



# Determining Attorney's Fees

## A STORY IN TWO PARTS

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### PART 1: ATTORNEY'S FEES AND THE AMOUNT IN CONTROVERSY

#### A. INTRODUCTION

A common issue in collection and consumer litigation is the award of attorney's fees, and in particular, the amount of attorney's fees awarded. Attorney's fees, like awards in general have increased over the years, so that attorney's fees can easily exceed the amount in controversy. This has resulted in litigation and the development of case law regarding the amount of attorney's fees; especially in relation to the amount in controversy.

#### B. THE BASIC FACTS

The basis for awarding attorney's fees can be found in various statutes.<sup>1</sup> Rule 104 of the Texas Disciplinary Rules of Professional Conduct generally governs the amount of fees. Under Rule 1.04(a), a fee is unconscionable if a competent attorney could not form a reasonable belief that the fee is reasonable.

The reasonableness of the fee is determined by looking at all relevant factors, which includes these eight factors:

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 would preclude other employment by the lawyer;

3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the result 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 result obtained or uncertainty of collection before the legal services have been rendered.<sup>2</sup>

The reasonableness of the requested attorney's fees "is a question of fact for the trier of fact."<sup>3</sup> Thus, the court or jury may consider "the nature and complexity of the case, the amount in controversy, the amount of time and effort required, and the expertise of counsel in arriving at a reasonable amount as attorney's fees."<sup>4</sup> Courts may also consider their "common knowledge and experience as lawyers and judges."<sup>5</sup>

#### C. THE AMOUNT IN CONTROVERSY AND THE AMOUNT OF ATTORNEYS' FEES—WHAT IS THE RELATIONSHIP?

As noted above, one factor to consider in determining the reasonableness of attorney's fees is "the amount involved and the results obtained."<sup>6</sup> Thus attorney's fees "must bear some reasonable relationship to the amount in controversy."<sup>7</sup> However,

the amount of damages awarded is not controlling and is but one factor used to determine the reasonableness of attorney's fees.<sup>8</sup> As shown below, attorney's fees can easily be double or triple the amount recovered by a successful plaintiff.

### 1. *There is No Set Formula To Determine Attorney's Fees*

There is no mechanical formula to apply as to the amount of attorney's fees. In *Flint & Associates v. Intercontinental Pipe and Steel, Inc.*,<sup>9</sup> Justice Hecht, then on the Dallas Court of Appeals, upheld an award of attorney's fees that was nearly seven times the amount of actual damages recovered. The defendants complained that the trial court's award of \$162,000 in attorney's fees was excessive because of the damage award, which was only \$24,067.14.<sup>10</sup> In rejecting the argument of the defendants, Justice Hecht wrote that the amount of recovery was "but one factor to be considered in determining reasonable attorney's fees in a case."<sup>11</sup> He explained that:

The determination of what is reasonable cannot be made by application of some mechanical formula. Rather, the court must take into consideration the entire nature of the case.<sup>12</sup>

In a warning to future litigants, Justice Hecht wrote, "Having picked the game and set the stakes, the Flints cannot now complain of the size of the pot."<sup>13</sup>

### 2. *Following the Principle of Flint: There is No Set Formula*

Other courts have chosen to follow the reasoning of *Flint*. For example, in *Murrco Agency, Inc. v. Ryan*, the Dallas Court of Appeals upheld an award of attorney's fees that was nearly three times the amount in controversy.<sup>14</sup> In that case, attorney's fees were \$92,000 and the damage award was approximately \$28,000. While recognizing that the amount of damages is a factor to be

considered in measuring the reasonableness of attorney's fees, the court said that other factors to be considered would include "the total amounts of money involved in the case, the nature of the case, the time spent, and the skill and experience required."<sup>15</sup>

Another example recognizing that attorney's fees can be more

than twice the amount recovered is *Great Northern American Stationers v. Ball*.<sup>16</sup> In *Ball*, the court upheld an attorney's fee award of \$225,008 where the damages were only \$90,724.38. In upholding the award the court held:

"[t]he fact that the fees awarded were almost three times the damage awarded does not render the attorney's fees excessive."<sup>17</sup>

The Dallas Court of Appeals, however, is not alone in recognizing that attorney's fees can exceed the amount in controversy.

