THE CAREFUL FEE AGREEMENT, AND PROVING YOUR ATTORNEY'S FES IN LITIGATION: CONTROLLING CASE LAW AND ETHICS RULES

University of Texas School of Law
Mastering the Art of Collecting Debts and Judgments
September 3, 2010

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I. OVERVIEW OF THE DISCIPLINARY RULES, AND THIS PAPER

The TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT[1] and all that they demand – a daunting tome. A organization-less morass of meticulous and seemingly random standards. A professional wrecking ball. Wolves with open fangs waiting to pounce on the hapless practitioner, a mere innocent against their weighty demands. Numerous, overly encompassing, and unsympathetic laws that condemn more than guide – akin, even, to The Law.[2] An un-scalable mountain. The endless road. The very Rock of Sisyphus.

They're really not all that bad.

But you probably haven't read through them – at least, not *all* of them – in a good while. You should. They're written in plain, straightforward English and contain many helpful examples and potential scenarios in their comments. Indeed, all Texas attorneys could afford to read them again, certainly this Paper's author. Reading them again brings new insights. Every attorney's accumulating professional experience provides a helpful frame of reference for understanding the Rules' text and purposes.

Unfortunately, because of their busy professional and personal schedules, most attorneys do not read the Rules with any regularity. In fact, most attorneys wouldn't know how to find them in a law library (so, thank goodness on-line research, Westlaw and LEXIS). Worst of all, most attorneys do not check their fee agreements regularly to ensure compliance with the Rules. This Paper focus on this last, important point: checking written fee agreements against the Rules in order to ensure maximum compliance.

Although violations of the Rules themselves do not give rise to causes of action – by, for instance, clients against attorneys, or by attorneys opposing one another in litigation – the Rules certainly provide persuasive "standards" and "common and acceptable practices." Deviations from such standards and acceptable practices can become valuable evidence in lawsuits challenging the competency and care of attorneys charged with knowing and abiding by the Rules. So,

- ► Know the Rules.
- ► Review them regularly.
- ► Have a handy copy of them alongside your *O'Connor's* manuals, *Black's Law Dictionary* and *The Blue Book.*

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1 All citations to "Rules" or comments thereto are from TEX. DISCIPLINARY R. PROF. CONDUCT, reprinted in TEX. GOV'T CODE, tit. 2, subtit. G app. (STATE BAR RULES, art. X, § 9).

2 *E.g., Romans* 4:15 ("[T]he law brings wrath. [W]here there is no law there is no transgression.") (English Standard Version.).

Also, consult the table behind **Exhibit A** of this Paper in order to survey the various ethics issues, common attorney-client scenarios, and "flashpoints" that may arise in your law practice.

This Paper, in section II, focuses on linking your written fee agreements with those Rules that most directly pertain to client relationships. Section III focuses on proving attorney's fees claims in litigation.

II. THE CAREFUL ATTORNEY-CLIENT FEE AGREEMENT IN TEXAS: ONE THAT COMPLIES WITH THE DISCIPLINARY RULES TO THE GREATEST EXTENT POSSIBLE

Texas law does not openly construe fee contracts against the drafters, who typically are the attorneys and not the clients. *See Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 267 S.W.3d 454, 469-71 (Tex. App. – Houston [14th Dist.] 2008, pet. filed). Nonetheless, in the context of fee negotiation or other aspects of the engagement, the attorneys – not the clients – are charged with knowledge of the Disciplinary Rules. Consequently, the attorneys must take extra care to ensure compliance with the Rules.

Complying with the Rules usually means attending carefully to the client's actual or potential interests during the attorney-client relationship, from start to finish. More often than not, the Rules protect the clients.

A. Initial Parameters Must Be in Writing: the Scope of the Relationship and the Bases of Compensation.

Attorneys in writing must define the scope of their representations of their clients' interests. *See* Rule 1.02(b) (noting that an attorney "may limit the scope, objectives and general methods of the representation if the client consents after consultation"). Rule 1.02 and related comments are broad; they demand more than just stating in writing the "scope, objectives and general methods of the representation." If attorneys are limiting their representations to just a select group of clients or associated entities, they should state so in writing. If they are expressly declining to represent persons and entities associated with the clients, they should state so in writing. If they are limiting their representations to just certain matters for the clients, and declining other matters, they should state so in writing.

