FEE AGREEMENTS AND ENGAGEMENT LETTERS

CARLOS R. SOLTERO
APRIL E. LUCAS
MARCUS V. EASON
McGinnis, Lochridge, & Kilgore, LLP
600 Congress Avenue, Suite 2100
Austin, Texas 78701

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CARLOS R. SOLTERO
McGinnis Lochridge
600 Congress Avenue, Suite 2100
Austin, Texas 78701
512-495-6033
Fax: 512-505-6333

McGinnis, Lochridge & Kilgore, LLP
Carlos represents plaintiffs and defendants in civil litigation matters in a variety of industries, including commercial disputes, malpractice, constitutional litigation, personal injury, and wrongful death cases. Carlos serves on the firm's Management Committee and heads the firm's Litigation Practice.

Recent Experience
In recent years, Carlos's work has primarily involved obtaining settlements on behalf of plaintiffs in wrongful death and personal injury cases involving trucking and other accidents. He has also been asked to assist in preparing, submitting, and arguing jury instructions for both plaintiffs and defendants, and he frequently performs appellate work particular to complex cases.

Carlos is Board-Certified in Personal Injury Trial Law and has tried, as either first chair or in a supporting role, a variety of cases to juries, the bench, and arbitrators. He has published and lectured in the area of trial practice, including Evidence, Jury Selection, Daubert, and Choice-of-Law Issues.

Activities
Robert Calvert Chapter, Inns of Court, Member (2001-2007)
State Bar of Texas; Rules Committee (2007 to present, Vice-Chair 2012-2014, Chair 2014-2015)
State Bar of Texas; Business, Consumer & Employment Pattern Jury Charges (Vol. 4) Committee (2001-2007)
The University of Texas, Lecturer (Spring 2001)
Advisory Board Member to Center for U.S. and Mexican Law (2012-present)

Professional Background
Yale Law School, J.D. 1994
Yale University, B.A. 1991
Admitted to Practice: Texas; Colorado; Supreme Court of the United States of America; United States Court of Appeals for the Fifth Circuit; United States District Courts for the Eastern, Northern, Southern, and Western Districts of Texas

APRIL E. LUCAS
McGinnis Lochridge
600 Congress Avenue, Suite 2100
Austin, Texas 78701
512-495-6156
Fax: 512-505-6356

McGinnis, Lochridge & Kilgore, LLP
April is a commercial litigator in a variety of areas. Her recent practice includes defending lawyers from claims of legal malpractice and breach of fiduciary duties, including claims arising from commercial litigation, bankruptcy, family law, and transactional matters. She also has experience with fiduciary litigation, such as trusts and estates, family disputes, and probate matters, as well as experience in oil and gas and appellate work. April serves as a Loss Prevention Partner for McGinnis Lochridge.

Activities
Travis County Women Lawyers Association, Secretary
Texas Supreme Court Historical Society
Austin Bar Association: Litigation and Appellate Sections
American Constitution Society

Professional Background
Briefing Attorney, Justice David Puryear, Third Court of Appeals, Austin Texas 2004-2005
University of Texas School of Law, J.D. 2004
Texas A&M University, B.A. 2001
Admitted to Practice: Texas; United States Court of Appeals for the Fifth Circuit; United States District Courts for the Eastern, Northern, Southern, and Western Districts of Texas

MARCUS V. EASON
McGinnis Lochridge
711 Louisiana Street, Suite 1600
Houston, Texas 77002
(713) 615-8500
Fax: (713) 615-8585
meason@mcginnislaw.com

Marcus Eason represents plaintiffs and defendants in a wide variety of litigation matters, including complex commercial litigation and general litigation. He focuses his practice on complex commercial litigation and has actively represented clients in all aspects of the litigation process, including drafting pleadings and discovery, providing legal research, hearings, and taking depositions. Before joining the firm, Marcus interned in the office of Secretary James Baker, III, and clerked with Judge Mike Engelhart of the 151st District Court.

Activities
Houston Bar Association
Houston Young Lawyers Association

Professional Background
University of Houston Law Center, J.D., 2014
Texas A&M University, B.A., 2010
Admitted to Practice: Texas, United States District Court for the Southern District of Texas

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I. WHY HAVE FEE AGREEMENTS AND ENGAGEMENT LETTERS?

Engagement letters and fee agreements set out the terms of the relationship between an attorney and a client. Although an attorney-client relationship may exist without a written engagement letter or fee agreement, in many cases it is good practice to have one.

The specific terms of a client's engagement of an attorney's services can vary tremendously, and "one size" truly does not fit all. Practitioners and clients are well advised to think about the nature of the engagement and use fee agreements or engagement letters to promote clarity and communication between attorney and client for the specific assignment or task. Importantly, engagement letters can assist the lawyer in complying with Texas Disciplinary Rule of Professional Conduct 1.03 (b): "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

While it may be customary to use standard engagement letters and agreements, there are reasons why taking some time to think about fee agreements and engagement letters on the front-end is invaluable. First and foremost, as expressed above, they perform an important client service function. They provide clarity and effective communication between attorney and client as to expectations and goals, and can help prompt questions or discussions at the outset of the representation by helping clients think through important issues concerning their legal needs. Second, these documents clarify the terms and conditions of the representation, including important conditions like the extent of the lawyer's services and duties, and the payment for legal services and related fees and costs. Third, in certain circumstances, (e.g., contingency fee contracts), they are required. Fourth, if a client may be entitled to seek attorneys' fees from a different or adverse party, these instruments may become evidence to establish recoverable fees. Fifth, attorneys may be able to avoid unnecessary disputes with clients by properly documenting the parameters of the engagement.

In considering engagement agreements, it is helpful to consult the Texas Disciplinary Rules of Professional Conduct and to refer to Ethics Opinions and case law. There are important ethical as well as practical concerns to consider. Engagement agreements can help attorneys properly explain and carry out their duties. As the Texas Supreme Court has noted, "when interpreting and enforcing attorney-client fee agreements, it is 'not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship.'" *Hoover Slovacek, LLP v. Walton*, 206 S.W.3d 557, 561-62 (Tex. 2006) (quoting *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 868 (Tex. 2000)) (finding termination clause that created an unconscionable fee unenforceable as a matter of law).

When interpreting and enforcing an attorney-client agreement, the Texas Supreme Court has admonished courts to be mindful of those ethical considerations. *Hoover Slovacek LLP*, 206 S.W.3d at 560 (reasoning that an attorney has a special responsibility to maintain the highest standards of conduct and fair dealing when contracting with a client or otherwise taking a position adverse to the client's interests). Courts construe engagement and fee agreements from the standpoint of a reasonable person in the client's circumstances. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 cmt. h. Courts place the burden of clarifying attorney-client agreements on the attorney because they presume the attorney has greater knowledge and experience with respect to engagement agreements, and because of the trust, a client places in the attorney. *See Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 95 (Tex. 2001).

Stated more recently by the Texas Supreme Court:

> Construing client-lawyer agreements from the perspective of a reasonable client in the circumstances imposes a responsibility of clarity on the lawyer that should preclude a determination that an agreement is ambiguous in most instances. Lawyers appreciate the importance of words and "are more able than most clients to detect and repair omissions in client-lawyer

> contracts." A client's best interests, which its lawyer is obliged to pursue, do not include having a jury construe their agreements.

Anglo-Dutch Petro. Int'l, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445, 453 (Tex. 2011). Additionally, the Supreme Court wrote that:

> Because a lawyer's fiduciary duty to a client covers contract negotiations between them, such contracts are closely scrutinized. Part of the lawyer's duty is to inform the client of all material facts. And so that this responsibility is not a mere and meaningless formality, the lawyer must be clear. Clarity in fee agreements is certainly important to clients.

Anglo-Dutch Petro., 352 S.W.3d at 450. However, the standard is reasonableness:

> Only reasonable clarity is required, not perfection; not every dispute over the contract's meaning must be resolved against the lawyer. But the object is that the client be informed, and thus whether the lawyer has been reasonably clear must be determined from the client's perspective.

Anglo-Dutch Petro., 352 S.W.3d at 451.

