ATTORNEYS’ FEES & ETHICS

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State Bar of Texas
31st ANNUAL ADVANCED FAMILY LAW COURSE
August 8-11, 2005
Dallas

CHAPTER 58.2
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ATTORNEYS’ FEES AND ETHICS

I. SCOPE

This article is designed to explore the ethical considerations involved in attorneys’ fees, client relationships, collection issues and tips on how to avoid encounters with the grievance committee or a malpractice lawsuit. Hopefully this article will promote thought, self-examination, and a re-evaluation of your billing philosophy and client relationships.

II. DISCIPLINARY RULES AND ATTORNEYS’ FEES

A. Disciplinary Rules and Attorneys’ Fees

The Texas Disciplinary Rules of Professional Conduct provide the bedrock principles on the reasonableness and necessity of attorneys’ fees. The Texas Rules of Professional Conduct define proper conduct for purposes of professional discipline. The Texas Rules of Professional Conduct are imperatives, cast in terms “shall” or “shall not.” The Comments following the Rules are cast often in terms of “may” or “should” and are permissive, defining areas in which the lawyer has professional discretion. When a lawyer exercises such discretion in relation to the Comments, whether by acting or not acting, no disciplinary action may be taken. The Comments also frequently illustrate or explain applications of the Rules, in order to provide guidance for interpreting the Rules and for practicing in compliance with the spirit of the Rules.

B. Applicable Rules and Comments

The following disciplinary rules and comments are set forth because of their special applicability to attorneys’ fees and family law cases:

"Rule 1.04 Fees.

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. (emphasis added)

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(e) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

Subsections (f) and (g) involve the division of fees between lawyers and are new sections to Rule 1.04, effective March 1, 2005.

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is:
(i) in proportion to the professional services performed by each lawyer; or
(ii) made between lawyers who assume joint responsibility for the representation; and

(2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including

(i) the identity of all lawyers or law firms who will participate in the fee-sharing arrangement, and
(ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and
(iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

(3) the aggregate fee does not violate paragraph (a).

(g) Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, shall be confirmed by an arrangement conforming to paragraph (f). Consent by a client or a prospective client without knowledge of the information specified in subparagraph (f)(2) does not constitute a confirmation within the meaning of this rule. No attorney shall collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way, except for:

(1) the reasonable value of legal services provided to that person; and
(2) the reasonable and necessary expenses actually incurred on behalf of that person.

(h) Paragraph (f) of this rule does not apply to payment to a former partner or associate pursuant to a separation or retirement agreement, or to a lawyer referral program certified by the State Bar of Texas in accordance with the Texas Lawyer Referral Service Quality Act, Tex. Occ. Code 952.001 et seq., or any amendments or recodifications thereof.

The reasonableness and necessity of attorney's fees awarded by a District Court should be determined in light of the standards prescribed in Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct. Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex.1998).

Comment 1 under Rule 1.04 Fees, Unconscionable Fee:

"A lawyer in good conscience should not charge or collect more than a reasonable fee, although he may charge less or no fee at all. The determination of the reasonableness of a fee, or of the range of reasonableness, can be a difficult question, and a standard of 'reasonableness' is too vague and uncertain to be an appropriate standard in a disciplinary action. For this reason, paragraph (a) adopts, for disciplinary purposes only, a clearer standard: the lawyer is subject to discipline for an illegal fee or an unconscionable fee. Paragraph (a) defines an unconscionable fee in terms of the reasonableness of the fee but in a way to eliminate factual disputes as to the fee's reasonableness. The Rule's 'unconscionable' standard, however, does not preclude use of the 'reasonableness' standard of paragraph (b) in other settings."

The Texas Committee on Professional Ethics Opinion 518, September, 1996 states, "If a competent lawyer could not form a reasonable belief that the fee to be charged is reasonable, the fee would be unconscionable and DR 1.04 would be violated."

Comment 2 under Rule 1.04 Basis of Fee, Written Agreement:

Comment 2 states in part the following: "... It is not necessary to recite all the factors that underlie the basis of a fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, in order to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a
Comment 2 strongly urges that all fee contracts should be in writing in order to reduce the possibility of misunderstandings. A written fee agreement is mandatory in a contingent fee case.

Comment 8 under Rule 1.04 Overreaching, Unconscionable Fees:

"Two factors in otherwise borderline cases might indicate a fee may be unconscionable. The first is overreaching by a lawyer, particularly of a client who was unusually susceptible to such overreaching. The second is a failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated."

Given the traumatic experience of a divorce, the high emotional level, and the common feelings of insecurity, divorce clients are typically vulnerable, susceptible people. Therefore, it is imperative a lawyer in a family law case avoid even the appearance of overreaching.

Comment 9 under Rule 1.04, Fees in Family Law Matters:

"Contingent and percentage fees in family law matters may tend to promote divorce and may be inconsistent with a lawyer's obligation to encourage reconciliation. Such fee arrangements also may tend to create a conflict of interest between lawyer and client regarding the appraisal of assets obtained for client. See also Rule 1.08(h). In certain family law matters, such as child custody and adoption, no res is created to fund a fee. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified."

Comments 10-18 are new and became effective March 1, 2005, regarding the division of fees between attorneys.

Comment 10 under Rule 1.04, Division of Fees:

"A division of fees is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fees facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring or associating lawyer initially retained by the client and a trial specialist, but it applies in all cases in which two or more lawyers are representing a single client in the same matter, and without regard to whether litigation is involved. Paragraph (f) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes joint responsibility for the representation."

Comment 11 under Rule 1.04 Division of Fees:

"Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (d) of this Rule."

Comment 12 under Rule 1.04 Division of Fees:

"A division of a fee based on the proportion of services rendered by two or more lawyers contemplates that each lawyer is performing substantial legal services on behalf of the client with respect to the matter. In particular, it requires that each lawyer who participates in the fee have performed services beyond those involved in initially seeking to acquire and being engaged by the client. There must be a reasonable correlation between the amount or value of services rendered and responsibility assumed, and the share of the fee to be received. However, if each participating lawyer performs substantial legal services on behalf of the client, the agreed division should control even though the division is not directly proportional to actual work performed. If a division of fee is to be based on the proportion of services rendered, the arrangement may provide that the allocation not be made until the end of the representation. When the allocation is deferred until the end of the representation, the terms of the arrangement must include the basis by which the division will be made."

Comment 13 under Rule 1.04 Division of Fees:

Joint responsibility for the representation entails ethical and perhaps financial responsibility for the representation. The ethical responsibility assumed requires that a referring or associating lawyer make
reasonable efforts to assure adequacy of representation and to provide adequate client
communication. Adequacy of representation requires that the referring or associating
lawyer conduct a reasonable investigation of the client’s legal matter and refer the matter
to a lawyer whom the referring or associating lawyer reasonably believes is competent to
defend it. See Rule 1.01. Adequate attorney-client communication requires that a
referring or associating lawyer monitor the matter throughout the representation and
ensure that the client is informed of those matters that come to that lawyer’s attention
and that a reasonable lawyer would believe the client should be aware. See Rule 1.03.
Attending all depositions and hearings, or
requiring that copies of all pleadings and
 correspondence be provided a referring or
 associating lawyer, is not necessary in order
to meet the monitoring requirement proposed
by this rule. These types of activities may
increase the transactional costs, which
ultimately the client will bear, and unless
some benefit will be derived by the client,
they should be avoided. The monitoring
requirement is only that the referring lawyer
be reasonably informed of the matter,
respond to client questions, and assist the
handling lawyer when necessary. Any
referral or association of other counsel should
be made based solely on the client’s best
interest.

Comment 14 under Rule 1.04 Division of Fees:

“In the aggregate, the minimum activities
that must be undertaken by referring or
associating lawyers pursuant to an
arrangement for a division of fees are
substantially greater than those assumed by a
lawyer who forwarded a matter to other
counsel, undertook no ongoing obligations
with respect to it, and yet received a portion
of the handling lawyer’s fee once the matter
was concluded, as was permitted under the
prior version of this rule. Whether such
activities, or any additional activities that a
lawyer might agree to undertake, suffice to
make one lawyer participating in such an
arrangement responsible for the professional
misconduct of another lawyer who is
participating in it and, if so, to what extent,
are intended to be resolved by Texas Civil
Practice and Remedies Code, ch. 33, or other
applicable law.”

