AN OVERVIEW OF FEE DISPUTE UNDER TEXAS LAW AND DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Michael Sawicki
Brown & Sawicki, L.L.P.
2626 Cole Avenue, Suite 850
Dallas, Texas 75204
(214) 468-8844 Telephone
(214) 468-8845 Facsimile
msawicki@brownsawickilaw.com

TEXAS TRIAL LAWYERS ASSOCIATION

2007 ANNUAL CONFERENCE AND SEMINAR

Driskill Hotel/Austin, Texas
November 28-30, 2007

TABLE OF CONTENTS

AN OVERVIEW OF FEE DISPUTE UNDER TEXAS LAW AND DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

"In Texas, we hold attorneys to the highest standards of ethical conduct in their dealings with their clients. The duty is highest when the attorney contracts with his or her client or otherwise takes a position adverse to his or her client's interests."
- Hoover Slovacek, L.L.P. v. Walton, 206 S.W.3d 557, 561 (Tex. 2006).

"No rational plaintiff changes lawyers midway through a case in order to recover less, and John B. Walton, Jr. was not irrational."
- **dissent by Justices Hecht, Medina and Willet**

Resolving disputes when a contingency fee client leaves a lawyer during the course of litigation involves balancing two competing factors. The lawyer typically wants a strict adherence to the contingency contract. The client wants to use the power found in Texas Disciplinary Rules of Professional Conduct that prevent limits on the rights of clients to choose a lawyer. Obtaining a successful outcome of this tug of war requires a careful analysis of the underlying facts and a healthy dose of common sense.

First, the rule allowing a lawyer to seek his full fee when a contingency client leaves is still in effect in Texas. *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969) allows a lawyer hired on a contingency fee basis, that is discharged without good cause before the representation is completed, to seek compensation in quantum meruit or in a suit to enforce the contract by collecting the fee from any damages the client subsequently recovers. But numerous cases warn lawyers against taking an obstinate, head-in-the-sand approach to this issue.

Second, Texas Disciplinary Rules of Professional Conduct reflect the trend found in a majority of other states. The rules protect a client's right to choose a lawyer. They also place obligations on lawyers involved in fee disputes to work to resolve them without resorting to a suit against the client. As a practical matter, the ethical rules arm clients with ways to fight strict

adherence to the contract in a fee dispute. These rules must be taken into consideration by lawyers seeking to enforce a contingency fee contract against a former client.

Finally, there is no certainty that can be drawn from recent cases about what will be considered "good cause" for terminating a client contract. The few published opinions concerning "good cause" leave the definition open ended. This presents a challenge to any lawyer seeking to assert a contingency fee contract. The case will require close scrutiny of the nature and quality of the representation prior to termination, the client's reasons for termination and the lawyer's response to the issues surrounding the breakup.

I. MANDELL & WRIGHT

Mandell & Wright remains the seminal case for any discussion concerning contingency fee attorney-client disputes. While still good law in Texas, the case has been the subject of much debate since it was decided in 1969. The case embodied the typical "contract-rule" which required strict adherence to the contingency fee contract. The rationale for the rule was based on three assumptions: 1) that the full contract fee was the most logical measure of damages as it reflects the value of the services at the time the contract was entered; 2) awarding the damages prohibits the client from profiting from his own breach of the contract; and 3) it lessens the difficult task of placing a value on the lawyer's partially completed work.[1]

Mandell & Wright involved a suit brought by the widow of a man killed when a ship he was on sank. The widow was contacted by her husband's union representative within hours of learning about his death. The union representative recommended hiring Mandell & Wright to handle the case. The widow did not sign the contract that day so the union representative and Mr. Wright returned to her home three days later with contract in hand. This time they got her to sign up. Approximately a week later, the widow called the firm asking if she could withdraw her

[1] See *Olsen and Brown v. City of Englewood*, 889 P.2d 673 (Colo. 1995); *Rosenberg v. Levin*, 409 So. 2d 1016 (Fla. 1982).

contract. She indicated that she had concerns about being lumped in with a group of other clients from the disaster that Mandell & Wright had also signed up. She said she wanted a lawyer just to represent her case. She was tersely advised "That is your privilege" by the firm and left to sign with another lawyer.