In *Pegasus Energy Group v. Cheyenne Petroleum*, the Corpus Christi court upheld an award of attorney's fees of \$293,821.43 when the damages awarded were \$148,054.47.<sup>18</sup> The opinion reiterated the common factors to be considered such as:

- (1) The time and labor involved;
- (2) The nature and complexity of the case;
- (3) The value of the interest involved;
- (4) The extent of the responsibilities assumed by the attorneys; and
- (5) The benefits resulting to the client.<sup>19</sup>

A key factor in supporting the *Pegasus* award of attorney's fees was the complex nature of the case.

## D. TWO RECENT EXAMPLES: ATTORNEYS' FEES SUBSTANTIALLY IN EXCESS OF THE PLAINTIFF'S RECOVERY

In 2004, the Beaumont and El Paso courts of appeal both decided cases where the defendants challenged the attorney's fees awarded as excessive in light of the amount of the debts.<sup>20</sup> In both cases the award of attorney's fees was affirmed.<sup>21</sup>

### 1. *The Sibley Case*

In *Sibley v. RMA Partners*, Sixth RMA, a purchaser of loans, brought suit against Sibley based on two promissory notes purchased from the Resolution Trust Corporation. The trial court awarded attorney's fees through trial of \$82,7648.50. The principal sum of the two promissory notes totaled \$19,342.82. Interest by the time of trial was approximately \$43,000.<sup>22</sup> Thus, the attorney's fee award was almost twice the amount of principal and interest due on the trial date.

Sibley's attorney objected to the attorney's fees sought by Sixth RMA because of the amount of the fees requested, "when compared to the amounts owed on the notes."<sup>23</sup> The Court of Appeals rejected this argument because what is reasonable cannot be determined by applying "some mechanical formula."<sup>24</sup> In rejecting Sibley's argument the court noted, "that the amount of attorney's fees seems excessive if compared to the amount owed, [but] that comparison is only one factor that the trial court could have considered."<sup>25</sup>

The court then reviewed the conflicting evidence presented at trial. Sibley's expert claimed a reasonable number of hours for this case would have been 240 at \$150.00 per hour. He further contended that while the case had been contentious, with unusual developments in defenses and claims, these issues should have posed no problem for attorneys familiar with this type of litigation, like the attorneys representing Sixth RMA.<sup>26</sup>

Sixth RMA's expert presented a different picture. He submitted into evidence a summary of the hours worked and fees actually billed to Sixth RMA. He then explained the history of the case and the difficulties encountered including:

1. In the 5 years before trial the case had three different judges (two of whom were visiting judges from outside Jefferson County);
2. Discovery issues and delays had occurred;
3. There were difficulties in setting pretrial conferences;
4. There were thirteen attempts to obtain an agreement on a trial setting, which required coordinating with the visiting judges, the parties, and the court to whom the case was assigned;
5. The various legal issues required extensive briefing, not only for trial but for pretrial motions, including three summary judgment motions [though the opinion only noted one motion for summary judgment, there were three extensive motions filed, two by Sixth RMA and one by Sibley].<sup>27</sup>

The court held the testimony of Sixth RMA's counsel was sufficient to support the trial court's conclusion that the case was complicated and time consuming. That there was testimony to the contrary did not show an abuse of discretion by the trial court.<sup>28</sup>

