

Dallas Bar Association  
Trial Skills Section  
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ATTORNEYS' FEES: TIMEKEEPING AND BILLING

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# PROBLEM ISSUES AND OH BLEEP MOMENTS!

Law firm sues client for \$675,000 in unpaid legal fees.

- “Here we are already \$200k over our estimate—that’s team \_\_\_\_\_!”
- “Now Vince has random people working full time on random research projects in standard ‘churn that bill, baby!’ mode.” ...That bill shall know no limits.”

# 1. CONTINGENT FEE REQUIREMENTS UNDER RULE 1.04

- Contingent fees are prohibited in criminal matters.
- Contingent fee agreements must be in writing – oral agreements are voidable.
- The contingent fee contract must show how expenses will be handled – whether they are deducted before or after the contingent fee is calculated.

# 1. (Cont.) CONTINGENT FEE REQUIREMENTS UNDER RULE 1.04

- At the conclusion of the matter, the lawyer must provide the client with a written closing statement describing the method of calculating the contingent fee.

## 2. ATTORNEYS' FEES MUST NOT BE UNCONSCIONABLE

- Factors:
  - The time and labor required, the novelty and the difficulty of the questions involved and the skill requisite to perform the legal service properly.
  - The likelihood that the acceptance of the particular employment by the lawyer will preclude other employment by the lawyer.
  - The fee customarily charged in the locality for similar legal services

## 2. (Cont.) ATTORNEYS' FEES MUST NOT BE UNCONSCIONABLE

- The amount involved and the results obtained.
- The time limitations imposed by the client or by the circumstances.
- The nature and length of the professional relationship with the client.
- The experience, reputation and ability of the lawyer.
- Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

## 2. (Cont.) ATTORNEYS' FEES MUST NOT BE UNCONSCIONABLE

- Comments 7 & 8 to Rule 1.04 further define unconscionability.
  - The risk of non-payment is part of what justifies a contingent fee.
  - The risk is observed prospectively and not in hindsight. This gives some cover to a lawyer who undertook a risky case and got a quick and overly generous recovery.

## 2. (Cont.) ATTORNEYS' FEES MUST NOT BE UNCONSCIONABLE

- Queries:
  - What happens if the lawyer is offered a case that does not have Comments 7's many uncertainties and contingencies? *Eich v. Maceau*, Colorado Court of Appeals
  - What is a reasonable fee when the client sitting across from the lawyer has a case with what appears to be clear liability and unassailable damages in the millions?

## 2. (Cont.) A CONTINGENT FEE MUST NOT BE UNCONSCIONABLE

- What happens when the lawyer has two cases with strong liability facts and large damages, but one case has no insurance?

## 4. THE RIGHTS OF THE TERMINATED ATTORNEY UNDER A CONTINGENT FEE CONTRACT

- *Mandell & Wright v. Thomas*, 441 S.W.2d 841 (Tex. 1969)
  - A client has a right to fire an attorney at any time during the representation.
  - When the client terminates an attorney without good cause, the discharged attorney can still recover on his or her contingent fee contract.
  - When the client terminates the attorney for good cause, the attorney cannot recover on the contingent fee contract but may be allowed to recover under *quantum meruit*.

## 4. (Cont.) THE RIGHTS OF THE TERMINATED ATTORNEY UNDER A CONTINGENT FEE CONTRACT

- OPEN QUESTIONS UNDER *MANDELL*
  - What happens if the attorney withdraws instead of being terminated?
  - What constitutes good cause for terminating a lawyer?
  - What is the attorney entitled to receive under *quantum meruit*?
  - Potential claim of tortious interference against the second lawyer?

## 5. UNCONSCIONABILITY ISSUES

- *Augustson v. Speiser, Krause, Madol & Mendelsohn*, 76 F.3d. 658 (5<sup>th</sup> Cir. 1996).
  - Law firm moves to withdraw after clients refused to accept a settlement offer, which the law firm had strongly recommended and clients refused to give the lawyer a final figure on which they would agree to settle.

