REVERSE, Opinion Signed June 30th, 2005

BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS

No. 32082

CINDY RENEA WEIR (State Bar Card No. 2199420)

v.

COMMISSION FOR LAWYER DISCIPLINE
OF THE STATE BAR OF TEXAS

On Appeal from the Evidentiary Panel
of the District 15D Grievance Committee
of the State Bar of Texas
SBOT Cause No. F2100213258

OPINION AND ORDER

Considered En Banc March 31, 2005

COUNSEL:

Appellant Cindy Renea Weir, Odessa, *pro se*

For Appellee, Commission for Lawyer Discipline of the State Bar of Texas, Linda A. Acevedo, Assistant Disciplinary Counsel, Austin

OPINION:

Appellant Cindy Renea Weir appeals from a State Bar of Texas disciplinary judgment signed February 4, 2004 suspending her from the practice of law for six months with the suspension fully probated[1] for charging an unconscionable fee in violation of Texas Disciplinary Rules of Professional Conduct 1.04(a) ("Rule(s)").[2] Weir argues on appeal that the evidentiary panel applied the incorrect standard for determining whether a fee is unconscionable. Appellee Commission for Lawyer Discipline of the State Bar of Texas ("Commission") moves to strike certain appendices to Weir's brief because they are not properly part of the record on appeal. Neither party requested argument.

We grant the motion to strike Appendices 1, 2, 3, 4, and 9 attached to Weir's brief. We agree with Weir that the Commission failed to show that the fee was unconscionable as a matter of law, reverse the finding of misconduct and the sanctions, and dismiss the complaint.

Underlying Grievance

This disciplinary action originated with a grievance filed against Weir by her former client, Sheerie Tyler, who first met with Weir in March 2002 to pursue an "employment discrimination" case against Tyler's employer, a dentist. Tyler paid Weir a $3,000 retainer on April 15 explaining that she believed the dentist was about to fire her because she had asked him to pay for carpal tunnel treatment for her under his workers' compensation coverage. Tyler claimed that she developed the carpal tunnel

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[1] Weir's sanction was not stayed during this appeal, and she served the probated suspension beginning April 1, 2004 and ending September 1, 2004. The evidentiary panel also ordered Weir to pay restitution to Sheerie Tyler in the amount of $500, attorneys' fees to the State Bar of Texas of $1,500, and $485.97 in costs to the Bar. BODA stayed disbursal of the restitution payment to Tyler pending the outcome of this appeal.

[2] All references to "Rule(s)" are to the TEX. DISCIPLINARY R. OF PROF. CONDUCT, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A.

injury while working for the dentist because he was left-handed, which required her to assist him from a position on the opposite side of the patient from where she had always worked.

Tyler had seen a poster in her employer's office stating that he was covered under the workers' compensation program. When Tyler told him that her doctor thought that her injury was due to her present job and asked him to pay for her therapy, the dentist supposedly became angry because he did not, in fact, have workers' compensation coverage. He did, however, pay for physical therapy for Tyler for about a month. When she told him that she needed additional treatment including surgery, he refused further payment.

Weir wrote to the dentist on April 16 to initiate settlement discussions concerning his failure to provide Tyler with the proper equipment, "basic assistance" for her injuries, and wrongfully denying her compensation and bonuses. His lawyer responded the next day, stating that the dentist provided Tyler with proper equipment and paid for some of her medical treatment, but denying that he owed her anything as the condition pre-existed her employment with him. Tyler was fired the following day.

Weir then asked Tyler to get documentation from her doctor refuting the dentist's claim that her condition pre-existed her employment with him. Tyler testified that she called Weir with questions about this documentation but always spoke with her assistant. Tyler never produced any statements or medical records for Weir. Near the end of May, Tyler asked Weir to return her file and the retainer fee.

Weir's secretary initially told Tyler that the fee was nonrefundable. Tyler contacted the State Bar Client Attorney Assistance Program, who wrote several letters to Weir. After Tyler filed a grievance, Weir returned $2,000 of the fee, and Tyler signed a statement that her claims against Weir were settled. Weir testified that she discussed returning a portion of the fee with the Chief Disciplinary

Counsel investigator handling the matter before doing so. He told her that, while it wouldn't stop the grievance, "it would help." Tyler thereafter testified at the grievance committee investigatory hearing that "Cindy paid me $2,000 of the $3,000 back, but I'm not satisfied."

The grievance committee investigatory committee found just cause, the parties were unable to negotiate a sanction, and Weir did not elect to have the case heard in district court,[3] and the matter was heard by an evidentiary panel of the State Bar of Texas district 15D grievance committee on February 5, 2004.

