

IN BRIEF

A FORUM FOR TEXAS WOMEN LAWYERS

PRESIDENT'S COLUMN

Referendum on Referral Fees and Advertising

By Susan G. Morrison, Austin

Recently, the Texas Supreme Court has attempted to amend the Texas Rules of Civil Procedure (Rule 8a) to include limits and regulations of referral fees for Texas lawyers. The proposed changes would affect the conduct of lawyers which has, in the past, been governed by professional conduct rules.

Several of the proposed changes have not been adopted by any other state in the nation or by the American Bar Association. The proposed changes include the public disclosure of a client's contract with an attorney without consideration of the client's objection to such disclosure. In addition, the value of a lawyer's contribution would be measured using undefined terms that are subject to interpretation. These and several other changes have not been reviewed by the Texas Disciplinary Rules of Professional Conduct Committee or the Board of Directors of the State Bar of Texas. The lack of review and debate on these changes has raised many concerns among Texas lawyers.



Because of the unprecedented number of comments and objections from attorneys throughout the State of Texas, the State Bar of Texas Executive Committee has unanimously voted to request that the Supreme Court of Texas delay the implementation of the rule. Along with their request for a delay, the State Bar of Texas has created a proposal for the development of a task force to conduct hearings about Rule 8a and place the item to vote at the next referendum. The greatest concern is that the Supreme Court, will allow the Court the opportunity to review the rules while still respecting the principle of self-governance.

The debate about Rule 8a and the impending changes is important even if you do not pay nor rely on referral fees in your practice. Hearings will soon be scheduled around the State. Participate in this debate!

GLORIA ALLRED TO HEADLINE TWL ANNUAL MEETING AND CLE PROGRAM FEBRUARY 28, 2004 - *By Cori A. Harbour, El Paso*

TWL is pleased to announce that Gloria Allred, Los Angeles-based attorney and frequent legal commentator on Fox News Channel, MSNBC and CNN, will headline the Annual Meeting and CLE Program. Ms. Allred will speak about "The Treatment of Women in High-Profile Cases." She will also offer a question and answer session.

Ms. Allred is an attorney and a partner in the law firm of Allred, Maroko & Goldberg. The firm was founded in 1976 by named partners Gloria Allred, Michael Maroko and Nathan Goldberg, all of whom have been named Super Lawyers by Los Angeles Magazine and Law and Media, Inc. Over the years, the law firm has earned a nationwide reputation for championing the rights of employees, women, minorities, and various causes in need of strong advocacy. That reputation is the result of a long record of success in cases involving high profile issues, cutting edge application of legal principles, and multi-million dollar verdicts. In the last five years alone her law firm has won over 100 million dollars for victims in confidential settlements and trials.

As recognized experts in employment law and champions of important causes, the firm is often called upon by national television, radio and print media for legal opinions on current events of a legal nature. Allred, Maroko & Goldberg remains dedicated to its core mission of championing the fundamental rights of individuals. With 27 years' experience working on groundbreaking civil rights cases, her firm has taken on more women's rights cases than any other plaintiff's private law firm in the nation. "We've earned the trust of many women, and we win cases," states Ms. Allred as the reason for her firm's success.

Ms. Allred has won countless honors for her pioneering legal work on behalf of women's rights and rights for minorities who are discriminated against on account of their gender, race, age, sexual orientation, or physical condition. An active feminist, Ms. Allred founded the Women's Equal Rights Legal Defense and Education Fund (WERLDEF). She hosted a radio show on KABC Radio in Los Angeles for 14 years.

Ms. Allred was born in Philadelphia, Pennsylvania, and earned her B.A. with honors in English from the University of Pennsylvania. She earned her M.A. from New York University and her J.D. cum laude from Loyola University School of Law in Los Angeles. She was also awarded an Honorary J.D. from the University of West Los Angeles School of Law. In addition to being an attorney, Ms. Allred has held California life credentials in secondary school education and supervision. She taught in public schools for six and one half years, and was also a lecturer at the University of Southern California for several years.

