

Be Careful

WHAT YOU ASK FOR

ATTORNEY JAMIE REPRESENTS A SCHOOLTEACHER, Alex, in connection with a personal injury matter. Alex is not satisfied with the outcome of the case and engages another attorney, Morgan, to investigate Jamie's handling of the case. Morgan determines that Jamie made serious errors in handling Alex's matter and agrees to pursue a malpractice claim against Jamie.

Before filing suit, Morgan makes a settlement demand to Jamie only to learn that Jamie does not have malpractice insurance or sufficient assets to pay the damages that Morgan has demanded on Alex's behalf. Morgan then suggests an alternative proposal: Alex will release Jamie from the malpractice claim if Jamie agrees to assign a portion of Jamie's future contingency fees in other cases unrelated to Alex's matter.

Jamie decides that having an aggrieved client with an interest in other clients' cases is too complicated, too likely to foster further disagreements and litigation, and may be unethical.

According to a recent Ethics Opinion, which of the following is most accurate?

- A. Morgan's proposed agreement does not violate the ethics rules.
- B. If Jamie accepts the proposed settlement, both Morgan and Jamie would be violating the ethics rules.
- C. If Jamie accepts the proposed settlement, only Jamie would be violating the ethics rules.
- D. Regardless of whether Jamie accepts the proposed settlement, Morgan violated the ethics rules merely by proposing the settlement.
- E. Both B and D.



ABOUT THE CENTER

The Texas Center for Legal Ethics was created by three former chief justices of the Supreme Court of Texas to educate lawyers about ethics and professionalism. Lawyers can access the Texas Disciplinary Rules of Professional Conduct, the Texas Lawyer's Creed, and a variety of other online ethics resources by computer or smart device at legalethicstexas.com.

DISCLAIMER

The information contained in Ethics Question of the Month is intended to illustrate an ethics issue of general interest in the Texas legal community; it is not intended to provide ethics advice that applies regardless of particular facts. For specific legal ethics advice, readers are urged to consult the Texas Disciplinary Rules of Professional Conduct (including the official comments) and other authorities and/or a qualified legal ethics adviser.



ANSWER: Rule 5.04(a) of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from sharing or promising to share legal fees with a non-lawyer, except in certain circumstances that do not apply here. Alex is a teacher, not a lawyer. Therefore, the proposed fee-sharing agreement would violate that rule if Jamie and Morgan agreed to it.

The more interesting question, however, is whether Morgan violated the rule merely by *proposing* the settlement agreement. Rule 8.04(a) states that lawyers shall not violate the rules or "knowingly assist or induce another to do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship." So did Morgan's offer to settle the case "assist" or "induce" Jamie to violate the rules?

Ethics Opinion 698 (June 2023) considered this issue, focusing on the meaning of "assist" and "induce" in this context. It found that an "attempt" to violate the rule does not rise to the level of assisting or inducing where "no violation of that Rule has occurred." The opinion notes that other rules do explicitly prohibit "offers" or "encouragement" of a rules violation, such as Rule 5.06(a), Rule 4.02(a), and Rule 5.03(b)(1). Therefore, the absence of similar language in Rule 8.04(a) indicates that an attendant rules violation is required to run afoul of Rule 8.04(a). It should be noted that the opinion emphatically disapproves of knowingly proposing a prohibited fee-sharing arrangement but concludes that "disapproval is not the test."

Here, Morgan proposed a prohibited transaction, but no rules violation ultimately took place because Jamie refused the offer. The correct response is B. For more analysis, go to legalethicstexas.com/ethics-question-of-the-month. **TBJ**