rules of procedures. Texas will stand alone as the only state which places such strict caps on referral fees. Finally, Texas will stand alone as the only state that requires public disclosure of referral fees.

The Task Force believes it is better for Texas to be in the mainstream, because Texas practitioners will then have some guidance in interpreting any new referral fee rule from other jurisdictions, commentators, the ALI's Restatement and the ABA's relevant Model Rules.<sup>68</sup>

### *B. The Likely Effects of the 2005 Amendments*

Besides a stated concern "to be in the mainstream,"<sup>69</sup> the Task Force had little to say regarding the intended goals or anticipated benefits of the proposed changes to Rule 1.04. Indeed, its primary focus appeared to be defending the proposed changes against claims that they might make clients worse off. For example, the Task Force Report stated:

The evidence produced at the six public hearings as well as the referral fee practice in other states supports the conclusion that the restrictions on and changes to the Texas referral fee system proposed by the Task Force will not impair the matching of client need to lawyer skill.

....

No witnesses who testified before the Task Force opposed requiring additional disclosure to clients or obtaining written consent when fees are divided among lawyers.

....

Further, as a matter of principle, the Task Force believes that clients should have to give their informed consent to any referral to or association of additional counsel before it becomes effective.

....

For these reasons, the Task Force has concluded that the additional restrictions it proposes on the referral fee system in Texas will not impair the ability of clients to obtain good, competent and acceptable legal representation.<sup>70</sup>

To be sure, the fact that the proposed changes do "not impair the ability of clients to obtain good, competent and acceptable legal representation" is preferable to the alternative. But one might have expected the Task Force to be able to articulate the affirmative benefits that clients were expected to receive from the changes even if it could not also offer an assessment of why those benefits

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68. *Id.* at 24–25 (citation omitted).

69. *Id.* at 25.

70. *Id.* at 3–4, 7.

were predicted to exceed any potential costs. Surprisingly, the Task Force had nothing to say on these topics.

In fact, there is reason to believe that the changes to the disclosure and consent requirements of Rule 1.04 do disadvantage clients in certain circumstances, and that the costs to clients exceed the potential benefits of the changes. A major context in which fee sharing among attorneys takes place is mass tort personal injury litigation, such as pharmaceutical litigation.<sup>71</sup> These cases tend to proceed along predictable lines, with plaintiffs' lawyers learning of a problem with the drug, and then notifying the public of that danger as they advertise for clients who may have been injured by the drug and who are interested in retaining the attorneys on a contingent-fee basis to pursue their claims.<sup>72</sup> At the outset of the litigation, the plaintiffs' lawyers conduct discovery, employ experts to aid in their investigations, and sometimes commission scientific or medical research regarding the drug at issue.<sup>73</sup>

Consortia of plaintiffs' lawyers begin to form and include advertising lawyers, trial lawyers, and lawyers with special talents and expertise in settlement negotiations.<sup>74</sup> These consortia continue to form and evolve over the course of the litigation, with the goal of strengthening the litigation and settlement position of the relevant plaintiffs' claims.<sup>75</sup> Agreements among the plaintiffs' lawyers to share the contingent legal fees attached to the claims for which any of them is the signing attorney are the glue that binds each consortium's members. These fee-sharing agreements may also specify how much each attorney in the consortium is to contribute to the ongoing litigation expenses of the joint group of clients. On occasion, an attorney or law firm may be added to a consortium solely in order to provide additional funding for the prosecution of the consortium's joint cases.<sup>76</sup> Thus, fee sharing is a way for plaintiffs' attorneys also to finance, and to share the financial risks of, the litigation.

Just as consortium formation is beneficial to the plaintiffs' attorneys—and, ultimately also to their clients—litigating and settling one's claim as part of a larger group of claims is usually beneficial to an individual plaintiff. As I have

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71. In recent years, such litigation has included drugs such as Rezulin, Zyprexa, Fen-Phen, Bextra/Celebrex, Oxycontin, Seroquel, Avandia, Paxil, hormone replacement therapy, and, most notably, Vioxx. *See, e.g.*, Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 *FORDHAM L. REV.* 1833, 1845–46 (2011).

72. *See, e.g.*, MICHAEL D. GREEN, *BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* 109–20, 159–66 (1996); ALICIA MUNDY, *DISPENSING WITH THE TRUTH: THE VICTIMS, THE DRUG COMPANIES, AND THE DRAMATIC STORY BEHIND THE BATTLE OVER FEN-PHEN* 1–32, 127–30 (2001); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 37–57 (enlarged ed. 1987).

73. *See, e.g.*, GREEN, *supra* note 72, at 121–47; MUNDY, *supra* note 72, at 1–223; SCHUCK, *supra* note 72, at 50–54, 72–110.

74. *See, e.g.*, GREEN, *supra* note 72, at 159–66; MUNDY, *supra* note 72, at 27–32, 127–223, 252–367; SCHUCK, *supra* note 72, at 46–57.

75. *See, e.g.*, GREEN, *supra* note 72, at 159–66, 170–73; MUNDY, *supra* note 72, at 127–223, 252–367; SCHUCK, *supra* note 72, at 46–57, 73–76, 92–110, 118–24.

