SURPRISE! We Settled Your Case!

Ethical and Malpractice Considerations in Insurance Settlements

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I. INTRODUCTION & SCOPE OF THE PAPER

Cynics regard “lawyer ethics” as an oxymoron. But, we who labor daily in the vineyards of justice know the vast majority of lawyers take their ethical obligations very seriously and strive to do the right thing. This paper examines some of the ethical issues arising in connection with personal injury settlements.

The personal injury trial lawyer, and the lawyer’s staff, as well as insurance defense counsel, must be able to recognize and resolve the ethical issues presenting in settling personal injury claims. Problems involving personal injury settlements account for more claims of legal malpractice than any other area of complaint, excepting only a lawyer's failure to calendar events and respond to deadlines. Nine to ten percent of all legal malpractice claims involve the following complaints:

1. Failure to resolve insurance (especially workers compensation) subrogation claims and hospital and government liens;

2. Settlements without authorization;

3. Lost settlement opportunities;

4. Failure to convey offers of settlement; and

5. Errors in the drafting of settlement documents.

Ethical violations and malpractice claims probably go hand-in-hand with settlements for the same reason legendary safecracker Willie Sutton offered when asked why he robbed banks: "That's
where the money is." It is also where the client bargains away their legal rights, pays the lawyers, reimburses expenses and confronts competing claims.

This paper is offered as neither a scholarly tome nor an exhaustive compendium on its subject. Rather, it is put forward as a brief, practical discussion of ethical issues and malpractice issues for the practitioner (mostly plaintiff’s personal injury) and his or her staff.

II. THE POWER OF ATTORNEY AND EMPLOYMENT AGREEMENT

The avoidance of ethical predicaments and malpractice complaints in settlements starts with the power of attorney and employment agreement. It should address and resolve the following settlement issues:

1. What claims can the attorney seek to resolve? For example, can the attorney pursue and seek a fee on claims involving the claimant’s own insurance? Un/Underinsured motorist coverage claims can amount to a significant recovery in auto cases. Can the attorney pursue, and seek a fee on, collateral claims arising from the core dispute (such as bad faith claims)? Is the attorney authorized to negotiate a structured settlement?

2. What fee will be charged? What events will trigger an increase in fees... filing suit? ...starting trial?...appeal bond? Will the attorney fee change in a suit for injury to a minor when the minor reaches age eighteen?

3. Who will share in the fee?

4. How will a fee be computed and paid if a settlement is structured, paid in kind or involves the forgiveness of indebtedness or payment of obligations?

5. Will the fee be based upon a gross or net recovery (e.g., net of expenses, liens and guaranteed bills)? In a structured settlement, will the fee be based on actual cost or present value?

6. What expenses will be deducted?

The Texas Disciplinary Rules of Professional Conduct require:

1. That a contingent fee agreement be in writing and state the method by which the fee is to be determined;

2. If there is to be a differentiation in the percentage or percentages that accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated;

3. The agreement shall state what litigation and other expenses are to be deducted before or after the contingent fee is calculated [D.R. 1.04(d)]; and

4. If there is to be a division of a fee between lawyers in different firms, that the division is made by written agreement with the client with a lawyer who assumes joint responsibility for the representation [D.R. 1.04(f)(iii)].
In Texas, an attorney is required to sign the power of attorney and employment agreement and furnish a copy to the client. Always completely fill out the power of attorney and, as with any contract, get the client to initial any interlineations or handwritten modifications of the printed provisions. Too many lawyers get the client’s signature on a blank power of attorney—failing even to fill in the date or describe the nature of the claim—not realizing that the contract would likely be void were it ever challenged.

If a legal assistant is called upon to secure the execution of a power of attorney, they may do so only where the attorney has already negotiated all terms and conditions of employment such that the execution of the contract is nothing more than a clerical act, formalizing an existing understanding. Non-lawyer personnel must entirely refrain from offering opinions as to the meaning of particular terms or provisions or the suitability of the engagement to the client’s needs. Even if non-lawyer personnel are certain of what the attorney would say, they are prohibited by the canons of ethics from offering views requiring interpretation or professional judgment. Non-lawyer personnel may, of course, relay the lawyer’s express instructions; however, the judgment must emanate from the lawyer and the client must understand and appreciate that the assistant is merely repeating the lawyer’s opinion, not offering their own.

III. THE SETTLEMENT DEMAND

No matter how adept the lawyer may be at evaluating claims, counsel cannot safely pursue settlement absent an understanding of the client's expectations. As a practical matter, the plaintiff's lowest demand creates a settlement ceiling. An unauthorized settlement demand below a client's expectations will generate client conflicts. It matters not that the client's expectations are wildly unrealistic and insupportable: the lawyer's job is to educate and guide the client to realistic expectations, not act independently of the client's wishes.

If, despite a lawyer's best efforts, the client's expectations remain fantastic, it is better to return the file than to "sabotage" (in the client's eyes) the case with a too-low demand.

Unlike lawyers, who understand that the *ad damnum* in the petition often bears little relation to the settlement value of a case, clients attach great import to, and eagerly want to know, "What did you sue for?" Thus, it's important to advise a client—from and before the moment they first see the original petition—that the amount demanded in the lawsuit is not the settlement value of the case. Likewise, be aware that the process of securing the client's consent to an initial demand may inadvertently commit the client to that demand as the settlement value of the claim.

The legal assistant may have more frequent or extensive dealings with the client. The client often recognizes that the legal assistant has participated in the development and resolution of many cases and may seek the legal assistant’s views with respect to the value of their case. A client can attach great weight to the legal assistant’s view, particularly if that view coincides with the client’s own attitudes. Unrealistic expectations are easy to foster and hard to correct. The client will quickly etch an offhand remark about value in stone. While experienced legal assistants have an uncanny ability to correctly value a case, it is nonetheless essential that all discussion of case strength or value be reserved exclusively to the attorney.

If a demand must be reduced to reflect finite insurance coverage, sovereign immunity, statutory damage caps or the like, the lawyer must educate the client about such limiting factors before conveying the demand. In the same way, the lawyer should help the claimant to appreciate the significance that adjusters attach to objective proof of loss, such as medical bills and verifiable lost
wages. A client needs to appreciate that a case’s value is tied less to what they actually have lost or suffered than it is to what can be proven to have been lost or suffered.

Clients are frequently unfamiliar with the claims process and the maddeningly slow pace at which negotiations may proceed. A client may see giving a carrier thirty days to respond to a settlement demand as a sign of weakness. We must help clients to understand the way carriers operate and the importance (e.g., to establish Stowers liability) of affording the carrier a reasonable time during which to evaluate the claim. The legal assistant is one of the first lines of defense against frustrated and dissatisfied clients. The legal assistant should strive to always know why a particular claim is proceeding in a particular way so as to be able to assure the client that their matter is not languishing on a back burner. Finally, the lawyer must be sure that the demand meets the requisites of a Stowers demand—a greater challenge than might be imagined in light of the Texas Supreme Court’s ruling in American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842 (Tex. 1994). A demand for policy limits may fail as a Stowers demand if other claims or expenses have operated to reduce coverage under the policy such that the stated policy limits are unavailable.

IV. OFFERS OF SETTLEMENT AND NEGOTIATIONS

The Disciplinary Rules require a lawyer to keep a client reasonably informed about the status of a matter and to promptly reply with reasonable requests for information. D.R. 1.03(a). Further, a lawyer is obliged to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. D.R. 1.03(b). The Commentary to the Disciplinary Rules emphasize the importance of equipping the client with sufficient information and guidance to intelligently weigh an offer of settlement and the need to promptly inform a client of the substance of a settlement offer "unless prior discussions with the client have left it clear that the proposal will be unacceptable." D.R. 1.03, Comment 1.

The failure to communicate offers poses ethical and malpractice concerns for attorneys on both sides of the docket. Such failure by insurance defense counsel can engender Stowers liability, as occurred in Allstate Insurance Co. v. Kelly, 680 S.W.2d 595 (Tex. App.-- Tyler 1984, writ ref’d n.r.e.), or may constitute a violation of Texas Insurance Code art. 21.56, which requires that:

An insurer shall notify the named insured in writing of an initial offer to compromise or settle a claim against the insured made under a casualty policy issued to the named insured. The notice shall be given not later than the 10th day after the date on which the offer is made.

An insurer shall notify the named insured in writing of any settlement of a claim against the insured made under a casualty policy issued to the named insured. The notice shall be given not later than the 30th day after the date of the settlement.

The lawyer’s omission violates the statute because the defense attorney is deemed the agent of the insurance carrier and can visit vicarious liability upon the carrier. Ranger County Mutual Insurance v. Guin, 723 S.W.2d 656 (Tex. 1987).

The author has seen powers of attorney which seek to empower the lawyer, without further notice, to make settlement demands, conduct all negotiations for the clients, agree to a settlement, sign the client’s name to all settlement documents (including releases and checks) and distribute the proceeds. While to be vested with such boundless power must be a heady experience, it is, in fact,
an invitation to disaster and a violation of a lawyer's ethical duties according to an opinion of the Professional Ethics Committee of the Supreme Court of Texas (Opinion 330, December 1966). Seeking or using such powers is akin to wearing a "please sue me" sign.

A similar but somewhat more insidious circumstance is the client that says "You're the expert, just do what you think is best." This is gratifying, but the counsel should still resist the temptation to simply substitute his or her own judgment for the client's. The client who delegates all authority is only satisfied until they learn about someone's cousin's brother-in-law who "had the same injury but got lots more money."

Settlement complaints—like so many other attorney-client problems—can usually be traced to poor communications. The client should know where the lawyer is going in negotiations and how he or she intends to get there. If the lawyer and the client have jointly arrived at a settlement strategy, it probably isn't necessary to communicate every incremental demand and offer. Clients are usually content to let the lawyer work in an environment where the client isn't contacted about new offers "until they get above" a particular sum. Of course, counsel must be vigilant to insure that no offer the client "might have accepted" (or later claim to have been willing to accept) escapes the client's notice. A letter setting out the agreed settlement strategy is helpful in this regard, even if unsigned by the client.

A classic settlement conflict is presented when the client and counsel are divided as to whether to accept or reject an offer. When counsel is recommending an offer be accepted and the client wishes to proceed to trial, it is essential that counsel memorialize that the client's rejection is in conflict with counsel's advice and that counsel has informed the client of the risks of going to trial. Insisting that the client sign such an acknowledgment underscores the gravity of counsel's recommendation and is often the catalyst for the client's reconsideration. Counsel should studiously avoid seeking to "blackmail" the client into settlement by threatening to terminate the representation if the offer is rejected. Although Disciplinary Rule 1.15 contemplates that a lawyer may withdraw from representation where "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement," the better approach is that if the lawyer contracted to carry the case through trial and the client wants a trial despite a clear understanding of all the attendant risks, give the client the trial.

Sometimes, the client will instruct counsel to accept a stated sum and, when that sum is offered, counsel will sense an ability to recover more money and want to continue negotiations. As sums offered in settlement can usually be withdrawn at any time (albeit a fairly rare occurrence), encouraging a client to reject a satisfactory settlement is a risky business. Unless counsel wants to personally indemnify the client from any loss—and thereby tap dance through an ethical minefield—the risk of loss needs to be carefully weighed against the potential incremental gain.

As the legal assistant so often serves as the communications conduit between lawyer and client, the legal assistant must be vigilant with respect to helping the lawyer to meet the obligations outlined above. The legal assistant should insure that an effective mechanism is in place for the prompt communication of offers and responses between lawyer and client and that both the lawyer's advice and the client's directions are adequately documented as negotiations progress.

V. SETTLEMENT SIDE EFFECTS

It is an extremely important part of a lawyer's job to acquaint the client with all significant repercussions of a settlement. Understandably, clients focus on the dollars and cents of the
settlement offer and rarely focus on the effects a settlement may have upon other rights or benefits they currently enjoy. A prime example is settlement with a third-party when the plaintiff is receiving workers compensation benefits. A widow of an employee killed on the job may be entitled to receive hundreds of dollars each week for her entire life, so long as she does not remarry. Such a benefit may be worth a substantial sum, even reduced to present value.

A. Example 1: Workers Compensation

A settlement of the widow's third party negligence claim may seem appealing until one realizes that a subrogation claim for workers compensation benefits previously paid must be satisfied and the widow's net recovery (after deduction of attorney fees and repayment of litigation costs) may be taken as a credit against future payment obligations by the workers compensation carrier, resulting in the prolonged suspension of weekly benefits. See Tex. Labor Code § 417.002 (1999). Thus, a seemingly advantageous settlement may amount to little more than a borrowing from Peter to pay Paul. The lawyer profits, the insurance carrier wins, but the client has not improved her situation one bit. It's a recipe for malpractice.