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- Family opposes the law firm's withdrawal, but the court permits it.
- Second attorney settles the case for much more money.
- **Holding:**

The failure of a client to accept a settlement offer **does not constitute just cause** to permit an attorney to withdraw and still collect a fee.

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- **Problems with departing attorneys**
  - If the client asks the departing lawyer to continue handling the case, what are the rights of the law firm?
  - Does that constitute good cause for terminating the law firm?
  - If the law firm seeks to collect a fee, does that create the potential for an unconscionable fee (2 firms charging a fee)?

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- **Your Worst Nightmare.**

- *Law Offices of Windle Turley vs. Robert L. French, et al.*, 141<sup>st</sup> District Court of Tarrant County, Texas.
- Claims: Attorney sued for discharge without good cause under *Mandell* and for *quantum meruit*. Counterclaim for intentional infliction of emotional distress.
- **Jury Verdict:**  
**The Firm receives \$0 on its fee claim, and client receives a verdict of \$1.4 million on the intentional infliction claim.**

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- The guaranteed contingent fee provision
  - 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 . . . *Hoover Slovacek, LLP vs. Walton*, 206 S.W.3d 557 (Tex. 2006).

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- **Holding:**

Clause violates *Mandell*.

It makes no distinction between discharges occurring with or without cause.

It assesses the attorney's fees as a percentage of the present value of the client's claim at the time of discharge.

It requires the client to pay the lawyer the percentage fee immediately at the time of discharge.

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- Result:

The termination fee provision violated public policy and was unconscionable as a matter of law.

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- Contingent fee ONLY on the net recovery for the client.
  - *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92 (Tex. 2001).
  - **Holding:**

A lawyer is entitled to recover a contingent fee only on the net recovery received by the client.

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- Can the lawyer have the authority to settle?
  - “I/we fully authorize my said attorney to bring suit, if necessary, and to prosecute the same to final judgment and to compromise and settle this claim, with or without suit, in any manner which they may deem necessary, including signing my/our names to finalize such settlement.” *Sanes v. Clark* 25 S.W.3d 800 (Tex. – Waco 2000, pet. denied).

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- **Holding:**

Contingent fee agreement is void, because an attorney is required to abide by client's decision regarding whether or not to accept a settlement offer.

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- Expenses Matter!
  - Arbitration involving John O'Quinn.
  - Contingent fee agreement did not permit the deduction for General Breast Implant Expenses of 1.5% for each settlement.
  - **Holding:**

Arbitration panel ordered a partial forfeiture of **\$35 million** of Mr. O'Quinn's fees, which with interest and attorney's fees could be as much as **\$58 million.**

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- Ambiguous Fee Agreements:
  - *Anglo Dutch Petroleum International v. Greenberg Peden*, 352 S.W. 3d 445 (Tex. 2011)
  - “Construing Client-Lawyer Agreements from the perspective of a reasonable client in the circumstances imposes a responsibility of clarity on the lawyer that should preclude a determination that an agreement is ambiguous in most instances...”

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- “A client’s best interests, which its lawyer is obliged to pursue, do not include having a jury construe their agreements.”

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- Non-refundable retainers
  - *Cluck vs. Commission for Lawyer Discipline*, 214 S.W.3d 736 (Tex. App. – Austin, no pet.)
  - Contract provision: “No part of the legal fee is to be refunded should the case be discontinued or settled in any other manner.”
  - **Holding:**

Lawyer violated Rule 1.14(a) because the non-refundable fees were not true retainers.

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- Ethics Opinion 431

A non-refundable retainer may be permitted if the lawyer can substantiate that **other employment will probably be lost by obligating himself to represent the client.**

- Ethics Opinion 611 (September, 2011)

Payment for the **provision** of future services rather than for the **availability** of future services is not permitted.

