DO’S AND DON’TS OF BILLING
OR
HOW TO GET PAID, STAY PAID, AND REMAIN LICENSED

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HOUSTON BAR ASSOCIATION
2015 NEW LICENSEE INSTITUTE

June 5, 2015
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Mr. Weisblatt has practiced continuously since becoming licensed in 1992 and has represented businesses ranging in size from one person start-up ventures to multi-national corporations employing hundreds of people in multiple countries. From 2005 through 2009 Mr. Weisblatt was in-house counsel and chief operating officer of a multi-national corporation in the steel products industry. That in-house position provided valuable insight into how businesses work and what they actually need from their lawyers – both in-house and outside counsel. In 2009 Mr. Weisblatt started the The Weisblatt Law Firm, L.L.C. with the goal of creating a special law firm which could cater to a few clients and provide them the best legal services coupled with the best customer service. It is a matter of great pride to Mr. Weisblatt that the very first customer who hired him when he started in 1992 was also the first customer of The Weisblatt Law Firm, L.L.C. continuing a many decade long relationship.

Mr. Weisblatt is proudly a member of the State Bar of Texas including the business, creditor-debtor, litigation, commercial law, real estate, and law office management practice groups. He also is an avid reader, an exercise buff, enjoys woodworking and participates each year in the MS150 bicycle ride from Houston to Austin to raise money to fight multiple sclerosis.
# The Dos and Don’ts of Billing

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1. INTRODUCTION

This short paper is intended to identify some of the important “dos and don’ts” that a new lawyer in a solo or small firm will face when preparing to send out his first invoice for legal services. It is not intended to be a comprehensive guide to all aspects of legal invoicing or recordkeeping. In writing this paper, the author relied heavily on State Bar of Texas published materials, including “A Lawyer’s Guide to Client Trust Accounts” updated April 15, 2014 which is available on the State Bar of Texas website.

The invoices which lawyers send to their clients are among the most scrutinized documents which we produce. The clients read them (often with dismay!), they are regularly produced in discovery for the other side to read, judges and juries read them when deciding the amount of attorneys’ fees to award, another lawyer may read them when evaluating, preparing or filing a malpractice suit against us, judges and juries may read them in the event of a malpractice case against us, and a disciplinary panel may read them when deciding the merits of a grievance. With so many eyes on our bills, it behooves us all to have a good understanding of the rules behind billing and a working knowledge of the tricks and traps that we must navigate to satisfy these varied and often diametrically opposed audiences.

This paper is intended to be a practical guide rather than an exhaustive review of the laws and ethics opinions regarding billing.

2. BILLING AND THE ENGAGEMENT LETTER

Contingent fee agreements must be in writing. Other than that rule, there is no law that requires you to have a written engagement letter with your client. That said, failing to have a written fee agreement is a profound mistake. Your fee agreement, if carefully thought out, will help you avoid a legion of problems. This paper is not about fee agreements, but I encourage you to make sure that your fee agreement at minimum includes the following information:

i. Identify your client
ii. Scope of representation
iii. Identify potential conflicts
iv. State Bar required disclosures vis-à-vis grievance procedures; and
v. the deal points of your agreement with your client.

When describing the deal with your client, you should include at the very least:

i. Hourly, flat rate, or contingent fee.
ii. Percentage of contingent fee
iii. Hourly rate
iv. Billing increment
v. Amount of retainer (if any);
vi. Amount of deposit against fees
vii. Amount of deposit against expenses (often combined with the deposit against fees)
viii. Any requirement that the client refresh any of the deposits.

You should review these deal points with your client prior to their signing the engagement letter and make sure that you are starting with a clear, mutual understanding of each party’s obligations. This meeting is the beginning of a very important dialog. Your client has to decide to pay your bill every month. Use this meeting to establish trust and confidence and an expectation with the client that you will expect and need to be paid so that you can help the client reach its goals.
Practice Note: ALWAYS, ALWAYS, ALWAYS take the time to draft an engagement letter which is signed by you and your client.

Practice Note: The contract used for hourly engagements by the author is attached as exhibit 1.

3. IOLTA ACCOUNTS

The Mechanics: The Texas Disciplinary Rules of Professional Conduct (particularly rule 1.14) require that all lawyers who hold funds belonging to another hold such funds in a special account called an IOLTA account. IOLTA stands for “Interest on Lawyers Trust Accounts.” The interest generated by these accounts are used by the State Bar to fund programs to provide legal services to indigent people.

All monies that are unearned, all cost deposits, all mixed earned and unearned money, and all settlement monies must be deposited into the lawyer’s IOLTA account.

Practice Note: Lawyers can get into a lot of trouble depositing money that should be in an IOLTA account but not very much trouble at all depositing money that need not be in an IOLTA account into an IOLTA account. If you aren’t sure, deposit it into your IOLTA account and then sort it out.

Confusion sometimes arises in new lawyers because of the word “account.” You do not have to have a separate account at your bank for each client’s trust money. You do, however, have to maintain a separate ledger for each client’s trust funds.

For example, if client A gives me a deposit against fees and expenses of $2000, I must deposit all of these funds into my firm’s IOLTA account. At this point, all of that money belongs to the clients. I am simply holding it in trust for them.

I must however, at all times, be able to identify the owner of all of the funds in the account. So if at the end of the month assume I performed $3000.00 of work for client A and $500 dollars of work for client B, I could properly remove all of client A’s money ($2000) and $500 of client B’s money and put the sum $2500 into my operating account.

Note that I could not remove all $3000 of the money from the account because if I did so, I would be taking some money from client B to pay for client A’s legal work.

Practice Note: maintain separate accounting records for each client’s funds in your IOLTA account.

The Texas Rules of Disciplinary Procedure (Rule 15.10) requires that you keep the accounting records for each client who had funds in your IOLTA account for five years after the last of those funds is disbursed. If you were to be in a conflict with a client, you would not want to destroy those records until the conflict had resolved – even if it were more than five years after disbursement of the last funds.

As long as you have an IOLTA account, you must submit an annual report to the State Bar of Texas. The report is done contemporaneously with paying your annual lawyer tax and State Bar dues and the State Bar of Texas provides the form. It take just a few minutes to complete.

Retainers, Deposits And Flat Fees: Retainers: a retainer is not a deposit against
fees and expenses. A retainer is a sum of money paid to a lawyer to compensate that lawyer for the loss of opportunity to work on other projects. It could be described as a “signing bonus.” Retainers are fully earned when paid and not subject to being broken into hourly increments. (See Professional Ethics Committee Opinion No. 611, attached as exhibit 2.)

**Deposits:** a deposit is an advanced payment for fees or expenses or both.

**Flat Fee:** a flat fee is a designated amount of money that the lawyer and client agree will compensate the lawyer for a specific task. Despite the fact that the lawyer and client may contract that the fee (at least some portion at least) is fully earned and non-refundable, the fee is always refundable until the lawyer has completed the scope of work. See *Cluck v. Commission for Lawyer Discipline*; 214 S.W.3d 736 (App.-Austin) 2007

**Deposits** and **Flat Fees** must BOTH be deposited into IOLTA accounts until earned. In the case of a flat fee, the fee is earned when the task is completed. A large flat fee could be earned according to certain milestones so it could be disbursed as those milestones are reached. Even though a client and attorney contract that a flat fee is fully earned and non-refundable, the attorney still must deposit it into the IOLTA account and not touch it until the task is complete.