B. Example 2: Submission Pitfalls

Similarly, in litigation involving multiple defendants, settlement will have significant consequences both in terms of the jury submission process and claims for settlement credit.¹ A client needs to understand that, in Texas, a jury must assign percentages of responsibility to each contributorily negligent claimant, to each defendant from whom the plaintiff seeks relief, from each responsible third party not sued by the claimant who was timely joined by a defendant and to each settling person. Tex. Civ. Prac. & Rem. Code §33.003. Thus, settlement assures the defendant that the liability of the settling person will remain an issue in the case and may operate to defeat the plaintiff's ability to secure joint and several liability. Moreover, settlement with any person entitles non-settling defendants to elect either a dollar-for-dollar credit for the full amount of all settlements or a sliding scale credit equal to the total of the following percentages of damages found by the trier of fact:

- 5% of damages to $200,000
- 10% of damages from $200,001 to $400,000
- 15% of damages from $400,001 to $500,000 and
- 20% of damages greater than $500,000.


Applying these rules to a serious injury case against a drunk driver and the manufacturer of a defective automobile where the conduct of both contributed to cause the wreck, assume the judgment-proof drunk driver tenders liability policy limits of $20,000.00 in settlement. Shortsighted counsel might recommend settlement where the better course would be to refuse the amount offered in settlement and non-suit the drunk driver. This peculiar outcome flows from the fact that

¹ This area of the law changes with virtually every legislative session in a paroxysm of “tort reform.” Do not rely solely upon this analysis as it likely became obsolete before the toner fused. Check the latest statutory pocket parts and cases!
under Texas law, the non-suited defendant who does not settle will not be submitted in the comparative responsibility issue.

**Assuming that the drunk driver was not timely brought in by the automaker as a responsible third party and the time to do so has expired pursuant to Tex. Civ. Prac. & Rem. Code §33.004**, the automaker will be required to pay 100% of the plaintiff's one million dollars in damages found by the jury. Turning down the settlement nets a one million dollar recovery. Alternatively, had the $20,000 been accepted in settlement, such settlement would "cost" the plaintiff a minimum of $145,000 (the sliding scale credit on one million dollars) to as much as, *e.g.*, $914,500 (if the automaker were found to be only 10% responsible for the damages when its conduct is compared to the drunk driver)…a very costly settlement indeed.

The significance of all this is that, once again, an offer of settlement can appear favorable at first blush but turn out to be disastrous for the plaintiff if accepted. Absent an informed decision by the client after a full disclosure of the consequences, plaintiff's counsel has probably committed malpractice by recommending settlement.

A different twist on the same issue is presented in cases involving multiple plaintiffs. The problem is, the Supreme Court appears internally conflicted over resolution of this issue.

In *Drilex Systems, Inc. v. Flores*, 1 S.W.3d 112 (Tex. 1999), a *unanimous* Supreme Court held that multiple family member claimants—the injured husband/father and his wife and children as consortium claimants—in a personal injury case should be treated as one claimant for the purpose of application of pre-trial settlement credits. The Civil Practice and Remedies Code defines “claimant” to mean:

...[a] party seeking recovery of damages....In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, ‘claimant’ includes both that other person and the party seeking recovery of damages pursuant to the provisions of Section 33.001.

Tex. Civ. Prac. & Rem. Code § 33.011(1). The non-settling defendant elected a dollar-for-dollar credit pursuant to Section 33.012(b)(1), which provides:

If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a credit equal to...the sum of the dollar amounts of all settlements.

After reciting the quoted sections, the Court stated: “All of the Flores family members are seeking recovery of damages to Jorge. Thus, under the plain language of section 33.011(1), the term ‘claimant’ in section 33.012(b)(1) includes all of the family members.” *Id.* at 122.

Applying the rule it set down, the Court lumped the individual claimants’ recoveries from their pre-trial settlement together and credited the total settlement amount against the total of all jury awards (less a 10% reduction for Jorge’s contributory negligence). The net was then allocated among the family members based on their respective percentages of recovery of the total jury award before reductions.

The family argued that “gross inequities” would result in some cases, with some plaintiffs recovering more than the jury awarded to them and other plaintiffs realizing reduced awards based on
settlements recovered by others. The majority agreed, but reasoned: “Although such results may seem harsh, they are mandated by the statutory language and are consistent with legislative intent.” *Id.* at 123. The Court went on to say that, “Using a method of allocation that is not dependent on the distribution of the settlement money chosen by the plaintiffs is the best method of ensuring that nonsettling defendants are not penalized.” *Id.*

A little more than 15 months later, seven of the same justices issued an opinion that seems directly contrary to *Drilex*, and four of them openly advocated overruling *Drilex*. In *Utts v. Short*, ___ S.W.3d___ (Tex. Sup. Ct. – No. 99-0366, opinion Dec. 7, 2000), the Court decided that an individual wrongful death beneficiary’s settlement was *not* required to be included in the multiple claimants’ pre-trial settlement kitty for the purpose of affording a settlement credit to a non-settling defendant. *Id. (per curiam)* opinion).

In *Utts*, multiple family members sued a doctor and a hospital for medical malpractice resulting in the wrongful death of their husband and father. Before trial, one of the four surviving children, adult daughter Dorothy, settled with the hospital for $200,000. By agreement, she recovered $50,000, and the remaining $150,000 was put into a trust account maintained by plaintiffs’ counsel. The same day she signed the settlement agreement, Dorothy gave the law firm written instructions to give $10,000 “gifts” to her mother and three siblings out of the monies deposited in trust. (The balance of $110,000 was applied to attorney’s fees and litigation expenses.) Shortly thereafter, the hospital reached settlements with the widow, three other children and Estate for $10.00 each, and by the time the case went to trial against the doctor, no plaintiff had a claim against the settling hospital, and *Dorothy had non-suited her case against the doctor.*

At trial, Doctor Utts sought a dollar-for-dollar credit in the amount of the $200,000 settlement Dorothy made with the hospital. Instead, he received only a $10.00 offset as to each plaintiff.

Seven justices of the Supreme Court affirmed the trial court’s judgment that the doctor’s settlement credit was limited to the $10.00 token payments made to the plaintiffs other than Dorothy. Three of them decided that this case could and should be decided without overruling *Drilex* because it was distinguishable from *Drilex*, reasoning that

a former plaintiff who settles and is no longer party to the suit when the case is submitted to the jury is not a claimant or a component of a complainant for the purposes of crediting settlements under section 33.012.

*Id.* at concurring opinion, Gonzales, J., Part IIA. Four of the members of the Court said “we misread the statute [in *Drilex*] and how it should apply to multiple plaintiffs.” *Id.* at concurring opinion, Hankinson, J. Urging that *Drilex* be overruled, Justice Hankinson wrote:

[*P*]laintiffs asserting derivative claims are asserting separate and distinct claims for their own losses, tangible and intangible, caused by the injury to another person. And no language in chapter 33 suggests that the Legislature intended to group all derivative plaintiffs together as one claimant so that some derivative plaintiffs lose their individual claims if other plaintiffs settle; rather, under the plain language of section 33.011(1), ‘claimant’ includes only one derivative plaintiff together with the injured person. The troubling effect of *Drilex* is that any settlement with any one derivative plaintiff, for example, one wrongful-death beneficiary, is in effect a settlement with all possible derivative plaintiffs or wrongful-death beneficiaries.
I simply see no way to read section 33.011(1) to permit one wrongful-death beneficiary to cut off or settle another beneficiary’s right to his or her full measure of recovery.

The dissent by Justice Owen, in which Justice Hecht joined, vigorously defended *Drilex* and, further, “would hold that when a ‘claimant’… receives settlement proceeds, either directly or indirectly, non-settling defendants are entitled to full credit for the settlement payment.” *Id.* at dissenting opinion, Owen, J. Interestingly, of the three justices supporting the continued viability of *Drilex*, albeit with the *Utts* exception, only one, Chief Justice Phillips, remains on the Court, at least as of this writing. Justice Gonzales is now President Bush’s private lawyer, and Justice Abbott has resigned the Court to run for Lt. Governor. Justice Baker has announced his impending retirement, leaving three justices to denounce *Drilex*—Justices Hankinson, Enoch and O’Neill.

**C. Example 3: UIM Settlements and Carrier Consent/Prejudice Issues**

The standard Texas UIM clause provides that the claimant cannot settle with the third party tortfeasor without first securing the consent of the UIM carrier. The underlying rationale was that UIM carriers—who hold the right to seek subrogation against the tortfeasor for UIM benefits paid to the claimant—would be prejudiced if settlement with the tortfeasor cut off those derivative rights. The provision has been found to be valid and enforceable, *Guaranty County Mutual Ins. Co. v. Kline*, 845 S.W.2d 810 (Tex. 1992); however, the UIM carrier may not enforce the consent requirement to defeat coverage unless the carrier can affirmatively demonstrate that it was prejudiced by the claimant’s failure to secure the consent before settlement. *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691 (Tex. 1994). Thus, the overzealous attorney who mistakenly accepts an offer of settlement without first securing consent of the UIM carrier may be spared if the lost subrogation rights prove to be of little or no value.

It should also be noted that settlement of the underlying claim for less than the full amount of available insurance coverage does not necessarily bar a further UIM recovery. A settlement for less than limits will be treated as if limits were recovered, such that the claimant may only recover UIM benefits for damages in excess of the underlying policy limits. *Olivas v. State Farm Mutual Automobile Ins. Co.*, 850 S.W.2d 564 (Tex. App.-- El Paso 1993, writ denied).

**VI. PROTECTING THE INTERESTS OF THIRD PARTIES**

A recurrent source of complaint—just check any month’s issue of the Texas Bar Journal—grows out of the failure of counsel to resolve or protect the interests of third parties with respect to settlement proceeds. Texas Disciplinary Rule 1.14 provides that, “Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person.” (emphasis added) Further, “[a] lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.” *Id.* The Comment to the Rule makes clear that a lawyer may have a duty to protect third-party claims against wrongful interference by the client and may refuse to surrender the property to the client. *Id.* at Comment 3. Attorneys have many times been sued or subjected to grievances by subrogated lien holders whose claims were not protected in settlement. However, compliance with the Rule is also conducive to grievance filings by the client as they watch their settlement proceeds disappear, doled out to various protected creditors.

It is not uncommon for personal injury attorneys to agree, with the client’s consent, to protect a medical provider’s charges out of the client’s net settlement proceeds and thereby create a lien
upon those proceeds. If your office furnishes letters of protection, it is a good practice to secure the client’s consent to such protection in writing and to furnish a copy of the letter of protection to the client at the time of its issuance. Eschew language that fosters unreasonable expectations or operates as a guarantee of payment. Ideally, the protection given should afford some leeway to re-negotiate the obligation so as to insure that the client is not deprived of a share in his or her own recovery.

In addition to obligations undertaken by letters of protection, entities which have furnished health care services (e.g., hospitals or the Veteran’s Administration), paid medical bills (insurance carriers, Medicare or Medicaid) or reimbursed lost earnings (workers compensation carrier) may be subrogated to the plaintiff’s right to recover in a third-party claim.

The legal assistant should be sure that an effective and reliable system exists for tracking the interests of third parties in client recoveries. It is important that this information be current and readily accessible to the attorney, particularly during settlement negotiations. If your firm uses a case information sheet system, then this information should be a part of the information contained therein. Additionally, the same information should be made a part of any settlement or accounting files that would routinely be reviewed prior to the disbursement of client funds. An unreimbursed obligation poses both an ethical and a financial problem for the attorney. Be sure such items are not overlooked at closing.

A. Contractual Rights of Reimbursement

Routinely, health care plans provide for a contractual right of reimbursement from the proceeds—making no provision for sharing of attorney fees or expenses of litigation. Claimants should be questioned to determine if, in order to secure medical benefits, they were required to execute a reimbursement agreement obligating the claimant to reimburse the medical insurance carrier for all medical bills it paid. Claimant’s counsel should demand a copy of the contractual provision on which the reimbursement claim is grounded and freely challenge such claims where the company claiming such a right is not forthcoming with documentation to substantiate its interest.

