ATTORNEY FEES AND THE ETHICS INVOLVED

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CHAPTER 24

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Amarillo, Texas

Professional Associations

- Licensed to practice law in Texas and Oklahoma
- Sprouse Shrader Smith PLLC: shareholder 1993 – present; Managing Shareholder 2010 – 2012
- Culton, Morgan, Britain & White: Partner, 1982 – 1993

Bar Activities

- Texas Board of Legal Specialization: Board Member 2011-present
- State Bar of Texas Committee on Continuing Legal Education: Member 2007 – present; Chair 2015 – present
- Texas Commission for Lawyer Discipline,: Member 2002-2006; Chair 2003-2006
- Supreme Court Task Force on The Texas Disciplinary Rules of Professional Conduct: Member 2003-2006
- State Bar of Texas Task Force on Lawyer Mental Health Issues: Member 2006
- State Bar of Texas Sunset Review Committee: Member 2002
- Board of Directors, State Bar of Texas: Director 1999-2002; Committee Chair, Facilities & Equipment: Member 2001-2002; Committee Chair, Disciplinary/Disability Systems Oversight: Chair 2001-2002

Bar Honors/Awards

- Recipient of Standing Ovation Award presented by Texas Bar CLE: 2013
- Recipient of the Dan Rugeley Price Memorial Award by Texas Bar Foundation: 2011
- Recipient of Judge Sam Williams Award by State Bar of Texas: 2007
- Recipient of Resolution Honoring Mark D. White by State Bar Board of Directors: September 23, 2005
- Recipient of State Bar of Texas Presidential Citation: June 2004

Local Professional Activities

- Texas - American Board of Trial Advocates: President of Amarillo Chapter 2015
- Texas Tech University School of Law Foundation Board: Member 2010-present; Investment & Finance Committee: Member
- Amarillo Area Bar Association; President 2006

Other

- Board Certified, Civil Trial Law – Texas Board of Legal Specialization, since 1987

OTHER CONTINUED

- Basic Mediation Training, 40-hour course; The Dispute Resolution Training Institute/Texas Tech University, 2009
- Sustaining Life Fellow, Texas Bar Foundation; Life Fellow, American Bar Foundation
- Member: Texas Council of School Attorneys; Texas Association of Community College Attorneys; International Association of Defense Counsel, American Board of Trial Advocates, Texas Association of Defense Counsel, Inc., Defense Research Institute, American Bar Association, ABA Center for Professional Responsibility, and Texas Center for Legal Ethics

EDUCATION

B.B.A. in Finance: Texas Tech University 1979; Texas Tech University School of Law: J.D. 1982

CIVIC ACTIVITIES

Amarillo College Foundation: Board of Directors 2009-present; Chair 2013-2015

Amarillo Symphony, Inc.: Board of Directors 2001-present; President 2008-2010

Amarillo Club: Board of Directors 2013-present

Boy Scouts of America, Southern Region: Regional Advisory Council Member 2000-present

Boy Scouts of America, Golden Spread Council: Board of Directors 1990-present; President 1994-1996

Amarillo College – Capital Needs Assessment Committee: Member 2007

Lone Star Runners Club: President 2008

Junior League of Amarillo: Community Advisory Council 2010-present

PUBLICATIONS AND PRESENTATIONS

- *Attorney Fees: Getting from Bourbon Street to Easy Street*
  Advanced Trial Strategies 2015: State Bar of Texas February, 2015
- *Fee Agreements and Disciplinary Rules Working Together*
  Essentials for the General Practitioner: State Bar of Texas January, 2015
- *Conflict Issues in Title Examination*
  Oil, Gas and Mineral Titles Examination: State Bar of Texas June, 2014
- *Agricultural Ethics*
  8th Annual John Huffaker Agricultural Law: State Bar of Texas May, 2014
- *Recovery of Attorney's Fees*
  Fiduciary Litigation: State Bar of Texas January, 2014
- *A Matter of Discipline: How the State Bar of Texas, the Legislature, and the Supreme Court of Texas work together to maintain an efficient system that balances the protection of both the public and the lawyer.*
  76 Tex. B.J. 1047 (2013)
- *Attorney Fees in Business Litigation*
  Business Disputes: State Bar of Texas September, 2013

- *Deadly Sins of Attorney Fee Agreements*
  Estate Planning, Guardianship and Elder Law Conference: UT Law CLE 2013

- *Deadly Sins of Recovering Attorney's Fees*
  State Bar of Texas Webcast: July 16, 2013

- *Course Director*
  Advanced Personal Injury Law Course: State Bar of Texas July 2013

- *Ethics, Fee Agreements and Malpractice in Elder Law*
  Advanced Elder Law & Guardianship Law Course: State Bar of Texas April, 2013

- *Attorney Fees Update*
  Litigation Update Institute: State Bar of Texas 2013

- *Preparing an Effective Engagement Letter*
  75 Tex. B.J. 684 (2012)

- *Fee Agreements That Work: Examples & Samples*
  Advanced Civil Trial Course: State Bar of Texas 2012

- *Attorney Fees & Sanctions*
  Damages in Civil Litigation Course: State Bar of Texas 2012

- *Recovery of Attorney Fees*
  Advanced Civil Trial Course: State Bar of Texas 2011

- *Accounting to the Client for the Icing on the Cake: Expert's Fees, Attorney's Fees, Sanction Fees, and Costs*
  Damages in Civil Litigation Course: State Bar of Texas 2011

- *Nuances of Contingency Fee Contracts*
  Texas Association of Defense Counsel: Summer 2011

- *Privileges Relating to Witnesses and Documents*
  Advanced Evidence and Discovery Course: State Bar of Texas 2011

- *Proposed Amendments to Texas Disciplinary Rules of Professional Conduct*
  Advanced Personal Injury Law Course: State Bar of Texas 2010

- *Course Director*
  Strategies for Damages and Attorney Fees: State Bar of Texas February 2010

- *Non-Refundable Retainers and Contingency Fee Contracts*
  Evaluating, Negotiating, Proving and Collecting Damages and Attorneys' Fees: State Bar of Texas February 2009

- *Non-Refundable Retainers: The Confusion Clarified at Last!*
  State Bar of Texas Webcast: May 29, 2008

- *Attorney Fees*
  Causes of Action Course: State Bar of Texas 2008

PUBLICATIONS AND PRESENTATIONS, CONTINUED

- *Attorney – Client Relationships that Work*
  The New Lawyers Course and Practice Skills for New Lawyers: March 2007 and September 2008

- *Understanding the Grievance Process*
  Success Strategies for Mid-Career Lawyers: State Bar of Texas 2007

- *Tasers: Liability Issues*
  Suing & Defending Governmental Entities Course: State Bar of Texas July 2006

- *How to Avoid an Encounter with the Texas Commission for Lawyer Discipline*
  West Texas General Practice Symposium: Texas Tech School of Law March 2006

- *Conflicts and Fee Problems in Tort Litigation*
  The Car Crash Seminar: University of Texas School of Law December 2005

- *How the New State Bar Act Changes the Attorney Disciplinary System in Texas*
  Dallas Bar Association: September 2004

- *Condition or Use of Real Property*
  Suing & Defending Governmental Entities Course: State Bar of Texas July 2004

- *Volunteers and Liability Under the Texas Tort Claims Act*
  Suing & Defending Governmental Entities Course: State Bar of Texas July 2002

- *Course Director*
  Suing & Defending Governmental Entities Course: State Bar of Texas July 2001

Malerie T. Anderson

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Professional Associations

- Licensed to practice law in Texas : 2013; Admitted Northern District of Texas: 2014
- Sprouse Shrader Smith PLLC: Litigation Associate, 2013– present
- St. Mary's Law Journal, Solicitations and Articles Editor, Volume 44 Board 2012–2013
- Texas Fourth Court of Appeals: Intern, Justice Hilbig 2012
- Legal Aid of Northwest Texas (Odessa): Paralegal, 2009–2010

Bar Activities

- Amarillo Area Women's Bar Association: Secretary/Treasurer 2015–present
- Texas Young Lawyers Association: Member
- Amarillo Area Young Lawyers Association: Member
- Amarillo Area Bar Association: Member

Education

- St. Mary's University School of Law, J.D. 2013
- B.B.A. in Political Science: Texas Tech University, 2008

Awards

- Recipient of Outstanding Staff Writer Award, St. Mary's Law Journal Volume 43: 2013

Civic Activities

- Haven Health: Board of Directors, 2015–present; Vice President 2016–present

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ATTORNEY FEES AND THE ETHICS INVOLVED

I. INTRODUCTION

One of my favorite legal sayings is "If you take care of a client for five years, he will take care of you for ten." But do not take the attorney-client relationship for granted. Although it is a simple contractual arrangement, each component of the relationship has its own set of nuances, problems, duties, and considerations. This presentation explores the major components of the fee agreement and provides examples.

Multiple representation and waiver of conflicts is beyond the scope of the presentation.

II. WHAT ARE THE VARIOUS ROLES OF A LAWYER?

When you are forming a relationship with a client, or working on a matter for a client that has been assigned to you by a partner in your law firm, it is helpful to recognize at the outset what function you are performing. There are five distinct functions or roles of the lawyer. You may be called upon to act in one or several of these functions. They are:

- Advisor – providing a client with an informed understanding of the client's legal rights and obligations and explaining their practical implications.
- Advocate – zealously asserting the client's position under the rules of the adversary system.
- Negotiator – seeking a result advantageous to the client but consistent with requirements of honest dealing with others.
- Intermediary – reconciling, between clients, their divergent interests as an advisor and, to a limited extent, acting as a spokesperson for each client.
- Evaluator – examining a client's affairs and reporting about them to the client or to others.

Tex. Disciplinary Rules Prof'l Conduct Preamble, ¶2.

III. THE ATTORNEY-CLIENT RELATIONSHIP

A. When does the relationship begin?

It is important to note the relationship can begin without an official fee agreement between the attorney and client. Rather, because the attorney-client relationship is contractual in nature, it begins when an attorney agrees to render professional services for a client. This agreement may be express or implied from the conduct of the parties. *See Valls v. Johanson & Fairless, L.L.P., 31*4 S.W.3d 624, 633–34 (Tex. App.—Houston [14th Dist.] 2010) (citing Perez *v. Kirk & Carrigan, 822 S.*W.2d 261 (Tex. App.—Corpus Christi 1991)). In fact, the relationship can be formed even when there is no agreement for payment of a fee or no payment of a fee at all. The relationship may simply exist as a result of rendering services gratuitously. *Id.*

B. How do we determine whether an agreement was reached with the client?

Because it is a creature of contract, the determination of whether an agreement has been reached is made by using objective standards of what the lawyer and possible client said and did, instead of looking at their subjective states of mind. *Terrell v. State*, 891 S.W.2d 307 (Tex. App.—El Paso 1994, pet. ref'd). It is not enough that either the lawyer, or the client, alone, thinks he has made a contract. It is not enough that the client just "thinks" that you represent him. There must be objective indications. *Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.). And the mere fact that a person pays the legal fee on behalf of another client does that necessarily make that person a client. *Roberts v. Healey*, 991 S.W.2d 873 (Tex. App.—Houston [14th Dist.] 1999, writ denied).

