ETHICS Q&A

NON-REFUNDABLE FEE AGREEMENTS

Janet represents creditors in consumer bankruptcy claims litigation. She has an institutional lending client who retains her on multiple cases each month. She receives a $5,000 "non-refundable retainer" for each file. Her fee agreement specifies the retainer is non-refundable and will cover all services up to the time of trial on the matter. There will be additional fees for a trial. Janet places the retainer in her operating account.

In one case the debtor files a large Fair Debt Collection claim against Janet's client which will require substantial discovery and time before trial. Janet asks the client to renegotiate the retainer agreement and after discussion the client agrees to pay Janet on an hourly basis.

Which of Janet's actions, if any, were potentially improper?

A) Charging a non-refundable retainer?
B) Depositing the retainer into her operating account?
C) Requesting a change in the terms of the fee agreement after the litigation was filed?
D) A and B?
E) A, B and C?

Professional Ethics Committee Opinions 391, 431, 611 and 679 discuss the various issues posed and are incorporated into Rules 1.04 and 1.14 of the Texas Disciplinary Rules of Professional Conduct (TDRPC).

Non-Refundable Retainer

Opinion 391 (Feb. 1978) concluded that if a "non-refundable retainer" is earned at the time the fee is received, it may be placed in the attorney's operating account. The opinion, however, did not specify what facts constitute a non-refundable retainer and seemingly permitted any retainer agreement to be denoted a non-refundable retainer. Professional Ethics Committee Opinion 391 (Feb. 1978).

Opinion 431 (June 1986) examined Opinion 391 and limited the opinion's approval of non-refundable retainers that secure a lawyer's services and compensate for loss of the opportunity to accept other employment.

"A true [non-refundable] retainer, however, 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 obligating himself to represent the client, then 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". Professional Ethics Committee Opinion 431 (June 1986).

In summary, it is not permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to include in an employment contract an agreement that the amount paid by a client with respect to a matter is a "non-refundable retainer" if that amount includes payment for the lawyer's services on the matter up to the time of trial.

May Janet Deposit the Fee into Operating Account?

Opinion 391 requires the attorney to determine the nature and ownership of the funds received. DR 9-102 incorporated into Rule 1.14 requires funds belonging to a client to be deposited into a trust account. If the retainer includes an advance payment for services not yet rendered and is refundable, that portion must be placed in the attorney's trust account.

May Janet Request a Change in the Terms of the Fee Agreement?

Rule 1.04 TDRPC prohibits illegal or unconscionable fees. The rule and its comments do not expressly address the propriety of a lawyer renegotiating fee agreements after representation has commenced. However, in *Jampole v. Matthews*, 1997 WL 414637 (Tex. App.—Houston [1st Dist.] 1997, no writ), the court of appeals summarized Texas law as follows:

"An attorney and client may modify the fee agreement during the existence of the attorney-client relationship. However, a presumption of unfairness, arises, and the attorney has the burden to show the fee modification is fair under the circumstances." *Id*. at *10 (discussing *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964) and *Robinson v. Garcia*, 804 S.W.2d 238, 248 (Tex. App.—Corpus Christi 1991), *writ denied per curiam*, 817 S.W.2d 59 (Tex. 1991)). This special scrutiny is required because the client is at a disadvantage: Changing lawyers during the representation is burdensome and "[a] client might hesitate to resist or even to suggest changes in new terms proposed by the lawyer, fearing the lawyer's resentment or believing that the proposals are meant to promote the client's good." Restatement (Third) of the Law Governing Lawyers § 18, comment e (2000). Moreover, a lawyer "usually has no justification for failing to reach a contract at the inception of the relationship or pressing need to modify an existing contract during it. The lawyer often has both the opportunity and the sophistication to propose appropriate terms before accepting a matter." *Id*.

The Fifth Circuit followed the same reasoning in *In re Wells v. Hughes 294 Fed.Appx. 841 (5th Cir. 2008).*

Comment 2 to Rule 1.04 TDRPC discusses changing a fee agreement with a long-standing client: "When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. If, however, the basis or rate of fee being charged to a regularly represented client differs from the understanding that has evolved, the lawyer should so advise the client."