In the judgment of the author, many such claims of contractual right of reimbursement are unenforceable as a lien upon the proceeds of a claimant’s recovery. Despite numerous requests for same, carriers with whom the author has dealt have frequently been unable to furnish a document signed by the client agreeing to make such reimbursement. Often, the only remedy available to the carriers is to intervene in pending litigation or decline further payments under the policy... a practice that may subject the carrier to liability for breach of contract. If a health carrier demands that a liability carrier protect an unenforceable right of reimbursement, the effect of such action may be to hinder or delay resolution of the claim and thereby invest the claimant with an independent cause of action for damages against the health carrier.

B. Workers Compensation Subrogation

Texas workers compensation law provides for a powerful statutory right of subrogation in favor of the workers compensation carrier to the extent of its payments for medical care and other compensation benefits. See Tex. Labor Code §417.002 (1999). The statute provides for payment of attorney fees and sharing of the costs of suit. Tex. Labor Code §§417.003 (1999). The compensation carrier’s right of subrogation cannot be extinguished by the conduct of the claimant and various creative attempts to thwart the lien have met with failure. See, e.g., Insurance Co. of
North America v. Wright, 886 S.W.2d 337 (Tex. App.-- Houston [1st Dist.] 1994, writ denied); Employers Casualty Co. v. Henager, 852 S.W.2d 655 (Tex. App.--Dallas 1993, writ denied); American General Fire & Casualty Co. v. McDonald, 796 S.W.2d 201 (Tex. App.-- San Antonio 1990, writ denied). Counsel nevertheless should determine if the carrier's assertion of subrogation rights is overreaching (as in seeking a recovery for sums never paid or not properly a part of the lien) or has been made in bad faith (as in seeking to impose the subrogation claim on the recoveries of persons not receiving compensation benefits or refusing to share in the cost of obtaining the third-party recovery) or is not supported by Texas law (as in asserting a subrogation claim for payments made under another state's compensation system). Because the law so favors the carrier, occasionally a carrier or its counsel will seek to take too big a bite of the claimants' recovery. Plaintiffs' counsel should not blindly or blithely accept the subrogation claim without close scrutiny.

C. Federal Government Liens & Texas Regulation of Medicaid Payments

The federal government enjoys broad rights of subrogation for, e.g., Medicare and Medicaid payments and payments for medical care furnished to injured servicemen and veterans. See 42 U.S.C. §1395 and 38 U.S.C. §1729. Often called a "super lien," the government is not even required to intervene or otherwise act to protect its rights. Such liens need to be resolved before distribution of settlement proceeds. Although Medicare employs a somewhat convoluted scheme for resolution of its liens, the Medicare reimbursement formula fairly takes into account attorneys fees and court costs associated with the tort recovery and can even be adjusted in special circumstances.

The Texas Department of Health regulates third party reimbursement of Medicaid payments to Texas residents. The February 15, 1999, "final" draft of the Department's proposed comprehensive scheme with respect to Medicaid subrogation is published at the Texas Trial Lawyers' Association website, http://www.ttla.com/3rdPartyReimbursement.htm. Any plaintiff's attorney handling a case for a client who has received medical care pursuant to Medicaid should familiarize himself with the applicable Department provisions, which as currently formulated impose an affirmative duty on attorneys to notify the Department within 45 days of their representation or identification of potential third parties, provide information and status reports concerning third party claims, and facilitate reimbursement to the Department of Medicaid expenditures out of third party recoveries. A 15% attorney's fee will be paid if the Department is reimbursed in compliance with the rules, as well as pro rata reasonable expenses not to exceed 10% of the amount of the Department's recovery. The Department possesses limited authority to waive liens. Medical providers are granted separate rights to pursue third party payment (in excess of Medicaid caps); thus, plaintiff's counsel would be wise to initiate all Department-required activities and inform the health care provider of his actions to avoid finding himself in competition with a separate subrogation action by an aggressive health care provider.

D. Hospital Liens

Hospitals are afforded the right to impose a lien pursuant to Texas Property Code §55.01 et seq for reasonable and regular charges for the first 100 days of hospitalization following an injury. In order for a hospital lien to attach, the treatment must commence within 72 hours of the injury, but the lien is enforceable in favor of a hospital to which the victim is transferred. Importantly, hospital liens do not apply to workers compensation recoveries (including FELA and maritime cases) or to "the proceeds of an insurance policy in favor of the injured individual or the injured individual's beneficiary or legal representative, except public liability insurance carried by the insured that protects the insured against loss caused by an accident or collision."
Some medical providers have taken to abusing the hospital lien statute by filing liens for inflated charges, unrelated care or for care that was rendered long after the initial hospital admission, alleging that the late care falls under the facility transfer provision. Here again, the lien should not be accepted as valid without scrutiny and confirmation that the filing requisites have all been correctly observed.

E. Equitable Subrogation

Texas recognizes the doctrine of equitable subrogation in favor of insurers, but only with respect to proceeds in excess of that required to make the injured party whole and to pay plaintiff’s counsel and reimburse the costs of litigation. Ortiz v. Great Southern Fire & Cas. Ins. Co., 597 S.W.2d 342 (Tex. 1980). However, a recent decision establishes that the injured party is not obliged to act to protect the interests of the subrogated carrier. Esparza v. Scott & White Health Plan, 909 S.W.2d 548, 548 (Tex. App--Austin 1995, writ denied) (“An insured party seeking compensation for a grievous injury should not be put in the position of having to look out for the competing interests of others.”) Applying these two decisions, a carrier asserting either a contractual or an equitable subrogation interest may lose that interest by failing to act diligently to protect its interests or to demonstrate that the plaintiff was made whole by a recovery. Presumably, the issue of diligence will hinge, in part, upon whether the carrier had a reasonable opportunity to protect its interests prior to the extinguishment of those interests by plaintiff’s execution of a release or by the entry of judgment. Prudence dictates that subrogated carriers be advised in writing of the pendency of a claim or suit against a third-party tortfeasor.

Note that if an employer self-funds a health plan (as opposed to purchasing an insurance policy), the employer-funded health plan (or, more likely, its collection agent) may argue that ERISA preempts state subrogation law (particularly the Ortiz “plaintiff made whole” rule) and will hang their hat on plan language granting the self-funded plan a priority right to any third-party monies recovered. See Sunbeam-Oster Co., Inc. Group Benefits Plan v. Whitehurst, 102 F.3rd 1368 (5th Cir. 1996)

F. Med Pay Subrogation

Texas law requires that Personal Injury Protection (PIP) coverage be extended as part of a standard Texas automobile liability policy unless the insured expressly declines such coverage in writing. Of late, auto liability carriers have been encouraging insureds to decline PIP coverage and instead buy less costly Medical Payments (MedPay) coverage. PIP coverage has several advantages over MedPay, among them that, unlike MedPay, benefits recovered under PIP need not be reimbursed to the claimant’s carrier out of a third-party recovery. The “good news” about the MedPay subrogation is that a recent case held that the subrogor “stands in the shoes” of the claimant with respect to the subrogated amount such that where the insurer benefits from the efforts of the insured’s attorney in the recovery of its MedPay subrogation, the Common Fund Doctrine dictates that the insurer must bear its pro-rata share of the attorney’s fees. Texas Farmers Ins. Co. v. Seals, 948 S.W.2d 532 (Tex. App.-- Fort Worth 1997, no writ).

VII. RENEGOTIATING THE FEE

Settlements usually occur when the pressures and vicissitudes of litigation are at their peak. Many cases settle as trial approaches, when the risk attendant to litigation seems magnified and the dollar
cost of moving forward rises exponentially. High-priced experts must be secured, experienced trial
counsel associated and preparation of slick-but-pricey demonstrative evidence begun. In this
pressure cooker setting counsel may be sorely tempted—or even invited—to re-negotiate the
employment agreement to secure a more appealing fee or shift the case costs burden.

Simply stated: No lawyer should ever do it.

A modification of an attorney employment agreement made in the course of the legal representation
is subject to the presumption that such an agreement is tainted with fraud on the part of the
attorney. See Archer v. Griffith, 390 S.W.2d 735 (Tex. 1965); Robinson v. Garcia, 804 S.W.2d 238
(Tex. App.-- Corpus Christi 1991), writ denied, 817 S.W.2d 59 (Tex. 1991). In theory, a fee
agreement could be re-negotiated in anticipation of settlement if the clients were, say, represented
in the negotiations by independent counsel, were fully informed of their rights and received new
consideration. Even then, you will end up defending a grievance or getting sued. A lawyer should
make the deal when undertaking the representation and stick by it.

VIII. CHECK THE EMPLOYMENT AGREEMENT!

Although it would seem painfully obvious, it's essential to review the actual power of attorney and
employment agreement executed by the client at the start of the representation. Often, the power
of attorney will depart from the lawyer's usual and customary terms of employment as, for example,
where there was a negotiated reduction of the percentage contingency fee, the "triggering" events
which escalate the fee differ or the fee is to be calculated only on the recovery net of expenses or
on monies in excess of a stated sum. Since the failure to review the power of attorney most often
results in errors benefiting the lawyer, counsel will at best be embarrassed or, worse, thought to
have tried to cheat the client.

The legal assistant should insure that counsel re-examine the power of attorney in connection with
the closing of any settlement and, if the legal assistant participates in the preparation of closing
statements, should check the power of attorney and employment agreement to be sure that the
appropriate fees and expenses have been computed.

A recent case serves as a warning: when you check the employment agreement, are you resolving
any ambiguities (or even plainly understood terms) in your favor, or in your client’s favor? In Lopez
v. Munoz, Hockema & Reed, L.L.P., 980 S.W.2d 738 (Tex. App. -- San Antonio 1998, pet. filed),
plaintiff’s counsel operated under a “standard” contingency agreement providing for the escalation
of the attorney’s fee from 40% to 45% “if the case is appealed to a higher court.” The case was
tried to a $25+ million verdict, reduced to judgment. Plaintiffs’ counsel initiated settlement
negotiations to avoid the risk of appeal, and the judgment debtor agreed to pay the $15 million
demand on October 11. Before the settlement agreement was finalized on October 30, the
defendant filed a deposit in lieu of cost bond. Based on that single action, the attorneys took an
additional 5% fee as a part of the settlement.

The clients sued the attorneys for breach of fiduciary duty and fee forfeiture, arguing there was no
appeal to trigger the fee increase from 40% to 45%. The Court of Appeals was quick to agree,
stating “[W]hatever ‘appealed to a higher court’ means, it means more than filing a cash deposit in
lieu of a cost bond....” Id.

Certainly, the Lawyers understood that “appealed to a higher court” means more
than initiating the appellate process. Construing the employment contract in
consideration of the parties’ intention [citation omitted], no evidence exists that the Lopezes intended to pay their lawyers an additional $750,000.00 for doing nothing. The conduct relied on by the Lawyers for charging the additional fee is not even their own conduct, but rather the unilateral action of the defendant’s attorney.

Id. Accordingly, the Court held that the attorneys breached their employment contract by overcharging the clients and rejected the attorneys’ arguments that the consummated settlement by the clients with knowledge of the 45% fee being taken constituted accord and satisfaction or estoppel by acceptance of benefits. Further, the Court held that the breach of contract constituted breach of fiduciary duty as a matter of law because the attorneys knew the case was not going to be appealed at the time they grossly over-charged the family the extra 5%, and the clients overcame the attorneys’ limitations defense by the Court’s application of the discovery rule.

Over the dissent of one justice, the San Antonio Court gave the attorneys one break: they refused to order complete and total fee forfeiture, requiring the attorneys to disgorge only the extra 5% in recognition of the fact that “the Lawyers succeeded in their roles as trial advocates on behalf of the Lopez family, [although] they failed in their roles as counselors.” Id. In fashioning the equitable remedy, the Court cited and followed the Houston Court’s reasoning in Arce v. Burrow, 958 S.W.2d 239 (Tex. App. -- Houston [14th Dist.] 1997, pet. granted)(discussed in detail later in this article, at XII. RESOLVING CONFLICTS AMONG CLAIMANTS).

IX. SETTLEMENT STATEMENTS

Settlement statements in contingency fee matters are governed by Texas Disciplinary Rule 1.04(d) which requires that, upon conclusion of a matter, the lawyer shall furnish a written statement to the client detailing the outcome and showing "remittance to the client and the method of its determination." This Rule should be considered in conjunction with Disciplinary Rule 1.14 governing the safekeeping of property belonging to clients and third parties. Remember that all monies recovered in a case belong to the client or to a third party. Even if denominated an attorney fee, it's still the client's money (though perhaps subject to a lien or claim upon such proceeds by virtue of the attorney's employment agreement).