C. What about consulting with "prospective clients"?

Many times a lawyer will consult with a prospective client to determine whether or not he wants to undertake the representation. Be careful here. There are cases that broadly provide that the attorney's fiduciary obligations arise even during those preliminary consultations if the attorney discusses with the potential client his legal problems with a view toward undertaking representation. *See Nolan v. Foreman*, 665 F.2d 738 (5th Cir. 1982). However, because the attorney-client relationship is a creature of contract, it is the clear and express agreement of the parties that controls. *Parker v. Carnahan*, 772 S.W.2d 151 (Tex. App.—Texarkana 1989, writ denied).

The cases that focus on attorney's duties toward someone with whom he consults for the possibility of representing him are generally focused on the professional obligations of the lawyer as he performs incidental services necessary to make a decision about taking the case. For instance, the confidentiality rules of 1.05 apply. Tex. Disciplinary Rules Prof'l Conduct R. 1.05. To the extent that incidental legal services are performed (such as in accumulating medical records for review or advising of the statute of limitations), the lawyer should use reasonable care.

There is very little case law available concerning duties toward a prospective client. Most of the law concerning these duties has to do with the use of confidential information obtained when interviewing a prospective client. But the Restatement of the Law Governing Lawyers (Third) is helpful. The Restatement contemplates that when a person discusses with a lawyer the possibility of their forming a relationship, it is for a

"matter." This is important because most preliminary consultations result in an agreement to perform only some incidental legal services in connection with the continued investigation of the matter, until such time that the lawyer determines whether or not to take the matter. Here is how the Restatement handles it in Section 15, Lawyers Duties to a Prospective Client:

§ 15. A Lawyer's Duties to a Prospective Client

1. When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must:

   (a) not subsequently use or disclose confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client as stated in §§ 61–67;
   (b) protect the person's property in the lawyer's custody as stated in §§ 44–46; and
   (c) use reasonable care to the extent the lawyer provides the person legal services.

So there is a definite distinction between the incidental legal services to be performed in the investigative stage and the ultimate "matter," which may or may not become the subject of the agreement.

D. Do lawyers have duties that extend beyond the agreement?

The answer is no. Of course the lawyer must always abide by the Texas Disciplinary Rules of Professional Conduct, but because it is based on contract, the legal relationship is defined by the "clear and express agreement of the parties as to the nature of the work to be undertaken." Annot., 45 ALR 3d. 1181 (1972).

However, there may be a duty to inform someone that you do not represent them. The duty to so advise would arise if it can be determined that the attorney is aware or should be aware that his conduct would lead a reasonable person to believe that he was being represented by the attorney. Parker, 772 S.W.2d 151.

IV. FEE ARRANGEMENTS

A. Documenting the Attorney-Client Relationship or Agreement

It is best to document the attorney-client relationship in writing. A written document is not explicitly required except for contingent fee cases and in cases involving association with or referral to a different law firm or lawyer. Tex. Disciplinary Rules Prof'l Conduct R. 1.04 (D), (F). However, documenting all attorney-client relationships in writing is obviously preferable.

B. Establishing the Fee Agreement at the Outset

In Texas, attorneys are held to the highest standards of ethical conduct in their dealings with their clients. *Hoover Slovacek L.L.P. v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006). One of the most important and overlooked parts of an attorney conducting himself or herself in an ethical manner with clients—and in avoiding disputes and malpractice claims—is clearly establishing the fee agreement from the beginning of the attorney-client relationship.

Prior to accepting representation, the attorney is in a position to negotiate with the potential client and set reasonable terms for an attorney-client relationship. Once the attorney accepts representation, the attorney has a fiduciary duty to pursue the client's best interest. If the fee agreement is not established at the outset of the representation or is renegotiated in the middle of a case, the client is entitled to representation by independent counsel for the purpose of reviewing the late or modified fee agreement. *See Piro v. Sarofim*, 80 S.W.3d 717 (Tex. App.—Houston [1st Dist.] 2002).

C. Unreasonable Fee vs. Unconscionable Fee

An important thing to note about Rule 1.04 is that it does not prohibit an "unreasonable" fee, it only prohibits an "unconscionable" fee. Tex. Disciplinary Rules Prof'l Conduct R. 1.04. Does this make sense? Yes. Remember, the disciplinary rules are written for the purpose of lawyer discipline. As bankruptcy courts, other judges or juries regularly reduce the amount of attorneys fees that have been sought at trial, the effect is that the fact finder regards some of the fees sought as unreasonable. If Rule 1.04 was cast in terms of unreasonableness, a client would be entitled to file a grievance against the lawyer in every instance where a fact finder reduced the fees that were sought. It is for this reason that 1.04(a) contains the second sentence which defines "unconscionable."

D. Fee Contract vs. Fee Shifting

Remember that the attorney-client relationship is contractual in nature, and begins when an attorney agrees to render professional services for a client. The concept of the contract is important in the fee context because the fees charged to the client (authorized by contract) may not necessarily be the same as the fees recoverable from the adverse party under a fee shifting statute. For example, a client agrees to pay a paralegal for all of his/her work, but only substantive legal work is allowed as a basis for recovery from the other party. Another example is that a client may make requests of the attorney to perform certain activities (which are to be paid for as authorized by the contract), but these activities may not be necessary to the prosecution of the

case, such that they may not be recoverable from the adverse party. What does all of this mean? It means that you should tell your client up front that just because his cause of action against the adverse party may authorize the recovery of attorney's fees, he will not necessarily recover one hundred percent of his fees. This is a frequent problem that is easy to remedy at the outset of the attorney-client relationship.

Remember, a client's agreement to pay a certain hourly rate is not necessarily proof that the rate is reasonable. By the same token, payment by the client does not necessarily prove the necessity of the fees. *See, e.g.*, *Hoover Slovacek L.L.P.*, 206 S.W.3d at 571–72 (clarifying that "Texas law does not *award* lawyers unreasonable fees").

V. WHAT SHOULD ENGAGEMENT LETTERS CONTAIN?

The following is a list of considerations for your engagement letters, including examples for reference.

A. Specific identification of who the client is.

Remember, if the client is an organization, the lawyer represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. The concern here is that the person that speaks to the lawyer on behalf of the organization must legitimately represent the organization and not be in conflict with the organization. The lawyer's role should be carefully spelled out. The comments to Texas Disciplinary Rules of Professional Conduct Rule 1.12 are very helpful in doing so.

Consider this example:

> Please understand that although this firm maintains its relationship with ABC, Inc. primarily through contact with President Smith, this firm represents ABC, Inc. in this matter, as distinct from the company's directors, officers, shareholders or employees. ABC, Inc. agrees to immediately notify the firm should circumstances arise about whether the company has become adverse to President Smith or whether he ceases to legitimately represent the company.

B. Description of the specific objective or objectives of the representation.

An attorney intending to represent the client in a limited capacity should clearly indicate the specific activities where the attorney will provide legal representation. For example, if an attorney agrees to represent the client in the initial lawsuit but not on appeal, in the event the client does not prevail, then the engagement letter should clearly specify when the attorney-client relationship ends.

Consider this example:

> The terms of this letter agreement will be applicable to all matters that we undertake for the Company or for any related or affiliated corporation, partnership, association or other entity, although we will not undertake representation on any other matter unless requested to do so in writing.

C. No guarantees.

Consider this example:

> We will use our best efforts in representing ABC, Inc., but we cannot assure that we will achieve a favorable outcome. Both the Company and our firm will have the right to terminate this representation upon written notification to the other; provided that in the event of a termination, the Company will remain liable for our fees and any expenses incurred by us on your behalf prior to such termination plus any fees and expenses incurred at your request in connection with the transition to substitute counsel.

D. Limitations on the representation.

Rule 1.02 provides that a lawyer may "limit the scope, objectives and general methods of the representation if the client consents after the consultation." If the client does consent, these limits need to be spelled out in the fee agreement.

However, too often, lawyers attempt to limit their professional duties to their client by having the client sign an agreement prospectively limiting the lawyer's obligation to communicate with the client. Remember that the fee agreement cannot limit the lawyer's duties so drastically that the representation would violate Rule 1.01 (Neglect) or 1.03 (Communication). For example, many fee agreements provide that the client consent to communication through legal assistants, agreeing not to call the lawyer directly. That is contrary to the duties of Rule 1.03 providing a lawyer shall keep a client reasonably informed about the status of the matter and promptly comply with requests for information.

Consider this example:

> You acknowledge that this firm does not act as ABC, Inc.'s general counsel and that our acceptance of this engagement does not involve an undertaking to represent your company or its interests in any matter other than that specifically described above. Our representation does not entail a continuing obligation to advise you concerning

subsequent legal developments that might have a bearing on the affairs of the company.

E. Someone else pays the bill.

If someone other than the client is paying the fee, get the client's consent to comply with Texas Disciplinary Rules of Professional Conduct Rule 1.08(e).

Consider this example:

>  Client consents that the firm will accept compensation from client's parents, Mr. and Mrs. Smith. Despite this arrangement, client understands that the firm owes its duties to the client, and that the firm will not allow this arrangement to interfere with the firm's professional judgment or its relationship with the client, and that information relating to representation of client will be maintained as confidential, even as to Mr. and Mrs. Smith.

F. Clear description of the fee.

The exact type of fee to be charged must be spelled out clearly in the engagement letter or at the very least, at the outset of the representation.

It is essential this part of the engagement letter be spelled out plainly. If the fee is to be an hourly rate, it should be so stated.

Consider this example:

>  The billing rates for the professionals who may work on this matter vary in accordance with each person's experience and expertise. The hourly billing rates presently in effect range from $135 for associates newly admitted to the practice to $350 for our more experienced members of the firm. My billing rate is currently $300 per hour.
>
> As part of our efforts to provide you with cost-effective legal services, from time to time we may utilize the services of paralegals and other support personnel for routine tasks such as document organization and review that do not require the attention of an attorney. Some of this work may be substantive legal work to be done by a paralegal under the supervision of a lawyer. Other work may be clerical in nature. Our rates for paralegals currently range from $110 to $135 per hour.

