WHAT ARE REASONABLE ATTORNEY FEES?

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After receiving his BA in Government from the University of Texas at Austin in 1994, Benjamin obtained his JD from the University of Houston Law Center in 1997, where, among other accomplishments, he was named a Dean’s Scholar, was Editor-in-Chief of Legalese, the official student publication of the University of Houston Law Center, and received awards for outstanding achievement in legal research and best brief in legal writing.

Benjamin is the 2006-07 Chair of the State Bar of Texas Hispanic Issues Section, as well as the 2007-08 President of the Mexican-American Bar Association of Houston and the 2006-07 President-Elect of the Mexican American Bar Association of Texas. Benjamin served as the Co-Chairman of the Pro Bono Subcommittee of the ABA Section of Litigation Trial Practice & Procedure Committee from 2005 to 2007. Benjamin currently serves on the Board of Trustees of the Houston Lawyer Referral Service, the Editorial Board of The Houston Lawyer magazine, and the City of Houston Automotive Board (appointed by Mayor Bill White).

Benjamin has been Chair of the Houston Bar Association’s Lawyers in Public Schools Committee and a member of the Houston Bar Association’s Speakers Bureau Committee. Benjamin was a member of the award-winning 2005-06 Editorial Board of The Houston Lawyer, which received the State Bar of Texas’ Best Publication Award for 2005-06, and was named a “Local Hero” by the 2004-2005 Editorial Board of The Houston Lawyer (of which he was not a member at the time).

Benjamin has spoken to and taught students from elementary school to law school and to adult groups on a myriad of subjects, including the power of positive thinking, setting and achieving goals, the importance of education, choosing law as a career, our justice system and how it operates, the everyday life of a litigator, the importance of our jury system, and the 50th Anniversary of Brown v. Board of Education. Benjamin was chosen to give the New Century 8th Grade Promotion Keynote Speech at his alma mater, Alexander Hamilton Middle School in the Houston Heights in 2000. Benjamin has been married for 15 years.
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WHAT ARE REASONABLE ATTORNEY FEES?

by

Benjamin K. Sanchez

I. Introduction

Some lawyers tend to give short shrift to proving up attorney fees, believing that they can “self testify” without argument. Yet, I have seen lawyers stumble when questioned about the reasonableness of their fees in a default hearing, let alone a jury trial with opposing counsel. Lawyers must prepare their attorney fees evidence and arguments as vigorously as the underlying representation or be subject to doing all of their work for less compensation than expected.

Fees are the life blood of a legal practice. Attorney fees are subject to a reasonableness standard, whereas general business transactions are not. But for extreme cases such as gasoline prices during hurricane evacuations, a seller and a purchaser are free to agree on any price for a product or service in our economic system. Yet, an attorney is restricted from exercising the same type of business judgment. Even should a client and an attorney agree to a fee, that fee could later be determined to be unreasonable and the fee reduced or revoked in its entirety!

II. Texas Disciplinary Rules of Professional Conduct

Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct3 (“the Rules”) concerns attorney fees. Before reviewing that particular rule, we need to put that rule into context.

A. The Preamble

The Preamble to the Rules set forth general guidelines regarding a lawyer’s professional and personal responsibilities in the practice of law in Texas as well as the

reasonably expended on the litigation multiplied by a reasonable hourly rate.”).

1 See Hensley v. Eckerhart, 461, U.S. 424, 433 (1983) (“The most useful starting point for determining the amount of a reasonable fee is the number of hours


scope of the Rules in their application to the legal profession in Texas. Three paragraphs contained in the Preamble are of particular importance in discussing attorney fees.

i. **Paragraph 7**

Paragraph 7 of the Preamble affirms that ethical conflicts routinely arise in the practice of law and that the Rules can be used to help resolve those tensions:

> In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from apparent conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests. The Texas Disciplinary Rules of Professional Conduct prescribe terms for resolving such tensions. They do so by stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of these Rules many difficult issues of professional discretion can arise. The Rules and their Comments constitute a body of principles upon which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment. In applying these rules, lawyers may find interpretive guidance in the principles developed in the Comments.

What to charge for fees is one of the most important ethical conflicts a lawyer faces in his or her practice. Should the lawyer be allowed to charge whatever the client will pay? Does the conflict depend on the specific lawyer, client, and situation? Does a $400 per hour attorney charge a reasonable rate to a major oil company in regulatory and administrative matters? If so, is that same $400 rate reasonable for a single mother of two children attempting to divorce her abusive husband? What if the husband was a millionaire instead of a truck driver? These types of ethical conflicts come up all the time in virtually every matter we lawyers handle, because we must determine in every matter we handle how much to charge for our fees (not taking into consideration appointments). Paragraph 7 states that we can look to the Rules and their Comments for guidance in navigating these conflicts.

ii. **Paragraph 9**

Paragraph 9 of the Preamble encourages lawyer to attain the highest degree of ethical conduct rather than meeting the minimum standards:

