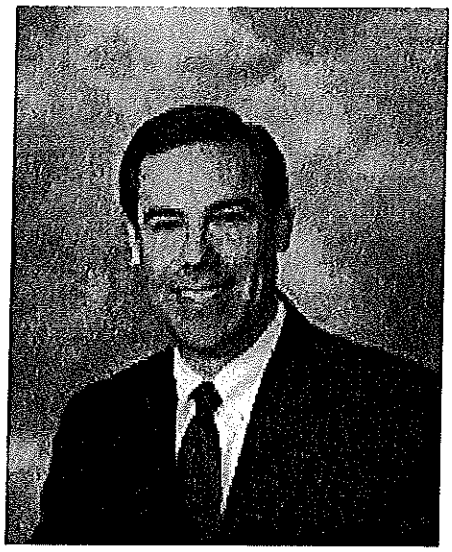
AVOIDING A GRIEVANCE / MALPRACTICE
"When Mama Ain't Happy – Ain't Nobody Happy!"
(Second Verse, Same as the First)



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State Bar of Texas
23RD ANNUAL ADVANCED
PERSONAL INJURY LAW COURSE
July 18 - 20, 2007 — *Dallas*
August 1 - 3, 2007 — *San Antonio*
August 22 - 24, 2007 — *Houston*

CHAPTER 33

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PUBLICATIONS (Since 2003):

Avoiding a Grievance / Malpractice: "When Mama Ain't Happy, Ain't Nobody Happy!" (Second Verse, Same as the First), State Bar of Texas 23rd Annual Advanced Personal Injury Law Course, 2007.

Mental Anguish Damages in Personal Injury Cases, San Antonio Trial Lawyers Association CLE, 2007.

"When Mama Ain't Happy, Ain't Nobody Happy!" State Bar of Texas 22nd Annual Advanced Personal Injury Law Course, 2006.

"The Money Pit: Liens and Subrogation Interests," State Bar of Texas 21st Annual Advanced Personal Injury Law Course, 2005.

"When Mama Ain't Happy, Ain't Nobody Happy," Legal Ethics in Texas Seminar, 2005.

"New and Old Money Grubbers: Liens, Subrogation and the Made-Whole Doctrine (Same Song – Second Verse)," Texas Trial Lawyers Association 15th Annual Medical Malpractice Conference, 2004.

"New and Old Money Grubbers: Liens, Subrogation and the Made-Whole Doctrine," State Bar of Texas Real Damages after HB4 Seminar, 2004.

"New and Old Money Grubbers: Liens, Subrogation and the Made-Whole Doctrine," Texas Trial Lawyers Association 14th Annual Medical Malpractice Conference, 2003.

"New Malpractice Caps Will Hurt Children, Elderly," San Antonio Express-News, December 11, 2003, at 7B.

"The Most Commonly Encountered Liens and Subrogation Interests in Medical Malpractice and Nursing Home Negligence Cases," State Bar of Texas 19th Annual Advanced Personal Injury Law Course, 2003.

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AVOIDING A GRIEVANCE/MALPRACTICE "WHEN MAMA AIN'T HAPPY – AIN'T NOBODY HAPPY!"

(Second Verse, Same as the First)

I. Introduction

"When Mama ain't happy, ain't nobody happy
So Daddy's gonna make Mama happy tonight."
--Tracy Byrd, "When Mama Ain't Happy"

The song is right: when Mama ain't happy, ain't nobody happy! The same is true with clients. When your client ain't happy, ain't no way you're happy!

Most lawyers who have practiced for any length of time have experienced client problems. When they occur, client problems consume a lawyer's time, productivity and energy until resolved. And, unfortunately, the resolution can take the form of a State Bar sanction or legal malpractice judgment.

Fortunately, most client problems can be avoided. This paper is intended to provide some practical tips for keeping your clients happy. If you can keep your clients happy by avoiding some recognized pitfalls, you will minimize your risk of having a grievance[1] or legal malpractice suit filed against you. In the unfortunate event that a grievance is filed against you, however, this paper is intended to provide some insight into how you can survive that process with your scalp intact.[2]

II. Why Clients Complain and How to Minimize the Risk of a Grievance and/or Getting Sued

"It's the little things, the itty bitty things
It's the little things
That piss me off."
--Robert Earl Keen, "It's The Little Things"

Indeed, it's the little things – the itty bitty things -- that snowball over time and result in grievances and legal malpractice lawsuits. Every grievance and/or legal malpractice claim begins with a dissatisfied client.

Between June 1, 2006 and May 31, 2007, **6954** grievances were filed.[3] Of these grievances, the Chief Disciplinary Counsel ("CDC") classified 2,247 (32%) as Complaints and dismissed 4,445 (64%) as Inquiries. Of the Complaints on the docket, 320 (14%) resulted in the Attorney being sanctioned by the State Bar.[4]

Historically, criminal lawyers have been the most susceptible to having a grievance filed against them, followed by family lawyers, then personal injury lawyers.

The overwhelming majority of Complaints allege **neglect**,[5] followed closely by its twin sister, **lack of communication.**[6] Thereafter, the most common allegations involve shortcomings in attorney **integrity**,[7] **declining or terminating representation**,[8] **failing to safeguard property**,[9] **disputes over fees**,[10] **conflicts of interest**,[11] and, to a much lesser extent, breach of **client confidentiality**.[12]

The ABA's rule of thumb is that, for every ten grievances that are filed, one will result in a legal malpractice lawsuit. Accordingly, by understanding *why* clients file grievances and *how* to avoid them, a lawyer can avoid getting sued for legal malpractice, as well.

A. Neglect

"I didn't know you were so lonely
Am I to blame for makin' you that way?
Did I neglect all that mattered?"
--Shania Twain, "Raining on Our Love"

Perhaps no professional shortcoming is more widely resented than procrastination. Texas Disciplinary Rule of Professional Conduct 1.01(b)

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[1] "Grievance" means a written statement, from whatever source, apparently intended to allege Professional Misconduct by a lawyer, received by the Office of Chief Disciplinary Counsel. Rule 1.05(R) T.R.D.P. (eff. Jan. 1, 2004).