Ms. Allred has one daughter, Lisa Bloom, and two grandchildren, Sarah and Sam. Her daughter Lisa is an anchor on Court TV.

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TEXAS WOMEN LAWYERS AND ITS MISSION

Texas Women Lawyers (TWL) is a nonprofit corporation that was created in 1994 to provide a voice for women attorneys in Texas. TWL is comprised of women lawyers throughout the State of Texas. It advocates the interests of women through its network of members who include solo practitioners, associates, partners, corporate counsel and the judiciary. To advocate these interests and to achieve its mission, TWL sponsors and supports legislation, offers programs that provide networking, CLE opportunities, and mentoring.

TWL is committed to the empowerment of women lawyers to achieve full rights, privileges and responsibilities in the legal profession. Through our network, we advocate the interests of women in the justice system and society.

Membership Application

REMINDER: DUES FOR 2004 - 2005 ARE DUE BEFORE MARCH 1, 2004

An individual annual membership in Texas Women Lawyers (TWL) is \$50.00 for attorneys practicing more than 5 years and \$35.00 for attorneys practicing less than 5 years. Additionally we offer "Sustaining" and "Lifetime" memberships. Sustaining memberships are \$100 per year and Lifetime memberships are \$1,000 paid one time (or \$100 per year for ten years). Sustaining and Lifetime membership provides you with special recognition in our directory. The lifetime membership entitles you to membership with no annual dues payments. We encourage you to join TWL, as a Sustaining or Lifetime member, or at the regular dues rate.

Please check each that applies:

- \$ 35 Individual Membership (attorneys practicing 5 years or less)
\$ 50 Individual Membership (attorneys practicing more than 5 years)
\$ 10 Law Student Membership
\$ 100 Sustaining Membership
\$1,000 Lifetime Membership

Enclosed is my additional contribution in the amount of \$ _____ to TWL

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Preferred mailing address: office home

Permission to use this info in the membership directory yes no

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THE TEXAS SUPREME COURT TAKES ACTION ON PENDING RULES CHANGES

The Texas Supreme Court has suspended the January 1, 2004, effective date for the rule and outlines the path of continued discussion on the referral fee issue. Since its proposal in October 2003 the Court has received extensive comments, including a letter from the State Bar's Board of Directors Executive Committee requesting postponement of the effective date to allow time for further study.

The order suspending the effective date of Rule 8a and accompanying appendices provide information regarding the development of the proposed rule and its intended purpose, discusses and responds to comments to the Court from interested parties, discusses the State Bar's suggestions and, as requested by the leadership of the Bar, sets out issues that should be included in its study.

The Supreme Court of Texas indicated earlier this month that it would delay the effective date of proposed Rule 8a to allow State Bar leadership to appoint a special task force on referral fees and related advertising issues.

In addition to delaying the implementation of the rule, the Court also will identify the primary concerns raised by lawyers during the comment period as well as any other issues the Court believes should be addressed in the Bar's consideration of referral fees. The task force will conduct public hearings throughout the state as well as obtain input and feedback through surveys, written comments, the website, and the Texas Bar Journal.

The task force will report to the Board of Directors, which will then forward to the Court any rules recommendations with the request that the Court authorize the Bar to hold a referendum in accordance with the Texas Government Code Section 81.024. It is expected this process will culminate in a referendum during the fall of 2004.

The remaining two rules proposed relating to Class Actions (Rule 42) and Offer of Settlement (Rule 167) are unaffected by this order and remain scheduled to take effect on January 1, 2004.

Changes to Texas Rules of Disciplinary Procedure

The Court will adopt the State Bar's proposal modifying the Texas Rules of Disciplinary Procedure without change. The State Bar, working with lawyer discipline-related groups, had sent the Court the proposals to modify the disciplinary procedure rules that govern the state's lawyer-grievance process in the state. The new changes will apply only to grievances filed after January 1, 2004, and ongoing proceedings will be governed by the new rules.

