

DANCES WITH WOLVES AND LEGAL ETHICS

MARK D. WHITE, *Amarillo*
Executive VP, General Counsel
Amarillo College

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	THE VARIOUS ROLES OF A LAWYER	1
III.	THE ATTORNEY-CLIENT RELATIONSHIP	1
	A. Beginning the relationship.	1
	B. Whether an agreement was reached with the client.	1
	C. Consulting with “prospective clients.”	1
	D. Duties beyond the agreement.	2
IV.	FEE ARRANGEMENTS.....	2
	A. Documenting the attorney-client relationship or agreement.	2
	B. Establishing the fee agreement at the outset.	2
	C. Unreasonable fee vs. unconscionable fee.....	2
	D. Fee contract vs. fee shifting.....	2
V.	CONTENTS OF ENGAGEMENT LETTERS	3
	A. Specific identification of the client.	3
	B. Description of the specific objective or objectives of the representation.....	3
	C. No guarantees.....	3
	D. Limitations on the representation.	3
	E. Someone else pays the bill.	4
	F. Clear description of the fee.	4
	G. Monthly billing.....	5
	H. Clause allowing increase.....	6
	I. Clear description about how expenses will be paid.	6
	J. Clear description about how disbursements will be billed.....	6
	K. Disclosure about recovery of fees.	6
	L. Retainers, “non-refundable” retainers, and “deposits.”	7
	M. Arbitration clause.	8
	N. Confidentiality.....	10
	O. Multiple representation.	11
VI.	CONTINGENT FEES.....	11
	A. Increase in percentage.	11
	B. Expenses.....	11
	C. Calculating the fee.....	12
	D. Assignment of the cause of action.....	12
VII.	INCLUDE INFORMATION ON WHAT HAPPENS IN THE EVENT OF WITHDRAWAL OR TERMINATION.....	12
VIII.	ENCLOSE THE TEXAS LAWYER’S CREED	13
IX.	APPLICABLE RULES.....	13
	A. Fees.	13
	B. Disciplinary rule limitations on fee agreements.....	13
X.	CONCLUSION.....	15
	THE TEXAS LAWYER’S CREED A MANDATE FOR PROFESSIONALISM	17

DANCES WITH WOLVES AND LEGAL ETHICS

I. INTRODUCTION

Many papers have been written about attorney engagement letters. The Texas Bar CLE online library contains a wealth of information about how to describe the relationship with the client such that the scope of the engagement and the client's responsibility for expenses and fees is not likely to be misunderstood.

The purpose of this paper is to remind lawyers which disciplinary rules are directly applicable to fee agreements. The paper also contains suggestions for compliance.

II. THE VARIOUS ROLES OF A LAWYER

When you are forming a relationship with a client, or working on a matter for a client that has been assigned to you by a partner in your law firm, it is helpful to recognize at the outset what function you are performing. There are five distinct functions or roles of the lawyer. You may be called upon to act in one or several of these functions. They are:

- Advisor – providing a client with an informed understanding of the client's legal rights and obligations and explaining their practical implications.
- Advocate – zealously asserting the client's position under the rules of the adversary system.
- Negotiator – seeking a result advantageous to the client but consistent with requirements of honest dealing with others.
- Intermediary – reconciling, between clients, their divergent interests as an advisor and, to a limited extent, acting as a spokesperson for each client.
- Evaluator – examining a client's affairs and reporting about them to the client or to others.

Tex. Disciplinary Rules Prof'l Conduct Preamble, ¶2.

III. THE ATTORNEY-CLIENT RELATIONSHIP

A. Beginning the relationship.

It is important to note the relationship can begin without an official fee agreement between the attorney and client. Rather, because the attorney-client relationship is contractual in nature, it begins when an attorney agrees to render professional services for a client. This agreement may be express or implied from the conduct of the parties. See *Valls v. Johanson & Fairless, L.L.P.*, 314 S.W.3d 624, 633–34 (Tex. App.—Houston 2010, no pet.) (citing *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991, writ denied)). In fact, the relationship can be formed even when there is no agreement for payment of a fee or no payment of a fee at all. The relationship

may simply exist as a result of rendering services gratuitously. *Id.*

B. Whether an agreement was reached with the client.

Because it is a creature of contract, the determination of whether an agreement has been reached is made by using objective standards of what the lawyer and possible client said and did, instead of looking at their subjective states of mind. *Terrell v. State*, 891 S.W.2d 307 (Tex. App.—El Paso 1994, pet. ref'd). It is not enough that either the lawyer, or the client, alone, thinks he has made a contract. It is not enough that the client just “thinks” that you represent him. There must be objective indications. *Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dismissed by agr.).

C. Consulting with “prospective clients.”

Many times a lawyer will consult with a prospective client to determine whether or not he wants to undertake the representation. Be careful here. There are cases that broadly provide that the attorney's fiduciary obligations arise even during those preliminary consultations if the attorney discusses with the potential client his legal problems with a view toward undertaking representation. See *Nolan v. Foreman*, 665 F.2d 738 (5th Cir. 1982). However, because the attorney-client relationship is a creature of contract, it is the clear and express agreement of the parties that controls. *Parker v. Carnahan*, 772 S.W.2d 151 (Tex. App.—Texarkana 1989, writ denied).

The cases that talk about an attorney's duties toward someone with whom he consults about the possibility of representing him are generally focused on the professional obligations of the lawyer as he performs incidental services necessary to making a decision about taking the case. For instance, the confidentiality rules of 1.05 apply. To the extent that incidental legal services are performed (such as in accumulating medical records for review, or advising of the statute of limitations), the lawyer should use reasonable care.

There is very little case law available concerning duties toward a prospective client. Most of the law concerning these duties has to do with the use of confidential information obtained when interviewing a prospective client. But the Restatement of the Law Governing Lawyers (Third) is helpful. The Restatement contemplates that when a person discusses with a lawyer the possibility of their forming a relationship, it is for a “matter.” This is important because most preliminary consultations result in an agreement to perform only some incidental legal services in connection with the continued investigation of the matter, until such time that the lawyer

determines whether or not to take the matter. Here is how the Restatement handles it in Section 15, Lawyers Duties to a Prospective Client:

§ 15. A Lawyer's Duties to a Prospective Client

1. When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must:
 - (a) not subsequently use or disclose confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client as stated in §§ 61-67;
 - (b) protect the person's property in the lawyer's custody as stated in §§ 44-46; and
 - (c) use reasonable care to the extent the lawyer provides the person legal services.

So there is a definite distinction between the incidental legal services to be performed in the investigative stage and the ultimate "matter," which may or may not become the subject of the agreement.