A true retainer can be deposited into the lawyer’s operating account as fully earned and non-refundable.

Why not designate every flat fee as a retainer? First of all, because they’re not. Secondly, because the lawyer may be called upon to support the notion that the retainer reasonably relates to the “lost opportunity to do other work” and must also show that the retainer did NOT include compensation for actually doing the work. If the “retainer” both compensates the lawyer for the lost opportunity to work AND to do the legal work contemplated by the agreement, then it must be put into the IOLTA account until the work is completed. It if does both, then it is not a “true retainer.”

In the event that a lawyer is unable to complete the flat fee project, then the lawyer must somehow demonstrate how much of the fee is earned and how much is unearned. The engagement letter can help with this problem by designating a method for accomplishing this such as milestones or an hourly basis.

**Settlement Funds:** All settlement funds must be deposited into the lawyer’s IOLTA account. All of these funds should remain there until they have been collected.

Lawyers are wise to distinguish from “Available Funds” and “Collected Funds.” Due to some idiosyncrasies in the banking laws, banks are required to make some funds available for withdrawal by the depositor before the bank has actually collected the funds from the payee’s bank. This fact has been noticed by the con artists of the world and they have created a special set of cons just for lawyers.

The con works thusly: A new client approaches the lawyer and asks the lawyer to take on some task – typically the client is overseas and the task is collection of an unpaid invoice. The “client” will want the case taken on a contingent fee basis. The “client” will provide some information which the lawyer uses to establish the existence of the alleged debtor (who is actually a co-conspirator with the client). The lawyer makes a demand and almost immediately the
alleged debtor makes payment. At this point, the lawyer is thinking – “great! Easy money. I’ve just earned a nice contingent fee without doing much work at all!” The lawyer deposits the money into her trust account and then the “client” begins to apply tremendous pressure on the lawyer to disburse the funds as soon as they are available. The “client” even threatens a grievance if the lawyer “continues to wrongfully hold the money.” The lawyer sees that the funds are “available” and wires the “client’s” share to the overseas “client.” Of course, the check is fraudulent and once the bank realizes it, it reverses the deposit transaction and takes back the full amount of the deposit. This is a disaster for the lawyer as the deposit was made into an IOLTA account. When the bank reverses the deposit, the bank has then seized funds that do not belong to the lawyer – they belong to the clients of the lawyer. The lawyer must, of course, quickly reimburse the funds to the actual, real clients or face issues for not safeguarding the clients’ trust funds. This situation can be devastating.

There are a number of ways to avoid this scam. The first and most important is to know your client. The scam clients will never agree to a telephone interview. The author receives about 3 – 10 e-mails a week from “clients” overseas who ask the same generic “does your firm handle contract disputes” and “does your firm handle collection matters.” The first step is to ask for a telephone conference – if they refuse – they are a scam artist. The second good way to protect yourself from this scam is to include in your engagement letter the provision that you will not release any settlement funds until such time as they are “collected.” See exhibit 3 for the most recent e-mail correspondence from one of these scam artists.

Lawyers should always prepare a settlement statement when disbursing funds. The settlement statement should include the full amount recovered, the amount of expenses, the amount of attorney’s fees, the amount disbursed to the client. This document could prove invaluable in the event that there is later a dispute with the client regarding the fate of the settlement funds. The form of settlement statement used by the author is attached as exhibit 4.

**Practice Note:** Have your clients sign the settlement statement and instruct you, in writing, regarding how to disburse their funds. This will greatly reduce the possibility of conflict later.

**Disputed Funds:** There are many ways that disputes can arise regarding funds held by a lawyer in a trust account. The situation most applicable to this paper is the situation where the lawyer and client disagree regarding the fees charged. In such a case, the lawyer should not disburse any funds from the IOLTA account to the attorney which are disputed. The attorney may disburse undisputed funds. In the event that the client and attorney are unable to agree as to the disposition of the disputed funds, the funds should be left in the trust account and a legal action commenced to resolve the question of ownership.

**Abandoned Funds:** If an attorney cannot find the owner of funds in the attorney’s trust account, the attorney should turn the funds over to the Texas Comptroller of Public Accounts. See Opinion Number 602 attached as exhibit 5.

**4. EFFECTIVE BILLING OF CLIENTS**

Now that you have a contract with the client, and a place to put that deposit against fees
and expenses, you need to do the work and then present the client with a bill that he, she or it will pay. The invoice that you send to your client (and all those other audiences referenced above) matters! Your client will read the bill and you want them to pay it. The balance of this paper discusses the lessons I have learned when billing my clients.

### The Dos

**Set reasonable deposits:** It is important that you set the deposit amount high enough to provide coverage for busy months. I try to set the deposit at about 1.5 times what I think a large monthly invoice will be. This way, most months my invoice is paid in full from the trust account balance on hand. If you set the amount too low, you will spend too much time chasing clients for payment and will not have enough time to perform productive work.

**Practice Tip:** Remember – if your client cannot or will not pay you a reasonable retainer at the beginning, the client will not pay you in the middle or at the end.

**Analyze your Hourly Rate:** It is important to regularly analyze your hourly rate. Ask for a rate that is commensurate with your experience and your knowledge. You should regularly – at least yearly – review your rate. Be sure to include in your engagement letter the right to periodically increase your rate.

**Bill Regularly:** It is important to the efficient administration of a law office that the bills go out regularly. I typically bill once per month. This permits you to prepare your bills while they are fresh in your mind and also allows the client to receive the bills close in time to when the work is done. It also helps to keep the client informed about the work being done and prevents the situation of the client getting a bill for several months of work that might be difficult to pay at once. It also will keep you aware of the client’s ability and willingness to pay – you will know sooner if the client is falling behind if you bill regularly.

**Descriptive Entries are better:** It’s not just the quantity of words written in the entry, it’s also the quality of the information. Most of your clients will be very interested in their cases. They will read your bill. You want them to have a feeling for the work that you did which is described in your entry. For example, compare the following billing entries.

“Legal research, application of law to facts. Email correspondence with client – 3 hours.”

Compared to:

“Conducted online legal research relating to the issue of res judicata. Reviewed Texas Rule of Civil Procedure no. 97. Reviewed prior court case file to confirm that earlier case resulted in a final judgment as Rule 97 requires. Draft e-mail to client suggesting revision to answer to include defense of res judicata. – 3 hours.”

The second entry is, of course, more descriptive, but it also informs the client of the nature of the work that was done, why it was done, and reminds the client that you sent them an e-mail about it. This type of entry, in my experience, is much more effective and leads to a much happier client who is more likely to pay the invoice.