The modifications resulted from the State Bar "sunset" bill that required amendments to the Texas Rules of Disciplinary Procedure. Among the most important changes were:

1. A requirement that the Court adopt rules relating to "classification" of grievances and a requirement that the chief disciplinary counsel make an initial determination of whether "just cause" exists to pursue the grievance. If no "just cause" exists, the chief disciplinary counsel is to recommend dismissal of a complaint. This system would replace the current "investigatory hearings process" (Sections 81.072(b), 81.073, 81.074, and 81.075);
2. The elimination of the respondent attorney's appeal of the classification decision and a complainant's option to appeal an evidentiary panel finding (Sections 81.075 and 81.0751);
3. The requirement that all summarily dismissed inquires and complaints be referred to the Client Attorney Assistance Program (Section 81.075(c)(1)); and
4. The pledge of confidentiality during the conduct of an evidentiary panel hearing, unless a public sanction is entered, and the availability of a private reprimand before that panel (Section 81.0752).

FMLA, 10 Years and Counting

By C.B. Burns*, El Paso



In 1993, President Clinton signed into effect the Family and Medical Leave Act of 1993. Hailed as long-awaited protection for employees needing to take time off from work for family and medical reasons, the now 10-year old FMLA provides up to 12 weeks of job-protected leave each year to employees for childbirth or adoption, to attend to family members with serious health conditions, or to recuperate from their own serious health conditions. As with most pieces of legislation, the FMLA has spawned pages and pages of regulations and thousands of lawsuits, all attempting to give effect to the FMLA. This article highlights some of the basic principles under the FMLA and how they have been interpreted by the Department of Labor and courts.

I. The Basics

All public sector employers are covered. Private sector employers with 50 or more employees within a 75-mile radius are covered. Eligible employees are those who have worked for their employer for at least 12 months and at least 1,250 hours during the preceding 12-month period. 29 C.F.R. 825.104-111.

The heart of FMLA, of course, is the protected job leave it provides. Eligible employees of covered employers are entitled to take up to 12 weeks of leave during any 12-month period because of childbirth or adoption, to take care of a close family member with a serious health condition, or because of an employee's own serious health condition that renders the employee unable to perform the functions of her position. Upon return to work from FMLA leave, an employee is entitled to be reinstated to the same position she held at the time of leave or to a substantially equivalent position. When necessitated by a serious health condition, leave also may be taken in intermittent or reduced leave blocks. For example, an employee who needs to attend regular physical therapy appointments related to a serious health condition must be allowed to take intermittent leave to cover those appointments.

II. Does 12 weeks mean 12 weeks?

The Department of Labor, whose Wage and Hour Division is responsible for enforcing the FMLA, issued final regulations interpreting FMLA in 1995. Considered onerous and overreaching by many, these regulations cover virtually every conceivable issue that could arise under the FMLA. One regulation provides that if an employer does not advise an ineligible employee that she is not yet entitled to FMLA leave, the employee is nonetheless eligible for leave. 29 C.F.R. 825.110(d). Several courts have disagreed, holding this particular regulation to be invalid because it improperly expands the provisions of the FMLA by allowing an employee to take leave before statutorily eligible. See e.g., *Dormeyer v. Comerica Bank*, 223 F.3d 579 (7th Cir. 2000).

Another regulation that has come under attack deals with an employer's failure to designate leave as FMLA-qualifying. In its regulations, the

DOL requires an employer to notify an employee that leave is FMLA-qualifying and provides that if an employer fails to make that notification, the leave taken by the employee does not count towards the employee's 12-week FMLA allotment. 29 C.F.R. 825.700(a). What this regulation means is that if an employee took four weeks of leave because of a serious health condition and the employer failed to inform the employee that these four weeks counted towards the 12 weeks of allowed FMLA leave, the employee would be entitled to take an additional 12 weeks of job-protected leave beyond the four already taken. This regulation was challenged - and invalidated - in *Ragsdale v. Wolverine Worldwide, Inc.*, 122 S. Ct. 155 (2002). In that case, an employee with Hodgkin's disease took seven months of paid sick leave to battle her illness. Her employer did not notify her that this leave counted towards her FMLA allotment. When she asked for additional leave, her employer denied the request, citing that her sick leave had been exhausted. The issue presented to the Supreme Court was whether the employer's failure to notify Ragsdale that her seven months of leave counted towards her FMLA allotment meant she was entitled to 12 more weeks of job-protected leave, the position advocated by Ragsdale and the DOL. The Supreme Court concluded that the DOL's interpretation went beyond the requirements of the FMLA and that Ragsdale had exhausted the 12 weeks of job-protected leave to which she was entitled under the FMLA and was not eligible for further leave.