Janet has a New Client

Janet is retained by a new individual client to prosecute an objection to dischargeability of a debt against a debtor and charges a $10,000 non-refundable retainer. Janet uses the same fee agreement she uses with the lender. The debtor files a counter claim against the client which will require substantial time. Janet asks the individual to renegotiate the fee and the clients agrees.

Should Janet have requested the client to renegotiate the fee agreement?

Comment 2 to Rule 1.04 TDRPC continues: "In a new client-lawyer relationship, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, in order to identity the factors that may be taken into account in finally fixing the fee. When developments occur during the representation

that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding, and when the lawyer has not regularly represented the client it is preferable for the basis or rate of the fee to be communicated to the client in writing. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth. In the case of a contingent fee, a written agreement is mandatory."

Janet does not have a prior relationship with the new client and the client does not have experience in litigation. The client's expectations are probably based on the fee agreement which does not address the change in circumstances. Should Janet have anticipated a counter claim? Did Janet discuss with the client the possibility of additional litigation? In this circumstance the renegotiated fee would more likely be considered unconscionable.

SUSPECTED SUBSTANCE ABUSE

Finis Valorum and Sheev Palpatine represent opposing parties in an adversary proceeding. They have known each other many years and have always maintained a professional (if sometimes tense) relationship. During this adversary proceeding, however, Finis notices that Sheev has missed deadlines, failed to protect his client's interests, and has made nonsensical legal arguments.

Finis recently observed Sheev heavily drinking one Wednesday early afternoon at the Mos Eisley Cantina. Finis also swears he smelled alcohol on Sheev's breath one morning in the courtroom. Alarmed, Finis considers whether he should report Sheev to the Office of Chief Disciplinary Counsel or the Texas Lawyer's Association Program or both.

Choose the best answer:

A. Finis is required to report the ethics violation to CDC, but contacting TLAP about Sheev's possible alcohol problem is discretionary.
B. Finis must notify both the CDC and TLAP of Sheev's behavior.
C. Finis is not required to report Sheev's behavior because he Skywalkers not know for certain whether Sheev even has an alcohol problem, and reporting Sheev's behavior could disadvantage Finis's client in the current adversary proceeding.
D. Finis must report Sheev's behavior, but he an choose whether to report it to either CDC or TLAP.

Answer: D

REPRESENTING A DEBTOR WHEN A CURRENT CLIENT IS A CREDITOR

John is asked to file a bankruptcy for Tote the Note Used Cars. A creditor of Tote the Note is Regional Bank which John currently represents in unrelated commercial litigation. John believes he can effectively represent both clients without adversely affecting either client.

Would John's representation of both clients be improper under the Texas Disciplinary Rules of Professional Conduct?

Rule 1.06 of the TDRPC, provides in part as follows:

"(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

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

It does not appear John's representation of both clients would be a violation of Rule 1.06. However, John cannot stop there.

The issue of concurrent representation in Federal Courts was addressed in *In Re Dresser Industries, Inc., Petitioner, 972 F.2d 540 (5th Cir. 1992).* Dresser, a defendant in commercial litigation, moved to disqualify the plaintiff's attorney on the grounds that the attorney represented Dresser in unrelated litigation. The District Court held Rule 1.06 TDRCP was the controlling statute and did not require disqualification in the facts presented. However, the Fifth Circuit, citing *Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976)* held that the conduct of attorneys in federal courts is governed by current national standards of legal ethics. The court looked to the ABA Model Rules of Professional Conduct and the Code of Professional Responsibility *Id.* at 544. In footnote 9, the Fifth Circuit cited the ABA/BNA Lawyer's Manual on Professional Conduct:

"A lawyer may not represent one client whose interests are adverse to those of another current client of the lawyer's even if the two representations are unrelated, unless the clients consent, and the lawyer believes he or she is able to represent each client without adversely affecting the other. Courts and ethics panels generally take a broad view of this restriction, and a specific adverse effect probably will not have to be shown. All that need be present is that one lawyer is or firm is representing two clients, even in unrelated matters, with potentially conflicting interests."
ABA/BNA Lawyer's Manual On Professional Conduct, 51:101 (1990 supp.).

While John's representation of both clients may not violate Rule 1.06 TDRPC, John nevertheless would violate Rule 3.04(d) TDRPC which prohibits a lawyer from knowingly disobeying an obligation under the standing rules of a tribunal.