### 2. *The Cordova Case*

In *Cordova v. Southwestern Bell Yellow Pages, Inc.*, Southwestern Bell Yellow Pages filed suit to collect \$7,092.18.<sup>29</sup> The suit contained claims of breach of contract, sworn account and quantum meruit. Cordova filed an answer asserting affirmative defenses like failure of consideration, breach of contract, fraud and misrepresentation. A counterclaim was also filed which included claims of fraud, breach of contract and violations of the Texas Deceptive Trade Practices Act.<sup>30</sup> At trial Cordova dropped

**There is no mechanical formula to apply as to the amount of attorney's fees.**

his counterclaims and merely asserted his affirmative defenses. The trial court awarded a judgment in favor of Southwestern Bell Yellow Pages. The judgment was for \$7,092.18 on the debt plus \$20,885 in attorney's fees.<sup>31</sup>

As in *Sibley*, there was conflicting testimony about attorney's fees. Cordova's attorney testified the case was simple and straightforward and that fees of \$1,500 to \$2,000 would be reasonable, even with the counterclaim. Southwestern Bell Yellow Pages counsel countered with testimony about preparing for both the collection suit and the counterclaims of fraud and deceptive trade practices, which were not dropped until the day of trial. There was also testimony about the various types of written discovery involved, and that three depositions were taken in the case.<sup>32</sup>

The court rejected Cordova's argument finding "[t]his was not a simple debt collection."<sup>33</sup> The Court noted that Cordova had sought lost profits, attorney's fees, court costs, interest and exemplary damages. Thus, even though these counterclaims were not raised at trial, the need to prepare for such claims justified the award of attorney's fees.

It should be noted that Cordova also made a claim of over preparedness. In particular, he claimed that 23.25 hours of preparation was unnecessary in a case with only two witnesses and a five-minute conversation would have sufficed.<sup>34</sup> The Court explained that even though the trial was uncomplicated, the plaintiff did not know this ahead of time, and thus had to do additional discovery and preparation.

### ***3. The Lesson To Be Learned – Starting a Bigger Fight Has Consequences***

The lesson to be learned from *Sibley* and *Cordova* is that when a case becomes hotly contested as in *Sibley*, or even mildly contested as in *Cordova*, attorney's fees only go up. Judges and juries understand this. Without recovery of reasonable attorney's fees, defendants would have an incentive to stonewall a plaintiff or pursue worthless defenses and tactics to wear down an opponent, without consequences. The purpose of awarding attorney's fees is to encourage people to pursue their legitimate claims whether the plaintiff is a creditor on a sworn account, or a consumer under the Deceptive Trade Practices Act.

Certainly every party is entitled to aggressively pursue or defend its case. However, if a party chooses to engage in an aggressive stance, it cannot be heard to complain when the other side's attorney's fees escalate. To paraphrase the Fifth Circuit:

Having kicked the snow loose at the top by a vigorous, aggressive defense, defendants must now bear the consequences of the attorney fee avalanches at the bottom.<sup>35</sup>

## **E. CONCLUSION**

The award of attorney's fees is now common in collection and consumer litigation. Knowing the applicable rules governing attorney's fees is not a luxury, but a requirement for all attorneys. With regard to contingent fee contracts, the contract controls the attorney's compensation, not the sum awarded by the Court. And with regard to the amount of fees, the amount in controversy does not set a limit on the amount of attorney's fees that can be awarded. Instead, the amount in controversy is but one factor to be considered in proving a reasonable attorney's fee.

## **PART 2: CONTINGENT FEE CONTRACTS AND COURT AWARDED FEES**

### **A. INTRODUCTION**

The majority of collection work done by attorneys is on

a contingent fee basis. The amount of the contingent fee is agreed upon by the client and the attorney and is usually set forth in writing. Having the agreement set in writing may be required by state bar rules.<sup>36</sup> The attorney may base the contingent fee on rates suggested in schedules such as the Commercial Law League of America or upon another amount agreed upon between the client and the attorney.<sup>37</sup>

### **B. THE PROBLEM DEFINED**

One area of contention that may arise is when court awarded attorney's fees exceed the contingent fee as calculated by the contingent fee agreement. The following are two examples:

In the first example, damages recovered are \$23,000, but the court awards \$41,000 in attorney's fees based on the hours worked times the attorney's hourly rate. The client receives a total award of \$64,000 (\$23,000 + \$41,000). If the contract provides for a 40% fee, would the attorney receive the court awarded \$41,000, or 40% of the total award, \$25,600, as calculated in the contract? (40% of \$64,000 = \$25,600).