D. Duties beyond the agreement.

Generally, the lawyer has no duty to the client beyond those described in the agreement. Of course the lawyer must always abide by the Texas Disciplinary Rules of Professional Conduct, but because it is based on contract, the legal relationship is defined by the "clear and express agreement of the parties as to the nature of the work to be undertaken." Annot., 45 ALR 3d 1181 (1972).

However, there may be a duty to inform someone that you do not represent them. The duty to so advise would arise if it can be determined that the attorney is aware or should be aware that his conduct would lead a reasonable person to believe that he was being represented by the attorney. *Parker*, 772 S.W.2d 151.

IV. FEE ARRANGEMENTS

A. Documenting the attorney-client relationship or agreement.

It is best to document the attorney-client relationship in writing. A written document is not explicitly required except for contingent fee cases, Tex Disciplinary Rules Prof'l Conduct R. 1.04(D), and in cases involving association with or referral to a different law firm or lawyer. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(F). However, documenting all

attorney-client relationships in writing is obviously preferable.

B. Establishing the fee agreement at the outset.

In Texas, attorneys are held to the highest standards of ethical conduct in their dealings with their clients. *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006). One of the most important and overlooked parts of an attorney conducting himself or herself in an ethical manner with clients—and in avoiding disputes and malpractice claims—is clearly establishing the fee agreement from the beginning of the attorney-client relationship.

C. Unreasonable fee vs. unconscionable fee.

An important thing to note about Rule 1.04 is that it does not prohibit an "unreasonable" fee, it only prohibits an "unconscionable" fee. Tex. Disciplinary Rules Prof'l Conduct R. 1.04. Does this make sense? Yes. Remember, the disciplinary rules are written for the purpose of lawyer discipline. As bankruptcy courts, other judges or juries regularly reduce the amount of attorneys fees that have been sought at trial, the effect is that the factfinder regards some of the fees sought as unreasonable. If Texas Disciplinary Rules of Professional Conduct Rule 1.04 was cast in terms of unreasonableness, a client would be entitled to file a grievance against the lawyer in every instance where a factfinder reduced the fees that were sought. It is for this reason that 1.04(a) contains the second sentence which defines "unconscionable."

D. Fee contract vs. fee shifting.

Remember that the attorney-client relationship is contractual in nature, and begins when an attorney agrees to render professional services for a client. The concept of the contract is important in the fee context because the fees charged to the client (authorized by contract) may not necessarily be the same as the fees recoverable from the adverse party under any of the causes of action described above. For example, a client agrees to pay a paralegal for all of his/her work, but only substantive legal work is allowed as a basis for recovery from the other party. Another example is that a client may make requests of the attorney to perform certain activities (which are to be paid for as authorized by the contract), but these activities may not necessarily be necessary to the prosecution of the case, such that they may not be recoverable from the adverse party. What does all of this mean? It means that you should tell your client up front that just because his cause of action against the adverse party may authorize the recovery of attorney's fees, he will not necessarily recover one hundred percent of his fees. This is a frequent problem that is easy to remedy at the outset of the attorney-client relationship.

Remember, a client's agreement to pay a certain hourly rate is not necessarily proof that the rate is reasonable. By the same token, payment by the client does not necessarily prove the necessity of the fees.

V. CONTENTS OF ENGAGEMENT LETTERS

The following is a list of considerations for your engagement letters, including examples for reference.

A. Specific identification of the client.

Remember, if the client is an organization, the lawyer represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. The concern here is that the person that speaks to the lawyer on behalf of the organization must legitimately represent the organization and not be in conflict with the organization. The lawyer's role should be carefully spelled out. The comments to Texas Disciplinary Rules of Professional Conduct Rule 1.12 are very helpful in doing so.

Consider this example:



Please understand that although this firm maintains its relationship with ABC, Inc. primarily through contact with President Smith, this firm represents ABC, Inc. in this matter, as distinct from the company's directors, officers, shareholders or employees. ABC, Inc. agrees to immediately notify the firm should circumstances arise about whether the company has become adverse to President Smith or whether he ceases to legitimately represent the company.

B. Description of the specific objective or objectives of the representation.

An attorney intending to represent the client in a limited capacity should clearly indicate the specific activities where the attorney will provide legal representation. For example, if an attorney agrees to represent the client in the initial lawsuit but not on appeal, in the event the client does not prevail, then the engagement letter should clearly specify when the attorney-client relationship ends.

Consider this example:



The terms of this letter agreement will be applicable to all matters that we undertake for the Company or for any related or affiliated corporation, partnership, association or other entity, although we will not undertake representation on any other matter unless requested to do so in writing.

C. No guarantees.

Consider this example:



We will use our best efforts in representing ABC, Inc., but we cannot assure that we will achieve a favorable outcome. Both the Company and our firm will have the right to terminate this representation upon written notification to the other; provided that in the event of a termination, the Company will remain liable for our fees and any expenses incurred by us on your behalf prior to such termination plus any fees and expenses incurred at your request in connection with the transition to substitute counsel.

D. Limitations on the representation.

Rule 1.02 provides that a lawyer may "limit the scope, objectives and general methods of the representation if the client consents after the consultation." If the client does consent, these limits need to be spelled out in the fee agreement.

However, too often, lawyers attempt to limit their professional duties to their client by having the client sign an agreement prospectively limiting the lawyer's obligation to communicate with the client. Remember that the fee agreement cannot limit the lawyer's duties so drastically that the representation would violate Rule 1.01 (Neglect) or 1.03 (Communication). For example, many fee agreements provide that the client consent to communication through legal assistants, agreeing not to call the lawyer directly. That is contrary to the duties of Rule 1.03 about a lawyer keeping a client reasonably informed about the status of the matter and promptly complying with requests for information.

Consider this example:



You acknowledge that this firm does not act as ABC, Inc.'s general counsel and that our acceptance of this engagement does not involve an undertaking to represent your company or its interests in any matter other than that specifically described above. Our representation does not entail a continuing obligation to advise you concerning subsequent legal developments that might have a bearing on the affairs of the company.

Consider this example:



The firm's representation of you in this matter is limited to the defense of the claims made against you in cause no. xxxxx.

The firm will be paid by ABC Insurance Company because these claims are covered by the CGL insurance policy. This firm has not been engaged by you to pursue claims for affirmative relief arising out of this accident, nor has the firm been engaged to provide general legal advice to you on matters not arising out of the claims described above.

E. Someone else pays the bill.

If someone other than the client is paying the fee, get the client's consent to comply with Texas Disciplinary Rules of Professional Conduct Rule 1.08(e).