[2] Robert Valdez will give a 45 minute luncheon presentation on Friday entitled "Responding to the Grievance Committee: The Respondent's Perspective." Nothing herein is intended to detract from Mr. Valdez's in-depth coverage of that topic.

[3] The 10-year average for grievance filings is 8,309/year. However, the number of grievances filed each year appears to be steadily declining: 17% fewer grievances were filed in 2006-07 than in 2003-04.

[4] Of the 320 sanctions in 2006-07, there were 30 Disbarments, 31 Resignations, 110 Suspensions, 62 Public Reprimands, and 87 Private Reprimands.

[5] In 2006-07, 1009 Complaints (45%) alleged that the Attorney neglected the client matter.

[6] In 2006-07, 974 Complaints (43%) alleged that the Attorney failed to adequately communicate with the client.

[7] 509 Complaints (23%).

[8] 436 Complaints (19%).

[9] 321 Complaints (14%).

[10] 137 Complaints (6%).

[11] 96 Complaints (4%)

[12] 40 Complains (2%)

prohibits the neglect of legal matters and the frequent failure to completely carry out the lawyer's obligations to the client. Rule 1.01(b) states:

> *(b) in representing a client, a lawyer shall not:*
> *(1) neglect a legal matter entrusted to the lawyer; or*
> *(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.*
> *(c) As used in this Rule, "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.*

Significantly, pursuant to subsection (c), if the lawyer acts in good faith, she is not subject to discipline for an isolated inadvertent or unskilled act or omission, tactical error, or error of judgment. The sanction for neglect is predicated on a finding of "conscious disregard." However, a finding of conscious disregard could be made against a well-meaning, overworked lawyer who persistently neglects a client matter to the detriment of the client.

In 2006-07, 45% of the Complaints filed in Texas alleged that the attorney neglected the client matter. Often, as a result of the neglect, the client's interests were irreparably harmed. Here are some tips to avoid neglecting a client matter:

- Calendaring errors, which cause a lawyer to neglect a critical task, are a leading cause of grievance and malpractice claims. Common mistakes include data entry errors, absence of a back-up calendar, and procrastination until the last minute to file documents. You should have a calendaring system that is easy to use, maintain, and teach to new personnel. It should have "checks and balances," which might consist of the comparison of a master calendar to a back-up calendar, multiple eyes to verify entries, and tracking procedures to identify who made any given entry. Remember: There is no such thing as secretary or paralegal malpractice. There is only Attorney Malpractice. Accordingly, you must take personal responsibility for the accuracy of your calendar.
- Just say no! Don't accept a new client matter unless you can reasonably foresee that you will have adequate time to competently handle the matter in the near future. Some lawyers are afraid to say "no" to a prospective client, even if they are overwhelmed by their current caseload. Perhaps the lawyer fears that, although she is extremely busy today, she may have precious little to do next year. A well-intentioned, but overworked lawyer, who can't seem to find time to get to a client matter, is at risk for a grievance alleging neglect. The better practice? If you're too busy, refer the matter to a competent attorney that can timely do the work. Receiving a referral fee check in the mail is much better than receiving a grievance citation or legal malpractice petition!
- Don't dabble! Don't accept a new client matter that is outside of your legal comfort zone, unless you have spare time to devote to the matter. Remember: there is no such thing as a "simple" will or an "uncontested" divorce. Often, it's easy to put off working on a client matter that is "outside of the box" and easier to fill every day by working on client matters that fit squarely within our legal comfort zone. This may create a situation that is a set-up for client neglect.
- Periodically discuss the status of the case with your client – either in person, by telephone, or in writing (including e-mail). Clients get irritated when they don't know what is happening on their case. You may wish to consider writing each client a 3-4 sentence status letter every month – even if the letter says nothing more than that the case is still pending and there is nothing new to report.
- Return your client's phone calls within 24 hours of receipt. Clients dislike it when an attorney is less than responsive.
- Make yourself personally available to clients. A frequent complaint from clients is that, after the lawyer accepted their case, they never heard from the lawyer again -- the only person they ever talked to was the lawyer's secretary/paralegal. Having a personal relationship with your client goes a long way towards avoiding a grievance and ensuring that you will not get sued. Bottom line: It's hard to sue someone you like.
- In the context of plaintiff's personal injury cases, don't wait until limitations is about to expire before you evaluate a client's case. Make it a practice to evaluate the merits of a case within three months of the case coming in the door – and faster if there is a pressing limitations issue. Clients hate it when a lawyer camps on their case for the better part of two years and then rejects it right before the expiration of limitation.
- Identify and minimize stress. Stress can push predisposed attorneys into clinical depression or cause other health problems, including

anxiety disorders. Depression and other psychiatric problems may result in an attorney neglecting his/her docket. Be on the lookout for changes in behavior, such as lethargy, despondency, inappropriate anger, tearfulness, self-criticism, distractibility and lack of interest in pursuing activities that once brought pleasure, difficulty concentrating and forgetfulness. Proactively get help for yourself or a member of your firm that is suffering the ill-effects of stress.

- Beware of substance abuse. It doesn't take long for an impaired attorney to ruin a firm's reputation by neglecting the cases on his docket. Symptoms of substance abuse include frequent Monday morning tardiness, missing deadlines, neglecting mail, not returning phone calls, and missing appointments. There is usually a slow but steady deterioration in work product and productivity and an increase in frequency of excuses in personal relationships. Apparent behavioral changes could include drinking, defiance, impatience, intolerance, unpredictability, or impulsiveness. If you or a lawyer in your firm is suffering from chemical dependency, please seek help now.