III. What is a Serious Health Condition?

This question, which often determines whether leave is FMLA-qualifying, has confounded employers, requiring them to make, sometimes erroneously, judgment calls on the seriousness of a health condition. The DOL regulations offer a broad description of what constitutes a serious health condition: a serious health condition is an illness, injury, impairment or physical or mental condition that involves (1) inpatient care in a medical facility, including any follow-up treatment; (2) any period of incapacity for more than three consecutive calendar days and subsequent treatment by a health care provider; (3) any period of incapacity due to pregnancy; (4) any period of incapacity due to a chronic serious health condition that requires periodic visits by a health care provider and that may cause episodic, rather than continuous, periods of incapacity; (5) any period of incapacity which is permanent or long-term in nature and for which treatment may not be effective; and (6) any period of absence to receive periodic treatments, such as chemotherapy or dialysis, for a serious health condition. 29 C.F.R. 825.114(a).

While conditions such as cancer and heart disease can easily be considered serious health conditions, what about the flu, a child's ear infection, or just feeling sick? Although the DOL opines that conditions such as the common

cold, the flu, ear aches, head aches, and an upset stomach will not ordinarily be serious health conditions, see 29 C.F.R. 825.114(c), courts have been less than clear in answering these conditions. One court opined that an employee who misses work for a week with flu-like symptoms but who does not go to a doctor and takes only over-the-counter medication will likely not have a serious health condition, whereas an employee with the same condition but who sees a doctor probably would. See *Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001). Another court also found that a child with a runny nose, sore throat and low-grade fever a condition that most young children have repeatedly during the course of a year had a serious health condition, thus qualifying his mother to take FMLA leave. *Brannon v. OshKosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995). In another case, however, a child with an ear infection another common childhood condition did not have a serious health condition. *Seidle v. Provident Life Ins. Co.*, 871 F. Supp. 238 (E.D. 1994).

In an interesting case, the Eighth Circuit held that an employer did not violate the FMLA when it offered personal leave, rather than FMLA leave, to an employee undergoing gender reassignment surgery. In *Sanders v. May Dept. Stores Co.*, 315 F.3d 940 (8th Cir. 2003), Sanders, born a male, decided to have gender reassignment surgery and resigned his position for privacy reasons. The company, in trying to find an alternative to resignation, advised him that he was eligible for one week of leave for each year of service. After surgery, Sanders sought reemployment, was rehired in a different position, but was terminated shortly thereafter for poor performance. Sanders then sued under the FMLA, claiming that she should have been offered FMLA leave instead of personal leave and thus should have been reinstated to her original position. The court rejected her claim, finding that Sanders had not requested FMLA leave and that the company had no obligation to offer FMLA leave under the circumstances.

IV. More to Come

Without space restraints, the FMLA and the regulations and decisions interpreting it could be discussed endlessly. This 10-year old statute provides needed rights and protections to employees, at the same time aggravating and confounding employers with its technicalities and unpredictability. What is certain is that the FMLA will continue to evolve through regulation and court interpretation through its teen years and will keep employers and their lawyers very busy.

* C.B. Burns is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. She is a partner in and Chairperson of the Labor, Employment and Immigration Department of Kemp Smith LLP.



