

**DRAFTING APPELLATE
FEE AGREEMENTS & HANDLING
FEE DISPUTES: A DEFENSE PERSPECTIVE**

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“The matter of fees is important far beyond the mere question of bread and butter involved. Properly attended to fuller justice is done to both lawyer and client. An exorbitant fee should never be claimed. As a general rule, never take your whole fee in advance, nor any more than a small retainer. When fully paid before hand, you are more than a common mortal if you can feel the same interest in the case, as if something was still in prospect for you, as well as for your client. And when you lack interest in the case, the job will very likely lack skill and diligence in the performance. Settle the *amount* of fee and take a note in advance. Then you will feel that you are working for something, and you are sure to do your work faithfully and well. Never sell a fee-note—at least, not before the consideration service is performed. It leads to negligence and dishonesty—negligence, by losing interest in the case, and dishonesty in refusing to refund, when you have allowed the consideration to fail.”

Abraham Lincoln, “Notes on the Practice of Law,” *Abraham Lincoln: Speeches and Writings 1832-1858*, p. 246 (Libr. Of Amer. 1989).

Lincoln’s wisdom provides guidance even today. Recently, the Texas Supreme Court has stated that fee forfeiture can result from serious breaches of fiduciary duty, even if the client has suffered no other legal injury. *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1990). The Texas Supreme Court has left open whether charging or collective excessive fees for handling an appeal will breach a fiduciary duty. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 862 (Tex. 2000).

This raises the possibility that disputes over contract interpretation and excessive fees can escalate into claims of breach of fiduciary duty. Because the fee agreement is the first place both the courts and the parties must begin in any analysis, it must be written both with forethought and consideration for the best interests of the client.

The lawyer must first and always remember that the fee agreement is a contract between the lawyer and the client. This contract not merely specifies as a fee, but determines the nature and character of the relationship. Because it becomes the relationship’s foundation, it has a great role to play in resolving fee disputes. At the beginning of any contract, the parties do not normally wish to discuss what will occur if things do not go well or if they have disputes. However, a few minutes taken at the beginning of the case to explain to the client how fees could be calculated in various scenarios or how termination of the contract could work to the client’s benefit may create a feeling of security rather than distrust.

This article proposes to discuss not only the caselaw and Texas Disciplinary Rules of

Professional Conduct, but also the RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS currently under consideration by the ALI. (“RESTATEMENT”). At several points, the RESTATEMENT fleshes out several of the standards left vague by the ABA Model Rules. It proposes to be a body of law governing all aspects of the legal profession. Moreover, the Supreme Court referred to the RESTATEMENT in *Arce*, 997 S.W.2d at 237 and in *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W. 3d 92, 94 (Tex. 2001). Consequently, the RESTATEMENT may become a valuable guide in tort and contract disputes between lawyer and client.

I. CONTRACT CONSTRUCTION

A. Rules of Construction

Texas follows the general rule that fee contracts are subject to the same rule of construction as other contracts. *Stern v. Wonzer*, 846 S.W.2d 939, 944 (Tex. App.-Houston [1st Dist.] 1993, no writ); *Howell v. Kelly*, 534 S.W.2d 737, 739 (Tex. Civ. App.-Houston [1st Dist.] 1976, no writ). Generally, the goal of contract construction would be the intent of the parties as revealed by the language. *Forbau v Aetna Life Ins. Co.*, 876 S.W.2d 132 (Tex. 1994).

However, RESTATEMENT § 18(2) provides:

"A tribunal shall construe an agreement between client and lawyer as a reasonable person in the circumstances of the client would have construed it."

See, e.g., Estate of Sparkman v. Smith, 639 So.2d 1258, 1261 (Miss. 1994) (applying § 18(2)). Sec. 18, cmt (h) noted three reasons for this rule. First, lawyers always draft fee agreements, invoking the rule that the agreement is interpreted

against the author. *Beatty v. NP Corp.*, 581 N.E. 2d 1311, 1315 (Mass.App. 1991) (noting this rule "counts double when the drafter is a lawyer."). Second, attorneys are more able than clients to detect omissions in the agreement. *Levine*, 40 S.W.3d at 95; *Untiedt v. Grand Lab., Inc.*, 552 N.W.2d 571, 575 (Minn.App. 1996, rev. denied). Third, lawyers have a fiduciary obligation to inform clients of the risks of representation. *Untiedt, Id.*; *Beatty*, 581 N.E.2d at 1315; *compare, Levine*, 40 S.W.3d at 95.

In *Lopez*, the majority did not expressly accept or reject RESTATEMENT § 18(2) as the initial standard to construe contract language. The majority appeared to follow the rule that a fee agreement be construed like other contracts. 23 S.W.3d at 860-61. The court must ascertain the parties' intent from the language. *Id.* at 861. Only if the language is unclear or ambiguous should the court construe it against the author or in an equitable manner. *Id.* at 860. Justice Gonzales' dissent agreed that standard contract construction rules applied, but adopted, RESTATEMENT § 18, as the standard to resolve ambiguities. *Id.* at 864, 866.

In *Levine*, the court adopted RESTATEMENT § 35 to construe a contingent fee agreement. *Levine*, 40 S.W.3d at 94. There, the question was whether an agreement to pay the attorney 1/3 of "any amount received by settlement or recovery" meant 1/3 of the net recovery or of the gross amount before offsets were applied. *Id.* The court concluded that RESTATEMENT § 35 correctly stated the majority view that, absent language to the contrary, the fee is figured only on the client's net recovery after it is reduced by offsets, counterclaims, etc. *Id.* The majority stated that the reason for this rule was (1) lawyers are more able to determine ambiguities in the contract and in drafting them and, (2) the burden is on the attorney to express in a written document whether the fee will be calculated on noncash benefits as well as money damages. 40 S.W.3d at 95. Moreover, the burden was justified because of the trust relation between client and attorney. Justice Owen wrote a concurring opinion that this did not change the rule of construction expressed in *Lopez*. She concluded that the majority was only expressing the policy

concerns for holding the language to be unambiguous. *Id.* at 100.

There is a decided preference for express fee agreements, preferably in writing. TEX. DISCIPL. R. PROF. COND. 1.04(d) requires contingent fee agreements be in writing. RESTATEMENT, § 38(1) provides:

"Before or within a reasonable time after beginning to represent a client in a matter, a lawyer must communicate to the client, in writing when applicable rules so provide, the basis or rate of the fee, unless the communication is unnecessary for the client because the lawyer has previously represented the client on the same basis or at the same rate."