The Court more recently echoed this in *In re Davenport*, where the Supreme Court refused to read language into a fee agreement that permitted the lawyers to receive a part of their client's business as payment pursuant to the fee agreement, when the agreement did not clearly set out those terms. *In re Davenport*, 522 S.W.3d 452, 458 (Tex. 2017) ("This does not mean every dispute over the contract's meaning must be resolved against the lawyer, but whether the lawyer was reasonably clear is determined from the client's perspective. Placing the burden on the lawyers to be "clear" in fee agreements is warranted, given a lawyer's sophistication, the trusting relationship between a lawyer and his client, and a lawyer's responsibility to notify the client of the fee's basis or rate at the outset.").

II. THINGS TO THINK ABOUT—IDENTITY OF THE CLIENT.

While the identity of the client may appear to be a simple and obvious fact, it is not always as straightforward as it seems. Particularly at the beginning of a representation, issues concerning the identity of a client are frequently overlooked. Misunderstandings can arise in a variety of circumstances, such as when the representation involves a business entity, either to be formed or already in existence, which must communicate through its agents, members, or principals. *See* Tex. Disciplinary R. Prof'l Conduct R. 1.12 (Organization as Client). It is helpful for the individuals to understand at the outset whether they, the entity, or some combination of entity and individuals, are the client(s). Often multiple parties with aligned interests seek legal counsel together, such as an individual defendant and that defendant's employer. Siblings may seek advice as to a family trust, or heirs may seek advice concerning an estate. Spouses may have legal needs that coincide, or they may have conflicts that argue in favor of engaging separate counsel. Some of the other persons who had contact with an attorney may later claim that they believed their interests were also being protected. *See, e.g., Bounds v. Brown McCarroll, LLP*, 495 B.R. 725 (W.D. Tex. 2013) (firm that represented husband individually and two of husband's companies in bankruptcy was sued for alleged legal advice given to wife, who claimed firm failed to advise her of consequences of husband's bankruptcy).

Additionally, a party may simply be easy to misname. A good engagement letter can clarify who the client is and what duties the attorney has undertaken with regard to that client. Whether in the context of small corporations or other non-natural entities, co-defendants in employment discrimination cases, trust disputes, survival or wrongful death actions beneficiaries, and a variety of other disputes, the questions of "who is the client" or "who are the clients" can be more complex than they may appear. Going through the exercise of identifying the parties in writing can open up a conversation with the client and clarify their expectations, with potential advantages to the client and the lawyer.

Confusion as to the identity of the client can lead to disappointment, complications in the litigation or transactional matter at hand,

additional costs and delay and, in some cases, claims against the attorneys for legal malpractice or breach of fiduciary duty.

At common law, an attorney owes a duty of care only to his or her client, not to third parties who may have been damaged by the attorney's negligence. *Barcelo, III v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996). Texas does not recognize a cause of action for negligence against an attorney by one who is not in privity with that attorney. *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 621 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

The existence of an attorney-client relationship, and thus the duties a lawyer has to a putative client, may be a fact issue. *See, e.g. Burnap v. Linnartz*, 38 S.W.3d 612, 619 (Tex. App.—San Antonio 2000, no pet.). Even in the absence of an attorney-client relationship, parties have been known to sue attorneys for alleged negligence in failing to advise a person whom they did not represent him. *See, e.g., id.* at 619. In *Burnap*, the court accepted a plaintiff's sworn affidavit that he reasonably believed his son had retained a firm to represent both an entity in which he held an interest along with each of the individual partners of that entity, and that he expected the firm to protect his interests and notify him of any conflicts of interest with other partners, as summary-judgment proof sufficient to create a fact issue as to the existence of an attorney-client relationship. Courts consider various types of evidence to determine whether an attorney-client relationship existed, including the attorney's conduct and the subjective views of the potential client or other person. *See, e.g. Vinson & Elkins v. Moran*, 946 S.W.2d 381, 402-04 (Tex. App.—Houston [14th Dist.] 1997, writ dismissed) (discussing interactions with beneficiaries, as well as verbal and written communication with beneficiaries and not merely executors, and finding an attorney-client relationship had been created); *cf. People v. Boyer*, 934 P.2d 1361, 1362 (Col. 1997) (potential client's belief that attorney would represent her was a basis for disciplinary action); *but see DeYoung v. Beirne, Maynard & Parsons, L.L.P.*, 2014 WL 1058201, *3-4 (Tex. App.—Houston [1st Dist.] Mar. 18, 2014, no pet.) (rejecting claims that attorney-client relationship was created by conduct where no communication supported the claim and distinguishing *Bright v. Addison*, 171 S.W.3d 588, 597 (Tex. App.—Dallas 2005, pet. dism'd), where attorney had provided legal advice, billed, and sent letter discussing attorney-client relationship, and did nothing to later inform putative clients that relationship did not exist).

Thus, potentially as important as who an attorney represents is who an attorney does *not* represent. In addition to concerns about liability, attorneys may encounter problems with confidentiality. Both communications between an attorney and client and the attorney's work product are privileged and cannot be discovered or disclosed. Tex. R. Evid. 503; Tex. R. Civ. P. 192.5. Lawyers additionally have a broader duty to protect client confidential information. Tex. Disciplinary R. Prof'l Conduct R. 1.05. But there is no privilege:

> If the communication: is offered in an action between clients who retained or consulted a lawyer in common; was made by any of the clients to the lawyer; and is relevant to a matter of common interest between clients.

Tex. R. Evid. 503(d)(5). This exception, particularly in its use of the phrase "consulted a lawyer in common," raises the specter of a demand on a lawyer to disclose highly sensitive, otherwise privileged material in a client's file upon a demand of someone claiming also to have been a client—for example, an agent, family member, employee, witness, beneficiary, executive, or joint-venturer of the client, all of whom are prone to becoming engaged in a later "action between clients." Although not a cure-all, an engagement letter could help guide and inform the determination of what duties of confidentiality or disclosure are owed.

An example of someone who claims to have "consulted a lawyer in common" could include a wife of a personal injury plaintiff. In *Elizondo v. Krist*, 415 S.W.3d 259, 260-61 (Tex. 2013), a husband and wife complained about the size of a settlement they received. The husband, but not the wife, executed a power of attorney to retain the lawyers to represent him. Then they made a personal-injury demand on behalf of both husband and wife, who had a consortium claim to

accompany her husband's physical injury claim. *Id*. Only the husband signed the release in the ensuing settlement. Among other things, the couple claimed in the malpractice suit that the firm failed to properly represent the wife, failed to obtain any consideration for her consortium claim, and failed to pursue her claim before it became time-barred. *Id.* The case was decided for the lawyers because of a failure to show resulting damages. However, *Elizondo* is instructive for attorneys considering whether their acts or communications may lead a potential client *not* to consider retaining her own counsel and suing before limitations bars her claim.

If the engagement letter language addresses who the client is, who the client is not, and to whom the documents, information, or privilege belong, the likelihood of potential disputes and attendant conflicting claims of confidentiality may be reduced. Clear communication at the outset of a matter might prompt retention of additional or separate counsel, a re-negotiation of the relationship to include the additional party or parties, or trigger some other way to avoid a problem from the start.

Another helpful practice is writing "non-engagement" or "I'm-not-your-lawyer" letters. Not every problematic situation can be spotted before it becomes problematic. Still, when a question arises, where there is communication between an attorney and, for example, a co-trustee, an employee, or a family friend of a client, there may be circumstances in which correspondence can help make clear whom the firm represents, to whom the firm owes duties, and to whom all information at issue will and will not be provided. Doing so may protect client confidences from future attack. In addition, it could help protect lawyers from claims by persons to whom they do not owe duties. *See, e.g., Moran,* 946 S.W.2d at 405-06. In *Moran,* the court held that the attorney-client relationship is contractual, and contracts depend on a meeting of the minds. Meeting of the minds requires objective actions and statements, not one party's feeling that a contract was created; the firm's acts indicating that there was an agreement were necessary to find an attorney-client relationship. *Id*. at 406. Objective evidence like "I'm-not-your-lawyer" letters would make it difficult for others to show that there was a meeting of the minds where none existed.

Another event implicating the identity of the client is joint representation. Joint representation occurs when multiple parties share counsel in the same matter. Joint representation is permitted when all clients consent and there is no substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to the other. *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 50 (Tex. 2012) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 (2000)). Where appropriate, a joint representation can be advantageous to the clients, as it allows them to save and share litigation fees and coordinate strategies and maintain a united front.[1] However, joint representation can also implicate a host of potential issues and concerns, which a well-drafted engagement letter may help the attorney and clients identify and address.