76. *See, e.g.*, SCHUCK, *supra* note 72, at 46–47, 51–53.



explained in previous work, the benefits to claimants of group litigation include: (1) economies of scale (reduced per capita litigation costs); (2) increased leverage in settlement negotiations; (3) equalizing plaintiffs' and defendants' risk; and (4) the conservation of the defendants' assets.<sup>77</sup>

As the litigation proceeds, the value of the claims begins to be established.<sup>78</sup> The results of additional scientific and medical research become known. Cases with early court settings may be tried to a verdict. Settlements of a few small groups of claims may be negotiated. Eventually, when the defendants' and the plaintiffs' attorneys believe they have sufficient information about the value of the claims in the tort system, larger group or "inventory" settlements are negotiated with various consortia.<sup>79</sup> Finality is a central goal of the defendant at this time; each claim left unresolved leaves it vulnerable to further liability and the expense of continued litigation.<sup>80</sup>

With the above background, let us now consider the practical effect of the 2005 amendments to Rule 1.04 in the context of mass tort litigation. Under the amended rule, if two plaintiffs' attorneys each represent 1000 claimants and are interested in forming a consortium that involves sharing the contractual contingent fees in one another's cases against a particular defendant, each attorney will need to obtain the advance, written consent of each of their 1000 individual clients to the fee-sharing arrangement. This means that each attorney will need to mail out, and then wait for the return of, 1000 "permission slips" for their own group of clients. Each attorney will almost certainly end up with two separate inventories of clients: those who signed and returned the fee-sharing consent form and are now part of the group of cases represented by the consortium, and those who did not timely return the consent form and will continue to be represented only by their signing attorney. Moreover, many—perhaps most—of the clients who did not timely sign and return their form consenting to the fee-sharing arrangement are probably not opposed to the arrangement—they simply lost or misplaced the form, or missed the deadline to return it amidst the crush of their other daily obligations and activities.

The delay and substantial transaction costs involved in this disclosure and consent process may cause some attorneys initially to ignore the strict requirements of the rule, even at the risk of losing their contractual contingent fee

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77. Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 744–49 (1997).

78. See, e.g., GREEN, *supra* note 72, at 121–58, 164–79, 189–206, 226–36, 273–98, 333–34; MUNDY, *supra* note 72, at 224–83; SCHUCK, *supra* note 72, at 68–71, 138–42.

79. See, e.g., GREEN, *supra* note 72, at 68–71, 138–42; MUNDY, *supra* note 72, at 251–367; SCHUCK, *supra* note 72, at 143–91 (class action settlement); see also, e.g., *Vioxx Client Cover Letter*, OFFICIAL VIOXX SETTLEMENT, available at <http://www.officialvioxxsettlement.com/documents/Client%20Cover%20Letter%20-%20FINAL.pdf> (summarizing the Vioxx litigation record that preceded the nationwide settlement).

80. See, e.g., Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 270–74, 318–20 (2011); Silver & Baker, *supra* note 77, at 760–62.

and being left to seek quantum meruit compensation from the relevant clients.<sup>81</sup> Ultimately, however, the disclosure and consent requirements will, at the margin, deter contingent-fee plaintiffs' attorneys from forming (or enlarging existing) consortia that are potentially advantageous to their clients. This is especially likely to be true when the opportunity to join forces arises late in the litigation when there simply may not be time to comply with the requirement of advance written consent, or when large numbers of plaintiffs are involved and the transaction costs of compliance are especially high.

Opportunities to create or join a consortium that arise late in the litigation process are potentially the most beneficial to the plaintiff-clients. For example, Attorney A may need substantial, additional funds in order to continue aggressively prosecuting the claims of his group of 750 clients in the face of what he considers to be a low-ball offer from the defendant to settle. Attorney B, who currently represents no clients in the litigation, may be willing and able to provide Attorney A the necessary cash in exchange for a share of Attorney A's eventual attorneys' fees on those 750 cases.<sup>82</sup> Or Plaintiff's Attorney X may have attained an unusually good bargaining position with the defendant due to the imminent trial of an especially high valued case for which she is counsel or co-counsel. Plaintiffs' Attorney Y may be able to increase the settlement value of his existing group of clients significantly if they can quickly become part of the group of clients for whom Attorney X serves as counsel or co-counsel before Attorney X begins formally negotiating a settlement of her entire inventory of cases.

Now consider how each of the above situations would unfold under the pre-2005 fee-sharing rule. Under that rule, Plaintiffs' Attorneys A, X, and Y in the examples above were required only to advise their clients of the proposed fee-sharing arrangement and give them an opportunity to object.<sup>83</sup> This meant that the attorneys could simply mail a notice to each of their clients informing them of the proposed arrangement and then wait a reasonable period of time for anyone to object. With regard to the second example above, only those clients represented by Attorney Y who affirmatively objected would not be included in the group of clients for whom Attorney X would henceforth serve as co-counsel and for whom

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81. See *supra* notes 23–24 and accompanying text. These attorneys may hope and expect that their clients will not be aware of the attorneys' disclosure and consent obligations and the remedy for attorney non-compliance available to the clients under the amended Rule 1.04. It will likely take only one bar grievance procedure or breach of fiduciary duty lawsuit brought by an enterprising attorney after a large-dollar group settlement, however, to change the risk–reward calculations of mass tort plaintiffs' attorneys regarding compliance with the rule. See, e.g., *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) (holding that a client can obtain partial or complete forfeiture of attorneys' fees by proving a breach of fiduciary duty, even in the absence of any showing that the attorney's breach resulted in any economic harm to the client).