B. Duty to State Basis of Fee

In *Levine*, the majority states that a lawyer has a duty to inform the client of the basis of rate of the fee at the outset of the matter. 40 S.W.3d at 96, citing RESTATEMENT § 38. The question now raised is whether a lawyer has any fiduciary relationship to the client when drafting the initial fee agreement. The lawyer has some duty when drafting the initial fee agreement to communicate the basis or rate of the fee, unless the circumstances indicate otherwise. *Levine*, 40 S.W.3d at 95, citing RESTATEMENT, § 38(1); see also TEX. DISCIPL. R. OF PROF. CONDUCT 1.04(c). Rule 1.04, cmt. 2 states that it is not necessary to recite all factors and underline the basis of the fee, but only those directly involved in its computation, e.g. the basic hourly rate, the fixed amount, etc.

However, the RESTATEMENT § 38, cmt. (e), recognizes a policy the lawyers have a "fiduciary obligation" to inform the client of the risks of representation. In *Levine*, the Supreme Court did not expressly adopt that ground, but did state that the duty to clarify the contract was reasonable because of the trust the client places in the attorney. 40, S.W.3d at 95. This raises the question of whether this is simply a rule of contract construction or that attorneys actually acquire fiduciary obligation in reducing an arms length transaction to writing.

Recently, the Houston Court addressed when there may be a fiduciary duty to provide a detailed explanation and analysis. *Tanox, Inc. v.*

Akin, Gump, Hauer & Feld, 105 S.W.3d 244 (Tex. App.–Houston [14th Dist.] 2002, pet. denied). There, Tanox reached a contingent fee arrangement with Akin Gump lawyers it wished to hire to take over a trade secret case. The fee agreement not only gave the attorneys a percentage of any net cash payments, it also gave the attorneys a 10% of royalties in any new business formed by Tanox as a result of settling with the opposing party. Tanox sought to renege on the fee agreement when it settled for \$32 million dollars and the formation of a new business venture. Tanox claimed that the lawyers breached a fiduciary duty to disclose an ambiguity in the fee agreement that would give the attorneys “massive fees” if it formed a new business venture.

The Houston court concluded there would be no duty to disclose and explain an ambiguous fee provision absent a fiduciary relation between Tanox and the attorneys; this in turn depended on whether an attorney-client relation existed before the agreement was signed. 105 S.W.3d at 254. Whether the parties had such relation depended on the existence of an agreement that the attorneys would render professional services; this could either be based on an express agreement or implied from the party’s conduct, words or actions. *Id.* The fact finder can consider what the attorneys said, when they began billing, whether Tanox was also negotiating to hire other attorneys, and the extent of any actual arms-length negotiating. *Id.* at 254-55. The court stated that the parties may agree that no attorney-client relation can exist until after the fee agreement negotiated. *Id.* at 255, citing RESTATEMENT § 14, cmt. (e). The Houston Court found sufficient evidence to uphold a finding that no attorney-client or fiduciary relationship existed before executing the fee agreement. *Id.* at 255-56. Because the client had adequate knowledge concerning the terms of the fee agreement, there was no breach of the duty to inform the client of the basis or rate of the fee. *Id.*

C. Modifying the Contract

This problem arises for appellate counsel in several ways. First, counsel may try to reduce a prior oral agreement to writing. Second, counsel may feel a modification is

appropriate if the case has become more difficult, e.g., an appeal to the Texas or U.S. Supreme Court. Finally, the appellate counsel is taking over the case from a trial lawyer in the same firm who has an existing fee agreement with the client.

Fee agreements signed after representation has begun are suspect because they are a transaction with one with whom the lawyer has a fiduciary obligation. *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964). A fee agreement executed during the course of the lawyer/client relationship is enforceable if it is fair and reasonable compensation and it is executed freely and voluntarily with full understanding by the client. It is presumed to be unfair; the attorney has the burden of proof to show it is fair and reasonable. *Id.*; see also, *Keck, Mahim & Cate v. Nat’l Union Fire Ins. Co.*, 20 S.W.3d 692, 699 (Tex. 2000).

Modifications are doubly suspect. *Garcia v. Robinson*, 804 S.W.2d 238, 248 (Tex. App.-Corpus Christi 1991), writ denied, 817 S.W.2d 59 (Tex. 1991). A new agreement or modification for additional compensation is unenforceable unless the attorney assumes new duties. *Cooley v. Buie*, 291 S.W. 876, 883 (Tex.Comm.App. 1927, holding app.). There is no consideration for the increase in fee if the lawyer is simply to perform the same services. *Garcia*, 804 S.W.2d at 248. An attorney may be entitled to extra compensation if he (1) performs services not contemplated as probable or needed at the time the contract was executed, and (2) the additional services were made necessary by subsequent, unexpected events in the progress of the case. *Cooley*, 291 S.W. at 883-84; *Coon v. Ewing*, 275 S.W. 481, 484 (Tex. Civ. App.-Beaumont 1925, writ dism.). For example, if the opposing party pleads new and unexpected causes of action, an attorney might be able to contract for additional sums for services not contemplated by the original agreement. *Gill v. Randolph*, 269 S.W.2d 529, 532 (Tex. Civ. App.–Galveston 1954, writ ref. n.r.e.). RESTATEMENT § 18(1) provides:

“(1) A contract between a lawyer and client concerning the client-lawyer relationship, including a contract modifying an existing contract, may be enforced by either party if the contract

meets other applicable requirements, except that:

(a) if a contract or modification is made after a reasonable time after the lawyers begin to represent the client in the matter . . . the client may avoid it unless the lawyer shows the agreement and the circumstances of its formation were fair and reasonable to the client; and

(b) if the contract is made after the lawyer has finished providing services, the client may avoid it if the client was not informed of facts needed to evaluate the appropriateness of the lawyer's compensation or other benefits conferred on the lawyer by the agreement."

Section 18, cmt (e), provides that the lawyer's burden to prove fairness and reasonableness encompasses two elements. First, that the client was adequately aware of the circumstances showing a need for modification and of all of the disadvantages and effects of the agreement. Second, the lawyer must show that the client was not pressured to agree to the modification to avoid alienating the lawyer or succumbing to the problems of changing counsel.

II. UNCONSCIONABILITY

As a general rule, the court has no authority to determine what fee a litigant should pay counsel, that being a matter of contract. *Thomas v. Anderson*, 861 S.W.2d 58, 62 (Tex. App.-El Paso 1993, no writ); *In re Polybutylene Plumbing Litigation*, 23 S.W.3d 428, 436 (Tex. App.-Houston [1st Dist.] 2000, pet. dismissed by agreement). When the language in the attorney's fee contract is plain and unambiguous, it is enforced as written. *Stern*, 846 S.W.2d at 944. If the

contract was valid when made and the parties are mentally competent, it is enforced without court review of the reasonableness of the fees agreed upon. *Polybutylene Plumbing*, 23 S.W.3d at 436; *Parker v. Boyles*, 197 S.W.2d 842, 849 (Tex. Civ. App.-Galveston 1946, writ ref. n.r.e.).