The widow then filed suit to rescind the first contract. She argued it should be invalidated because she was still suffering from the shock of learning of her husband's death and she did not appreciate what she was doing when she signed it. Mandell & Wright also sought a declaratory judgment that the contract vested them with a one-third interest in any cause of action for the husband's death and a one-third interest in the proceeds of any settlement of the death claim.

The Court ruled that the widow had the mental capacity to understand the effects of what she was doing when she signed the contract. The Court rejected a request to give Mandell & Wright a quantum meruit recovery and, instead, held the contract assigned them an undivided 1/3 interest in all of her claims.

The *Mandell & Wright* opinion does not go into much detail to support any of its rulings and does not address what constitutes "good cause" for terminating a fee contract.

In recent years, the decision has come under scrutiny as the majority of other states have moved away from this "strict contract" approach to the issue. The view reflected in most other states is that a lawyer is entitled only to a quantum meruit value of his services if terminated before completing a contingency fee case.[2] This view is premised upon the special confidence and trust that exists between an attorney and client which sets this relationship apart from other employment relationships.[3] Despite the growing trend against this view, the Texas Supreme

[2] *See, e.g., AFLAC, Inc. v. Williams*, 264 Ga. 351, 444 S.E.2d 314 (1994); *Committee on Legal Ethics of the West Virginia State Bar v. Cometti*, 189 W.Va. 262, 430 S.E.2d 320 (1993); *LaRocco v. Bakwin*, 108 Ill.App.3d 723, 64 Ill.Dec. 286, 439 N.E.2d 537 (1982); *Estate of Forrester v. Dawalt*, 562 N.E.2d 1315 (Ind.App.1990); *O'Brien v. Plumides*, 79 N.C.App. 159, 339 S.E.2d 54 (1986); *Jacobson v. Sassower*, 122 Misc.2d 863, 474 N.Y.S.2d 167 (1983); *Augustson v. Linea Aerea Nacional-Chile S.A.*, 76 F.3d 658, 662 (5th Cir.(Tex.) Feb 29, 1996).

[3] See *Rosenberg v. Levin*, 409 So.2d 1016, 1019-20 (Fla.1982).

Court recently restated support for it, but with some reservations.[4]

In *Hoover Slovacek,* the Texas Supreme Court examined the case of a law firm suing to recover the value of its contingency fee based on an amount the client did not actually obtain. In the case, the firm had been hired to recover unpaid royalties from oil and gas companies. The contract awarded the firm a 30% contingency for all claims on which collection was achieved. But the contract also had a clause dealing with what would happen if the client ended the relationship before trial. It stated:

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

Prior to the contract termination, the lawyer made a demand upon the defendants for $58.5 million – an amount the defendants reported was so high that they would "quit listening" to further negotiations. The defendant did offer $6 million to settle the claims and to purchase various surface estates – a condition that was unappealing to the client. The client was upset with the lawyer's high initial demand and terminated him. He retained new counsel and ultimately settled the case for $900,000 but did not transfer the requested surface estates. The lawyer then sued the client claiming that he was owed a $1.7 million fee based upon the $6 million offer. The case was tried and a jury found that the client had no good cause to terminate the contract and awarded the full fee amount.

Chief Justice Jefferson wrote for the six member majority. His opinion began with a review of the special nature of the relationship between a lawyer and client. The majority rejected the "strict contract" approach and held the provision liquidating the client's damages at time of

[4] See *Hoover Slovacek L.L.P., v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006).

termination was unconscionable.[5] The Court touched upon *Mandell & Wright* and noted that its remedies are also ". . . subject to the prohibition against charging or collecting an unconscionable fee . . ." found in the Texas Disciplinary Rules of Professional Conduct.[6] The Court concluded that the section violated public policies found in the disciplinary rules that protect a client's freedom to choose a lawyer.

The majority makes clear that while *Mandell and Wright's* rule still exists, any attempt to apply the "strict contract" approach will be subject to substantial scrutiny. The decision also shows the power contained in the disciplinary rules and reflects the trend away from *Mandell & Wright* seen in other states.

Dissenting from the opinion were Justices Hecht, Medina and Willett. They felt the focus on evaluating the contract should center on the facts at its inception, not when the contract terminated.