> Each lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

Although we expect lawyers to weigh their actions against their own conscience, we recognize that lawyers are flawed human beings like everyone else. Therefore, we don’t necessarily trust a lawyer’s conscience to be the determining factor in deciding ethical issues in our “noble profession.”
While a lawyer can be compromised, the law and legal profession cannot permit compromise in the important area of ethical conduct!

iii. Paragraph 11

Paragraph 11 of the Preamble acknowledges the limitations of the Rules in the greater context of governing the legal profession:

*The rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The rules and Comments do not, however, exhaust the moral and ethical considerations that should guide a lawyer, for no worthwhile human activity can be completely defined by legal rules.*

It is important to realize that, while attorneys may judge the reasonableness of their fee by the Rules (especially Rule 1.04, which will be soon discussed), the ultimate judgment as the fee’s reasonableness will be determined by a myriad of considerations, of only which part is the Rules. Judicial decisions are as much of a factor in determining a fee’s reasonableness as anything set forth in the Rules.

As a profession and a society, we try to maintain legal standards with some flexibility, but in the end, we must look at the facts of the matter at hand to help us determine the reasonableness of our fee. How else could we explain why a $70,000 attorney fee bill in pursuing a $50,000 breach of contract claim might be reasonable in one case and a $30,000 attorney fee bill collecting the same amount be unreasonable in another case?

B. Rule 1.04

Rule 1.04 of the Rules is the part of the Rules that guides lawyers in determining the reasonableness of attorney fees. Rule 1.04 was amended in March 2005, but the amendment concerned referral fees, not the factors to determine whether or not fees are reasonable.

i. Fees are never “unreasonable”

Even though I and other legal commentators might use the term “unreasonable” in discussing the reasonableness of attorney fees, it is important to note that Rule 1.04 and its Comments NEVER use that term. Instead, the terms used to describe the opposite of “reasonable” are “illegal” and “unconscionable,” thus suggesting no gray area in the middle. Attorney fees are deemed either reasonable or illegal/unconscionable, which is a heavy burden to carry the further you get away from charging a reasonable fee! Rule 1.04(a) appears to leave no room for a sliding scale, but rather insists on a bright line test:

*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.*
Comment 1 to Rule 1.04 acknowledges that such a bright line test exists under the Rules and explains the basis for such a test:

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.

Thus, as the Comment explains, a reasonableness standard is too vague and uncertain for a disciplinary standard, yet it could be used in non-disciplinary settings, such as proving up “reasonable and necessary attorney fees” in a trial. Lawyers who try to take advantage of the distinction may not be feeling so good if they get their fees awarded by a trial court only to have a grievance upheld! This brings us back to Paragraph 9 of the Rules’ Preamble, which encourages lawyers to “attain the highest possible degree of ethical conduct.”

ii. Unconscionable fees

Despite adopting a bright line test to determine a fee’s reasonableness, Rule 1.04 acknowledges the difficulty of such a test. Comments 7 and 8 specifically address the unconscionability test:

7. Two principal circumstances combine to make it difficult to determine whether a particular fee is unconscionable within the disciplinary test provided by paragraph (a) of this Rule. The first is the subjectivity of a number of the factors relied on to determine the reasonableness of fees under paragraph (b). Because those factors do not permit more than an approximation of a range of fees that might be found reasonable in any given case, there is a corresponding degree of uncertainty in determining whether a given fee is unconscionable. Secondly, fee arrangements normally are made at the outset of representation, a time when many uncertainties and contingencies exist, while claims of unconscionability are made in hindsight when the contingencies have been resolved. The unconscionability standard adopts that difference in perspective and requires that a lawyer be given the benefit of any such uncertainties for disciplinary purposes only. Except in very unusual situations, therefore, the circumstances at the time a fee arrangement is made should control in determining a question of unconscionability.

8. Two factors in otherwise borderline cases might indicate a fee may be unconscionable. The first is over-reaching 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. For example, a fee arrangement negotiated at arms length
with an experienced business client would rarely be subject to question. On the other hand, a fee arrangement with an uneducated or unsophisticated individual having no prior experience in such matters should be more carefully scrutinized for overreaching. While the fact that a client was at a marked disadvantage in bargaining with a lawyer over fees will not make a fee unconscionable, application of the disciplinary test may require some consideration of the personal circumstances of the individuals involved.

In the context of representing a small business, this gives lawyers good news and bad news. Comment 8 sets forth the specific example of “an experienced business client,” but lawyers representing small business owners all too often realize that a small business owner will be considered more like a novice than a Fortune 500 company when it comes to deciding a fee dispute! I urge attorneys read “big” before “business” in Comment 8, and even then, I would not assume that your fee arrangement with a big business client would not be questioned. Would you want to take the chance that your fee falls under one of those rare circumstances in which the reasonableness of a fee arrangement with a big business client is questioned, especially for disciplinary purposes?