**Take multiple forms of payment:** Make it easy on your client. If they want to pay by credit card, paypal, wire transfer, check, or even cash, make sure that they can do so. Some of these forms of payment are more expensive to you than others, but it is much
better to get paid and give up a few percent than to not get paid.

Reconcile your IOLTA Account: While this is tangential to your actual billing process, each month every client’s trust account should be balanced. This will help you maintain your records and keep your client informed.

Consider a Credit Card “Backup”: It is ethical to require your client to provide a credit card which you may charge in the event the client has not 1. disputed the invoice; and 2. Paid the invoice within a certain amount of time. (See Opinion 582 attached as exhibit 6). This system allows the client time to pay the invoice from alternate sources if it prefers, preserves the client’s right to dispute the invoice, but also gives the lawyer a tiny bit more security that he will get paid.

Require “evergreen” deposits: It is good practice to require that your clients refresh their deposits against fees and expenses monthly. This will keep the client from having to come up with very large sums of money all at once and will let you know early if the client is falling behind.

Decide in advance if the work is pro-bono: You should decide in advance, if the project is going to be pro-bono or performed at a reduced rate. It is fine (and admirable) to take some cases at no cost or reduced cost. It should, however, be a decision that’s made at the beginning by you and not in the middle by the client.

Listen to your clients: If your client is frustrated about an invoice – listen to them. Sometimes they are right! If you have made a mistake on an invoice, quickly correct it and send a revised invoice. If the client is particularly upset about a single time entry – waiving it is sometimes the best money you can spend.

Invoice everything! You should treat your clients fairly. If you make a very short call which you determine was so short you should not charge for it, bill it and then “no-charge” it on the client’s invoice. This buys you good-will and lets your client know that you are being fair. Clients cannot help but like seeing the “no charge” items on their invoices.

The Don’ts

Never comingle funds: Do not ever put IOLTA funds into any account other than an IOLTA account. Never, ever, ever. This is a fast way to be on the wrong end of a breach of fiduciary duty lawsuit – one in which your client does NOT have to prove one cent of damages to win. Your IOLTA account is your friend. When in doubt, deposit all funds into IOLTA – you can always sort it out from there without worry that you have accidentally comingled funds.

Do not get conned: Know your client and understand the rules relating to “available funds” versus “collected funds.” (See discussion above.)

Beware of up charging expenses: While it is technically permissible to upcharge expenses, you must provide disclosure to the client and obtain the client’s consent. (See opinion no. 577, exhibit 7). This means that if the photocopy costs you a nickel, and you charge the client a quarter, you must disclose that you are up charging the copies and you must get the client’s advanced consent. I tell clients that I will not charge them for anything that doesn’t have a receipt, and they can look at the receipt anytime they would like. I have not had an expense questioned in at least five years.
Do not expense anything you would be uncomfortable discussing with a grievance panel or a judge: Some of the expenses that lawyers have charged or attempted to charge their clients are ludicrous. For instance, charging the client for gifts purchased for other members of the firm, charging clients for lavish meals, charging clients for private jets (without good reason), charging clients for clothing, etc… Just imagine how a breach of fiduciary duty jury is going to react to billing a client for a $300 dollar bottle of wine…

Do not charge unconscionable fees: You may not charge an unconscionable fee (TDRPC 1.04). An unconscionable fee is defined in TDRPC 1.04 as “A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.” This definition was used by the Texas Supreme Court in Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 568 (Tex. 2006).

Contingent Fees Must be in Writing: Contingent fees must be in writing. If you do not have a written contract, do not try to charge a contingent fee.

Do not charge illegal fees: Do not charge a fee that is greater than that which is allowed by statute. See, for instance, Texas Tax Code 34.04(i) which limits the fee an attorney may charge for assisting a person in obtaining excess funds from a tax sale to 25% of the excess or a $1000 whichever is less. (Tex. Tax Code 34.01(i)).

Do not move money out of an IOLTA account without sending an invoice: Take the situation wherein a client has $10,000 in the IOLTA account, and you have done $3000 of work. You are short on cash so you want to move just a little – say $1000 out of IOLTA into your operating account. You might think it ok since you have done much more than $1000 of work and the client easily has enough money to cover the move. You must not move any of that money without sending an invoice to the client before or contemporaneously with the move. This is true even though you KNOW that there is plenty of money in the account and there is no danger of invading another client’s funds and you KNOW that you have done enough work to easily justify the amount moved. We have a lot of latitude. We are allowed to move the money as soon as we send the invoice. We get to bless our own decisions in that regard, however, we cannot move money without providing an invoice to the client.

Billing Clients for Contract Lawyers: If the contract lawyer is “in” the firm, the client can be charged a fee greater than the amount being paid to that lawyer. If the lawyer is not “in” the firm, then the contract lawyer must be billed as an expense – and expenses can only be up charged after disclosure and consent. If one up-charges a contract lawyer, that equates to “fee splitting” at which time all of the fee splitting rules will apply (proportionality, professional responsibility, written client consent etc..) (see TDRPC 1.04(f) and 7.01).
Exhibit 1 – Sample Engagement Letter
Privileged & Confidential

CLIENT NAME
CLIENT ADDRESS

Re: DESCRIPTION OF MATTER.

Dear Mr.:

When countersigned by you and returned to me, this will be the Representation Agreement under which I will be your lawyer in subject to the scope of representation set out below.

1. **Scope of My Representation:** You have requested that I assist you in: *INSERT SCOPE OF WORK* You may assign other tasks to me which I will accept or reject in writing. Unless you have a written confirmation from me, you must assume that I am not working on any other project other than the review of the captioned documents.

2. **Identification of Client and limit of representation:** My only client is this matter is: You have asked that I represent your business, CLIENT’, and not you individually. I have agreed to that representation only with regard to the matters set out above. You should not assume that I am acting as your lawyer in any other matter or for any purposes other than those specified in paragraph 1 above. I have not undertaken, for example, to give you or your business general business or legal advice nor advice on (for example) any sort of taxes or financial planning or regulatory compliance. Nor am I representing or advising you on any document review nor any existing or potential disputes with anyone other than the parties in the captioned matters. If you have need for, and if I agree to, any further and unrelated representation, then we will document that through a separate written agreement.

3. **Manner of My Representation:** I will represent you honestly and in my usual and customary manner, acting as both your counselor and advocate in accordance with my professional experience and discretion. I will advise and consult with you to develop an overall strategy for representing your interests, and thereafter I will advise and consult with you before making any significant change in that strategy. I will also make reasonable efforts to keep you apprised of all significant developments.
in connection with my representation of you, and to respond to your requests and comments. In particular, I will not make any binding commitments relating to my representation of you without first obtaining your specific consent.