A. Settlement Statement Checklist

For a typical lump sum recovery in a contingency fee matter, counsel should develop a settlement statement that will, at a minimum:

1. Detail the full amount of any gross recovery;
2. Show the amount of the client’s gross share and how computed;
3. State the dollar and percentage amount of attorney fee deducted;
4. Reflect the division of attorney fees if shared with other counsel;
5. Detail deductions for expenses and court costs (a lump sum deduction would suffice if a detailed breakdown follows as an attachment to the settlement statement);
6. Show all deductions for subrogation claims repaid, third-party liens satisfied, protected medical bills paid, client advances recovered or the like; and
7. Clearly state the client's net recovery—the actual take-home figure—leaving no doubt as to how and why that number was computed.
It's also a good idea to include an acknowledgment for the client's execution to establish that the client has read and understood the settlement statement and (where appropriate) understands that the net recovery is all the money that will ever be recovered in the case. Such an acknowledgment can be used to expressly demonstrate that various risks and consequences related to settlement have been fully disclosed to the client. For example, the suspension of compensation benefits, potential tax consequences, claims for unknown medical charges, etc. Disclosures should be individually tailored to the case rather than be simply a litany of boilerplate disclaimers.

It is a simple but useful practice to re-cast the Settlement Statement in the form of a Distribution Sheet, detailing the amount and payee of all checks drawn on your Trust Account in disbursing settlement funds. It's a good idea to attach copies of the Trust Account checks to the Distribution Sheet.

If circumstances dictate that the legal assistant or other lay staff present the closing papers, release, checks and other documents to the client for execution, it is absolutely essential that the attorney go over all the documents with the client and answer all questions before the closing. The paralegal's handling of a settlement closing without the lawyer present should be discouraged, and it must never require the paralegal to stand in the shoes of the lawyer in addressing the client's questions or concerns.

X. ACCOUNTING FOR CASE COSTS

Lawyers intending to deduct case development costs from a client's recovery must have a reliable accounting system. It may be as simple as a manual ledger or a file jacket where you stash paid invoices and canceled checks. The simpler, and ultimately the more cost-effective, approach is the use of check writing or accounting software. The author finds the inexpensive software package "Quicken" to be a near-perfect system for his cost-basis, all-contingent-fee practice. No doubt other products will work as well. The ability to instantly obtain a current and detailed accounting of all case-specific expenditures is an important settlement tool and can keep a lawyer from dangerously underestimating deductions when projecting a client's net recovery.

There is some considerable divergence among claimant's counsel as to what items constitute case expenses properly charged to the client. Actual out-of-pocket costs like filing fees, expert's charges, postage, case-specific travel and the like are pretty clearly the client's responsibility. But the line blurs when lawyers charge for a pro-rata share of office utility costs, secretarial or paralegal time, in-house graphics production, purchase of reference books, facsimile transmissions, interest on case costs or flying on the law firm jet?

The bottom line is that the contract of employment must support the deduction and the charge must have been reasonably calculated to advance the ends of the client in the litigation. With respect to in-house charges, they must be competitive with outside services of comparable quality and the client should be advised that they are, in fact, charges recouped by the lawyer or firm. Contemporaneous logs should support copy, courier and facsimile charges.

Some lawyers pass on large chunks of what have traditionally been viewed as office overhead expense. Some even assess a fixed periodic charge to defray the cost of file folders, pens and legal pads. Again, the "smell test" will control and the intention to deduct such items should be expressly stated in the employment agreement or are best absorbed in the attorney fee. Avoid even the appearance of overreaching and impropriety.
It is a good idea to periodically account to the client with respect to case costs. In the contingency fee practice, the client seldom sees an accounting for case costs until the time of settlement and may balk at a hefty deduction. Periodic reporting pre-conditions a client and offers the incidental benefit of demonstrating the lawyer's ongoing financial commitment to the case.

**XI. SETTLEMENT PACKAGE**

Careful lawyers handling contingency fee cases will furnish a complete set of settlement documents to the client, referring counsel and, where applicable, to the attorney ad litem or guardian of a minor or incompetent claimant. Such a settlement package might contain:

1. The settlement sheet;
2. A detailed breakdown of case expenses and court costs which have been deducted from the recovery;
3. The Distribution Sheet;
4. Copies of the checks or drafts funding the settlement;
5. Copies of all Trust Account checks disbursing settlement funds;
6. A copy of the Release executed by the claimant;
7. A copy of any partial or final judgment resulting from settlement; and,
8. A copy of the power of attorney and employment agreement showing counsel may deduct the attorney fee and expenses.

In cases involving structured settlements, a copy of the annuity purchased by the defendant to fund the settlement and any documents creating a qualified assignment should likewise be furnished to the client. Structured settlements pose a greater challenge to insure that the client receives full disclosure of all important facts and considerations. The settlement sheet should set out the payment schedule and clarify the basis for computation of the attorney fee. The acknowledgment should, *inter alia*, memorialize the client's understanding and acceptance of the structured settlement and make clear that the terms of payment may not be accelerated or modified. Some practitioners recommend a separate "Affidavit of Consent and Understanding" for this purpose, especially where the structured settlement is not approved in open court such that the client's acceptance and understanding is made a part of the record.

If a legal assistant, secretary or firm administrator is responsible for the preparation and/or assembly of settlement documentation, the legal assistant should create a checklist of the contents of the settlement package and, working with the attorney, should develop a consistent and coherent method of accounting for and presenting the facts and figures of settlement. As a rule, the attorney should review and approve all accounting statements prior to their presentment to the client. A checklist or other method should be employed to track the return of executed settlement documents to opposing counsel, collection of settlement monies, satisfaction of third-party claims, remittance of referral fees, payment of outstanding case expenses and recovery of court costs.

**XII. RESOLVING CONFLICTS AMONG CLAIMANTS**

Where a lawyer represents several clients seeking recovery from the same source, the lawyer must be mindful of potential conflicts of interest. For example, the lawyer should not of his own accord allocate a lump sum recovery among claimants. Still, it is amazing how frequently this occurs. Even where the allocation appears to come from the defendant in the form of separate settlement offers, it's likely the Plaintiff's lawyer "suggested" a particular allocation.
There are no simple or foolproof solutions to resolving conflicts among multiple clients. Where the claimants are adults of relatively equal bargaining power, the claimants can agree to an allocation of gross settlement proceeds. However, where the lawyer recognizes (or should recognize) a gross disparity of bargaining power and the potential for overreaching, the lawyer may be remiss in seeking to resolve the conflict by requiring the claimants to agree. It may even be advisable to enlist the aid of the court or a special master so as to insure a division be equitable without forcing the lawyer to choose between competing client interests.

Where the situation involves a minor or incompetent claimant whose interests conflict with those of a parent or guardian acting as next friend, the time-tested solution calls for the appointment of a guardian ad litem pursuant to Rule 173 of the Texas Rules of Civil Procedure. The guardian ad litem’s job is to ascertain whether the terms of settlement, and particularly any division of settlement proceeds, is fair and equitable vis-à-vis the competing interests of the minor or incompetent claimant and his or her next friend.

In cases of multiple claimants represented by the same counsel, it is essential that there be full disclosure to, and consent from, all concerning the amount and terms of any aggregate settlement offers as well as the amounts received (or to be received) by individual claimants. See Disciplinary Rule 1.08(f). Negotiation of mass tort settlements poses a particularly nettlesome problem for plaintiff’s counsel, who must fashion an equitable basis for allocation of settlement proceeds without sacrificing the interests of one claimant to another.

The legal assistant should be mindful of the lawyer’s duty in the representation of multiple claimants. Some clients you like a lot and some not as much. It is easy to be more open, candid and supportive of one client versus another (e.g., returning phone calls rapidly for some, treating one client as a conduit for information to all, etc.). The lawyer’s duty to treat all clients even-handedly extends to the conduct of the legal assistant as well. Never lump individual offers when discussing a potential settlement with a client.

Although a lawyer may generally represent multiple claimants whose interests converge with respect to claims against a common defendant, a serious --and occasionally irreconcilable conflict can crop up when the multiple claimants seek to share in limited and inadequate resources. A lawyer may not represent opposing parties to the same litigation [D.R. 106(a)]. Although co-plaintiffs are not, technically, opposing parties, their interests diverge where a favorable result for one claimant can adversely impact upon the other. Thus, if a case is postured such that the more money recovered for one client necessarily reduces the recovery for another, a conflict may exist which may or may not be alleviated by full disclosure and consent. The best test may be to inquire whether an uninterested lawyer would conclude that the client should not agree to the representation under the circumstances. If not, the interests of one of the claimants (or possibly both, depending on issues of confidentiality and prejudice) should be handled by another attorney.

For further discussion of this issue in the context of the commonly presented fact scenarios that can evolve during a single attorney’s representation of the driver and passenger(s) in a car involved in a collision with another vehicle, see Texas Professional Ethics Committee Opinion No. 500, 58 Tex. B. J. 380 (1995) (Appendix C to this article).

The most important recent case in this area is Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999), which follows upon the many claims and settlements growing out of a massive petrochemical plant explosion in Harris County. In that matter, all parties agree that a lawyer representing multiple
claimants in the same action should never try to “pool” such claims and seek an “aggregate settlement,” to be parcelled out to clients according to the plaintiff attorney’s personal sense of justice. Settlement amounts should be determined according to the merits of each individual claim. The plaintiffs in Arce contend that no separate evaluation of their claims occurred. Instead, they allege that an aggregate settlement was reached by plaintiffs’ counsel, who then made a unilateral allocation of settlement proceeds—with the outcome that such Solomon-like behavior resulted in their claims being settled for less than fair value.

The trial court determined a fact issue existed as to liability, i.e., was there an aggregate settlement of the clients’ claims against Phillips? An “aggregate settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client.” Id. at 245 [citations omitted]. An attorney owes a common law fiduciary duty of loyalty and good faith to each client, as well as an ethical duty to obtain individual settlements, “unless each client has consented [to an aggregate settlement] 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.” Id.; D.R. 108(f).

The trial court granted summary judgment in the attorneys’ favor on the issue of damages, rejecting the clients’ arguments that they suffered actual damages as a result of the alleged breach of duty and held that fee forfeiture was the appropriate remedy for an attorney’s breach of fiduciary duty. Thus, the main issue on appeal was whether an attorney’s fees can be forfeited when the attorney has breached his fiduciary duty by entering into an aggregate settlement.

The Texas Supreme Court held fee forfeiture is a recognized remedy when an attorney breaches a fiduciary duty to his client. Id. at 246. (Other equitable remedies include rescission or imposition of a constructive trust. Id.) The Court then addressed four sub-issues, providing answers, as follows:

1. ISSUE: What must a client prove to be entitled to fee forfeiture?

HOLDING: All the client needs to prove is breach of fiduciary duty by the attorney B no causation or damages proof is required because, inter alia, the breach inherently damaged the client; forfeiture punishes the attorney and deters further lapses in professional conduct; and the actual harm to the client may be difficult to ascertain or intangible (such as the client’s loss of loyalty in the attorney and faith in the legal system). Id. at 240;

2. ISSUE: Is the forfeiture complete and automatic on proof of breach of fiduciary duty?

HOLDING: No, an attorney need not necessarily forfeit his or her entire fee because of a breach of fiduciary duty. In making the determination of whether and to what extent forfeiture is appropriate, the Court identified several relevant factors, discussed below. Id. at 245.

3. ISSUE: Is there a right to jury trial in fee forfeiture cases?

HOLDING: Under Texas law, a jury may decide disputed issues of fact in equitable proceedings, but they may not fashion equitable remedies. Thus, while a jury may
decide whether there has been a breach of fiduciary duty by the attorney, the trial court alone decides the issue of fee forfeiture. *Id.* at 246.

4. ISSUE: What factors should the trial court consider in assessing fee forfeiture?

HOLDING: Because fee forfeiture is an equitable remedy, the amount of forfeiture is dependent on the facts of each case, and in determining the amount, the following factors should be considered (a hybrid list taken from the Restatement (Third) of the Law Governing Lawyers and the statutory bases for awarding punitive damages in Texas): (1) the nature of the wrong committed; (2) the character of the attorney’s conduct; (3) the degree of the attorney’s culpability; (4) the situation and sensibilities of all parties, including any threatened or actual harm to the client; (5) the extent to which the attorney’s conduct offends a public sense of justice and propriety; and (6) the adequacy of other available remedies. *Id.* at 245.

In sum, on the clients’ claim of breach of fiduciary duty, the Supreme Court largely affirmed the Court of Appeals’ reversal of the summary judgment favoring the attorneys and remanded for a determination whether a breach occurred, and if so, for the trial court’s fee forfeiture decision. *Id.* at 247.