A dangerous practice involves giving the lawyer the sole discretion to convert from an hourly rate to a contingent fee (or vice versa) during the course of the representation, or trying to decide the amount of the contingent fee up front for purposes of payment upon termination.

Consider this BAD example:

>  Percentage of interest: client shall pay to attorney as compensation for his services, $250.00 per hour for the first sixty (60) days of representation of client and if no resolution thereafter client agrees to 25% of any recovery obtained on behalf of the client by settlement or compromise of the claim before suit is filed; or 33 1/3% of all recovery obtained for the client after suit is filed, regardless of whether or not the suit is actually tried, provided the claim is concluded before any appeal is made.

Note that in the above example, the lawyer could do nothing to try to settle the claim for 60 days, then convert to a contingent fee and file suit, all without the client's input.

"Convertible" fee agreements are susceptible to clients' claims that the lawyer has acquired too much control over the litigation.

Consider this BAD example:

>  [Lawyer] is entitled to 33% of any amounts recovered. If you agree to settle this case for an amount that will pay less than $175 per hour for the time I invest, then I shall receive an amount over and above the 33% to compensate me at the rate of $175 per hour before you receive your portion of the settlement.

Note that this convertible fee agreement uses a client's decision to settle as a trigger to convert contingent fee representation into an obligation to pay hourly fees. It has been held that an agreement of this kind impermissibly burdens the client's exclusive right to settle a case. *See Compton v. Kittleson*, 171 P.3d 172 (Alaska 2007).

Another example is the following provision that was criticized in the Supreme Court in *Hoover*:

> You may terminate the Firm's legal representation at any time. . . . Upon termination by You, You agree to immediately pay the Firm the then present value of the Contingent Fee described [herein], plus all Costs then owed to the Firm, plus subsequent legal fees [incurred to transfer the representation to another firm and withdraw from litigation].

Hoover at 558.

The above provision is a BAD example and was held to be unconscionable. *Id.* The Supreme Court noted the following problems: (a) the termination provision made no distinction between discharges occurring with or without cause; (b) it assessed the attorney's fee as a percentage of the present value of the client's claim at the time of discharge, in derogation of the quantum meruit and contingent fee measurements allowed by *Mandell & Wright v. Thomas*, *44*1 S.W.2d 841 (Tex. 1969); and (c) it required the client to pay the lawyer the percentage fee immediately at the time of discharge. *Id.* at 562. In this case, requiring the client to pay the percentage fee immediately at the time of discharge is contrary to the principle in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 (2000) concerning the rule that a contingent fee lawyer "is entitled to receive the specified fee only when and to the extent the client receives payment." By requiring immediate payment, the termination provision also grants the lawyer a proprietary interest in the client's claim without regard to the ultimate results obtained, which would be a prohibited transaction. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(h).

Another example of a BAD convertible fee agreement was discussed in *Wythe II Corp. v. Stone*, 342 S.W.3d 96 (Tex. App.—Beaumont 2011, pet. denied). In the *Wythe* case, the engagement letter provided as follows:

> As an optional alternative to the hourly bill basis, and at the sole option of said attorney, the attorney may elect to receive compensation for attorney's time on the basis of a specified contingency fee calculated as a percentage of the total recovery achieved by virtue of the undertaking which forms the basis of this agreement. . . . The attorney may designate this contingency fee option at any time during the representation.
>
> In the event the attorney has elected to be compensated on the basis of the contingency fee option, and subsequently withdraws from this representation, then said attorney shall receive an assigned interest equal to the contingency fee percentage that would have applied at the time of such withdrawal the same as if the matter had been settled in its entirety on the date of withdrawal.

Here, the client claimed that the unilateral option was unconscionable and that the termination provision failed to distinguish between terminations occurring with or without cause. The court concluded that this kind of unilateral option provision is generally unenforceable. However, this was an unusual case, and the contingent fee was previously approved by a bankruptcy court. Importantly, the appellate court did not let the unenforceability of the contract provision preclude the attorney from collecting a fee. Rather, the court remanded the case for a jury trial on the amount of a reasonable fee.

The *Wythe* case teaches another lesson. There, the attorney sought to prove his fees for his fee collection suit by expert testimony from a mixture of evidence that a forty percent (40%) contingency fee is customary in the jurisdiction and that the total number of hours put into the case were reasonable. However, the experts did not try to determine a reasonable fee based upon an hourly rate. The appellate court held that the supporting evidence did not provide significant justification for shifting the entire amount of the contingent fee to the client. Finding that the fee awarded by the jury was excessive, the court remanded the fee dispute with instructions for the trial court to make a "determination of a reasonable fee based on an hourly rate, not determined as a percentage of damages." *Id.* at 108.

G. Monthly billing.

Consider this example:

> Our customary procedure is to send a statement to you each month for services rendered and expenses incurred during the previous month. Any statement not paid in full within thirty days after the date of the statement will be considered overdue. Overdue invoices may result in the discontinuance of our representation of the Company.

H. Clause allowing increase.

If it is contemplated that the hourly rate will increase over time, that should be stated also. This is because there is a presumption of unfairness when a fee contract is entered into during the attorney-client relationship that raises the fee mid-stream. *See Robinson v. Garcia*, 804 S.W.2d 238, 248 (Tex. App.—Corpus Christi 1991, writ denied) (citing *Waterbury v. City of Laredo*, 68 Tex. 565, 5 S.W. 81, 86 (Tex. 1887) (noting "effect is generally not given to a contract that obligates the client to pay . . . the attorney a sum of money in excess" of the originally agreed amount); *but see*, *Cahill v. Dickson*, 77 S.W. 281, 288–89 (Tex. Civ. App. 1903, writ ref'd) ("[I]f the original contract has been terminated by mutual agreement of the parties, a new contract providing for the payment of a greater sum than that specified in the former agreement is valid and binding."). The same thing goes for contingent fees. It is ill-advised to raise the percentage of the contingent fee mid-stream without giving the client the opportunity to consult a lawyer. *Id*. Doing so shifts the burden to

the attorney to show the fairness of the contract. *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964).

Consider this example:

> The firm reviews its hourly rates annually, and you should anticipate an annual increase (in January) of not more than $10.00 per hour for each lawyer and paralegal working on this matter.

I. Clear description about how expenses will be paid.

Some expenses may be advanced by the lawyer; some expenses may be paid directly by the client, particularly for large items such as expert's fees, accountant's fees, etc.

Remember that a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses to the client, and provide that the repayment of those expenses may be contingent upon the outcome of the matter. Other than that, providing financial assistance to a client in connection with pending or contemplated litigation is a "prohibited transaction" under Texas Disciplinary Rules of Professional Conduct Rule 1.08(d).

Consider this example:

> In addition to legal fees, the Company will be responsible for all out-of-pocket expenses incurred in connection with our representation. Such expenses include charges for filing and serving court documents, courier or messenger services, recording and certifying documents, court reporting investigations, long distance telephone calls and other forms of communication, copying materials, overtime clerical assistance, travel expenses, postage and other expenses. We may elect to forward statements we receive from suppliers to the Company for payment directly to the suppliers, particularly with respect to large expenditures.

J. Clear description about how disbursements will be billed.

The client needs to know at the outset what disbursements will be billed, and how. Is it proper for the lawyer to "mark up" these expenses such that when they are passed along to the client, the lawyer makes some profit on them? Yes, but only if it is reasonable and fully explained, and agreed to by the client at the outset. see ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 93-379.

Consider this example:

> Rather than building an increased overhead factor into our hourly rates, we believe it is appropriate that to the extent possible, costs for ancillary services performed by us be allocated to those of our clients who actually need and use them. Therefore, we will also bill for photocopying and other document reproduction, telecopying, computerized input and retrieval of documents, computerized research, overtime, word processing and similar work by employees, if required by you, or the nature of the services performed for you. We will charge for copies $.20 per page and for faxes $1.00 per page, although actual costs to us are less.

K. Disclosure about recovery of fees

Consider this example:

> The claims asserted in this matter may involve statutes that provide for the recovery by the successful party of attorneys fees from the other side. While the firm intends to seek the recovery of fees from defendants as part of your claims, please understand that the jury or Court may award none, or a reduced amount as part of your recovery. If that happens, you are still obligated to the firm for the fees as set out in this agreement. Of course, any recovery of fees from the other side belongs to you, and not the firm.

L. Retainers, "non-refundable" retainers, and "deposits."

The term "retainer" has been used to describe several different types of fee arrangements. The use of the word "retainer" is perhaps the most troublesome part of attorney fee agreements. This problem is compounded by the fact that case law sometimes refers to retainers as "general" or "special."

Generally a retainer is defined as monies paid in advance from which expenses and fees may be deducted. This goes into the lawyer's trust account until earned. See Tex. Disciplinary R. Prof'l Conduct 1.14, cmt.2. Consider using the term "advance payment" or "deposit." These words are more descriptive than "retainer."

Consider this example:

 Client agrees to deposit the sum of $50,000 with the firm, to be billed against on an hourly basis as set out above. This advance deposit will be held in the firm's trust account until such time as it, or a portion of it is earned, at which time it will be made available to the firm's general account. Monthly statements will be sent to the client as provided above. These statements will be paid from the advance deposit thirty days after the date of the statements. At the conclusion of the matter, the balance of the advance deposit will be returned the client.

An "evergreen" retainer is one that must be replenished periodically. Spell this out carefully and provide that any unused retainer will be returned to the client at the conclusion of the matter.

Consider this example:

 In addition to payment of the monthly statements, we ask that the company wire a retainer in the amount of $10,000 to be held in our trust account and to be billed against. We ask that the trust balance be maintained at the level of $10,000, and our monthly statements will reflect the balance necessary to maintain that amount. Of course, at the conclusion of the litigation, any balance in the trust account will be promptly refunded to the company.

A "flat fee" is an amount agreed to at the outset which constitutes payment in full for the professional services rendered and the related expenses incurred in the representation contemplated.

Consider this example:

 My fee for this representation described above is $25,000. This is a fixed fee that includes expenses that I may advance, and is not dependent on the course or outcome of the litigation or upon the time I spend on the matter. The fee is due in a lump sum in advance. This money will be held in trust, and withdrawn by me as earned. It will be considered earned as follows: 10% after initial interviews and case investigation; 40% after discovery, pre-trial motions and hearings; 50% after trial. The full fee will be considered earned upon termination of proceedings by trial or settlement, regardless of whether all proceedings have occurred and regardless of time expended or outcome. If my representation is terminated before completion of the engagement, I will be entitled to the reasonable value of my services, and any remaining balance will be refunded. I will notify you when funds are withdrawn from trust and will account for funds remaining in trust.