There are two recognized exceptions to enforcement once the attorney has performed: (1) fraud and breach of fiduciary duty; *Burrow*, 997 S.W.2d at 232; *Archer*, 390 S.W.2d at 740; and, (2) cases involving minors and incompetents. *Polybutylene Plumbing*, 23 S.W.3d at 437. Recently, the El Paso Court has held the court may not enforce an "unconscionable" fee or a fee that amounts to a contractual penalty. *Walton v. Hoover, Bax, & Slovacek, L.L.P.*, 149 S.W.3d 834, 842-43, 846 (Tex. App.-El Paso 2004, pet. filed).

ABA Model Rules of Prof. Conduct, Rule 1.5(a), provides that "[a] lawyer shall not make an agreement for, charge, or collect unreasonable fee or an unreasonable amount for expenses." This is a change from the ABA Model Code - EC-2-17 stated a lawyer should not charge more than is reasonable, but DR 2-106 prohibited only charging "... an illegal or clearly excessive fee." The Model Rules made "reasonableness" the standard to clarify the rule and protect the client. ABA, *Legislative History of the Model Rules of Prof. Conduct*, 40 (1987). The former standard had led some authorities to conclude lawyers could be sanctioned only for grossly excessive fees. Geo. C. Hazard & W. William Hodes, *The Law of Lawyering*, 107 (2 ed. 1990).

The RESTATEMENT § 34, also adopts the 'reasonableness' standard. It prohibits a lawyer from charging a fee larger than "reasonable" under the circumstances.

However, TEX. DISCIPL. R. PROF. COND. 1.04(a) preserved the old standard. It states:

"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."

Rule 1.04, cmt (1), makes it clear that Texas' rule adopts a higher standard. The lawyer is to be disciplined only for an *unconscionable* fee. Cmt (7) recognizes that "unconscionable" is difficult because factors setting reasonableness under Rule

1.04(b) are many times subjective. Cmt 7 also recognizes that fee agreements are struck at the beginning of the relationship when many uncertainties and contingencies exist. Therefore, “unconscionable” adopts a perspective to give the lawyer the benefit of the doubt of the uncertainties at the outset.

The Disciplinary Rules are frequently a source consulted by the courts to determine if a contract violates a public policy and, therefore, not enforceable. *See, e.g., Bond v. Crill*, 906 S.W.2d 103, 106 (Tex. App.–Dallas 1995, no writ); *Pollard & Cook v. Lehman*, 832 S.W.2d 729, 736 (Tex. App.–Houston [1st Dist.] 1992, writ denied). Therefore, it may be that unconscionability under Rule 1.04(a) may be a sufficiently tough and clear standard which the courts can treat as an affirmative defense to enforcement. *See Walton*, 149 S.W.3d at 842-43.

The possibility that an excessive fee alone may breach a fiduciary duty is foreshadowed in *Lopez*. The majority finessed the issue by construing *Lopez* to assert only breach of contract as the fiduciary duty breach. *Lopez*, 22 S.W.3d at 862. The majority noted *Lopez* did *not* claim that (1) a 45% contingent fee was excessive when the contract was made, (2) a 5% fee for the appeal was excessive, or (3) the attorney manipulated the process to trigger the basis to charge the extra fee. *Id.* That the Court borrowed from Rule 1.04 indicates that the court is inclined to consider some level of excessiveness as a breach of fiduciary duty. Justice Gonzales’ dissent (joined by Chief Justice Phillips) left no doubt that collecting an unconscionable fee violates a fiduciary duty. 22 S.W.3d at 867. Even if the contract entitles him to it, the lawyer has a fiduciary duty to decline. *Id.* at 868. As standards for “unconscionable,” Justice Gonzales quoted Rule 1.04(a) and RESTATEMENT § 46, 47. However, he went a step further, that a fee is unreasonable if it is grossly disproportionate to the work and risks. *Id.* The lawyer may breach the duty if he provides “little or no services” and collects a substantial part of the recovery. *Id.* at 868. Justice Gonzales cited *General Motors v. Bloyd*, 916 S.W.2d 949, 960 (Tex. 1996), which discusses the “lodestar” method for calculating attorneys fees in class actions. *Id.* at 867.

The suggests that the ultimate litmus test for unconscionable under Rule 1.04 will be a comparison of the lawyer’s time and effort with the fee and the results. *See Walton*, 149 S.W.3d at 844.

Curiously, it is not unconscionable to charge a fee that is too low or no fee at all. Texas Prof. Ethics Opinion, No. 542 (February 2002). This becomes an issue when the lawyer accepts a low fee from a third party that may affect representation of the client; the lawyer may not allow the fee to affect the quality of representation. *Id.* However, counsel cannot agree to pay court costs, except for an indigent client. *Id.* citing TEX. DISCIPL. R. PROF. COND. 1.08(d)(2).

III. CONFLICTS OF INTEREST

Space does not permit a complete treatment of conflicts of interest. The point here is to identify conflicts at the outset so that appellate counsel can either decline representation or advise the client so that the client may reach an informed decision whether to waive conflicts.

Conflicts of interest present problems for all lawyers. Appellate lawyers may have special problems. First, the appellate lawyer is often retained in cases when the client and the party paying the fees (often an insurer) may have different goals or actual conflicts. The appellate lawyer needs to identify the conflict and obtain the client’s informed consent. Second, appellate lawyers can have positional conflicts, i.e., the possibility of making bad law for another current client.

A. Conflicts with current or prior clients

TEX. DISCIPL. R. PROF. COND. 1.06(b) prohibits representation whenever representation of one person involves a substantially related matter in which that person’s interests are materially and directly adverse to another client’s interests or the lawyer reasonably believes responsibilities to another client or third party may adversely limit that representative. In either case, the lawyer may represent both clients if (1) the lawyer reasonably believes he can provide competent and diligent representation to both, and, (2) both clients give informed consent after full disclosure. Comment (7) to Model Rule 1.6 indicates that the first prong is an *objective* standard. If a disinterested lawyer cannot

reasonably conclude that competent and diligent representation will be given both, the lawyer cannot properly ask the client to consent. TEX. DISCIPL. R. PROF. COND. 1.09(a) prohibits representation whenever representation of one person on a matter adverse to a former client if it involves a substantially related matter, representation creates a reasonable probability of breaching confidentiality, or it may question the validity of the attorney's work product for the former client.

The RESTATEMENT §§ 121 and 122 reach the same result. Under § 121, absent the client's consent, the lawyer may not represent the client if there exists a substantial risk that representation will be materially and adversely affected by the lawyer's duties to another current or former client, or a third party. Under § 122(2)(c), the lawyer cannot represent the new client, even with consent, if it is not reasonably likely that the lawyer will be able to provide adequate representation to one of the clients. Section 122, cmt g(iv), makes it clear that consent still will not permit 'objectively inadequate' representation.