Comment 15 under Rule 1.04 Division of Fees:

“A client must consent in writing to the terms
of the arrangement prior to the time of the
association or referral proposed. For this
consent to be effective, the client must have
been advised of at least the key features of
that arrangement. Those essential terms,
which are specified in subparagraph (f)(2),
are 1) the identity of all lawyers or law firms
who will participate in the fee-sharing
agreement, 2) whether fees will be divided
based on the proportion of services
performed or by lawyers agreeing to assume
joint responsibility for the representation, and
3) the share of the fee that each lawyer or law
firm will receive or the basis on which the
division will be made if the division is based
on proportion of service performed. Consent
by a client or prospective client to the referral
to or association of other counsel, made prior
to any actual such referral or association but
without knowledge of the information
specified in subparagraph (f)(2), does not
constitute sufficient client confirmation
within the meaning of this rule. The referring
or associating lawyer or any other lawyer
who employs another lawyer to assist in the
representation has the primary duty to ensure
full disclosure and compliance with this
rule.”

Comment 16 under Rule 1.04 Division of Fees:

“Paragraph (g) facilitates the enforcement of
the requirements of paragraph (f). It does so
by providing that agreements that authorize
an attorney either to refer a person’s case to
another lawyer, or to associate other counsel
in the handling of a client’s case, and that
actually result in such a referral or
association with counsel in a different law
firm from the one entering into the
agreement, must be confirmed by an
arrangement between the person and the
lawyers involved that conforms to paragraph
(f). As noted there, that arrangement must be
presented to and agreed to by the person
before the referral or association between the
lawyers involved occurs. See subparagraph
(f)(2). Because paragraph (g) refers to the
party whose matter is involved as a “person”
rather than as a “client,” it is not possible to
evade its requirements by having a referring
lawyer not formally enter into an attorney-
client relationship with the person involved
before referring that person’s matter to other
counsel. Paragraph (g) does provide, however, for recovery in quantum meruit in instances where its requirements are not met. See subparagraphs (g)(1) and (g)(2). “

Comment 17 under Rule 1.04 Division of Fees:

“What should be done with any otherwise agreed-to fee that is forfeited in whole or in part due to a lawyer’s failure to comply with paragraph (g) is not resolved by these rules. “

Comment 18 under Rule 1.04 Division of Fees:

“Subparagraph (f)(3) requires that the aggregate fee charged to clients in connection with a given matter by all of the lawyers involved meet the standards of paragraph (a) — that is, not be unconscionable.”

Comment 19 under Rule 1.04 Fee Disputes and Determinations:

“If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by a bar association, the lawyer should conscientiously consider submitting to it…”

Rule 1.14 Safekeeping Property:

"(a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property. Such funds shall be kept in a separate account, designated as a "trust" or "escrow" account, maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

"(b) Upon receiving funds or the other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, 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.

"(c) 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 interest, 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."

Comment 1 under Rule 1.14 Safekeeping Property:

"1. A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. Paragraph (a) required that complete records of the funds and other property be maintained.

"2. Lawyers often receive funds from third parties from which the lawyer's fee will be paid. These funds should be deposited into a lawyer's trust account. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed to those entitled to receive them by virtue of the representation. A lawyer should not use even that portion of..."
trust account funds due to the lawyer to make direct payment to general creditors of the lawyer of the lawyer's firm, because such a course of dealing increases the risk that all the assets of that account will be viewed as the lawyer's property rather than that of clients, and thus as available to satisfy the claims of such creditors. When a lawyer receives from a client monies that constitute a prepayment of a fee and that belongs to the client until the services are rendered, the lawyer should handle the fund in accordance with paragraph (c). After advising the client that the service has been rendered and the fee earned, and in the absence of a dispute, the lawyer may withdraw the fund from the separate account. Paragraph (c) does not prohibit participation in an IOLTA or similar program."

C. Contingent Fee

Although contingent fee contracts are rarely used in family law matters, contingent fees are authorized by the Texas Disciplinary Rules of Professional Conduct, Rule 1.04(b)(8). However, Comment 9 to Rule 1.04 discourages contingent fee arrangements in family law cases and states that they are rarely justified.

Rule 1.5(d)(1) of the ABA Model Rules of Professional Conduct states that a lawyer may not enter into a contingent fee arrangement in a domestic relations matter when the fee is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.

The contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. TDRPC, Rule 1.04(d). Texas Government Code Section 82.065(a) provides that a contingent fee contract for legal services must be in writing and signed by the attorney and client.

1. Contingent Fee in Common Law Marriage Case


2. Contingent Fee in Child Support Case

Texas Committee on Professional Ethics, Opinion 485, March 1994 states that an attorney can have a contingent fee contract with a client for the collection of child support arrearage. The opinion stated that the attorney could charge a contingent fee, but the fee must be reasonable and must comply with Rule 1.14. The opinion further stated that prior to the execution of the contingent fee contract, the attorney is obligated to fully disclose all options to the client, including the option for the client to utilize the Texas Attorney General’s Office to handle the child support arrearage case free of charge to the client. Other options should be discussed, as well as the pros and cons. Opinion 485 further states that all dealings with the arrearages that are collected should comply with Rule 1.14 involving the safekeeping of property and keeping client funds separate from attorney’s fees.

3. Contingent Fee or Hourly, Whichever is Greater

The Texas Committee on Professional Ethics, Opinion 518, September 1996, addressed the question as to whether or not an attorney may enter into a contingent fee arrangement where the attorney is to be paid the greater of (a) the fee that would have been charged for the same services on an hourly basis or (b) the percentage of the amount recovered for the client. The committee basically answered no and stated, “An agreement obligating a client to pay the attorney the greater of (a) the fee that is reasonable if determined and collectable strictly on a contingent fee basis or (b) the highest fee that would be reasonable based strictly on an hourly rate appears to violate DR 1.04, because (1) the uncertainty of a collection normally would not considered in arriving at a fee for services on an hourly rate and (2) a higher fee payable only out of a recovery on a contingent fee basis normally would be justified due to the uncertainty of collection.” The committee implied that a contingent fee arrangement where the client would pay the reasonable contingent fee or the reasonable hourly fee, whichever is less, would not violate Rule 1.04.

4. Termination of Representation under a Contingent Fee Contract

When a client terminates representation under a contingent fee contract, the lawyer’s compensation is determined by whether the client had good cause for the termination. If the client had good cause, the lawyer may recover in quantum meruit for services rendered up to the time of termination. But if the client terminated the representation without good cause, the lawyer is not limited to quantum meruit and may also recover on the contingent fee contract. Walton v. Hoover, Bax and Slovack, LLP, 149 S.W.3rd 834, 843 (Tex.App.-El Paso 2004, no pet. h.)

5. Enforceable Contingent Fee Contracts

There are several Texas cases that have implicitly held that contingent fee contracts are valid in domestic relations cases. Archer v. Griffith, 390 S.W.2d 735 (Tex. 1964); Kelly v. Gross, 4 S.W.2d 296 (Tex. Civ. App. - El Paso 1928, writ ref’d); Bryan & Amidei v. Law, 435 S.W.2d 587 (Tex. Civ. App. - Fort Worth 1969, no writ); Rawlins v. Stahl, 304 S.W.2d 549 (Tex. 1957).
III. RETAINER FEES

Abraham Lincoln is reputed to have said, "The lawyer should always get some of his fee in advance from the client. This way the client knows he has a lawyer and the lawyer knows he has a client."

The importance of obtaining a significant retainer at the commencement of a case cannot be over emphasized. Unfortunately for lawyers, legal fees do not rate very high on the payment priority list. After legal services have been rendered, clients have a tendency to pay their other monthly living expenses, mortgage payment, car payments, utility bills, and credit card bills, on an on-going basis to maintain their standard of living. Typically a client's standard of living will not suffer if they do not pay their legal fees. People somehow are simply more willing and able to pay you when they need you, rather than when they no longer need you. Get a significant retainer from the client when the client needs you, rather than chasing an unpaid receivable after the conclusion of the case.

A. Refundable Retainers

A refundable retainer is an advance payment or deposit paid by the client to the lawyer for the costs, expenses and legal fees which will be incurred, but are not yet earned. A refundable retainer, until it is earned or expenses incurred, belongs to the client and must be placed in the lawyer's trust account. As fees are earned, whether the lawyer utilizes an hourly billing method or some other basis for establishing the fee, the client is billed and paid out of the lawyer's trust account, as per the provisions of the written fee contract between the client and the lawyer. The lawyer enjoys the security of the retainer for the payment of fees and costs. The retention and handling of client funds, in the form of a refundable retainer, must conform to the requirements imposed by the Texas Disciplinary Rules of Professional Conduct, Rule 1.14. Virtually every issue of the Texas Bar Journal reports disciplinary action taken against one or more attorneys for violating some portion of Rule 1.14 by either failing to maintain an identifiable bank account for client trust funds, failure to account for client funds or failure to return client trust funds to the client.

B. Nonrefundable Retainers

A nonrefundable retainer belongs entirely to the lawyer at the time it is received because the fee is earned at the time of receipt. The fee is earned upon receipt because payment commits the lawyer to the client's case. In effect, a nonrefundable retainer is an engagement fee that indicates the lawyer's willingness to represent the client and guarantees the lawyer's availability to take on the case for the client. However, a nonrefundable retainer is subject to TDRPC, Rule 1.04(a) which states that a lawyer shall not enter into
an agreement or, charge, or collect an illegal or clearly excessive fee.