There can also be a "retainer" that is non-refundable; that is, an amount of money that the client pays you solely for the privilege of having you as his lawyer. *Sacks v. Haden*, 266 S.W.3d 447 (Tex. 2008); *Cluck v. Comm'n of Lawyer Discipline*, 214 S.W.3d 736 (Tex. App.—Austin 2007, no pet.). The "true retainer" is paid by the client solely for your availability, readiness, and the privilege of having you as his lawyer, apart from any other compensation. *Cluck*, 214 S.W.3d 736. Even though the Cluck case calls this arrangement a "true retainer," consider using the words "engagement retainer fee." This is even more descriptive and is endorsed by the Restatement (Third) of The Law Governing Lawyers § 34 (2000).

There is little case law on this topic and what is available is confusing. But we know one thing: all fees must be earned in some way — that is, a benefit to the client must follow. If the fee is nonrefundable, then spell out in the fee agreement that it is earned upon payment, and why. *Tex. Comm. on Professional Ethics, Op. 431*, 49 Tex. B.J. 1084 (1986).

The key here is that the best way to make a "nonrefundable" fee truly nonrefundable, is to demonstrate and communicate to the client how it was actually earned upon payment. Otherwise, a dispute will most likely follow about whether it was earned in full. The lesson from *Cluck* is that the fee does not become nonrefundable just because it says "nonrefundable" in the contract. *Cluck*, 214 S.W.3d 736.

Consider this example:

 In addition to paying for the service on an hourly basis as set forth herein, the client agrees to pay firm an engagement retainer fee in the amount of $10,000. Such fee is paid in order to secure the firm's immediate availability and readiness to undertake this representation, and in recognition that due to the publicity of this matter, the firm is likely to be prevented from accepting other legal work in this area. The $10,000 engagement retainer fee is not refundable, and client agrees that it is earned by the firm immediately.

M. An arbitration clause?

It is permissible to include an arbitration provision in an attorney engagement letter with a client that covers disputes relating to fees or malpractice, as long as notice is given regarding certain advantages and disadvantages

of arbitration, including the waiver of trial by jury and the loss of appellate review. *See Royston v. Lopez*, Nos. 13-206 and 14-0109 (Tex. June 26, 2015), *available at http://docs.texasappellate.com /scotx/op/13-1026/2015-06-26.johnson.pdf*. To be enforceable, the arbitration provision must not limit the lawyer's liability. Due to a split in the Texas Court of Appeals, it may sometimes be necessary to include the signatures of both parties and counsel for both parties (i.e., independent counsel for the prospective client) on the agreement to avoid the possibility of arbitration being denied in the event a court decides legal malpractice is a personal injury claim (as the Corpus Christi Court of Appeals has done). *See Taylor v. Wilson*, 180 S. W.3d 627 (Tex. App.—Houston [14th Dist.) 2005, writ denied) *and In re Godt*, 28 S.W.3d 732, 738–39 (Tex. App.—Corpus Christi 2000, no pet.)

1. Professional Conduct in Texas

The Professional Ethics Committee for the State Bar of Texas (Committee) has issued an opinion on whether binding arbitration clauses in lawyer-client engagement agreements are permissible under the Texas Disciplinary Rules of Professional Conduct. Tex. Comm. on Prof'l Ethics, Op. 586, (2008). The opinion concludes that:

> It is permissible under the Texas Disciplinary Rules of Professional Conduct to include in an engagement agreement with a client a provision, the terms of which would not be unfair to a typical client willing to agree to arbitration, requiring the binding arbitration of fee disputes and malpractice claims provided that (1) the client is aware of the significant advantages and disadvantages of arbitration and has sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision, and (2) the arbitration provision does not limit the lawyer's liability for malpractice.

Id. The Committee points out that the State Bar of Texas "encourages voluntary arbitration as a preferred method of resolving fee disputes." *Id.* Texas Disciplinary Rule 1.08(a) requires business transactions between lawyers and clients to be fair and reasonable to the client. Tex. Disciplinary Rules Prof'l Conduct R. 1.08(a). The Committee interprets this rule to mean a lawyer should not "attempt to include clearly unfair terms in the agreement, such as providing for the selection of the arbitrator solely by the lawyer, requiring arbitration in a remote location, or imposing excessive costs that would effectively foreclose the client's use of arbitration." Tex. Comm. on Prof'l Ethics, Op. 586, (2008). Texas Disciplinary Rule 1.03(b) requires a lawyer to explain matters as necessary to clients in order for clients to make an informed decision regarding representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.03(b). To meet the requirements of this rule, a lawyer (when asking a prospective client to agree to a binding arbitration agreement) "should explain the significant advantages and disadvantages of binding arbitration to the extent the lawyer reasonably believes is necessary for an informed decision by the client." Tex. Comm. On Prof'l Ethics, Op. 586, (2008). The scope of the explanation varies with the sophistication of the client. *Id.* A large business may require no explanation while an individual may need to be advised of the following:

*(1) the cost and time savings frequently found in arbitration, (2) the waiver of significant rights, such as the right to a jury trial, (3) the possible reduced level of discovery, (4) the relaxed application of the rules of evidence, and (*5*) the loss of the right to a judicial appeal because arbitration decisions can be challenged only on very limited grounds. The lawyer should also consider the desirability of advising the client of the following additional matters, which may be important to some clients: (1) the privacy of the arbitration process compared to a public trial; (2) the method for selecting arbitrators; and (3) the obligation, if any, of the client to pay some or all of the fees and costs of arbitration, if those expenses could be substantial.*

Id. These notices are required for attorney disciplinary issues rather than the validity of the arbitration clause. *See Sidley Austin Brown & Wood, L.L.P. v. J.A. Green Dev. Corp., 32*7 S.W.3d 859, 865 (Tex. App.—Dallas 2010) (Tex. App.—Dallas, no pet.). The omission of an explanation of the advantages and *disadvantages* of arbitration will not by itself render an arbitration clause unenforceable. *Id.*

2. ABA Opinion

The American Bar Association (ABA) has issued an opinion on the topic of arbitration provisions in attorney engagement letters as well. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002). The ABA looks to the Model Rules of Professional Conduct Rule 1.8(h). *Id* at 3. This rule prohibits lawyers from prospectively agreeing to limit their legal malpractice liability. *Id.* The ABA agreed with many other authorities and decided that arbitration provisions prescribe the procedure to be used rather than limit any liability. *Id*; *see also In re Hartigan*, 107 S.W.3d 684, 689 (Tex. App.—San Antonio 2003, pet. denied) (approving ABA Opinion 02-425). The ABA opinion applies rule 1.4(b) to arbitration provisions in retainer agreements. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002). This rule makes it necessary for a lawyer to explain the arbitration provision in a manner sufficient for the client to make an informed decision. *Id.* at 5. The scope of the explanation depends on the sophistication of the client, but should make certain things clear, for instance, the

client is waiving "significant rights, such as the waiver of the right to a jury trial, the possible waiver of broad discovery, and the loss of the right to appeal." *Id.* Explanation might be needed in regard to whether the case will be decided by a single arbitrator or a panel of arbitrators and of the distribution of costs between the lawyer and client for arbitration. *Id.* at 6. The ABA ultimately concludes it is ethically permissible to include binding arbitration clauses in attorney-client engagement letters as long as the client has been given a sufficient amount of information regarding the advantages and disadvantages of arbitration and the lawyer has not used the provision to limit liability he may otherwise have. *Id.* at 7; *see also* Restatement (Third) of The Law Governing Lawyers § 54 cmt. b (2000) ("A client and lawyer may agree in advance . . . to arbitrate claims for legal malpractice, provided that the client receives proper notice of the scope and effect of the agreement and if the relevant jurisdiction's law applicable to providers of professional services renders such agreements enforceable.").

3. Statutes & Cases

The Texas General Arbitration Act (TAA) provides a broad framework for using arbitration as a binding alternative to the court system. TEX. CIV. PRAC. & REM. CODE ANN. Ch. 171 (West 1997). The Federal Arbitration Act (FAA) generally applies when the dispute involves interstate commerce. *See* 9 U.S.C. § 2 (1947). The FAA preempts the TAA if "(1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses, and (4) state law affects the enforceability of the agreement." *In re Nexion Health at In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005). The TAA has two important caveats applicable to arbitration provisions in lawyer-client engagement letters. CIV. PRAC. & REM. § 171.002(a). The first caveat says the TAA does not apply to an agreement for services in which the individual furnishes consideration of greater than $50,000, unless the parties agree in writing and the agreement is signed by each party and each party's attorney. *Id.* § 171.002(a)(2) & (b). This essentially means that independent counsel would have to advise the individual and sign the agreement in order to meet the exception. The second important exception excludes personal injury claims from the scope of the TAA, unless the parties to the claim agree in writing to arbitrate and the agreement is signed by each party and their attorneys. *Id.* § 171.002(a)(3) & (c). Once again requiring independent counsel to advise and sign, along with the client, an agreement to arbitrate in the engagement letter.

The Professional Ethics Committee for the State Bar of Texas notes in their opinion that the Texas Court of Appeals are "split on whether a legal malpractice claim is one for 'personal injury,' which under the Texas Arbitration Act can be the subject of an arbitration agreement only if the client has separate representation in entering into the agreement." Tex. Comm. On Prof'l Ethics, Op. 586, (2008); *compare In re Godt*, 28 S.W.3d 732, 738–39 (Tex. App.—Corpus Christi 2000, no pet.) (holding a legal malpractice claim to be a personal injury claim), *with In re Hartigan*, 107 S.W.3d 684, 689–91 (Tex. App.—San Antonio 2003, pet. denied) (holding that a legal malpractice claim is not a personal injury claim), *Miller v. Brewer*, 118 S.W.3d 896, 898–99 (Tex. App.—Amarillo 2003, no pet.), *and Taylor v. Wilson*, 180 S.W.3d 627, 629–31 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). The Corpus Christi Court of Appeals is the only appellate court in Texas that has held legal malpractice to be in the category of personal injury; thus requiring each party to sign a written agreement as well as each party's attorneys to sign the agreement. *See In re Godt*, 28 S.W.3d 732. If the required signatures were not obtained, than the Corpus Christi court will not compel arbitration. *Id.* The Amarillo, Houston [14th district], and San Antonio courts have compelled arbitration under the TAA when an agreement to arbitrate has been found and the opposing party refuses to arbitrate. *See* CIV. PRAC. & REM. § 171.021; *In re Hartigan*, 107 S.W.3d 684 (Tex. App.—San Antonio 2003, pet. denied); *Miller v. Brewer*, 118 S.W.3d 896 (Tex. App.—Amarillo 2003, no pet.); *Taylor v. Wilson*, 180 S.W.3d 627 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

Arbitration clauses in attorney-client engagement letters are permitted by The Professional Ethics Committee for the State Bar of Texas, the ABA, and by Texas state law. To satisfy the Professional Ethics Committee and the ABA, the lawyer must provide the client with information regarding the advantages and disadvantages of arbitration compared to judicial courts and the lawyer must not limit his liability in any way through the arbitration provision.