B. Lack of Communication

"You don't write
And I been waitin' for your call
You say you busy baby
But is that really all."
--Ka'au Crater Boys, "You Don't Write"

Simply stated, most clients need a lot of attention. They want to be kept informed. They want their lawyer to accept their calls and/or return their calls promptly. They don't want their case to fall into a black hole. They need to feel that their lawyer cares about their problem and has their best interest at heart.

An attorney's ethical obligation regarding communicating with clients is found in Rule 1.03 of the Texas Disciplinary Rules of Professional Conduct. The rule provides the following:

> *(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.*
> *(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*

When I served on Grievance Committee 4C in Houston, Texas, it seemed that the root cause of most every failed attorney-client relationship was a lack of communication. The attorney had repeatedly failed to be as responsive to the client as the client expected the attorney to be. Over time, the client's resentment grew, until it culminated with the client filing a grievance against the attorney.

Here are some tips to ensure better communication with your clients:

- At the start of the representation, establish the "ground rules" of what your client can expect from you in terms of communication. For instance, I tell clients that, given the case load that I am carrying, it will not be possible for me to telephone them on a consistent basis to update them on the day-to-day aspects of their case. However, I pledge to timely advise them of significant developments in their case, like settlement offers. And, I encourage my clients to call me for status updates.
- Introduce your clients to your staff. Lay the ground work that, in all likelihood, your client will communicate more with your secretary, paralegal, and/or associate than they will with you. Stress to your client that there are some aspects of their case that your staff is more familiar with than you are. For instance, in my practice, my subrogation paralegal is much more knowledgeable about the status of liens than I am. Accordingly, if a client calls with a question regarding Medicaid reimbursement, the client is promptly directed to my subrogation paralegal and not to me.
- Explain clearly to each new client, orally and in writing, the purpose for which the firm was hired, the fee arrangements, the reporting and billing procedures, and the client's obligations.
- At the onset, ensure that your client has realistic expectations regarding the legal services to be provided and, in the context of plaintiff's personal injury, the likely value of the client's case. Nothing tends to cause more problems than an unrealistic client with stars in her eyes.
- Implement an office policy whereby all telephone calls are either accepted or returned within 24-hours. Communicate this policy to your client so that your client will know that, if you do not have time to return their call today, you will do so tomorrow.
- Keep appointment times with clients – and don't keep them waiting.
- Implement an office policy in which your staff lets you know if a client appears to be getting

unhappy and/or is becoming "needy." Promptly call that client and give her the "kid glove" treatment. Don't be afraid to ask your client if they are having a problem with you or your staff. What you hear from one frustrated client may allow you to enhance your relationships with all of your clients. Again, good communication is vital. Clients don't file sue lawyers they like!

- If possible, update your client in writing regarding the significant developments in the case. This is especially true for attorneys who bill by the hour. It's wise not to send a bill unless you are confident that your client is fully abreast of the status of the case.
- Encourage your clients to e-mail you. I have found that this is an excellent, and time efficient, way to keep clients abreast of developments in their case.
- Copy your client on all correspondence (regardless of whether it is substantive or not) so that the client can see that you are working on their case.
- Keep your commitments to your clients. Follow through on pledges to complete assignments by a certain date. If an unforeseen delay arises, advise your client and provide a revised expected completion date.
- At the fist sign of trouble, don't act like an ostrich and bury your head in the sand. Avoidance is rarely beneficial. Rather, COMMUNICATE. Call a meeting. Address your client's concerns head-on. Then, prepare an accurate file memo, which documents the content of the meeting. At the very least, the fact that you tried to resolve your client's dissatisfaction will be a feather in your cap should your client later file a grievance.
- If you have made a mistake that may cause, or has caused, your client harm, confess your sin to your client! Do not attempt to placate your client with vague explanations in the hope that your client will simply go away. You owe a fiduciary duty to tell your client "the truth, the whole truth, nothing but the truth." I recently prosecuted a legal malpractice case against a personal injury attorney who failed to tell his client that her case got dismissed because he missed a critical deadline. This deliberate "cover-up" made a bad case worse. Remember: You carry professional liability insurance for a reason – to compensate your clients for your errors.

C. Integrity

"And what about INTEGRITY?
Is that a language that you don't speak?
And what about your fees?
Huh, I guess I haven't understood."
--Extrema, "Lawyers, Inc."

Following Complaints for neglect and lack of communication, Complaints alleging lack of integrity are the most common. In 2006-07, 509 of the 2247 Complaints (23%) involved lawyer integrity. A lawyer's ethical obligations regarding integrity are found in Rules 8.01, 8.04, and 8.05 of the Texas Disciplinary Rules of Professional Conduct. Of these, Rule 8.04 gets the most play.

Rule 8.04 is admittedly a broad, catch-all rule. In pertinent part, it states that a lawyer shall not:

- violate the Disciplinary Rules;
- commit a serious crime[13] or other criminal act that reflects negatively on the lawyer's honesty, trustworthiness or fitness as a lawyer;
- engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- engage in conduct constituting obstruction of justice;
- engage in conduct that constitutes barratry;
- violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.

According to the CDC, the most common Complaints regarding lawyer integrity involve lying to a client, lying to a judge, filing fraudulent documents in court, theft of client property, and conviction of a crime – and not necessarily in that order. Unlike most other grievances, a Complaint involving lawyer integrity is often brought by someone other than your client.

Frequently, the CDC is informed that a lawyer has committed a crime by the prosecuting District Attorney. The CDC may also become aware that a lawyer has committed a crime by reading published accounts in the newspaper. Upon receipt of this information, the CDC has the power to bring a Compulsory Complaint, *sua sponte*.

Similarly, a sitting Judge may inform the CDC that an attorney has committed fraud in her courtroom

[13] "Serious crime" means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

by filing a fraudulent document or making a material misrepresentation. When this occurs, the CDC may, *sua sponte*, file a Compulsory Complaint.