A nonrefundable retainer may be a **nonrefundable noncreditable** or **nonrefundable creditable**. A lawyer's billings, whether on an hourly basis or other basis are credited against a nonrefundable creditable retainer. On the other hand, a lawyer's billings are not credited against a nonrefundable noncreditable retainer. A nonrefundable noncreditable retainer is analogous to the signing bonus utilized legally by professional football teams and illegally by college football teams. The client pays a bonus, nonrefundable noncreditable retainer, for the privilege of having a particular lawyer represent him as opposed to his spouse. The lawyer's hourly billings or other means of compensation are totally in addition to and separate from the nonrefundable noncreditable retainer.

The fee contract utilized by some attorneys provides that client pay two retainers: a nonrefundable retainer against which attorney's fees are credited and a refundable retainer, against which court costs and expenses are credited. In that event, the client should pay the lawyer with two separate checks, one for the nonrefundable retainer which will be deposited in the lawyer's general operating account, and one for the refundable retainer which will be deposited in the lawyer's trust account. It is critically important to note that in the event a client pays both the nonrefundable and refundable retainers with one check, the entire check must be deposited into the lawyer's trust account according to the provisions of TDRPC, Rule 1.14. Thereafter, the attorney may transfer the funds representing the nonrefundable retainer into the attorney's general operating account in accordance with Rule 1.14.

### Caveat on Nonrefundable Retainers

The Texas Committee on Professional Ethics Opinion 431, June 1986, provides that nonrefundable retainers are not inherently unethical, but must be utilized with caution because such agreements pose many potential problems. The opinion additionally refers to Texas Ethics Opinion 391, February 1998, and states, “Texas Ethics Opinion 391 is still viable, but is overruled to the extent that it states that every retainer designated as a nonrefundable retainer is earned at the time it is received. A fee is not earned simply because it is designated as nonrefundable.” The opinion further states that if a nonrefundable retainer is not excessive, it will be deemed earned at the time it is received, and may be deposited in the attorney’s account. However, if the attorney is discharged for cause, or voluntarily withdraws before other employment opportunities have been lost, DR 2-110 (now Rule 1.15) imposes a duty on the attorney to promptly refund an equitable portion of the retainer. Ethics Opinion 431 provides the following conclusion:

“A retainer fee is a payment to compensate an attorney for his commitment to provide certain services and forego other employment opportunities. Non-refundable retainers are not inherently unethical, but must be utilized with caution. Such agreements pose at least three potential problems: 1. Interference with the client’s right to discharge the attorney if the client fears the retainer will be forfeited under any circumstances. 2. If the attorney’s action causes the value of the retainer to be reduced and he is discharged for cause or voluntarily withdraws, an equitable portion of the retainer should be refunded to the client. 3. The fee may be excessive if not determined by relevant factors such as the degree of reputation and ability of the lawyer. See DR 2-106.” (now Rule 1.04).

Remember, Rule 1.04 states that a fee can never be unconscionable.

### C. Evergreen Retainer

Many lawyers are using a concept called "evergreen" as a part of the refundable retainer provisions of their employment contract. The client is required to replenish the initial refundable retainer when it is depleted below a certain designated dollar amount because of lawyer’s fees being credited against it. For example, the employment contract could require the client to pay the lawyer an initial refundable retainer of $5,000, which is placed in the lawyer's trust account. As the lawyer expends legal services and reduces the refundable retainer by monthly billings to an amount below $2,000, the client would be required to replenish the lawyer's trust account, keep it "green" if you will, by paying an amount into the attorney trust account to replenish the retainer to $5,000 or by paying a designated dollar amount. Properly utilized by the lawyer, the "evergreen" concept would allow the lawyer to enjoy the security of having funds on hand with which to pay attorney's fees as they are earned and billed.

An “evergreen" retainer will allow a lawyer to devote his full attention, energy and concern to his client's case and not be distracted because of worry and concern over whether or not he will be paid. The way to explain the "evergreen" concept to a client is as follows:

“Cars cannot run without gasoline and law offices cannot run without cash to pay staff salaries, rent, equipment and computer maintenance, and other overhead expenses.
So think of a gas gauge. When the needle goes down to one-third or one-fourth of a tank, it is time to fill up the tank. When the amount of your retainer in the trust account goes below $2,000.00, you must fill up the tank so to speak, and replenish the trust account by depositing enough money to bring your funds in the trust account to the original $5,000.00 retainer amount.

An example of "evergreen" language in an employment contract is as follows:

"Client shall pay the Firm a refundable retainer of $5,000.00 to take Client's case. CLIENT UNDERSTANDS THAT LEGAL REPRESENTATION WILL NOT COMMENCE UNTIL THE RETAINER FEE IS PAID IN FULL AND THIS CONTRACT HAS BEEN SIGNED BY CLIENT AND GIVEN TO THE FIRM. The hourly fee will be credited against the retainer. After such credits have been made against the retainer, reducing the balance left on the retainer fee to below $2,000.00, Client will be notified of same and will be required to pay an additional retainer to the Firm to replenish the Trust Account to the amount of the original retainer. If Client fails to deposit the additional retainer, as requested herein, within fifteen (15) days after the billing, the Firm may withdraw as Client's attorney, cease work, and will have no further responsibility to work on Client's case. Client will be sent periodic statements for work done and expenses incurred."

D. Trial Retainer and Mediation Retainer

A trial retainer is an additional retainer that must be deposited with the attorney prior to trial to cover the professional fees and expenses resulting from the trial. A mediation retainer is an additional retainer that must be deposited with the attorney prior to mediation to cover the professional fees and expenses associated with a mediation.

E. Interest on Lawyers' Trust Accounts

Texas Committee of Professional Ethics Opinion 404 (September 1982) states that it is not permissible for an attorney to use client money to earn interest for himself by placing such funds in an interest bearing account. However, under IOLTA (Interest On Lawyers' Trust Accounts), interest can be earned on funds in a lawyers' trust account. It is permissible for an attorney or law firm to establish an interest bearing account for a specific client’s funds, when the client owns the funds and the interest earned in the account belongs to the client. Texas Committee on Professional Ethics Opinion 421, November 1984. Generally, a separate interest bearing account for client funds, with interest payable to the client, cannot be done unless the funds are large enough and will stay in the account long enough for the interest earned to be sufficient to justify the establishment of the separate account.

IV. ATTORNEYS' FEES AND EMPLOYMENT CONTRACTS

A. Five Undeniable Principles

1. Informed clients expect to pay a fair fee for legal services.
2. A lawyer is entitled to charge a fair fee for legal services.
3. Whatever the method of billing, the fee must be fair and reasonable, not illegal, unconscionable or excessive.
4. Do not commingle client money with attorney money.
5. A lawyer has three choices:
   * work and get paid - a necessity for most attorneys;
   * work and not get paid - plain dumb and soon to be bankrupt;
   * not work and not get paid - wouldn't it be nice?

B. Attorney-Client Employment Contracts

"Sloppy fee setting accounts for the largest volume of complaints to grievance committees...One of the two most common complaints against lawyers is the complaint involving the amount of the fee that was charged." "Avoiding Unintentional Grievances, Professional Responsibility and the Texas Lawyer", Office of the General Counsel, State Bar of Texas (1979).

The same holds true today, 26 years after the above quote, as fee disputes represent the majority of issues presented to grievance committees as substantiated by each issue of the Texas Bar Journal.

1. Must Be In Writing

The absolute best safeguard against sloopy fee setting is a clearly written employment contract, sometimes referred to as a legal representation agreement. Oral agreements will simply not suffice. Remember, a client in a family law matter is frequently an emotional basket case and will unlikely remember exactly what the lawyer has told him in the initial conference. It is not uncommon for a client, having previously signed a written employment contract...
containing a provision for a minimum $5,000 nonrefundable creditable retainer fee, to receive a statement from his lawyer for an additional $3,000, because the $5,000 was insufficient to cover the whole fee, to angrily call his lawyer and state, "I thought you told me that my total attorney's fees would be $5,000." It provides the lawyer a sense of security and joy to be able to ask the client to pull out his copy of the employment contract and direct the client's attention to the paragraph that clearly states that the $5,000 fee is a minimum fee, not the total fee, and to the provision in the employment contract that states that the client will receive a bill when the $5,000 retainer is exhausted.

Comment 2 under Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct states that a fee arrangement with a client should be in writing and that a contingent fee arrangement must be in writing. A written fee agreement not only reduces the possibility of a later misunderstanding between lawyer and client, but will also work for good relations between lawyer and client.