Consider this example:



Client consents that the firm will accept compensation from client's parents, Mr. and Mrs. Smith. Despite this arrangement, client understands that the firm owes its duties to the client, and that the firm will not allow this arrangement to interfere with the firm's professional judgment or its relationship with the client, and that information relating to representation of client will be maintained as confidential, even as to Mr. and Mrs. Smith.

F. Clear description of the fee.

The exact type of fee to be charged must be spelled out clearly in the engagement letter or at the very least, at the outset of the representation.

It is essential this part of the engagement letter be spelled out plainly. If the fee is to be an hourly rate, it should be so stated. If it is contemplated that the hourly rate will increase over time, that should be stated also. This is because it is improper to raise the fee mid-stream. The same thing goes for contingent fees. It is improper to raise the percentage of the contingent fee mid-stream without giving the client the opportunity to consult a lawyer. *Robinson v. Garcia*, 804 S.W.2d 238 (Tex. App.—Corpus Christi 1991, writ denied).

Consider this example:



The billing rates for the professionals who may work on this matter vary in accordance with each person's experience and expertise. The hourly billing rates presently in effect range from \$135 for associates newly admitted to the practice to \$350 for our more experienced members of the firm. My billing rate is currently \$300 per hour.

As part of our efforts to provide you with cost-effective legal services, from time to time we may utilize the services of paralegals and other support personnel for routine tasks such as document organization and review that do not require the attention of an attorney. Some of this work may be substantive legal work to be done by a paralegal under the supervision of a lawyer. Other work may be clerical in nature. Our rates for paralegals currently range from \$110 to \$135 per hour.

A dangerous practice involves giving the lawyer the sole discretion to convert from an hourly rate to a contingent fee (or vice versa) during the course of the representation, or trying to decide the amount of the contingent fee up front for purposes of payment upon termination.

Consider this BAD example:



Percentage of interest: client shall pay to attorney as compensation for his services, \$250.00 per hour for the first sixty (60) days of representation of client and if no resolution thereafter client agrees to 25% of any recovery obtained on behalf of the client by settlement or compromise of the claim before suit is filed; or 33 1/3% of all recovery obtained for the client after suit is filed, regardless of whether or not the suit is actually tried, provided the claim is concluded before any appeal is made.

Note that in the above example, the lawyer could do nothing to try to settle the claim for 60 days, then convert to a contingent fee and file suit, all without the client's input.

"Convertible" fee agreements are susceptible to clients' claims that the lawyer has acquired too much control over the litigation.

Consider this BAD example:



[Lawyer] is entitled to 33% of any amounts recovered. If you agree to settle this case for an amount that will pay less than \$175 per hour for the time I invest, then I shall receive an amount over and above the 33% to compensate me at the rate of \$175 per hour before you receive your portion of the settlement.

Note that this convertible fee agreement uses a client's decision to settle as a trigger to convert contingent fee representation into an obligation to pay hourly fees. It has been held that an agreement of this kind impermissibly burdens the client's exclusive right to settle a case. See *Compton v. Kittleson*, 171 P.3d 172 (Alaska 2007).

Another example is the following provision that was criticized in the Supreme Court in *Hoover*:

You may terminate the Firm's legal representation at any time.... Upon termination by You, You agree to immediately pay the Firm the then present value of the Contingent Fee described [herein], plus all Costs then owed to the Firm, plus subsequent legal fees [incurred to transfer the representation to another firm and withdraw from litigation].

Hoover at 558.

The above provision is a BAD example and was held to be unconscionable. The Supreme Court noted the following problems: (a) the termination provision made no distinction between discharges occurring with or without cause; (b) it assessed the attorney's fee as a percentage of the present value of the client's claim at the time of discharge, in derogation of the quantum meruit and contingent fee measurements allowed by *Mandell & Wright v. Thomas*, 441 S.W.2d 841 (Tex. 1969); and (c) it required the client to pay the lawyer the percentage fee immediately at the time of discharge. *Id.* at 562. In this case, requiring the client to pay the percentage fee immediately at the time of discharge is contrary to the principle in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 concerning the rule that a contingent fee lawyer "is entitled to receive the specified fee only when and to the extent the client receives payment." By requiring immediate payment, the termination provision also grants the lawyer a proprietary interest in the client's claim without regard to the ultimate results obtained, which would be a prohibited transaction. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(h).

Another example of a BAD convertible fee agreement was discussed in the case of *Wythe II Corp. v. Stone*, 342 S.W.3d 96 (Tex. App.—Beaumont 2011, pet. denied). In the *Wythe* case, the engagement letter provided as follows:

As an optional alternative to the hourly bill basis, and at the sole option of said attorney, the attorney may elect to receive compensation for attorney's time on the basis

of a specified contingency fee calculated as a percentage of the total recovery achieved by virtue of the undertaking which forms the basis of this agreement. . . . The attorney may designate this contingency fee option at any time during the representation.

In the event the attorney has elected to be compensated on the basis of the contingency fee option, and subsequently withdraws from this representation, then said attorney shall receive an assigned interest equal to the contingency fee percentage that would have applied at the time of such withdrawal the same as if the matter had been settled in its entirety on the date of withdrawal.

Here, the client claimed that the unilateral option is unconscionable and that the termination provision fails to distinguish between terminations occurring with or without cause. The court concluded that this kind of unilateral option provision is generally unenforceable. However, this was an unusual case, and the contingent fee had been previously approved by a bankruptcy court. Importantly, the appellate court did not let the unenforceability of the contract provision preclude the attorney from collecting a fee. Rather, the court remanded the case for a jury trial on the amount of a reasonable fee.

The *Wythe* case teaches another lesson. There, the attorney sought to prove his fees for his fee collection suit by expert testimony that was a mixture of evidence that a forty percent (40%) contingency fee is customary in the jurisdiction and that the total number of hours put into the case were reasonable. However, the experts did not try to determine a reasonable fee based upon an hourly rate. The appellate court held that the supporting evidence did not provide significant justification for shifting the entire amount of the contingent fee to the client. Finding that the fee awarded by the jury was excessive, the court remanded the fee dispute with instructions for the trial court to make a "determination of a reasonable fee based on an hourly rate, not determined as a percentage of damages." *Wythe II Corp.*, 342 S.W.3d at 108.

G. Monthly billing.

Consider this example:



Our customary procedure is to send a statement to you each month for services rendered and expenses incurred during the previous month. Any statement not paid in full within thirty days after the date of the statement will be considered overdue. Overdue

invoices may result in the discontinuance of our representation of the Company.