The problem is complicated further by duties owed to former clients or parties to joint defense agreements. RESTATEMENT § 131, and TEX. DISCIPL. R. PROF. COND. 1.09(a) prohibit representing someone in a matter if the lawyer represented a former client in the same or substantially related matter whose interests are materially adverse to the former client. The principal rationale is to preserve client confidences and any continuing duties owed the former client. However, the rule should not transfer every engagement into a lifetime commitment; otherwise lawyers would be discouraged from taking small, "one-shot" cases. Because protecting confidences is a key, the rule applies also to confidences gained through "joint defense" agreements with non-clients in multi-party cases. See generally, James Fisher, *The Attorney-Client Privilege Meets the Common-Interest Arrangement*, 16 REV. OF LITIGATION 631 (1997).

The appellate lawyer will have run a thorough conflicts check. This will require examination not only of former clients, but related companies and parties to joint-defense agreements.

Conflicts of interest present a special problem in federal courts. Some federal courts permit the opposing party to disqualify counsel for conflicts of interest in which it has no actual standing. *In re American Airlines, Inc.*, 972 F.2d 605, 610-11 (5th Cir. 1992). This is compounded by the lack of a single federal "common law" of legal ethics. See, Ted Schneyer, *Nostalgia in the Fifth Circuit: Holding the Line on Litigation Conflicts Through Federal Common Law*, 16 REV. OF LITIGATION 537, 540ff (1997). Thus, the appellate lawyer may believe no conflict exists based on state law, only to find that the federal appellate court may survey legal ethics guidelines nationwide and find one. Familiarity with ABA and RESTATEMENT standards will allow appellate counsel to avoid pitfalls at the outset.

B. Positional Conflicts of Interest

Appellate lawyers may have a unique problem: "positional" conflicts. TEX. DISCIPL. R. PROF. COND. 1.06, comment (10), recognized that appellate lawyers have the unique ability to argue for caselaw that will adversely affect other clients. Comment 10 argued that it could be improper to represent parties with antagonistic positions on legal issues pending at the same time in appellate courts. It was drawn from the former ABA Model Rule 1.7, comment (9), that forbid concurrent representation if the firm would have to argue contrary legal positions in the same jurisdiction, unless neither case is likely to lead to precedent harmful to the other. ABA Comm. on Ethics, Op. 93-377 (1993). See generally, Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457 (1993) Strictly interpreted, the concept applies only when the lawyer faced representing two clients simultaneously and arguing two different interpretations of law that will adversely affect one of them. J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 SW. L. J. 677, 690 (1989).

The RESTATEMENT § 128, comment (f), took a broader view. It refers to this problems as "[c]oncurrently taking adverse legal positions on behalf of different clients." The RESTATEMENT § 128, comment (f), makes no distinction between trial and appellate courts. Instead, comment (f) requires consideration of whether a substantial risk that the actions in one case will adversely effect the other, whether the issues are procedural or substantive, the client's reasonable expectations in retaining the lawyers, and the

practical significance on each client's immediate and long-term interests. The focus is on whether the lawyer might "pull his punches" on the legal arguments in one case to favor the other's outcome.

In August, 2002, the ABA modified comment 9 to Rule 1.7. The new comment 24 adopts the Restatement view. A "positional" conflict of interest exists if there is a "significant risk" that the lawyer's action for one client could materially limit the lawyer's effectiveness for another client in another case. The elements to consider are borrowed from the Restatement.

C. Conflicts Caused by Third-Party Payment or Control

The most frequent "third-party payment" problem is when the client's insurer retains appellate counsel. However, the same problem exists anytime a third party pays the legal fees, e.g., a manufacturer who defends the dealer, a corporation that defends its officers, a parent that provides for a child, a public interest group that pays for indigent services, etc. Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, 16 REV. OF LITIGATION 585, 602-618 (1997). The problems revolve around who is the client, who has ultimate control of the case, and protecting confidentiality.

TEX. DISCIPL. R. PROF. COND. 1.06(b)(2) prohibits representation if a lawyer's responsibilities to a third person could adversely limit representation. This becomes a problem if the interests of the client diverge from those of the party paying the bills. This often arises when the insurance company has coverage defense to some of the claims in the appeal or the judgment exceeds policy limits. TEX. DISCIPL. R. PROF. COND. 1.06(c) permits representation if (1) the lawyer reasonably believes representation will not be materially affected, and (2) the client gives informed consent after full disclosure.

Similarly, if there is an excess judgment, retained counsel should probably advise the client in writing of the potential conflicts with the insurance company and obtain informed consent.

The Restatement permits representation if the client receives reasonably adequate

information about the risks of representation. RESTATEMENT § 122(1). It puts the duty to provide that information on the attorney, although the duty is satisfied if the client learns the information from other sources (e.g., personal counsel). RESTATEMENT § 122 cmt (c)(I). If there are no coverage issues, an "informative letter" at the outset of the letter may suffice. RESTATEMENT § 134 cmt (f). Otherwise, the commentary suggests that the required information about a conflict cover the interests of the other party, courses of action that may be foreclosed or impaired, the effect on maintaining confidentiality, any reservations the lawyer may have, and the consequences to the client if the lawyer must withdraw if consent is not given. RESTATEMENT § 122 cmt (c)(I). In such cases, consent can be inferred from the client's continued active participation, but any ambiguities in manifesting consent are construed against the lawyer. *Id.*

Under either the Texas Rules or the Restatement, the client's informed consent to representation is necessary. This burden probably falls on the appeal counsel if he or she is taking over the case. Appellate counsel should consider a letter setting out who retained counsel and will pay the fees, with any pertinent information about billing guidelines. The insured's knowledge of any reservation of rights letters should be discovered. While appellate counsel need not explain the insurance policy, counsel should find out if the insured understands the policy limits and that the insurer disputes coverage for all or part of the judgment. The current ABA Model Rule 1.7(b)(4) requires consent be "confirmed in writing." This means a writing signed by the client or a writing promptly sent by counsel to the client following consent. ABA Model Rule 1.7(b), cmt (20).

Many third-party payors require communications from the appellate counsel, e.g., case reports, evaluation, etc. Such communications are usually considered privileged work product or communications. Nevertheless, the Restatement states that consent to allowing the insurer to hire counsel is not necessarily consent to reveal confidential information. RESTATEMENT § 134 cmt (e). The client must be informed about disclosures to the insurer as part of getting consent to any conflict of interest. RESTATEMENT §§ 60 cmt (1), 122.

This becomes a problem in two cases. First, some carriers may require bills to be audited by outside auditors; some carriers may ask the reports be forwarded to coverage counsel. Most states have concluded that bills cannot be forwarded to third-party auditors without the client's informed consent. David Klein, "An Ethics Opinion on Auditing of Attorneys' Bills," *FOR THE DEFENSE*, pp. 4-5 (June 1998); Douglas Richmond, "Of Legal Audits and Legal Ethics," *DEFENSE COUNSEL JOURNAL*, p. 512 (Oct. 1998). Because this potentially exposes client confidences to parties not bound by confidentiality, the counsel must obtain the client's informed consent or decline representation. Texas Prof. Ethics Opinion 532 (Sept. 2000), citing TEX. DISCIPL. R. PROF. COND. 1.05. For much the same reason, the insurer's coverage counsel is probably not entitled to receive the reports absent client consent. Also, the third-party payor may have "litigation/billing guidelines." The lawyer may not agree to abide by billing/litigation guidelines that interfere with the exercise of independent professional judgment in rendering legal services to the client. Texas Prof. Ethics Opinion, No. 533 (September 2000). This becomes an issue if the guidelines unduly interfere with or control research.

