ETHICAL FEE AGREEMENTS AND BILLABLE HOURS

THOMAS H. WATKINS
BROWN MCCARROLL, L.L.P.
111 Congress Ave.
Suite 1400
Austin, Texas 78701
(512) 472-5456
twatkins@mailbmc.com

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BROWN : Attorneys : at Law MCCARROLL

Thomas H. Watkins

Partner

111 Congress Avenue, Suite 1400
Austin, TX 78701-4093

512-703-5752
twatkins@brownmccarroll.com

Legal Experience

Tom Watkins has practiced full-time litigation for over 38 years. He was invited to be a member of the American College of Trial Lawyers in October 1990 and the American Board of Trial Advocates. He has been listed in the Best Lawyers in America for a number of years. He is experienced in handling high profile litigation requiring direct contact with the media.

Specific Matters of Representation

- Civil Litigation
- Class Actions
- Business Organization Litigation
- Asset Recovery Litigation
- Legal Malpractice Defense
- Patent/Trade Secret Litigation
- Municipal, Estate, Corporate, and Employment Litigation
- Health Care Litigation

Education

- Bachelor of Laws, The University of Texas School of Law
    - ♦ Phi Delta Phi
- Bachelor of Arts in Government, University of Oklahoma

Professional Licenses

- Attorney at Law, Texas, 1964
- Texas Board of Legal Specialization, Civil Trial Law, Board Certified

Court Admissions

- United States Supreme Court
- United States Court of Appeals, Federal Circuit
- United States Court of Appeals, Fifth Circuit
- United States Tax Court
- United States District Court for the Western District of Texas
- United States District Court for the Southern District of Texas

Prior Professional Experience

- Hilgers & Watkins, P.C., Director and Executive Vice President

Speeches and Publications

Mr. Watkins has been privileged to be on the faculty for many legal education programs including the State Bar of Texas, Travis County Bar Association, the University of Texas, University of Houston, South Texas College of Law, Practicing Law Institute, SMU, CLE International, and private industry. He has authored the following articles:

- *Avoiding Malpractice at the Speed of Light: Are your Email Communications Protected and Secure?*, Texas Bar Journal, 2005, Article
- *Balancing the New Texas Ethics Rules with Federal Ethics Requirements,* 23rd Annual Advanced Business Bankruptcy Course, May 2005
- *Malpractice Issues in the Technology Sector*, 17th Annual Computer & Technology Law Institute Conference at The University of Texas in Austin, 2004, Speech
- *A Rose Is a Rose Is a Rose - Or Is It?* Fiduciary and DTPA Claims Against Attorneys, St. Mary's Law Journal, Volume 35 Number 4, 2004, Article

Professional Memberships and Activities

- American Bar Association
- American Board of Trial Advocates
- American College of Trial Lawyers, 1990-Present
- Association of Trial Lawyers of America
- Supreme Court Task Force on Texas Disciplinary Rules of Professional Conduct, Chairman
- State Bar of Texas
    - ♦ Board of Disciplinary Appeals, Chairman, 1992-1994
    - ♦ District 9 Grievance Committee, Chairman, 1986-1989
    - ♦ Board of Directors, 1981-1983
    - ♦ Professional Ethics Committee, Former Member
    - ♦ CLE Committee, Chairman
- College of the State Bar of Texas
- Texas Trial Lawyers Association
- Texas Commission for Lawyer Discipline, Member, 1995-1999
- Travis County Bar Association
    - ♦ President, 1979
- Austin Junior Bar Association
    - ♦ President, 1972

Honors

- AV® Preeminent ™ Peer Review Rated
    - ♦ AV® Preeminent ™ and BV® Distinguished™ are certification marks of Reed Elsevier Properties Inc., used in accordance with the Martindale-Hubbell certification procedures, standards and policies.
- Recognized in *Best Lawyers in America*, Bet-the-Company Litigation & Commercial Litigation
- Recognized as “Super Lawyer” by Law & Politics Media
- Professionalism Award from Texas Center for Legal Ethics, 2003
- State Bar/Texas Gene Cavin Award for Excellence in Continuing Legal Education, May 2003
- Distinguished Lawyer Award for 2000 from the Travis County Bar Association, May 2000
- State/Bar/Texas Presidential Citation for leadership in improving SBOT grievance system, 1999
- Lola Wright Foundation Award in memory of Coleman Gay for outstanding public service in the enhancement of legal ethics in Texas, 1995
- State/Bar/Texas President’s Special Recognition for service to SBOT and public while Chairman of the Board of Disciplinary Appeals, 1993
- Outstanding Young Lawyer Award, Austin Junior Bar Association, 1972

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I. BACKGROUND

Most courts refer to the Texas Rules of Disciplinary Conduct (TRDC) for guidance in fees matters. The current rule, TRDC 1.04 has a long and tortured history. Bill Chriss and Dean John Sutton have a good discussion of the history of the rule in the "Texas Lawyers' Professional Ethics" 4th edition put out by the Texas Young Lawyers Association. The current TRDC 1.04 reads:

> A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

This is the standard for grievance committees and not the standard for civil liability. In determining what a reasonable fee is, the rule sets out eight items that should be reviewed:

A. Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

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

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

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

(4) the amount involved and the results obtained;

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

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

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

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

These form the guidelines for measuring a reasonable fee. It seems that they are usually used in hindsight in a fee application in court, a malpractice case, or a grievance.