> "Fee arrangements normally are made at the outset of representation, at time when many uncertainties and contingencies exist, while claims of unconscionability are made in hindsight when the contingencies have been resolved . . . Except in very unusual situations, therefore, the circumstances at the time a fee arrangement is made should control in determining a question of unconscionability. Agreements are unconscionable when they are not or cannot be proper, not when it is merely possible for them to be improper."[7]

The dissent also includes this warning:

> "If the Court is serious about today's analysis, many more fee agreements and other contracts will be unconscionable. The Court says that "hourly fee agreements . . . do not implicate the same concerns." But they do."[8]

Given the Court's adherence to the rule in *Mandell & Wright* along with its clear instruction that any dispute will be closely reviewed for public policy violations, lawyers must use

---

[5] ". . . a fiduciary is held to something stricter than the morals of the marketplace. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. Accordingly , a lawyer must conduct his or her business with inveterate honesty and loyalty, always keeping the client's best interests in mind." *Hoover*, 206 S.W.3d at 561.
[6] Id. at 562.
[7] Id, at 571.
[8] Id.

common sense and reason when approaching these matters. This approach must include a review of the ethical considerations contained in the disciplinary rules.

II. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT GOVERN ATTORNEY/CLIENT CONTRACTS

Under Texas law, the relationship between the attorney and his client must be based upon the utmost trust and confidence. If that basis has been substantially undermined, that relationship should be terminated.[9] To uphold this public policy, it is uniformly recognized that the attorney/client contract is terminable at will by the client for any reason.[10] This goal underlines the policies provided by the Texas Disciplinary Rules of Professional Conduct. The rule gives the clients' right to choose a lawyer much protection. Under Rule 1.15(a)(3), it states that a lawyer must withdraw from a case when the lawyer has been "discharged with or without good cause." As such, the exercise of the right to discharge a firm with or without cause, does not constitute a breach of the contract because it is the basic power under the Rules of Professional Conduct for them to do so. This issue has been examined in many other states.[11] One argument is that the contractual rights of a lawyer are subject to and subordinate to the rights given to clients by the Texas Disciplinary Rules of Professional Conduct. Any rule that prevents a client to have the right to choose a lawyer may violate public policies cited under the rule.

The Texas Disciplinary Rules of Professional Conduct are considered to be quasi-statutory.[12] The rules are used to determine whether a contract violates public policy.[13] State Bar Rules (Texas Disciplinary Rules of Professional Conduct) were adopted on January 1, 1990 by

---

[9] Texas Ethics Opinion 459, 51 Tex. B. J. 1140, (1988).
[10] *Bray v. Squires*, 702 S.W.2d 266, 272 (Tex. App. –Houston [1st Dist.] 1985, no writ); *Hume v. Zuehl*, 119 S.W.2d 905, 907 (Tex. Civ. App. –San Antonio 1938, writ ref'd n.r.e.).
[11] See e.g. *Goodman*, 741 S.W.2d 233 (Ark. 1987).
[12] *Kuhn, Collins & Rash v. Reynolds*, 614 S.W.2d 854, 856 (Tex. App. –Texarkana 1981, writ ref'd n.r.e.); *Cushnie v. The State Bar*, 845 S.W.2d 358 (Tex. App. –Houston [1st Dist.] 1993, writ denied); and *Koch Oil Co. v. Anderson Producing*, 883 S.W.2d 784 (Tex. App. –Beaumont, 1994 writ denied).
[13] *Bond v. Crill*, 906 S.W.2d 103 (Tex. App. –Dallas 1995); *Polland & Cook v. Lehmann*, 832 S.W.2d 729 (Tex. App. –Houston [1st Dist.] 1992)(contract not performed in accordance with disciplinary rules may be excused as against public policy); *Lemond v. Jamail*, 763 S.W.2d 910 (Tex. App. –Houston [1st Dist.] 1988)(attorney referral agreement that violated Disciplinary Rules was unenforceable as being against the public policy).

order of the Texas Supreme Court. Rule 1.15(a)(3) gives clients the rights to choose and fire attorneys at any time. Rule 1.04 prevents an attorney from charging or attempting to charge an excessive fee. Under these rules contracts that take away a client's right to discharge an attorney with or without cause may be insupportable.[14] Neither a firm nor any of its members may claim a possessory interest in its client.[15] Texas Ethics Opinion 459 states: "Since clients are not merchandise and are free to seek the lawyer of their choice, an attempt to recognize a propriety interest in clients is improper." Similarly, economic disincentives imposed upon a client in the event of a discharge may result in an ethical violation for a lawyer.[16] In addition, any partnership, employment or dissolution agreement that directly or indirectly impairs a departing lawyer's freedom to practice law is unenforceable in Texas.[17]