The only tip I can provide to help you avoid this type of Complaint is a quote from Jim Carrey, who played a reformed lawyer who could no longer tell a lie in *Liar, Liar*: "Stop breaking the law!"

D. Declining / Terminating Representation: Declination Letters

"That ain't no way to go
Girl it just ain't right
Don't you think that I deserve
To hear you say 'Goodbye.'"
--Brooks & Dunn, "That Ain't No Way to Go"

A lawyer's ethical obligations regarding declining or terminating representation are found in Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct. Pursuant to subsection (b) of Rule 1.15, a lawyer is prohibited from withdrawing from representing a client unless good cause for the withdrawal exists. The rule provides six examples of good cause for withdrawal, such as the client has used the lawyer's services to perpetrate a fraud, or the client has not paid the lawyer's fee as agreed.

Of the grievances filed which allege a Rule 1.15 violation, most concern the lawyer's shortcomings upon termination of the representation. In this regard, Rule 1.15(d) states:

> *(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law if such retention will not prejudice the client in the subject matter of the representation.*

Simply stated, an attorney has the ethical obligation not to prejudice the client in any respect when terminating representation.

Here are some tips to avoid a grievance related to declining or terminating representation:

- In the plaintiff's personal injury practice, trial lawyers routinely enter into contingency fee agreements with clients *before* investigating the merits of the claim. Numerous cases are rejected after the trial lawyer investigates and determines the claim lacks merit. Never rely on a verbal rejection. Always send a written rejection/declination letter. Without a declination letter, your client may erroneously believe that you are still their lawyer – and you will not have any evidence to the contrary.
- As stated above, never reject a client's case on the eve of limitations. Rejecting a case on the eve of limitations would compromise the client's interests, would not provide reasonable notice to the client, and would not allow time for the client to employ another attorney.
- In the declination/termination letter, clearly inform the client that you are unable to assist them further as their lawyer. At your discretion, it may be appropriate to provide your rationale for rejecting the case. If you do this, however, clearly state that your rationale is subjective and should not be construed by the client as a legal opinion regarding the merits of the client's claim. Always advise the client about the limitations period applicable to their case. It is also wise to advise your client to seek other legal representation and to refer your clients to the local bar association for a referral.[14]
- When declining/terminating representation, return the original file to your client – and have your client sign a receipt to evidence that they received it. (You may need to copy certain aspects of the file for your records, in the event that a dispute arises at a later date). Your file is your client's property. You have no ownership interest in it. To avoid an ethical violation, you must return the original file to your client.
- If you have accepted a retainer, refund any unused portion to the client. If the client is hostile about the declination/termination of the relationship, you may wish to consider returning the entire retainer.
- If you have been billing by the hour on an ongoing client matter that has now ended, send your client a termination letter that clearly states that your representation of the client has now come to a close.
- If you are withdrawing from ongoing litigation, advise your client in writing of any approaching deadlines, in accordance with Tex. R. Civ. P 10.

[14] In San Antonio, that's the San Antonio Lawyer Referral Service at (210) 227-1853.

E. Failure to Safeguard Property

"It's fun to steal
It's fun to fool around
But only once will I warn you this way
It's fun to steal
But ask anyone in town
You'll find out there's a price to be paid."
--Mono Puff, "It's Fun to Steal"

The failure to safeguard a client's property often takes the form of commingling. A lawyer's ethical obligations regarding safeguarding a client's property is found in Rule 1.14(a) of the Texas Disciplinary Rules of Professional Conduct. Rule 1.14(a) states:

> *(a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyers own property. Such funds shall be kept in a separate account, designated as a trust or escrow account.... Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.*

Accordingly, a lawyer has the duty to hold a client's property with the care required of a professional fiduciary. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property.

Commingling occurs when a lawyer combines client funds with the lawyer's personal/business funds. Even inadvertent commingling may be an ethical violation.

Here are some tips to safeguard your client's property and/or avoid commingling:

- Keep funds in your business/personal accounts separate from your clients' trust funds and/or IOLTA accounts.
- Never "borrow" from client funds to meet cash flow, even on an overnight basis.
- Don't deposit a contingent fee into your business/personal accounts unless and until you have assured yourself that there is no dispute over fees.
- Don't reimburse yourself for case expenses until you have assured yourself that there is no dispute over fees.

In my experience on Grievance Committee 4C in Houston, the Committee was willing to give a lawyer the benefit of the doubt with regard to many alleged ethical violations, but rarely did so when the allegation was commingling. Commingling is an unforgivable sin.

F. Fees

"Money, it's a crime
Share it fairly but don't take a slice of my pie.
Money, so they say
Is the root of all evil today."
--Pink Floyd, "Money"

Money. Isn't it interesting how often money affects a lawyer's relationship with a client. Whether your fees are determined by billable hours or a contingent fee interest in the outcome of the case, the attorney-client relationship often gets tense when it's time for the client to pay your legal fees. When clients first consult with you, their "ox is in a ditch." They need your help. They tell you, "It's not about the money – I'm seeking justice." Be careful! It usually winds up being about the money.

A lawyer's ethical obligations regarding fees are found in Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct. Rule 1.04(d) mandates that contingency fee agreements must be in writing and must state the method by which the fee will be determined, the costs and expenses that will be deducted from any recovery, and whether the expenses will be deducted before or after the contingent fee is calculated.

If the fee is not contingent, the rules merely provide that "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." Rule 1.04(c)(emphasis added).

Tips:

- To avoid unhappy clients, always have a written fee agreement, signed *before* legal work begins.
- Regardless of whether you are billing by the hour or have a contingent interest in the case, itemize the types of expenses you believe the client is likely to incur in your fee agreement. The more specific your contract is regarding expenses, the less likely you are to have a client misunderstanding.
- If you plan to refer the case to a lawyer in another firm, the contract must identify the lawyer to whom the case will be referred, advise the client of the details of the fee-

sharing agreement, and specify whether the fees will be divided based on the proportion of professional services provided by each lawyer, or based on the lawyers agreement to accept "joint responsibility" for the representation.