2. Ten Commandments of An Employment Contract

The 10 commandments of a properly drawn attorney-client employment agreement and the essential elements under each commandment are as follows:

COMMANDMENT I: Scope of the Agreement

1.01 Name and address of lawyer or law firm.
1.02 Name and address of client.
1.03 Role and responsibility of lawyer or law firm.
1.04 Role and responsibility of client.
1.05 Nature of legal services:
   (1) Divorce
      - Without children
      - With children
      - Custody (uncontested)
      - Custody (contested)
   (2) Modification of noncustody matter
   (3) Modification of custody matter
   (4) Adoption
   (5) Contempt
   (6) Enforcement
   (7) Etc.

COMMANDMENT II: Attorneys' Fees

2.01 Fee Setting Arrangement. List the eight factors set forth in the Texas Disciplinary Rules of Professional Conduct, Rule 1.04.

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) The fee customarily charged in the locality for similar legal services;
(4) The amount involved and the results obtained;
(5) The time limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

2.02 How Fee Will Be Calculated.

(1) Straight hourly fee
   Board certified attorney - $300 per hr.
   Non-board cert. attorney - $200 per hr.
   Legal Assistant - $200 per hour
   Law clerk - $75 per hour
   Word Processing - $40 per hour

(2) Explain how time will be recorded, for example in minimum increments of one-tenth of an hour or six minutes;
(3) Hourly fee with a minimum fee of no less than a designated dollar amount;
(4) Hourly fee combined with set fee arrangement for document preparation;
(5) Hourly fee with bonus provision for results achieved;
(6) Lump sum fee for a turnkey job;
(7) Minimum-maximum lump sum fee;
(8) Fixed fee by stages;
(9) Combination of hourly fee and contingent fee when a family law case has a domestic tort as an added cause of action;
(10) Weighted unit billing; and
(11) Value billing.
2.03 Initial Retainer.

(1) Due date;
(2) Language stating that attorney-client relationship does not commence and work does not begin until retainer paid;
(3) Amount of initial retainer;
(4) Type of retainer:
   - Nonrefundable, noncreditable
   - Nonrefundable, creditable
   - Refundable
   - Partially refundable and nonrefundable
   - Evergreen retainer

(5) Purpose of retainer:
   - Engagement fee
   - Deposit on attorneys' fees
   - Deposit on court costs and expenses

COMMANDMENT III: Costs and Expenses

3.01 Give attorney authority to incur.
3.02 Provide method of payment.

(1) Client pays directly;
(2) Attorney bills to client by using client’s credit card;
(3) Attorney bills long distance telephone calls to client’s phone number or calling card; and
(4) Attorney pays expense, client reimburses attorney either from money in trust account or by bill to client.

3.03 Provide that major single item of expense such as use of expert, appraisers, accountants and depositions will not be incurred without client's prior consent.
3.04 Provide that smaller expenses such as filing fees, court costs, travel, special mail, excessive photo copies, fax copies, and long distance telephone calls, can be incurred without client's prior consent.
3.05 Set forth amounts for certain expenses:

(1) Fax - $1.00 per page for outgoing or incoming;
(2) Photocopy - .10¢ per page;
(3) Mileage - .36¢ per mile;
(4) Long distance telephone charges:
   - Actual expense from phone records
   - Estimated by attorney
   - $4 per call regardless of length
   - Charge to client's phone
   - Charge to client's telephone calling card

COMMANDMENT IV: Billing Procedures and Statement

4.01 When sent.
4.02 When due by client.
4.03 Attorney's rights if statement not paid when due.
4.04 Client has duty to sign note if statement not paid in full by due date.
4.05 State whether or not attorney will accept payment by credit card.
4.06 Interest or finance charges:

(1) Must comply with applicable truth in lending laws;
(2) Must comply with applicable usury laws.

4.07 State whether or not attorney will accept payment from prepaid legal insurance.

COMMANDMENT V: Payment by Opposing Party

5.01 Make it clear that lawyer fees are determined as between the lawyer and client by the employment contract and that client must pay.
5.02 Provide that failure of court to order opposing party to pay fee or amount less than full fee does not excuse client's obligation to pay fee.
5.03 Provide that any fee collected from opposing party will be credited to unpaid balance owed by client or refunded to client if bill already paid in full.
5.04 Provide that client pays attorney additional fees at hourly rate set forth in employment contract if client wants attorney to pursue collection of judgment against opposing party for attorneys' fees.

COMMANDMENT VI: Security Agreement

6.01 Provide for security interest in property to secure payment of fee.
6.02 Provide how attorney will identify and safeguard client's property.
6.03 Provide for payments to client to be made to attorney and retain right to use such funds to pay attorney's fees.
6.04 Provide for a guarantor.

COMMANDMENT VII: Termination of Employment

7.01 Set forth when client can terminate employment.
7.02 Set forth rights and obligations of client and attorney when employment terminated by client.
7.03 Set forth when attorney can terminate employment by withdrawal, see TDRPC, Rule 1.15
7.04 Set forth rights and obligations of attorney and client when attorney withdraws.

COMMANDMENT VIII: Power of Attorney

8.01 Provide language where client appoints lawyer as his attorney-in-fact to endorse, negotiate, cash, deposit and apply funds to payment of attorneys' fees and expenses for any client funds that come into the hands of the lawyer.

COMMANDMENT IX: General Contract Terms

9.01 Provide that contract represents the entire agreement between attorney and client.
9.02 No amendment to agreement unless in writing.
9.03 Severability and enforceability terms.
9.04 Set forth place of employment and place of payment for venue purposes.
9.05 Provide language that no one in attorney's office has made any prediction or guarantee as to the outcome of the case.
9.06 Have client acknowledge that no guarantees have been made.
9.07 Provide language that client has fully and complete read the foregoing contract, has no questions regarding the contact, agrees to each provision of the contract and has voluntarily and knowingly signed the contract.
9.08 Set forth right of attorney to collect and the obligation of the client to pay reasonable attorneys' fees and cost of litigation if attorney must file suit against client to collect attorneys' fee and to give information about the client to a collection agency.
9.09 Provide for arbitration in the event of a fee dispute with a client.
9.10 Provide notice language to client required by the State Bar of Texas with a phone number, regarding alleged professional misconduct committed by attorneys.
9.11 Provide a copy of the Texas Lawyer's Creed.
9.12 Provide an explanation that conversations between attorney and client are confidential, except in accordance with Texas Family Code Section 261.101 regarding child abuse, which states that if a professional, which includes attorneys and staff for attorneys, has cause to believe that a child has been abused or neglected, or may be abused or neglected, the professional shall make a report of same.

COMMANDMENT X: Commencement of Representation

10.01 Provide language in all caps that client understands and acknowledges that attorney-client relationship does not commence and that legal services and work will not begin until initial fee requirements have been paid and the employment contract signed and returned to the lawyer.

C. Arbitration Language in Fee Contract
A growing number of attorneys are utilizing arbitration language in their attorney-client fee contracts for the purpose of settling fee disputes and malpractice disputes. However, the following discussion will show that it is acceptable to agree to arbitration to resolve a fee dispute, but not acceptable to resolve a malpractice dispute.

1. Agreements to Arbitrate Fee Disputes
Bar Associations have encouraged the arbitration of fee disputes between lawyers and clients for years. See ABA Model Rules of Arbitration (1995). Comment 19 of Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct endorses the arbitration of fee disputes and states in part:

"Fee Disputes and Determinations"

19. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by a bar association, the lawyer should conscientiously consider submitting to it...

2. Agreements to Arbitrate Malpractice Disputes
The authority to arbitrate malpractice disputes is not as clear, but does exist. In the newsletter entitled “Ethics Chat”, Issue 5, Volume 3, January 2000, by Walter W. Steele, Jr. and David J. Moraine, the topic
of arbitration clauses in fee contracts is discussed extensively. Walter W. Steele, Jr. states that by its very nature, arbitration short circuits some of the procedures inherent in typical judicial disputes. For example, an agreement to arbitrate is tantamount to a waiver of the right to a jury trial. Walter W. Steele, Jr. further states, “Therefore one can argue that asking a client to agree to an arbitration clause that includes any prospective acts of legal malpractice or breach of fiduciary duty limits the lawyer’s liability to a client, because the clause limits the range of processes that otherwise would be available to the client if the client sought redress for those acts in court.”

Prospectively limiting a lawyer’s liability to a client for malpractice is strictly controlled by Rule 1.08(g) of the Texas Disciplinary Rules of Professional Conduct which states as follows:

“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.”