H. Clause allowing increase.

If it is contemplated that the hourly rate will increase over time, that should be stated also. This is because it is improper to unilaterally raise the fee midstream. It is improper to raise a fee without giving the client the opportunity to consult a lawyer. Robinson, 804 S.W.2d at 248 (Tex. App.—Corpus Christi 1991, writ denied) (finding an increased percentage in a contingent fee case is subject to the same requirements as a regular fee). Also, there is a presumption of unfairness attaching to a fee contract entered into during the existence of the attorney-client relationship, and the burden of showing the fairness of the contract is on the attorney. *Id.* (citing *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964)).

Consider this example:



The firm reviews its hourly rates annually, and you should anticipate an annual increase (in January) of not more than \$10.00 per hour for each lawyer and paralegal working on this matter.

I. Clear description about how expenses will be paid.

Some expenses may be advanced by the lawyer; some expenses may be paid directly by the client, particularly for large items such as expert's fees, accountant's fees, etc.

Remember that a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses to the client, and provide that the repayment of those expenses may be contingent upon the outcome of the matter. Other than that, providing financial assistance to a client in connection with pending or contemplated litigation is a "prohibited transaction" under Texas Disciplinary Rules of Professional Conduct Rule 1.08.

Consider this example:



In addition to legal fees, the Company will be responsible for all out-of-pocket expenses incurred in connection with our representation. Such expenses include charges for filing and serving court documents, courier or messenger services, recording and certifying documents, court reporting investigations, long distance telephone calls and other forms of communication,

copying materials, overtime clerical assistance, travel expenses, postage and other expenses. We may elect to forward statements we receive from suppliers to the Company for payment directly to the suppliers, particularly with respect to large expenditures.

J. Clear description about how disbursements will be billed.

The client needs to know at the outset what disbursements will be billed, and how. Is it proper for the lawyer to "mark up" these expenses such that when they are passed along to the client, the lawyer makes some profit on them? Yes, but only if it is reasonable and fully explained, and agreed to by the client at the outset. ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 93-379.

Consider this example:



Rather than building an increased overhead factor into our hourly rates, we believe it is appropriate that to the extent possible, costs for ancillary services performed by us be allocated to those of our clients who actually need and use them. Therefore, we will also bill for photocopying and other document reproduction, telecopying, computerized input and retrieval of documents, computerized research, overtime, word processing and similar work by employees, if required by you, or the nature of the services performed for you. We will charge for copies \$.20 per page and for faxes \$1.00 per page, although actual costs to us are less.

K. Disclosure about recovery of fees.

Consider this example:



The claims asserted in this matter may involve statutes that provide for the recovery by the successful party of attorneys' fees from the other side. While the firm intends to seek the recovery of fees from defendants as part of your claims, please understand that the jury or Court may award none, or a reduced amount as part of your recovery. If that happens, you are still obligated to the firm for the fees as set out in this agreement. Of course, any recovery of fees from the other side belongs to you, and not the firm.

L. Retainers, “non-refundable” retainers, and “deposits.”

The term “retainer” has been used to describe several different types of fee arrangements. The use of the word “retainer” is perhaps the most troublesome part of attorney fee agreements. This problem is compounded by the fact that case law sometimes refers to retainers as “general” or “special.”

Generally a retainer is defined as monies paid in advance from which expenses and fees may be deducted. This goes in the lawyer’s trust account until earned. This goes into the lawyer’s trust account until earned. See Tex. Disciplinary R. Prof’l Conduct 1.14, cmt.2. Consider using the term “advance payment” or “deposit.” These words are more descriptive than “retainer.”

Consider this example:



Client agrees to deposit the sum of \$50,000 with the firm, to be billed against on an hourly basis as set out above. This advance deposit will be held in the firm’s trust account until such time as it, or a portion of it is earned, at which time it will be made available to the firm’s general account. Monthly statements will be sent to the client as provided above. These statements will be paid from the advance deposit thirty days after the date of the statements. At the conclusion of the matter, the balance of the advance deposit will be returned the client.

An “evergreen” retainer is one that must be replenished periodically. Spell this out carefully and provide that any unused retainer will be returned to the client at the conclusion of the matter.

Consider this example:



In addition to payment of the monthly statements, we ask that the company wire a retainer in the amount of \$10,000 to be held in our trust account and to be billed against. We ask that the trust balance be maintained at the level of \$10,000, and our monthly statements will reflect the balance necessary to maintain that amount. Of course, at the conclusion of the litigation, any balance in the trust account will be promptly refunded to the company.

A “flat fee” is an amount agreed to at the outset which constitutes payment in full for the professional services rendered and the related expenses incurred in the representation contemplated.

Consider this example:



My fee for this representation described above is \$25,000. This is a fixed fee includes an expenses that I may advance, and is not dependent on the course or outcome of the litigation or upon the time I spend on the matter. The fee is due in a lump sum in advance. This money will be held in trust, and withdrawn by me by as earned. It will be considered earned as follows: 10% after initial interviews and case investigation; 40% after discovery, pre-trial motions and hearings; 50% after trial. The full fee will be considered earned upon termination of proceedings by trial or settlement, regardless of whether all proceedings have occurred and regardless of time expended or outcome. If my representation is terminated before completion of the engagement, I will be entitled to the reasonable value of my services, and any remaining balance will be refunded. I will notify you when funds are withdrawn from trust and will account for funds remaining in trust.

There can also be a “retainer” that is non-refundable; that is, an amount of money that the client pays you solely for the privilege of having you as his lawyer. *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447 (Tex. 2008); *Cluck v. Comm’n of Lawyer Discipline*, 214 S.W.3d 736 (Tex. App.—Austin 2007, no pet.). The “true retainer” is paid by the client solely for your availability, readiness, and the privilege of having you as his lawyer, apart from any other compensation. *Cluck*, 214 S.W.3d 736. Even though the *Cluck* case calls this arrangement a “true retainer,” consider using the words “engagement retainer fee.” This is even more descriptive and is endorsed by the Restatement (Third) of the Law Governing Lawyers § 34.

There is little case law on this topic and what is available is confusing. But we know one thing: all fees must be earned in some way – that is, a benefit to the client must follow. If the fee is nonrefundable, then spell out in the fee agreement that it is earned upon payment, and why. Tex. Comm. on Professional Ethics, Op. 431, 49 Tex. B.J. 1084 (1986).

The key here is that the best way to make a “nonrefundable” fee truly nonrefundable, is to demonstrate and communicate to the client how it was actually earned upon payment. Otherwise, a dispute will most likely follow about whether it was earned in full. The lesson from *Cluck* is that the fee does not become nonrefundable just because it says “nonrefundable” in the contract. *Cluck*, 214 S.W.3d 736.

Consider this example:



In addition to paying for the service on an hourly basis as set forth herein, the client agrees to pay firm an engagement retainer fee in the amount of \$10,000. Such fee is paid in order to secure the firm's immediate availability and readiness to undertake this representation, and in recognition that due to the publicity of this matter, the firm is likely to be prevented from accepting other legal work in this area. The \$10,000 engagement retainer fee is not refundable, and client agrees that it is earned by the firm immediately.