4. Enforceability

Note the TAA does not apply to agreements where the services will be greater than $50,000 or personal injury claims, unless both parties sign the agreement and both sides have counsel. The Corpus Christi Court of Appeals considers legal malpractice to be a personal injury claim, thus triggering the extra requirement in the TAA. The remaining courts will likely enforce an arbitration provision (found in the attorney engagement letter) in a legal malpractice case when there is a valid agreement, which has been signed by the client. All Texas courts will enforce valid arbitration provisions (signed by the client) when there is a dispute as to legal fees and costs.

Think carefully about whether you want to provide an arbitration clause in your engagement letter. If you are engaged for a jury trial, it sends inconsistent signals

to your client about your confidence in the jury system. If it is a case where your fee agreement may be discoverable or even admissible, a judge or a jury may wonder why you have confidence in them to try your client's case but not the potential case against you. And finally, if you are going to include an arbitration clause in your agreement, you should run it by your malpractice carrier first.

Consider this example:

> In the event that a disagreement arises, which we are not able to satisfactorily resolve between us, then you hereby agree that any and all disputes, controversies, claims, or demands arising out of or relating to this agreement, our relationship with you, or our performance of any current or future legal services, will be resolved exclusively by submission to binding arbitration in Amarillo, Texas. This includes, but is not limited to, disputes regarding attorney's fees or costs, claims of malpractice, breach of fiduciary duty, breach of contract, negligence, deceptive trade practices, fraud, or other legal theories sought to be asserted against us. Arbitration is to be conducted under the Texas Arbitration Act in accordance with the laws of the State of Texas. A single arbitrator who is both neutral and independent will conduct arbitration. The arbitrator will be chosen by mutual agreement of the parties. Arbitration costs will be allocated evenly among the involved parties. The arbitrator will have the authority to award any relief that a judicial court would have the jurisdiction to grant. The arbitrator will be permitted to award attorney's fees as he or she deems necessary and just.
>
> Arbitration has both advantages and disadvantages. Arbitration requires both parties to submit to an arbitrator's decision. Arbitration often provides a quick, private, and less expensive forum for the resolution of disputes. The arbitrator's legal and factual decisions are binding and typically not subject to appellate review. By agreeing to arbitrate all disputes, you are waiving your right to a trial by jury. Rules of evidence tend to be less formal and discovery will often be limited. You are encouraged to consult with independent counsel to determine if arbitration is acceptable to you. By signing this agreement, arbitration will become the sole forum for the resolution of any disputes, and both parties waive their right to submit their claims to a judicial court.

VI. CONTINGENT FEES

Too often a lawyer will use a standard contingent fee agreement or fail to spend the time necessary to draft an agreement that will be workable. Following are some of the critical areas that lawyers may not look at frequently, but need to understand completely.

Texas Disciplinary Rules of Professional Conduct Rule 1.04 is the place to start for compliance with a lawyer's obligations concerning attorney's fees in a contingency fee case. There is actually a lot of guidance in the rule for contingency fees.

In addition to the rule's prohibition on contingent fee contracts for criminal cases and family law matters (*See* 1.04(e) and comment 9), a state district judge in Dallas has held that a lawyer cannot enforce a lien against a client's criminal restitution recovery. *See Office of the Attorney General of Texas v. John H. Carney & Associates*; order by 68th District Judge Martin Hoffman.

A. Increase in percentage

Generally, it is not improper to raise the fee during the course of the representation when the client has agreed to the increase; however, there is a presumption of unfairness because the arrangement was entered into during the course the attorney-client relationship. *Robinson*, 804 S.W.2d 238. The same thing goes for percentage fees in a contingency situation. Of course, the client can agree up front that the percentage is different for each level: trial, appeal, etc. Upon review of the contract where the percentage of the contingent fee is raised mid-stream, the Courts encourage the lawyer to give the client the opportunity to consult a independent counsel before signing the new agreement. *Id.*

B. Expenses

In a contingent fee matter, are the expenses deducted from the entire recovery or from the client's share? Rule 1.04(d) recognizes how important this is to the client and mandates that it be set out in the written agreement. Give some thought to the definition of "gross recovery" in the contingency fee agreement. In a contingent fee matter, make sure to spell out whether the expenses are deducted from the entire recovery or from the client's share.

C. Calculating the fee

Recall that Rule 1.08 does not allow a lawyer to acquire a proprietary interest in the cause of action or subject matter of the litigation, except a lawyer may contract in a civil case for a contingent fee permissible under Rule 1.04. Rule 1.04(f) is very clear that this permissible exception is only for a fee that is

"contingent on the outcome of the matter for which the service is rendered. . . ."

This language should cause lawyers drafting contingent fee agreements to carefully describe not only the legal matter, but the objective or expectation of the matter. It is only in this way that the appropriate fee can be calculated from the outcome.

This detail is especially important when it is anticipated that counterclaims or offsets will be prosecuted by the defendant. In one case of that nature, the Supreme Court considered a contingent fee case where the plaintiffs recovered damages but the damages were offset by a balance due on their mortgage. *Levine v. Bayne, Snell & Krause, Ltd., 40* S.W.3d 92 (Tex. 2001). The lawyer tried to collect his percentage of the gross recovery which would have given the lawyer more fees than the plaintiffs recovered in the litigation. The Supreme Court did not allow that, relying on the Restatement (Third) of The Law Governing Lawyers § 35, which provided that the lawyer was entitled to receive the contingent fee "only when and to the extent the client receives payment."

D. Assignment of the cause of action

The Texas Supreme Court has recognized that a lawyer may take an assignment of part of a recovery and a part of the cause of action in a contingent fee case. *Dow Chem. Co. v. Benton*, 357 S.W.2d 565 (Tex. 1962). This is the exception to the general rule of prohibited transactions with clients. Tex. Disciplinary Rules. Prof'l Conduct R. 1.08(h). But this assignment cannot prevent a client from firing his attorney and employing a new one.

This assignment is separate and distinct from the common law "attorney's lien," which is a possessory lien against a client's property, money and papers for the amount due to the attorney for fees and expenses. See Tex. Comm. on Professional Ethics, Op. 305 (May 1979).

Contrary to the Texas Supreme Court's position, the Professional Ethics Committee for the State Bar of Texas issued Opinion 610 related to assignments. The Committee concluded: "a lawyer representing a client in litigation may not acquire, by agreement with his client, a lien upon the subject matter of the litigation as a means of securing payments of the lawyer's fee . . . ." *Tex. Comm. on Prof'l Ethics, Op. 610*, 74 Tex. B.J. 857 (2011). The 2011 Ethics Opinion distinguishes between a security interest and a contingent fee. *Id.* The Committee states that although a contingent fee is permissible, "a security interest to secure such a fee" does not follow. *Id.* Opining that the security interest itself must qualify as an exception under Rule 1.08(h), the Committee asserted "a proprietary interest in a litigation matter being handled by the lawyer who is seeking to acquire the security interest" does not fall within the scope of stated exceptions. Id; see Tex. Disciplinary Rules Prof'l Conduct R. 1.08(h) (listing the two exceptions). Remember, Texas Government Code Section 181.092 (c) provides that committee opinions are not binding on the Supreme Court.

The Court's acceptance of a lawyer taking a security interest in his client's cause of action in relation to a contingent fee arrangement is advanced by the numerous benefits it provides to clients. Pursuing a claim through the legal system can be expensive, thus establishing a barrier between the people and the courts. Restatement (Third) of Laws Governing Lawyers § 43 cmt.d (2000) (pointing to the lawyer's assurance of receiving a fee as "making it easier for people to secure competent representation when they have small means and meritorious claims"). Provided the percentage taken by the lawyer be reasonable and the arrangement is consensual, a lawyer should not be prohibited from taking a security interest in their client's cause of action. See id. (supporting the notion that rules of reasonableness and agreement between attorney and client should be maintained); Tex. Disciplinary Rules Prof'l Conduct R. 1.04 (requiring an arrangement for legal fees be reasonable).

The Dow Chemical decision remains the authority on a lawyer's ability to take an assignment of their client's cause of action in a contingent fee case. *Dow Chem. Co.*, 357 S.W.2d at 566 (describing the situation where an attorney contracts with his client to secure a percentage of the amount awarded).

Furthermore, it is permissible for attorneys to enter into promissory notes with their clients for a specified amount of attorneys fees. *See, e.g., Hall v. Fowler*, 389 S.W.2d 730 (Tex. App.—Dallas 1965, writ ref'd n.r.e.). In such a case, any recovery pursued on the note is a contractual matter, eliminating the need to determine whether the attorney fees are reasonable and necessary. If there is a question as to the value of the services rendered by the attorney, it must be resolved at the execution of the promissory note. *Crumplet v. Humphries*, Tex. Civ. App. 218 S.W.2d 215, 217; *Oddo v. Raborn*, 1987 Tex. App. Lexis 7773 (Tex. App.—Houston [14th Dist.]), *unpublished*. Once the note is executed, the client loses the ability to challenge whether the amount is "reasonable and necessary". *Hall*, 389 S.W.2d 730. Assuming the note is not procured under fraudulent circumstances or undue influence, "mere inadequacy of consideration . . . s not a defense to a negotiable instrument." *Id.* at 732.

VII. INCLUDE INFORMATION ON WHAT HAPPENS IN THE EVENT OF WITHDRAWAL OR TERMINATION

If an attorney hired on a contingent-fee basis is discharged without good cause before the representation is completed, the attorney may seek compensation in quantum meruit or in a suit to enforce the contract by collecting the fee from any damages the client

subsequently recovers. *Hoover Slovacek L.L.P.*, 206 S.W.3d at 561–62 (citation omitted). Alternatively, if an attorney is terminated for good cause, it appears that the attorney is not entitled to recover under the contingent fee contract; rather, he is limited to quantum meruit. *Rocha v. Ahmad*, 676 S.W.2d 149 (Tex. App.—San Antonio 1984, writ dism'd). Both remedies are subject to the prohibition against charging or collecting an unconscionable fee. *Id*. (citing Tex. Disciplinary Rules Prof'l Conduct R. 1.04).

Whether a particular fee amount or contingency percentage charged by the attorney is unconscionable under all relevant circumstances of the representation is an issue for a fact finder. On the other hand, whether a contract, including a fee agreement between attorney and client, is contrary to public policy and unconscionable at the time it is formed is a question of law.