Agreement to Arbitrate Malpractice is Enforceable

Provisions in an Attorney-Client Fee Agreement wherein the attorney and client agreed to binding arbitration in the event of a malpractice dispute between the client and the attorney was held to be enforceable in Henry v. Gonzales, 18 S.W. 3rd 684 (Tex.App.-San Antonio 2000, petition for review dism’d February 1, 2001). The Henry v. Gonzalez case arises from the efforts of two attorneys, Thomas Henry and Michael Hearn, to compel the arbitration of a legal malpractice claim filed against them by Hector Gonzales. Hector and Noela Gonzalez hired Thomas Henry and Michael Hearn in March of 1997 to pursue a medical malpractice action in their behalf. On December 17, 1997, prior to the filing of an original petition in the case and approximately two weeks before the expiration of the statute of limitations, Henry sent a letter to the Gonzalezes stating that he and Hearn intended to terminate the attorney-client contract and thus the attorney-client relationship. The Gonzalezes immediately contacted another attorney, Raul Garcia, who wrote a letter to Henry, encouraging him to continue on the case through filing the original petition. Henry subsequently filed a petition in Corpus Christi, a place of improper venue, against the defendants in the medical malpractice case. However, Henry did not notify the Gonzalezes or Garcia that he filed the petition, nor did he return the case file to them. Although Henry signed the petition as the attorney of record, Henry titled it as a "pro se" petition. Henry did not serve the defendants, and the statute of limitations expired without a proper suit being filed.

The Gonzalezes subsequently filed suit against Henry and Hearn, alleging causes of action for legal malpractice, breach of fiduciary duty, and violations of the Texas Deceptive Trade Practices Act. The Gonzalezes also sought a declaratory judgment that the arbitration clause in the attorney-client contract was unenforceable and void as a matter of public policy. Henry and Hearn filed a motion to compel arbitration against Hector Gonzalez contending that the attorney-client contract mandated disposition of the dispute by arbitration. The Gonzalezes prevailed at the trial court and the attorneys appealed. The Court of Appeals in the 2-1 decision, ruled that the trial court should have compelled arbitration. The San Antonio Court of Appeals based its decision in part on Dallas Cardiology Associates, P.A. v. Mallick, 978 S.W.2d 209, 212 (Tex.App. Texarkana 1998, writ denied) and cited Dallas Cardiology Associates, P.A. v. Mallick as follows:

“In determining whether to compel arbitration, the trial court must decide the following: (1) whether a valid, enforceable arbitration agreement exists, and (2) if so, whether the claims asserted fall within the scope of that agreement. Dallas Cardiology Assoc., P.A. v. Mallick, 978 s.W2d 20, 212 (Tex. App. Texarkana 1998, writ denied). If the answers to both prongs are affirmative, the trial court has no discretion but to compel arbitration and stay its proceedings pending arbitration. Id. The party seeking arbitration has the initial burden to establish his right to the remedy under the first prong; that is, to establish that a valid arbitration agreement exists. Id. Once the existence of an arbitration agreement has been established, a presumption attaches favoring arbitration. Id. At this point, the burden shifts to the opposing party to establish some ground for the revocation of the arbitration agreement. Such grounds include fraud, waiver, unconscionability, or that the dispute falls outside the scope of the agreement. Id. Under the second prong, to determine whether a claim falls within the scope of an arbitration agreement, the trial court must examine the factual allegations of the complaint, rather than the legal causes of action asserted. Id. The trial court must
resolve any doubt about these issues in favor of arbitration. Id."

The employment contract was signed by Hector Gonzalez, not his wife. Therefore, the ruling of the Court of Appeals applied only to Hector Gonzalez. The employment contract contained arbitration language that stated in part as follows: "Any and all disputes, controversies, claims, or demands arising out of or relating to this Agreement or any provision hereof, the providing of services by Attorneys to Client, or in any way relating to the relationship between Attorneys and client whether in contract, tort, or otherwise, at law or in equity, for damages or any other relief, shall be resolved by binding arbitration..." Just above the signature line, the contract contained the following inscription: "THIS CONTRACT IS SUBJECT TO ARBITRATION UNDER THE TEXAS GENERAL ARBITRATION STATUTE." The top of the first page of the contract contains the following inscription, "THIS CONTRACT IS SUBJECT TO ARBITRATION."

One of the issues in the opinion was whether Henry and Hearn's termination of the attorney-client contract also terminated any application of the internal mandatory arbitration clause. Because this issue is a question of law, subject to de novo review, the Court of Appeals addressed the issue and decided that the internal mandatory arbitration clause survived the termination of the attorney-client contract. At the time the attorney-client contract was executed, the Texas Arbitration Act provided: "A written agreement to submit any controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Tex. Civ. Prac. & Rem. Code Ann §171.001 (West 1997) (amended by Tex.Civ.Prac.& Rem. Code. Ann.§ 171.001(a),(9b) (West Supp. 2000), effective Sept. 1, 1997)."


"In Pepe, the Houston Court of Appeals recognized that the Texas Arbitration Act mandated that the agreement to arbitrate contained in a written contract is separable from the entire contract. Id. (Citing Miller v. Puritan Fashions Corp., 516 S.W.2d 234, 238 (Tex.Civ.App.-Waco 1974, writ ref. n.r.e.) (addressing the issue under the FAA)). The Pepe Court held that any arbitration agreement contained within the contract is valid and enforceable in spite of any attack made upon the contract as a whole. Miller, 516 S.W.2d at 218. More recently, the Dallas Court of Appeals followed Pepe in a case brought under the TAA in its present form. See Dallas Cardiology Assoc., 978 S.W.2d at 213; see also Tex. Civ. Prac. & Rem. Code Ann § 171.001(a), (b) (West Supp.2000). The Dallas Court of Appeals held that the arbitration clause contained within a contract between the parties remained in effect and enforceable in spite of any alleged or disputed breach of the contract. Id."

Following the line of reasoning of the above cases, the San Antonio Court of Appeals held that an arbitration agreement contained within a contract survives the termination or repudiation of the contract as a whole. See Dallas Cardiology Assoc., 978 S.W.2d at 213; Pepe Int'l. Dev. Co., 915 S.W.2d at 932; Miller, 516 S.W.2d at 238.

The San Antonio Court of Appeals then addressed two grounds for revocation of the arbitration agreement argued by Gonzalez: (1) the application of the arbitration clause to this case violates public policy and (2) fraudulent inducement. The Court held: "Gonzalez's public-policy contentions are unfounded because well established case law favors mandatory arbitration and holds that arbitration does not deny parties their right to a jury trial, as a matter of law. See Jack B. Anglin Co., Inc., 842 S.W.2d at 268; Fridl, 908 S.W.2d at 511; D. Wilson Const. Co., Inc. v. McAllen Ind. Sch. Dist., 848 S.W.2d 225, 231 (Tex. App. - Corpus Christi 1992, writ dis'd w.o.j.)."

Regarding the fraudulent inducement argument, the San Antonio Court of Appeals held:

"To the extent Gonzalez argues that he was fraudulently induced to sign the contract containing the arbitration clause due to his decreased mental capacity and the fact that the arbitration clause was not conspicuous, his argument fails. An allegation that the contract itself was fraudulently induced is a matter to be decided by the arbitrator. See In re Weekley Homes, 985 S.W.2d 111, 115 (Tex.App.-San Antonio 1998, writ denied); Pepe Int'l. Dev. Co. v. Pub Brewing Co., 915 S.W.2d at 930. Fraudulent inducement to sign the contract, thus, cannot support the trial court's order denying Henry and Hearn's motion to compel arbitration, as a matter of law."
Next, the San Antonio Court of Appeals addressed whether the matters asserted in this dispute fall within the scope of the arbitration agreement and held:

“The matters in controversy fall within the scope of the arbitration agreement because the factual allegations forming the bases of the Gonzalezes’ legal malpractice and breach of fiduciary duty causes of action necessarily arose from Henry and Hearn's representation of the Gonzalezes under the attorney-client contract. The Gonzalezes’ DTPA cause of action falls within the scope of the arbitration agreement because the actions forming the basis of this cause of action related to “the providing of services” by Henry and Hearn to the Gonzalezes, necessarily related to that relationship, and were so factually interwoven with the contract that such action could not stand alone. See Ford v. NYLCare Health Plans of Gulf Coast, Inc., 141 F.3d 243, 250 (5th Cir. 1998).”

Chief Justice, Phil Hardberger, filed a dissenting opinion, stating that public policy should not allow an arbitration agreement to be binding in a case involving an attorney fee contract. Justice Hardberger explained that in a serious personal injury case, clients are typically deeply in grief, overwhelmed by the circumstances that have come upon them and are vulnerable. Justice Hardberger further states, “More importantly, the fundamental fiduciary nature of the attorney-client relationship dictates against an attorney fee contract. Clients are often in vulnerable positions, requiring them to bestow a large amount of trust in their attorneys.” Justice Hardberger then quotes the following language from a South Texas Law Review article: “The client’s vulnerability vis-a-vis the attorney is often exacerbated by the client's current legal situation... He is neither expecting, nor emotionally prepared, to ‘do battle’ with his chosen attorney to protect his own rights.” Powers, “Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR”, 38 S. Tex. L. Rev. 625, 648 (1997).