XIII. DUE DILIGENCE

There are several critical areas in connection with settlements where a lawyer can get into serious trouble by failing to act with due diligence to verify certain facts. In particular, counsel must take appropriate steps to verify the limits of available insurance coverage and a defendant’s insolvency when modest policy limits or a defendant’s insolvency may engender a settlement for less than full damages. Further, counsel must evaluate the financial strength of insurance carriers and the suitability of an annuity when settling cases with structured settlements and must investigate the potential for unknown heirs in wrongful death settlements.

A. Policy and Coverage Limits

Many times the value of a case for settlement purposes is based upon the amount of available insurance coverage rather than the strength of the case or the extent of the plaintiff’s loss. When a case is to be settled for policy limits and those limits fall below the reasonable settlement value of the case, claimant’s counsel must establish that the proffered limits are, in fact, the only applicable coverage and that the insured does not possess substantial assets available for execution in the event of an excess judgment. If a case is not in suit and documentary discovery is unavailable, an affidavit from the insured and/or the carrier’s representative attesting to the policy limits and the absence of other primary, excess or umbrella coverage should suffice. The goal here is to leave open a claim of fraud in the inducement enabling counsel to set aside a settlement should other coverage surface. Likewise, a credit report, a photograph of the defendant’s home or car, and/or an asset check should suffice to shield counsel from a claim that a judgment against the defendant should have been pursued.

B. Structured Settlements

Structured settlements—settlements in exchange for a stream of future payments—remain an excellent means to protect claimants from their own profligacy and secure important tax benefits. However, since structured settlements expose claimants to long term (often life long) risks of
insurance carrier or assignee failure and afford no opportunity for modification or acceleration of
the annuity proceeds if the claimant's needs change, the lawyer recommending a structured
settlement has some homework to do. The subject of structured settlements is too broad and
complex to be extensively discussed in this paper but there follows a brief discussion of several
pitfalls for the plaintiff's counsel considering a structured settlement:

1. Suitability of a Structure

A structured settlement is not for everyone but, for some claimants, counsel may be negligent in
failing to consider a proffered structured settlement. Many people handle money poorly and it is
a sad fact that most personal injury lump sum recoveries are dissipated rapidly. In cases involving
minors, large future damages, heavy tax liability, unsophisticated or impaired claimants and other
situations where the claimant either needs a protected long-term payment stream, or may lose or
squander settlement proceeds, counsel must consider a structured settlement.

The structured settlement should be carefully tailored to the needs of the beneficiary. In
catastrophic injury cases, this will entail consultation with physicians and life care planners to
ascertain when monies will be needed for surgical procedures, special equipment or attendant care.
For minors, college funds, costs of future counseling, lump sums for purchase of housing or
transportation, may all be relevant concerns. Obviously, the age, health, mortality, residence, family
situation, educational background, professional training and other claimant demographics should
be evaluated. A fifty year payout makes no sense for a claimant in her seventies; whereas, it may
make perfect sense to defer all payments beyond age eighteen when the claimant is a young child
and there is no need for interim supplementary support (with the attendant high management costs
of a minor's trust).

One of the most important considerations is the anticipated need for flexibility in the availability of
funds. Although structured settlements offer many options in the design phase; once assembled
and purchased, structured settlements are set in stone. This limitation—a benefit to those who
might act improvidently—is a key factor to be weighed by counsel and the client.

2. Preserving Tax Benefits

Damages recovered for personal injuries or sickness are excluded from gross income for purposes
of federal taxes. Internal Revenue Code §104(a)(2). Thus, when a plaintiff recovers a lump sum
for actual damages, the recovery is not taxable. However, when the plaintiff invests that lump sum,
the interest income or capital gains thereby generated may be significantly eroded by taxes. A
principal benefit of a structured settlement is the fact that, when set up correctly, the stream of
payments received by the claimant—both principal and investment return—is not taxable as
personal income. Internal Revenue Code §104(a)(2).

In order for the structured payout to retain its character as a periodic payment of personal injury
damages, the claimant must not actually or constructively receive the present value of the
settlement. Actual receipt would involve, e.g., the plaintiff receiving a lump sum settlement and
tendering it back to the carrier or other financial institution in exchange for an annuity. Constructive
receipt occurs when the Plaintiff acquires such rights to control or receive the lump sum as to have
gained effective possession of the money. To avoid constructive receipt, Treasury Regulation
1.451-2(a) guidelines should be followed:
a. The claimant should never have the right to receive the present discounted value of the settlement;

b. The claimant should have no control over the investment of the funds;

c. The claimant should not be able to increase or decrease the periodic payments; and,

d. A lump sum payment should not be offered as an alternative to the periodic payments.

Do not confuse constructive receipt with disclosure of the cost of the structured settlement despite defense counsel’s tendency to rattle the bones of the constructive receipt bogeyman when plaintiff's counsel seeks to learn the cost of the annuity package. Disclosure of the cost of a structured settlement (or of its component annuities) will not cause plaintiff to be in constructive receipt of the amount invested in the structure. See, e.g., Internal Revenue Service Private Letter Ruling 8333035 (May 16, 1983). In fact, it is essential that plaintiff's counsel learn the actual cost of the structure in order to properly assess attorney fees.

3. Financial Stability of Carrier and Assignee

Several years ago, proponents of structured settlements crowed that no U.S. life insurance company had ever failed. No one says that anymore. Recent insurance company failures have involved quite large carriers with significant assets. Plaintiff's counsel must carefully check the financial strength and recourse options with respect to both the carrier who will sell the annuity and the entity to whom the annuity will be assigned (the qualified assignee). There are several services publishing financial ratings of the major insurance carriers. For example (followed by website URL):

a. A. M. Best Company
   http://www.ambest.com/

b. Standard & Poor's Corporation
   http://www.standardpoor.com/ratings/insurance/

c. Moody's Investor Service
   http://www.moodys.com/insurance/

d. Duff & Phelps Credit Rating Co.
   http://www.dcrco.com/ratlook/start.cfm

While a favorable rating is, by no means, a guarantee of lasting solvency, the failure of counsel to secure such ratings promises liability for negligence if the carrier goes belly up. An insurance specialist can also help steer the annuity to a company located in a state (such as New York) with favorable insurance guaranty laws and may be able to suggest ways in which larger parent carriers can stand behind the payout.

The selection of the annuity carrier is more than simply a due diligence issue in settlements involving a minor or incapacitated person. Effective September 1, 1999, Section 142 of the Texas Property Code was amended as follows:

Sec. 142.009. Annuity Contract Requirements for Structured Settlement.

(a) An annuity contract that funds a structured settlement as provided by section 142.008 must be provided by an insurance company that is not:
(1) An affiliate, as that term is defined by article 21.49-1, Insurance Code, of a liability insurance carrier involved in the suit for which the structured settlement is created; or

(2) Connected in any way to a person obligated to fund the structured settlement.

(b) An insurance company providing an annuity contract for a structured settlement must:

(1) Be licensed to write annuity contracts in this state;

(2) Have a minimum of $1 million of capital and surplus; and

(3) Be approved by the court and comply with any requirements imposed by the court to ensure funding to satisfy periodic settlement payments.

(c) In approving an insurance company under subsection (b)(3), the court may consider whether the company holds an industry rating equivalent to at least two of the following rating organizations:

(1) A M. Best Company: A++ or A+;

(2) Duff & Phelps Credit Rating Company insurance company claims paying ability rating: AA-, AA, AA+, or AAA;

(3) Moody's Investors Service claims paying ability rating: AA3, AA2, AA1, or AAA; or

(4) Standard & Poor's Corporation insurer claims-paying ability rating: AA-, AA, AA+, or AAA.

Accordingly, in cases involving minors and incompetents, never permit any annuities funding the structure to be carried by (or, for that matter, assigned to) the settling party's liability insurer or its affiliates. Even in cases involving competent adults, the liability carrier should not be permitted to issue the annuity unless it can be proven that their quote was substantially more favorable to the structure beneficiary than competing quotes available from other qualified carriers in the marketplace. Be wary of any carrier that insists upon keeping the annuity “in-house.”

4. Guarantee Period

Counsel should be sure that the structured settlement has an adequate guaranteed payout component beyond the up-front cash used to pay attorney fees, expenses of litigation, and medical bills. If the plaintiff's death within, say, twenty-five years, would relieve the carrier of all payment obligations, it may be a poor structure. One suggested rule-of-thumb is be certain the guaranteed minimum payout exceeds the present cost of the annuity; but, no rule-of-thumb should take the place of a structure tailored to the client's needs and well-suited to the value of the case.

5. Rated-Up Risks

A little-known bumble of plaintiff's counsel in serious injury cases is the failure to determine if the claimant qualifies as a rated-up risk. If the plaintiff's injury can be expected to reduce the plaintiff's
life expectancy, the plaintiff may be a "rated-up risk" and will be entitled to much more 'bang for the buck' in terms of the future benefits a settlement dollar will buy. A seriously injured young child may be viewed, in actuarial terms, as if she were well into middle age. In that event, future periodic payments can be significantly increased without additional cost since, to the carrier's way of thinking, the claimant likely won't survive to claim those (non-guaranteed) benefits.

Obviously, equipping the defense with proof that the claimant will not live to her full life expectancy can adversely impact the courthouse value of a case. It may be prudent to defer addressing the rated-up risk issue until it appears certain that the case will be resolved by structured settlement. Once the cost has been established, it is a relatively simple matter to re-cast the benefit stream to reflect the advantages of a rated-up risk.

6. Client Consent

In a typical structured settlement, the lawyer gets the entire fee up front while the client may wait a lifetime to recover all benefits. If unanticipated or misunderstood, such a seemingly inequitable situation can spawn a very unhappy client. Counsel should spare no effort to insure that the claimant fully comprehends and agrees to a structured settlement. In particular, the client must appreciate that the payments are "locked in" and that the lawyer (and perhaps others) will be paid up front. Structures benefiting claimants who are minors must necessarily be memorialized in the Court's judgment and the approval of the ad litem and next-friend should be made a part of the record in open court.

7. Calculation of Fees

In the opinion of the author, a claimant's attorney who takes a lump-sum fee based upon any valuation of a structured settlement in excess of its actual cost (including up-front cash and other pecuniary benefits) is cheating the client. Of course, in those instances where present value falls below actual cost, it is to the client's benefit to base the fee on the lower figure. There is scant law in Texas to support this widely-held contention, but see Sisters of Charity v. Dunsmoor, 832 S.W.2d 112 (Tex. App.-- Austin 1992, writ denied); however, the Association of Trial Lawyers of America has adopted the position that the lesser of cost or present value should be used to value a structured settlement and other states, notably Florida and New Jersey, mandate the use of the cost basis in their disciplinary rules.

As stated above, the authority to negotiate a structured settlement, the right to receive attorney fees in a lump-sum and the manner in which the fee will be calculated should all be set out in the power of attorney and employment agreement.

8. New Rules Regarding Presentment of Structures

For suits filed after September 1, 1999 involving injuries to a minor, incapacitated person or to one who has suffered “substantial disablement,” new rules dictate the manner in which an offer of a structured settlement must be presented to claimant’s counsel and to the claimant:
CHAPTER 139. PERSONAL INJURY TO CERTAIN PERSONS

Subchapter A. General Provisions

Section 139.00 (new). Definitions in this Chapter.

(1) "Claimant" means a person described by section 139.002 (1) or (2) who makes a claim to which this chapter applies.

(2) "Incapacitated person" has the meaning assigned by Section 601, Texas Probate Code. [Note: The Probate Code defines "incapacitated person" to include minors and persons with physical and mental incapacities, among others].

Section 139.002 (new). Scope of Chapter.

This chapter applies only to a suit on a claim for damages arising from personal injury:

(1) to an incapacitated person; or

(2) in which the personal injury has resulted in the substantial disablement of the injured person.

(Sections 139.003-139.100 reserved for expansion)

Subchapter B. Structured Settlement Offer

Section 139.101 (New). Written Offer Required.

An offer of structured settlement made after a suit to which this chapter applies has been filed must be:

(1) made in writing; and

(2) presented to the attorney for the claimant.

Section 139.102 (new). Presentation to Claimant.

(a) As soon as practicable after receiving the offer under section 139.101, but not later than any expiration date that may accompany the quotation that outlines the terms of the structured settlement offered, the attorney receiving the offer shall present the offer to the claimant or the claimant's personal representative.