The general rule for withdrawal and termination is (a) return the file, and (b) return any unearned fee. The assertion of an attorney's lien over the file while waiting on full payment of the fee is fraught with difficulties. Texas Disciplinary Rules of Professional Conduct Rule 1.15(d) provides that:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a clients' 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.

Texas courts and the Fifth Circuit have held that an attorney may withhold a client's file as security for payment of a fee. *Griffith v. Geffen & Jacobsen, P.C.*, 693 S.W.2d 724 (Tex. App.—Dallas 1985, no writ); *Nolan*, 665 F.2d 738. But in doing so, the attorney had better be correct—or otherwise he violates Texas Disciplinary Rules of Professional Conduct Rule. 1.15(d). In every instance of withdrawal or discharge, the lawyer must take all reasonable steps to mitigate the consequences to the client. If returning the file is necessary for that, do you really want to hold on to it to force the payment of the fee?

VIII. ENCLOSE THE TEXAS LAWYER'S CREED

This mandate for professionalism was promulgated by the Supreme Court in 1989. Section II ¶1 of the Creed provides that an attorney should advise his clients of its contents when undertaking representation. It is recommended that the Creed be enclosed with the engagement letter, and that the letter spell out to the client that the lawyer intends to abide by it. If your client asks you to be abusive or pursue tactics for delay only, you can refuse easily by telling the client that he was told upfront that these tactics would not be undertaken. Plus, compliance with the Creed is the right thing to do.

IX. APPLICABLE RULES

When drafting a fee agreement, one should keep the existing disciplinary rules in mind. There are a number of rules addressing fees and fee agreements; however, some of the more important rules are as follows:

A. Fees

- Rule 1.04(c) indicates that the basis or rate of the fee shall be communicated to the client.
- Rule 1.04 provides that a contingent fee must state the litigation and other expenses to be deducted from the recovery, and whether the expenses are to be deducted before or after the contingent fee is calculated.
- Rule 5.04 contains the general prohibition that a lawyer shall not share legal fees with a non-lawyer. Comment 3 of that rule clarifies that a lawyer and client can share the proceeds of an award in which both damages and attorneys' fees have been included.

B. Disciplinary Rule Limitations on Fee Agreements

Texas Disciplinary Rules of Professional Conduct Rule 1.04 provides:

(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.

(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 lawyers 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.

(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 modifications thereof.

The reason the entire rule is set out above is to enable several observations. First, note that this is one of the few disciplinary rules that really does define civil standards. The factors articulated by the Texas Supreme Court to be used to determine the reasonableness of attorneys' fees are taken from Tex. Disciplinary Rules of Professional Conduct Rule 1.04. *See Arthur Andersen & Co. v. Perry Equip. Corp., 94*5 S.W.2d 812, 818 (Tex. 1997).

X. PROVING UP ATTORNEY'S AND PARALEGAL FEES

A. General Rules

Because the general rule in Texas is that each litigant must pay its own attorneys' fees, it is important to recognize the limited circumstances where the recovery of fees from the other party is allowed. These circumstances are:

- When authorized by state **statute**, including Chapter 38 of the Texas Civil Practice and Remedies Code. There are over 157 statutes that authorize private litigants to recover fees. Also, by federal fee-shifting statute. *E.g.*, 42 USCS § 1988.
- When authorized by a **contract** between the parties. Remember that as between the lawyer and client, the contractual provisions will control over Chapter 38, because the parties are always free to adopt different standards for the recovery of fees.
- Under principles of **equity**.

There is a great deal more to a complete understanding of charging and collecting attorneys' fees than knowing how to recover them at trial. However, this paper will discuss some preliminary observations about recovering attorneys' fees and paralegal fees, and then will point out a few of the most often-encountered pitfalls in the recovery process.

B. Recovering Attorney's Fees by Statute

For more than a century, Texas law has not allowed recovery of attorneys' fees unless authorized by statute or contract. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006). This rule is so venerable and ubiquitous in American courts it is known as "the American Rule." *Id.* Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party's fees. *Id.*; *see, e.g., Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) ("In the United States, parties are ordinarily required to bear their own attorney's fees—the prevailing party is not entitled to collect from the loser. Under this 'American Rule,' we follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority.")

There are several statutes that provide for the recovery of attorney's fees, but this paper will discuss the most commonly cited statute, Chapter 38 of the Texas Civil Practice and Remedies Code, and the recovery of fees under a fee-shifting statute, 42 USC § 1988(b). (O'Connor's CPRC *Plus* provides a great non-exhaustive list of 157 statutes that provide for the recovery of attorneys' fees by private litigants').

Texas Civil Practice and Remedies Code Chapter 38 provides as follows:

> § 38.001. Recovery of Attorney's Fees
> A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:
>
> (1) rendered services;
> (2) performed labor;
> (3) furnished material;
> (4) freight or express overcharges;
> (5) lost or damaged freight or express;
> (6) killed or injured stock;
> (7) a sworn account; or
> (8) an oral or written contract.
>
> § 38.002. Procedure for Recovery of Attorney's Fees
> To recover attorney's fees under this chapter:
>
> (1) the claimant must be represented by an attorney;
> (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and
> (3) payment for the amount owed must not have been tendered before the expiration of the 30th day after the claim is presented.
>
> § 38.003. Presumption
> It is presumed that the usual and customary attorney's fees for a claim of the type described in section 38.001 are reasonable. The presumption may be rebutted.
>
> § 38.004. Judicial Notice
> The court may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence in:
>
> (1) a proceeding before the court; or
> (2) a jury case in which the amount of attorney's fees is submitted to the court by agreement.
>
> § 38.005. Liberal Construction
> This chapter shall be liberally construed to promote its underlying purposes.
>
> § 38.006. Exceptions
> This chapter does not apply to a contract issued by an insurer that is subject to the provisions of:
>
> (1) Title 11, Insurance Code;
> (2) Chapter 541, Insurance Code;
> (3) Chapter 9, Insurance Code;
> (4) the Unfair Claim Settlement Practices Act (Subchapter A, Chapter 542, Insurance Code); or
> (5) Subchapter B, Chapter 542 Insurance Code.

Under Section 38.001, the term person includes a corporation, organization, the government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *See* TEXAS CODE CONSTRUCTION ACT. The language of Section 38.001 limits liability for attorney's fees to individuals and corporations; however, that

language was often overlooked, resulting in courts awarding fees against partnerships, limited liability companies, and limited partnerships. To solve this inconsistency, the 84th Legislature considered amending Section 38.001 to include "other legal entit[ies]" thereby subjecting noncorporate entities to the same liability as individuals and corporations under the statute. *See* HB230, *Relating to recovery of attorney's fees in certain civil cases*, (05/21/2015 Senate left pending in committee).

While, § 1988 is a prevailing party statute, Chapter 38 is not. It simply provides for the recovery of attorneys' fees for a prevailing plaintiff, but does not provide for the recovery of fees for a prevailing defendant who was not successful on a counterclaim, but merely defends against a claim. *See Brockie v. Webb*, 244 S.W.3d 905, 910 (Tex. App.—Dallas 2008, pet. denied); *Energen Res. MAQ, Inc. v. Dalbosco*, 23 S.W.3d 551, 558 (Tex. App. Houston [1st Dist.] 2000, pet. denied).

With regard to demand and presentment, the plaintiff must plead and prove that it presented its claim for payment to the defendant or defendant's authorized agent. *Goodwin v. Jolliff*, 257 S.W.3d 341, 349 (Tex. App.—Fort Worth 2008, no pet.). No particular form of demand or presentment is required. *Id.* at 349. Presentment is simply a demand or request for payment and can be either written or oral. *Id.* In addition, there is no requirement that a plaintiff must present its claim at least 30 days prior to suit, and the claim can be made either before or after filing suit. *Brd of Cty. Comm'rs v. Amarillo Hosp. Dist.*, 835 S.W.2d 115, 127 (Tex. App.—Amarillo 1992, no writ); *VingCard A.S. v. Merrimac Hospitality Sys.*, 59 S.W.3d 847, 868 (Tex. App.—Fort Worth 2001, pet. denied). However, the act of filing suit alone is not sufficient to constitute a demand and presentment under the statute. *Goodwin*, 257 S.W.3d at 349.

Finally, the requirement of being represented by an attorney has been held to cover in-house counsel, a law firm represented by one of its own attorneys, and an attorney who represents herself. *Tesoro Pet. Corp. v. Coastal Ref. & Mktg., Inc.*, 754 S.W.2d 764, 766-767 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (in-house counsel entitled to recover attorneys' fees); *Campbell, Athey & Zukowski v. Thomasson*, 863 F.2d 398, 400 (5th Cir. 1989) (law firm entitled to fees after being represented by own attorney); *Beckstrom v. Gilmore*, 886 S.W.2d 845, 847 (Tex. App.—Eastland 1994, writ denied) (pro se attorney entitled to recover fees). Under the Civil Rights Attorney's Awards Act, the fact that the attorney is court-appointed or that the client is represented by a law school clinic program, or a nonprofit legal services organization, does not inhibit a recovery of attorney fees. *See, e.g., Miller v. Carson*, 563 F.2d 741 (5th Cir. 1977) (court-appointed attorney); *Proulx v. Citibank, N.A.*, 709 F.Supp. 396 (S.D. N.Y. 1989) (law school clinic program); *Evans v. Jeff D.*, 475 US 717 (1986) (nonprofit legal aid society); *Blanchard v. Bergeron*, 489 US 87 (1989) (attorneys working on a pro bono basis). *But see Davis v. Parratt*, 608 F.2d 717 (8th Cir. 1979) (denying a pro se litigant attorney's fees because § 1988 presupposes an attorney-client relationship).

At least one federal district court has taken judicial notice of the State Bar of Texas Department of Research and Analysis Annual Hourly Rate Report, which provides statistics on attorney hourly rates by years in practice, location and type of practice. *See Alvarez v. AMB-Trans, Inc.*; 2013 U.S. Dist. LEXIS 29579, *6 (W.D. Tex. Mar. 4, 2013). The court found that the median hourly rate reported was reasonable and customary. *Id*.

C. Proving Up Attorneys' Fees in Court

1. The Lodestar Calculation

Texas courts, like federal courts, utilize the lodestar method to calculate fees. The lodestar method calculates fees by multiplying the number of hours expended by an hourly rate, the reasonableness of which is determined by a variety of factors. The factors include:

(1) Benefits obtained for the plaintiff;
(2) The complexity of the issues involved;
(3) The expertise of the attorney;
(4) The attorney's inability to accept other legal work; and
(5) The hourly rate customarily charged in the region for similar legal work.
Gen. Motors Corp. v. Bloyed, 916 S.W.2d 949, 960 (Tex. 1996).