Going back to Comment 7 to Rule 1.04, an important explanation is included therein that is not made in the Rule itself. Comment 7 discusses the difference in time perspective when evaluating whether fees are reasonable or unconscionable and gives the benefit of the doubt to the lawyer, but for disciplinary purposes only! Again, a Texas lawyer should always be mindful that the Rules, while aspirational for the profession in general, specifically apply to the attorney disciplinary process in particular. Do not hang your hat on the Rules without knowing the difference. You may not get your requested fees, but you won’t be disciplined; or you may get your requested fees and be disciplined. Always, always, always attain the highest degree of honor and ethics possible!

iii. 8 non-exclusive factors

Rule 1.04(b) sets forth eight factors to help us determine which side of the reasonable/unconscionable line we are on in any given matter. The factors set forth are not exhaustive, however, but rarely do you need to go beyond them to determine reasonableness of a fee. Rule 1.04(b) is as follows:

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;
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(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.

The factors set forth above are often bandied about in attorney fee affidavits and testimony regarding attorney fees. Recall that though the unconscionability standard applies in the disciplinary context, Comment 1 suggests that the 8 factors listed above would apply in non-disciplinary contexts, i.e., trial, administrative hearings, regulatory or transactional matters, etc.

III. Arthur Andersen

Comment 1 to Rule 1.04, however, is not the reason the 8 factors in Rule 1.04(b) are so prevalent in proving up the reasonableness of attorney fees in non-disciplinary proceedings. Such prevalence derives from the Texas Supreme Court’s adoption of those factors to determine the award of attorney fees in any given matter.

In 1997, the Texas Supreme Court decided Arthur Andersen & Co. v. Perry Equipment Corp.4 In that case, Perry Equipment purchased an audit of another company’s financial statement by the accounting firm of Arthur Andersen & Co. in contemplation of a purchasing that company. Upon later discovering that the purchased company was not as profitable as the financial statements indicated, Perry Equipment sued Arthur Andersen for the faulty audit. The jury awarded over $9 million to Perry Equipment, which included attorney fees based upon a jury charge instructing the jury to calculate attorney fees three ways (dollars and cents, percentage of recovery, and combination of dollars and cents and percentage of recovery). The First Court of Appeals upheld the verdict, including the award of attorney fees. The Texas Supreme Court reversed and remanded on two issues, one of which was whether the attorney fees requested were reasonable and necessary.

The Texas Supreme Court specifically stated in the Opinion that “[f]actors that a factfinder should consider when determining the reasonableness of a fee include” the factors set forth in DR 1.04.5 Since that Opinion was delivered in 1997, Texas lawyers and courts have used the 8 factors set forth in DR 1.04 to prove up and determine the reasonableness of attorney fees.

IV. When is the determination made?

“Fee contracts between lawyers and their clients are presumed invalid.”6 Therefore, lawyers must never forget that not only must the fee be fair and reasonable, but also lawyers, not clients, will bear the burden of proving the fairness and reasonableness of the fee in any dispute between the lawyer and client.

Although most opinions consider the fairness and reasonableness of the fee as of the creation of the transaction, unanimity on that issue does not exist. Note 7, § 207 Comment e of the RESTATEMENT (THIRD) OF

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4 See Arthur Anderson & Co. v. Perry Equipment Corp., 945 S.W.2d 812 (Tex. 1997).
5 Id. at 818.
6 Watkins, Equity Position in a Client as a Fee, State Bar of Texas Litigation Update Institute (January 2002).
THE LAW GOVERNING LAWYERS (2000) states that “[f]airness is determined based on facts that reasonably could be known at the time of the transaction, not as facts later develop.” In considering a “stock for fees” arrangement, the American Bar Association Standing Committee on Ethics and Professional Responsibility agreed with the RESTATEMENT. The Iowa State Bar determined in its Opinion 02-01, contrary to most opinions on the subject, that the reasonableness of the fee is to be determined both at the time the fee agreement is made and at the time the fee is collected. Being that Texas has yet to issue a formal opinion regarding when the determination of reasonableness of the fee should be made, Texas lawyers would be wise to consider reasonableness at the time of creation and collection.

V. Conclusion

A lawyer must ensure that the fee charged to the client is reasonable. A fee that is not reasonable is not “unreasonable” but rather “unconscionable” or “illegal.” There are 8 factors set forth in Rule 1.04(b) of the Texas Disciplinary Rules of Professional Conduct to guide lawyers in determining the reasonableness of the fee. The Texas Supreme Court adopted those factors in Arthur Anderson & Co. v. Perry Equipment Corp. The determination of reasonableness of the fee should be made both at the time of the contract formation and when the fee is paid.

Setting fees for Texas lawyers is not just a matter of getting paid but also a subject of discipline by the State Bar of Texas. Lawyers should always err on the side of taking too little than too much!

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