In a second example, the contingent fee contract provides that the attorney would be paid one-third of any recovery by the plaintiff. The damages awarded were \$6,339.20, and the court awarded attorney's fees were \$3,500, giving plaintiff a total recovery of \$9,839.20. One-third of the total recovery results \$3,279.93 in attorney's fees. The question now is whether the attorney recovers the court awarded \$3,500 or the \$3,279.93 based on the contingent fee contract?

The answer in both examples is that the attorney receives the amount provided for in the contract, not the attorney's fees awarded by the court. The next section will help illustrate these scenarios. In both of the following example cases, the court held that the contract language controlled and limited the attorney's fees to the amount stated in the contract.

### **C. THE CONTRACT CONTROLS**

#### ***1. The Martin Case***

*Martin v. Lovorn* involved statutory fees pursuant to a federal statute for sexual harassment and discrimination.<sup>38</sup> Despite the statutory basis for legal fees, the court found that a contingent fee agreement between the client and the attorney controlled.<sup>39</sup> Although Congress intended to provide attorney's fees for recovery of civil rights litigation "this purpose does not override the contract as agreed upon by Martin and Lovorn."<sup>40</sup> Consequently, the court looked to "the agreement between [the parties] to determine the entitlement of the disputed amount."<sup>41</sup>

In reaching their decision, the court noted that the language in the agreement should be given its plain grammatical meaning unless it is absolutely certain that that meaning would defeat the intention of the parties.<sup>42</sup> The contract at issue in this case provides as follows:

The Client agrees to pay and hereby assigns to the Attorney as compensation for her services as follows:  
(33%) One-third percent before suit is filed;  
(40%) after suit is filed; or  
(50%) if the case is appealed,  
out of any and all recovery obtained on behalf of the Client which is obtained by settlement or compromise of the client's claim before or after legal litigation is filed, whether actually tried or not.<sup>43</sup>

The court held that the attorney was not entitled to the court awarded fees because the plain language of the contract provided the attorney would receive 40% "out of any and all recovery obtained on behalf of the client."<sup>44</sup>



## 2. The Taft Case

*Aetna Casualty and Surety Company v. Taft* involved a subcontractor claim to collect for work done.<sup>45</sup> The attorney claimed he was entitled to the court awarded fees of \$3,500, following a judgment for his client totaling \$9,839.20. The court rejected the attorney's claim, limiting the attorney's fees as calculated in the contract. The contingent fee contract provided the attorney would receive 1/3 of any recovery made by the plaintiff. Thus, the attorney was limited to the lower amount of \$3,279.73.<sup>46</sup>

The above cases illustrate that courts generally give deference to any contingent fee contract that may exist between the attorney and the client. Nevertheless, some courts have reached similar holdings when determining why an attorney should be limited to contractual fees and not the court awarded fees based on other reasons. The following sections explore these additional holdings.

## D. THE ATTORNEY'S DUTY

### 1. The Attorneys Fiduciary relationship

Attorneys must recognize that there is a fiduciary relationship between themselves and the client. Such a relationship requires absolute and perfect candor, openness and honesty, in the absence of any concealment or deception.<sup>47</sup> Supplementing the fiduciary relationship, most rules of conduct governing attorneys provide that a lawyer has a duty to fully and honestly inform his or her client of a fee arrangement.<sup>48</sup> In Texas, and most other states, contingent fee arrangements must be in writing and signed by both the attorney and the client.<sup>49</sup> Like all fiduciaries, attorneys have a duty to act in their client's best interest.<sup>50</sup>