The **Exhibits** to this Paper contain sample fee contracts, from the Author's own law practice and professional associations. **Exhibit B** contains a simple contingency-fee contract, **Exhibit C** a simple hourly-fee contract, **Exhibit D** a complex contingency-fee contract, and **Exhibit E** a mixed hourly-fee and contingency-fee contract (which is somewhat dated, originating in the mid 1990s). All sample contracts, in their opening paragraphs, potentially accomplish Rule 1.02's objective of defining the scope and nature of the representation.

Attorneys in writing must define the terms of their compensation, whether it be hourly, contingency or mixed hourly-contingency. Such written definitions become especially important when they attorneys and clients do not have a history with one another, such as in a newly developed attorney-client relationship. *See* Rule 1.04(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."); Rule 1.04 cmt. 2 ("A written statement concerning the fee reduces the possibility of misunderstanding, and when the lawyer has not regularly represented the client it is preferable for the basis or rate of the fee to be communicated to the client in writing. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth. In the case of a contingent fee, a written agreement is mandatory."). Indeed, the Rules requiring attorneys to define the bases of their compensation are so broad, that attorneys ought to put into writing when they are performing even *pro bono* legal services for clients.

As to contingency-fee contracts, Texas law strictly enforces compliance with Section 82.065(a) of the Civil Practice and Remedies Code and Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct. Attorneys performing contingency-fee services should read 82.065(a) and 1.04 carefully and regularly; they should perform yearly assessments of their firm's standard contingency-fee contracts to ensure compliance. *See generally* TEX. GOV'T CODE, tit. 2, subtit. G, § 82.065(a) ("A contingent fee contract for legal services must be in writing and signed by the attorney and client."); Rule 1.04(d) ("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 lawyer 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." (emphasis added)).

Exhibit B's simple contingency-fee contract summarily checks all of Rule 1.04(d)'s boxes. Note that it does so in an abbreviated format. Simple personal-injury cases typically involve ordinary persons who are not accustomed to reading multiple-page contracts. They desire simple contracts, common sense, and plain dealing – not pages worth of corporate-style contracts that anticipate and highlight all potential scenarios that could arise during the representation. Indeed, such detailed contracts could give them enough concern that they seek a different attorney for the representation. An ethical attorney can utilize a simple, one-page contract to suit the client's preferences while fully complying with Rule 1.04(d). It would be accompanied by a more-detailed settlement statement, outlining the distribution of settlement funds and the handling of case expenses. *See* Rule 1.04(d) ("Upon conclusion of a contingent fee matter, the lawyer 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.").

Exhibit D's complex contingency-fee contract also meets Rule 1.04(d)'s demands, including the provision for "a differentiation in the [contingency] percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal." **Exhibit D** is intended for more-sophisticated business clients, who are accustomed to and even expect detailed contracts which anticipate potential scenarios that could arise during the representation.

Not just any "writing" signed by the attorney and potential client will suffice for purposes the contingency-fee contract. The writing should carefully and expressly state the contingency-fee percentage(s), the handling of case-related expenses and court costs, and the terms for withdrawal or termination by the client or by the attorney. *See, e.g.*, *French v. Law Offices of Windle Turley, P.C.*, No. 2-08-273-CV, 2010 Tex. App. LEXIS 1586 (Tex. App. – Fort Worth Mar. 4, 2010, no pet. h.) ("An attorney in Texas is permitted to seek recovery of a fee, either in contract or in quantum meruit, depending on how the relationship between the attorney and the client ended. Thus, [the attorney] had a legal right to seek recovery of at least the reasonable value of its services, subject to a defense that [the attorney] had abandoned its representation of [client] without just cause." (citing *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006); other citations omitted)); *Ray v. T.D.*, No. 03-06-00242-CV, 2008 Tex. App. LEXIS 986 at *22 (Tex. App. – Austin Feb. 7, 2008, no pet.) (distinguishing a proper contingency-fee contract from the purported contracts before the court: "the 'handwritten unverified document . . . mentions nothing about attorney's fees," "the 'Power of Attorney' . . . does mention attorney's fees, it does not reflect that [the potential client] executed the document other than in her own behalf").