M. Arbitration clause.

It is permissible to include an arbitration provision in an attorney engagement letter with a client that covers disputes relating to fees or malpractice, as long as notice is given regarding certain advantages and disadvantages of arbitration, including the waiver of trial by jury and the loss of appellate review. To be enforceable, the arbitration provision must not limit the lawyer's liability. Due to a split in the Texas Court of Appeals, it may sometimes be necessary to include the signatures of both parties and counsel for both parties (i.e., independent counsel for the prospective client) on the agreement to avoid the possibility of arbitration being denied in the event a court decides legal malpractice is a personal injury claim (as the Corpus Christi Court of Appeals has done).

i. PROFESSIONAL CONDUCT IN TEXAS

The Professional Ethics Committee for the State Bar of Texas (Committee) has issued an opinion on whether binding arbitration clauses in lawyer-client engagement agreements are permissible under the Texas Disciplinary Rules of Professional Conduct. Tex. Comm. on Prof'l Ethics, Op. 586, (2008). The opinion concludes that:

It is permissible under the Texas Disciplinary Rules of Professional Conduct to include in an engagement agreement with a client a provision, the terms of which would not be unfair to a typical client willing to agree to arbitration, requiring the binding arbitration of fee disputes and malpractice claims provided that (1) the client is aware of the significant advantages and disadvantages of arbitration and has sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision, and (2) the arbitration

provision does not limit the lawyer's liability for malpractice.

Id. The Committee points out that the State Bar of Texas "encourages voluntary arbitration as a preferred method of resolving fee disputes." *Id.* Texas Disciplinary Rule 1.08(a) requires business transactions between lawyers and clients to be fair and reasonable to the client. Tex. Disciplinary Rules Prof'l Conduct R. 1.08(a). The Committee interprets this rule to mean a lawyer should not "attempt to include clearly unfair terms in the agreement, such as providing for the selection of the arbitrator solely by the lawyer, requiring arbitration in a remote location, or imposing excessive costs that would effectively foreclose the client's use of arbitration." Tex. Comm. on Prof'l Ethics, Op. 586, (2008). Texas Disciplinary Rules of Professional Conduct Rule 1.03(b) requires a lawyer to explain matters as necessary to clients in order for clients to make an informed decision regarding representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.03(b). To meet the requirements of this rule, a lawyer (when asking a prospective client to agree to a binding arbitration agreement) "should explain the significant advantages and disadvantages of binding arbitration to the extent the lawyer reasonably believes is necessary for an informed decision by the client." Tex. Comm. On Prof'l Ethics, Op. 586, (2008). The scope of the explanation varies with the sophistication of the client. *Id.* A large business may require no explanation while an individual may need to be advised of the following:

- (1) *the cost and time savings frequently found in arbitration,*
- (2) *the waiver of significant rights, such as the right to a jury trial,*
- (3) *the possible reduced level of discovery,*
- (4) *the relaxed application of the rules of evidence, and*
- (5) *the loss of the right to a judicial appeal because arbitration decisions can be challenged only on very limited grounds. The lawyer should also consider the desirability of advising the client of the following additional matters, which may be important to some clients: (1) the privacy of the arbitration process compared to a public trial; (2) the method for selecting arbitrators; and (3) the obligation, if any, of the client to pay some or all of the fees and costs of arbitration, if those expenses could be substantial.*

Id. These notices are required for attorney disciplinary issues rather than the validity of the arbitration clause. See *Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 865 (Tex. App.—Dallas,

no pet.). The omission of an explanation of the advantages and *disadvantages* of arbitration will not by itself render an arbitration clause unenforceable. *Id.*

ii. ABA OPINION

The American Bar Association (ABA) has issued an opinion on the topic of arbitration provisions in attorney engagement letters as well. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002). The ABA looks to the Model Rules of Professional Conduct Rule 1.8(h). *Id.* at 3.

This rule prohibits lawyers from prospectively agreeing to limit their legal malpractice liability. *Id.* The ABA agreed with many other authorities and decided that arbitration provisions prescribe the procedure to be used rather than limit any liability. *Id.*; see also *In re Hartigan*, 107 S.W.3d 684, 689 (Tex. App.—San Antonio 2003, pet. denied) (approving ABA Opinion 02-425). The ABA opinion applies rule 1.4(b) to arbitration provisions in retainer agreements. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002). This rule makes it necessary for a lawyer to explain the arbitration provision in a manner sufficient for the client to make an informed decision. *Id.* at 5. The scope of the explanation depends on the sophistication of the client, but should make certain things clear, for instance, the client is waiving “significant rights, such as the waiver of the right to a jury trial, the possible waiver of broad discovery, and the loss of the right to appeal.” *Id.* Explanation might be needed in regard to whether the case will be decided by a single arbitrator or a panel of arbitrators and of the distribution of costs between the lawyer and client for arbitration. *Id.* at 6. The ABA ultimately concludes it is ethically permissible to include binding arbitration clauses in attorney-client engagement letters as long as the client has been given a sufficient amount of information regarding the advantages and disadvantages of arbitration and the lawyer has not used the provision to limit liability he may otherwise have. *Id.* at 7; see also RESTATEMENT (THIRD) OF LAW OF GOVERNING LAWYERS § 54 cmt. b (1998) (“A client and lawyer may agree in advance . . . to arbitrate claims for legal malpractice, provided that the client receives proper notice of the scope and effect of the agreement and if the relevant jurisdiction’s law applicable to providers of professional services renders such agreements enforceable.”).

iii. STATUTES & CASES

The Texas General Arbitration Act (TAA) provides a broad framework for using arbitration as a binding alternative to the court system. TEX. CIV. PRAC. & REM. CODE ANN. ch. 171 (West 1997). The Federal Arbitration Act (FAA) generally applies when the dispute involves interstate commerce. See 9 U.S.C.

§ 2 (1947). The FAA preempts the TAA if “(1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses, and (4) state law affects the enforceability of the agreement.” *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005). The TAA has two important caveats applicable to arbitration provisions in lawyer-client engagement letters. CIV. PRAC. & REM. § 171.002(a). The first caveat says the TAA does not apply to an agreement for services in which the individual furnishes consideration of greater than \$50,000, unless the parties agree in writing and the agreement is signed by each party and each party’s attorney. *Id.* §171.002(a)(2) & (b). This essentially means that independent counsel would have to advise the individual and sign the agreement in order to meet the exception. The second important exception excludes personal injury claims from the scope of the TAA, unless the parties to the claim agree in writing to arbitrate and the agreement is signed by each party and their attorneys. *Id.* § 171.002(a) (3) & (c). Once again requiring independent counsel to advise and sign, along with the client, an agreement to arbitrate in the engagement letter.