Justice Hardberger cites other articles and then states, “The essence of these articles is that whatever public policy may be served by enforcing arbitration agreements is more than offset by the public policy of not allowing attorneys to take advantage of their clients. Trust is the essential ingredient in an attorney-client relationship. The great majority of clients are not even close to being in an equal bargaining position with their attorneys.” 

The points made by Justice Hardberger regarding the vulnerability and emotionality of a personal injury client are certainly applicable to family law clients. When Hardberger's public policy argument is combined with Rule 1.08(g) of the Texas Disciplinary Rules of Professional Conduct which states 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 at the time of making the agreement, it appears that this issue may be far from being clearly resolved.

**Agreement to Arbitrate Malpractice Dispute Not Enforceable**

In re Godt, 28 S.W. 3rd 732 (Tex.App.-Corpus Christi 2000, no writ) held that the agreement to arbitrate a legal malpractice case was not enforceable. Godt was a mandamus proceeding wherein Pamela Godt sought relief from the order of a trial court compelling arbitration under the Texas General Arbitration Act (the TAA) of her legal malpractice action against real party-in-interest attorney Thomas J. Henry (Henry). Yes, this is the same Thomas Henry as mentioned in the foregoing case of Henry v. Gonzalez, 18 S.W.3rd 684 (Tex.App.-San Antonio 2000, petition dis'd February 1, 2001), with the same attorney-client contract, same complaint, and most distressingly a virtually identical fact pattern with a different client.

Godt signed the contingent fee contract presented by Henry's paralegal. The paralegal did not explain or discuss any of the provisions contained in the agreement with Godt. Godt alleges Henry failed to investigate or pursue her medical malpractice claim. Shortly before the statute of limitations expired, Henry attempted to refer the case to two other attorneys. Godt contends that by that time, there was insufficient time to adequately investigate or prepare the case, and both attorneys rejected her case. With only a couple of months left before limitations expired, Henry withdrew from representation. However when Godt complained that she was unable to obtain another lawyer under the circumstances, Henry prepared a pro se petition.

Godt filed suit against Henry, alleging his mishandling of her medical malpractice claim constituted negligence, gross negligence, fraud, misrepresentation, breach of fiduciary duty, and violations of the Deceptive Trade Practices Consumer Protection Act. Henry answered, and filed a motion to compel arbitration based on the mandatory arbitration clause contained in the contingent fee contract. The trial court granted Henry's motion to compel arbitration and stayed the lawsuit pending resolution by binding arbitration. Godt sought a writ of mandamus from the Corpus Christi Court of Appeals.

The Corpus Christi Court of Appeals held that the trial court abused its discretion. As it turned out, Henry never signed his own contingent fee contract.
At page 738 of the opinion, the court states that section 82.065(a) of the Texas Government Code provides that a contingent fee contract for legal services must be in writing and signed by the attorney and client. It was undisputed that the contingent fee contract was signed only by Godt. Therefore, the Corpus Christi Court of Appeals held that Henry may not enforce the arbitration agreement in the contingent fee contract.

Importantly, the Corpus Christi Court of Appeals held that even if the contingent fee agreement met the requirements of Texas Government Code Section 82.065(a) the arbitration agreement in the contingent fee contract would still not have been enforceable under the Texas General Arbitration Act (TAA) section 171.002(a)(3). The Court stated at page 739:

"The TAA does not apply to a claim for personal injury unless: (1) each party to the claim, on the advice of counsel, agrees in writing to arbitrate; and (2) the agreement is signed by each party and each party's attorney. Tex.Civ.Prac.&Rem.Code Ann.§ 171.002(a)(3), (c) (Vernon Supp.2000)."

Texas law classifies a legal malpractice claim as a personal injury action. Sample v. Freeman, 873 S.W.2nd 470, 476 (Tex.App.-Beaumont 1994, writ den'd). The Corpus Christi Court of Appeals further ruled in Godt at page 739:

"It is undisputed that Godt was not acting on the advice of counsel when she signed the agreement and that the agreement is not signed by an attorney representing either party. We hold that a claim for legal malpractice is a claim for personal injury within the meaning of section 171.002(a). We further hold the arbitration agreement is unenforceable under the TAA."

Because the Corpus Christi Court of Appeals in Godt concluded the arbitration agreement was unenforceable because the agreement fell within the personal injury exception of Section 171.002(a)(3)c, Tex.Civ.Prac.&Rem.Code, the court did not address Godt's arguments that the agreement was unenforceable on public policy grounds. However, the court noted in footnote 7, page 739, that Rule 1.08(g) of the Texas Disciplinary Rules of Professional Conduct provides, in relevant part:

"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, ... Tex.R.Prof. Cond. 1.08(g), reprinted in Tex.Gov't. Code Ann. tit. 2 subtit. G app. A (Vernon 1998)."

3. Arbitrating Grievance Disputes
   No legal authority could be found to support arbitration language in a fee contract as a means to resolve a grievance dispute. Given the peculiar nature of the grievance process and its quasi-criminal nature as a means for handling allegations of misconduct, it appears unlikely that a court would approve arbitration language in an attorney-fee contract that would subvert the public disciplinary, grievance process.

V. COLLECTING ATTORNEYS' FEES
A. Charging Interest on Attorneys' Fees
1. Not Unethical or Illegal
   Texas Committee on Professional Ethics Opinion 409, January 1984, states that it is permissible for an attorney to charge interest on unpaid balances of fees owed to the attorney by a client, provided that the interest charged is reasonable and the underlying fee is reasonable. The original fee cannot be excessive or unconscionable, in violation of Rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct. The interest rate cannot violate Texas usury laws as set forth in the Texas Finance Code, Title IV, Regulation of Interest, Loans, and Financed Transactions, subtitled A. Interest, Chapters 301, 302, 303, and 305. In some instances, the interest charged and the credit arrangements made must comply with Regulation Z of the Federal Truth in Lending Act.

2. Usury
   a. Creating a cause of action against yourself
      If a lawyer has a client sign a note for attorney's fees owed at the end of a case and charges interest thereon, the lawyer has engaged in a closed-end credit transaction. If a lawyer's fee contract allows the lawyer to charge interest on the unpaid balance of attorney's fees as the fees are incurred and billed monthly, the lawyer may have engaged in an open-end credit transaction.

Section 302.001(b) of the Texas Finance Code reads as follows:

"The maximum rate or amount of interest is ten percent a year except as otherwise provided by law. A greater rate of interest than ten percent a year is usurious unless otherwise provided by law. All contracts for usurious interest are contrary to public policy and subject the appropriate penalty prescribed by Chapter 305."

Section 303.001(a) of the Texas Finance Code reads as follows:
“Except as provided by Subchapter B, a person may contract for, charge, or receive a rate or amount that does not exceed the applicable interest rate ceiling provided by this chapter. The use of a ceiling provided by this chapter for any contract is optional, and a contract may provide for a rate or amount allowed by other applicable law.”

Section 303.009 of the Texas Finance Code provides for various interest rates based on a weekly, monthly, quarterly, or annualized ceiling, resulting in interest rates of 18%, 24%, 28%, or 21% per year. Legally charging an interest rate under this section, requires expertise beyond that of the ordinary lawyer attempting to collect some interest on the unpaid balance of attorney's fees. Prudence would dictate that an attorney would never charge interest above the ten percent rate set forth in Section 302.001(b) of the Texas Finance Code.

The penalties for charging an interest rate above the maximum amount allowed are set forth as follows:

"Finance Code Section 305.001. Liability for Usurious Interest.

(a) A creditor who contracts for, charges, or receives interest that is greater than the amount authorized by this subtitle is liable to the obligor for an amount that is equal to the greater of:

(1) three times the amount computed by subtracting the amount of interest allowed by law from the total amount of interest contracted for, charged, or received; or
(2) $2,000 or 20 percent of the amount of the principal, whichever is less.

(b) This section applies only to a contract or transaction subject to this subtitle.

"Finance Code Section 305.003. Liability for Usurious Legal Interest.

"(a) A creditor who charges or receives legal interest that is greater than the amount authorized by this subtitle is liable to the obligor for an amount that is equal to the greater of:

(1) three times the amount computed by subtracting the amount of legal interest allowed by law from the total amount of interest charged or received; or
(2) $2,000 or 20 percent of the amount of the principal, whichever is less.

(b) This section applies only to a transaction subject to this subtitle.

"Finance Code Section 305.005. Attorney’s Fees.

"A creditor who is liable under Section 305.001 or 305.003 is also liable to the obligor for reasonable attorney’s fees set by the court.

"Finance Code Section 305.008. Criminal Penalty.

(a) A person commits an offense if the person contracts for, charges, or receives interest on a transaction for personal, family, or household use that is greater than twice the amount authorized by this subtitle.