First, co-clients cannot maintain a privilege against one another as to a communication regarding a matter of common interest between or among them made to a lawyer retained or consulted in common. Tex R. Evid. 503(d)(5); *In re XL Specialty Ins. Co.*, 373 S.W.3d at 50. That is, anything one co-client discusses cannot be kept from the other co-client(s) by their lawyer in common. In a great many joint representations there will be communications from one client that do not copy the other client or occur in his presence. Engagement letters to all clients in these circumstances can explicitly make clear that any confidences shared with the lawyer will be shared with the other client(s).

Second, it is not uncommon for clients who appeared wholly aligned at the beginning of a representation to become less so as the litigation or transaction develops. Should a conflict of

[1] Multiple clients can even agree to share certain fees and information while keeping other information separate, with appropriate fee agreement language. *See, e.g. Hernandez v. Abraham, Watkins, Nichols, Sorrels & Friend*, 451 S.W.3d 58, 71 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

interest arise, a lawyer may be forced to withdraw from representation of one or all of the clients concerned. This can cause financial and strategic upheaval for the clients, so an engagement letter addressing how this will be handled and how the risks, if any, will be ameliorated, can help the parties anticipate, prepare for, and perhaps prevent such difficulties.

In some cases one client (for example, an employer) may ask the lawyer to obtain a waiver from another client (for example, an employee) providing that, if an actual conflict arises, the lawyer may withdraw from representing the employee but continue to represent the employer in the same matter. If this can be achieved within the bounds of one's duties to the clients and the requirements of the disciplinary rules, it can require robust, thorough disclosures and waiver language. *See* Tex. Disciplinary R. Prof'l Conduct R. 1.06, 1.07 and comments thereto (regarding whether and when a lawyer can represent either client after withdrawing from joint representation; 1.09 further discusses responsibilities to former clients). An engagement letter is an opportunity to make important disclosures and to obtain informed consent.

Texas Disciplinary Rule of Professional Conduct 1.06(a) prohibits a lawyer from representing "opposing parties to the same litigation." Where the representation does not involve opposing parties to the same litigation but involves substantially related matters and the representation may appear to be adversely limited by responsibilities to another client or third person (e.g., a former client), the lawyer may represent the client only if additional conditions are met.[2]

The Disciplinary Rules define representing "two or more parties with potentially conflicting interests" as "act[ing] as intermediary" and impose restrictions on when and how a lawyer may do so. *See* Tex. Disciplinary R. Prof'l Conduct R. 1.07(d). To do so, a lawyer must consult with each client concerning the implications of the common representation, including the advantages and risks involved and the effect on privileges, obtain each client's written consent, and reasonably believe that the representation can be resolved without contested litigation in each client's best interest and can occur impartially and without impairing his responsibilities to the clients. *Id*. at 1.07(a). These disclosures and consultations may be memorialized as part of an engagement letter.

Just as an engagement letter can cure ambiguities regarding who the client is, a well-written and clear engagement letter may avoid potential disputes regarding who the "lawyer" is. *Anglo-Dutch Petro.*, 352 S.W.3d at 452 (concluding that fee agreement was unambiguously with law firm, not an individual attorney). Clarity about the role or title of the lawyer(s) working on the file is something to pay attention to as well. See Tex. Disciplinary R. Prof'l Conduct R. 7.01 (a lawyer may only hold himself or herself as being a partner, shareholder, or associate with one or more other lawyers only if they in fact are).

III. THINGS TO THINK ABOUT—SCOPE OF THE REPRESENTATION.

In many cases, lawyers and clients may benefit from taking time considering, discussing, and memorializing the specific scope, tasks, and topics for which the client desires to hire the lawyer. Under the Texas Disciplinary Rules, "[a] lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation." Tex. Disciplinary R. Prof'l Conduct R. 1.02(b). Comment 4 to Rule 1.02 actually suggests doing so by engagement letter: "The scope of representation provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined objective. Likewise, representation provided through a legal aid agency may be subject to limitations on the types of cases . . . ."

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[2] The lawyer must reasonably believe that the representation will not be materially affected, and the lawyer must obtain consent after "full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any." Tex. Disciplinary R. Prof'l Conduct R. 1.06(c).

The scope of a representation may go from nearly complete as an "in-house" counsel or a "general counsel" for a client with a wide-sweeping arrangement or can be as restricted as handling a portion of a discrete legal matter or issue at a specific phase in litigation. Often the scope of the representation could be limited to serving as local counsel,[3] co-counsel, state court counsel, federal court counsel, advising on a particular area of expertise, or assisting with a portion of trial or appeal. "The scope within which the representation is undertaken also may exclude specific objectives or means, such as those the lawyer or client regards as repugnant or imprudent." Tex. Disciplinary R. Prof'l Conduct R, 1.02 cmt. 4. Engagements can be extremely restricted, depending on particular client needs.

Fee agreements and engagement letters are an excellent place to specify the proposed scope of an engagement, including any restrictions, and create an excellent opportunity to obtain informed client consent after a memorialized consultation.

The Texas Supreme Court has written on the issue of scope of the representation:

> Generally, a lawyer's fiduciary duties to a client, although extremely important, "extend[ ] **only to dealings within the scope of the underlying relationship of the parties**."

Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 159 (Tex. 2004) (quoting *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977)); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. c; § 50 cmt. d (2000) (a lawyer's duties are ordinarily limited to matters covered by the representation). Therefore, a clear statement of that scope could be helpful for the client and lawyer to understand and agree on what "dealings" the representation encompasses. It can help answer what professional services are to be rendered, and define the nature of the attorney-client relationship. *See Joseph v. State*, 3 S.W.3d 627, 639 (Tex. App.—Houston [14th Dist.] 1999, no pet.) ("The nature of the attorney-client relationship defines an attorney's duties and the professional services to be rendered.").

Thus, the engagement agreement can shape the parties' underlying relationship and influence the reach and content of the duties an attorney assumes. Early discussion and negotiation can help set appropriate client expectations. For example, a personal injury lawyer or commercial litigator may understandably not undertake to give tax, investment, or estate planning advice. Therefore, some elect to include language in their engagement agreements to so inform the client. This could prevent an unwelcome surprise at the end of a successful (or unsuccessful) suit, when the client has questions about the tax or other consequences of the outcome. Divorce practitioners may wish to state that they won't undertake to represent a client with respect to creditors or debts, including marital debts, or that they won't undertake modification or other suits without a new engagement. An estate planner may specify she will not undertake to find or value property, or perform tracing to classify community or separate property. Some clients will require limited-scope engagements for financial or management, or other reasons. In fact, a lawyer may not act beyond the scope of the contemplated representation without additional authorization from the client. *Joe*, 145 S.W.3d at 159-60 (citing Tex. Disciplinary R. Prof'l Conduct R. 1.02; RESTATEMENT § 16, cmt. c; § 27, cmt. e).

If the client knows from the outset that another lawyer or other advisor may be needed to address areas outside the lawyer's expertise or engagement, the lawyer and client can coordinate planning for those areas, including perhaps a helpful referral.[4] This is one more way in which

[3] If the role of an attorney as "local counsel" is meant to be of limited scope, clearly expressing that in the engagement letter signed by the client is helpful. Recently, Travis County amended its local rules to allow for a formalized "limited engagement" in certain circumstances. Travis (Tex.) Civ. Dist. Ct. Loc. R. 20.1-20.5.

[4] Clients generally have a right to be represented by counsel that they choose. *In re El Paso Healthcare System, Ltd.*, 225 S.W.3d 146, 153 (Tex. App.—El Paso 2005, pet. dism'd); *Keller Indus. v. Blanton*, 804

a well-thought out engagement letter can promote positive client relations.

In addition to defining the contours of the lawyer's duties, a thoughtful delineation of scope can direct and channel the attorney's communication with the client. An attorney owes a duty to inform the client of matters material to the representation. *Joe*, 145 S.W.3d at 159-60; *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988). This duty does not extend to matters beyond the scope of the representation; in addition to the client convenience of limiting the stream of prophylactic information (with its attendant costs) to the client to matters actually material to the representation, this rule also protects lawyers. *See, e.g., Joseph*, 3 S.W.3d at 639 (noting that an attorney could not render ineffective representation to a criminal defendant on offenses for which she was not retained to represent defendant); *Klager v. Worthing*, 966 S.W.2d 77, 83 (Tex. App.—San Antonio 1996, no writ) (holding that law firm did not assume a duty to supervise a client's medical care despite agreeing to represent client in silicone breast implant litigation).