82. For an example of this type of fee-sharing context, see SCHUCK, *supra* note 72, at 46–47, 51–53.

83. Under the pre-2005 Rule 1.04, "negative check-off" notice would need to be provided to the clients, but it was unclear what the deadline was by which an attorney was obligated to provide even that form of notice prior to entering into a fee-sharing arrangement. TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.04 cmt. 10 (1989) (amended 2005); REFERRAL FEE TASK FORCE REPORT, *supra* note 33, at 35–36.

Attorney X would negotiate a beneficial settlement. All other clients represented by Attorney Y, however, would automatically be subject to the proposed fee-sharing arrangement and become part of Attorney X's advantageous settlement negotiations. Thus, the pre-2005 "negative check-off" rule could be expected to result in lower transaction costs for Attorney Y and his clients relative to the post-amendment rule, insofar as the former rule was less likely to result in Attorney Y ultimately representing two parallel groups of plaintiff-clients (i.e., those who consented to have Attorney X serve as co-counsel and share in the contingent attorneys' fees and those who did not).

In addition, an option involving no delay or transaction costs was available to Attorneys A, X, and Y and their respective clients under the pre-2005 rule, but explicitly eliminated by the 2005 amendments. Prior to 2005, an attorney was not prohibited from including in the retainer agreement with each of his or her clients a provision that authorized the attorney to retain at the attorney's own expense (that is, enter into a fee-sharing agreement with) any additional attorneys that the signing attorney deemed to be in the client's best interests.<sup>84</sup> If Attorneys X and Y in the example above had included such language in their retainer agreements, Attorney Y could promptly agree to merge his group of clients with those of Attorney X for purposes of the latter's settlement negotiations, without either attorney being obligated to provide their clients any additional notice. Similarly, if Attorney A had included such language in his contracts with his 750 clients, he could promptly accept Attorney B's offer of funding in exchange for a share of the eventual attorneys' fees from those clients' cases without being obligated to notify his clients of that new fee-sharing agreement. It is important to note that this type of advance client consent to fee-sharing arrangements did not ultimately divest a client of any "control" over his representation since the client retained the right to discharge any attorney with whom the signing attorney might enter into a fee-sharing arrangement.<sup>85</sup>

In summary, the 2005 amendments to the fee-sharing rule imposed a variety of potentially significant costs on clients with mass tort personal injury claims, while offering scant counterbalancing benefits. Under the pre-amendment rule, very few clients ever objected to their signing attorney's choice of additional counsel to share in the contractual attorneys' fees.<sup>86</sup> This is not surprising since those fee-sharing arrangements uniformly did not affect the total attorneys' fees to be paid by the client, nor did they typically in any way alter the client's relationship with the signing attorney. The burdensome disclosure and consent requirements of the 2005 amendments will likely deter potentially advantageous mergers of plaintiff groups, especially those contemplated on the eve of settlement, thereby potentially reducing the settlement value of the affected claims. In addition, when an attorney does undertake to merge her group of clients with another attorney's group in order to increase the potential settlement value of her

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84. See *supra* note 5 and accompanying text.

85. A client would presumably only be interested in discharging the newly retained attorney if the client had "cause" to do so, in which case the client would have little if any financial obligation to the discharged attorney, even under *Mandell & Wright*. See also *supra* note 62 and accompanying text.

86. See Conversations by Author with various mass tort plaintiffs' attorneys.

clients' claims, the 2005 amendments impose additional costs on those clients, including the costs of sending out and having the client return the written consent form, and the time lost while waiting for the clients' written consents to arrive. Finally, some clients may not timely return the written consent form, despite having no objection to the proposed fee-sharing arrangement, and will therefore not be able to participate in the potentially advantageous settlement negotiated by the new attorney.

On the "benefits" side of the ledger, to be balanced against all the above costs to those clients, is the enhanced communication ensured by the post-amendment requirement that clients sign and return a document authorizing their signing attorney to enter into the proposed fee-sharing arrangement. As noted above, however, this enhanced communication pertains to an issue likely to be of little, if any, interest to the clients.

This cost-benefit analysis suggests that the 2005 amendments to the disclosure and consent requirements of Rule 1.04 were not likely to result in a net benefit to a client with a mass tort personal injury claim whose signing attorney was interested in associating an additional attorney in the client's representation, to be paid out of the signing attorney's contractual fees. And that is the subset of clients most likely to be affected by the fee-sharing rule. Interestingly, those most likely to benefit from the disclosure and consent requirements of the 2005 amendments are the corporate defendants in the actions brought by those mass tort personal injury claimants. Insofar as those amendments deter the formation of consortia of plaintiffs' attorneys, they potentially reduce the settlement bargaining power of some plaintiffs. And this, in turn, may enable the defendant ultimately to pay less to resolve the same number of mass tort personal injury claims.

This leaves us with several questions: how and why did the 2005 amendments yield this odd result? What are the goals of the ethics rulemaking process in general? And how should that process be structured to best meet those goals?