Third, the insured may demand counsel not communicate confidences that bear on coverage issues, extra-contractual claims, or a "sweetheart deal." Counsel must respect the request and not communicate the information to the carrier. TEX. DISCIPL. R. PROF. COND. 1.05(b)(1); ABA Model Rule 1.6(a); RESTATEMENT §§ 60 cmt (l), 134 cmt (f). Possibly counsel may not reveal adverse information concerning coverage issues under any circumstance. RESTATEMENT § 134 cmt (f). Depending on the nature of the information, this may require counsel to advise the insurer an irreconcilable conflict exists and withdraw without disclosing the information. *Id.*

IV. DEFENSE CONTINGENT FEE PROBLEMS

A. Propriety of "Reverse Contingent Fee Agreements"

Contingent fee agreements do not violate public policy. *Mandell & Wright v. Thomas*,

441 S.W.2d 841, 846 (Tex. 1969); *Kuhn, Collins & Rash v. Reynolds*, 614 S.W.2d 854, 857 (Tex. Civ. App.-Texarkana 1981, writ ref. n.r.e.). TEX. DISCIPL. R. PROF. COND. 1.04(d) provides the fee may be contingent on the outcome of matter for which services are rendered, except to the extent prohibited by law. Attorney contingent fees serve several purposes:

1. They are the only means by which some plaintiffs can afford to pay for legal services;
2. Success creates a source of funds with which to pay fees;
3. The potentially greater fee compensates the attorney for the risk that the attorney may receive not fee whatsoever.

Arthur Anderson & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997); *In re Polybutylene Plumbing*, 23 S.W.3d at 436; *Kuhn*, 614 S.W.2d at 857. The ABA has suggested contingent fees may be appropriate when the client could afford to pay an hourly rate because it frees up the client's income pending the outcome of the case. *See, ABA Formal Opinion*, 94-389 (Dec. 5, 1994).

In the last decade, "reverse" contingent fees have become increasingly popular. Under this fee agreement, the lawyer is compensated based upon a percentage of the amount they client is saved or the amount by which the client's liability or indebtedness is reduced.

Initially, one court held that a reverse contingency fee based upon the amount of tort liability saved the client was excessive and void against public policy. *See, Wunschell Law Firm, P.C. v. Clabaugh*, 291 N.W.2d 331 (Iowa 1980). There, the client agreed to pay his defense counsel a fee equal to a percentage of the difference between (1) the addendum clause in plaintiff's petition and (2) the amount eventually paid by settlement or judgment. The Iowa Supreme Court reasoned this fee was excessive because the fee was dependent in part upon whatever amount the plaintiff chose to plead. Because the plaintiff might choose to plead an excessive, unreasonable amount as damages, the amount of work expended and risk incurred

might not be at all proportional to the potential fee.

Thereafter, the ABA concluded that “reverse contingent fee” agreements could be valid and enforceable under the rules. ABA Formal Opinion 93-373 (April 1993); ABA Formal Opinion 94-389. (Dec. 1994).

A “reverse contingency fee” must be tied to some reasonable benchmark. *See Brown & Sturm v. Frederick Road, Ltd.*, 768 A.2d 62, 76-78 (Md. App. 2001). There counsel had represented a family in selling the family farm to the children which resulted in a \$60 million tax assessment by the IRS. After counsel began representing the children in the tax court proceedings, the children signed a fee agreement giving counsel 10% of the amount saved. Eventually, the parties agreed to a \$20 million dollar assessment; the lawyers then demanded a \$4 million fee, i.e., 10% of the \$40 million reduction.

The Maryland Court of Appeals upheld a finding that this fee was excessive. Prominent in the analysis was the fact that the lawyers had already undertaken representation and there was no showing that the IRI’s original \$60 million assessment represented a “reasonable benchmark” against which to measure a valid reduction. 768 A.2d at 77-78.

The Houston Court of Appeals recently enforced a “reverse contingent fee” agreement in *Chapman v. Hootman*, 999 S.W.2d 118 (Tex. App.-Houston [14th Dist.] 1999, no pet.). There, Chapman quit paying his mortgage when he discovered the seller had failed to deliver good title. 999 S.W.2d at 120. Expecting collection suits, Chapman retained attorney Hootman. The fee agreement had two clauses.

Hootman obtained no cash recovery but reduced the note’s balance, his fee was 10% of the reduction; and if Hootman obtained a cash recovery and reduced the note, he received 50% of the recovery and 10% of the reduction. *Id.* at 120-21. Chapman eventually settled the resulting lawsuits obtaining only a release of the mortgage. *Id.* Chapman refused to pay Hootman; he claimed that only the *second* clause applied and, because there was no recovery, the contingency (recovery and reduction) failed to occur. *Id.* at 122.

The Houston Court of Appeals affirmed a summary judgment for the attorney,

reasoning that the first clause applied, i.e., the clause providing only 10% of the amount of reduction if there was no recovery. *Id.* at 123.

B. “Blended” Contingent Plus Hourly Rate Fees

Another option is the “blended” fee, part contingent fee and part hourly rate. This is permissible within certain limits. Texas Prof. Ethics Opinion No. 518 (September 1996). Except in unusual circumstances, it is probably unreasonable or unconscionable to contract for a contingent fee that is the higher of a (1) the highest reasonable contingent fee, or (2) the highest hourly rate. *Id.* A combination of reduced contingent percentage and a reduced hourly rate is probably acceptable if the total fee collected is reasonable under TEX. DISCIPL. R. PROF. COND. 1.04. *Id.*

C. Voidable Contingency Fee Contracts

Appellate counsel who drafts a “reverse” or “blended” contingency fee agreement should be mindful of an important statute: TEX. GOV. CODE ANN. § 82.065(a). It requires that a contingent fee agreement be in writing and signed by both attorney and client. Section 82.065(b) provides that the contract is voidable *by the client* if it is procured as a result of conduct that violates either the laws of the state or the Disciplinary Rules of the State Bar of Texas regarding barratry. If the client does not sign the contract, an oral contingency fee agreement is voidable by the client. *Tillery v. Zurich Ins. Co.*, 54 S.W.3d 356, 359 (Tex. App.–Dallas 2001, pet. denied). *Sanes v. Clark*, 25 S.W.3d 800, 804 (Tex. App.–Waco 2000, pet. denied). It may be necessary for the client to notify counsel that the agreement is terminated before the attorney has substantially performed. *Tillery*, 54 S.W.3d at 359. Courts have split over whether the client can void the contract if the attorney fails to sign. *Compare, Enochs v. Brown*, 872 S.W.2d 312, 318 (Tex. App.–Austin 1994, no writ)(attorney’s failure to sign agreement did not bar enforcement or no complaint raised until after case settled); and, *In re Godt*, 28 S.W.3d 732, 738 (Tex. App.–Corpus Christi 2000, orig. proc.) (attorney’s failure to sign contract barred enforcement of arbitration when a client sued attorney for malpractice.).