1. The Contingency Fee Percentage

Rule 1.04(a) states that "A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee." Sound like a clear-cut standard? Hardly.

What constitutes an unconscionable contingent fee? Rule 1.04 states that "a fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable." Now, that helps doesn't it? Not really.

Section (b) of Rule 1.04 lists several factors that may be considered in determining the reasonableness of a fee, as follows:

- *the time and labor involved, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;*
- *the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;*
- *the fee customarily charged in the locality for similar legal services;*
- *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 or lawyers performing the services; and*
- *whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.*

When assessing the reasonableness of a contingent fee, Section 233 of the Texas Probate Code, states that an attorney may recover a one-third (1/3) contingent fee interest in an Estate claim without court approval. However, if the attorney wishes to collect a contingency fee in excess of one-third (1/3), then Section 233 directs Probate Courts to consider several factors, similar to those found in Disciplinary Rule 1.04(b), prior to approving or ratifying a contingency fee contract that conveys a contingency interest that exceeds one-third (1/3).

As a practical matter, whether a fee is unconscionable depends a lot upon community standards. For instance, if the community standard is for attorneys to charge a 40% contingency fee in a given type of case, then it may be unconscionable for an attorney to charge a 45% fee, without proof of other applicable factors.

In addition, whether a fee is unconscionable depends a lot upon the level of sophistication of the client. Importantly, in the *Comments* to Tex. Disciplinary R. Prof. Conduct 1.04, the Comments state the following:

> *A fee arrangement negotiated at arms length with an experienced business client would rarely be subject to question. On the other hand, a fee arrangement with an uneducated or unsophisticated individual having no prior experience in such matters should be more carefully scrutinized for overreaching.*

To avoid client problems about money, it is wise to exhaustively cover the way the contingent percentage and expenses will be treated BEFORE the client signs the contingency fee contract. In the initial meeting, I have found that it's helpful to illustrate these points on a piece of scratch paper for the client, using $1.00 in recovery as an example.[15] Then, I'll have the client initial the scratch paper to verify that he understands how any recovery will be divided. If a dispute over money arises at closing, I'll retrieve that piece of scratch paper from the file and gently remind the client of the agreement that he made.

2. Don't Sue a Client to Recover a Fee

According to the ABA, fee disputes are at the heart of a significant portion of all legal malpractice claims each year. Although it is not unethical to sue

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[15] For instance, I'll say: "Let's assume that I am able to get the Defendant to settle this case for $1.00. Now, the first thing that's going to happen to that $1.00 is that you're going to pay 40¢ for my legal fee. I have a 40% interest in your case. Now, that's 40¢ for me and 60¢ for you. The next thing that you're going to do is reimburse me for the money that I spent to prosecute your case. That money is called 'costs and expenses.' Let's say that I spent 10¢ on expenses. So, out of your 60¢, you'd give me back the 10¢ that I invested in your case. Now, I have 50¢ and you have 50¢. But, the next thing that's going to happen to your money is that you have to re-pay lienholders, such as Medicare, Medicaid, and insurance companies for the money that they spent on your medical care to get you better from your injuries. Let's say you owe the lienholders 15¢. Out of your 50¢, you'd have to give the lienholders 15¢. Now, in our example, we settled the case for $1.00 and you'd have 35¢ after you paid my fee, reimbursed me for my expenses, and re-paid the lienholders. In our example, 35¢ is what you'd take home. And, that math works the same, whether we recover $1.00, $1,000, $100,000, or $1,000,000."

your client to recover a fee, it is not usually a wise practice. In Ethical Opinion 341 (from March 1968), the Bar stated that, "Controversies with clients concerning fees, of course, should be avoided wherever reasonably possible, but an attorney is entitled to receive reasonable compensation for his services and, if all reasonable collection efforts are fruitless, it is not unethical for an attorney to sue his client as a last resort."

That being said, however, if a client hasn't paid your bill, odds are the client is either: (1) dissatisfied with some aspect of your legal representation; (2) a deadbeat; or (3) both. If you sue your client to recover a fee, it is probable that your client will retaliate in kind. Regardless of whether your client retaliates with a bar grievance or a suit for legal malpractice, the tail is about to start wagging the dog! By suing your client to enforce your fee, you will have incurred the full wrath of the client. In defending the grievance and/or malpractice suit, your productivity will be zapped and you'll lose countless hours of time, which you could have spent on more profitable matters. And, in the end, you'll likely wind up waiving your fee in consideration for your client's agreement to drop the malpractice claim.

The better policy, from my perspective, is to stop *"whinin' and cryin' and pitchin' a fit"* and *"get over it!"* to quote The Eagles. If your client doesn't pay, and is unwilling to work out a realistic payment plan, or consider other alternatives such as mediation or arbitration, in my opinion, you should write the matter off, take the loss, benefit from any tax savings, and live to fight another day.

G. Conflicts of Interest [16]

"Take a number
Get in line
Hurry up and take your time
Don't make waves you'll be just fine
Make sure your interests don't
Conflict with mine."
--Joe Perry, "Conflict of Interest"

An attorney can avoid almost all ethical dilemmas by representing his client diligently, communicating with his client, and doing things that his instincts tell him are just and right. One of the areas in which an attorney can unexpectedly get into ethical trouble, however, involves conflicts of interest.

Several of the Texas Rules of Disciplinary Procedure address conflicts of interests, but the general rule is found in Rule 1.06, which states:

> *(a) A lawyer shall not represent opposing parties to the same litigation.*
> *(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:*
> *(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm;*
> ***
> *(c) A lawyer may represent a client in the circumstances described in (b) if:*
> *(1) the lawyer reasonably believes the representation of each client will not be materially affected; and*
> *(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.*

Although there is nothing in the disciplinary rules that generally prohibits an attorney from representing multiple parties in litigation, the representation of multiple parties is fertile soil for the development of conflicts of interest and grievances.