Capable attorneys can differ as to the best way to articulate a limitation on the scope of representation. One way is to describe the limited topic for which the lawyer will be providing services, and specifying what services will be provided (for example, an opinion letter, drafting a contract or set of contracts, etc.). For litigation matters, some attorneys will describe the dispute, perhaps identify the opposing party, or, if a case is on file, it can be helpful to include the exact name and cause number of the court case and state that any other work will be the subject of an additional agreement and letter (and perhaps additional retainer or deposit).

Another approach, which can be combined with the above, is to list certain tasks, topics, or responsibilities that the lawyer will *not* be responsible for. This can help clarify if there are subjects that could be perceived as a gray area on the edges of what an attorney has undertaken. However, some attorneys have significant concerns with expressly excluding listed areas of representation, because they are concerned it could be interpreted as an exclusive list; that is, that everything conceivable not listed *is* the attorney's responsibility. Often the particular characteristics and posture of the matter, the client, and the attorney will direct which, if any, of these approaches is the best fit. Each representation is different.

IV. THINGS TO THINK ABOUT—REASONABLE FEES.

One of the more obvious functions of an engagement agreement is to set forth how an attorney will be paid.

An attorney has a responsibility to the client to ensure the client understands the terms of the fee arrangements. *See Hoover Slovacek LLP v. Walton*, 206 SW.3d 557, 560-61 (Tex. 2006); *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 95 (Tex. 2001); *Lopez*, 22 S.W.3d at 867-68 (Gonzalez, J. concurring and dissenting). Similarly, Disciplinary Rule 1.04(c) requires communication of the basis of the lawyer's fee. One way to do so is through a clear, written engagement agreement.

Engagement letters can also help a lawyer think through and educate a client on a reasonable fee to be negotiated and collected. The Disciplinary Rules and the Texas Supreme Court have provided eight non-exclusive factors for fact-finders to use to determine the reasonableness of attorneys' fees under Texas law:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly.
2. The likelihood that the acceptance of the particular employment will preclude other employment by the attorney.
3. The fee customarily charged in the locality for similar legal services.

S.W.2d 182, 185 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding).

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

Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997).

These factors, based on Texas Disciplinary Rule 1.04(b), apply to fee awards by juries and also attorneys' fees awards made by judges. *Young v. Qualls*, 223 S.W.3d 312, 314 (Tex. 2007). The Fifth Circuit has articulated similar factors, set forth in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714, 717–19 (5th Cir. 1974). *See also El Apple*, 370 S.W.3d at 761 n.1; *Mid-Continent Cas. Co. v. Chevron Pipe Line Co.*, 205 F.3d 222, 232 (5th Cir. 2000). The *Johnson* factors are similar to the *Arthur Anderson* factors but also include: (a) the "undesirability" of the case; and (b) fee awards in similar cases. *Id.*

While these are often cited in connection with attempts to recover attorneys' fees from adverse parties[5], these same factors help evaluate whether a fee earned by an attorney is reasonable, which is important in starting out an attorney-client relationship. A fee may not be unconscionable under all relevant circumstances. *Hoover Slovacek*, 206 S.W.3d at 561-62 (citing Tex. Disciplinary R. Prof'l Conduct R. 1.04(a)).

Whether a fee agreement is fair and reasonable is judged at the time the parties enter into the agreement. *McGuire, Craddock, Strother & Hale, P.C. v. Transcontinental Realty Investors, Inc.*, 251 S.W.3d 890, 895 (Tex. App.—Dallas 2008, pet. denied) (citing *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)).

A complaint about the fees raised in *McGuire, Craddock* involved allegations that the law firm improperly raised the hourly rates of lawyers during the course of the litigation. However, the evidence showed that the general counsel had been advised that the firm periodically raised its rates. *McGuire, Craddock*, 251 S.W.3d at 896. An express statement to that effect in an engagement letter is something to consider.

Another aspect not to overlook is the payment for appellate fees should they become necessary. Some contingency fee agreements include an elevated percentage of any recovery in exchange for the services of representing a client on appeal. *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 859-60 (Tex. 2000). The contract in *Lopez* (which the Supreme Court upheld and enforced) provided for an assignment of 40% in the litigation and for a 45% contingency of the underlying wrongful death case if the matter were appealed. Since 4 of the 5 potential blanks for recovery of an award of attorneys' fees on the pattern jury charge question involve appellate fees (*see* PJC § 115.47), one does well to give them some thought during the engagement letter or fee agreement phase of the relationship. *See also Hawkins v. Walker*, 233 S.W.3d 380, 399 (Tex. App.—Fort Worth 2007, pet. denied).

Another issue becoming increasingly more common involves requests from clients or those paying legal bills (e.g. insurers) requesting budgets as to legal services. *See e.g., McGuire,*

[5] Fee arrangements between the client and the attorney are not dispositive of any attorneys' fees issue, including reasonableness. *Arthur Andersen*, 945 S.W.2d at 818 (noting that mere fact of a contingent fee agreement does not by itself establish reasonableness for purposes of making the defendant pay the fee). Even hourly rate fee agreements do not by themselves establish reasonableness of the fee. *Hawkins*, 233 S.W.3d at 397 n. 55; *Smith v. Smith*, 757 S.W.2d 422, 424 (Tex. App.—Dallas 1988, writ denied) ("An agreement to pay an attorney's fee based upon a certain amount per hour is not proof of its reasonableness.").

Craddock, 251 S.W.3d at 896-97. If clients require attorneys to stay within a litigation budget, that can be memorialized in the documents pertaining to the engagement. Where appropriate, engagement agreements can provide that, while the attorney may give estimates or opinions (about costs or other matters, where appropriate), these are difficult to estimate and are not guaranteed or binding.

Having clear, written agreements regarding who will pay the lawyer and the terms for payments may be essential and even required to establish payment if payment obligations are later disputed. An interesting case is *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2014). In *Yates*, a lawyer provided services in defending an officer of Dynegy in both federal criminal matters and various civil matters. Initially, the Dynegy officer had told the lawyers that the company would pay the legal fees, and according to testimony, the associate received oral confirmation from an in-house attorney, saying "The Board has passed a resolution, so, yes, we are paying [the] fees," and instructing that the bills be submitted to her. *Yates*, 422 S.W.3d at 640. The company then refused to pay the fees and ultimately the lawyer lost the claim to be paid by the company because the alleged oral agreement was barred by the Statute of Frauds. Having a clearly written engagement letter or other fee agreement with the person or entity agreeing to pay the legal fees is thus advisable.

V. THINGS TO THINK ABOUT—CONTINGENCY FEES ARRANGEMENTS.

In other circumstances, agreements must be in writing to be enforced. Contingency fee agreements are an example. Texas Disciplinary Rule 1.04 provides:

> A fee may be contingent on the outcome of the matter for which the service is rendered . . . A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Pursuant to Tex. Gov. Code §82.065(a), contingent fee agreements "must be in writing and signed by the attorney and client." The Texas Supreme Court heard oral arguments on October 10, 2017 regarding whether when a contract is voided under Tex. Gov. Code §82.065(c), an attorney may still recover fees under a quantum meruit theory. *Shamoun & Norman, LLP v. Hill*, 483 S.W.3d 767, 779 (Tex. App.—Dallas 2016, pet. granted).

In *Shamoun & Norman, LLP*, Shamoun & Norman was hired to represent Hill, and executed various fee agreements on various interrelated matters that were part of a "spider web" of other litigation matters. 483 S.W.3d at 775. Shamoun however undertook to lead the settlement efforts for the entire "web." *Id.* Once the "spider web" of cases was settled, there was a disagreement over what Shamoun was owed. *Id.* at 777-780. Because there was no written agreement specifically regarding the scope of the global settlement services, Shamoun could not recover under the terms of the agreement he thought the parties had, and instead relied on a quantum meruit theory of recovery.[6] *Id.* at 779.

Given this, engagement letters with clearly defined fee agreements are helpful towards representation in any matter where the attorney's payment is contingent upon its outcome.