If Regional Bank and Tote the Note both consented to John's representation, there would be no violation.

CONFUSED CLIENT

Mina Bonteri represents the elderly Shmi Skywalker in a chapter 13 bankruptcy. Ms. Skywalker, who used to operate the region's most profitable moisture farm, now is missing appointments, forgetting answers to basic questions about her finances, and misunderstanding basic math when reviewing budgets.

What are some basic steps that Ms. Bonteri might take to assist Ms. Skywalker?

A. Put deadlines into writing and send regular reminders to Ms. Skywalker before critical appointments.
B. Spend additional time with Ms. Skywalker to explain legal concepts in terms that lay people (i.e., non-lawyers) may understand.
C. A and B.
D. B.

Answer – C.

CLIENT MORE THAN A LITTLE CONFUSED

Mina Bonteri has continued to work with Shmi Skywalker by taking extra time to discuss legal issues in terms her client can understand and by setting up a system by which her staff regularly remind Ms. Skywalker of important deadlines. Despite these measures, Mina is concerned that Ms. Skywalker appears to be suffering from cognitive deficits.

Mrs. Skywalker listed her adult son Anakin as an emergency contact. Should Mina call Anakin to discuss the particulars of Ms. Skywalker's case?

A. Absolutely not. Mrs. Skywalker's communications with Mina are protected by attorney client privilege.
B. Yes, but only to the extent necessary to protect Mrs. Skywalker's interests.
C. No, but Mina can reveal confidences to separate counsel to the extent necessary to seek appointment of a guardian ad litem for Mrs. Skywalker.
D. B or C.

LAWYERS ON THE MOVE

Ted has been approached by Boutique Law Firm to leave his current firm and join Boutique. Boutique has extended the offer subject to reaching a final agreement on compensation and a review of possible conflicts. Boutique asks Ted for a list of prior clients and the clients' matters to determine if there are any conflicts of interest. Ted is concerned that revealing confidential or privileged information to Boutique without the clients' consent would violate Rule 1.05(b)(1) which provides:

> (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:
>
> (1) Reveal confidential information of a client or a former client to:
> (i) a person that the client has instructed is not to receive the information; or
> (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

However, Boutique insists on receiving the information to determine if there are any conflicts of interests. If a conflict is discovered after hiring Ted, Boutique would have to withdraw from representation of one of its current clients as required by Rule 1.09(b).

Rule 1.09 provides the following:

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;
(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
(3) if it is the same or a substantially related matter.

Is there a solution to the chicken or egg dilemma? While Rule 1.05 generally prohibits a lawyer from disclosing confidential information without the client's consent there is an exception in 1.05(c)(4):

(c) A lawyer may reveal confidential information:

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, or a Texas Disciplinary Rules of Professional Conduct, or other law.

Ted, after a review of 1.09 and 1.05, determines he can provide a limited disclosure of confidential information which should enable Boutique to determine if there are any conflicts and both parties will have met their obligations under 1.09 and 1.05.

Should Ted provide the information and then negotiate the compensation package?

The more prudent approach would be to agree on a compensation package first and then provide the information. If Ted and Boutique cannot agree on the compensation, there is no need to determine if there are any conflicts and no information need be disclosed.

ANGRY CLIENTS

Padme Naberrie represents Count Dooku in an individual chapter 11. During her representation, Padma recommends a course of action to Count Dooku. The proposed course of action has to do with strategy and does not involve a chapter 11 debtor's fiduciary duties. County Dooku thinks the advice is so awful that he tells Padme he never wants to see her again. Count Dooku then posts hateful things about Padme and her law firm in an online Yelp review.

What are Padme's options?

A. Immediately file a motion to withdraw as counsel but keep the reasons for requesting withdrawal sufficiently vague so that no confidential information is revealed.
B. Immediately file a motion to withdraw as counsel that details all the horrible and nasty things she learned about Count Dooku – including but not limited to his secret Sith studies - in the course of her representation.
C. Set up a meeting with Count Dooku to 1) defend her actions and 2) demand the retraction of the Yelp review.
D. A and C.

Answer – D.

WHO IS FILING THIS BANKRUPTCY?

