Taking Care of Your Fee Agreements: Creative Approaches for the Small Firm

University of Texas School of Law
Continuing Legal Education

2013 Page Keeton Civil Litigation Conference
October 24-25, 2013

James Holmes

Schmidt and Holmes LLP
3012 Fairmount St.
Dallas, Texas 75201
(214) 520-8292
holmes@shllp.com

TABLE OF CONTENTS

I. THE DISCIPLINARY RULES AND THIS PAPER

Texas attorneys do not spend as much time as they should reading the Texas Disciplinary Rules of Professional Conduct[1] and their comments. The Rules and comments comprise a straightforward and helpful body of ethics principles. Reading them again and again – periodically, and over several years – never fails to yield new insights. A given attorney's ever-growing experience as practitioner, business developer, and advocate gives the attorney an expanding 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 for on-line research like Westlaw and LEXIS!). Worst of all, most attorneys do not check their fee agreements regularly to ensure compliance with the Rules. This Paper focuses on this last, important point: checking written fee agreements against the Rules in order to ensure maximum compliance. It does so primarily from the small firm's perspective.

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.[2] The Rules, however, do provide persuasive standards and common and acceptable practices (even though some case law states that Rule violations cannot sustain malpractice claims). Deviations from Rule-based 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.[3] Departing from the Rules can directly vanquish a contingency-fee arrangement.[4] Moreover, maximizing Rule compliance in the long run makes an attorney and law firm more effective, sustains good relationships with their clients, and endows them with a good reputation in their community – thereby leading to further legal business. Over a sustained time period,

---

[1] All citations and references 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.*, *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 80 n.21 (Tex. App. – Houston [14th Dist.] 2004, no pet.) ("In Texas, the disciplinary rules do not define standards of civil liability of lawyers for professional conduct." (citations omitted)).

[3] *E.g.*, *Authorlee v. Tuboscope Vetco Int'l, Inc.*, 274 S.W.3d 111, 120-21 (Tex. App. – Houston [1st Dist.] 2008, pet. abated); *George Fleming & Fleming & Assocs., L.L.P. v. Kinney*, 395 S.W.3d 917, 927-28 (Tex. App. – Houston [14th Dist.] 2013, pet. filed) (both expressly embracing Disciplinary Rules as standards of care for evaluating attorneys' conduct in litigation and in settlement). *See also In re Posadas USA, Inc.*, 100 S.W.3d 254, 257 (Tex. App. – San Antonio 2001, orig. proceeding) ("Although the Texas Disciplinary Rules are not controlling standards governing motions to withdraw [from representing a client], they articulate considerations relevant to the merits of such motions. The moving party bears the burden to establish with specificity a violation of the disciplinary rules." (citation omitted)).

[4] TEX. GOV'T CODE, tit. 2, subtit. G, § 82.065(b) ("Any contract for legal services is voidable by the client if it is procured as a result of conduct violating the laws of this state *or the Texas Disciplinary Rules of Professional Conduct* of the State Bar of Texas regarding barratry by attorneys or other persons." (emphasis added)).

Rule compliance builds a better practice. The foot race may go to attorneys who depart from Rule compliance – but attorneys adhering closely to the Rules win the marathon.

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. These recurring ethics topics appear alphabetically in the table.

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 FEE AGREEMENT: 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.[5] 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. Case law on fee agreements frequently favors client interests over attorney interests.[6]

A. Assessing the Attorney's Competency and Ability to Work Diligently.

Careful attorneys work within their areas of competence, and they do not stretch themselves or their office staff beyond that work to which they can attend diligently.

Before entering a fee agreement, attorneys should assess their competence, their know-how, and their specific experience – to ensure the same enables them effectively to handle the representation. The trial and appellate lawyer, for instance, should not engage himself to structure and paper a commercial real-estate deal when he lacks sufficient experience and forms for the engagement. A criminal defense attorney in Texas should not become the principal trial lawyer for a catastrophic injury case in Louisiana, even if she associates with local counsel, when she herself has scant experience with tort work. An experienced commercial litigator may

---

[5] *See, e.g.*, *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 451 (Tex. 2011) ("Only reasonable clarity is required, not perfection; not every dispute over the contract's meaning must be resolved against the lawyer. But the object is that the client be informed, and thus whether the lawyer has been reasonably clear must be determined from the client's perspective.").