The type of grounds upon which a client may seize to avoid the contract under sec. 82.065(b) may be broad. *See, e.g., Sanes*, 25

S.W.3d at 805. There, the contingent fee contract contained a clause authorizing the counsel to file suit, settle the claim and sign the client's name to releases. The Waco Court concluded this clause violated TEX. DISCP. R. OF PROF. COND., 1.02(a)(2), which requires the attorney accept the client's decisions regarding settlement. Citing Sec. 82.065(b) the court concluded that the clients were entitled to void the contracts on the ground they violated Rule 1.02(a).

Under § 82.065(b), only the client can void the contract. *Robert L. Crill, Inc. v. Bond*, 76 S.W.3d 411, 420 (Tex. App.—Dallas 2001, pet. denied).

V. BILLING FOR COSTS AND EXPENSES

Most defense attorneys are accustomed to billing for time and expenses incurred. However, most contingent fee agreements also provide that certain file expenses will be reimbursed. In complex plaintiff's cases, allocation of expenses and proper billing of expenses to the file can become complex, in addition to amounting to a significant portion of the recovery. Therefore, there is every reason to think that the client will scrutinize the request for expense reimbursements on a contingent fee case as in an hourly rate case.

TEX. DISCIPL. R. PROF. COND. 1.04 does not expressly address charging the expenses of litigation. ABA Model Rule 1.5(a) prohibits charging or collecting an "unreasonable amount for expenses." ABA MODEL R. OF PROF. COND. 1.5(a) (2002 ed.). Comment [i] to Model Rule 1.5(a) that an attorney can either charge a reasonable amount to which the client has agreed or an amount that reasonably reflects the lawyer's incurred costs; this includes copying, telephone calls, etc.

The caselaw construing agreements about proper billing and expenses is relatively rare. Most caselaw comes from federal courts which require attorney's fees be adjudged by the court. Therefore, there is a substantial body of federal caselaw construing what charges are appropriate for recovery for statutory attorney fees or recoveries under a "common fund" theory.

Differentiating between legal work, paralegal work and clerical work has become

critical. Generally, lawyers should not charge at all for any clerical tasks they do as if it were legal work, i.e., activities involving legal skills and experience. See, e.g., *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992), *vacated in part*, 984 F.2d 345 (9th Cir. 1993). For example, document filing or document delivery is not properly chargeable. *Missouri v. Jenkins*, 491 U.S. 274, 288, n.10 (1989); *Dickinson v. Indiana State Election Bd.*, 817 F.Supp. 737 (S.D.Ind. 1992); *Mautner v. Hirsch*, 831 F.Supp. 1058 (S.D.N.Y. 1993). Likewise, tasks such as file organization, copying, document filing, etc. cannot be charged as legal fees. *Rahaender v. Univ. of Minn.*, 546 F.Supp. 158 (D.Minn. 1982); *In re Taylor*, 100 B.R. 42 (Bankr.D.Colo. 1989); *Spicer v. Chicago Bd. Of Options Exch., Inc.*, 844 F.Supp. 1226 (D.Ill. 1993); *Keith v. Volpe*, 644 F.Supp. 1317 (C.D.Calif. 1986), *aff'd*, 858 F.2d 467 (9th Cir. 1988).

Even then, the courts scrutinize how the attorney uses his time. For example, it may not be reasonable for every new associate on the file to do a thorough file review to get "caught up." *Hart v. Bourque*, 798 F.2d 519, 522 (1st Cir. 1986). Also, it may be difficult to justify spending more time to prepare for a deposition than take it. *Ramos v. Davis & Geck*, 968 F.Supp. 765, 776 (D.P.R. 1997). Likewise, an excessive amount of time in drafting documents and checking cites can be questionable. See, e.g., *Coalition to Save Our Children v. State Bd. Of Education*, 901 F.Supp. 824, 831 (D.Del. 1995).

Likewise, "block" or "bundled" billing has become a questionable practice. "Block" or "bundled" billing is a practice of lumping together into a single time of the compensable time all work performed during that time period. *Keith*, 644 F.Supp. at 1322. Unless the client specifically agrees to this practice, the difficulty is that it is difficult to know how much time was spent on any individual item. *Keith*, 644 F.Supp. At 1322. Federal courts have been particularly critical of block billing in trying to determine fee awards. *In re Holthoff*, 55 B.R. 36, 42 (Bankr.E.D.R. 1985); *In re Adventist Living Centers*, 137 B.R. 701, 705 (Bankr.N.D.Ill. 1991); *In re STN Enterprises*, 70 B.R. 823, 832 (Bankr.D.Verm. 1987).

It goes without saying that doubling up on files should be avoided unless there has been full consultation and consent by the client. It may be difficult to explain after the fact why two

attorneys were necessary for a hearing or deposition, or even why counsel needed a paralegal. For most clients, the maxim “one riot - one Ranger” is a good rule of thumb.

VI. DISPUTING FEES DUE UNDER CONTRACT

Some disputes arise out of an attempt to charge or collect more fees than the contract arguably allows after the lawyer has performed.

A. Dispute Resolution Itself Becomes Grounds for Suit

Even the attempt to resolve the dispute over the amount due may itself generate more problems. *See, e.g., Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692, 699 (Tex. 2000); *Garcia v. Robinson*, 804 S.W.2d at 248; *Commission For Lawyer Discipline v. Eisenman*, 981 S.W.2d 737, 741 (Tex. App.–Houston [1st Dist.] 1998, writ denied); *Spera v. Fleming, Hovenkampen & Fleming, P.C.*, 25 S.W.3d 863 (Tex. App.–Houston [14th Dist.] 2000 no pet.). A lawyer may not settle a claim for liability with an unrepresented client without first advising the client in writing that independent representation is appropriate. TEX. DISCIPL. R. PROF. COND. 1.08(b); *see also* ABA Model Rule 1.8(g).

In *Keck*, the excess carrier sued the attorney retained by the primary insurer for malpractice, under the doctrine that the excess carrier is subrogated to the rights of client. 20 S.W.3d at 695. However, the client had signed a release with the attorneys concerning legal fees for an unrelated matter. *Id.* at 696. The release forgave not only the unpaid legal fees, but released the attorneys from any demands, claims, causes of action of any kind attributed to the rendition of legal services to the client.