Rule 1.06 expressly prohibits an attorney from representing parties in an action who have claims in opposition to each other. Thus, an attorney cannot represent both a plaintiff and a defendant against whom that plaintiff is asserting a claim. For example, if P1 and P2 were the driver and passenger in a vehicle involved in an accident with a vehicle driven by D, an attorney could not represent both P1 and P2, if P2 is asserting a claim against P1 and D for both being negligent in causing the accident. Rule 1.06(a) prohibits such a representation, even if P1 and P2 both want the attorney to represent them.

Aside from this ban on representing clients who are in direct opposition to each other in litigation, whether an attorney can undertake joint representation when there is a conflict between clients is a matter that must be addressed on a case-by-case basis. In evaluating the risks, the attorney should keep in mind the following pitfalls.

[16] I gratefully acknowledge and freely admit that, in this section, I have plagiarized portions of the excellent paper written by Alex M. Miller, of the Watts Law Firm, L.L.P., entitled "Representing Multiple Parties in Civil Litigation," which he presented on March 8, 2005 at the Legal Ethics in Texas seminar in San Antonio, Texas.

1. Representing Multiple Plaintiffs

a. Conflicts arising from limited settlement funds

When multiple client plaintiffs are "competing" for limited settlement funds, a conflict may arise under Rule 1.06(b). To avoid this conflict, an attorney should make a concerted effort to advise each of the clients early-on that there may not be enough insurance proceeds to make each client whole. The clients do not necessarily need to resolve this potential problem at the onset of the litigation, but they should be fully informed of the risk of limited settlement funds and should be given the opportunity to decide whether they want to continue with one attorney (who will not be able to advocate for or against any of the clients as between each other), or whether they wish to retain separate counsel.

b. Conflicts arising from changed relationships

Another situation in which a conflict of interest may arise when representing multiple client plaintiffs is when the relationship of the clients changes. The most common example is when the plaintiffs file for divorce. Even though the scope of the attorney's representation is the civil litigation and not the divorce action, once divorcing plaintiffs hire their own divorce counsel, they will often not want to share all of their confidential information with the attorney who represents both of them. Also, the pending divorce will sometimes create a conflict as to the amount of money the clients want to receive because they no longer intend to share the proceeds jointly. If the divorcing parties cannot resolve their issues, the attorney handling the civil litigation may have no choice but to withdraw from representing either divorcing client.

c. Conflicts arising from changed liability facts

Another potential pitfall when representing multiple client plaintiffs arises when the attorney learns additional facts about liability after the joint representation begins. For instance, the attorney may learn that one of his clients has a potential claim against another. Once the attorney recognizes this potential conflict, he must fully advise all of the clients affected by these facts and allow them to determine whether they want to consent to continued joint representation.

2. Representing Multiple Defendants

Most of the problems that exist with representing joint plaintiffs also exist with representing joint defendants. Some of the pitfalls that are unique to joint defendants include the following.

a. Conflicts arising from the employer-employee relationship

One of the pitfalls for an attorney representing a corporate defendant is the determination of who is and who is not his client. An attorney representing an employer will often have discussions with employees about the facts of the litigation and the underlying conduct at issue. Because these employees are fact witnesses who might be deposed and might be potential parties, the employees might reasonably believe that the attorney is representing their interests, in addition to their employer's interest. The problem is that the employer and the employee may have different interests. There could be differences in insurance coverage, such that the employer is covered but the employee is not covered for her individual acts. There could be an issue of indemnification, since the employer has a right of common law indemnification against an employee that causes vicarious liability under the doctrine of *respondeat superior*. *See St. Anthony's Hosp. v. Whitfield*, 946 S.W.2d 174, 178 (Tex. App. – Amarillo 1997, writ denied). The attorney must identify these issues and clarify the nature of the relationship with the employee at the onset. If the employer has agreed to pay for the employee's defense, this usually works as an incentive for the employee to overlook any potential conflicts and consent to joint representation.

In rare circumstances, however, an employee's previous consent to joint representation becomes ineffective to waive a conflict of interest. For instance, the employee may become a "turncoat" or "whistleblower" who takes a position inconsistent with the employer's position. If the attorney represents both the employer and the employee when this occurs, the attorney may have no choice but to withdraw from representing either client.

Another unforeseen change in relationship that may create a conflict is when the employer fires the employee during the midst of joint representation, creating dissention between the two clients. A similar situation occurred in *Wasserman v. Black*, 910 S.W.2d 564 (Tex. App. – Waco 1995, orig. proceeding), where a city and city secretary were represented by one attorney. The city secretary questioned some of the defenses being raised by the attorney. In response, the city fired the secretary and rescinded its agreement to indemnify him. The attorney withdrew from representing the secretary, but continued to represent the city. The court of appeals held that the attorney was disqualified from representing either client.

b. Conflicts arising from indemnification and contribution

Under Texas law, almost every claim against multiple defendants gives rise to an issue of contribution between those defendants, based on our comparative responsibility scheme. Tex. Civ. Prac. & Rem. Code §33.015-33.016. Although defendants who are related often agree to not seek contribution from each other so that they can present a united defense, this is still a conflict of interest that must be specifically waive under Rule 1.06.

c. Conflicts arising from joint defense agreements

Joint defense agreements are not usually thought of as creating attorney-client relationships. Consequently, most attorneys might not anticipate that being involved in such an agreement will restrict his ability to represent his client. The Texas Supreme Court's decision in *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996), holds that an attorney that receives confidential information under a joint defense agreement cannot honor the agreement to maintain confidentiality if he represents clients against that defendant in a related action. *Id.* at 131. Thus, even though the attorney did not represent the other defendant as his attorney, his agreement to maintain the confidences of the defendant would adversely limit his ability to represent his client. The *Godbey* case presents an additional twist to the Texas Supreme Court's interpretation of the ethics involved in joint defense agreements, because the attorney actually received consent to represent a client with an interest adverse to the other defendants as a condition of the joint defense agreement, yet the Supreme Court held the attorney was still prevented from representing a client adverse to that position.