4. **Your Non-Financial Commitments as a Client**: You will keep me apprised of your then-current permanent contact information at home and at work at all times. You will remain available on a reasonable basis for consultation (or warn me in advance when you know will not be available for more than a day or two). You will also seek, and give reasonable consideration to, my legal advice and recommendations before making any important decisions with respect to the matters on which I am representing you. Most important of all, for I cannot effectively represent you otherwise: **You must be honest and forthcoming with me.**

5. **Texas Lawyer’s Creed**: I endorse, and try to follow, the principles set forth in the Texas Lawyer’s Creed as adopted by the Supreme Court of Texas and published at:

   http://www.texasbar.com/Content/ContentGroups/Bar_Groups/Foundations1/Texas_Bar_Foundation/TX_Lawyers_Creed.htm

I strongly recommend that you review the contents of the Creed before engaging me. Pay particular attention to Part II regarding Lawyer to Client relations, which describes legal and ethical obligations that may require me to refuse some sorts of instructions. (For example, I won’t “pursue conduct which is intended primarily to harass or drain the financial resources of [an] opposing party,” or “pursue any course of action which is without merit” in my judgment.) Although I formalize these disclosures at the beginning of every new representation, I do not anticipate any disagreement with you over these principles — else I would not be offering to represent you at all.

6. **Disclosures**: I am not aware of any conflict to this representation.

7. **No Competing Representation; Potential Conflicts Between You**: I will not undertake to represent the interests of any other party in connection with this matter without first obtaining your fully-informed written consent.

8. **Fees and Expenses**:

   (a) **Deposit Against Fees and Expenses**: To secure my agreement to undertake your representation, you have agreed to pay me an unearned deposit against fees and expenses, in advance, in the amount of:

   $0000.00.

I will deposit those funds in my firm’s trust account and keep it segregated from my law firm’s operating funds and from my own personal funds. (Although I control the deposit and disbursement of funds from that trust account while acting as trustee for my clients, nevertheless, by law, all
interest on lawyer trust account funds — as earned and paid into these so-called “IOLTA accounts” — goes to support Texas legal aid organizations serving the poor through the Texas Access to Justice Foundation. See http://www.teajf.org/ for details.)

(b) My hourly rate for this representation is:

$000.00

Other attorneys in my office may work on this matter at rates ranging from:

$0000.00 to $000.00.

Paralegals in my office may work on this matter at rates ranging from:

$0000.00 to $000.00

(c) Monthly Statements: On a roughly end-of-each-month basis thereafter, I will provide you with a written statement for my services rendered (at the rates set out above and in quarter-hour increments) and my expenses incurred. To the extent possible, I will simultaneously pay that statement from your retainer by transferring such funds from my trust account to my operating account.

(d) Refresher Payments/Refund: The rate at which the initial retainer and any refresher payments are consumed by my statements for fees and expenses will depend on how matters progress and your ongoing decisions regarding what services you wish for me to provide. However, to secure my continued representation, I will require you to make additional unearned retainer payments sufficient to pay refresh your funds on deposit back to their original balance mentioned above within a ten-day period after each billing. At the conclusion of my representation, I will refund to you any unearned net balance remaining from your retainer and any refresher payments at the same time I provide you with my final statement of fees and expenses.

(e) Special fee provisions (if any): NONE.

9. **Termination**: We expect this Representation Agreement to continue in effect until its natural conclusion because you no longer need my legal representation. However, this Representation Agreement may also be terminated by either side for any reason, with or without good cause, upon thirty (30) days' advance written notice to the other. (Emails and faxes shall constitute written notice for this purpose, effective as of the date the email or fax is sent, so long as a duplicate copy of such email or fax is also sent on that same date by regular first class or certified U.S.
In the event of such termination by either of us, you will not unreasonably withhold your written consent to my withdrawal as your counsel of record if I am such counsel in any court proceeding. If you retain substitute counsel to replace me, I will assist him or her in the transition of representation. Whether or not you have new counsel to replace me, I will take reasonable steps to avoid, insofar as may be practicable, undue prejudice to your legal interests from my withdrawal.

10. **Records and Files**: Under Texas law, the records and files I compile in the course of my representation of you belong to you, and I will make them (or copies of them) available to you for any purpose at any reasonable time upon reasonable advance notice. I reserve the right, however, to also retain copies of any or all of such records and files at my own expense notwithstanding the natural conclusion of my representation or its earlier termination. Insofar as possible, I try to maintain “paperless files” by creating or otherwise capturing materials in digital form, and once so captured in digital format, I may discard or destroy hard-copy originals at my sole discretion. At any given time, then, my entire “file” on this matter may consist — for purposes of your ownership and the file’s potential transmission back to you — primarily or even solely of digital data that I may copy from my computer(s) onto one or more CDs, DVDs or “thumb drives.” In accordance with my regular storage practices, I may destroy or delete your entire file without notice to you at any time more than three (3) years after the later of (a) the natural conclusion of my representation or (b) the termination of this Representation Agreement, so you should ask me for a copy of your file before then if you want one.

11. **Statutory Notice**: Pursuant to Texas Gov’t Code § 81.079, the State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar’s Office of Chief Disciplinary Counsel will provide you with information about how to file a complaint. Although I hope you would speak with me first if you ever became dissatisfied with my representation, you may call 1-800-932-1900 toll-free for more information. I support and approve of the Texas law which requires that this notice be given to all clients, and I have nothing to hide or fear on this account.

12. **Miscellaneous Provisions**:

(a) **In connection with your hiring me through this Representation Agreement**, I cannot simultaneously act as your advocate and my own, because I have financial interests as a businessman that are different from — and potentially contrary to — yours as a potential client. Accordingly, I invite you to seek a second opinion or independent legal review of this Representation Agreement before signing it, and I caution you that you must look out for your own interests regarding its terms.

(b) This Representation Agreement constitutes our entire agreement — meaning we have no “side deals” or other arrangements that are not set
forth in it — and when countersigned by you, this document supersedes all of our previous discussions, negotiations, or drafts.

(c) This Representation Agreement may only be changed, amended, or supplemented by a further written agreement that makes express reference to this Representation Agreement and that has been signed by all of us.

(d) This Representation Agreement is made and should be construed under the laws of the State of Texas. The state district courts of Harris County, Texas, are the sole appropriate forum in the event of any litigation brought under or affecting this Representation Agreement, and this forum selection clause may be enforced by mandatory injunction issued by such courts if need be (it being stipulated by the parties that violation of such clause would cause immediate and irreparable injury for which there is no adequate remedy at law, and that the balance of equities, public policy, and other traditional grounds for equitable relief would also favor such injunctive relief).

(e) This Representation Agreement is effective upon your countersignature below and transmission back to me (by mail, fax, or email) of an original or copy bearing such signature.

13. **Favorable Outcome Never Guaranteed**: I may offer my opinions about negotiation strategies or tactics and I may make predictions or evaluations — including statements regarding the merits of claims or defenses, or their value, or the percentage likelihood of certain events — to help you make informed decisions regarding these legal matters, but all such predictions and evaluations are expressions of my subjective opinion only. I have explained, and you have acknowledged, that there is risk and uncertainty inherent in all negotiations and litigation. I therefore cannot provide you with any guarantee, firm assurance, or warranty (either express or implied) regarding the results or outcome of any strategy or tactic or, in the event of litigation, claims asserted by or against you, or on any other related legal matter. Indeed, I hereby disclaim, and you hereby waive any right to enforce or rely upon, any such guarantee, firm assurance, or warranty (either express or implied) — whether made orally or on my website or otherwise in writing, and whether made before or after you sign this Representation Agreement.