[6] The jury awarded $7.25 million to Shamoun & Norman on its quantum meruit theory.

In addition, where an attorney plans to divide fees with another the Texas Disciplinary Rules place certain conditions on fee-splitting arrangements, sometimes requiring that these agreements be memorialized in writing. Specifically, Rule 1.04(f) of the Texas Disciplinary Rules of Professional Conduct prohibits lawyers who do not practice at the same law firm from splitting contingency fees unless certain conditions are met, namely: (1) there is a written fee agreement identifying the law firms; (2) the client is advised and consents in writing ahead of time; and (3) the fee is in proportion to the work done or the firms have agreed to accept joint representation. In sum, more just than viewing a written fee agreement as a helpful prophylactic measure, an attorney must be ever conscious that a written agreement might be a required measure in certain circumstances and thus take the time to enter into one accordingly.

VI. THINGS TO THINK ABOUT—RETAINERS AND DEPOSITS.

Retainers or deposits are another frequent subject of engagement agreements. Many attorneys require or accept retainers or deposits, and many engagement letters discuss them. In many areas of practice, including bankruptcy, family law, estate planning, and others, the practice of taking advance payment retainers is common.

According to the Fifth Circuit, retainer agreements fall into three general categories: (1) classic retainers; (2) security retainers; and (3) advance payment retainers (also called deposits). *See, e.g., Barron v. Countryman*, 432 F.3d 590, 595 (5th Cir. 2005). A classic retainer is earned in its entirety by counsel upon payment, a security retainer is paid to counsel for prospective services with the attorney holding the funds until services are actually rendered, and an advance payment or flat fee retainer is paid as compensation for services to be rendered, but belongs to counsel when paid. *Id*.

The category or type of the retainer has important consequences; for instance, in bankruptcy, it can affect whether the money belongs to the attorney or client at a certain point in time, and therefore whether it's part of the debtor's estate under the court's purview or not. *Id.* Ownership of funds at a given point in time is also important because a lawyer must hold funds belonging in whole or in part to her client in a trust account and not the lawyer's own account. Tex. Disciplinary R. Prof'l Conduct R. 1.14(a) ("A lawyer shall hold funds . . . belonging in whole or in part to clients . . . in a separate account, designated as a 'trust' or 'escrow' account."). The requirement that the funds be placed in a trust account rather than the lawyer's operating account is not designed to protect the client from an unscrupulous lawyer, but to protect them from the reach of the lawyer's creditors, giving the client an extra level of protection. Tex. Comm. on Prof'l Ethics, Op. 611 (2011).

If a lawyer is holding funds belonging to her client, she must promptly deliver them, or an accounting of them, upon request. Tex. Disciplinary R. Prof'l Conduct R. 1.14(b). Similarly, upon termination of representation, a lawyer shall take reasonable steps to protect a client's interest, such as refunding any advance payment of fees that have not yet been earned. Tex. Disciplinary R. Prof'l Conduct R. 1.15(d). Non-refundable retainers should be approached with caution. As the Texas Commission on Professional Ethics warns, "[w]hile a non-refundable retainer is not unethical per se, an attorney may be disciplined for refusing to refund an unearned fee . . . or for charging a clearly excessive fee. . . . Non-refundable retainers are not inherently unethical, but must be utilized with caution." Tex. Comm. on Prof'l Ethics, Op. 431 (1986), 49 Tex. B.J. 1084 (1986). Deposits that may seem reasonable at the outset of a litigation can appear in a different light after termination following very little work. *See, e.g., Cluck v. Commission for Lawyer Discipline*, 214 S.W.3d 736, 740 (Tex. App.—Austin 2007, no pet.) (discussing whether billing was unconscionable where $20,000 retainer was nonrefundable and only 11 hours of work were performed).

The type of retainer can affect how a lawyer should handle a refund, should one become necessary. "A true retainer . . . is not a payment for services. It is an advance fee to secure a lawyer's services, and remunerate him for loss of the opportunity to accept other employment. . . . If the lawyer can substantiate that other employment will probably be lost by [the representation, as by conflicts or perhaps workload requirements], the retainer fee should

be deemed earned at the moment it is received. If, however, the client discharges the attorney for cause before any opportunities have been lost, or if the attorney withdraws voluntarily, then the attorney should refund an equitable portion of the retainer." Tex. Comm. on Prof'l Ethics, Op. 431 (1986), 49 Tex. B.J. 1084 (1986). A legal fee for future services is a non-refundable retainer *only* if it in its entirety is reasonable to secure the availability of the lawyer's future services and compensate the lawyer for foregoing other employment. Tex. Comm. on Prof'l Ethics, Op. 611 (2011). It can be deposited in the lawyer's operating account. *Id*. However, a lawyer is not permitted to accept a so-called "non-refundable retainer" that includes payment for the provision of future legal services rather than solely for availability. *Id.*

Some engagement agreements call for an "evergreen" retainer—that is, the client deposits a certain sum, and the lawyer is paid from that sum, but the client must continually refresh the amount upon depletion of the account, usually in accordance with periodic billing by the attorney. This can be a helpful way to keep the client engaged with the status and costs of the representation, and manage expectations, as well as keep the client current on payment. But it, too, can be subject to hindsight judgments as to reasonableness and fair treatment of clients. *See, e.g., Cluck*, 214 S.W.3d at 740 (affirming discipline where non-refundable retainer was not yet depleted, but attorney required additional "retainer" to resume dormant case, which was deposited in operating, rather than trust, account).

VII. THINGS TO THINK ABOUT—BEGINNING AND TERMINATING THE RELATIONSHIP.

Fee agreements and engagement letters can clarify the beginning and end of the attorney-client relationship. Another important function of explicitly limiting the scope of representation is that it can dictate when and how an engagement ends. Engagement agreements explicitly contemplating a limited number of tasks can cause the representation to terminate automatically once those tasks are completed. The attorney-client relationship is one of contract and generally ends once the purpose of the employment is completed, unless there is a special agreement to the contrary. *Rosas v. Comm'n for Lawyer Disc*., 335 S.W.3d 311, 317 (Tex. App.—San Antonio 2010, no pet.); *Stephenson v. LeBoeuf*, 16 S.W.3d 829, 836 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

"Unless the representation is terminated as provided in Rule 1.15 [discussed infra], a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's representation is limited to a specific matter or matters, the relationship terminates when the matter has been resolved." Tex. Disciplinary R. Prof'l Conduct R. 1.02 cmt. 6. If, however, a lawyer has represented a client "over a substantial period in a variety of matters, the client may sometimes assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice to the contrary." *Id.* A lawyer's engagement letter can clarify this point, and the disciplinary rules' comment supports doing so in writing: "Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing." *Id*.

Some engagement agreements state that the representation will not begin until the client signs and returns the engagement letter, thereby clarifying when the lawyer agrees to start work. Others may give a required retainer or deposit fee and state that the representation will not or cannot begin until the retainer is received and deposited by the lawyer. These provisions can perform many of the functions of a non-engagement letter or an "I'm-not-your-lawyer" letter as discussed above. They can help the client understand the parameters and requirements of the relationship and allow the lawyer to manage his practice appropriately.

However, certain obligations and duties can be created in the absence of an engagement letter or before the client signs or pays the retainer. Payment is not necessary, for example, for a person to become a "client" for purposes of privileged communications. A "client" whose communications are privileged can include a person who "consults a lawyer with a view to obtaining professional legal services from the lawyer." Tex. R. Evid. 503(a)(1)(B).

Because a lawyer can incur certain duties to a potential client who never hires that lawyer, or can be conflicted out of representation by obtaining confidential information from a

potential client, certain lawyers will refuse to meet with or speak to clients before an engagement or fee agreement, and sometimes retainer, is in place. To the extent an agreement states that the representation has not begun and will not begin until a later date, it could reduce or eliminate certain duties of a lawyer by informing the recipients that they are not, or not yet, clients. *See, e.g.* discussion of identity of client, *supra*; *compare McGrede v. Rembert Nat. Bank*, 147 S.W.2d 580, 584 (Tex. Civ. App.—Texarkana 1941, no pet.) ("Communications made to an attorney after being informed that no employment would or could be accepted are not privileged.")