The Texas Bar opposes restrictive covenants in a lawyer's employment agreement on the grounds that they lead to the bartering of clients and hinder the public's freedom of choice in obtaining counsel.[18] From the discharged lawyer's perspective, removal without cause under the circumstances may seem harsh and unfair. But fairness to lawyers is a policy consideration subordinate to the right of clients to choose and change their legal representation,[19]

---

[14] See Texas Ethics Opinion 459, 51 Tex. B.J. 1140 (1988); *Bray v. Squires*, *Id.; Charles W. Wolfram, Modern Legal Ethics* § 9.5.2, at 545 (1986) ("It is now uniformly recognized that the client-lawyer contract is terminable at will by the client. For good reasons, poor reasons or the worst reasons, a client may fire the lawyer."); see also Rule 1.15(a)(3).

[15] Texas Ethics Opinion 459, Texas Bar Journal, December 1988.

[16] See *Florida Bar v. Doe*, 550 So.2d 1111 (Fla. 1989)(directing the private reprimand of a lawyer whose contingent fee contract included a "discharge clause" requiring the client to pay the lawyer the greater of $350 per hour for all time spent on the case *or 40 percent* of the greatest amount offered in settlement). See also *In the Matter of Cooperman*, 83 N.Y.2d 465, 473-474, 633 N.E.2d 1069, 1072-1073 (1994)("A special nonrefundable retainer agreement clashes with public policy because it inappropriately compromises the right to sever the fiduciary services relationship with the lawyer…To answer that the client can technically still terminate misses the reality of the economic coercion that pervades such matters. If special nonrefundable retainers are allowed to flourish, clients would be relegated to hostage status in an unwanted fiduciary relationship—an utter anomaly.")

[17] Texas Ethics Opinion 459, 51 Tex. B.J. 1140 (1988); PEC Op. 459 (1978); and Rule 5.06 of the Texas Disciplinary Rules of Professional Conduct, Gov. C. §81.001. See also *Law Offices of Windle Turley v. Giunta*, 1992 WL 57464 (Tex. App. – Dallas)(Voiding contract that impaired attorney's right to work with other former employees "because the contract provision restricts Turley's attorneys from leaving that firm's employment from participating in the practice of law, it inhibits the public's access to the counsel of their choice and violates the public policy of the state.")

[18] Commentary to Texas Rule of Disciplinary Professional Conduct 5.06.

[19] *Fracasse v. Brent*, 6 Cal. 3d 784, 790, 494 P.2d 9, 13 (1972)(stating that the interests of clients are superior to the interests of attorneys).

Seeking to charge a full fee after the client's discharge by doing no additional work may run afoul of Texas Rule of Disciplinary Conduct 1.04. This rule prohibits a lawyer from charging, or attempting to charge, an unconscionable fee. A fee is considered unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable. Factors that may be considered in determining the reasonableness of a fee include:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;

(2) The likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Many contingency fee law contracts are drafted before adoption of the Disciplinary Rules of Professional Conduct. The rules adopted in 1990 stress that a client has the right to choose their lawyer and prohibits restrictions on this right. The rules also prohibit charges or attempts to charge unconscionable fees. These rules were developed after the decisions in *Mandell & Wright v. Thomas,* 441 S.W.2d 841 (Tex. 1969). At the time of *Mandell & Wright*, the State a series of Canons that were considered basic principles for the profession.[20] The new disciplinary rules

[20] See *Lemond v. Jamail*, *Id.* at 913; *Auguston v. Linea Aera Nacional- Chile S.A.*, 76 Fed. 658 (5th Cir. 1996) (The Mandell & Wright rule is the "traditional" but now minority rule, and this court has expressed its disfavor with it… The majority jurisdictions reason that allowing recovery on the contract impinges on the client's absolute right to select the lawyer of his choice by forcing the client to pay double fees, one to his discharged attorney and one to his new lawyer. These jurisdictions typically imply a term into the contingency contract allowing discharge of the attorney at will, so that discharge is not considered a breach and does not give rise to contract damages.")

were established to serve as interpretive guidelines for the basic principles of the profession. They have been used by many courts to void contracts considered to be against public policy. Lawyers and their clients cannot by contract agree to waive these public policies.[21] A contract held against public policy is defined as a provision or stipulation that is inconsistent with or contrary to the public's best interest.[22] Courts looking at contingency fee contracts and their adherence to public policy have reiterated the client's right to choose a lawyer as a basic right.