Very truly yours,

Andrew D. Weisblatt

AGREED:
CLIENT

Name: ____________________________
Authorized Representative

__________________________________________  ___________________________
Date Signed

UNTIL SUCH TIME AS YOU HAVE RECEIVED A SIGNED REPRESENTATION AGREEMENT FROM ME, AND MADE THE INITIAL DEPOSIT DESCRIBED ABOVE, I HAVE NOT BEEN RETAINED AS YOUR LAWER AND WILL TAKE NO ACTIONS ON YOUR BEHALF.
QUESTION PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to include in an employment contract an agreement that the amount initially paid by a client with respect to a matter is a “non-refundable retainer” that includes payment for all the lawyer’s services on the matter up to the time of trial?

STATEMENT OF FACTS

A lawyer proposes to enter into an employment agreement with a client providing that the client will pay at the outset an amount denominated a “non-refundable retainer” that will cover all services of the lawyer on the matter up to the time of any trial in the matter. The proposed agreement also states that, if a trial is necessary in the matter, the client will be required to pay additional legal fees for services at and after trial. The lawyer proposes to deposit the client’s initial payment in the lawyer’s operating account.

DISCUSSION

Rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct provides that a lawyer shall not enter an arrangement for an illegal or unconscionable fee and that a fee is unconscionable “if a competent lawyer could not form a reasonable belief that the fee is reasonable.” Rule 1.04(b) sets forth certain factors that may be considered, along with any other relevant factors not specifically listed, in determining the reasonableness of a fee for legal services. In the case of a non-refundable retainer, the factor specified in Rule 1.04(b)(2) is of particular relevance: “the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer . . . .”

Rule 1.14 deals in part with a lawyer’s handling of funds belonging in whole or in part to the client and requires that such funds when held by a lawyer be kept in a “trust” or “escrow” account separate from the lawyer’s operating account.

Two prior opinions of this Committee have addressed the relationship between the rules now embodied in Rules 1.04 and 1.14.

In Professional Ethics Committee Opinion 391 (February 1978), this Committee concluded that an advance fee denominated a “non-refundable retainer” belongs entirely
to the lawyer at the time it is received because the fee is earned at the time the fee is received and therefore the non-refundable retainer may be placed in the lawyer’s operating account. Opinion 391 also concluded that an advance fee that represents payment for services not yet rendered and that is therefore refundable belongs at least in part to the client at the time the funds come into the possession of the lawyer and, therefore, the amount paid must be deposited into a separate trust account to comply with the requirements of what is now Rule 1.14(a). Opinion 391 concluded further that, when a client provides to a lawyer one check that represents both a non-refundable retainer and a refundable advance payment, the entire check should be deposited into a trust account and the funds that represent the non-refundable retainer may then be transferred immediately into the lawyer’s operating account.

This Committee addressed non-refundable retainers again in Opinion 431 (June 1986). Opinion 431 concluded that Opinion 391 remained viable and that non-refundable retainers are not inherently unethical “but must be utilized with caution.” Opinion 431 additionally concluded that Opinion 391 was overruled “to the extent that it states that every retainer designated as non-refundable is earned at the time it is received.” Opinion 431 described a non-refundable retainer (sometimes referred to in Opinion 431 as a “true retainer”) in the following terms:

“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 opportunitues have been lost, or if the attorney withdraws voluntarily, then the attorney should refund an equitable portion of the retainer.”

Thus a non-refundable retainer (as that term is used in this opinion) is not a payment for services but is rather a payment to secure a lawyer’s services and to compensate him for the loss of opportunities for other employment. See also Cluck v. Commission for Lawyer Discipline, 214 S.W.3d 736 (Tex. App.-Austin 2007, no pet.).

It is important to note that the Texas Disciplinary Rules of Professional Conduct do not prohibit a lawyer from entering into an agreement with a client that requires the payment of a fixed fee at the beginning of the representation. The Committee also notes that the term “non-refundable retainer,” as commonly used to refer, as in this opinion, to an initial payment solely to secure a lawyer's availability for future services, may be misleading in some circumstances. Opinion 431 recognized in the excerpt quoted above that a retainer solely to secure a lawyer’s future availability, which is fully earned at the time received, would nonetheless have to be refunded at least in part if the lawyer were discharged for cause after receiving the retainer but before he had lost opportunities for other employment or if the lawyer withdrew voluntarily. However, the fact that an amount received by a lawyer as a true non-refundable retainer may later in certain
unusual circumstances have to be at least partially refunded does not negate the fact that such amount has been earned and under the Texas Disciplinary Rules may be deposited in the lawyer’s operating account rather than being subject to a requirement that the amount must be held in a trust or escrow account.

In view of Opinions 391 and 431, the result in this case is clear. A legal fee relating to future services is a non-refundable retainer at the time received only if the fee in its entirety is a reasonable fee to secure the availability of a lawyer’s future services and compensate the lawyer for the preclusion of other employment that results from the acceptance of employment for the client. A non-refundable retainer meeting this standard and agreed to by the client is earned at the time it is received and may be deposited in the lawyer’s operating account. However, any payment for services not yet completed does not meet the strict requirements for a non-refundable retainer (as that term is used in this opinion) and must be deposited in the lawyer’s trust or escrow account. Consequently, it is a violation of the Texas Disciplinary Rules of Professional Conduct for a lawyer to agree with a client that a fee is non-refundable upon receipt, whether or not it is designated a “non-refundable retainer,” if that fee is not in its entirety a reasonable fee solely for the lawyer’s agreement to accept employment in the matter. A lawyer is not permitted to enter into an agreement with a client for a payment that is denominated a “non-refundable retainer” but that includes payment for the provision of future legal services rather than solely for the availability of future services. Such a fee arrangement would not be reasonable under Rule 1.04(a) and (b), and placing the entire payment, which has not been fully earned, in a lawyer’s operating account would violate the requirements of Rule 1.14 to keep funds in a separate trust or escrow account when funds have been received from a client but have not yet been earned.

When considering these issues it is important to keep in mind the purposes behind Rule 1.14. Segregating a client’s funds into a trust or escrow account rather than placing the funds in a lawyer’s operating account will not protect a client from a lawyer who for whatever reason determines intentionally to misuse a client’s funds. Segregating the client’s funds in a trust or escrow account may however protect the client’s funds from the lawyer’s creditors in situations where the lawyer’s assets are less than his liabilities and the lawyer’s assets must be liquidated to attempt to satisfy the lawyer’s liabilities. In those situations, client funds in an escrow or trust account may be protected from the reach of the lawyer’s creditors.

Accordingly, if a lawyer proposes to enter into an agreement with a client to receive an appropriate non-refundable retainer meeting the requirements for such a retainer and also to receive an advance payment for future services (regardless of whether the amount for future services is determined on a time basis, a fixed fee basis, or some other basis appropriate in the circumstances), the non-refundable retainer must be treated separately from the advance payment for services. Only the payment meeting the requirements for a true non-refundable retainer may be so denominated in the agreement with the client and deposited in the lawyer’s operating account. Any advance payment amount not meeting the requirements for a non-refundable retainer must be deposited in a
trust or escrow account from which amounts may be transferred to the lawyer’s operating account only when earned under the terms of the agreement with the client.