The Supreme Court reversed summary judgment for the attorneys, holding there was a fact question concerning the fairness of any such release. *Id.* at 699. Any agreements negotiated between attorney and client are closely scrutinized; due to the fiduciary relationship, a presumption of unfairness attached to such contracts. *Id.* The attorneys had the burden to show the release was fair and reasonable and that the client was informed of all material facts relating to the

release. *Id.* at 699. A provision in the release advising the client that independent representation would be appropriate was insufficient to rebut the presumption of unfairness. *Id.*

In *Robinson*, after the client recovered a \$10 million settlement, he and his counsel disputed whether a modification raising the fee from 37½ to 50% was valid. Attorney Garcia tendered the client his 50% share, conditioned on the client signing an accord and satisfaction of the fee dispute. 804 S.W.2d at 241.

The majority opinion by Justice Kennedy concluded that any accord and satisfaction of the fee dispute was presumed unfair. He reasoned that it was akin to modifying a fee agreement during the course of representation, thereby putting the burden on counsel to establish the fairness of any compromise. 804 S.W.2d at 248. A concurring opinion by Chief Justice Nye condemned demanding a compromise of the fee dispute before releasing any part of the recovery to the client. 804 S.W.2d at 251-54.

Garcia has in large measure been superseded by statute. The “full-payment-check” accord and satisfaction was later limited by statute. TEX. BUS. & COMM. CODE ANN. § 3.311 (Vernons 2002). Also TEX. DISCIPL. R. PROF. COND. 1.14(e) has now solved the specific problem by requiring the lawyer to disburse to the client the undisputed part of the recovery. Although Rule 1.14 permits the lawyer to retain possession of the disputed part in which the lawyer claims an interest, the lawyer should be careful in determining whether there is any good faith basis for claiming an interest in the disputed part.

See, e.g., Commission For Lawyer Discipline v. Eisenman, 981 S.W.2d 737, 741 (Tex.App.–Houston [1st Dist.] 1998, writ denied). There, the client had received an offer to settle a bodily injury claim for \$250,000.00. Attorney Eisenman agreed to take the case for a 30% contingent fee of any amount that exceeded the \$250,000.00 offer. The attorney then found that the client had lied to him about preexisting physical injuries. 981 S.W.2d at 738. The case settled then for the original \$250,000.00 offer. However, the attorney retained \$30,000.00 “in escrow” from the disbursement as a fee in *quantum meruit* for the client’s fraud. *Id.* at 739. The Houston court concluded it violated Rule 1.14 to retain the \$30,000.00, because the attorney had

no *contractual* right to the money. *Id.* at 741. That the lawyer might have a colorable fraud or *quantum meruit* claim against the client did not give the attorney any colorable interest in the settlement monies which would justify a retention under Rule 1.14.

Seeking court approval of the fee has its pitfalls. The *Spera* case was fee dispute arising from the settlement that was the subject of *In re Polybutylene Plumbing Litigation*. In that case, counsel were sued by former clients over their fees for obtaining a \$170,000 million aggregate settlement in a mass tort case. 25 S.W.3d at 867. Although this was *not* a class action, the court decided to hold a “fairness hearing” to “approve” counsel’s fee under the 40% contingent fee agreements. *Id.* at 467. When the clients sued for breach of fiduciary duty, the attorneys argued the prior ruling on their fees was collateral estoppel. *Id.* at 861. The Houston Court concluded that once the trial court sought to review and approve the fees due under the contract a conflict of interest arose; the attorneys then had a duty to advise the clients of the conflict and of their right to attend and contest their attorneys’ request. *Id.* at 870, 873. Their failure to advise the clients was a breach of fiduciary duty, even though the trial court’s decision on the fees due was later vacated. *Id.* at 874.

B. Arbitration

A new problem is whether arbitration clauses are enforceable under the Texas Arbitration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 171.001, *et seq.*, (Vernons Supp. 2000). Section 171.001(a) prohibits arbitration of “personal injury” claims, unless the claimant had separate representation before signing. Moreover, TEX. DISCIPL. R. PROF. COND. 1.08(g) prohibits prospectively limiting the lawyer’s liability to the client. The ABA Model Rule 1.8(g), cmt [14], states that the prohibition on prospective agreements to limit liability does not apply to a legal arbitration clause, provided the client is “fully informed of the scope and effect” of the arbitration agreement. The prevailing view outside Texas is that a fee agreement may include an arbitration clause if it is fully explained to the client and the client gives informed consent. *See* RESTATEMENT §54(b),

cmt (b); ABA Formal Opinion 02-425; Okla. Bar Ass’n Legal Ethics Comm’n, Opinion 312 (August 2000); Conn. Bar Ass’n Comm’n on Prof. Ethics, Informal Opinion 99-20 (June 1999), Informal Opinion 97-5 (March 1997); Penn. Bar Ass’n Comm. On Legal Ethics, Formal Opinion 97-140 (September 1997). TEX. DISCIPL. R. PROF. COND. 1.08, cmt 6, has no comment concerning arbitration. That leaves open the question of whether inserting an arbitration clause in the contract or failing to explain it defeats arbitration or gives the client a claim for breach of fiduciary duty.

The courts of appeal are split on whether a legal malpractice claim is one for “personal injury,” thereby triggering section 171.002(a). *Compare In re Godt*, 28 S.W.3d 732, 738 (Tex. App.—Corpus Christi 2000, orig. proc.) (legal malpractice claims fall within section 171.002(a)); *and Miller v. Brewer*, 118 S.W.3d 896, 898-99 (Tex. App.—Amarillo 2003, no pet.) (expressly rejecting *Godt*); *In re Hartigan*, 107 S.W.3d 684, 690 (Tex. App.—San Antonio, orig. proc.) (rejecting *Godt*).

In *Godt*, the Corpus Christi court did not reach the public policy argument that an arbitration clause violated TEX. DISCIPL. R. PROF. COND. 1.08(g). 28 S.W.3d at 729 n.7. The San Antonio court of appeals confronted the issue and held it does not violate Rule 1.08(g). *In re Hartigan*, 107 S.W.3d at 689; *Henry v. Gonzalez*, 18 S.W.3d 684, 691 (Tex. App.—San Antonio 2000, pet. denied).

This opens some interesting issues. The Corpus Christi court did not have to decide whether an *Arce*-type suit for breach of fiduciary duty and fee forfeiture is a “personal injury” claim for the purposes of § 171.002(a). This leaves the problem that arbitration clauses may or may not be enforceable, depending on the nature of the dispute between client and counsel. *See Validity and Construction of Agreement Attorney and Client To Arbitrate Disputes*, 26 ALR 5th 107; Robert Kraemer, *Attorney-Client Conundrum: The Use of Arbitration Agreements for Legal Malpractice in Texas*, 33 St. Mary’s L.J. 909 (2002).