[6] *See, e.g.*, *id.* at 453 ("Construing client-lawyer agreements from the perspective of a reasonable client in the circumstances imposes a responsibility of clarity on the lawyer that should preclude a determination that an agreement is ambiguous in most instances. . . . A client's best interests, which its lawyer is obliged to pursue, do not include having a jury construe their agreements.").

lack the requisite competence to follow his client through bankruptcy proceedings.[7] Rule 1.01(a) and its comments expressly encourage attorneys to remain within their areas of core competence – most particularly when an engagement involves "major litigation and complex transactions."[8]

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 (**B.1** without a provision for an existing referring attorney, **B.2** *with* an existing referring-attorney provision), **Exhibit C** an hourly-fee contract with a provision for receiving payment from and communicating with a non-client source, **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 late 1990s). All sample contracts accomplish Rule 1.01: the Author of this Paper never enters a representation under one of these contracts unless he or his law partners possess the requisite competence in the legal area involved and sufficient time and resources to work diligently and to completion on whatever litigation tasks present themselves.

B. The Scope of the Relationship, Expressed Clearly in Writing.

Careful attorneys work for specific purposes and projects. They should not serve as "one stop shopping" for the entirety of their clients' legal needs. They should communicate openly about a project-narrowing approach to legal services when they first consult with their clients. Failing to do so leads to trouble for the smaller firm. (Larger firms, with many lawyers possessing varied expertise (and sufficient time and willingness to lend a hand to originating partners), may tackle open-ended matters for clients willing to pay them by the hour for one-stop legal shopping. But this is a rare scenario.)

In consultation with their clients, attorneys must hem in the work that clients can expect of them during the representation. Defining and, better yet, narrowing their potential work becomes even more important when attorneys are representing clients on contingency fee or on any bases that are riskier than hourly work with retainer security. On contingency fee or on a mixed-fee basis, attorneys who have failed carefully to define their potential work for clients can make themselves subject to a protracted and complex client relationship, which they may find difficult to exit until they have completed a broad and time-consuming amount of work.[9] Consequently, attorneys in writing must define carefully and narrowly the scope of their representations for their clients' miscellaneous interests. Rule 1.02(b) provides that an attorney

---

[7] *McIntyre v. Commission for Lawyer Discipline*, 169 S.W.3d 803, 807-10 (Tex. App. – Dallas 2005, pet. denied) (faulting a commercial trial lawyer under Rule 1.01(a) for attempting to represent a client in bankruptcy court, while admitting before such court his unfamiliarity with bankruptcy law and procedures).

[8] TEX. DISCIPLINARY R. PROF. CONDUCT 1.01 cmt. 2, reprinted in TEX. GOV'T CODE, tit. 2, subtit. G app. (STATE BAR RULES, art. X, § 9) [hereinafter "DISCIPLINARY RULE"].

[9] *See generally* DISCIPLINARY RULE 1.02 cmt. 6 ("Unless the representation is terminated as provided in Rule 1.15 [which allows for terminating the representation for a variety of reasons], a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's representation is limited to a specific matter or matters, the relationship terminates when the matter has been resolved."); *In re Nunnery*, 798 N.W.2d 239, 243 (Wis. 2011) (faulting an attorney working on a mixed-fee basis for refusing to work further in a representation – and to file the necessary federal-court lawsuit – when he had defined the representation broadly as "[t]he scope of [attorney's] representation will cover this matter through the United States Federal District Court OR a state circuit court . . . .").

"may limit the scope, objectives and general methods of the representation if the client consents after consultation." However, Rule 1.02 and related comments 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.

To round off Rule 1.02(b), the attorney may not limit the scope of representation if doing so impedes effective, diligent service to the client.[10] Representations that must involve a broad spectrum of client interests should take place, if at all, on an hourly basis rather than on contingency fee or on bases riskier than hourly work.