The plaintiff should provide a lodestar figure calculated by multiplying the total hours reasonably spent working on the case by the reasonable hourly rate for the work.

The lodestar calculation may be adjusted upward or downward depending on the *Johnson* factors. The *Johnson* factors include:

(1) The time and labor required;
(2) The novelty and difficulty of the questions;
(3) The level of skill required;
(4) The effect on other employment of the attorney;
(5) The customary fee;
(6) Whether the fee is fixed or contingent;
(7) Time limitations imposed by the client or the circumstances;
(8) The amount of money involved and the results obtained;
(9) The experience, reputation, and the ability of the attorney;
(10) The undesirability of the case;

(11) The nature and length of the attorney's relationship with the client;
(12) Awards in similar cases.

Johnson v. Ga. Hwy. Exp., Inc., 488 F.2d 714, 717–19 (5th Cir. 1974).

In federal cases, the U.S. Supreme Court has barred the use of factors 6 and 7 above from consideration of the lodestar adjustment, but Texas courts have interpreted this bar to only apply to cases based on federal law and continue to allow these factors to be considered on cases involving state law. *See Dillard Dep't Stores v. Gonzales*, 72 S.W.3d 398, 412 (Tex. App.—El Paso 2002, pet. denied).

A Texas court has added a factor: the effect that the attorneys fees award would have on the law. *Bates v. Randall Cnty*, 297 S.W.3d 828, 838 (Tex. App.—Amarillo, 2009). In this whistleblower case, the trial court awarded fees to the plaintiff in an amount less than 17% of the lodestar amount. The Court of Appeals reversed and remanded, concerned about the "chilling effect on future whistleblowers' willingness to bring suit."

Obviously, the attorneys' fees must be reasonable and necessary. The Texas Supreme Court has adopted eight factors to be used by the fact finder to determine the reasonableness of attorneys' fees, which are similar to the lodestar factors set out above:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
(2) The likelihood that the acceptance of the particular employment will preclude other employment by the attorney;
(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 the ability of the attorney performing the legal services;
(8) Whether the fee is fixed or contingent on results obtained.

Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 819 (Tex. 1997). These factors are taken directly from Texas Disciplinary Rule of Professional Conduct 1.04(b), which is one of the few disciplinary rules that defines civil standards.

When proving up attorneys' fees, it is important for the testifying attorney to discuss the *Anderson* factors set forth above as well as a discussion that the hourly rates for the attorneys and paralegals that worked on the case were reasonable given their respective training and experience. The testifying attorney should also discuss the nature and extent of the legal services performed and that the number of hours worked in the case were reasonable and necessary. Upon proving the reasonableness and necessity of the rate and hours, then the testifying attorney should discuss the lodestar factors and whether the attorney believes that an upward or downward adjustment is required after application of the lodestar factors. Finally, as discussed in more detail below, the testifying attorney should discuss whether or not the fees should be segregated between claims or whether segregation is not required because the legal services for the claims (not the facts) are too intertwined for the fees to be segregated.

2. Lodestar is Presumed Reasonable

The Texas Supreme Court has recently reviewed the proper application of the lodestar method in determining contested attorney's fees. In *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012), the court addressed two issues in a fee-shifting case involving employment discrimination and retaliation claims brought pursuant to the Texas Commission on Rights Act. The high court determined that the trial court evidence was insufficient to make a lodestar calculation, and the case was remanded to the trial court.

The court went through a detailed analysis about the method in which the lodestar calculation should be made. Importantly, the court accepted the premise that the lodestar presumptively produces a reasonable fee, noting that exceptional circumstances may justify enhancements to the lodestar number. However, the court determined that the base lodestar in this case could not be determined because the trial court did not have in front of it legally sufficient evidence to calculate the fee. The court made it clear that this evidence must include documentation of the services performed, who performed them and the hourly rate then, along with their date and how much time the work required.

The Supreme Court recognized that in the past courts have regularly accepted attorneys' fee applications that included lawyers' affidavits with estimates of the number of hours spent on a case. The court also recognized that the attorneys in the *El Apple* case may not even have contemporaneous billing records available. Nevertheless, the lawyers seeking attorneys' fees were instructed to reconstruct their work to provide the information that the trial court needed to perform a meaningful review of their fee application.

Undoubtedly this will change the practice of attorneys statewide and will cause lawyers to start maintaining contemporaneous time records.

The *El Apple* court also commented that the case involved another indicator of a reasonable fee. The opposing party provided evidence of *its* fees. The court commented that this evidence was a "sure" indicator of

a reasonable fee. This statement is contrary to the case of *MCI Telecomms. Corp. v. Crowley*, 899 S.W.2d 399 (Tex. App. 1995) in which it was stated that the opposing party's fees are irrelevant.

3. Proving Up Attorneys' Fees in Federal Courts

Like Texas courts, federal courts follow a similar standard for the recovery of attorneys' fees. As set forth above, calculating attorneys' fees involves a two step process. The court initially calculates the "lodestar" fee by multiplying the reasonable number of hours expended on the case by the reasonable hourly rates for the participating attorneys. *Migis v. Pearle Vision*, 135 F.3d 1041, 1047 (5th Cir. 1998) (citing *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995)). The court then determines if this lodestar figure should be adjusted upward or downward based on the twelve factors outlined in *Johnson*, 488 F.2d 714. *Id. See Saizan v. Delta Concrete Prods.Co.*, 448 F.3d 795, 800 (5th Cir. 2006) (noting the "lodestar may not be adjusted to a *Johnson* factor . . . if the creation of the lodestar amount already took that factor into account.").

The first step in this process is a determination of the number of hours reasonably expended on the litigation. *La. Power & Light Co.*, 50 F.3d 319, 324 (5th Cir. 1995). The party seeking fees bears the burden of establishing that they are entitled to recovery, and this involves "presenting evidence that is adequate for the court to determine what hours should be included in the reimbursement." *Bode v. United States*, 919 F.2d 1044, 1047 (5th Cir. 1990). The number of hours awarded can be reduced by the court if documentation of those hours is "vague or incomplete." *La. Power & Light Co.*, 50 F.3d at 324 (citing *Alberti v. Klevenhagen, 89*6 F.2d 927, 931 (5th Cir. 1990)).

Likewise, the testimony regarding reasonableness and necessity is basically the same as discussed above, although the Anderson factors do not apply in federal court.

D. Common Pitfalls Encountered in Proving Up and Recovering Attorneys Fees

1. Excessively Redacted Timesheets

Time records are not absolutely required in either federal or state courts for recovery of attorney fees. However, "the amount of time devoted to a case is an essential element of the computation of reasonable fees, and...it is difficult to determine that component without adequate documentation." *Copper Liquor Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1094 (5th Cir. 1982). Therefore, courts suggest that time records be kept and produced in order to prove reasonableness of fees. Federal courts, however, are much more insistent than state courts in strongly suggesting that an attorney keep time records.

The Fifth Circuit strongly indicates that contemporaneous time records should be kept and "if the "'reasonableness of the hours claimed becomes an issue, the [lawyer] should voluntarily make his time charges available for inspection by the District Court or opposing counsel on request.'" *Id*. at 1094–1095. While the Fifth Circuit has not adopted a view so strict as to deny fees altogether because counsel did not keep records, the Court emphasizes "prudent counsel will adhere to that procedure" of carefully documenting time records and the descriptions of the services rendered. *Id.*

However, the United States Supreme Court ruled in an action seeking fees under the 1976 Civil Rights Attorney's Fees Awards Act that since the starting point in assessing fees is a review of the number of hours expended, and the burden is on the party seeking fees, an award may be reduced if the documentation of hours by the attorney is inadequate. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

> "The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant . . . should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Id.*

In addition, the Fifth Circuit has excluded or reduced an award of attorneys' fees where the documentation was vague, general, and inadequate. *See, e.g., Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993) (excluding attorneys' fees because of vague, general, and inadequate documentation); *Alberti v. Klevenhagen*, 896 F.2d 927, 931 (5th Cir. 1990) (vague time entries may lead to a reduction of the number of hours awarded).

As for state court, none of the eight factors listed in Arthur Anderson mandates that time records be kept or produced; instead, Arthur Anderson only states that a fact finder "should consider" those factors. *Hanif v. Alexander Oil Co., WL 31087247* (Tex. App.—Houston [1st Dist.] 2002). "Although contemporaneous time records can be beneficial in assessing a claim for attorney's fees, they are not required." *Rio Grande Valley Gas Co. v. City of Edinburg*, 59 S.W.3d 199, 223 (Tex. App.—Corpus Christi 2000); *Richard Gill Co. v. Jackson's Landing Owners' Assn*, 758 S.W.2d 921, 928 (Tex. App.—Corpus Christi 1988, writ denied). A Texas appellate court has expressly refused to extend the United States Supreme Court finding that time records should be kept, stating that "[u]nder Texas law . . . billing records need not be introduced to recover attorney's fees." *Air Routing Intern. Corp. (Canada) v. Britannia*, 150 S.W.3d 682, 692 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

2. Segregation

For actions involving multiple claims, the segregation rules have changed drastically. For many years, Texas lawyers operated under the segregation rules of *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1 (Tex. 1992).

The Old Rule: The Sterling case held that as a general rule "the plaintiff is required to show that [attorney's] fees were incurred while suing the defendant sought to be charged with the fees on a claim which allows recovery of such fees." Id. at 10. But the Supreme Court added an exception to the general rule when the causes of action involved in the suit are dependent upon the same set of facts or circumstances and are so "intertwined to the point of being inseparable." In that situation, the party suing for attorneys' fees may recover the entire amount covering all of the claims, even if some of the claims would not support an award of attorney's fees.

Under that old rule, the emphasis was on the facts and circumstances that gave rise to the claims. However, the exception had threatened to swallow the rule and had been hard to apply consistently. The courts of appeals have disagreed about what makes two claims inextricably intertwined--some focusing on the underlying facts, others on the elements that must be proved, and others on some combination of the two. Some did not require testimony that claims are intertwined, while others did. When faced with fraud and breach of contract claims, some have held the claims inextricably intertwined, and others just the opposite.

The New Rule: Therefore, the Supreme Court announced the new rule in *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299 (Tex. 2006). The Supreme Court stated that "[t]o the extent Sterling suggested that a common set of underlying facts necessarily made all claims arising therefrom 'inseparable' and all legal fees recoverable, it went too far. *Id.* at 313. The emphasis is now on an analysis of the discrete legal services, to determine whether those services advance both a recoverable and an unrecoverable claim. If so, they do not need to be segregated. In other words, instead of concentrating on intertwined facts, courts now concentrate on intertwined legal services.