The Professional Ethics Committee for the State Bar of Texas notes in their opinion that the Texas Court of Appeals are “split on whether a legal malpractice claim is one for ‘personal injury,’ which under the Texas Arbitration Act can be the subject of an arbitration agreement only if the client has separate representation in entering into the agreement.” Tex. Comm. On Prof'l Ethics, Op. 586, (2008); compare *In re Godt*, 28 S.W.3d 732, 738–39 (Tex. App.—Corpus Christi 2000, no pet.) (holding a legal malpractice claim to be a personal injury claim), with *In re Hartigan*, 107 S.W.3d 684, 689–91 (Tex. App.—San Antonio 2003, pet. denied) (holding that a legal malpractice claim is not a personal injury claim), *Miller v. Brewer*, 118 S.W.3d 896, 898–99 (Tex. App.—Amarillo 2003, no pet.), and *Taylor v. Wilson*, 180 S.W.3d 627, 629–31 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). The Corpus Christi Court of Appeals is the only appellate court in Texas that has held legal malpractice to be in the category of personal injury; thus requiring each party to sign a written agreement as well as each party’s attorneys to sign the agreement. See *In re Godt*, 28 S.W.3d 732. If the required signatures were not obtained, then the Corpus Christi court will not compel arbitration. *Id.* The Amarillo, Houston [14th district], and San Antonio courts have compelled arbitration under the TAA when an agreement to arbitrate has been found and the opposing party refuses to arbitrate. See CIV. PRAC. & REM. § 171.021; *In re Hartigan*, 107 S.W.3d 684 (Tex. App.—San Antonio 2003, pet. denied); *Miller v.*

Brewer, 118 S.W.3d 896 (Tex. App.—Amarillo 2003, no pet.); *Taylor v. Wilson*, 180 S.W.3d 627 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

Arbitration clauses in attorney-client engagement letters are permitted by The Professional Ethics Committee for the State Bar of Texas, the ABA, and by Texas state law. To satisfy the Professional Ethics Committee and the ABA, the lawyer must provide the client with information regarding the advantages and disadvantages of arbitration compared to judicial courts and the lawyer must not limit his liability in any way through the arbitration provision.

iv. ENFORCEABILITY

Note the TAA does not apply to agreements where the services will be greater than \$50,000 or personal injury claims, unless both parties sign the agreement and both sides have counsel. The Corpus Christi Court of Appeals considers legal malpractice to be a personal injury claim, thus triggering the extra requirement in the TAA. The remaining courts will likely enforce an arbitration provision (found in the attorney engagement letter) in a legal malpractice case when there is a valid agreement, which has been signed by the client. All Texas courts will enforce valid arbitration provisions (signed by the client) when there is a dispute as to legal fees and costs.

Think carefully about whether you want to provide an arbitration clause in your engagement letter. If you are engaged for a jury trial, it sends inconsistent signals to your client about your confidence in the jury system. If it is a case where your fee agreement may be discoverable or even admissible, a judge or a jury may wonder why you have confidence in them to try your client's case but not the potential case against you. And finally, if you are going to include an arbitration clause in your agreement, you should run it by your malpractice carrier first.

Consider this example:



In the event that a disagreement arises, which we are not able to satisfactorily resolve between us, then you hereby agree that any and all disputes, controversies, claims, or demands arising out of or relating to this agreement, our relationship with you, or our performance of any current or future legal services, will be resolved exclusively by submission to binding arbitration in Amarillo, Texas. This includes, but is not limited to, disputes regarding attorney's fees or costs, claims of malpractice, breach of fiduciary duty, breach of contract, negligence, deceptive trade practices, fraud, or other legal theories sought to be asserted against us. Arbitration is to be conducted

under the Texas Arbitration Act in accordance with the laws of the State of Texas. A single arbitrator who is both neutral and independent will conduct arbitration. The arbitrator will be chosen by mutual agreement of the parties. Arbitration costs will be allocated evenly among the involved parties. The arbitrator will have the authority to award any relief that a judicial court would have the jurisdiction to grant. The arbitrator will be permitted to award attorney's fees as he or she deems necessary and just.

Arbitration has both advantages and disadvantages. Arbitration requires both parties to submit to an arbitrator's decision. Arbitration often provides a quick, private, and less expensive forum for the resolution of disputes. The arbitrator's legal and factual decisions are binding and typically not subject to appellate review. By agreeing to arbitrate all disputes, you are waiving your right to a trial by jury. Rules of evidence tend to be less formal and discovery will often be limited. You are encouraged to consult with independent counsel to determine if arbitration is acceptable to you. By signing this agreement, arbitration will become the sole forum for the resolution of any disputes, and both parties waive their right to submit their claims to a judicial court.

N. Confidentiality.

Lawyers often overlook that certain confidentiality concerns can be addressed in the initial engagement letter. In many instances, your client will rely on a close friend, business associate or family member to assist in the legal matter, primarily for the purpose of helping evaluate the information given by the lawyer, or just to understand it. At the outset of the representation, it is wise to have the client agree that the lawyer is authorized to disclose information to the third party. Remember, a lawyer may reveal confidential information when the lawyer has been expressly authorized to do so or when the client consents after consultation. Tex. Disciplinary Rules Prof'l Conduct R.1.05(c). Also, the lawyer may reveal confidential information to the client's representatives, except when otherwise instructed by the client. Tex. Disciplinary Rules Prof'l Conduct R. 1.05(c)(3).

Consider this example:



Please make every effort to maintain the confidentiality of our communications because those are privileged from disclosure.

We understand that your daughter, Marsha Smith, and your son-in-law, David Smith are authorized by you to receive confidential information from us, but it is not intended by you to have that information disclosed to third persons.

To take another step to protect the communications from being discoverable, it might be helpful to have the client agree that these persons are also authorized to seek legal advice on their behalf, as those terms are used in Tex. R. Evid. 503(a)(2)(A).

Consider this example:



We also understand that Marsha and David have authority to obtain legal services or act on advice rendered by us, on your behalf. According to the Texas Rules of Evidence, the communications between all of us are also privileged, but please caution Marsha and David to not discuss these matters with others, for that could waive this privilege.

O. Multiple representation.

Texas Disciplinary Rules of Professional Conduct Rule 1.06, the conflict of interest rule, provides that a lawyer may represent multiple parties in a conflict of interest situation only in certain prescribed circumstances. First, the lawyer must reasonably believe that the representation of each client will not be materially affected and each client must consent to the representation but only after it receives full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation, and the advantages involved, if any. This means that the engagement letter must actually spell out the implications, that is the good and the bad, of the common representation.