All sample contracts attached as **Exhibits**, in their opening paragraphs, accomplish Rule 1.02's objective of defining the scope and nature of the representation.

C. The Bases of Compensation, Negotiated Early and Expressed Clearly in Writing.

Attorneys in writing must define the terms of their compensation, whether it be hourly, contingency, or mixed hourly-contingency. They should establish the fee in writing as early into the client relationship as possible – because courts will view fee alterations well into the relationship with substantial scrutiny if clients complain of the fee.[11] Attorneys, as fiduciaries for their clients, cannot use the practicalities and inertia of an ongoing relationship as leverage for fee re-negotiation.

A carefully written fee becomes especially important when attorneys and clients do not have a history with one another, such as in a newly developed attorney-client relationship.[12] Indeed, the Rules requiring attorneys to define the bases of their compensation are so broad and protective of the client's interests that attorneys ought to put into writing when they are

---

[10] DISCIPLINARY RULE 1.02 cmt. 5 ("Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.01 [requiring competent and diligent representation], or to surrender the right to terminate the lawyer's services or the right to settle or continue litigation that the lawyer might wish to handle differently.").

[11] *See, e.g.*, *Keck, Mahin & Cate v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 699 (Tex. 2000) ("Contracts between attorneys and their clients negotiated during the existence of the attorney-client relationship are closely scrutinized. Because the relationship is fiduciary in nature, there is a presumption of unfairness or invalidity attaching to such contracts." (citations omitted)).

[12] *See* DISCIPLINARY 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."); DISCIPLINARY 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.").

performing even *pro bono* legal services for clients.[13] It is conceivable that a *pro bono* client may believe that he ultimately may have to pay a fee or experience some downside to litigation (such as paying court costs); therefore, a careful agreement should anticipate and address such matters clearly and in writing for the lawyer's and client's benefits.

As to contingency-fee contracts, Texas law strictly enforces compliance with Section 82.065(a) of the Government Code and Disciplinary Rule 1.04. Accordingly, "[a] contingent fee contract for legal services must be in writing and signed by the attorney and client."[14] If the contract is not in writing and fails to include the attorney's and client's signatures (especially the client's signature), then a client may void the contract.[15] If the contract violates the Disciplinary Rules' prohibitions against barratry,[16] then it is voidable by the client.[17] Section 82.065 operates broadly to prevent fraud on the client and misunderstandings between attorney and client.[18]

Rule 1.04(d) requires that contingency-fee contracts be in writing, clear as to the calculations underlying the fee, and clear as to the netting of expenses before/after the fee.[19] Attorneys from different firms working on contingency fee, and attorneys using referring firms that sign up clients, will need to study carefully and periodically comments 10-18 to Rule 1.04 and Rule 1.04(f) itself. The comments and Rule stringently control fee sharing among firms, especially in the context of contingency fees and the commonplace division between (a) firms that sign up clients and refer them out and (b) firms that perform legal services for clients. In

---

13 *See McCleery v. Commission for Lawyer Discipline*, 227 S.W.3d 99, 105-06 (Tex. App. – Houston [1st Dist.] 2006, pet. denied) (faulting an attorney under Rule 1.04 for overreaching and for failing to communicate openly with a *pro bono* client).

14 TEX. GOV'T CODE, tit. 2, subtit. G, § 82.065(a).

15 *Tillery & Tillery v. Zurich Ins. Co.*, 54 S.W.3d 356, 359 (Tex. App. – Dallas 2001, pet. denied) ("A contingent fee agreement that does not meet the requirements of section 82.065 is voidable by the client."); *id.* (voiding a contingency-fee contract when the client had not signed it and the attorney had not substantially performed the contract before learning of the client's refusal to honor it).

16 DISCIPLINARY RULE 8.04(a)(9) ("A lawyer shall not engage in conduct that constitutes barratry as defined by the law of this state."); TEX. PENAL CODE § 38.12(a)-(b) (defining criminal barratry, including when "[a] person . . . pays, gives, or advances or offers to pay, give, or advance to a prospective client money or anything of value to obtain employment as a professional from the prospective client").