### III. THE RULEMAKING PROCESS

#### *A. Explaining the 2005 Amendments to Rule 1.04*

As we have seen above, the disclosure and consent requirements of the 2005 amendments to the fee-sharing rule do not obviously pass muster under a cost-benefit analysis. One therefore wonders how they came to be proposed and adopted.

One possibility is that attorneys who regularly represent corporations that are defendants in mass tort personal injury lawsuits were able to successfully lobby or otherwise seize control of the Task Force. The Task Force itself had eighteen members, seven of whom in 2004 were not involved in representing either corporations or personal injury plaintiffs.<sup>87</sup> Of the remaining eleven members of

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87. Those members were JoAl Cannon Sheridan (family law, Moak & Sheridan, LLP), Linda Eads (Professor, SMU Dedman School of Law), David Evans (Judge, Texas district court), Ygnacio Garza (CPA, Long Chilton, LLP; previously Mayor of Brownsville,

the Task Force, six had practices in 2004 that involved substantial representation of corporations,<sup>88</sup> while five had practices focused on the representation of personal injury plaintiffs (with three of these including substantial representation of plaintiffs in mass tort cases).<sup>89</sup>

A second possibility is that attorneys whose clients regularly include mass tort personal injury plaintiffs were not represented on the Task Force, or were unable effectively to convey their views to the Task Force, or simply did not express their concerns to the Task Force, perhaps because they did not appreciate until too late the potential costs to their clients of the proposed disclosure and consent requirements.

A third possibility is that mass tort personal injury attorneys recognized, and were concerned by, the potential costs to their clients of the proposed disclosure and consent requirements, but were nonetheless not eager to go on record opposing those requirements. Perhaps increased disclosure carries with it a sufficiently great aura of unquestionably being in the best interests of clients that even attorneys who clearly see the potential costs are unwilling publicly to oppose increased disclosure because of the risk that they will be viewed as somehow self-serving.

The existing record does not provide a definitive answer to questions of how or why the 2005 amendments to Rule 1.04 came to be adopted despite imposing costs on clients that seem likely to exceed any benefits. We do know from the referendum vote that the entire package of proposed changes to Rule 1.04 and its formal comments was controversial, with more than 45% of those voting opposing the changes.<sup>90</sup> Most importantly, however, the fact that the existing rulemaking procedures resulted in rule changes that seem likely to impose costs on

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Texas and Chairman of Texas Parks and Wildlife Department), Robert Schuwerk (Professor, University of Houston Law Center), Kent Sullivan (Judge, Texas district court), and Hector Zavaleta (family law, Hector M. Zavaleta Attorney).

88. Those members were Alistair Dawson (Beck, Redden & Secrest, LLP), John Hagan (Sarles & Ouimet, LLP), Hugh Rice Kelly (General Counsel of Texans for Lawsuit Reform, a corporation-friendly tort-reform group; previously General Counsel for Reliant Energy and CenterPoint Energy), Ron Lewis (Baker Botts, LLP), Steve McConnico (Scott, Douglass & McConnico, LLP), and Lonny Morrison (President, Offenhauser Oil & Gas, LLC).

It should also be noted that although Kent Sullivan was a judge in 2004, see *supra* note 87, he had previously practiced with a firm primarily focused on civil trial defense, as well as a firm that represented mass tort and other personal injury plaintiffs.

89. The members whose practices in 2004 included the representation of personal injury plaintiffs were Hartley Hampton (Fibich, Hampton & Leebron, LLP), Richard Hile (Dies & Hile, LLP), Steven Laird (Law Offices of Steven C. Laird, PC), Stephen Maxwell (Bodoin, Agnew, Greene & Maxwell, PC), and Richard Pena (Law Offices of Richard Pena, PC). Of these, Hampton, Hile, and Laird had practices that included any significant representation of mass tort plaintiffs. See also *supra* note 88 (discussing Kent Sullivan).

90. See *supra* note 45 and accompanying text. Because the various amendments to Rule 1.04 and its formal comments were proposed as a package subject to a single yes/no vote, it is not possible to discern which of the proposed changes would have been adopted, and which would not have been, if each had been subject to a separate vote.

clients that exceed any benefits to them, suggests that those procedures could benefit from close examination and proposals for reform.

### *B. Crafting a Better Rulemaking Process*

The rulemaking process described in Part I.B above had three major components: (1) the State Bar Board of Directors' naming of a Task Force to consider and draft the proposed rule changes; (2) the holding of public meetings and the general solicitation of input by the Task Force regarding the proposed rule changes; and (3) the state bar membership referendum on the proposed changes. In this Part, I examine the operation of that process in the adoption of the 2005 amendments to Rule 1.04, with an eye toward improving upon it. I arrive at four specific recommendations that I believe would enhance any state's process for making and amending its rules of legal ethics.