Consider this example:



Both of you have asked this firm to represent you in connection with separate matters. However, the matters are substantially related and one of your interests are materially and directly adverse to the interests of the other, it appears that our representation of one of you may become adversely limited by our obligation to the other. Notwithstanding the conflict, we have determined, in our professional opinion, that the representation of each of you will not be materially affected. If we felt that the representation of each of you would be

materially affected, we would not be writing this letter.

The purpose of this letter is to disclose to you the implications of the multiple representation. Please understand that these matters will in all probability be resolved more expeditiously and inexpensively by having our firm represent both of you. Also, as a matter of negotiation strategy, we feel that the adverse party will be more receptive to a resolution of this matter if it appears that you are represented by the same lawyer. Finally, please understand that the one potential adverse consequence of common representation in this situation is that there will be no confidentiality of information between the two of you with respect to this very limited matter. If you have any more detailed questions about the existence, nature, implication or possible adverse consequences of our representing both of you, please give us a call. Otherwise, please consider consenting to the representation, and if so, please sign below.

VI. CONTINGENT FEES

Too often a lawyer will use a standard contingent fee agreement or fail to spend the time necessary to draft an agreement that will be workable. Following are some of the critical areas that lawyers may not look at frequently, but need to understand completely.

Texas Disciplinary Rules of Professional Conduct Rule 1.04 is the place to start for compliance with a lawyer's obligations concerning attorney's fees in a contingency fee case. There is actually a lot of guidance in the rule for contingency fees.

A. Increase in percentage.

Generally, it is improper to raise the fee during the course of the representation unless the client has agreed to the increase. The same thing goes for percentage fees in a contingency situation. Of course, the client can agree up front that the percentage is different for each level: trial, appeal, etc. It is improper to raise the percentage of the contingent fee mid-stream without giving the client the opportunity to consult a lawyer. *Robinson*, 804 S.W.2d 238.

B. Expenses.

In a contingent fee matter, are the expenses deducted from the entire recovery or from the client's share? Rule 1.04(d) recognizes how important this is to the client and mandates that it be set out in the written agreement. Give some thought to the definition of "gross recovery" in the contingency fee agreement.

In a contingent fee matter, make sure to spell out whether the expenses are deducted from the entire recovery or from the client's share.

C. Calculating the fee.

Recall that Rule 1.08 does not allow a lawyer to acquire a proprietary interest in the cause of action or subject matter of the litigation, except a lawyer may contract in a civil case for a contingent fee permissible under Rule 1.04. Rule 1.04(f) is very clear that this permissible exception is only for a fee that is "contingent on the outcome of the matter for which the service is rendered...."

This language should cause lawyers drafting contingent fee agreements to carefully describe not only the legal matter, but the objective or expectation of the matter. It is only in this way that the appropriate fee can be calculated from the outcome.

This detail is especially important when it is anticipated that counterclaims or offsets will be prosecuted by the defendant. In one case of that nature, the Supreme Court considered a contingent fee case where the plaintiffs recovered damages but the damages were offset by a balance due on their mortgage. *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92 (Tex. 2001). The lawyer tried to collect his percentage of the gross recovery which would have given the lawyer more fees than the plaintiffs recovered in the litigation. The Supreme Court did not allow that, relying on the Restatement (Third) of the Law Governing Lawyers § 35, which provided that the lawyer was entitled to receive the contingent fee "only when and to the extent the client receives payment."

D. Assignment of the cause of action.

The Texas Supreme Court has recognized that a lawyer may take an assignment of part of a recovery and a part of the cause of action in a contingent fee case. *Dow Chemical Co. v. Benton*, 357 S.W.2d 565 (Tex. 1962). This is the exception to the general rule of prohibited transactions with clients. Tex. Disciplinary Rules. Prof'l Conduct R. 1.08(h). But this assignment cannot prevent a client from firing his attorney and employing a new one.

This assignment is separate and distinct from the common law "attorney's lien," which is a possessory lien against a client's property, money and papers for the amount due to the attorney for fees and expenses. See Tex. Comm. on Professional Ethics, Op. 305 (May 1979).

Contrary to the Texas Supreme Court's position, the Professional Ethics Committee for the State Bar of Texas issued Opinion 61 related to assignments. The Committee concluded: "a lawyer representing a client in litigation may not acquire, by agreement with his client, a lien upon the subject matter of the litigation as

a means of securing payments of the lawyer's fee" Tex. Comm. on Prof'l Ethics, Op. 610, 74 Tex. B.J. 857 (2011). The 2011 Ethics Opinion distinguishes between a security interest and a contingent fee. *Id.* The Committee states that although a contingent fee is permissible, "a security interest to secure such a fee" does not follow. *Id.* Opining that the security interest itself must qualify as an exception under Rule 1.08(h), the Committee asserted "a proprietary interest in a litigation matter being handled by the lawyer who is seeking to acquire the security interest" does not fall within the scope of stated exceptions. *Id.*; see Tex. Disciplinary Rules Prof'l Conduct R. 1.08(h) (listing the two exceptions).

The Court's acceptance of a lawyer taking a security interest in his client's cause of action in relation to a contingent fee arrangement is advanced by the numerous benefits it provides to clients. Pursuing a claim through the legal system can be expensive, thus establishing a barrier between the people and the courts. Restatement (Third) of Laws Governing Lawyers § 43 cmt. d (1998) (pointing to the lawyer's assurance of receiving a fee as "making it easier for people to secure competent representation when they have small means and meritorious claims"). Provided the percentage taken by the lawyer be reasonable and the arrangement is consensual, a lawyer should not be prohibited from taking a security interest in their client's cause of action. See *id.* (supporting the notion that rules of reasonableness and agreement between attorney and client should be maintained); Tex. Disciplinary Rules Prof'l Conduct R. 1.04 (requiring an arrangement for legal fees be reasonable).

The Dow Chemical decision remains the authority on a lawyers' ability to take an assignment in their client's cause of action in a contingent fee case. *Dow Chem. Co.*, 357 S.W.2d at 566 (describing the situation where an attorney contracts with his client to secure a percentage of the amount awarded). Remember, Texas Government Code Section 181.092 (c) provides that committee opinions are not binding on the Supreme Court.