Historically most fees in civil cases have been either contingent fee arrangements or hourly fees. Contingent fee arrangements have stirred quite a bit of controversy but have the advantage of aligning the attorney's economic interest more closely to the clients. Hourly fees, on the other hand, create entirely different economic interests between the attorney and client. Client wants lower hourly rates, attorney wants higher hourly rates. It is in the clients' interest for the matter to be concluded quickly, if the case extends over time, the attorney makes more money. The Texas Lawyers Creed states:

> II.2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.

Because of the differing economic interest, vagueness and lack of documentation of fee arrangements poses a disservice to the client and danger to the attorney.

II. REPRESENTING MULTIPLE CLIENTS IN THE SAME MATTER.

One of the most overlooked problems occur when an attorney represents multiple clients in the same matter. Proper identification of who is a client and who is not is important, both for the protection of the clients and the attorney. There are several red flags that should alert the attorney that special care is required:

A. More then one person shows up for the initial interview.

Often a husband and wife, two business partners, or two employees of the same company appear. Are they both clients? If not, what happens to the attorney-client privilege? If so, who controls the matter?

B. A new entity is created.

Is the new entity the client or the people or person who created it? Where is the fee coming from? Who is to communicate with the lawyer for the entity?

C. The fee is coming from somebody besides the client.

Insurance defense work, parents helping their adult children, and indemnity agreements all can give rise to a separation between the client and the payor. This can cause confusion as to the fiduciary duty, the attorney/client privilege, or control of the matter.

Part of the response to these red flags is covered by TRDC 1.06 which provides:

Rule 1.06 Conflict of Interest: General Rule

(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; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

A new proposed Rule 1.06 provides:

Rule 1.06. Conflicts of Interest

(a) A conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(b) A lawyer shall not, even with informed consent, represent opposing parties in the same matter before a tribunal.

A red lined version would look like this:

Rule 1.06. Conflicts of Interest~~: General Rule~~

(a) A conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(~~a~~b) A lawyer shall not, even with informed consent, represent opposing parties ~~to~~ in the same ~~litigation~~ matter before a tribunal.

~~(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; or~~

~~(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.~~

The proposed Rule 1.06 allows an attorney to take on a case with a conflict if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the client;

(2) the representation complies with Rule 1.07; and

(3) the client provides informed consent, confirmed in writing.

The reference to the proposed Rule 1.07 provides a guideline for attorneys dealing with clients with a conflict or dealing with multiple clients in the same matter:

(1) the representation complies with Rule 1.06;

(2) the lawyer reasonably believes that:

(i) the clients can agree among themselves to a resolution of any material issue concerning the matter;

(ii) each client is capable of understanding what is in that client's best interest and making informed decisions;

(iii) the lawyer can deal impartially with each of the clients; and

(iv) the representation is unlikely to result in material prejudice to the interests of any of the clients;

(3) prior to undertaking the representation or as soon as practicable thereafter the lawyer discloses to the clients that during the representation the lawyer:

(i) must act impartially as to all clients; and

(ii) cannot serve as an advocate for one client in the matter against any of the other clients, as a consequence of which:

(A) each client must be willing to make independent decisions without the lawyer's advice to resolve issues that arise among the clients concerning the matter; and

(B) events might occur during joint representation that could require the lawyer to withdraw from representing any or all of the clients before the matter is completed; and

(4) after making the determinations required by (a)(1) and (a)(2), and as soon as reasonably practicable after making the disclosures required by (a)(3), the lawyer obtains each client's informed consent, confirmed in writing, to the representation.

This list of determinations and disclosures is good practice regardless of the rules as it protects the attorney by documenting the disclosures made to the client.

III. BILLING HEADACHES

The process of transferring legal services rendered into hours recorded and then into fee bills is arduous and complicated. Differences in efficiency and thoroughness between lawyers can cause legal bills to vary widely for the same work. Experienced client will try to control their legal expense cost by trying to standardize billing:

A. No block billing.

It is tempting and efficient to block bill. If an attorney works three hours and does several different things for the client on the same matter, the temptation is to put down the three hour block and list all the things done for the client. Insurance carriers and other experienced client are requiring individual entries for each thing done with the time spent on that item.

B. No billing for conferences.

It is often efficient and necessary for trial teams to confer and make assignments and determine strategy. Some clients will not pay for joint meetings. One client will only pay for one lawyers time at the meeting.

C. Charging for travel time.

The attorney who is required to travel on client business loses the time and needs to bill for it. The client does not want to pay attorney rates for a lawyer sitting on a plane. If a lawyer has work for that client that can be done on the plane the problem is solved. Otherwise some agreement should be reached between the client and the attorney.

D. Minimum time units.

There should be a consistent unit of time used to record time. One tenth of an hour is probably fairest to all sides. One quarter hour is probably not fair.

E. Expenses

If the fee agreement provides that the client will pay expenses, then their should be no "markup" on the in house expenses. If it costs eight cents a copy, the expense to the client should only be eight cents. There is nothing wrong with charging twenty-five cents a copy if that price is agreed in the engagement letter. Otherwise, only charge the actual expense.