CONCLUSION

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.
Exhibit 3 – Sample E-mail from Con Artist
No thanks.

I am leaving the workplace now on a business and won't be around for a week. Looking at the time difference on both sides I recommend I keep in touch with you by email with general outline of the case, we can then examine the matter in detail via telephone when I get back.

Let me know your thoughts.

On Wed, May 27, 2015 at 8:15 PM, Andrew Weisblatt <adw@weisblattlaw.com> wrote:

We routinely handle breach of contract cases.

We would begin with a telephone conference. You may contact me at your convenience.
Facsimile: 713-784-7797
Cellular: 832-248-5156

Information contained in this e-mail message is intended only for the personal and confidential use of the recipient(s) named above. This message may be an attorney-client communication and/or work product and as such is privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to the intended recipient, you are hereby notified that you have received this document in error and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you have received this communication in error, please notify us immediately by e-mail, and delete the original message. Please see our complete terms and conditions of e-mail use at: WWW.WEISBLATTLAW.COM

From: [your-name]
Sent: Wednesday, May 27, 2015 1:14 PM
To: Andrew Weisblatt
Subject: WEBSITE INQUIRY

From: [your-name]
Subject: [your-subject]

Message Body:
Legal representation based on breach of sale contract. I wait to hear from you if your firm take on such case.

Kind Regards,
[your-name]

---
This mail is sent via contact form on WEISBLATTLAW http://weisblattlaw.com

---
Malta
Telephone [phone-number]
Exhibit 4 – Sample Settlement Statement
VIA E-MAIL ONLY TO: ** CLIENT E-MAIL ADDRESS **

CLIENT NAME
CLIENT ADDRESS

Re: Cause No. 2014-XXXX; ** CLIENT v. BAD GUYS; In the District Court of Harris County, Texas, XXXst Judicial District

SETTLEMENT STATEMENT

Dear CLIENT –

I am pleased we were able to bring this case to a successful resolution. Please sign below confirming the distribution of the settlement funds. With your authorization, the settlement proceeds will be applied to your current balance and final bill dated today, ** DATE **. The remainder will be disbursed in accordance with your instructions below. Applying this information to the settlement proceeds yields the following:

Total settlement amount received: $25,000.00

Past Due Amount (invoices nos. XXX and XXXX): $8,000.00

Current Balance Due (invoice XXXX): $1000.00

Total Due to The Weisblatt Law Firm, LLC: $9,000.00

NET PROCEEDS TO CLIENT: $16,000.00

Please let me know if you have any questions.

Cordially,

The Weisblatt Law Firm, L.L.C.

Andrew D. Weisblatt
I HAVE REVIEWED THE FOREGOING SETTLEMENT STATEMENT AND APPROVE IT.

Signature: _________________________   Date: ________________

Printed Name: ______________________

___ Please hold my funds. I will pick them up.

___ Please wire transfer my funds according to the following information:

   Bank Name:   ____________________

   Account Name:  ____________________

   Account Number: ____________________

   Routing Number: ____________________

(All wire expenses will be deducted from client’s funds.)

___ Please mail my funds to the following address:

____________________________________

____________________________________
QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer deliver to the Texas Comptroller of Public Accounts, and file related reports concerning, funds or other property held in the lawyer’s trust account for which the lawyer is unable to locate or to identify the owner?

STATEMENT OF FACTS

A lawyer holds in his trust account funds or other property belonging to a client or a third party. After three years, despite reasonable efforts, the lawyer either is unable to locate the client or third party that is the owner of the funds or other property or is unable to determine the identity of the owner.

DISCUSSION

Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct sets forth a lawyer’s obligations regarding funds and other property belonging to clients or third persons. Among other requirements, Rule 1.14(a) requires that a lawyer holding such funds keep the funds in a separate trust or escrow account and that “[c]omplete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.” Rule 1.14(b) provides:

“Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.”

Further, Rule 1.14(c) includes the requirement that “[a]ll funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law.”

Section 72.001(e) of the Texas Property Code defines a “holder” of property as “a person, wherever organized or domiciled, who is: (1) in possession of property that belongs to another;
(2) a trustee; or (3) indebted to another on an obligation.” Section 72.101(a) of the Texas Property Code provides that, with exceptions not here relevant:

“. . . personal property is presumed abandoned if, for longer than three years: (1) the existence and location of the owner of the property is unknown to the holder of the property; and (2) according to the knowledge and records of the holder of the property, a claim to the property has not been asserted or an act of ownership of the property has not been exercised.”

Section 74.301(a) of the Texas Property Code states, in relevant part, that “each holder who on June 30 holds property that is presumed abandoned under Chapter 72, 73, or 75 shall deliver the property to the comptroller on or before the following November 1 accompanied by the report required to be filed under Section 74.101.” Under section 74.101(a) of the Texas Property Code, each holder of property presumed abandoned under chapter 72 (which includes section 72.101(a) quoted above) “shall file a report of that property . . . .” with the Comptroller of Public Accounts. Section 74.101(c) requires that the report include, if known by the holder, certain identifying information about each person who appears to be the owner of the property or any person who is entitled to the property. Under section 74.103 of the Texas Property Code, a holder of property who is required to make such a report must keep for ten years certain records concerning reported property and persons who appear to be owners of such property.

Although this Committee does not have authority to interpret statutory law and no opinion is here offered as to the interpretation of the provisions of the Texas Property Code cited above, for purposes of this opinion the Committee assumes a Texas lawyer could reasonably conclude that in certain circumstances these provisions apply to property held in his trust account for which the owner of the property cannot be located or cannot be identified.

No provision of the Texas Disciplinary Rules of Professional Conduct limits or prohibits the transfer to the Texas Comptroller of funds or property that a lawyer reasonably believes to be “presumed abandoned” under the Texas Property Code. Any delivery of funds required by provisions of the Texas Property Code will be within the scope of Rule 1.14(b), which requires, with exceptions not here applicable, that “a lawyer shall promptly deliver to the . . . third person any funds or other property that the . . . third person is entitled to receive . . . .” Accordingly, if a lawyer concludes that he holds property subject to the delivery requirements of the Texas Property Code, Rule 1.14(b) of the Texas Disciplinary Rules of Professional Conduct not only permits but requires the lawyer to deliver such funds or property to the Comptroller in accordance with the Property Code’s requirements.

With respect to the filing of reports with the Comptroller on property required to be transferred to the Comptroller under the Texas Property Code, it is necessary to consider the requirements of Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct concerning confidential information relating to a lawyer’s representation of current and former clients. Rule 1.05(a) defines “confidential information” to include both “privileged information” and “unprivileged client information.” The latter category is broadly defined in Rule 1.05(a) to mean “all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.”
Much of the information called for in a report to the Comptroller under section 74.101 of the Texas Property Code appears to come within the definition of “confidential information” under Rule 1.05(a), including, for example, the name, social security number, driver’s license number, e-mail address, and last known address of the client or other person to whom the property is believed to belong.