3. Implications of Representing Clients with Conflicting Interests

a. Disqualification from the litigation

Clearly, one of the most apparent implications of violating Rule 1.06 is disqualification from the continued representation of the client in litigation. Although disciplinary rules are not the law of Texas with regard to disqualification of counsel, they are given substantial authority in determining whether an attorney should be disqualified. *See In re Epic Holdings, Inc.*, 985 S.W.2d 41, 48 (Tex. 1998); *In re Meador*, 968 S.W.2d 346, 350 (Tex. 1998); *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996).

b. Breach of Fiduciary Duty – Legal Malpractice – Forfeiture of Fee

Another potential implication of violating Rule 1.06 is to be sued by one or more of the clients for breach of fiduciary duty or legal malpractice. The end result of breaching a fiduciary duty is forfeiture of all or a part of the fee.

In 1999, the Texas Supreme Court issued its opinion in *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). In *Arce*, the Court addressed the issue of fee forfeiture arising out of a breach of fiduciary duty. In that case, the attorneys had represented a group of plaintiffs in a mass tort action arising out of a Phillips 66 chemical plant explosion. After the case settled, many of the plaintiffs sued their attorney for breach of fiduciary duty, seeking forfeiture of their attorneys' fees. The trial court granted summary judgment in favor of the attorneys, finding their conduct did not cause plaintiffs any harm. The court of appeals reversed and the Supreme Court agreed, holding that a plaintiff need not show any harm to obtain fee forfeiture on a breach of fiduciary duty claim.

The Supreme Court in *Arce* held that fee forfeiture is an equitable remedy intended to protect the client and discourage an agent's disloyalty. *Id.* at 238. The purpose of the doctrine is not to compensate the principal, but rather to punish or deter the agent from violating its fiduciary duty. In keeping with the purpose of imposing fee forfeiture, the Court also held that whether a violation of a fiduciary duty justifies any fee forfeiture and, if so, the amount, is determined based upon the facts of the case. *Id.* at 242. The Court held that some violations of the fiduciary duty are inadvertent or do not significantly harm the client, such that the forfeiture required, in equity, may be nothing or a small amount of the fee. *Id.* at 241. To create an absolute rule of full disgorgement would be inconsistent with the equitable doctrine.

Finally, the Court in *Arce* held that, although a jury may be required to determine whether there was a breach of fiduciary duty, it is for a judge to decide whether forfeiture is appropriate and, if so, how much. *Id.* at 245.

c Disciplinary Action

Naturally, in addition to the above, an attorney's violation of Rule 1.06 can result in a disciplinary action. Most of the disciplinary actions against attorneys violating Rule 1.06 arise not from inadvertent conflicts, but from the more egregious conduct of attorneys who are violating Rule 1.06 in order to benefit themselves or intentionally favor one client over another.

On such example is the case of *Daves v. Comm. For Lawyer Disp.*, 952 S.W.2d 573 (Tex. App. –

Amarillo 1997, pet. denied). In *Daves*, the attorney (Daves) had his license suspended for nine months because he represented a child and the child's parents in a settlement and failed to advise them of the conflict of interest or get consent from his clients. The case, which involved sodomy of the child at a hospital, had been settled for $1.5 million by an attorney representing the family. The parents initially agreed to the settlement, but later had a problem when they found out all of the money was going to their child. The parents then hired Daves to represent the family. Daves negotiated the settlement to give $1 million to the child and $500,000 to the parents. He did not contact the initial attorney or the child's ad litem during these negotiations. Daves argued that he did not represent the child because the child was represented by the ad litem. The court of appeals disagreed, finding Daves and the parents clearly intended for his representation to include the child.

H. Don't Disclose Client Confidences

"It doesn't matter what they say
In the jealous games people play
Our lips are sealed."
--The Go-Go's, "Our Lips Are Sealed."

Pursuant to Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, a lawyer shall not knowingly reveal "confidential information" of a client or former client. Confidential information includes both privileged and unprivileged information. Privileged information is that which would be privileged by Rule 503 of the Texas Rules of Civil Evidence. Unprivileged information is essentially everything else.[17]

Clients understandably get unhappy when they learn that their lawyer has had loose lips. Loose lips not only sink ships – they result in Bar grievances.

I am always amazed when I hear a lawyer discussing a case or client matter with friends/family/peers in a crowded restaurant or bar. How does that lawyer know whether someone (like me) can overhear her conversation? How does that lawyer know that a friend or relative of her client isn't sitting at the next table or on the adjacent barstool? It's like playing Russian roulette with your client confidences – and your Bar license.

The better practice is to be true to your fiduciary duty to your clients at all times. Ensure client confidentiality. The attorney-client privilege is sacred.

III. Responding to a Bar Grievance

There have been some recent changes to the Texas Rules of Disciplinary Procedure, which affect the way grievances are handled in Texas. **Between 1992 and December 31, 2003, the procedure was as follows:**

- Client filed a grievance alleging professional misconduct.
- The Chief Disciplinary Counsel ("CDC") reviewed the grievance. If, from the face of the grievance, assuming everything stated in the grievance was true, the acts/omissions described in the grievance constituted a violation of the Texas Disciplinary Rules of Professional Conduct, then the CDC classified the grievance as a "Complaint." If not, the CDC classified the grievance as an "Inquiry," and the matter was dismissed.
- If the grievance was classified as a Complaint, the CDC notified the Attorney and requested a written response to the allegations.
- Attorney submitted written response, together with documentation.
- A hearing was held before the local grievance committee, called an "Investigatory Panel." Both the Client and Attorney were invited to attend.
- If the Investigatory Panel did not find "just cause,"[18] the grievance was dismissed.
- If the Investigatory Panel found "just cause," it had the discretion to negotiate a sanction with the Attorney.
- If no negotiated agreement was reached, the grievance proceeded to a *de novo* proceeding before either a different grievance committee panel, called an "Evidentiary Panel," or a District Court, at the Attorney's option.