In addition to beginning a representation, an engagement agreement can help determine the end of the representation. As discussed above, if a lawyer's representation is limited to a specific matter or matters, the relationship can automatically terminate when the matter has been resolved. Tex. Disciplinary R. Prof'l Conduct R, 1.02 cmt. 6.

Where the engagement is not automatically terminated, Texas Disciplinary Rule 1.15 discusses some of the circumstances in which a lawyer should terminate the representation. Rule 1.15(a)-(c) provides:

> **Rule 1.15 Declining or Terminating Representation**
>
> (a) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, except as stated in paragraph (c), from the representation of a client, if:
>
> (1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;
>
> (2) the lawyer's physical, mental or psychological condition materially impairs the lawyer's fitness to represent the client; or
>
> (3) the lawyer is discharged, with or without good cause.
>
> (b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:
>
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonablybelieves may be criminal or fraudulent;
>
> (3) the client has used the lawyer's services to perpetrate a crime or fraud;
>
> (4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;
>
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (7) other good cause for withdrawal exists.
>
> (c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

There are also Texas rules governing a lawyer's withdrawal from representation in litigation which provide for specific notice provisions and allow the court to impose conditions on the withdrawal. *See* Tex. R. Civ. P. 10; Tex. R. App. P. 6.5. While a client can discharge his attorney at any time, a lawyer can

only withdraw in accordance with the requirements of Rule 10. *Rogers v. Clinton*, 794 S.W.2d 9, 10 n.1 (Tex. 1990).

Rule 10 provides that:

> An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as attorney for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only. If another attorney is not to be substituted as attorney for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; the party's last known address and all pending settings and deadlines. If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge at the time of the withdrawal and has not already notified the party. The Court may impose further conditions upon granting leave to withdraw. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail. If the attorney in charge withdraws and another attorney remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties in accordance with Rule 21a.

If the client has new counsel, fewer concerns are raised. Conversely, if no new counsel has agreed to take on a matter and the client is a non-natural person who may not appear *pro se*, the attorney may have more problems withdrawing. Corporations may not appear *pro se*; a non-attorney may not appear on its behalf. *See, e.g.*, *Kunstoplast of Am., Inc. v. Formosa Plastics Corp., USA*, 937 S.W.2d 455, 456 (Tex. 1996) (per curiam); *Corona v. Pilgrim's Pride Corp*. 245 S.W.3d 75, 79 (Tex. App.—Texarkana 2008, pet. denied). Therefore, certain courts will deny motions to withdraw as counsel of record, even where the client has agreed. Thus, if there are concerns with corporate entities that an attorney thinks may require later withdrawal, an attorney may consider and plan for them at the outset—for example, if there is a concern about liquidity, compliance with attorney advice, or the like, an engagement letter or provide an alternate fee agreement or some other form of security for the attorney who, despite his and the client's later agreement otherwise, may find himself bound to the representation for the long haul.

Fee agreements and engagement letters can include language specifying the situations and/or conditions for an attorney or a client to terminate the relationship, and can address many of the requirements and concerns raised in Disciplinary Rule 1.15 and Texas Rule of Civil Procedure 10. For instance, language can be included to indicate that the client agrees to cooperate, to be reasonably available, or to abide by other appropriate agreements. It can help set the client's reasonable expectations and to begin to provide notice of events or acts that may result in termination.

In some circumstances, the engagement is terminated simply because the matter is over, the transaction is concluded, or the litigation resolved. Closure letters briefly noting the conclusion of the representation, thanking the client, and making any recommendations for further or other steps, either for new counsel, or to be opened in a new file (perhaps with a new engagement letter) with current counsel, may be helpful. These can address the status of the legal matter, can specify that the lawyer does not undertake to keep the client informed about developments in the relevant law or facts, and can address any outstanding payment or fee matters. Closure letters range from detailed and complex to very brief and simple, depending on the circumstances and nature of the representation.

VIII. THINGS TO THINK ABOUT—RECOVERY OF FEES FROM OTHERS.

The general rule in the American legal system is that each party must pay its own attorneys' fees and expenses. *Perdue v. Kenny A.*, 559 U.S. 542, 550 (2010). Under the venerable and ubiquitous "American Rule," each party must pay its own attorneys' fees absent a specific statutory, contractual, or other legal basis to shift attorneys' fees. *Intercont'l Grp. P'ship v. KB Home Lone Star, L.P.*, 295 S.W.3d 650, 653 (Tex. 2009); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006). In diversity cases in the Fifth Circuit, Texas law "controls both the award of and the reasonableness of fees awarded where state law supplies the rule of decision." *Mathis v. Exxon Corp*., 302 F.3d 448, 461 (5th Cir. 2002).

Recovery from the opposing side of attorneys' fees is limited; the Texas Supreme Court wrote last year that attorneys' fees are neither "costs" nor "damages" generally. *In re Nalle Plastics Family L.P.*, 406 S.W.3d 168, 172–76 (Tex. 2013).[7] The Fifth Circuit recently echoed that pronouncement. *Richardson v. Wells Fargo Bank, N.A.*, 740 F.3d 1035, 1037–38 (5th Cir. 2014).

To the extent that the attorney and client anticipate seeking attorneys' fees from the opposing party, the engagement agreement between them can prepare for a successful claim. The engagement letter can be written with the legal requirements in mind.

Recovery of attorneys' fees is not authorized in most tort claims (*e.g.*, common law fraud) as a legal basis to shift attorneys' fees under Texas law. *MBM Fin. Corp. v. The Woodlands Operating Co., L.P*., 292 S.W.3d 660, 667 (Tex. 2009); *see also Chapa*, 212 S.W.3d at 304, 310–11.

Like tort plaintiffs, as a general rule, defendants are not entitled to recover attorneys' fees absent a specific statutory or legal basis. *See, e.g., Tana Oil & Gas Corp. v. McCall*, 104 S.W.3d 80, 81 n.3 (Tex. 2003). When the bulk of the legal work performed is in the pursuit of affirmative defenses, a party is not entitled to recover any fees unless provided for by statute or as some type of sanction. *Id*. Defendants do not have a right to attorneys' fees merely for prevailing on their defenses against claims made by plaintiffs under Chapter 38 of the Texas Civil Practices and Remedies Code. *See, e.g., Am. Airlines, Inc. v. Swest, Inc.* 707 S.W.2d 545, 547–48 (Tex. 1986) (citing predecessor of Chapter 38 and noting that the term "costs" in tariff rules does not include attorneys' fees); *Brockie v. Webb*, 244 S.W.3d 905, 910 (Tex. App.—Dallas 2008, pet. denied); *Energen Res. MAQ, Inc. v. Dalbosco*, 23 S.W.3d 551, 558 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (noting defendant cannot recover fees for defending breach of contract case). In some circumstances, a breach of contract defendant may recover attorneys' fees for successfully defending a counterclaim where it helped prove the defendant's own affirmative breach claim. *Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007); *Anglo-Dutch Petro. Int'l, Inc. v. Case Funding Network, L.P.*, 441 S.W.3d 612, 634-35 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (release investors had to overcome counterclaims to recover own breach claim).

One exception to the prohibition of recovering attorney' fees is contractual. The Texas Supreme Court has written that parties "are generally free to contract for attorney's fees as they see fit." *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 231 (Tex. 2014) (rejecting argument that "one-sided" arbitration agreement regarding fees is substantively unconscionable per se). Previously the Court had written that parties "are free to contract for a fee-recovery standard either looser or stricter" than Chapter 38's standards and in those instances the parties' agreements will control. *Intercont'l Grp.*, 295

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[7] The court noted that some attorneys' fees qualify as compensatory damages if recovering for fees paid in a prior suit or similar cases. *In re Nalle Plastics*, 406 S.W.3d at 174–75 (citing *Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat'l Dev. & Research Corp*., 299 S.W.3d 106, 111 (Tex. 2009)); *but see Aspen Tech, Inc. v. M3 Tech., Inc.*, 569 Fed.Appx. 259, 272 (5th Cir. 2014) (litigation costs incurred earlier in litigation against former employee not recoverable as damages or equitable exception).