John and Mary were married for ten years. They purchased a home with a $250,000 mortgage but John managed their finances poorly and in general was difficult to get along with. The couple divorced and John received the house in the divorce. Mary was still obligated on the note after the divorce, however. John's financial difficulties continued, and he defaulted on the mortgage. John unknown to Mary, filed two pro se bankruptcies to stop the foreclosure. The second bankruptcy was dismissed with prejudice for two years and John is facing foreclosure again.

John goes to a bankruptcy attorney on the Friday before foreclosure. The attorney advises John he cannot file again due to the prejudicial period. John asks if his ex-wife Mary, who is still liable on the mortgage, can file to stop the foreclosure. The attorney says yes, have her come to my office. On Monday John appears at the office and says Mary is attending a funeral and cannot come into the office. She has limited phone coverage due to the remote location where the funeral is held but can email the attorney. John pleads with the attorney to help them. The attorney, in an effort to help John and Mary electronically signs Mary's name and files a Bankruptcy Petition, Schedules and the Statement of Financial Affairs after receiving an email authorizing the filing.

On Wednesday the attorney receives a phone call from Mary asking who he is and why filed a bankruptcy petition in her name.

The attorney clearly violated:

A) 11 U.S.C. §526(a)(2) by making statements he knew or should have known were false:
B) 11 U.S.C. §527 by not providing a "clear and conspicuous notice" to the purported debtor that all documentation must be correct,
C) 11 U.S.C. §528 by not executing a written contract with the purported debtor,
D) Bankruptcy Rule 1008 by not obtaining a verified signature,
E) Bankruptcy Rule 5005 by representing he obtained an originally executed petition,
F) Bankruptcy Rule 9011 by warranting he had made a reasonable investigation and
G) Rules 1.01, 1.02, 1.03 and 3.03 of the Texas Disciplinary Rules of Professional Conduct.

However, sanctioning the attorney will not remedy the biggest problem. What can be done to rehabilitate Mary's credit rating?

Judge Jernigan, in a similar case issued an order that pursuant to 11 U.S.C. §303, (relating to a dismissal of an involuntary petition) all consumer reporting agencies were prohibited from making any consumer report that contained any information relating to the bankruptcy case and specifically prohibited the agencies from reporting the bankruptcy case on Mary's credit bureau report. Judge Jernigan then sealed the case.

The case sounds like a one off. However, there is another case pending where a California internet attorney filed a case without verifying who was on the other end of the line and without obtaining a wet signature. And yes, the husband filed in the wife's name.

AN OFFER YOU CAN'T REFUSE

Assume these facts in a hypothetical case. Sam comes to Roger's office to file a consumer bankruptcy. He tells Roger his employer is suing him for $3 million dollars, claiming he embezzled money during a five-year period using his position in the IT department. Sam admits the money was taken but says, "It was not my fault, the mob made me do it"

Sam continues, "Tony Soprano walked up to me one day and threatened me and my family. He made me set up a shell corporation that I was forced to use to purchase computer hardware for my employer's IT department. The purchase prices were inflated, and $3 million dollars was skimmed off the top. The mob also took my butterfly collection which was worth $100,000." Sam then says the mob felt bad later and purchased a $100,000 lot which Sam built a homestead on.

Sam says he included the embezzled money on his tax returns, which were prepared by the mob and the mob gave him the money to pay the taxes.

Should Roger:

A) Tell Sam to get out of his office?
B) Tell Sam he does not think a court will believe his story, and Sam should not file bankruptcy?
C) Tell Sam he does not think a court will believe his story, but will nevertheless file a bankruptcy for him?
D) Refer Sam to a criminal defense attorney?

What are the possible ramifications Sam might face if he offers perjured testimony? Committing a bankruptcy crime is one but are there others?

Assume Roger files a Chapter 13 bankruptcy for Sam. Sam repeats his story under oath at the 341 meeting and again at a Rule 2004 deposition. Sam's case is later converted to Chapter 7. Sam is eventually indicted, but not for any bankruptcy crimes.

A District Court finds Sam guilty of embezzling the money and sentences Sam to the maximum possible sentence. In announcing the sentence, the judge refers to Sam's repeated stories blaming the mob for the crimes. Did Sam's perjured testimony give him a year or two extra prison time?