On December 30, 2003, the Texas Supreme Court entered an Order imposing amendments to the Texas Rules of Disciplinary Procedure. All grievances filed on or after January 1, 2004 are governed by these amended rules. The new

[17] "Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client." T.D.R.P.C. 1.05(a).

[18] "Just Cause" means such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of Professional Misconduct requiring that a Sanction be imposed, or suffers from a Disability that requires either suspension as an attorney licensed to practice law in the State of Texas or probation.

disciplinary process is illustrated in the flowcharts, which are attached as an Appendix to this paper.

The single most significant change in the new disciplinary system is the elimination of the Investigatory Panel hearing process. In place of an Investigatory Panel hearing, the CDC now investigates each Complaint and determines whether just cause exists. If the CDC does not find just cause, then the Complaint is presented to a Summary Disposition Panel, outside the presence of the Client and Attorney, and the CDC requests a dismissal. If just cause is found, then the Attorney is presented with a description of factual allegations and alleged rule violations. The Attorney then elects whether he wants the Complaint heard by an Evidentiary Panel of the Grievance Committee, or whether he wants the Complaint tried in District Court.

Should you find yourself the unfortunate recipient of a Complaint, the following tips are offered to help you survive the process with as much scalp as possible.

A. Help the CDC Help You -- Be Forthcoming with Information

"You'll be free someday
The pain will go away
Just leave it in the past
You're already on your way
You know you can have it all
Take my hand
Help me help you"
--Holly Valance, "Help Me Help You"

A mistake that attorneys frequently make is to become unnecessarily adversarial with the CDC. Because the CDC will eventually prosecute the Complaint if just cause is found, some attorneys erroneously believe that it is in their best interests to "play their cards close to their vest" and be as uncooperative as possible with the CDC. This strategy rarely, if ever, proves beneficial.

The better approach is for the attorney to adopt a "help me help you" attitude. After the CDC has classified the grievance as a Complaint and is investigating whether just cause exists, the attorney is usually well-served to be forthcoming with all of the information that the CDC needs. The attorney should freely participate in the investigatory process, if for no other reason, to put the best "spin" on the facts as possible. Stonewalling the CDC will likely lead the CDC to conclude that the attorney is hiding something. If the CDC suspects that the attorney is not participating fully in its investigation, the CDC will be less likely to move for a Summary Disposition of the Complaint.

B. Be Prepared – Documentation is Key

"Baby, write this down, take a little note
To remind you in case you didn't know...
I'll sign it at the bottom of this page
I'll swear under oath
'Cause every single word is true
And I think you need to know."
--George Strait, "Write This Down"

After a grievance has been classified as a Complaint by the CDC, the attorney is asked to file a written response. This response should fully, if not exhaustively, address all of the issues raised in the Complaint and should attach all documents relevant to the inquiry.

The tone of the attorney's response should be informative and cooperative, and not overly defensive. If possible, the attorney should attempt to couch the Complaint as an unfortunate misunderstanding with a client, as opposed to a "he said -- she said" shouting match.

C. Take the High Road – Don't Disparage Your Client

"Try and take the high road
Remember we were friends."
--Third Eye Blind, "Crystal Baller"

In your initial written response to the Complaint, in your telephone conversations with CDC staff during their investigation, and in front of the Evidentiary Panel, NEVER disparage your client. Take the high road. More often than not, your client will be full of "piss and vinegar." If you can stay professional, the CDC may view the matter as a "crazy client" problem and begin to appreciate the difficult time that any lawyer would have had with this client.

D. Be Honest – Fall On Your Sword, If Necessary

"Honesty is such a lonely word
Everyone is so untrue
Honesty is hardly ever heard
And mostly what I need from you."
--Billy Joel, "Honesty"

If you made a mistake, own it. Fall on your sword. Then, beg for mercy. The CDC is not an evil body that is out to ruin the lives of well-meaning lawyers. Believe it or not, they are trying to do the right thing – to reach the right results.

A lot of the CDC staff and a majority of the grievance committee members are lawyers. Every lawyer has made mistakes. Some of the lawyers sitting in judgment on your case may have done the same

thing – or at least can easily see how the ethical violation could occur in their practice. When I sat as a member of Grievance Committee 4C, I can't count how many times I thought, "There, but for the grace of God, go I." That being said, no one on the Panel is wanting to hand down a harsher sentence than what the situation deserves. Your attitude, your honesty, will go a long way in softening the hearts of those sitting in judgment.

E. Be Contrite, Unassuming, Respectful and Professional

"Oh Lord, it's hard to be humble
When you're perfect in every way
I can't wait to look in the mirror
Cause I get better lookin' each day."
--Mac Davis, "It's Hard to be Humble"

Leave any attitude that you have at the door. This is not the time to be cocky, overly-confident, arrogant and self-absorbed. If you were "perfect in every way," you would not be occupying the time of the CDC. Rather, this is the time to be contrite, humble, unassuming, respectful and professional. Don't let your attitude serve as an excuse for the CDC to want to "knock you down a peg or two." As Bill Clinton used to say, let them "feel your pain." More importantly, let the CDC know that you feel your *client's* pain!

IV. Conclusion

"When Mama ain't happy, ain't nobody happy!" So, it's wise to do all that you can to keep your clients happy. If you pay close attention to your client's matter and communicate with your client to your client's satisfaction, you will avoid more than 90% of the grievances that are filed in Texas each year – and will not likely get sued for malpractice. But, in the unfortunate event that you find yourself looking down the cold barrel of a grievance, don't despair. The manner in which you conduct yourself during the grievance process will have great bearing on the result. If you are professionally forthright, prepared, honest, humble and contrite, you will likely survive the process with more than your scalp intact. Good luck!