> "The particular policy which underlines Ethical Considerations 2-1, 2-21, and 2-23 and DR 2-107 is that persons represented by lawyers in this state should be able to have a choice in finally determining who represents them and the nature of the legal fees which will be charged."[23]

Finally, the lawyer should carefully consider whether suing the client is the best course of action. Texas Ethical Consideration 2-23 states:

> "A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client."

The State Bar of Texas Fee Dispute Resolution Committee is one alternative available to attorneys contemplating a dispute with a former client. The committees are operated by many local bar associations across the state. The sessions are usually offered free of charge but participation is voluntary, both sides must give consent to the process. Information about the Committee is available at the State Bar's web site at www.texasbar.com.

III. GOOD CAUSE

It is clear that a client can discharge a lawyer if they have "good cause." But what exactly constitutes "good cause" is not defined in the disciplinary rules and is ill-defined in Texas case law. The case of *Rocha v. Ahmad*, 676 S.W.2d 149, 156 (Tex. App.- San Antonio 1984, writ

[21] *Scoville v. Spring Park Homeowners Ass'n, Inc.*, 784 S.W.2d 498 (Tex. App. – Dallas, 1990, writ denied); *Yamaha Motor Corp., U.S.A. v. Motor Vehicle Div. Tex. Dept. of Transp.*, 860 S.W.2d 223 (Tex. App. – Austin, 1993, writ denied).
[22] *Montgomery v. Browder*, 930 S.W.2d 772, 778 (Tex. App. – Amarillo 1996, writ denied).
[23] *Kuhn, Collins & Rash*, 614 S.W.2d at 857.

dism'd) is the starting point for any discussion of what constitutes good cause for termination. *Rocha* is the only Texas case that makes an effort to describe what evidence was necessary to prove "good cause" for a client to terminate a contract. The Court wrote:

> "[The client's] testimony further reveals that after some eleven months, they became discouraged by the lack of any action on their lawsuit; that they informed Rocha by letter that they were not satisfied with his performance, and discharged him. We note that Rocha himself testified that he did not work on the Ahmads' case between January 15, 1979, and May 5, 1979. We hold that there was some evidence to sustain the jury's finding that the Ahmads had good cause to discharge Rocha. We further find that the evidence was sufficient and was not so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust."[24]

The clients also testified that the lawyer in *Rocha* failed to request names of potential witnesses for trial, postponed the trial without telling the clients, made no effort to contract expert witnesses failed to keep client appointments and refused to try the case. The Court, however, failed to cite this evidence as grounds for establishing good cause to terminate the contract. This issue, then remains one that will have to be decided on a case by case basis. Its purely factual nature makes it one that will be hard to resolve with a motion for summary judgment.

If the client proves there was good cause, the lawyer can typically recover the value of his legal services under the quantum meruit theory.[25] But this is not always the end of the inquiry. The lawyer and client may have also agreed to abandon the contract. If this is the case, the lawyer forfeits his right to compensation under the contract.[26]

IV. CONCLUSION

While *Mandell & Wright* still exists, there is a clear movement away from the strict contract approach to settling attorney-client contract disputes. The special relationship created by the disciplinary rules places a heavy burden on a lawyer seeking to enforce a fee contract. His

[24] *Rocha v. Ahmad*, 676 S.W.2d at 155.

[25] See *Augustson v. Linea Aerea Nacional-Chile S.A.*, 76 F.3d 658, 662 (5th Cir.1996); *Howell v. Kelly*, 534 S.W.2d 737, 739-40 (Tex.Civ.App.-- Houston [1st Dist.] 1976, no writ) (attorney discharged without cause has a choice of remedies); *Rocha v. Ahmad*, 676 S.W.2d at 156.

[26] See *Diaz v. Attorney General of Texas*, 827 S.W.2d 19, 22-23 (Tex.App.--Corpus Christi 1992, no writ).

actions will come under close scrutiny by courts looking for ethical violations. Lawyers finding themselves in this situation should proceed carefully and reasonably or run the risk of a result they did not anticipate.