#### *1. Articulating the Problem to Be Solved*

It is significant and troublesome that the process by which the amendments to Rule 1.04 were adopted did not include an explicit statement of its goal. The Task Force did expressly take up several questions regarding possible changes to Rule 1.04 that the Texas Supreme Court had posed.<sup>91</sup> But the Task Force never articulated the problem that it was seeking to solve with its changes to the rule's disclosure and consent requirements, nor did it explain why it believed its proposed changes would mitigate that (unarticulated) problem. The Task Force also never provided an analysis of why it believed the proposed amendments' benefits to clients were likely to exceed the costs. The Report stated only:

The Task Force believes that earlier, increased disclosure to clients of referral or association arrangements should be the centerpiece of reform of such practices, and so has recommended sweeping changes to Rule 1.04(f)(2) with regard to those matters. . . . [T]hese changes will ensure that the client not only knows of the terms and conditions of any fee agreement, but also must affirmatively consent in writing to the arrangement prior to the time of the association or referral proposed. The old days of clients learning for the first time the terms of any fee-splitting arrangement when they are provided a distribution sheet at the conclusion of the representation are no longer. The proposed changes are significant and will eliminate many concerns raised by the court and legal commentators with regard to the issue of client consent.<sup>92</sup>

The questions left unanswered by the Task Force include: (1) what were the expected benefits to clients of learning about proposed fee-sharing arrangements earlier in the representation; (2) why was the existing "negative check-off" method for informing clients of proposed fee-sharing arrangements thought to be insufficient; (3) why was it deemed necessary to prohibit attorney-client retainer agreements from including advance waivers of client consent to possible future fee-sharing arrangements; and, more generally, (4) what were the

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91. Order 03-9207, *supra* note 31, at 24–29; REFERRAL FEE TASK FORCE REPORT, *supra* note 33, at 2–25.

92. REFERRAL FEE TASK FORCE REPORT, *supra* note 33, at 16–17.

“many concerns” regarding client consent in the fee-sharing context to which the Task Force was striving to respond and remedy? I would therefore recommend the following:

*Recommendation 1:* Any proposed change to a state’s ethics rules should include: (a) a statement of the existing problem sought to be remedied; (b) a summary of any empirical evidence confirming the existence and nature of the problem; (c) a statement of the expected costs and benefits to clients of the proposed change; and (d) an analysis of why the benefits are predicted to exceed the costs.

*2. Deciding Who Will Draft the Proposed Rule Changes*

The appointment of the members of the Task Force that will draft the proposed rule changes is obviously a critical component of the rulemaking process. Although the names of the members are known, one would also like to know, *inter alia*: (1) who chose them to serve on the Task Force; (2) why they each were chosen; (3) the contours of the larger pool of individuals from which they were chosen; (4) what sector of the bar membership each member was thought to “represent”; (5) who determined the size of the Task Force; and (6) why the specified number of members was thought to be the appropriate size. In its Report, the Task Force discloses only that it “was duly established by the State Bar Board of Directors at their meeting on January 23, 2004,” and that

all but one [of its eighteen members] are members of the State Bar of Texas. The membership includes lawyers of large defense and plaintiff firms, corporate in-house counsel, law school professors, attorney mediators and small firm practitioners. Each member brought a different perspective to the Task Force, based on their own experiences, their evaluation of the evidence and the weight given to the testimony and written comments.<sup>93</sup>

Today’s legal profession is indeed diverse. Different sectors of the profession serve clients with different needs and are impacted differently by many of the ethics rules.<sup>94</sup> The rule governing fee sharing, for example, is unlikely ever to significantly impact the many sectors of the profession that neither accept nor make case referrals involving some expectation of direct financial compensation.<sup>95</sup>

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93. REFERRAL FEE TASK FORCE REPORT, *supra* note 33, at Preface.

94. It is noteworthy in this regard that the Report regarding the 2005 amendments disclosed that “[t]he findings and recommendations do not reflect the views of all members of the Task Force; however, they do represent the views of the overwhelming majority of its members.” *Id.*

95. According to a 2004 survey of a random sample of 1215 Texas Bar members conducted by the Department of Research & Analysis of the Texas State Bar, nearly two-thirds (63.3%) of all attorneys surveyed, and more than one-half (52.1%) of those in private practice, stated that they neither make nor receive referrals involving some expectation of financial compensation. See STATE BAR OF TEX., DEP’T OF RESEARCH & ANALYSIS, TEXAS REFERRAL PRACTICES SURVEY REPORT 33 (2004), available at [http://www.texasbar.org/pdf/Survey\\_Report.pdf](http://www.texasbar.org/pdf/Survey_Report.pdf); see also *id.* at 3–4 (summarizing survey procedures). In contrast, more than three-quarters (77.5%) of all attorneys surveyed, including 87.8% of those in private practice, indicated that they make or receive referrals for cases involving *no* expectation of financial compensation. See *id.* at 18.