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- Ethics Opinion 582
  - If payment is not made to the lawyer within 30 days after the lawyer's invoice goes out, the lawyer may charge the client's credit card for the amount of the invoice.
  - This practice is okay if the client consents and the client's ability to challenge a disputed statement for legal fees is preserved.

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- Ethics Opinion 610 (August, 2011)
- Fee agreement allowed the lawyer to acquire a security interest in the subject matter of litigation** that the lawyer is conducting for the client in order to secure payment of the lawyer's fee.
- Holding: Security interest in a cause of action** is not an essential part of a contingent fee. Opinion does not ban contingent fees!

## 5. (Cont.) UNCONSCIONABILITY ISSUES

- Getting more than your client

Gross Recovery	\$100,000
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Attorney Contingent Fee 50%	\$ 50,000
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Expenses	<u>\$ 20,000</u>
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Amount Payable to Lawyer	\$ 70,000
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Amount Payable to Client	\$ 30,000
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## 5. (Cont.) UNCONSCIONABILITY ISSUES

- Ratcheting contingent fees.

Fee if case settled pre-suit	25%
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Fee if suit is filed	33%
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Fee if suit is tried	40%
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Fee if suit is appealed	45%
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# ARBITRATION OF FEE DISPUTES

- Claims for malpractice are subject to arbitration.
- Lawyer is entitled to sue for fees in court.
- Court of Appeals finds the arbitration provision to be unconscionable.
- *Royston, Rayzor, Vickery & Williams, L.L.P. v. Lopez*, 2015 Tex. LEXIS 622 (Tex. June 26, 2015)
- Beware of insurance carrier objections to arbitration clauses in fee agreements.

# Proving Attorney's Fees

- *Arthur Andersen v. Perry Equipment Corporation*, 945 S.W. 3d 812 (Tex 1997).
- DTPA case-lawyer handles on a contingent fee.
- Proof-introduce fee contract.
- Supreme Court-fee contract alone cannot support award of attorney's fees.
- Must consider the 8 factors listed in Rule 1.04.
- Must prove fees were reasonably incurred and necessary and specific dollar amount.

# *El Apple I, Ltd. V Olivas, 370 S.W. 3d 757 (Tex. 2012).*

- Claim under the TCHRA.
- Attorney's fees proved up under the lodestar method.  
Reasonable hours spent by counsel x reasonable hourly rate. Product = base fee or lodestar.  
Base lodestar may be adjusted up or down (apply a multiplier-.25 up to 4).

## *El Apple, cont.*

- Lawyers estimated that they spent 850 hours, but they didn't keep time sheets.
- Testified about nature of case, results obtained, and that representation precluded other employment.
- Multiplier of 2.0-Fee award of \$464,000.
- Criticism of lodestar method-since shifting fees to opposing party, no incentive for early settlement or to avoid excessive and unjustified work.

## *El Apple* cont.

- Proof of fees under lodestar method:
  1. Nature of the work;
  2. Who performed services and their rate;
  3. Approximately when services were performed; and
  4. Number of hours worked.
- In all but the simplest cases, proof of these elements will require contemporaneous billing records.
- Remand for new trial, so that attorneys can supply the required proof.

# Where Are We?

- Different standards for proving attorney's fees under the traditional and lodestar methods.
- When are required to use lodestar instead of traditional method?
- What does it take for an attorney to “opt for” proof under the lodestar method?
- Can court take judicial notice of reasonable fee without any proof?
- Last chapter on this issue has yet to be written!

# “Minnesota lawyer disbarred for servicing client”

- Lawyer represented client in her divorce.
- Lawyer asked client if she would like to have sex.
- Lawyer and client have an affair, and lawyer bills client for his time while having sex.
- Lawyer’s license suspended for 15 months.

## 6. CONCLUSION

- **READ THE RULES!!!**
- **DO NOT BE A PARTY IN THE NEXT REPORTED DECISION!!!**