S.W.3d at 653; *Epps v. Fowler*, 351 S.W.3d 862, 864, 871 n. 10 (Tex. 2011) (parties can contract for definition of term "prevailing party"); *Elekes v. Wells Fargo Bank, N.A.*, No. 5:13-CV-89, 2014 WL 2700686 (S.D. Tex. June 11, 2014) (federal court in diversity case will enforce contractual provision for reasonable fees in defending suit under Texas law).[8]

There are many statutes creating exceptions and allowing parties to claim attorneys' fees, and the specifics of each claim should be consulted when making or defending against a claim for attorneys' fees.[9] The Fifth Circuit made an "*Erie*-guess" that even though fees may not be recoverable under the provisions of the Insurance Code, they may be recoverable under Chapter 38 in certain insurance contract disputes. *Nat'l Liab. & Fire Ins. Co. v. R & R Marine, Inc*., 756 F.3d 825, 838 (5th Cir. 2014). Using an economic rule analysis and following Supreme Court precedent, an opinion this year concluded that attorneys' fees may be recovered in claims asserting breach of implied warranty of title. *City Direct Motor Cars, Inc. v. Expo Motorcars, LLC*, No. 14-13-00122, 2014 WL 2553484, at *7 (Tex. App.—Houston [14th Dist.] June 5, 2014, pet. denied).

A close reading of the statutory authorization for recovering fees may be wise — a series of cases have held that Chapter 38 does not apply in suits against partnerships because partnerships are neither "individuals" nor "corporations." *See e.g., Fleming & Assocs., L.L.P. v. Barton*, 425 S.W.3d 560, 575 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

One frequently used statutory exception, the Declaratory Judgment Act or Chapter 37, expressly authorizes the recovery of reasonable and necessary fees in the court's discretion. Tex. Civ. Prac. & Rem. Code §37.009 ("In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just."); *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998). However, not every legal declaration or every judgment entitles a party to attorneys' fees, otherwise Chapter 37's exception would engulf the American Rule. Stated differently, even an award of attorneys' fees on declaratory judgment claims may be unwarranted under Chapter 37 where the declaratory relief is defensive, does not present new controversies other than those already before the court, or when Chapter 37 is being used merely to obtain attorneys' fees not otherwise authorized. *MBM Fin.*, 292 S.W.3d at 669 n.53; *John G. Marie Stella Kennedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 289 (Tex. 2002).

By contrast, other statutes ***require*** an attorneys' fees award. *See, e.g.*, Tex. Civ. Prac. & Rem Code § 134.005(b) (under the Texas Theft Liability Act ("TTLA"), each prevailing person "***shall*** be awarded court costs and reasonable and necessary attorney's fees" (emphasis added)); *Glattly v. Air Starter Components, Inc.*, 332 S.W.3d 620, 641–42 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (awarding fees to prevailing party who recovered damages under the TTLA); *Arrow Maple, LLC v. Estate of Killon*, 441 S.W.3d 702, 705-06 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (dismissal with prejudice means that the parties' legal relationship has changed in a manner that materially benefits the defendant so as to qualify as a "prevailing party" under TTLA). The Declaratory Judgment Act also differs from other statutory authorizations of attorneys' fees in that a party does not have to be the prevailing party to recover fees under the Act. *Hong Kong Dev. Inc. v. Nguyen*, 229 S.W.3d 415, 452 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Del Valle*

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[8] Since a judgment must conform to the pleadings, a party failing to plead for attorneys' fees **under the contract** as opposed to under Chapter 38 will waive that claim for attorneys' fees. *Id*. at 659; *see also Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 60-61 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

[9] According to one helpful article, Texas lawyers may have to address "over 200 statutory exceptions allowing attorneys fees to a prevailing party." *See* M.H. "Butch" Cersonsky, *Attorneys' Fees for Lawyers in Collection and Commercial Cases*, SBOT CLE Collections and Creditors' Rights Course 7 (May 2013) (referencing O'Connor's compilation of fee-shifting statutes in O'Connor's CPRC Plus).

Indep. Sch. Dist. v. Lopez, 863 S.W.2d 507, 512–13 (Tex. App.—Austin 1993, writ denied) (noting that attorneys' fees are not limited to prevailing party); *see also Barshop v. Medina Cnty. Underground Water Dist.*, 925 S.W.2d 618, 637 (Tex. 1996) (rejecting argument that party had to substantially prevail to recover attorneys' fees under Chapter 37). Whether a fee is reasonable and necessary under Chapter 37 is generally a question for the fact-finder while determining whether a fee is "equitable and just" is a question for the court. *See Bocquet*, 972 S.W.2d at 21; *Fuqua v. Oncor Elec. Delivery Co.*, 315 S.W.3d 552, 559–60 (Tex. App.—Eastland 2010, pet. denied) (concluding that when summary judgment resolved declaratory claim, attorneys' fees issue for jury).

Additional limitations on attorneys' fees for declaratory judgment claims apply in federal court. In the Fifth Circuit, a Chapter 37 claim for declaratory relief alleged in federal court cannot provide an independent basis for attorneys' fees even if otherwise recoverable in state court. *Camacho v. Tex. Workforce Comm'n*, 445 F.3d 407, 409, 412–13 (5th Cir. 2006) (concluding that Chapter 37 does not provide basis for fees award).

The party seeking an attorneys' fees award bears the burden of proving that legal work relating to claims for which fees may be recoverable has been properly segregated from legal work relating to claims for which fees are not recoverable. *Chapa*, 212 S.W.3d at 313–14; *Hensley*, 461 U.S. at 435 (reasoning that when a plaintiff achieves only partial success, attorneys' fees should not be awarded for hours not "expended in pursuit of the ultimate result achieved"); *Lear Siegler Servs. v. Ensil Int'l Corp.*, CIVA SA-CV-679-XR, 2009 WL 5195884, at *2 (W.D. Tex. Dec. 18, 2009) (applying Texas law) ("The Fifth Circuit follows the general rule that successful and unsuccessful claims should be segregated when calculating attorney's fees."). A plaintiff cannot generally recover fees for attorney time spent on claims on which the party did not prevail or even pursue at trial. *Walker v. U.S. Dep't of Hous. and Urban Dev.*, 99 F.3d 761, 769 (5th Cir. 1996). In addition, the Texas Supreme Court wrote in 2013 in the context of a claimant seeking attorneys' fees that fees including hours "not properly billed to one's client are also not properly billed to one's adversary under a fee-shifting statute." *City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013) (citing *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 762 (Tex. 2012) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983))).

The failure to segregate fees relating to unsuccessful claims or claims for which attorneys' fees are not recoverable may bar relief. *Chapa*, 212 S.W.3d at 313–14; *but see Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997) (holding that absent objection, complaint about failure to segregate was waived); *Hruska v. First State Bank*, 747 S.W.2d 783, 785 (Tex. 1988) (same).

The frequently referenced exception to the segregation requirement applies when non-recoverable and recoverable attorneys' fees are "inextricably intertwined," although this exception has been limited. *Chapa*, 212 S.W.3d at 313–14. A prevailing party may only avoid the otherwise rigid requirement to segregate attorneys' fees when discrete legal services advance both a recoverable and unrecoverable claim that are so intertwined that they need not be segregated. *Id.* The Texas Supreme Court has limited this "intertwining exception." *MBM Fin. Corp.*, 292 S.W.3d at 667. Intertwined facts do not make fees incurred for otherwise non-recoverable (tort) claims recoverable. *Chapa*, 212 S.W.3d at 313. The party seeking to invoke this exception has the burden of demonstrating that it applies. *Id.* Some post-*Chapa* litigants have successfully done so. *C.f. 7979 Airport Garage, L.L.C. v. Dollar Rent a Car Sys., Inc.*, 245 S.W.3d 488, 509–10 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (concluding that unsegregated attorneys' fees amount was some evidence of what segregated amount should be).

An attorney hoping to collect attorneys' fees from an opposing party can lay the foundation for doing so in an engagement letter with the client in a variety of ways. The initial basis must be a fee calculation that is reasonable and necessary. Elements of this are discussed above. Courts generally will not award fees to an opposing side that were neither reasonable nor necessary. To the extent fees need to be segregated among causes of action under which they are recoverable, an engagement letter may be able to separate causes or topics in such a way that fees for the distinct work can be recorded and paid separately.