### 2. Contracts Interpreted Against the Attorney

*Levine v. Bayne, Snell & Krause, Ltd.* provides a good review of the law regarding the attorney's fiduciary duty and how courts interpret contracts against attorneys.<sup>51</sup> In *Levine*, the attorneys were attempting to recover their contingent fee not only on monies actually

paid to the client, but also on the dollar value of a significant debt that was cancelled (in this case, a mortgage which had been cancelled as a result of the successful litigation.)<sup>52</sup> The Texas Supreme Court denied the attorney's request to be awarded a percentage of the cancelled debt. As with the earlier cases the court's analysis began with the contract itself. The contract stated:

Client agrees to pay attorneys as attorney's fees for such representation 33-1/3% (1/3) of any amount received by settlement or recovery and to receive such payments, client assigns to attorney a 33-1/3% (1/3) undivided interest in his cause of action.<sup>53</sup>

The court noted that a contingent fee contract in this case did not define "any amount received," and construed this term against the attorney, holding that it referred only to the net amount of the clients' recovery, and thus, the attorney was not entitled to a percentage of the benefit the clients received from the satisfaction

of their mortgage after the clients had paid the offsetting judgment to vendors on the vendors' counterclaim for breach of mortgage agreement.<sup>54</sup> The court's reasoning is outlined in the next section.

## E. THE RESTATEMENT THIRD

After examining the contract, the *Levine* court continued by analyzing a handful of cases from the Second Circuit, Delaware, and Arkansas. These cases generally hold that in cases of ambiguity or omissions, a contingent fee arrangement contract could be held against the client.<sup>55</sup> In these cases, the courts held that under a contingent fee arrangement, attorneys were entitled to take a percentage of monies that they saved the client from paying through litigation.<sup>56</sup> The Texas Supreme Court rejected this approach, again relying on the Restatement Third of the Law Governing Lawyers. Section 35 of the Restatement Third of the Law Governing Lawyers states:

"When a lawyer has contracted for a contingent fee, the lawyer is entitled to receive the specified fee only when and to the extent the client receives payment."<sup>57</sup>

Comment (d) to Section 35 explains that without an agreement to the contrary, "the amount of the client's recovery is computed net of any offset, such as a recovery by an opposing party on a counter claim."<sup>58</sup> Thus, the Texas Supreme Court applied Section 35 to interpret the words "any amount received," to mean the net recovery, not to include monies that a plaintiff no longer had to pay as a result of successful litigation.<sup>59</sup> The court's reasoning for ruling in the client's favor was as follows:

"[L]awyers are more able than most clients to detect and clarify omissions in client-lawyer contracts because lawyers almost always write such contracts and are more familiar with the intricacies of legal representation and with the law in drafting a fee agreement and other contracts."<sup>60</sup>

The Texas Supreme Court chose to follow as persuasive authority, the reasoning of cases from Indiana, California as well as other states. The court cited an Indiana Supreme Court case that said:

"Lawyers almost always possess the more sophisticated understanding of fee arrangements. It is therefore appropriate to place the balance of the burden of fair dealing and the allotment of risk in the hands of the lawyer in regard to fee arrangements with clients."<sup>61</sup>

Similarly, it has been noted by the California Supreme Court that attorneys are "presumably familiar with legal terms and proceedings and accustomed to the use of language appropriate to the framing of contracts."<sup>62</sup> Other courts have followed these principles of construing the contracts against the lawyer based on the lawyer's superior knowledge of the work covered by the agreement. Given this unfair balance of knowledge between attorneys and clients, attorneys, having a higher understanding of contracts and law, should draft fee agreements in such a way as to minimize ambiguity.<sup>63</sup>