(b) To the extent reasonably necessary to permit the claimant or the claimant's personal representative to make an informed decision regarding the acceptance or rejection of a proposed structured settlement, the attorney shall advise the claimant or the claimant's personal representative with respect to:
(1) the terms, conditions, and other attributes of the proposed structured settlement; and

(2) the appropriateness of the structured settlement under the circumstances.

C. Unknown Heirs and Absent Claimants

Although a rare circumstance, counsel for both sides must be wary of settling wrongful death claims where there is the potential for unknown heirs. Under the Texas Wrongful Death Statute, any statutory beneficiary may bring suit on behalf of all statutory beneficiaries; however, should an unknown heir surface, the settling plaintiffs' recoveries may be subject to the claims of the unknown heir. Conversely, an unknown heir would likely claim that any prior release or settlement could not dispose of the unknown heir's right to pursue his or her wrongful death claim. It may be that their respective clients sue both plaintiffs' and defense counsel for malpractice. A diligent search for unknown heirs, a formal heirship determination and/or affidavits and indemnity agreements from the settling plaintiffs should protect the clients and, in turn, their lawyers.

If other beneficiaries are identified, how can the lawyer ethically approach them about participating in a settlement? Although a lawyer would have a valid purpose in contacting such persons as part of a legitimate investigative effort in the case, and despite the fact that the claimant would be overjoyed to learn they have valuable rights, Disciplinary Rule 7.02 makes it clear that a lawyer is prohibited from seeking professional employment from a prospective client who has not sought the lawyer's advice "by in-person or telephone contact, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."

It appears that, if accomplished without deception, coercion or duress, a lawyer may contact a prospective client able to "exercise reasonable judgment in employing the lawyer" by a written communication. D.R. 7.01(f). Such a letter would be governed by all of the provisions of Disciplinary Rule 7.01 and should make clear that the client is not obliged to engage the lawyer but is free to secure counsel of their own selection. [Caveat: Of course, counsel should avoid undertaking the representation of additional beneficiaries if their interests are in conflict with the interests of current client beneficiaries.]

XIV. FEE DISPUTES

A lawyer's ethical mettle can be sorely tested by a fee dispute, particularly where the lawyer's self-interest is juxtaposed against the client's best interests. Fee disputes—whether between lawyer and client or just between lawyers—surely contribute to the warm good feelings and high esteem in which the public holds attorneys. Still, lawyers have bills to pay and families to support and we must protect our right to be fairly compensated for our efforts.

Fee disputes largely boil down to the following categories:

A. Claims that the fee was calculated incorrectly;

B. Claims that fees charged were excessive or unconscionable; and,

C. Disputes between lawyers as to whether, or how, a fee is to be shared.
A. Claims That the Fee was Calculated Incorrectly

The first category must be addressed by improved communications. For a contingent fee, the power of attorney should set out the precise manner in which the fee is to be calculated, especially with respect to when a percentage attaches, to what sums it attaches and who is to bear expenses in what proportion. **Ambiguities must be resolved in favor of the client.** Most disputes about the calculation of a fee are readily resolved if the lawyer is willing to patiently explain the method of calculation and relate such calculation to the relevant portions of the fee agreement. Don't simply assume the client is trying to breach the fee agreement. Your arithmetic may be faulty. Always check your calculation and then have someone else check it for you.

Where explanation doesn't resolve the dispute and you are convinced that the fee was calculated correctly, offer to go over the calculation with a third-party whom the client trusts. This is not the time for the lawyer to nurse hurt feelings. Finally, if the client continues to reject your calculation, consider submitting the dispute, by mutual agreement, to a mediator or arbitrator. Do everything in your power to demonstrate to the client that your calculation was warranted and accurate and that you are willing to have others "grade your paper."

B. Claims that Fees Charged were Excessive or Unconscionable

Disciplinary Rule 1.04(a) provides that a lawyer shall not enter into an arrangement to collect an illegal or unconscionable fee. A fee is unconscionable if a competent lawyer couldn't form a reasonable belief that the fee is reasonable. **Id.** When the claim is that the fee charged, although calculated correctly, amounts to an unreasonable or unconscionable fee, the lawyer must be prepared to go beyond a demonstration of arithmetic prowess and substantively show the value of the services furnished. Remember that the client's claim of excessive fee is probably less an attack on your merit as an attorney as it is an effort to hold onto a bigger piece of the recovery in their case. If the fee was fair at the outset, clients will almost always agree to honor the contract that they signed. Problems arise when the attorney fails to fill out the power of attorney or doesn't furnish a copy to the client. Clients often fixate on the lowest contingency fee percentage or fail to consider the impact that case expenses or liens may have on their net recovery. Clients care about the bottom line—their take-to-the-bank dollars—so always emphasize that offers of settlement will be substantially reduced and be prepared to offer a reliable estimate of the client's net recovery, erring on the low side if necessary. A client is never distressed when they net a little more, but can be irate when receiving just a little less than you predicted.

It may be necessary to show that the fee collected is in line with other fees charged on similar cases by equally qualified counsel. It may be useful to go over the entire file in a non-combative way and help the client to understand the effort, risks, difficulties and expense that the matter entailed. If a client's only contact with the lawyer and knowledge of the lawyer's effort is the first meeting, the client's deposition and the settlement closing, it is not surprising that the client believes the lawyer is taking too big a piece of the pie. Such misconceptions are best avoided by involving the client throughout the pendency of the case. Get in the habit of copying the client on correspondence and court filings. Invite the client to sit in at depositions or attend hearings. Send periodic reports to the client detailing how much time and money you are investing in the client's case.

When counsel is compensated on an hourly basis, it's equally important to set out the compensation agreement in writing and obtain the client's consent at the outset. Regular periodic billing is critical, as it tends to reduce the size of sums in dispute and establishes a course of
dealing between lawyer and client that sheds light on the reasonableness of a claimed hourly rate. Among the factors listed in Disciplinary Rule 1.04(b) which will be considered in weighing the reasonableness of a fee are:

1. The time and labor required, the novelty and difficulty of the questions involved and the skill required to do the job well;
2. The likelihood, if apparent to the client, that the acceptance of employment in the matter will preclude the lawyer from employment in other matters;
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 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 were rendered.

Occasionally, fee contracts involve a combination of hourly and contingent components. In and of themselves, such hybrid fee arrangements are not prohibited. See D.R. 1.04 and Texas Professional Ethics Opinion No. 518, 59 Tex. B. J. 795 (1996). However, absent very unusual circumstances, a fee agreement providing for payment of the greater of the usual hourly fee or the usual percent contingent fee appears to violate the disciplinary rules. Id.

C. Fee Disputes between Lawyers

Fee disputes between lawyers generally revolve around the division of a referral fee or the degree to which a referral interest extends to a particular matter or client representation. Disciplinary Rule 1.04(f) governs fee division between lawyers and requires that:

1. A division or agreement for division of a fee between lawyers who are not in the same firm shall not be made unless the division is:
   a. In proportion to the professional services performed by each lawyer;
   b. Made with a forwarding lawyer; or,
   c. Made, by written agreement with the client, with a lawyer who assumes joint responsibility for the representation; and,
2. The client is advised of, and does not object to, the participation of all the lawyers involved; and,
3. The aggregate fee is not illegal or unconscionable.
All referral fee arrangements should be confirmed in writing and lay out the manner in which the referral fee is to be calculated and the extent, if any, to which the fee interest may attach to claims and recoveries that emerge or grow out of the core dispute or representation. For example, if one family member or a member of a group is referred and such representation leads to the representation of other family or group members not referred, does the referring counsel share in the other recoveries? If a referred client becomes a representative of a class of claimants, does the referral fee extend to the class recovery? Does a referral interest run with a case such that counsel who succeeds the lawyer giving the referral interest must protect the referring counsel's fee? The author believes that the answer to all of these questions is "No;" however, a poll of plaintiffs' and referring counsel would likely turn up strongly-held views to the contrary.

Where a referring counsel or other counsel sharing a fee is expected to participate in the development or trial of the suit or share the costs of development, the fee division agreement should set out the lawyers' duties. Does referring counsel expect to appear on the pleadings? Who decides if expenditures are warranted? How frequently and on what basis are case investments to be equalized or reconciled? What happens to the fee split if one of the lawyers dies or otherwise cannot participate in the case?

That a fee may be shared with a forwarding lawyer and the identity of that lawyer should be part and parcel of the power of attorney and employment agreement. Lawyers need a reliable system to remind them of referral fee interests at the time cases are settled. Such a system should also account for and flag unresolved liens, subrogation claims, advances, protected bills and outstanding case expenses so that these items do not fall through the cracks at settlement.

XV. HOLDING FUNDS HOSTAGE

Although it would seem self-evident, a lawyer faced with a fee dispute may not seek to benefit from the fact that the lawyer holds the money. Disciplinary Rule 1.14(c) provides that:

When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. All funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately.

One especially egregious example of holding settlement funds hostage to gain an unfair advantage is detailed in Robinson v. Garcia, 804 S.W.2d 238 (Tex. App.-- Corpus Christi 1991), writ denied, 817 S.W.2d 59 (Tex. 1991), where the lawyer, after raising his fee several times during the pendency of the litigation, tendered a check for the undisputed portion of settlement proceeds bearing a conditional endorsement intended to operate as a release of all claims. Acceptance of the portion of settlement proceeds to which the clients were unquestionably entitled would have required the clients to abandon their claim to over one million dollars in excessive fees. Although the majority based its decision that the clients could retain the conditional tender without risking accord and satisfaction on the Uniform Commercial Code, a concurring opinion focused on the
lawyer's ethical duties and made a compelling case of overreaching and breach of fiduciary duty by the attorney.

Undisputed sums should be tendered promptly and unconditionally to the client. The lawyer should take the initiative to get the fee dispute resolved in a timely and reasonable fashion. The lawyer should scrupulously avoid even the appearance or veiled suggestion that confidential client information may be used so as to gain an advantage in the fee dispute. Threats to withdraw if the dispute is not resolved as the lawyer demands should be avoided or only advanced in a manner consistent with Disciplinary Rules 1.15(b)(5) and (d). Efforts to deal directly with a client in an effort to compromise and settle fee disputes should be balanced against Disciplinary Rule 1.08(g) providing that:

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

Per Disciplinary Rule 1.08(a), any resolution of the dispute must end in a result that:

1. Is fair and reasonable to the client, following full disclosure of all relevant information in a manner that can be reasonably understood by the client;

2. Afforded the client a reasonable opportunity to seek the advice of independent counsel; and,

3. Secures the client's consent in writing to such resolution.

XVI. MARY CARTER AGREEMENTS: VOID IN TEXAS

Originating in Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967), overruled by Ward v. Ochoa, 284 So. 2d 385, 388 (Fla. 1973), the term "Mary Carter agreement" has been loosely applied to agreements by which a defendant, after settling with the plaintiff, nonetheless participates at trial and obtains an interest in the plaintiff's recovery. See Robin Renee Green, Comment, Mary Carter Agreements: The Unsolved Evidentiary Problems in Texas, 40 Baylor L. Rev. 449, 451 (1988).

Mary Carters survived only a few decades' use in Texas. In Elbaor v. Smith, 845 S.W.2d 240 (Tex. 1992), the Supreme Court defined a Mary Carter agreement as being one in which "the settling defendant retains a financial stake in the plaintiff's recovery and remains a party at the trial of the case." Id. at 247. Focusing on the distortion of the trial process arguably promoted by Mary Carter agreements, and rejecting the proposition that such agreements foster settlements, the Court stated that "the Mary Carter agreement is simply an unwise and champertous device that has failed to achieve its intended purpose," Id. at 249, and held, as a matter of public policy, that such agreements were void. Id. at 250.

In summary, a settling defendant may not participate in a trial in which he or she retains a financial interest in plaintiff's lawsuit. It should be noted that there is no prohibition of such agreements if the settling defendant does not retain a financial stake in the plaintiff's recovery nor is there any prohibition of the settling party retaining a financial stake in the plaintiff's recovery so long as the settling party does not remain a party at the trial of the case. Presumably the considerations enunciated in General Motors
Corp. v. Simmons, 558 S.W.2d 855, 858 (Tex. 1977), overruled on other grounds, Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 427 (Tex. 1984), would allow the existence of such not-quite-Mary Carter agreements to be disclosed to the jury if deemed likely to skew the presentation of the case.