Rule 1.05(c)(4) expressly authorizes a lawyer to reveal confidential information “[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.” (emphasis added) Thus, if a lawyer files a report containing confidential client information that the lawyer reasonably believes is required under provisions of the Texas Property Code concerning abandoned property, filing such report would not violate the lawyer’s obligations regarding confidentiality under Rule 1.05. It must be emphasized that this authorization applies only to disclosures that are “necessary” for compliance with applicable law. Particularly in view of the general obligation imposed by Rule 1.05 for lawyers not to reveal confidential information acquired in the representation of clients unless an exception such as Rule 1.05(c)(4) applies, the lawyer must take care not to make disclosures that exceed what is required to comply with applicable law. As noted in Comment 14 to Rule 1.05, “... a disclosure adverse to the client’s interest should be no greater than the lawyer believes necessary to the purpose.”

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer is permitted to deliver to the Texas Comptroller of Public Accounts, and to file required reports concerning, funds or other property held in the lawyer’s trust account for which the lawyer is unable to locate or to identify the owner, provided the lawyer reasonably believes that such action is required by applicable provisions of Texas law on abandoned property.
QUESTION PRESENTED

May a lawyer enter into a fee arrangement in which the lawyer bills for his services and the client agrees that, if payment is not made to the lawyer within 30 days of tender of the invoice, the lawyer may charge the client’s credit card for the amount of the invoice?

STATEMENT OF FACTS

A lawyer proposes to represent a client under a fee agreement that includes a provision under which the client authorizes the lawyer to charge the client’s credit card for invoices that are 30 days past due.

DISCUSSION

Both this Committee and the American Bar Association Standing Committee on Ethics and Professional Responsibility have previously ruled that using credit cards in payment of legal fees is acceptable. See Texas Professional Ethics Committee Opinion 349 (October 1969); American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 00-419 (July 7, 2000). Thus, a lawyer may accept a credit card in payment of a fee.

In the fact scenario here considered, the client is given the opportunity to pay by some other means during the first 30 days after the invoice is submitted. Only if the client does not pay within 30 days is the client’s credit card charged. Rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct states in part: “A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee.” If the fee charged otherwise complies with the Texas Disciplinary Rules of Professional Conduct and any applicable requirement for court approval of the fee, then there is nothing inherently illegal or unconscionable about the arrangement as stated. Because the facts in this opinion involve charging the client’s credit card after the legal services have been performed, it is permissible for the funds received under the credit card payment arrangement to go into the lawyer’s operating account.

A different rule applies if the client disputes the fee. It is not permissible for a credit card payment arrangement to negate the requirement that an attorney hold disputed funds separately. In ordinary circumstances, when a lawyer holds money or property of another and a dispute arises, a lawyer is required to segregate any disputed funds until the dispute is resolved. Rule 1.14(c) states in part:

“When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. . . . If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved . . . .”
If such a dispute exists, the lawyer may charge the client’s credit card for the disputed amount but the lawyer may not place that amount in his operating account.

CONCLUSION

The Texas Disciplinary Rules of Professional Conduct do not prohibit a lawyer’s charging a credit card for attorney’s fees that have been earned by the lawyer provided the client consents and the client’s ability to challenge a disputed statement for legal fees is preserved.
QUESTION PRESENTED

May a law firm hire a lawyer who is not an associate, partner, or shareholder of the law firm to provide legal services for a client of the firm and then bill the client a higher fee for the work done by that lawyer than the amount paid to the lawyer by the firm?

STATEMENT OF FACTS

A law firm enters into an arrangement with a lawyer who is not an associate, partner or shareholder of the law firm to work on a matter for a client. The law firm will pay the lawyer an agreed-upon amount for his work on the matter, but the lawyer will not assume joint responsibility with the law firm for the representation. The law firm intends to charge the client an hourly fee established by the law firm for the lawyer's work as well as for the work of the partners, shareholders and associates of the law firm. The result is that the law firm will charge the client more for the lawyer's work than the law firm is paying the lawyer for that work. The lawyer will be identified on the law firm's bills along with a description of the work done and the hours spent doing that work, but the amount paid by the law firm to the lawyer will not be disclosed to the client.

DISCUSSION

Rule 7.01(a) of the Texas Disciplinary Rules of Professional Conduct refers to lawyers practicing under a firm name, and Rule 7.01(d) provides that “[a] lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.” Rule 1.04(f) deals with a division of fees between “lawyers who are not in the same firm . . . .” The Terminology Section of the Texas Disciplinary Rules provides that “‘Firm’ or ‘Law firm’ denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government” and that “‘Partner’ denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.”

Rule 1.04(f) requires that, when a law firm and a lawyer who is not “in” the firm divide legal fees or agree to do so, the division must meet several requirements: (1) either the billing is in proportion to services performed or the lawyers involved assume joint responsibility for the matter, (2) the client consents in writing to the terms of the fee division arrangement, and (3) the total fee complies with the requirement of Rule 1.04(a) that a fee for legal services not be unconscionable.

If a lawyer is “in” the law firm that is billing for the lawyer’s work, such billing will not involve a division of fees and the requirements of Rule 1.04(f) will not apply. To determine whether a lawyer is or is not “in” a law firm, the relationship between the lawyer and the law firm must be considered in more detail. A lawyer will either be in the law firm and referred to in this opinion as a “firm lawyer” or not in the law firm and referred to in this opinion as a “non-firm lawyer.” The Texas Disciplinary Rules do not provide guidance on when a lawyer is in a law firm for purposes of the Rules. That may be in part because traditionally law firms consisted basically of partners or shareholders and “associates,” who were
any lawyers employed by the law firm who were not partners or shareholders. Today the legal services landscape is more varied.

In the case of a firm lawyer, his relationship with the firm may be as a shareholder, partner, or associate or he may have some other type of relationship with the firm. For the purposes of this opinion, firm lawyers who are not shareholders, partners, or associates will be referred to “other firm lawyers.” Other firm lawyers are lawyers that are reasonably considered to be “in” the law firm. Such a determination can be based on various objective factors, including but not limited to the receipt of firm communications, inclusion in firm events, work location, length and history of association with the firm, whether the firm and the lawyer identify or hold the lawyer out as being in the firm to clients and to the public, and the lawyer’s access to firm resources including computer data and applications, client files and confidential information. Examples of other firm lawyers include lawyers referred to as of counsel, senior attorneys, contract lawyers and part-time lawyers.

Just as with partners, shareholders and associates, a firm may establish an hourly rate for other firm lawyers that results in the firm charging the client more for the work of the other firm lawyers than the law firm is paying those lawyers for that work. Doing so does not mislead or deceive the client because other firm lawyers are understood to be “in” the firm, as are partners, shareholders and associates. For the same reasons, the law firm may identify other firm lawyers on the firm’s bills with a description of the work, the hours expended, and the lawyer’s hourly rate. Doing so does not violate either Rule 1.04(f) or Rule 7.01.