## F. THE DUTY TO CLARIFY THE CONTRACT

The *Levine* court, following the lead of the Minnesota Supreme Court, concluded there is an obligation on attorneys to clarify the attorney client contract because the attorney has greater knowledge and experience with regard to fee arrangements and



because of the trust the client has placed in the attorney.<sup>64</sup> Based on the foregoing, the court held that the attorney should have been aware that the plaintiffs might obtain a setoff, and thus, the burden is on the attorney to draft the contract accordingly. The *Levine* court supported their conclusion, noting that other courts have previously placed the burden of anticipating a setoff on the attorneys.<sup>65</sup> The court left open the possibility that the contract would be enforceable if it had been written so that the contingent fee specifically include not just net dollars to the plaintiff, but also any set-off or other economic advantage.

#### G. CAREFUL DRAFTING IS NO GUARANTEE OF SUCCESS

To address the possibility that court awarded fees may exceed the contractual amount, counsel might wish to insert language into a contingent fee agreement stating that the attorney will recover the greater of: (a) fees calculated on an hourly basis as awarded by the court; or (b) the percentage recovered pursuant to the contract. However at least one state has found such an arrangement to violate the disciplinary rules governing attorneys.

The Ethics Opinion department of the *Texas Bar Journal* published *Opinion 518*, leaving open the possibility that if the hourly rate used to calculate the fee was less than the attorney's usual hourly rate, then the agreement might not violate the disciplinary rules.<sup>66</sup> *Opinion 518* also noted that blended rates, which included a reduced hourly rate plus a reduced contingent fee would be permissible "provided the total fee paid under such arrangement is reasonable, considering all of the factors set out in [Texas] Disciplinary Rule[s] of Professional Conduct, Rule 1.04."<sup>67</sup>

The factors for determining whether a fee is reasonable include:

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; The time limitations imposed by the client or by the circumstances;
5. The nature and length of the professional relationship with the client;
6. The experience, reputation, and ability of the lawyer or lawyers performing the services; and
7. Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.<sup>68</sup>

#### H. CONCLUSION

The old saying "good fences make good neighbors" applies to attorney contingent fee contracts. Attorneys have a fiduciary duty to act in their client's best interest. This duty includes the obligation to explain contingent fee contracts clearly. Attorneys cannot purposely withhold information or be ambiguous. Furthermore, contingent fee arrangement contracts are generally construed against the author, that author usually being the drafting attorney, though not always when working with forwarders. Since ambiguities will probably be construed against the attorney, in preparing their contingent fee contracts, contracts must set forth all of the terms that would apply to their arrangement with the client including how the recovery will be calculated. Issues to be addressed in the contracts are whether the

fee arrangement will change upon the filing of a counter-claim, who will be responsible for the expenses, whether expenses will be deducted from the contingent fee amount or not, who will be responsible for representation in bankruptcy, and any other issue that concerns the attorney or the client.