(b) An offense under this section is a misdemeanor punishable by a fine of not more than $1,000.00.

(c) Each contract or transaction that violates this section is a separate offense.

(d) This section applies only to a contract or transaction subject to this subtitle.

3. Truth in Lending Act, Regulation Z
Under the Truth in Lending Act, 15 U.S.C. 1601, et seq., and Regulation Z, 12 C.F.R. 226, any person, including a lawyer, who regularly extends credit to a
natural person primarily for personal, family, or household purposes must make certain written disclosures to the consumer before the first credit transaction. The purpose of Regulation Z is to promote the informed use of consumer credit by requiring disclosures about its terms and costs. Regulation Z applies to an individual or business, offering or extending credit when four conditions are met: (1) the credit is offered or extended to consumers; (2) the offering or extension of credit is done regularly; (3) the credit is subject to a finance charge or is payable by a written agreement in more than four installments (not including a down payment); and (4) the credit is primarily for personal, family or household purposes. 12 C.F.R. 226.1(c)(1).

Under Regulation Z, Section 226.2(17)(i), "regularly extends credit" is defined as person extending credit more than 25 times (or more than 5 times for transactions secured by a dwelling) in the preceding calendar year. If a person did not meet these numerical standards in the preceding calendar year, the numerical standards shall be applied to the current calendar year. Violations of Regulation Z and the Truth in Lending Act can result in the forfeiture of interest, penalty payments, and attorney's fees. According to 15 U.S.C. 1607(c), the Federal Trade Commission is the overall enforcing agency. Not only are there civil penalties for noncompliance, Section 1611 of the Truth in Lending Act sets forth that any person who willfully and knowingly violates the Act or Regulation Z is subject to criminal liability of a fine of not more than $5,000 or imprisonment for not more than one year, or both.

Unfortunately, it appears that the burdensome requirements of the Truth in Lending Act and Regulation Z apply to many attorneys who charge interest on their fees. Utmost caution should be exercised by attorneys in this area.

**B. Filing Suit for Fee**

It is improper for a lawyer to secure a judgment for legal fees against his client in the same suit in which the client is being represented by the lawyer. Texas Committee on Profession Ethics Opinion 374, September 1974. This means that the lawyer cannot prepare a divorce decree which includes a judgment for recovery of his fees against the client. This conduct would be a violation of Rule 1.06. However, a lawyer can certainly put language in the decree of divorce awarding debts to husband and debts to wife, among which would include husband’s attorney’s fees and wife’s attorney’s fees. Allocating a debt for these attorney’s fees is a far different matter than language for a judgment for attorney’s fees which if not timely paid, let execution issue.

The proper procedure would be to withdraw from representation as per Rule 1.15 and then intervene in the same suit or file a separate suit.

Nearly every talk on the subject of lawyer grievances and malpractice provides advice not to sue a client for a fee because of the probability of being sued for malpractice. Issue No. 1 of the 2005 Texas Lawyers’ Insurance Exchange Legal Malpractice newsletter points out that suits and interventions for fees should be avoided. Legal malpractice is a mandatory counterclaim in a fee suit and a defense to payment of fees. The article further states that lawyers often do not analyze whether their time is more valuable when spent on other paying clients rather than on pursuing uncollected fees.

**C. Withholding Services until Fee is Paid**

A lawyer may condition acceptance of employment on payment of a fee in advance, but may not condition the completion of legal services on payment of unpaid portions of the fee. Late payment or nonpayment of an attorney’s fees does not justify withholding services from a client in the same manner that nonpayment of child support does not justify withholding visitation rights. If a client refuses to pay fees on request or as they become due, the attorney may withdraw from employment in accordance with the provisions of TDRPC, Rule 1.15(b)(5). Before withdrawal is proper, the attorney must obtain permission from the court before which the attorney has acted as the attorney of record for the client in accordance with Rule 10 of the Texas Rules of Civil Procedure. In any event, upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation. Rule 1.15(d) Texas Disciplinary Rules of Professional Conduct.

**D. Assertion of Attorney Lien Probably Unethical**

Under Rule 1.14(b) of the Texas Disciplinary Rules of Professional Conduct, a lawyer shall deliver to the client as requested by the client properties in possession of the lawyer which the client is entitled to receive. Also see Texas Committee on Professional Ethics Opinion 395, 1979 and Opinion 411, January 1984. Therefore, unless the client has executed a properly drawn security agreement, wherein specific property has been given as collateral to secure the attorney's fee, thus making the client not entitled to the property until the fee is paid, the lawyer must deliver
the property to the client. Thus, a security agreement giving a lawyer a lien on a hunting rifle to secure the lawyer's fee would be proper. The use of a security agreement to place a lien on property is entirely different from the retention by the attorney of the agreement to place a lien on property is entirely different from the retention by the attorney of the client's file containing papers and documents relating to the case and without which, the client could not properly proceed. Under Rule 1.15(d) of the Texas Disciplinary Rules of Professional Conduct, a lawyer withdrawing from representation must take all reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying applicable laws and rules. Thus, if assertion of an attorney's lien would result in foreseeable prejudice to the client, the lien cannot be ethically exercised.

Often, an attorney incorrectly believes that a client's attempt to dismiss him can be denied on an attorney's lien theory. Under Rule 1.15(a) of the Texas Disciplinary Rules of Professional Conduct, a lawyer who is discharged by a client must withdraw from employment. The language of the provision is mandatory.

Texas attorneys are regularly disciplined, as noted in nearly every issue of the Texas Bar Journal, for failing to return a client's file upon demand after termination of the attorney-client relationship.

E. Use of a Collection Agency

Many lawyers and law firms eventually turn over their accounts receivable to collection agencies. However, my firm received a letter dated May 31, 2005 from its collection agency alerting the firm to Texas Ethics Opinion 464, August 1989, stating that a lawyer could violate Rule 1.05 on confidentiality. Rule 1.05(a) states that confidential information includes both privileged information and unprivileged client information. The lawyer cannot reveal the confidential information except in very narrow circumstances. Under Rule 1.05(b) a lawyer is required to protect from disclosure confidential information regarding the lawyer's clients or former clients unless a specified exception applies. There are two principle exceptions that may apply to permit the disclosure of confidential information with respect to a client's legal fees. First, under Rule 105(c)(5), a lawyer may disclose confidential information "to the extent reasonable and necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client. This would include a fee dispute referred to an arbitration committee, as well as a grievance or malpractice suit filed by a client against a lawyer. It would also include a suit filed by a lawyer to collect the fee. Second, under Rule 1.05(c)(2), the lawyer may disclose confidential information if the client consents after consultation.

Opinion 464 states the following:

"Although under Rule 1.05(c)(5) a lawyer may disclose confidential client information to the extent reasonably necessary in a legal proceeding that is brought by the lawyer to collect a fee, disclosure of confidential client information as part of the sale of a delinquent account receivable to a factor is not necessary for the enforcement of the claim for the lawyer’s fee. Accordingly, consent of the client is the only permissible basis for the disclosure of confidential client information incident to a sale of delinquent accounts receivable to a factor.

"A client’s consent to the disclosure of confidential information is effective only if such consent is informed and uncoerced. Although consent “after consultation” is required by Rule 1.05 (c)(2), such consultation may occur at the outset of the lawyer-client relationship rather than only after an account receivable has arisen and has become delinquent. Hence such consent could be obtained at the time the lawyer accepts employment from the client and could be made part of an engagement letter.”

The Opinion further states that a lawyer could make the client’s consent on this matter a condition of the lawyer’s accepting employment, but after commencing representation, the lawyer could not try to coerce a client’s consent by threatening to withdraw from representation or to take some other action adverse to the client’s interest if the consent was not given. Ethics Opinion 484 concludes that a lawyer may not turn over an accounts receivable to a collection agency unless each client involved has previously given consent, after consultation with the lawyer, to the disclosure of confidential information incident to the collection of the accounts receivable.

As a result of the warning letter my firm received from the collection agency, and reading Opinion 464, my firm has added the following language to our Employment Contract:

"In the event Client fails to pay the balance owed to Firm, Client understands that Firm has a right to pursue collection remedies by either filing a lawsuit or by turning the account receivable over to a collection agency. Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct protects Client’s confidential information received by..."
Firm. Client consents and authorizes Firm to reveal confidential information to a collection agency or to another law firm for the purpose of Firm collecting fees owed by Client to Firm.”