For the purposes of this opinion, the term “non-firm lawyer” as applied to a particular lawyer’s relationship to a law firm means a lawyer who is not “in” the law firm and instead practices separately from the law firm even when working with the firm on a particular client’s matter. The determination as to whether a particular lawyer is or is not “in” a particular law firm can be based on the various objective factors discussed above. Examples of non-firm lawyers can include outside patent counsel, local counsel, counsel with expertise dealing with a particular government agency, counsel in another state hired to advise regarding the application of that state’s laws, and lawyers hired individually or through another organization that provides temporary additional staffing or capabilities such as document review or research for a particular matter. In many cases, a non-firm lawyer is in fact a member of another law firm.

In the case of non-firm lawyers, it is the opinion of the Committee that a division of fees subject to Rule 1.04(f) is not involved if the law firm bills the client as an expense, and without markup, the non-firm lawyer’s fees which have been billed to the law firm by the non-firm lawyer. Billing for a non-firm lawyer’s services as an expense should not be considered a division of fees implicating Rule 1.04(f) because there is in fact no division of fees taking place – the law firm is billing and collecting for the law firm the fees due for the law firm’s services and the law firm is billing, collecting and paying over the fees charged by the non-firm lawyer for that lawyer’s services. Although treating a non-firm lawyer’s bills as an itemized expense without markup would be the most usual arrangement in such cases, the law firm could also avoid a division of fees while including the non-firm lawyer’s work in hourly billing provided that there was a clear presentation in the bill of the non-firm lawyer’s billed time and resulting bill amount without markup or markdown. In this latter billing arrangement, the law firm would also be required to indicate clearly in the bill that the non-firm lawyer was not a lawyer in the firm.

Under Rule 1.04(f), a division of fees will exist when a law firm includes in its bills fees for work done by a non-firm lawyer and the amounts billed to the client for the non-firm lawyer’s work differ from the amounts billed by the non-firm lawyer to the law firm for such work. In that situation, either the non-firm lawyer is sharing fees for his services with the law firm or the law firm is sharing a portion of its fees with the non-firm lawyer. For example, consider the situation in which a law firm is handling a lawsuit
for a client and then brings in a non-firm bankruptcy lawyer for advice on a particular issue. In one month the bankruptcy lawyer bills the firm $500 for five hours of work on the case billed at the bankruptcy lawyer’s standard billing rate of $100 per hour. The law firm may, without engaging in a division of fees subject to Rule 1.04(f), bill to the client the $500 billed by the bankruptcy lawyer either as an expense or as hourly work for which exactly $500 is included in the law firm’s fee. However, if the firm bills the client more than $500 (say, $600) for the bankruptcy lawyer’s work, there will be a division of fees between the firm and the bankruptcy lawyer because the law firm rather than the bankruptcy lawyer will receive the excess (in this example $100) over the $500 billed by the bankruptcy lawyer for his 5 hours of work. There would also be a division of fees if the law firm chose to bill the client less than $500 (say $450) for the bankruptcy lawyer’s work because in that case the law firm would be sharing with the bankruptcy lawyer the law firm’s fees to the extent the amount collected for the bankruptcy lawyer’s work itself was insufficient to cover the full $500 due to the bankruptcy lawyer – in this example $50 of the law firm’s fees would be shared with the non-firm lawyer.

Thus, in the case of non-firm lawyers, when a law firm bills a client for the work of the firm’s lawyers and for the work of a non-firm lawyer, there will be a division of fees under Rule 1.04(f) unless the law firm bills the non-firm lawyer’s fee to the client in the same amount as billed to the law firm by the non-firm lawyer. If there is a difference between the amount billed by the non-firm lawyer and the amount charged by the law firm to the client with respect to this work, such billing will not be permissible unless all the requirements of Rule 1.04(f) are met – proportionality of fees to services performed or joint responsibility for the representation, written client consent to the terms of the fee division, and a total fee that is not unconscionable under Rule 1.04(a). In addition, Rule 7.01(d) will prohibit the law firm from incorporating the non-firm lawyer’s name, work and time into its own bill unless the law firm does so in a way that identifies the non-firm lawyer as a lawyer who is not in the firm.

The Committee notes that the conclusions reached in this opinion differ substantially from the conclusions reached in American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 00-420 (November 29, 2000) (the “ABA Opinion”). The ABA Opinion concluded, interpreting rules similar to the applicable provisions of the Texas Disciplinary Rules, that if the costs associated with a contract lawyer’s services are billed as an expense they should not be greater than the actual cost incurred by the billing lawyer (including expenses of the billing lawyer in obtaining and providing to the client the services of the contract lawyer) but that a billing lawyer may add a surcharge for the services of a contract lawyer when the services are billed to the client as a fee for legal services provided that the total charge is reasonable. However, for the reasons set forth above, this Committee believes that the conclusions reached in the present opinion correctly interpret the provisions of the Texas Disciplinary Rules of Professional Conduct applicable to Texas lawyers with respect to the issues addressed in this opinion.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a law firm may establish an hourly rate for a lawyer who is not a shareholder, partner or associate but is otherwise “in” the firm, the law firm may use that hourly rate in billing clients for such lawyer’s work at a rate that is more than the law firm is paying the lawyer for that work, and the law firm may identify such lawyer on the firm’s bills with a description of the work performed, the hours expended, and the lawyer’s hourly rate without distinguishing such lawyer from other lawyers in the firm and without disclosing the amount paid by the firm to such lawyer. However, when a law firm bills a client for legal services provided by a lawyer that is not “in” the law firm, there will be a division of fees between the law firm and the lawyer unless the law firm bills the client precisely the amount that has been billed to the law firm by such lawyer. Any arrangement for division of fees between a law firm and a non-firm lawyer would be required to meet all
the requirements of Rule 1.04(f) - proportionality of fees to services performed or joint responsibility for the representation, written client consent to the terms of the fee division, and a total fee that is not unconscionable under Rule 1.04(a). In addition, the law firm would be prohibited from incorporating a non-firm lawyer’s name, work and time into its own bill unless it did so in a way that showed that the non-firm lawyer was not in the firm.
Exhibit 8 - Additional Resources

a. Texas Center for Legal Ethics

b. State Bar of Texas
   i. http://www.texasbar.com/AM/Template.cfm?Section=For_Lawyers
      1. See Particularly – Resource Guides section
      2. See particularly – Grievance and Ethics Info

c. Texas Disciplinary Rules of Professional Conduct
   i. http://www.texasbar.com/AM/Template.cfm?Section=Ethics_Resources&Template=/CM/ContentDisplay.cfm&ContentID=14125

d. Texas Rules of Disciplinary Procedure
   i. http://www.texasbar.com/AM/Template.cfm?Section=Ethics_Resources&Template=/CM/ContentDisplay.cfm&ContentID=11069

e. Texas Board of Disciplinary Appeals
   i. http://txboda.org/

f. Contact me anytime:
   i. www.weisblattlaw.com