El Apple clarified that Texas calculations of a reasonable fee award require the "lodestar" method, similar to what has long been the practice in the Fifth Circuit. *El Apple*, 370 S.W.3d at 759–62; *Heidtman v. Cnty. of El Paso*, 171 F.3d 1038, 1043 (5th Cir. 1999). A lodestar is calculated by multiplying the number of hours reasonably expended by the attorney by an appropriate, prevailing hourly rate in the community for comparable work. *El Apple*, 370 S.W.3d at 759, 763, 765; *Heidtman*, 171 F.3d at 1043. After making this calculation, the court may take the "base fee" or "lodestar" and decrease or enhance the lodestar based on the relative weights of the *Johnson* factors. *El Apple*, 370 S.W.3d at 765; *Heidtman*, 171 F.3d at 1043.

However, the United States Supreme Court has established a "strong presumption" against upward departures from the lodestar in determining a reasonable fee, and an enhancement for contingency fee agreements alone is not permitted. *Perdue,* 559 U.S. at 552–54; *City of Burlington v. Dague*, 505 U.S 557, 562, 567 (1992); *see also El Apple*, 370 S.W.3d at 764. Upward adjustments of the lodestar figure are permissible in proper, rare, or exceptional cases supported by both specific evidence on the record and detailed findings by the court. *El Apple*, 370 S.W.3d at 765; *Perdue*, 559 U.S. at 553-57; *Shipes v. Trinity Indus.*, 987 F.2d 311, 320 (5th Cir. 1993). The most critical single factor in determining reasonableness is the degree of success obtained. *Hensley*, 461 U.S. at 436. Where a party has achieved only partial or limited success, even the lodestar may be excessive. *Johnson*, 488 F.2d at 801. Limited success may thus support a downward adjustment. *Walker*, 99 F.3d at 772. In Texas class action cases, any adjustment to the lodestar or base fee "must be in the range of 25% to 400% of the loadstar figure." *El Apple*, 370 S.W.3d at 761.

United States Supreme Court and Fifth Circuit authority indicates that the most important consideration in determining the propriety of an attorneys' fees award is the result obtained by the plaintiff at trial. *See Farrar v. Hobby*, 506 U.S 103, 114 (1992); *Romaguera v. Gegenheimer*, 162 F.3d 893, 896 (5th Cir. 1998), *decision clarified on denial of reh'g*, 169 F.3d 223 (5th Cir. 1999). If "a plaintiff has achieved only partial or limited success, the product of hours reasonably extended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Farrar*, 506 U.S at 114 (quoting *Hensley*, 461 U.S. at 436). This is not always the case, since in some civil rights or employment cases, even a modest recovery can justify meaningful fees. *Norsworthy v. Nguyen Consulting & Servs., Inc*., 575 Fed.Appx. 247, 249 (5th Cir. 2014) (noting success is not measured merely based on the recovery of monetary damages, as "a civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards") (citing *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986)).

An engagement agreement in a matter in which fees will be sought can anticipate the lodestar calculation and assist in establishing a reasonable hourly rate for certain types of work that the court can later use in evaluating the reasonableness of a fee to be awarded.

IX. THINGS TO THINK ABOUT—DISCOVERABILITY.

In writing a fee agreement or engagement letter, attorneys should consider whether the agreement may be discoverable to opposing parties, as in circumstances where they intend to seek recovery of fees from an opposing party, or where joint clients may require some or all of the file in a later dispute, as discussed above. The agreement itself may not be privileged.

Fee agreements are generally discoverable and not protected by the attorney-client privilege if a party seeks attorneys' fees. *See, e.g., Jim Walter Homes, Inc. v. Foster*, 593 S.W.2d 749, 752 (Tex. Civ. App.—Eastland 1979, no writ) ("The general rule appears to be that the fee arrangement [between attorney and client] is not privileged."); *Duval Cnty. Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 634 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.) ("[T]he attorney-client privilege does not encompass such nonconfidential matters as the terms and conditions of an attorney's employment, the purpose for which an attorney has been engaged, or any of the other external trappings of the relationship between the parties.").

Attorneys' fees information of the party in a purely defensive posture (resisting a claim for attorneys' fees and not seeking attorneys' fees) is

generally not relevant and therefore probably not discoverable. *In re National Lloyds Ins. Co.*, No. 5-0591, 2017 WL 2501107 at *17 (Tex. June 9, 2017).

Older cases suggest that information regarding actual payments of attorneys' fees, including the identity of the party paying attorneys' fees, may be discoverable and fall outside the protections of the attorney-client privilege. *See In re Grand Jury Subpoena*, 913 F.2d 1118, 1123 (5th Cir. 1990); *see also Allstate Tex. Lloyds v. Johnson*, 784 S.W.2d 100, 105 (Tex. App.—Waco 1989, no writ) (holding information about actual payment of attorneys' fees not privileged).

X. THINGS TO THINK ABOUT—OTHER CLAUSES.

Engagement letters and fee agreements may contain any number of other clauses. They all must be drafted with care and attorneys should consider the provisions included in each agreement and their applicability to the representation at hand.

Under established principles of construction, and because of the lawyer's presumed knowledge and the client's presumed trust, the lawyer bears the burden of ensuring that the contract states any terms that diverge from a reasonable client's expectations. *See generally*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 cmt. h. Although much of the case law illustrating this construction principle concerns disputes over fee terms, it applies to other terms as well. *Id*.

Those other terms may include arbitration clauses. Some attorneys wish to include arbitration provisions in their fee agreements. *See, e.g., Kennedy Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542, 544-45 (Tex. 2014) (compelling arbitration under fee agreement making clients liable to firm for entire contingency fee if they terminated firm without cause and requiring fee disputes to be arbitrated).

The Texas Supreme Court has ruled that the arbitration provision in an attorney-client agreement was enforceable notwithstanding that the arbitration provision (1) excepted claims by the law firm for its fees from arbitration, and (2) may not have been explained to the client by the firm. *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 506 (Tex. 2015).

In attempting to avoid the enforceability of the arbitration provision, the client argued that it was unconscionable and illusory because it forced him to arbitrate his claims, but allowed the firm to litigate its claims. *Id.* at 500, 505. The Court rejected this argument on the basis that arbitration agreements can include certain claims, but exclude others. *Id.* at 502.

The client also argued that the arbitration provision was unenforceable because public policy, via the disciplinary rules, dictated that the firm explain the terms of the arbitration provision to him. *Id.* To support this argument, the client cited Texas Disciplinary Rule of Professional Conduct 1.03(b) and Opinion 586 of the Professional Ethics Committee.[10] *Id.* at 503. The Court held that the firm was not under a duty to explain the terms of the provision agreement as the disciplinary rules do not impose legal duties. *Id.* at 503. The Court further argued that the legislature had previously determined that arbitration agreements are to be treated as typical contracts, and as typical contracts, the parties are deemed to know and understand the terms therein. *Id.* at 504-05.

The ruling in *Royston, Rayzor* is interesting because it runs counter to previous rulings where ethical considerations weighed in favor of the client in regards to explanation of fee agreement terms. *See, e.g., Hoover Slovacek*, 206 S.W.3d at 561-62.

Similarly, lawyers may attempt to include forum selection clauses in their agreements. They may not be effective. For example, in a pre-*Royston, Rayzor* case, *Falk & Fish, L.L.P. v. Pinkston's Lawnmower & Equip., Inc.*, 317

[10] Rule 1.03(b) provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Opinion 586 states that in order to comply with Rule 1.03(b), "the lawyer should explain the significant advantages and disadvantages of binding arbitration to the extent the lawyer reasonably believes it is necessary for an informed decision by the client."

S.W.3d 523, 526, 530 (Tex. App.—Dallas 2010, no pet.), a provision naming Texas as the forum for disputes between a lawyer and a client did not prevent a special appearance brought by a nonresident client. The client swore that "at no time before signing the Engagement Agreement" was the client advised that any dispute "would have to be resolved in Dallas, Texas." *Id*. at 530. Reasoning that it is the lawyer's responsibility to provide that information, the court dismissed for lack of personal jurisdiction. *Id*. In *Falk & Fish*, the court found that the entity was not "a sophisticated and experienced client who vigorously negotiated the fee agreement with his attorney," that the agreement was presented six months after the representation had begun, and that the forum selection clause was not clear and unequivocal. *Id.* at 529.

XI. CONCLUSION

Spending a little extra time considering the language in fee agreements and engagement letters and communicating expectations clearly and unequivocally at the beginning of the representation may help further the goals of the attorney-client relationship and both attorneys and clients.