

Op enthousiaste wijze heeft mr. Bram Mulder, advocaat te Amsterdam, zijn licht laten schijnen over de onderwerpen "no cure no pay", "no pay no cure" en "contingency fees". Voor gedeeltelijke resultaatsafhankelijke tariefafspraken met advocaten blijkt in Nederlandse verhoudingen meer ruimte dan menigeeen denkt, aldus de spreker. Ook kwam aan bod de situatie op dit punt in Amerika, waarop het bijgaande/onderstaande syllabus-materiaal betrekking heeft.

contingent fee arrangements

The primary rules governing contingent fee arrangements between clients and attorneys were adopted by the Texas Supreme Court in 1990 and amended in 2005. The rules are codified in the Texas Government Code in §1.04 of the Texas Lawyers Disciplinary Rules of Professional Conduct. The rules are applied by the State Bar of Texas in resolving disciplinary matters. The State Bar's Chief Disciplinary Counsel issued an article offering further explanation and advice on compliance with §1.04.

According to §1.04(d), contingency fee arrangements are permitted under Texas law. The contingency fee arrangement must be in writing and must state the method by which the fee is to be determined. For example, the agreement must clearly state whether the fee is calculated on gross or net recovery. Also, if the percentage fee changes according to the length of the case (e.g., through settlement, through trial, through appeal), the various fee levels must be defined. In addition, the agreement must address the payment of expenses incurred during litigation. In particular, the agreement must define what expenses will be deducted and whether such expenses will be deducted before or after the contingent fee is calculated.

Although contingency fee arrangements are permitted, the lawyer must not enter into an arrangement for, charge, or collect an unconscionable contingency fee. §1.04(a). Factors to be used in evaluating the reasonableness of a fee include the time and labor required, the novelty of the case, the skill required, the fee customarily charged, the amount at issue, and the results obtained. §1.04(b). Contingency fees often range from 25% to 45% of the client's recovery. *See, e.g., San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82 (Tex. App.—San Antonio 2003, pet. denied); *Oyster Creek Financial Corp. v. Richwood Investments II, Inc.*, 176 S.W.3d 307 (Tex. App.—Houston 2004, pet. denied).

According to §1.04(e) of the disciplinary rules, contingent fees are not allowed in criminal cases. Contingent fees are also discouraged in family law cases because they may tend to promote divorce and be at odds with the attorney's obligation to encourage reconciliation. *See Ballasteros v. Jones*, 985 S.W.2d 485, 497 (Tex. App.—San Antonio 1998, pet. denied).

Attorney contingency fee agreements serve two main purposes: first, they allow plaintiffs who cannot afford an attorney up-front to pay an attorney out of a recovery; and second, such agreements, because they offer a potentially greater fee than would result under an hourly fee agreement, compensate the attorney for the risk that no fee at all will be recovered if the case is lost. *Arthur Anderson v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). In effect, the attorney lends the value of legal services that are secured by the client's potential recovery. *Id.* Despite this shared financial interest, the attorney representing a client under a contingency fee arrangement remains only the client's legal representative and does not become a co-plaintiff with his client. *Fincher v. Wright*, 141 S.W.3d 255, 261 (Tex. App.—Fort Worth 2004, no pet.). If the client under a contingency fee agreement dismisses his attorney before the resolution of the case, the attorney may recover from the client in quantum meruit for the value of services rendered. *See Auguston v. Linea Area Nacional-Chile S.A. (LAN-Chile)*, 76 F.3d 658 (5th Cir. 1996); *Hoover Slovacek L.L.P. v. Walton*, 206 S.W.3d 557 (Tex. 2006); *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969). Contingency fee agreements are voidable by the client if they are procured as a result of violating state laws or the disciplinary rules regarding barratry. Tex. Gov. Code §82.065.

Fee agreements between attorneys and clients may be hybrids of contingency fee agreements and hourly fee agreements. For example, a court recently upheld a fee agreement in which the hourly fee was reduced to \$95 with a \$10,000 cap, plus a 20% contingency fee on damages recovered, plus an additional 25% contingency fee in the event of an appeal. *See ASEP USA, Inc. v. Cole*, 199 S.W.3d 369 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Contingency fee agreements also need not necessarily result in a cash payment to the attorney. For example, in *Hynd v. Sandler*, 95 S.W.2d 165, 166 (Tex. Civ. App.—Dallas 1936, writ dismissed), the court upheld a contingency fee agreement that resulted in the recovery by attorneys of a one-third interest in an oil leasehold as a fee for their legal services.

Several recent Texas cases point out interesting aspects of the law concerning contingency fee arrangements. In *Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227, 230 (Tex. App.—Houston [14th Dist.] 2000, no pet.), Curtis was an attorney assisting another attorney from a different firm on two sexual harassment cases. Without telling the other attorney, Curtis signed separate contingency fee agreements with the sexual harassment plaintiffs that also included a component for hourly fees. *Id.* Thus, the plaintiffs became obligated to pay their attorneys at least a combined 70% of recovery if the cases settled before trial, 85% if jury selection was completed, and 100% if the case was appealed. *Id.* The appellate court found the fee structure was unconscionable and that Curtis has violated §1.04 of the disciplinary rules. *Id.* Curtis also committed other violations of the disciplinary rules including making false and misleading statements to clients about other lawyers. *Id.* at 234. Curtis was enjoined from the practice of law and forced to pay the Commission for Lawyer Discipline nearly \$8,000 in attorneys fees and court costs. *Id.* at 235.

In *Robnett v. Kirklin Law Firm*, 178 S.W.3d 45 (Tex. App.—Houston [1st Dist.] 2005, no pet.), an attorney sought to enforce a contingency fee agreement she had signed with a client while she was suspended from the practice of law. The attorney likened her case to another case in which a disbarred attorney was nevertheless awarded attorney's fees from a contingency fee agreement. *Id.* at 52. However, the appellate court observed that the disbarred attorney completed the legal services before his disbarment, so that situation was not comparable to the case at bar. *Id.* The court held the attorney was not entitled to recover attorney's fees on contingency fee agreements she signed while she was suspended from the practice of law. *Id.*

In *Garza v. Gray & Becker, P.C.*, 2002 WL 31769034 (Tex. App.—Austin 2002, pet. denied) (not designated for publication), a law firm represented three unions in an arbitration proceeding on a contingency fee basis. The unions were awarded \$82 million but attempted to disavow the contingency fee of 33 1/3% that they owed to their law firm because they argued union members were not individually liable for contracts entered into by the union itself. *See Id.* at *8. The court held the union members could not accept one portion of the arbitration award- the money awarded- while disavowing the contingent attorney's fees owed to collect the money awarded. *Id.*

In *Sanes v. Clark*, 25 S.W.3d 800 (Tex. App.—Waco 2000, pet. denied), an attorney entered into a contingency fee agreement with a client in which the attorney was purportedly authorized to settle a case without any further consultation with the client. The appellate court held that the no-consultation provision made the whole agreement voidable by the client since the provision violated disciplinary rules regarding maintaining communication with a client during the course of the case and communication with a client regarding any settlement offers. *Id.* at 805.

Finally, in *Levin v. Harrington*, 2001 WL 422072 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (not designated for publication), the court stressed that a party signing a contingency fee agreement on behalf of others must have the authority to do so, otherwise the attorney cannot collect his contingency fee from parties which the signer did not have authority to bind.