XVII. DRAFTING SETTLEMENT DOCUMENTS

A few pitfalls to be avoided in the preparation of settlement agreements include:

A. Pitfalls for the Defendant’s Counsel

1. Failing to obtain a release from all claimants (e.g., a spouse, parent or child having viable consortium claims);
2. Failing to provide for the conclusion of third-party liens (e.g., claims for attorney fees, hospital liens, workers compensation liens, etc.);
3. Failing to name all defendants and carriers to whom a duty is owed as released parties;
4. Failing to secure indemnity sufficient to obviate the need to further participate in the case;
5. Failing to disclaim any admission of liability or responsibility;
6. Failing to foreclose all grounds for recovery in as broad a fashion as possible or to convey that the parties intend to compromise and settle all disputed claims;
7. Failing to foreclose claims for attorney fees;
8. Failing to secure warranties of capacity to release, non-assignment of rights and understanding of terms; and
9. Failing to disclaim extra-contractual promises, including any representations concerning tax consequences of structured settlements.

B. Pitfalls for the Plaintiff’s Counsel

1. Agreeing to indemnify a party who has, in turn, agreed to indemnify a non-settling defendant, resulting in full circular indemnity and the loss of plaintiff’s cause of action;
2. Agreeing to indemnify attorney fees and litigation costs in the face of even a remote chance that the settling party may monitor or participate in the case;
3. Agreeing to indemnify actions or claims other than those “by, through or under” the claimants;
4. Allowing the attorney to be named and sign as a party to the release and indemnity agreement, thereby subjecting the lawyer to personal liability for any breach of the agreement;

5. Granting an assignment of a live claim, which may entail further litigation or pose a hardship to the clients;

6. Agreeing to abide by an open-ended or prolonged confidentiality agreement, thereby subjecting the clients and the lawyer to open-ended liability and punitive actions;

7. Permitting execution of a release that gives up substantive rights unrelated to the pending action (e.g., the right to claim retirement benefits or insurance benefits for unrelated claims) or that limits or destroys rights against persons not party to the release;

8. Participating in agreements that restrict an attorney's right to pursue similar claims for other claimants. Disciplinary Rule 5.06(b) prohibits a lawyer from offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy;

9. In structured settlements, including clauses that support a claim by the I.R.S. of constructive receipt.

1. Resolve settlement disputes in the power of attorney.
2. Always get client authority for any demand or reduction.
3. Convey all offers or get clear authority re: acceptance or rejection.
4. Keep abreast of subrogated expenses, guaranteed bills, liens and other deductions as they accumulate.
5. Inform client of all competing claims (liens, subrogation, etc.).
6. Instruct client as to any and all benefits/rights lost or released in settlement (e.g., settlement credits, jury charge considerations, workers compensation credit).
7. Secure client’s signed directive to reject recommended offers of settlement and acknowledgment of risks.
8. Do due diligence: Verify policy limits, claimed liens and/or financial stability of structured settlement carrier.
9. Hold settlement proceeds in trust until competing claims are resolved.
10. Account, in writing, for every penny and check your arithmetic.
11. Never take a fee that the client has not expressly authorized.
12. Never share a fee unless the client knows about and consents to it.
13. Always ask yourself: “Am I doing this for the client or for me?”
**CRAIG D. BALL** is the principal in Craig D. Ball, P.C. Mr. Ball is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization and is a member of the State Bar College. He completed his undergraduate work at Rice University and obtained his J.D. with Honors from the University of Texas in 1982, where he served as a teaching assistant for the course in Professional Responsibility taught by the late W. James Kronzer. Mr. Ball has served as *a pro bono* special prosecutor for the State Bar of Texas Committee on Lawyer Discipline, a member of the State Bar Pattern Jury Charges committee, an adjunct professor at South Texas College of Law, and a frequent CLE program director and speaker. Mr. Ball is Chairman of the State Bar of Texas' Technology Advisory Committee and created the groundbreaking [MYTexasBar.com](http://MYTexasBar.com) web portal. A Director of the Texas Trial Lawyers Association and President of the Houston Trial Lawyers Association, Craig Ball chaired the TTLA Technology Task Force, created the TTLA and HTLA web sites and remains active in exploring the adaptation of emerging technologies to the law practice. Mr. Ball can be contacted as “craig@ball.net.” Mr. Ball limits his practice exclusively to plaintiffs’ contingent fee matters. Craig Ball is married to attorney, Diana Ball. They have two children.

**DIANA K. BALL** joined her husband’s personal injury practice in 1996 after 14 years of insurance defense work. She obtained her undergraduate degree in journalism from the University of Texas and her J.D. from the University of Houston. Ms. Ball passed the legal specialization tests for both personal injury trial law and civil trial law in the fall of 1992 and has been a CLE author/speaker for the State Bar of Texas, University of Houston, and Texas Association of Defense Counsel.
APPENDIX “A”

Contingent Fee Agreements

THIS IS A BINDING LEGAL DOCUMENT. PLEASE READ IT CAREFULLY BEFORE SIGNING.

POWER OF ATTORNEY AND EMPLOYMENT CONTRACT

I, __________________________ (“Client”), employ Craig D. Ball, P.C. (“Attorney”), as an attorney to prosecute and collect personal injury and property damage claims held by Client against __________________________ and/or any insurance carrier (including my own un/underinsured motorist coverage) in connection with personal injuries and other losses suffered as a consequence of ____________________________________________________________________________ in __________________________ County, Texas occurring on or about __________________________.

Said Attorney is fully authorized to sue on said claims, prosecute the same to judgment and negotiate settlement thereof; but, it is distinctly understood that no settlement shall be made by Attorney without Client’s approval and Client hereby agrees to make no settlement nor offer of settlement without the consent of Attorney. Client acknowledges that Attorney has neither promised nor guaranteed any outcome or recovery.

Client agrees that Attorney shall retain the unconditional right to withdraw from representation after investigation and cease all further responsibility as counsel upon 14 days written notice transmitted to Client at the address below. Such decision to withdraw shall be at Attorney’s sole discretion and Client agrees to assist and cooperate with Attorney in such withdrawal in the event it may occur.

In consideration of the services rendered and to be rendered to Client by Attorney, Client does hereby assign, give and convey to Attorney as compensation the following present undivided interest in said claims:

33 1/3 % If collection is made prior to the filing of a lawsuit;
40 % If collection or settlement is made after filing of a lawsuit.

The interests hereby assigned apply to the gross monetary recovery, including interest accrued on any judgment and recovered costs of court. All costs and expenses of litigation (including investigation expenses, medical records, expert consultation, postage, facsimile transmissions, photocopies, long-distance telephone charges, travel costs and discovery proceedings) are to be reimbursed to Attorney by Client from Client’s net recovery at the time of closing the case if there has been a monetary recovery to Client. Clients acknowledge that client was referred to Attorney by the law firm of _______________ and that a portion of the fee interest assigned above will be shared with said referring law firm. Such referral fee shall not increase the attorney fees to be paid by Client out of any recovery.

By: __________________________ (Signature) __________________________ (Print Name) Date:________

Address:________________________ S.S.#:________

Phone: __________________________

Agreed: CRAIG D. BALL, P.C.

By: __________________________

 NOTICE TO CLIENTS: The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar’s Office of General Counsel will provide you with information about how to file a complaint. For more information, please call 1-800-932-1900. This is a toll free phone call.
POWER OF ATTORNEY AND EMPLOYMENT CONTRACT

THIS AGREEMENT is entered into between _____________________ ("Client") and the law firm of Craig D. Ball, P.C., in Houston, Harris County, Texas ("attorney"), to govern and define their attorney-client relationship. In consideration of the mutual promises herein, the Client and Attorney agree as follows ("Agreement"):  

I. PURPOSE OF REPRESENTATION

Upon signing this Agreement, the Client employs Attorney to investigate, claim, sue for, recover, and collect all damages and compensation, and obtain all appropriate relief, to which the Client may be entitled, as well as to, with consent, compromise and settle all claims held by the Client arising out of:

[DESCRIBE CLAIM HERE, STATING EVENT DATE AND LOCATION]

This agreement specifically authorizes pursuit of a claim or suit against any responsible party, including:

[NAMESPACE KNOWN RESPONSIBLE PARTIES HERE]

Client understands Attorney has not made nor makes any guarantee of any recovery at all, and that Attorney is not obliged to furnish any legal services not specifically encompassed by this Agreement.

II. NO SOLICITATION OR ENCOURAGEMENT

Client fully understands that Client may select any attorney of Client's choice, and that by signing this Agreement, Client has willingly and freely chosen Craig D. Ball, P.C. to represent Client, without solicitation, undue influence, barratry or encouragement. Client agrees that this Agreement is fair, and was not made through undue influence or pressure.

III. ATTORNEYS' FEES AND ASSIGNMENT

1. Client hereby transfers, assigns, and conveys to Attorneys a contingent fee interest in the Claims in the amount of thirty-three and one-third percent (33\(\frac{1}{3}\)%), of said Claims. Client fully understands that Client is forever giving up, assigning over, transferring, and conveying a contingency fee interest to Attorneys at this time.
B. The contingency interest of Attorney shall be: Thirty-Three and One-Third Percent (33.33%) of all monetary or non-monetary recovery concerning the Claims and Client hereby agrees to pay Attorney an amount equal to said percentage of any recovery. If the claims are satisfied by a structured settlement (whereby a recovery is paid over a period of time rather than by a lump sum), it is agreed that the present value of such a settlement based upon its actual cost shall be employed as the basis for the computation of Attorney’s fees and, to the extent possible, all Attorney’s fees shall be paid at the time such settlement is first funded.

The recovery or settlement to which the percentage of Attorney’s contingent fee is to apply, and upon which such fees are to be calculated, includes all monies and everything of value (expressed in dollars) recovered, received or obtained as a result of any settlement or recovery. Such things of value include, but are not limited to, the value of any business deal or transaction entered into by the Client with any of the defendants in the lawsuit, including the forgiveness of debt or the value of any goods or services furnished to Client without charge or at a cost to Client below market rates. For example, if there is any type of agreement or settlement whereby the defendant(s) or an insurance carrier, instead of, or in addition to, paying money or property, makes an agreement with Client to provide something of benefit, then Attorneys would be entitled to their respective percentage of the present value of the benefits which are expected to flow to Client from the business deal.

If there is any type of settlement or recovery whereby Client is offered the option of receiving a lump sum settlement or a structured settlement and client elects to receive the structured settlement, such settlement shall be reduced to present value on a cost basis and structured in a manner whereby there will be sufficient present cash available at the time of settlement to pay Attorney’s fees. If actual cost cannot be ascertained, in determining the present value of future payments, Attorney and Client agree to use the yield of 30-year U.S. treasury bonds, as reported in the financial press on the earlier of the date of settlement or judgment.

IV. EXPENSES AND COSTS

It is further agreed that all reasonable and necessary costs and expenses of litigation and other proceedings, including without limitation deposition costs, record retrieval, witness expenses, site investigations, expert fees, filing fees, postal and delivery costs, travel and transportation costs, lodging and meals, and telephone, facsimile, and photocopy charges shall be advanced by Attorney, to be paid out of the Client’s net proceeds of any settlement or judgment on the Claims, after deduction of attorney’s fees. If no recovery is made, Attorney shall be solely responsible for payment of Attorney’s expenses and costs.
V. SETTLEMENT DECISIONS

No settlement of the Claims shall be made or obtained by either party (Attorney or Client) without the express approval of the other party. Client hereby authorizes Attorney to require that any settlement check, draft, or money order be made, at Attorney’s sole option, payable jointly to Client and Attorney, and Client agrees that after Client endorses the instrument, Client will allow Attorney to deposit the instrument in the Attorney’s Trust account and pay Client the portion to which Client is entitled after collection.

VI. COOPERATION OF CLIENT

Client agrees to keep Attorneys advised of any change of address, to appear at deposition and Court appearances, and to find and deliver necessary documents to Attorneys given reasonable notice.

VII. PERMISSION TO WITHDRAW

If at any time Attorneys determine that the Claims should not be pursued further, Client agrees that Attorneys may withdraw from representing Client by sending written notice of Attorneys' intention to withdraw from representation of Client, to Client at Client's last known address. In such event, Client shall not be obligated to pay any fees to Attorneys, and Client shall not be obligated to pay any expenses or costs incurred in pursuit of the claims.

VIII. CO-COUNSEL

Client fully consents that Attorneys may, in the exercise of Attorney’s professional judgment, choose to employ or associate one or more additional attorneys to prosecute the Claims. Client represents that it has not currently employed another attorney for this matter, nor assigned any part of the Claims to any other party.

IX. TEXAS LAW TO APPLY AND ARBITRATION REQUIRED

This Agreement shall be construed under and in accordance with the laws of the State of Texas. All obligations of the parties are to be performed in Harris County, Texas.