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1. See, e.g., TEX. CIV. PRAC. & REM. CODE § 38.001 (Vernon 1998) (contracts, sworn accounts, and quantum meruit, etc.); TEX. CIV. PRAC. & REM. CODE § 37.001 (Vernon 1998) (Declaratory Judgment Actions); TEX. BUS. & COM. CODE § 27.001(e) (statutory fraud); TEX. BUS. & COM. CODE § 17.50(d), (Deceptive Trade Practices), TEX. FIN. CODE § 292.403(b) (Vernon 1998) (Tex. Debt Collection Act).
2. TEX. DISCIPLINARY R. PROF'L CONDUCT §1.04(b), *cited in* Arthur Anderson & Co. v. Perry Equip. Corp., 945 S.W. 2d 812, 818 (Tex. 1997).
3. Sibley v. RMA Partners, L.P./Sixth RMA, 138 S.W. 3d 455, 458 (Tex. App. – Beaumont 2004, *no pet.*) quoting Stamp-Ad, Inc. v. Barton Rabin, Inc., 915 S.W. 2d 932, 937 (Tex. App. – Houston [1<sup>st</sup> Dist] 1996, *no writ*).
4. *Id.*
5. Cordova v. Southwestern Bell Yellow Pages, Inc., 148 S.W. 3d 441, 448 (Tex. App. – El Paso 2004, *no pet.*) and Sandles v. Howerton, 163 S.W. 3d 829, 838 (Tex. App. – Dallas 2005, *no pet.*) ("The court may also consider the entire record and the common knowledge of the lawyers and judges." *citing* Hagedorn v. Tisdale, 73 S.W. 3d 341, 353 (Tex. App. – Amarillo 2002, *no pet.*)).
6. *Arthur Anderson*, 945 S.W. 2d at 818.
7. *Cordova*, 148 S.W. 3d at 448.
8. *Id.*
9. 739 S.W. 2d 622 (Tex. App. – Dallas 1987, *writ den.*).
10. *Id.* at 626.
11. *Id.* at 626.
12. Here the case was transformed from a "simple suit on account into a four-week DTPA trial." *Id.*
13. *Id.* at 626.
14. *Murco Agency*, 800 S.W.2d 600, at 606 (Tex. App. – Dallas 1990, *no writ*).
15. *Id.* at 607.
16. 770 S.W.2d 631, 633 (Tex. App. – Dallas 1989, *writ dismissed*).
17. *Id.* at 634.
18. 3 S.W.3d 112 (Tex. App. – Corpus Christi 1999, *pet. den.*).
19. *Id.* at 132.
20. See Sibley v. RMA Partners, L.P./Sixth RMA, 138 S.W. 3d at 455, and Cordova v. Southwestern Bell Yellow Pages, 148 S.W.3d at 448.
21. Sibley, 138 S.W. 3d at 458-459, and Cordova, 148 S.W. 3d at 448-449.
22. 138 S.W. 3d at 458. The notes matured in 1991 and trial was in 2000.
23. *Id.* at 459.
24. *Id.* *citing Flint*, 739 S.W. 2d at 626.

25. *Id.* at 459. [Findings of fact were not requested, nor were any filed, thus the appellate court had to imply the trial court made all findings necessary to support the judgment, *Id.* citing *Worford v. Stamper*, 801 S.W. 2d 108, 109 (Tex. 1990)].

26. *Id.* at 458

27. *Id.* at 458.

28. *Id.* at 459.

29. 148 S.W. 3d 441, 448 (Tex. App. – El Paso 2004, *no pet.*)

30. *Id.* at 444.

31. *Id.*

32. *Id.* at 445

33. *Id.* at 448.

34. *Id.* at 449.

35. See *Schwartz v. Folloder*, 767 F.2d 125, 134 (5<sup>TH</sup> Cir. 1985).

36. See TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT, Rule 104(d).

37. The Commercial Law League of America ("CLLA") is a respected organization of attorneys and other experts in credit and finance actively engaged in the field of commercial law, bankruptcy and insolvency. Since 1895, the CLLA has been associated with the representation of creditor interests, while at the same time seeking fair, equitable and efficient administration of bankruptcy cases for all parties in interest.

38. *Martin v. Lovorne*, 959 S.W.2d 358 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, *no pet.*) (Attorney's pursuit of civil rights suit did not, by itself, create implied promise by client to pay entire statutory fee award to attorney, contrary to terms of contingent-fee agreement).

39. *Id.* at 361.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 359.

44. *Id.*

45. *Aetna Casualty and Surety Co. v. Taft*, 502 S.W.2d 903 (Tex. App.—Waco 1973, *writ ref'd n.r.e.*) ([A]mount due attorney was one-third of plaintiff's recovery even though amount thus awarded attorney was less than that determined by court to constitute reasonable attorney fees).

46. *Id.*

47. See *Perez v. Kirk & Caragon*, 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991, *writ denied*). (Attorneys for truck driver involved in fatal school bus accident may have breached their fiduciary duty, which arose from implied attorney-client relationship with truck driver, either by wrongfully disclosing privileged statement to district attorney or by wrongfully representing to truck driver that statement would be kept confidential).