And the sectors of the profession that are directly affected by the rule in their daily practice might be expected to have a greater appreciation than the rest of the bar for the likely costs and benefits of the rule for their clients. All this raises the question of what considerations should inform the selection of the Task Force members. I would recommend the following:

*Recommendation 2:* The considerations that inform the selection of the committee members responsible for proposing changes to the rules should be clearly and publicly articulated. Is the goal to represent those sectors of the profession that are directly impacted by the rule at issue? Is the goal to represent each or some of the diverse sectors of the profession? Is representation of the chosen sectors in direct proportion to their numbers within the state bar membership? Why or why not? Whatever goal of representation is chosen, the sector of the profession that each member represents should be identified, as well as the proportion of the profession included in that sector.<sup>96</sup>

### *3. Investigating the Costs and Benefits of Proposed Rule Changes*

Once it is established, the Task Force confronts the question of what its work will entail. The Texas Referral Fee Task Force reported that it “held six public hearings and received numerous written comments concerning . . . changes to the referral fee practice in Texas.”<sup>97</sup> Because “the Task Force is not an investigative body,” however, “it did not conduct an independent investigation into referral fee practices” and “it heard only the evidence that members of the bar and public wanted to present.”<sup>98</sup>

One wonders why the Task Force is not “an investigative body,” and why it is thought sensible to have potentially costly rule changes proposed by a committee that has undertaken no independent, systematic study of the matters at issue. To be sure, such independent research and study will be costly. But it is potentially more costly—to clients, attorneys, and the greater justice system—to adopt changes to the ethics rules based solely on “the views” articulated by self-selected members of the bar and the public.

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96. This recommendation highlights the potential importance and utility of the state bar systematically gathering information about the practice areas of its members, perhaps by requiring members to provide this information during the annual membership renewal process. If systematically obtained and updated in this way, the information would be available whenever changes to a state’s ethics rules were contemplated and the members of a Task Force were to be chosen.

97. REFERRAL FEE TASK FORCE REPORT, *supra* note 33, at Preface.

98. *Id.* Interestingly, however, the Task Force did commission the “Department of Research and Analysis of the State Bar of Texas” to conduct a “survey of members of the State Bar regarding referral fees.” *Id.* at 1; *see also supra* note 95. The formal Report of that survey was issued on May 20, 2004, four days before the Task Force issued its Report. The Task Force noted that it “has not referenced the results of this survey in its final report due to the receipt of the report at such a late date. However, it has reviewed the report and finds nothing that would indicate that its findings and recommendations contained herein are not appropriate.” *Id.* at 1 n.2 (report issued May 24, 2004).



Interestingly, as this Article was being finalized for publication in early 2011, the Texas State Bar was considering adopting numerous, wide-ranging changes to the ethics rules. The proposed changes were extraordinarily controversial, with two frequent criticisms being that: (1) “[t]he drafting committees have produced no evidence that the current rules are causing problems”;<sup>99</sup> and (2) no “financial-impact analysis” or cost-benefit analysis of the proposed changes has been undertaken or presented by the Bar or the drafting committees.<sup>100</sup> These concerns prompted one member of the Texas Legislature to file a bill on November 29, 2010, that would require the Texas Supreme Court

to conduct a cost-benefit analysis not later than the 90th day before the effective date of a proposed rule or a proposed amendment to a rule. . . . [T]he analysis would have to identify the benefits the court anticipates from adopting and implementing a rule, including any increased protection provided to the public and attorneys’ clients and any beneficial effect on the cost of legal services that attorneys provide to clients. The bill would also require the Supreme Court to

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99. See E-mail from James M. McCormack to Author as a Texas State Bar member (Jan. 13, 2011) (on file with Author) (titled “State Bar’s Former General Counsel to Vote ‘No’ on Referendum”); see also, e.g., E-mail from David T. Bright, Attorney, to Author as a Texas State Bar member (Feb. 4, 2011) (on file with Author) (titled “Five Reasons Why I Voted ‘No’ on the Rules” and observing that “[o]ur current rules have worked fine for 20 years. Have you ever heard anyone say ‘Oh, our current rules are a real problem and we absolutely must change them?’”); E-mail from “Concernedtxlawyers” to Author as a Texas State Bar member (Feb. 11, 2011) (on file with Author) (titled “Lawyers Voting ‘No’ on the Referendum” and observing that “I have not understood the alleged ‘need’ to change our existing Rules”); E-mail from Joe Crews, Crews Law Firm, to Author as a Texas State Bar member (Jan. 17, 2011) (on file with Author) (titled “Why Is Bar Leadership Using Our Dues to Sell Their Views? Vote ‘No’ on the Referendum” and observing that “[f]or the 20 years we’ve had the current rules, they seem to have worked well. Why do we need new rules? The old country saying ‘if it ain’t broke, don’t fix it’ seems to apply pretty well to this situation.”); E-mail from W. Michael Murray to Author as a Texas State Bar member (Jan. 31, 2011) (on file with Author) (titled “Don’t Drink the ‘New Coke’ Rules” and observing that “[o]ur current ethics rules have worked pretty well for 20 years. Neither clients nor lawyers have clamored for new rules. No widespread problems have been reported in the current rules.”).