C. Fees Due After Lawyer Withdraws

The amount of the attorney’s interest or fee becomes all the more difficult if the lawyer has withdrawn or been discharged. If the attorney is discharged without good cause before the case is

completed, the attorney is entitled to enforce the contingency fee contract and to receive the agreed upon percentage of the recovery. *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969); *Law Offices of Windle Turley, P.C. v. French*, 140 S.W.3d 407, 413 (Tex. App.–Fort Worth 2004, no pet.). Texas appears to be in a minority on this, because the majority of other states hold the attorney is entitled to *quantum meruit*. *Auguston v. Linea Aerea Nacional-Chile, S.A.*, 76 F.3d 658, 662 (5th Cir. 1996). See also, RESTATEMENT § 40 (attorney entitled to lesser of quantum merit or a ratable portion of the contract fee).

An attorney discharged without good cause is entitled to also elect to rescind the contract and seek *quantum meruit*. *Auguston*, 76 F.3d at 662; *Diaz v. Attorney General of State of Tex.*, 827 S.W.2d 19, 22 (Tex. App.–Corpus Christi 1992, no writ). The attorney discharged without cause has an election of remedies between the contract and *quantum meruit*. *Rocha v. Ahmed*, 676 S.W.2d 149, 156 (Tex. App.–San Antonio 1984, writ dismissed); *Howell*, 534 S.W.2d at 739. The attorney has only the burden to show the contract and performance; the client has the burden to show the discharge was with “good cause.” *Howell*, 534 S.W.2d at 739; *Rocha*, 676 S.W.2d at 156.

On the other hand, if the attorney withdraws without good cause, the attorney forfeits all right to compensation, even *quantum meruit*. *Royden v. Ardoin*, 160 Tex. 338, 331 S.W.2d 206, 209 (1960) [attorney who is disbarred or suspended before completing the case forfeits compensation]; *Auguston*, 76 F.3d at 662. It is unclear whether an attorney who voluntarily withdraws based on “just cause” is entitled to even *quantum meruit*. Compare, *Auguston*, 76 F.3d at 662-663, with *Staples v. McKnight*, 763 S.W.2d 914, 917 (Tex. Civ. App.–Dallas 1988, writ denied). It has been said that an attorney who voluntarily withdraws for “good cause” cannot recover under the contract, but may recover in *quantum meruit*. *Rocha*, 676 S.W.2d at 156; *Howell*, 534 S.W.2d at 739. However, a split has been noted where the disciplinary rules permit but do not require withdrawal. *Staples*, 763 S.W.2d at 917; *Howell*, S.W.2d at 739; *Auguston*, 76 F.3d at

662. There appears to be considerable concern that if the attorney has discretion to withdraw, this may constitute an abandonment. However, the attorney may terminate an agreement to handle future cases without jeopardizing fees on completed cases. *Madeksho v. Abraham, Watkins, Nichols & Friend*, 57 S.W.3d 448, 454 (Tex. App.–Houston [14th Dist.] 2001, pet. denied)(attorney did not “abandon” clients by voluntarily ending case referral arrangement).

The Texas Supreme Court currently has pending a petition from an El Paso Court decision declaring unconscionable a fee due upon terminating a contingent fee agreement. See *Walton v. Hoover, Bax, & Slovacek, L.L.P.*, 149 S.W.3d 834 (Tex. App.–El Paso 2004, pet. filed). There, the client hired the law firm to pursue an oil royalty dispute for a 30% contingent fee; it provided that if the client terminated the contract without cause, the client then had to pay a fee equal to 30% of the claim’s value at the time of termination. 149 S.W.3d at 837. The client was offered \$6 million to settle, but would have to convey property to the opposing party; the client rejected the offer and requested \$6 million without conveying the realty. *Id.* at 838. When this offer was rejected, the client fired the law firm and hired new counsel; the law firm demanded a fee of \$1.8 million under the contract. *Id.* at 839. Years later the case finally settled for \$900,000.00. *Id.*

The law firm sued for its fees. The jury determined the client did not have good cause to fire the law firm, the contract provision was not unconscionable, and the amount due under the contract was \$900,000.00. *Id.*

The El Paso Court reversed for the client. It held that the a lawyer cannot charge a fee upon discharge that is so excessive that penalizes the client for changing counsel. *Id.* at 843. If this were a contingent fee, a fee equal to 100% of the recovery was unconscionable as a matter of law. *Id.* at 844-45. However, it was not a contingent fee because it was not dependent on the outcome; therefore, the risk of could not justify a high percentage. *Id.* Likewise, it could not be justified based on time and effort, because the fee was fixed without regard to effort. *Id.* Therefore, it was akin to a liquidated damages clause and would be treated as a penalty. *Id.* On these facts, this particular clause resulted in an unconscionable fee as a matter of law. *Id.* at 846.

VII. TIPS FOR DRAFTING THE APPELLATE FEE RETENTION LETTER OR AGREEMENT

1. Define who you will represent and who you will not represent. This is particularly important if there are multiple or unsophisticated clients or if the person paying you is not the party you will represent in court.
2. Define the scope of representation. Does it include trial court representation, representation in the Supreme Court? Is this a “one shot” matter, such as a mandamus petition? Are you lead or support counsel? Will you handle oral argument or just briefing? Will you remain counsel after a remand?
3. Make it clear what you will not do. In complex cases, this means specifying what suits or issues you will not work on. Make it clear that you will not give opinions on the adequacy of trial counsel if that is an issue.
4. Specify what lawyers from your firm the client has authorized to work on the case and their compensation.
5. Identify and explain any conflicts of interest. State what advice you gave the client and the client’s decision. Describe how conflicts with third parties were resolved.
6. Specify the details of compensation. This must include how expenses are handled, e.g., copying, faxes, telephone charges, mailing and courier expenses, travel, electronic research, travel, reproducing the brief, “e-briefs,” etc. Spell out how the client will approve those expenses that must be approved in advance. Specify how and when billing will be done.
7. Spell out file retention and destruction. Let the client know how to obtain the file at the conclusion of representation. If you have a file retention/destruction policy, set how long you will retain the file before disposing of it.
8. Set out how each party may terminate representation. It is advisable to include a statement of counsel’s ethical obligation when withdrawing from the file.
9. Consider whether to include dispute resolution devices such as voluntary mediation. It remains to be seen whether Texas will permit arbitration. In any case, discuss this carefully and fully with the client.
10. Set out the client’s responsibilities, if any.
11. Attach copies of the Texas Lawyer’s Creed and the Texas Standards of Appellate Conduct. This will explain the client why, from time to time, you are civil to opposing counsel and the appellate court.

Excellent forms can be found in J. Scott Sheehan, “Attorney Engagement Letters” State Bar of Texas Prof. Development Programs (Dec. 1998); and Texas Center for Legal Ethics and Professionalism, THE ETHICS COURSE (6th Ed), Appendix F (2004).