By example, the Supreme Court stated:

> Requests for standard disclosures, proof of background facts, depositions of the primary actors, discovery motions and hearings, *voir dire* of the jury, and a host of other services may be necessary whether a claim is filed alone or with others. To the extent such services would have been incurred on a recoverable claim alone, they are not disallowed simply because they do double service. *Id.*

With regard to proof, the Supreme Court held:

> This standard does not require more precise proof for attorney's fees than for any other claims or expenses. Here, Chapa's attorneys did not have to keep separate time records when they drafted the fraud, contract, or DTPA paragraphs of her petition; an opinion would have sufficed stating that, for example, 95 percent of their drafting time would have been necessary even if there had been no fraud claim. The court of appeals could then have applied standard factual and legal sufficiency review to the jury's verdict based on that evidence. *Id.* at 314.

Finally, the Supreme Court included a fallback if a party fails to provide evidence of segregation when segregation is required. The Supreme Court held that evidence of unsegregated fees for the entire case constitutes some evidence of what the segregated amount should be. Id. at 314. Therefore, in a case where segregation was required, but the attorney failed to introduce evidence of segregation, remand is required. Id.

Remember, whether fees should be segregated is a question of law, and the issue of proper segregation is a mixed question of law and fact. *Penhollow Custom Homes, LLC v. Kim*, 320 S.W.3d 366 (Tex. App — El Paso, 2010, no pet.); *Endsley Electric, Inc. v. Altech*, 378 S.W.3d 15 (Tex. App. — Texarkana 2012, no pet.)

E. Standard for Recovery of Paralegal Fees

Paralegal fees are not automatically recoverable as a subset of attorneys' fees. Many attorneys have their paralegals perform a good amount of clerical work. It may be easier for the paralegal to do this work, and it may be that it is performed better or faster by a paralegal than other clerical staff. However, just because the paralegal did the work does not mean that the time spent is recoverable from the adverse party. The recoverable amount must be for substantive legal work done under the direction of an attorney. When proving those amounts, the attorney as an expert needs to provide the fact finder with a description of the qualifications of this paralegal to do substantive legal work.

In order to recover for paralegal fees in connection with the recovery of attorneys' fees, the paralegal must have performed work that has traditionally been done by an attorney. *Gill Sav. Ass'n v. Intl. Supply Co.*, 759 S.W.2d 697, 702 (Tex. App. — Dallas 1988, writ denied). In addition, the evidence must establish all of the following:

1) the paralegals are qualified through education, training or work experience to perform substantive legal work;
2) the substantive legal work was performed under the direction and supervision of an attorney;
3) the nature of the legal work performed;
4) the hourly rate charged for the paralegal was reasonable and necessary; and
5) the number of hours expended by the paralegals were reasonable and necessary.

See id.; see also Clary Corp. v. Smith, 949 S.W.2d 452, 469–70 (Tex. App.—Fort Worth 1997, writ denied) (outlining the requirements necessary for recovery and finding evidence legally insufficient for recovery); *Moody v. EMC Servs*, 828 S.W.2d 237, 248 (Tex. App. — Houston [14th Dist.] 1992, writ denied) (outlining the requirements necessary for recovery and finding evidence legally insufficient for recovery); *Multi-Moto Corp. v. ITT Commercial Fin. Corp.*, 806 S.W.2d 560, 571 (Tex. App.—Dallas 1991, writ denied) (outlining the requirements necessary for recovery).

In *Gill Savings*, the Dallas Court held that paralegal fees are includable in an attorneys' fee award, but require additional proof, stating:

i. Having determined that a legal assistant's time is properly includable in an attorney's fee award under certain conditions, we turn to Gill's alternative argument that International did not put on the necessary proof to substantiate the award. *Gill Savings*, 759 S.W.2d at 705.
ii. The Court then found that the testimony and exhibits did not provide any help in determining the qualifications, if any, of the legal assistants, the nature of the work performed, or the hourly rate being charged. The Court, therefore, held that:
iii. [T]he evidence concerning the work performed by the legal assistants is legally insufficient to support the award.

Id. (emphasis added).

Activities performed by paralegals that fall under the realm of "substantive legal work," include:

1) conducting client or witness interviews;
2) drafting documents;
3) assisting with answering discovery;
4) drafting correspondence;
5) drafting pleadings;
6) summarizing depositions;
7) summarizing documents;
8) attending depositions;
9) attending court hearings;
10) attending trial.

Although this list is by no means exclusive, a good general guideline to follow is whether or not the work performed by the paralegal required some independent thought or a slightly higher level of cognitive thinking. Activities that would not fall under the realm of "substantive legal work," include the following:

1) Filing;
2) Scanning documents;
3) Copying documents;
4) Bates stamping documents;
5) Locating documents;
6) Making attorney's revisions to a document or pleading;
7) Faxing or emailing documents;
8) Arranging conference calls;
9) Notarizing documents;
10) Scheduling/travel arrangements.

If paralegals worked on a case, the attorney should testify about their experience, work, and fees. One rule of thumb is that paralegal fees are recoverable if the work performed by the paralegal was work that is traditionally done by attorneys. First, the evidence must establish that the paralegal is qualified through education, training, or work experience to perform substantive legal work. Next, testimony regarding work should include a description of the tasks involved, if there is a question on whether it qualifies as substantive legal work or clerical work, and that such work was supervised by an attorney. Finally, with regard to fees, similar to when proving up a reasonable attorney fee, the attorney should testify that that the hourly rate charged for the paralegal work was reasonable. It is not sufficient to testify simply about the total amount of paralegal fees. *Clary Corp*., 949 S.W.2d at 470; see also *Moody*, 828 S.W.2d at 248 (invoices listing the total cost for various services performed by a paralegal were not sufficient to support the award of fees). For more information about the definition of paralegal standards and substantive legal work, *see* State Bar of Texas Paralegal Division, txpd.org (last visited Aug. 27, 2015).

As a final point regarding paralegal fees, remember that just because your client has agreed to pay you for all the fees incurred by your paralegal on the case, this does not mean that all of the fees are recoverable in litigation. It may be advisable to state in your fee agreement that from time to time, a paralegal may perform clerical services out of necessity, but that the client still agrees to pay the paralegal rate for all hours. The client should know that you will keep this to a minimum but that it does happen.

F. What Your Client Pays You is Not What You Can Recover

Most attorneys believe the maxim that simply because the client agreed to pay the invoices sent for the legal work performed, the attorney can recover all fees as reasonable and necessary. However, the mere fact that your client agreed to pay your rate does not mean that such an agreement between you and your client is binding on the opposing party, nor is it sufficient proof of the reasonableness of the rate. *See Smith v. Smith*, 757 S.W.2d 422, 424 (Tex. App.—Dallas 1988, writ denied); *Leal v. Leal*, 628 S.W.2d 168, 170–71 (Tex. App.—San Antonio 1982, no writ).

For example, if your client agrees to pay you $500 per hour for legal work on a case and you work 500 hours on the case, you will still need to prove up that that the rate is reasonable in the locale in which the case sits and that the hours expended on the case were necessary. Therefore, testimony that the fees and the hours are reasonable and necessary just because your client paid all your invoices is insufficient to properly prove up your entitlement to your fees. You still must go through all the requirements set forth in this paper in order to recover your fees.

Likewise, if you have the case on a contingent fee arrangement, it is insufficient to prove up your fees by testifying that your fees equate to a percentage of the damages awarded. A plaintiff seeking attorneys' fees from the defendant based on a contingent fee contract cannot ask for a percentage of the judgment; the plaintiff must seek attorneys' fees based on the work performed in the case. *Trinity Universal Ins. Co.*, 945 S.W.2d at 819; see also *San Antonio Credit Un. v. O'Connor*, 115 S.W.3d 82, 106 (Tex. App.—San Antonio 2003, pet. denied)(plaintiff must ask for attorney fees in a specific dollar amount, not as a percentage of the judgment). Even if a contingent fee is reasonable from the standpoint of the client and its attorney, it does not mean the fee can be recovered from the defendant. *Arthur Anderson*, 945 S.W.2d at 818. Therefore, when proving up attorneys' fees based on a contingent fee arrangement, you must still go through the reasonableness factors and lodestar calculation.

G. Jury Charge

Pattern Jury Charge 115.47 will be used by courts in a fee-shifting claim regardless of the terms of the fee agreement entered into by the attorney and the client. Texas Pattern Jury Charges – Business, Consumer, Insurance & Employment (2010 ed.).

Here is the question:

> If you answered "Yes" to Question _____ *[applicable liability question]*, then answer the following question. Otherwise, do not answer the following question.
>
> QUESTION _____
>
> What is a reasonable fee for the necessary services of Paul Payne's attorney, stated in dollars and cents?
>
> Answer with an amount for each of the following:
>
> a. For representation in the trial court.
>
> Answer: _____
>
> b. For representation through appeal to the court of appeals.
>
> Answer: _____
>
> c. For representation at the petition for review stage in the Supreme Court of Texas.
>
> Answer: _____
>
> d. For representation at the merits briefing stage in the Supreme Court of Texas.
>
> Answer: _____
>
> e. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.
>
> Answer: _____

Note that the words "if any" are not included when asking about the amount of fees. This is because the jury does not determine whether fees are recoverable; rather, it only determines the reasonable and necessary amount.

XI. REVIEWING ATTORNEY'S FEES ON APPEAL

An appellate court will review a trial court's award for attorney's fees using a factual sufficiency of the evidence standard. *See Barker v. Eckman*, 213 S.W.3d 306 (Tex. 2006). The court, when reviewing a jury's verdict, will uphold the jury's determination unless after considering all the evidence the verdict was contrary to the overwhelming weight of the evidence. *Austin ISD v. Manbeck*, No. 03-09-00682-CV, 2011 WL 1105720 (Tex. App.—Austin Mar. 23, 2011).

In many cases, the award of attorney's fees is based on actual damages. In such cases, when an appellate court reduces the amount of actual damages, the court will also remand the case for a trial on fees unless the court is "reasonably certain that the jury was not significantly influenced by the erroneous amount of damages it considered." *See Barker*, 213 S.W.3d at 314. In *Barker*, the Texas Supreme Court held that the appellate court erred by not remanding the case for a new trial after actual damages were reduced from $111,983.58 to $16,180.14. *Id.* Not every reduction in damages will require a reversal, however because actual damages in *Barker* were reduced by one-seventh and attorney's fees were based in part on such damages, the court was not reasonably certain that the jury was not significantly affected by the erroneous amount. *Id.*