TEXAS WOMEN LAWYERS' ANNUAL EVENT & CLE 2004

BUILDING BRIDGES

On Saturday, February 28, 2004, Texas Women Lawyers will host its Annual Event & CLE **BUILDING BRIDGES** in El Paso, Texas. **BUILDING BRIDGES** will offer a full day of CLE, networking opportunities, and career advice from female attorney role models from many aspects of our profession,* featuring

Gloria Allred

Los Angeles based attorney and partner in Allred, Maroko & Goldberg

The Treatment of Women in High-Profile Cases

BUILDING BRIDGES Program Schedule – February 28, 2004

8:15 - 8:45	Registration & Breakfast	1:10 - 1:20	Break
8:45 - 9:00	Opening Remarks	1:20 - 2:05	<i>Becoming a Judge and Women Helping Women on the Bench: The National Association of Women Judges --</i>
9:00 - 9:30	<i>State of the Legislature and its Impact on Women</i> -- Sen. Eliot Shapleigh		Hon. Kathleen Cardone, Judge, U.S. District Court, Western District of Texas; Hon. Bea Ann Smith, Justice, Third District Court of Appeals, Texas
9:30 - 10:15	<i>Affirmative Action: The Court Rules Again --</i> Prof. Shelli Soto, J.D., U.T.E.P.; Dr. Robert Pallitto, U.T.E.P.		Hon. Kathleen Cardone, Judge, U.S. District Court, Western District of Texas; Hon. Bea Ann Smith, Justice, Third District Court of Appeals, Texas
10:15 - 10:25	Break	2:05 - 2:35	<i>Rainmaking --</i> Sharla Frost, Powers & Frost LLP, Houston
10:25 - 10:55	<i>Becoming a Law Professor --</i> Daisy Floyd, Professor of Law, Texas Tech University School of Law	2:35 - 3:15	<i>Leadership: Getting There and Making a Difference --</i> Betsy Whitaker, President, State Bar of Texas; Lisa H. Pennington, Managing Partner, Baker & Hostetler LLP, Houston
10:55 - 11:25	<i>Judicial Ethics --</i> Hon. Richard Barajas, Chief Justice, 8th District Court of Appeals, Texas		
11:25 - 11:55	<i>Seeking Statewide Office --</i> Patricia Madrid, Attorney General, State of New Mexico	3:15 - 3:30	Break
11:55 - 12:10	Break	3:30 - 5:00	<i>The Treatment of Women in High Profile Cases --</i> Gloria Allred, Los Angeles based attorney and partner, Allred, Maroko & Goldberg
12:10 - 1:10	<i>Violence Against Women on the U.S.-Mexico Border</i> Hon. Kathleen H. Olivares, Judge, 205th Judicial District Court, Texas; Dr. Kathy Satudt, U.T.E.P.; Dr. Irasema Coronado, U.T.E.P. (Lunch is Provided)	5:00 - 6:30	Closing Remarks and Reception

** Approved for 6.75 hours, including one hour of ethics by the State Bar of Texas.*

The New Mexico MCLE Board has approved 6.7 credit hours, including 6.1 general hours and .6 ethics hours.

Registration cost is \$195 for non-members; \$145 for members. (Registration form follows)

The conference will be held at the historical Camino Real Hotel. Rooms are available at \$79.00 (exclusive of tax) by calling: (800) 769-4300 or (915) 534-3099, Monday through Friday from 8 a.m. to 6 p.m. (MST), by using the group name: Texas Women Lawyers. All reservations must be guaranteed with a credit card or an advanced deposit of the first night's room and tax to hold the room. Cut-off Date: February 13, 2004. Cancellations must be received by the hotel within forty-eight (48) hours prior to scheduled arrival.

Southwest Airlines offers up to 10% off most fares for air travel to and from the event, with the convenience of Ticketless Travel! To qualify, call Southwest Airlines Group and Meetings reservations at 800-433-5368 and reference the assigned I.D. Code M0324. Reservations Sales Agents are available 7:00 a.m. - 8:00 p.m. Monday-Friday, or 8:30 a.m. - 5:30 p.m. Saturday and Sunday, Central Standard Time.

Any questions, please contact Cezy Collins, President-Elect, TWL at (915) 533-4424, Kemp Smith LLP, 221 N. Kansas, Suite 1700, El Paso, Texas 79901, jcollins@kempsmith.com

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BUILDING BRIDGES

February 28, 2004

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