100. See, e.g., E-mail from David T. Bright, *supra* note 99 (“The proponents of these new rules and the State Bar have ignored the cost of these proposed rules. The new rules clearly would cost time and money for lawyers and clients—that would be true of any new rules—but these proposals do not create obvious improvements to outweigh those costs. And yet, the one topic that the folks pushing these rules always avoid is ‘what will these rules cost?’ Why?”); E-mail from Amon Burton, Chuck Herring & Jim McCormack to Author as a Texas State Bar member (Jan. 10, 2011) (on file with Author) (titled “Vote No on Disciplinary Rules Referendum” and observing that “[t]he State Bar Board failed to conduct the financial-impact analysis prescribed by its Policy Manual. What would that cost-benefit analysis have shown? We believe that the costs of implementing this new, Texas-only patchwork system of rules will far outweigh the benefits.”); E-mail from James M. McCormack, *supra* note 99 (“More than once, I have asked what all of this will cost. To date, no one has answered that question.”).

identify the costs the court anticipates as a result of implementing a change in the rules.<sup>101</sup>

The initial response of the Texas Supreme Court to the bill was most interesting:

Justice Phil Johnson, the Supreme Court's liaison for the Texas Disciplinary Rules of Professional Conduct, says the court does not have the resources to conduct a cost-benefit analysis. "We don't do that," Johnson says. "We don't have anybody that can do that." Johnson says the bill does not appear to provide the Supreme Court with additional funding to do such analyses. "It would take us quite a while to do that [conduct an analysis], and it would slow the rule-making process considerably," he says.<sup>102</sup>

To be sure, facts and data are more expensive and time-consuming to obtain than "views" and opinions. Equally surely, rule changes based on facts and data are less likely to impose costs on clients—and on the larger justice system—that exceed the expected benefits. The rulemaking process should not be viewed as an end in itself but rather as a means for improving the existing state of affairs in some identifiable and articulable way. Thus, I recommend:

*Recommendation 3:* The committee should be obligated to undertake an independent investigation of the problem it is charged to remedy. (See Recommendation 1 above). At a minimum, this investigation should include: (a) the systematic gathering of views of the members of each sector of the profession represented on the committee regarding any proposed rule changes; (b) an analysis by each committee member of the expected costs and benefits of each proposed rule change to the clients serviced by the sector of the legal profession that the committee member represents; and (c) a comprehensive survey of what rule(s) and formal comments, if any, every other state and the ABA have adopted to address the problem at issue.

#### 4. *The Role of the State Bar Membership*

The final step of the rulemaking process in Texas is for the proposed rule changes to be submitted to a vote of the state bar membership, pursuant to an order of the state supreme court.<sup>103</sup> Although the Court has observed that the referendum "is not a predetermination of any legal issues regarding the proposed rules,"<sup>104</sup> it is not clear whether such a referendum is merely advisory. The Texas Government Code sets out specific procedures for the supreme court to follow when proposing amendments to the state bar ethics rules, and states that "[t]he supreme court *shall promulgate* each rule and amendment that receives a majority of the votes cast in an election."<sup>105</sup> In addition, "[a] rule *may not be promulgated* unless it has been

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101. See *Cost-Benefit Analysis of Supreme Court Rules and Rule Amendments*, H.B. 352, 82d Reg. Sess. (Tex. 2010); *Cost-Benefit Analysis*, TEX. LAW., Dec. 6, 2010, at 3.

102. *Cost-Benefit Analysis*, *supra* note 101 (alteration in original).

103. Order 04-9220, *supra* note 41, at 2–3.

104. *Id.* at 2.

105. See TEX. GOV'T CODE ANN. § 81.024(e) (West 2005) (emphasis added).

approved by the members of the state bar” through such a referendum.<sup>106</sup> Although the Government Code thus seems to restrict substantially the discretion of the supreme court regarding the promulgation of ethics rules and amendments, one might question whether such statutory restrictions impermissibly impinge on the judicial power vested in the supreme court under the Texas Constitution.<sup>107</sup>

Putting to one side the question of whether the supreme court retains discretion under the Texas Constitution to consider the results of a referendum on a proposed amendment to be merely advisory, it is not clear what the purpose of such a referendum is. Nor is it clear what useful information the supreme court or anyone else might glean from the tally of votes.

Such a referendum requires, at the outset, a decision regarding how the various changes to even a single rule will be “packaged” for purposes of a yes/no vote. To the extent that more than one proposed change is included in a single ballot proposition, one cannot know which, if any, of the proposed changes, if taken alone, is favored by a majority of those voting and which, if any, is not.<sup>108</sup> It is significant, and a matter of increasing controversy in Texas, that the referendum is limited to the text of the proposed rules, and does not include proposed changes to the formal comments to the rules. As various critics have noted regarding the most recent round of proposed changes to the Texas rules (none of which was adopted<sup>109</sup>),

[t]wo-thirds of the wording in the proposed Rules and Comments are in the Comments (over 44,000 words). The Comments are

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106. *Id.* § 81.024(g) (emphasis added).

107. The Texas Constitution provides for the separation of governmental powers into

three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others . . . .

TEX. CONST. art. 2, § 1. The Constitution further specifies that “[t]he judicial power of this State shall be vested in one Supreme Court, . . . and in such other courts as may be provided by law.” *Id.* art. 5, § 1.

108. The rules referendum that was conducted in Texas from January 18 through February 17, 2011, for example, presented six ballot issues, each of which involved numerous proposed changes to various ethics rules.

