



# ETHICAL ISSUES IN CONTRACTING APPELLATE COUNSEL

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## Scope of Engagement

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### Texas Disciplinary Rule of Professional Conduct 1.02(b):

- “A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.”

### Comment 4:

- “The scope of representation provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined objective. . . . The scope within which the representation is undertaken also may exclude specific objectives or means, such as those that the lawyer or client regards as repugnant or imprudent.”

# Scope of Engagement

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## Comment 6:

- “If a lawyer's representation is limited to a specific matter or matters, the relationship terminates when the matter has been resolved.”
- “Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.”
- “For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.”



when you don't know the case  
you cited in your brief

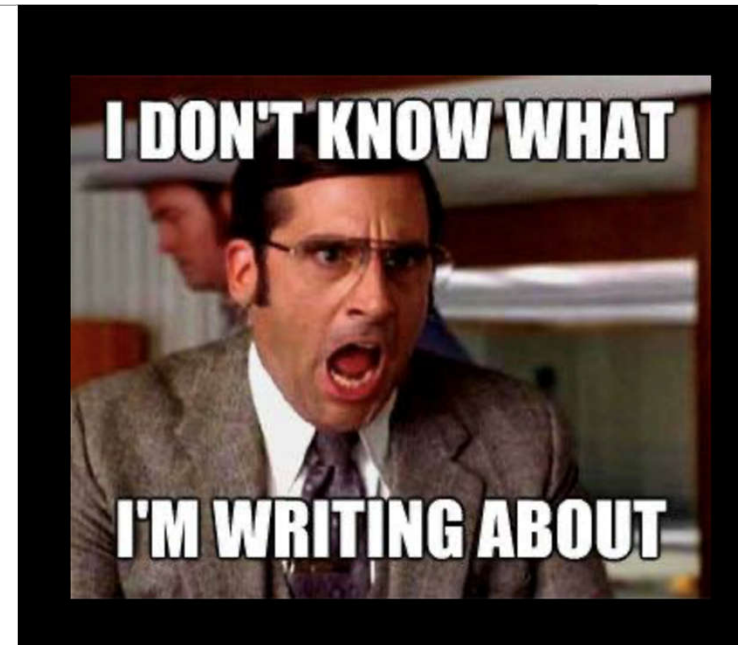


## Fees Generally-Rule 1.04

- (a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.
- (b) [factors to be considered in setting fees]
- (c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

# Contingent Fees-Rule 1.04(d)

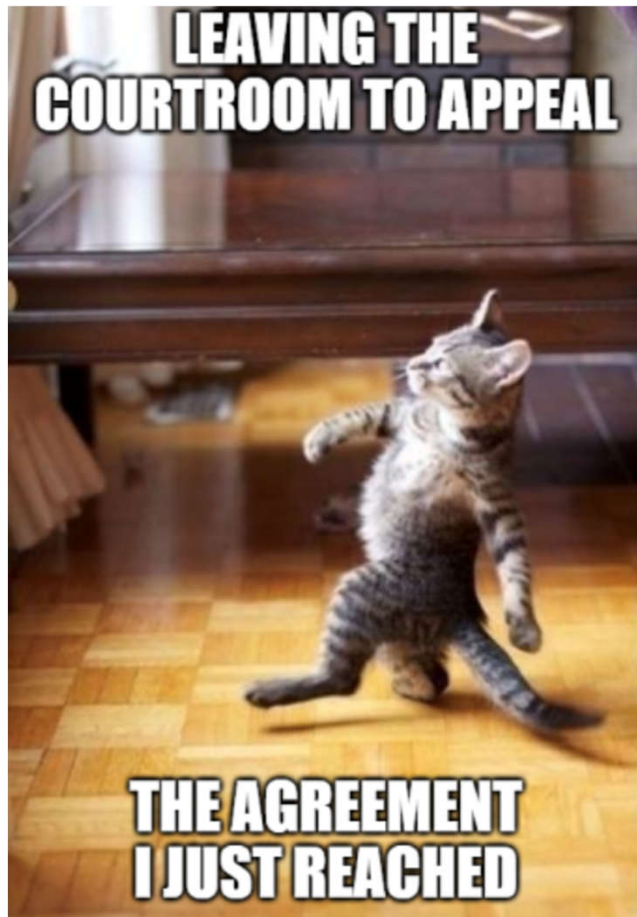
- Shall be in writing
- Shall state the method by which the fee is to be determined
- If different, percentages in the event of settlement, trial, or appeal shall be stated
- Shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated
- Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.



# Contingent Fee Splitting: Rule 1.04(f)

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- Division of fees between lawyers (not in the same firm): in proportion to the professional services performed or lawyers must assume joint responsibility for the representation; and
- The client must consent in writing **prior to the time of the association/referral proposed to:**
  - (i) identity of all lawyers or law firms participating, and
  - (ii) whether fees will be divided based on the proportion of services performed or by lawyers assuming joint responsibility, and
  - (iii) the share of the fee that each lawyer will receive or, if division is based on the proportion of services performed, the basis for the division; and
  - (iv) aggregate fee must not be unconscionable/unreasonable



# Additional Agreement Considerations

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- **Expenses:** who pays costs and expenses?
- **Who's the client?:**
  - Client is both the trial attorney and the trial attorney's client
  - Joint representation disclosures: Texas Rule of Disciplinary Procedure Rule 1.06(c)
- **Client Relations:** who will be in contact with and provide updates to the client?

# Additional Agreement Considerations

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- **Matter reference:** Reference the case by style and case number.
- **Retainer:**
  - How much?
  - “Evergreen retainers”
  - How paid; how replenished. (Check, eCheck, credit card, wire, etc.)
  - Give the client time to review the bill before transferring the retainer funds from your IOLTA to your operating account, and state how long that grace period is in your retainer agreement
  - State in the engagement letter that you reserve the right to withdraw for nonpayment!



# Additional Agreement Considerations

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- **Interest:** If you are going to charge interest for late payments, that has to be expressly spelled out and the amount cannot be usurious under the law.
- **Notices to client:** Professional misconduct claims submitted to the state bar; Texas Lawyer's Creed; Standards of Appellate Conduct.



# Additional Agreement Considerations

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- **Dispute resolution:** State the governing law particularly if working on out-of-state case or with out-of-state counsel. Consider a forum selection clause/arbitration clause.
- **Solo practitioners:** Include practice wind-up procedures/conservator information and information-sharing agreement

# Brandy Wingate Voss

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Brandy has represented clients before the Texas Supreme Court, the Texas Court of Criminal Appeals, the Texas intermediate courts of appeals, and the Federal Courts of Appeals for the Fifth and Third Circuits. She is board certified in Civil Appellate Law by the Texas Board of Legal Specialization. Brandy also has extensive experience in criminal appellate matters



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Kirk is a partner at the law firm of Durham, Pittard & Spalding, LLP which is an appellate boutique specializing in civil appeals and litigation support in state and federal court. As an instrument rated pilot, Kirk also practices Aviation Law.

Kirk graduated from Baylor University School of Law, in Waco, Texas in 1999 where he served as the Assistant Managing Editor for the Baylor Law Review and was on Baylor's mock trial team. Kirk is admitted to practice in all courts in Texas, New Mexico, and Colorado state courts, the United States Supreme Court, United States Court of Appeals for the Fifth and Second Circuits, United States District Courts for the Northern, Southern, Eastern, and Western Districts of Texas, and United States District Courts for the Eastern and Western Districts of Arkansas.



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