Any controversy arising out of this Agreement or any amendment hereto shall be resolved by binding and enforceable arbitration in Harris County, Texas, according to the rules and regulations of the American Arbitration Association. Client and Attorneys agree that any such arbitration must be instituted within two (2) years after any such controversy arises. Failure to institute arbitration proceedings within such period shall constitute an absolute bar to such proceedings and an absolute waiver of all claims relating to this Agreement.
X. PARTIES BOUND

This Agreement shall be binding upon the parties hereto, their respective heirs, assigns, successors, administrators, representatives, and executors.

XI. SEVERABILITY AND ENFORCEMENT

In case any one or more of the provisions contained in this Agreement shall for any reason be held by a Court to be invalid or unenforceable, such a holding will not affect any other provision of this Agreement, and this Agreement shall be construed as if such invalid or unenforceable provision had never been contained herein.

XII. SOLE AGREEMENT

This Agreement represents the sole and only agreement of the parties hereto and supersedes any prior understandings or written or oral agreements between the parties or their legal predecessors respecting the subject matter. The scope of Attorneys’ duties and responsibilities shall not be expanded in any way unless specifically set forth in writing between the parties.

This Agreement may be amended only by written agreement signed by both parties. This Agreement is effective upon execution by both the Client and Attorneys.

XIII. NOTICE TO CLIENT

The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys.

Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar Office of the General Counsel will provide you with information about how to file a complaint. For more information, please call 1-800-932-1900. This is a toll free phone call.

Agreed:__________________________________        Date:______________________

Client

Address: ______________________________  DOB:_____________________

______________________________ TDL:_______________________

Phone: ______________________________      S.S.#:_______________________

CRAIG D. BALL, P.C.

By:______________________________________

Craig D. Ball
Appendix “B”

Settlement and Distribution Sheets
## JOHN DOE UNDERINSURED MOTORIST CLAIM

### SETTLEMENT SHEET

**GROSS RECOVERY:** $50,000.00  
Less: **Attorneys Fees [1/3rd of Gross Recovery]**  
- To Referring Attorney: $5,555.56
- To Craig D. Ball, P.C.: $11,111.11  

Less: **Case Expenses:**  
- Facsimile: $3.50
- Photocopies: $25.00
- Postage: $12.34
- Medical Records: $91.54
- L.D. Telephone: $11.00
- Dr. I. Sawbones: $250.00  
Total: <$393.38>  

**NET RECOVERY TO CLIENT BEFORE PAYMENT OF MEDICAL BILLS:** $32,939.95  
Less: **Unpaid Medical Bills:**  
- Physical Therapy Associate: <$3,500.00>
- City Ambulance: <$300.00>
- Radiologists ‘R Us: <$150.00>
- MRI Services, Inc.: <$900.00>
- Orthopaedic Consultants, P.A.: <$400.00>  

**CLIENT’S NET RECOVERY:** $27,689.95  

I acknowledge receipt of $27,689.95 in full settlement of all my uninsured motorist claims against Altered State Mutual Automobile Insurance Company growing out of an automobile collision on September 1, 1997. I have reviewed this settlement sheet and it is correct. I acknowledge that my attorney is not responsible for payment of my medical bills and that he has been directed to withhold no funds for payment of unpaid medical bills (if any) or reimbursement for such payments by others excepting only those amounts set out above.

---

John Doe  
Date
JOHN DOE UNDERINSURED MOTORIST CLAIM

DISTRIBUTION SHEET

GROSS RECOVERY: $50,000.00

Distribution from Client Trust Account

John Doe $27,689.95
Craig D. Ball, P.C.: $11,504.49
   Attorney Fees: $11,111.11
   Costs and Expenses: $393.38

TOTAL $11,504.49

Bob Smith, Esq. (Referral Fee) $5,555.56
Physical Therapy Associates $3,500.00
City Ambulance $300.00
Radiologists R’ Us $150.00
MRI Services, Inc $900.00
Orthopaedic Consultants, P.A $400.00

I have reviewed this Distribution Sheet, including the detail of case expenses, and it is correct. I authorize Craig D. Ball, P. C. to distribute the sums shown above, by post-dated checks, to the named persons.

___________________________________________  __________________________
John Doe Date
Appendix “C”

Texas Commission on Professional Ethics
Opinion 500
Texas Commission on Professional Ethics
Ethics Opinion 500

QUESTIONS PRESENTED:

1. May a lawyer ethically represent both a passenger and a driver in a personal injury case arising from an automobile collision with another vehicle?

2. Is the answer to the preceding question any different depending upon whether or not the lawyer (a) reasonably believes that, or (b) does not know if, the driver of the other vehicle will allege that the driver of the first vehicle was negligent and proximately caused the collision?

3. May a lawyer ethically represent two persons who are injured in a single accident caused by a third person if it becomes clear that the third person has a limited amount of funds to pay a possible judgment or settlement (e.g., insurance policy limits substantially less than the likely verdict range)?

4. If representation is proper in any of the foregoing instances, what notices and disclosures should be provided to the client?

DISCUSSION:

The situations raised above are governed by DR 1.06, Conflict of Interest, of the Texas Disciplinary Rules of Professional Conduct. In relevant part, the rule reads as follows:

DR 1.06 Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or becomes adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:
(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

Each of these questions will be considered separately in light of the rule and its interpretive comments.

1. May a lawyer ethically represent both a passenger and a driver in a personal injury case arising from an automobile collision with another vehicle?

DISCUSSION:

DR 1.06(a) prohibits representation by a lawyer of opposing parties in litigation. However, in this situation, the passenger and the driver are not directly adverse, but it does present a situation for potential conflict.

Notwithstanding a conflict or a potential conflict, DR 1.06(c) does provide certain circumstances under which a client may consent to multiple representation. Even though a conflict, or potential conflict, may exist by representing co-plaintiffs or co-defendants, such multiple representation is permissible if the lawyer reasonably believes that the representation of each client will not be materially affected. Each affected or potentially affected client must consent to such representation, after full disclosure of the existence, nature, and implications of the conflict and of the possible adverse consequences of common representation and the advantages involved, if any [DR 1.06(c)].

CONCLUSION:

As this question is posed, the answer is in the affirmative so long as the lawyer complies with DR 1.06(c). However, it should be pointed out that potential conflict could develop into an impermissible conflict. As stated in Comment 3 of DR 1.06:

An impermissible conflict may exist or develop by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.

If such a situation should develop after accepting multiple representation properly under DR 1.06, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these rules [DR 1.06(e)].
2. Is the answer to the preceding questions any different depending on whether or not the lawyer (a) reasonably believes that, or (b) does not know if, the driver of the other vehicle will allege that the driver of the first vehicle was negligent and proximately caused the collision?

DISCUSSION:

Comment 7 of DR 1.06 states as follows:

A client under some circumstances may consent to representation notwithstanding a conflict or potential conflict. However, as indicated in paragraph (c)(1), when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client’s consent.

If the extent of the negligence of the driver is such that the passenger should assert a cause of action against the driver of the automobile in which he or she was a passenger, dual representation may not be permissible (e.g., both drivers disregarded the stop sign at a four-way stop intersection). In such a case, it is reasonable to assume that a disinterested lawyer would conclude that the client should not agree to dual representation. However, the circumstances must be examined on a case-by-case basis. Such an examination is essential because, notwithstanding the conflict, dual representation could be permitted under DR 1.06(c) under a different set of circumstances (e.g., the passenger may be a family member of the driver, and after full disclosure, may not wish to assert a cause of action against the driver).

CONCLUSION:

Each case must be examined on an individual basis; if the circumstances are such that compliance with DR 1.06(c) can be achieved, dual representation would be permissible.

3. May a lawyer ethically represent two persons who are injured in a single accident caused by a third person if it becomes clear that the third person has a limited amount of funds to pay a possible judgment or settlement (e.g., insurance policy limits substantially less than the likely verdict range)?

DISCUSSION:

A lawyer may not represent opposing parties to the same litigation [DR 1.06(a)]. Although co-plaintiffs, technically, are not opposing parties, Comment 2 states that the "term 'opposing parties' as used in this rule contemplates a situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party." Therefore, under the limited scope of the question presented, the more funds one party will receive from a limited amount of available funds to pay for a possible judgment or settlement, the less the
other party will receive. Depending on the limited amount of funds available for payment of a possible judgment or settlement and the extent of the co-plaintiff's damages, it very well may be that the representation of each client will be materially affected. Additionally, if a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such an agreement or provide representation on the basis of the client's consent [(Comment 7, DR 1.06)].

**CONCLUSION:**

Under the limited scope of the above question as posed, it would be a violation of DR 1.06 to represent two or more persons injured in a single accident caused by a third person when it becomes clear that the third person has a limited amount of funds to pay a possible judgment or settlement (e.g., insurance policy limits substantially less than the likely verdict range).

4. **If representation is proper in any of the foregoing instances, what notices and disclosures should be provided to the client?**

**DISCUSSION:**

Comment 8 to DR 1.06 states as follows:

Disclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. While it is not required that the disclosure 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.

Although there is no prescribed form to be used in giving notice and disclosures to potential dual clients, the lawyer should explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation [(DR 1.03, Communication)]. The notice or disclosure should fully disclose the existence, nature, and implication of the conflict, or potential conflict, and the possible adverse consequences of the common representation and the advantages involved, if any [DR 1.06(c)(2)].
Appendix “D”

Ethics Internet Web Sites
## Ethics Internet Web Sites

<table>
<thead>
<tr>
<th>U.R.L. (Web Address)</th>
<th>Site Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><a href="http://www.law.uh.edu/ethics/">http://www.law.uh.edu/ethics/</a></td>
<td><strong>The Texas Ethics Reporter</strong> J, presented by the University of Houston Law Center O’Quinn Law Library, is probably the best ethics resource around for Texas lawyers. It’s the place to come for Texas ethics opinions, rules, the creed, and disciplinary action reports.</td>
</tr>
<tr>
<td><a href="http://www.txethics.org/">http://www.txethics.org/</a></td>
<td>This handsome site is sponsored by a non-profit foundation called the Texas Center for Legal Ethics and Professionalism. The site offers ethics opinions, brief synopses of Texas ethics decisions and law review articles, attorney advertising rules, guidelines for gender-neutral courtroom practices, a bibliography and CLE materials.</td>
</tr>
<tr>
<td><a href="http://www.texbar.com/attydisc/questions.htm">http://www.texbar.com/attydisc/questions.htm</a></td>
<td>The attorney discipline section of the State Bar of Texas’ “new and improved” website opens with information for the public, including a downloadable grievance form. For practitioners, there is practical advice on avoidance of complaints and what to do if a grievance is filed. Looking for a second opinion on that nagging ethical dilemma? The General Counsel’s Office of the SBOT maintains a toll-free Attorney Ethics Hotline, 1-800-204-222 x 6456.</td>
</tr>
<tr>
<td><a href="http://www.abanet.org/cpr/home.html">http://www.abanet.org/cpr/home.html</a></td>
<td>The American Bar Association maintains this site for its Center for Professional Responsibility. It has some worthwhile content, but, surprisingly, it is far less useful than it should be. The best resources are sold in paper form at this site, and not made available online.</td>
</tr>
<tr>
<td>U.R.L. (Web Address)</td>
<td>Site Description</td>
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<tr>
<td><a href="http://www.findlaw.com/01topics/14ethics/index.html">http://www.findlaw.com/01topics/14ethics/index.html</a></td>
<td>THE place to start for quick online legal research of any kind, with Yahoo-like organization by topic, including Ethics and Professional Responsibility.</td>
</tr>
<tr>
<td><a href="http://www.cornell.edu/ethics">http://www.cornell.edu/ethics</a></td>
<td>The original law library of the Internet, and still the most comprehensive online legal resource, Cornell is now presenting summaries of the law submitted by prestigious lawyers and firms nationwide, writing <em>pro bono</em>. Vinson &amp; Elkins is writing the Texas Legal Ethics section. Each disciplinary rule is compared to its Model Rule counterpart and analyzed, with case citations.</td>
</tr>
<tr>
<td><a href="http://www.legalethics.com">http://www.legalethics.com</a></td>
<td>Legalethics.com offers legal professionals a gateway to understand the unique ethical issues raised by the Internet and Internet technology. Attorneys and state and local authorities will find links to articles, rules, and information relating to Internet ethics issues, including attorney advertising, e-mail communication, and UPL on the Internet. The &quot;Research&quot; section offers links to most of the primary Internet legal research resources and the site also offers links to most of the ethics resources available on the Internet.</td>
</tr>
</tbody>
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