Fee contracts not only should define the scope of representation and compensation bases, but also should anticipating the attorneys' needs for future withdrawal from the attorney-client relationship, such as withdrawing from contingency-fee contracts that have become uneconomical and/or burdensome to the attorney's or client's interests. *See* Rule 1.15 cmt. 4 ("Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.").

All sample contracts in **Exhibits B-E** anticipate the need for either attorney withdrawal or client withdrawal. They state in writing each party's right to withdraw from the attorney-client relationship, and **Exhibits D** and **E** even describe the case law supported "lien" that attorneys may receive when exiting contingency-fee arrangements. *See Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969) (authorizing withdrawing attorneys to pursue either "quantum meruit for the value of work performed between the date of employment and date of discharge" or "recover[y] on the [contingency-fee] contract for the amount of his compensation" – "when the client, without good cause, discharges an attorney before he has completed his work" (citations omitted)).

B. Actual and Potential Conflicts Must Be in Writing.

Attorneys' and clients' interests can and frequently do diverge. Written contracts must anticipate actual and potential conflicts of interests and in writing must state the parameters for tolerating conflicts.

1. Multiple-Client Scenarios Frequently Produce Conflicts

Attorneys must state in writing any matters adverse to the client, including the attorney's undertaking of a matter substantially related to his representation of the client. *See* Rule 1.06 cmt. 2 ("Moreover, as a general proposition loyalty to a client prohibits undertaking representation directly adverse to the representation of that client in a substantially related matter

unless that client's *fully informed consent is obtained* and unless the lawyer reasonably believes that the lawyer's representation will be reasonably protective of that client's interests." (emphasis added)). *See also* Rule 1.06(b)-(c). The fee agreement or a supplement thereto is a good place to inform the client of such conflicts and to seek the client's consent to the other undertaking.

Multiple-client representations frequently lead to conflicts between or among clients. *See* Rule 1.06(d) ("A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless *prior consent is obtained* from all such parties to the dispute." (emphasis added)); Rule 1.06 cmt. 8 ("While it is not required that the disclosure [concerning representations of clients with potentially conflicting interests] and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed."). Accordingly, attorneys should use fee agreements or supplements thereto to inform clients of multiple-party representations and to seek their consent to such representations.

The Rules address the multiple-client and multiple-party representation scenarios with some frequency – thereby showing the many potential conflicts that can arise between or among attorneys and their clients in these scenarios. Fee agreements or supplements thereto are good places to anticipate conflicts between or among attorneys and clients and to address potential remedies for such conflicts or to state parameters of conflict tolerance. Samples of conflicts between or among attorneys and client groups include, at least, when attorneys act as intermediaries between client groups, *see* Rule 1.07(a)(1) (advising that when attorneys represent multiple clients having potential conflicts: "the lawyer consults with each client concerning the implications of the common representation [*i.e.*, lawyer acting a intermediary between two or more clients], including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation") & Rule 1.07 cmt. 2 ("Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship; hence, the requirement of written consent."); and when attorneys negotiate group settlements or group criminal pleas, *see* Rule 1.08(f) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.").

Note that the two sample contingency-fee contracts, **Exhibits B** and **D**, anticipate group settlements and disclose that possibility to the clients signing the contracts. Supplemental, more-detailed written communications to the client group would precede any group or "global" settlement.

2. Conflicts Result When Attorneys Work with Clients Outside the Attorney-Client Relationship

Attorneys and clients frequently depart from the typical attorney-client relationship in which, for compensation or *pro bono*, the attorney undertakes to represent the client's interests in