VI. MISCELLAENOUS ETHICAL CONSIDERATIONS

A. Duty to Report Fraud by Client

Rule 3.03, Candor Toward the Tribunal, states that a lawyer may not knowingly make a false statement of a material fact or law to a tribunal or offer or use evidence that the lawyer knows to be false. Additionally, Rule 3.03(a)(2) states that a lawyer shall not knowingly fail to disclose the fact to the tribunal when the disclosure is necessary to avoid assisting a criminal or fraudulent act. Texas Ethics Opinion 473, June 1991, answered the following question in regard to Rule 3.03: What is the duty of appointed counsel to disclose the fraud of an allegedly indigent client? If an attorney is appointed to represent a defendant in a criminal case after the defendant has signed a sworn statement under oath that he is indigent and cannot hire an attorney and the appointed attorney later learns that the defendant was not indigent when the defendant signed the statement, the attorney has a duty to disclose fraud to the court. The opinion also addressed the same fact situation as above, except that the defendant was in fact unemployed and indigent at the time he signed the oath, but subsequently during the pendency of the case, obtained employment which enabled him to employ retained counsel. The opinion stated that the appointed attorney in both instances should attempt to get the defendant to terminate the appointment wherein the state was paying for the fees and either utilize the same attorney or a different attorney with the defendant paying his own attorney’s fees. If the attorney could not convince the defendant to do so, the attorney has a duty to report the fraud to the tribunal. This same situation could apply in a family law case where the state is seeking to terminate parental rights and appoints an attorney to represent the parent who claims to be indigent.

If a lawyer learned that the client has lied to the lawyer and lied under oath in court at a temporary hearing, the lawyer has a duty to get the client to correct the testimony. If the client refuses to correct the testimony, the lawyer has a right to withdraw from representation of the client. Rule 1.15 states the instances where a lawyer can withdraw from representation. Rule 1.15(b) states that a lawyer can withdraw if a client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes to be criminal or fraudulent or if the client has used the lawyer’s services to perpetrate the crime or fraud. Based on Rules 1.15 and 3.03, a client lying to a lawyer and lying under oath at a deposition or in a hearing provides just cause for an attorney to withdraw.

B. Reporting Professional Misconduct

Rule 8.03 reads as follows:

“(a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.

“(b) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.

“(c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of this Rule is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyer’s report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) or (b).

“(d) This rule does not require disclosure of knowledge or information otherwise protected as confidential information:

“(1) by rule 1.05 or
“(2) by an statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.”

Comment 1 under Rule 8.03 states that self-regulation of the legal profession requires that members of the legal profession initiate disciplinary investigations when they have knowledge not protected by Rule 1.05 that a violation of the rules has occurred. A lawyer should not fail to report an apparent disciplinary violation merely because the lawyer cannot determine its existence or scope with absolute certainty. Reporting a violation is especially important where the victim is unlikely to discover the offense. Comment 1 Rule 8.03.

Texas Committee on Professional Ethics Opinion 520, May 1997, addresses the duty to report and Rule 8.03. Comment 3 of Rule 8.03 states that the Rule is
not intended to, nor does it, limit those actual or suspected violations that a lawyer may report to an appropriate disciplinary authority. Rather, lawyers are instructed to use their best judgment in complying with the reporting requirements of the rule. The text of Rule 8.03(a) requires that a lawyer have knowledge (rather than suspicion) that another lawyer has committed a violation of the applicable rules before informing the appropriate disciplinary authority. A report of misconduct must therefore be based on objective facts that are likely to have evidentiary support. If a lawyer has knowledge, not mere suspicion, that has evidentiary support, a lawyer is required to report violations of the applicable rules of professional conduct that raise a substantial question as to a lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.

C. Reporting a QDRO Mistake

Texas Ethics Opinion 534, September 2000, addresses these questions regarding the duty to report a defective QDRO:

“Does an attorney who represents a non-employee spouse in a divorce proceeding violate the Texas Disciplinary Rules of Professional Conduct (the “Rules”) if the attorney prepares a materially defective Qualified Domestic Relations Order (“QDRO”) and does not correct the defects after being informed of the defects by an attorney reviewing the proposed QDRO for the employer concerned? If such conduct by the divorce attorney constitutes a violation of the Rules, is the employer’s attorney who notifies the divorce attorney of the defects in the proposed QDRO required to report such a violation to the appropriate disciplinary authority?”

Under Texas Disciplinary Rule 1.01, an attorney must represent a spouse in the divorce, including preparation of the QDRO, with competence and must not neglect this representation. Rule 1.01(a) and 1.01(b)(1). Rule 1.01(c) defines “neglect” for the purposes of Rule 1.01(b)(1) as signifying “inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.” These standards require that an attorney must correct material defects and work for a client if the attorney’s attention is called to the defect at a time when correction is possible. The Opinion further states that an attorney may or may not be permitted under the standards of Rule 1.04 to charge the client for services rendered to correct the defective QDRO. A personal comment: Never charge a client for correcting mistakes you make. The Ethics Opinion concluded that if the divorce attorney did not correct the defect in the QDRO and the employer’s attorney concluded that the divorce attorney’s failure as to the QDRO raised a substantial question with respect to the divorce attorney’s honesty, trustworthiness of fitness as a lawyer, the employer’s attorney should report the violation of the rules.

D. Attorney-Client Relationship

The lawyer should care about the client as a person. The lawyer should show that he or she cares. The lawyer shows care by listening and communicating. A huge source of grievances is violation of Rule 1.03, failing to keep a client informed and failing to communicate with the client about the status of the case. A lawyer’s “bedside manner”, to use a phrase from the medical community, can be as important as the lawyer’s expertise. Just as a doctor has to understand the patient as a person, a lawyer has to understand a client as a person. A lawyer must focus on the importance of empathy and respect in the attorney-client relationship and show the client care and compassion.

Whether it is a physician-patient relationship or attorney-client relationship, the nature of the relationship is critically important. It is pointed out in the book, Blink by Malcolm Gadwell on pages 39-43. Analyses of medical malpractice suits showed there are highly skilled doctors who get sued a lot and doctors who make many mistakes and never get sued. Studies further showed that an overwhelming number of people who suffer an injury due to negligence of a doctor never file a malpractice suit at all. In other words, patients do not file lawsuits because they have been harmed by shoddy medical care. Patients file lawsuits because they have been harmed by shoddy medical care and something else happens to them. The studies revealed that the something else is poor doctor-patient relationship or bad bedside manner. The study revealed that what comes up again and again in malpractice cases is that patients say that they were rushed or ignored or treated poorly. “People just don’t sue doctors they like, is how Alice Burkin, a leading malpractice lawyer puts it.” The book further explained that recently the medical researcher, Wendy Levinson, recorded hundreds of conversations between a group of physicians and their patients. Roughly one-half of the doctors had never been sued and the other half had been sued at least twice. Levinson found just on the basis of those conversations, that there were clear differences between the two groups. The surgeons who had never been sued spent more than three minutes longer with each patient than those who had been sued (18.3 minutes versus 15 minutes). Surgeons who spent more time with patients were more likely to make “orienting” comments such as “First I will examine you, and then we will talk the problem over” or “I will leave time for your
questions”, all of which help patients get a sense of what the visit is supposed to accomplish and when they ought to ask questions. The group that was not getting sued was engaging in active listening and saying such things as, “Go on, tell me more about that”, and they were far more likely to laugh and be funny during the visit. The study further revealed that there was no difference in the amount or quality of information that the two groups of doctors gave their patients. The difference was entirely in how they talked to their patients. In other words, the doctors with a good bedside manner showed their patients that they cared, causing the patients to like their doctor.

It appears to me that the above referenced studies involving doctors are remarkably applicable to lawyers. A legal assistant in my office has the following saying as her screen saver, “The client does not care how much you know, until the client knows how much you care.” Therefore, lawyers must take time to talk to a client as a person, ask the client about their children, their pets, etc. A lawyer’s intake sheet provides the date of birth for a client, so call them on their birthday and wish them well. If you know that your client or one of their relatives is having surgery, send them a card or certainly ask them how things went.

E. Ethics Resources

A terrific resource on ethics for Texas lawyers is a book published by the State Bar of Texas and the Texas Young Lawyers’ Association entitled, Texas Lawyers’ Professional Ethics, which provides exhaustive information on the Texas Disciplinary Rules of Professional Conduct, summaries of opinions by the Committee on Professional Ethics and an index to Ethics Opinions, and information on the Texas Rules of Disciplinary Procedure. Another excellent resource on ethical issues is the Texas Center for Legal Ethics and Professionalism, which has a very helpful website. A lawyer can become a member for as little as $100. The center offers three free hours of Ethics CLE to its members. From the website, you can access the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, Texas Ethics Opinions, Texas Bar Journal articles, Law Review articles, and much more. There is a section on Texas cases that provides a list of key cases under such headings as Conflicts of Interest, Statute of Limitations, Malpractice, Misconduct and Negligence, as well as Attorneys’ Fees. The website for the Texas Center for Legal Ethics and Professionalism is www.txethics.org.

VII. CONCLUSION

Care about your client. Communicate with your client. Be fair, honest and reasonable. Do not be greedy about attorneys’ fees. Do unto others as you would have them do unto you.