109. The Texas State Bar reported that approximately 44% of licensed attorneys eligible to vote participated in the 2011 referendum, and each of the six ballot items failed by an overwhelming margin. *See* State Bar of Tex., *Referendum 2011: Results*, TEX. B.J., Mar. 2011, at 195. The proportion of “no” votes ranged from 81.32% (Question C) to 72.31% (Question D). *Id.* According to several knowledgeable observers, “[t]he magnitude of the vote and the size of the defeat of all six proposals were unprecedented in modern State Bar referenda history.” E-mail from Chuck Herring, Amon Burton & Jim McCormack to Author as a Texas State Bar member (Feb. 18, 2011) (on file with Author) (titled “You Did It!” and stating, “We hope that any further rule-drafting in Texas will include all major interest groups of lawyers, as well as the public.”).

supposed to provide “guidance” concerning the “applicable standard of conduct.” But Texas lawyers don’t get to vote on them.<sup>110</sup>

In addition, the fact that each registered member of the bar has a vote in the referendum implies that “one person, one vote” is the proper weighting of views regarding the proposed changes, even if some sectors of the bar (and/or their clients) will not be directly impacted by those changes.

All of this causes one to wonder whether the primary function of the referendum in the rulemaking process is to provide some protection to the elected justices of the state supreme court.<sup>111</sup> Particularly when a controversial rule change is adopted, the court may usefully be able to deflect some of the ultimate responsibility and negative fallout if it can point to the fact that a majority of bar members voting supported the change. Thus, I recommend:

*Recommendation 4:* Insofar as the state Supreme Court has ultimate responsibility for the ethics rules, it is of course able to require a referendum, even if its primary function is to provide the elected justices some protection from negative fallout when controversial rule changes are involved. If the purpose of the referendum is to solicit as comprehensive as possible a statement of the views of the bar membership regarding the proposed changes, however, then: (a) each severable aspect of a proposed rule change should be subject to a separate yes/no vote; and (b) the tally of votes regarding each

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110. See E-mail from “Trial Lawyers Against Proposed Rule Changes” to Author as a Texas State Bar member (Jan. 11, 2011) (on file with Author) (titled “Many Trial Lawyers Urge ‘No’ Vote on Referendum”); see also, e.g., E-mail from Waylon Allen, Attorney to Author as a Texas State Bar member (Jan. 24, 2011) (on file with Author) (titled “Vote No Tomorrow” and observing that “[a]s most Texas lawyers know by now, we don’t get to vote on the Comments even though two-thirds of the verbiage in these Rules and Comments is in the Comments. That’s unfair and unwise, especially when the Preamble (which we also don’t get to vote on) says that the Comments ‘explain’ the Rules and provide ‘guidance’ concerning the Rules.”); E-mail from Brian Burris to Author as a Texas State Bar member (Jan. 18, 2011) (on file with Author) (titled “General Practice, Solos, Small Firms Council: Vote ‘No’ on 4 of 6 Referendum Items” and stating that “[t]he Bar leaders want to downplay the significance of Comments. In part, that’s probably because most of what would govern us in these proposals appears in the Comments, which are far longer than the Rules. But in any event, they’re not letting us vote on the Comments.”); E-mail from Amon Burton, Chuck Herring & Jim McCormack, *supra* note 100 (“Note that Texas lawyers are not being allowed to vote on the Comments to the Rules. Yet over two-thirds of the language in the proposed Rules and Comments is in the Comments (over 44,650 words of the 64,000+ words). And the Preamble says the Comments provide the ‘interpretive guidance.’”); E-mail from Joe Crews, *supra* note 99 (“[T]he referendum itself is, at best, ‘diluted democracy.’ Most of the proposed verbiage is in the Comments, not the Rules. But we don’t get to vote on the Comments. Yet the proposed Preamble—which we also don’t get to vote on—says we can ‘rely upon’ the Comments and that they provide ‘interpretive guidance’ and ‘illustrate or explain applications of the Rules.’ . . . I don’t find any rule or statute that says lawyers are prohibited from voting on the proposed comments. What’s the harm in letting us vote, giving us a say?”).

111. Under the Texas Constitution, the nine justices of the supreme court are to be “elected (three of them each two years) by the qualified voters of the state at a general election [and] shall hold their offices six years.” TEX. CONST. art. 5, § 2.

referendum item should include a breakdown of the tally of votes of each sector of the bar.<sup>112</sup>

### CONCLUSION

The process by which a state's rules of legal ethics are adopted and changed is fundamentally no different from other legislative and regulatory processes. Interest groups can be expected to seek influence in the process and to strive for outcomes that benefit them. And any given enactment will inevitably affect various sectors within the legal profession (and their clients) differently: some subgroups may be advantaged while others are disadvantaged, and some may not be affected at all.

The rulemaking rules themselves matter. And state supreme courts should ensure that those rules receive at least as much systematic study and careful consideration as the rules of legal ethics that they spawn.

By presenting a case study of one puzzling recent change to the Texas ethics rules, I have sought in this Article to inspire lawyers and the state courts that regulate them to think and talk seriously about the aims of their state's legal ethics rulemaking process, and how that process should be (re)structured in order best to attain those goals. With an eye toward further stimulating that larger conversation, I have offered four recommendations that I believe would enhance any state's process for making and amending its rules of legal ethics. Finally, I hope that this Article might persuade other legal scholars of the importance both of further research on the issues involved and of their own participation in the hoped-for larger conversation.

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112. If the state bar systematically gathered information about the practice areas of its members during the annual membership renewal process, *see supra* note 96, that should minimize the likelihood that any "strategic" or dishonest identification of practice sectors by the membership will be undertaken to skew tabulations of any particular referendum item.

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