48. See TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT, Rule 103(b).

49. See TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT, Rule 104(d), reprinted in TEX. GOV'T CODE ANN. § 82.065 (Vernon 2006).

50. See *Lopez v. Munoz Hockema and Reed, L.L.P.*, 22 S.W.3d 857 (Tex. 2000) (Gonzales\*, J., dissenting in part). (Language of retainer contract between clients and law firm and attorneys was unambiguous, where phrase "appealed to a higher court," which allowed law firm and attorneys to receive another five percent of lawsuit proceeds, if case was appealed to a higher court, could be given definite legal meaning, and was not reasonably susceptible to more than one meaning). \*[Justice Alberto Gonzales is currently the United States Attorney General].

51. *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 95 (Tex. 2001).

52. *Id.* at 93.

53. *Id.* at 94.

54. *Id.* at 100.

55. See *Manzo v. Dullen*, 96 F.2d 135 (2nd Cir. 1938) (Where contingent fee retainer agreement was silent regarding payment of expenses incident to maintaining litigation, the amount of expenses necessarily and actually paid was properly deducted from the remainder left for the client after the computation and deduction of the attorney's contingent fee); *Consol. Underwriters of S. Carolina Insur. Co. v. Bradshaw*, 136 F. Supp. 395 (W.D. Ark. 1958) (Under Arkansas law, where attorneys contracted with mortgagor to maintain action against insurer for fire loss on contingent fee basis, fee was calculable on basis of entire amount recovered from insurers, even though mortgagee recovered, in interpleader action, under loss payable clauses of policy, amounts which went to discharge mortgagor's obligation); *Saulsbury Am. Vulcanized Fibre Co.*, 91 A. 536 (Del. Super. Ct. 1914) (An attorney employed to act for a client for a percentage of the amount recovered is entitled to a percentage on the amount awarded the client, and also on an amount which the client would have been obliged to pay, but from which the client was released from liability by the decree).

56. See cases cited *supra* note 55.

57. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35(2) cmt. d, (2000).

58. *Levine*, 40 S.W.3d at 94.

59. *Id.* at 99.

60. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 cmt. h, (2000).

61. *Levine*, 40 S.W.3d at 95, citing *In re Myers*, 663 N.E.2d 771 at 774 (Ind. 1996).

62. *Id.*, citing *Bennett v. Potter*, 183, P.156 at 158 (Cal. 1919).

63. See *Hamilton v. Ford Motor Co.*, 636 F.2d 745 (D.C. Cir. 1980) (If [a] contingent fee agreement makes no specific reference to any possible attorney fee which may be awarded by the court and makes no specific provision for the manner in which any such fee is to be considered in computing the amount, source and manner of distribution of the contingent fee, any attorney fee awarded by the court shall be offset as a credit or deduction from the amount of the agreed contingent fee, as computed upon the basis of the amount of the judgment); *Kirwin v. McIntosh*, 110 P.2d 735 (Kan. 1941) (In construing ambiguous contracts between an attorney and client, doubts are resolved against the attorney, and the construction is adopted which is favorable to the client...); *In re Irwin*, 91 P.2d 518 (Or. 1939) (When an attorney claims that he ought to be compensated for work which he did as an extra item not included within retainer, ambiguities concerning agreement are resolved against him).

64. *Levine*, 40 S.W.3d at 95, citing *Cardenas v. Ramsey County*, 322 N.W.2d 191 (Minn. 1982).

65. See *Woolbridge v. Bradberry*, 215 S.W. 406 (Ky. Ct. App. 1919); see also *Mackey v. Passaic*, 266 A.D. 690 (N.Y. App. Div. 1943).

66. See *Ethics Opinion 518*, 59 Tex. B.J. 795.

67. *Id.* at 796.

68. See TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT, Rule 104(b).