VII. INCLUDE INFORMATION ON WHAT HAPPENS IN THE EVENT OF WITHDRAWAL OR TERMINATION

If an attorney hired on a contingent-fee basis is discharged without good cause before the representation is completed, the attorney may seek compensation in quantum meruit or in a suit to enforce the contract by collecting the fee from any damages the client subsequently recovers. *Hoover Slovacek LLP*, 206 S.W.3d at 561-62 (citation omitted). Alternatively, if an attorney is terminated for good cause, it appears that the attorney is not entitled to recover under the contingent fee contract; rather, he is

limited to quantum meruit. *Rocha v. Ahmad*, 676 S.W.2d 149 (Tex. App.—San Antonio 1984, writ dismissed). Both remedies are subject to the prohibition against charging or collecting an unconscionable fee. *Id.* (citing Tex. Disciplinary Rules Prof'l Conduct R. 1.04).

Whether a particular fee amount or contingency percentage charged by the attorney is unconscionable under all relevant circumstances of the representation is an issue for a factfinder. On the other hand, whether a contract, including a fee agreement between attorney and client, is contrary to public policy and unconscionable at the time it is formed is a question of law.

The general rule for withdrawal and termination is (a) return the file, and (b) return any unearned fee. The assertion of an attorney's lien over the file while waiting on full payment of the fee is fraught with difficulties. Texas Disciplinary Rules of Professional Conduct Rule 1.15(d) provides that:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a clients' interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

Texas courts and the Fifth Circuit have held that an attorney may withhold a client's file as security for payment of a fee. *Griffith v. Geffen & Jacobsen, P.C.*, 693 S.W.2d 724 (Tex. App.—Dallas 1985, no writ); *Nolan*, 665 F.2d 738. But in doing so, the attorney had better be correct—or otherwise he violates Texas Disciplinary Rules of Professional Conduct Rule 1.15(d). In every instance of withdrawal or discharge, the lawyer must take all reasonable steps to mitigate the consequences to the client. If returning the file is necessary for that, do you really want to hold on to it to force the payment of the fee?

A compelling reason to have a written engagement letter is for use in situations where the lawyer must withdraw for nonpayment. To comply with Texas Disciplinary Rules of Professional Conduct Rule 1.15(b), the lawyer will need to include in the motion to withdraw the fact that the client has failed to substantially fulfill an obligation to the lawyer, including an obligation to pay the lawyer's fee as agreed. It is most helpful if this fee agreement is in writing so that the fee agreement can be specifically referred to. Difficulties arise when the representation is of a corporation, partnership or other association, and the agreement to pay the lawyer was made by the

president or some other vice-principal of the business who has died or is no longer at the business. Now there is no way to show the court that the client has failed to fulfill a particular fee obligation.

VIII. ENCLOSE THE TEXAS LAWYER'S CREED

This mandate for professionalism was promulgated by the Supreme Court in 1989. Section II ¶1 of the Creed provides that an attorney should advise his clients of its contents when undertaking representation. It is recommended that the Creed be enclosed with the engagement letter, and that the letter spell out to the client that the lawyer intends to abide by it. If your client asks you to be abusive or pursue tactics for delay only, you can refuse easily by telling the client that he was told upfront that these tactics would not be undertaken. Plus, compliance with the Creed is the right thing to do. The Creed is set forth at the end of this paper.

IX. APPLICABLE RULES

When drafting a fee agreement, one should keep the existing disciplinary rules in mind. There are a number of rules addressing fees and fee agreements; however, some of the more important rules are as follows:

A. Fees.

- Rule 1.04(c) indicates that the basis or rate of the fee shall be communicated to the client.
- Rule 1.04 provides that a contingent fee must state the litigation and other expenses to be deducted from the recovery, and whether the expenses are to be deducted before or after the contingent fee is calculated.
- Rule 5.04 contains the general prohibition that a lawyer shall not share legal fees with a non-lawyer. Comment 3 of that rule clarifies that a lawyer and client can share the proceeds of an award in which both damages and attorneys' fees have been included.

B. Disciplinary rule limitations on fee agreements.

Texas Disciplinary Rules of Professional Conduct Rule 1.04 provides:

- (a) 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.

- (b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:
1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 3. the fee customarily charged in the locality for similar legal services;
 4. the amount involved and the results obtained;
 5. the time limitations imposed by the client or by the circumstances;
 6. the nature and length of the professional relationship with the client;
 7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.
- (c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing; before or within a reasonable time after commencing the representation.
- (d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyers shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
- (e) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.
- (f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:
1. the division is:
 - i. in proportion to the professional services performed by each lawyer; or
 - ii. made between lawyers who assume joint responsibility for the representation; and
 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; and
 3. the aggregate fee does not violate paragraph (a).
- (g) Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, shall be confirmed by an arrangement conforming to paragraph (f). Consent by a client or a prospective client without knowledge of the information specified in subparagraph (f)(2) does not constitute a confirmation within the meaning of this rule. No attorney shall collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way, 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.
- (h) Paragraph (f) of this rule does not apply to payment to a former partner or associate pursuant to a separation or retirement agreement, or to a lawyer referral program certified by the State Bar of Texas in accordance with the Texas Lawyer Referral Service Quality Act, Tex. Occ. Code 952.001 et seq., or any amendments or modifications thereof.

The reason the entire rule is set out above is to enable several observations. First, note that this is one of the few disciplinary rules that really does define civil standards. The factors articulated by the Texas Supreme Court to be used to determine the reasonableness of attorneys' fees are taken from Tex. Disciplinary Rules of Professional Conduct Rule 1.04. See *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

X. CONCLUSION

Fee agreements can either bind the attorney and the client but also provide flexibility in relationship with the client. Careful consideration of specific clauses and drafting a clear, workable fee agreement will help to avoid costly disputes that may arise.

THE TEXAS LAWYER'S CREED A MANDATE FOR PROFESSIONALISM

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right.

I. OUR LEGAL SYSTEM

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
3. I commit myself to an adequate and effective pro bono program.
4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
5. I will always be conscious of my duty to the judicial system.

II. LAWYER TO CLIENT

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.
2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.
4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.
5. I will advise my client of proper and expected behavior.
6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.
7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
8. I will advise my client that we will not pursue tactics which are intended primarily for delay.
9. I will advise my client that we will not pursue any course of action which is without merit.
10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.
11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. LAWYER TO LAWYER

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.
2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.
3. I will identify for other counsel or parties all changes I have made in documents submitted for review.
4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.
5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are canceled.
6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.
7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.
8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.

9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.
10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.
11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.
12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.
13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.
14. I will not arbitrarily schedule a deposition, court appearance, or hearing until a good faith effort has been made to schedule it by agreement.
15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.
16. I will refrain from excessive and abusive discovery.
17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.
18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.
19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

IV. LAWYER AND JUDGE

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.
3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.
4. I will be punctual.
5. I will not engage in any conduct which offends the dignity and decorum of proceedings.
6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.
7. I will respect the rulings of the Court.
8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.
9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.