17 TEX. GOV'T CODE, tit. 2, subtit. G, § 82.065(b) ("Any contract for legal services is voidable by the client if it is procured as a result of conduct violating the laws of this state *or the Texas Disciplinary Rules of Professional Conduct* of the State Bar of Texas regarding barratry by attorneys or other persons." (emphasis added)).

18 *Chambers v. O'Quinn*, 305 S.W.3d 141, 152 (Tex. App. – Houston [1st Dist.] 2009, pet. denied) (explaining that Section 82.065 "was designed to prevent fraud" and misunderstandings between attorney and client surrounding a contingency fee).

19 DISCIPLINARY 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)).

short summary, the firms sharing fees must disclose their relationship with clients, must obtain the clients' consent to the fee sharing, and must provide legal services to the clients in proportion to their given share of the overall fee. Failure to comply with Rule 1.04(f), especially as to obtaining prior written consent from a client, can result in a firm's losing its share of the fee.[20]

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.

Exhibits B.1 and **B.2** are simple contingency-fee contracts that summarily check all of Rule 1.04(d)'s boxes. Note that they do so in an abbreviated format. Personal-injury and wrongful-death 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). A more-detailed settlement statement, outlining the distribution of settlement funds and the handling of case expenses, would accompany the one-page contract.[21]

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 that anticipate potential scenarios that could arise during the representation.

Exhibit E also is a complex contingency-fee contract, with an hourly rate component. **Exhibit E** is intended for more-sophisticated business clients.

D. A Further Look at Contingency-Fee Arrangements: Getting Out of Them with Some Compensation.

Not just any "writing" signed by the attorney and potential client will suffice for purposes the contingency-fee contract. Pursuant to Rule 1.04(d), 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.[22] Of

---

[20] *Cf. Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 314 (Tex. App. – Houston [1st Dist.] 2011, no pet.) ("Under the Rules of Disciplinary Conduct, *a client must consent in writing to a referral agreement to give it effect*." (citing DISCIPLINARY RULE 1.04(f); emphasis added)).

[21] *See* DISCIPLINARY 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.").

[22] *See, e.g.*, *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," and "the 'Power of Attorney' . . .

particular concern for the attorney is the matter of early withdrawal or termination before conclusion of the contingency-fee arrangement. Understandably, an attorney wants to avoid time wasted on contingency fee because of a dispute with a client that leads to withdrawal or termination. The attorney can and should preserve in writing his ability to sue on contract or in quantum meruit for the value of legal services rendered up to the time of withdrawal or termination.[23] Accordingly, fee contracts not only should define the scope of representation and compensation bases, but also should anticipate an attorney's need for future withdrawal in the event that litigation becomes uneconomical and/or burdensome to the attorney's or client's interests.[24] (Extended discussion of an attorney's remedies when a contingency-fee relationship fails appears in subsection III.G below, in connection with the 2006 *Walton* case.)

All sample contracts in **Exhibits B.1**, **B.2**, and **D** 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 B.1**, **B.2**, **D** and **E** even describe the case law-supported "lien" that attorneys may receive when exiting contingency-fee arrangements.[25]

E. Actual and Potential Conflicts Must Be in Writing.

Attorneys' and clients' interests can diverge 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

An attorney must state in writing any matters adverse to the client's interests, including the attorney's undertaking of a matter substantially related to his representation of the client.[26]

---

does mention attorney's fees, it does not reflect that [the potential client] executed the document other than in her own behalf").

[23] *See, e.g.*, *French v. Law Offices of Windle Turley, P.C.*, No. 2-08-273-CV, 2010 Tex. App. LEXIS 1586, at *30 (Tex. App. – Fort Worth Mar. 4, 2010, no pet.) ("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)).

[24] *See* DISCIPLINARY 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.").

[25] *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)).

[26] *See* DISCIPLINARY 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* DISCIPLINARY RULE 1.06(b)-(c).