Unconscionability in Disciplinary Actions

The Commission argues that the proper standard of review in this case is substantial evidence[4] and that there is substantial evidence to support the finding of an unconscionable fee in violation of Rule 1.04(a). The amount of the initial retainer, the work Weir was hired to do, the work performed, and the amount of fee refunded to Tyler are not disputed. The evidentiary panel apparently found Weir's fee unconscionable by applying the "reasonableness" factors of Rule 1.04(b). However, the Rule and comments indicate that the factors in part (b) do not apply to disciplinary actions.[5] Whether

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[3] TEX. R. DISCIPLINARY P. 2.17, *reprinted* in TEX. GOV'T CODE, tit. 2, subtit. G, app. A-1 ("TRDP") (this case was tried under the procedural rules in effect prior to January 1, 2004; the prior rule was 2.16).

[4] TRDP 2.24 (prior Rule 2.21).

[5] "The Comments . . . explain applications of the rules, in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules." TEX. DISCIPLINARY R. PROF. CONDUCT *Preamble: Scope* para. 10.

a fee is unconscionable for disciplinary purposes is a question of law in Texas.[6] BODA reviews questions of law *de novo* on appeal.[7]

Rule 1.04(a) states: "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." However, the "reasonableness" standard of Rule 1.04(b) is too vague for a disciplinary action and is intended as guidance in (*inter alia*) the enforcement of fee contracts and awards of attorneys' fees in civil actions:

> The determination of reasonableness of a fee, or of the range of reasonableness, can be a difficult question, and a standard of "reasonableness" is too vague and uncertain to be an appropriate standard in a disciplinary action. For this reason paragraph (a) adopts, *for disciplinary purposes only*, a clearer standard: the lawyer is subject to discipline for an illegal or an unconscionable fee. Paragraph (a) defines an unconscionable fee in terms of the reasonableness of the fee *but in a way to eliminate factual disputes* as to the fee's reasonableness. The Rule's "unconscionable" standard, however, does not preclude use of the "reasonableness" standard of paragraph (b) *in other settings*.

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[6] Rule 1.04 cmt. 1; Robert P. Schuwerk & Lillian B. Hardwick, *Handbook of Texas Lawyer and Judicial Ethics* 358-359 (2004).

[7] *See In re Humphreys*, 880 S.W.2d 402, 404 (Tex. 1994) (conclusions of law are always subject to *de novo* review).

(emphasis added).[8] This approach was intended to "limit discipline to situations where reasonable minds could not differ as to whether the fee was clearly excessive or unconscionable," eliminating "factual disputes as to the fee's reasonableness."[9]

Generally, courts will not interfere with fee agreements, which are a matter of contract between attorneys and clients,[10] but a court will not enforce an unconscionable fee.[11] "A fee that seems

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[8] Rule 1.04 cmt. 1. While the disciplinary rules normally do not give rise to private causes of action or create any presumption that an attorney has breached a legal duty to a client (TEX. DISCIPLINARY R. PROF. CONDUCT *Preamble: Scope* para. 15), Texas courts have applied the factors in Rule 1.04(b) to determine reasonableness in various civil fee actions: *Bouquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) (reasonableness and necessity of attorney's fees awarded in suit under Declaratory Judgments Act must be determined in light of Rule 1.04(b)); *Arthur Anderson & Co., v. Perry Equip. Corp.*, 945 S.W.2d 812, 818-819 (Tex. 1997) (Rule 1.04(b) factors applied to determine reasonableness of attorneys' fees sought under fee-shifting of DTPA statute where plaintiff had contingent fee agreement with its attorneys, because DTPA allows recovery of "reasonable and necessary attorneys' fees"); *Doncaster v. Hernaiz*, 2005 Tex. App. LEXIS 773 (Tex. App.—San Antonio 2005, no pet. h.) (fee awarded in suit to collect a debt must be reasonable and necessary with reasonableness determined according to Rule 1.04(b)); *Goodyear Dunlop Tires N. Am., Ltd., v. Gamez*, 151 S.W.3d 574, 580 (Tex. App.—San Antonio, no pet.) (trial court must determine reasonableness of guardian ad litem fees under TRCP 173 by examining the factors set out in Rule 1.04(b)); *see also Kurtz v. Kurtz*, 2004 Tex. App. LEXIS 10631 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.) ("as a matter of public policy, reasonableness is an implied term in any contract for attorneys' fees.").

[9] Schuwerk & Hardwick 359 (internal quotation marks omitted).

[10] *Walton v. Hoover, Bax & Slovacek, L.L.P.* 149 S.W.3d 834, 842 (Tex. App.—El Paso 2004, petition filed); *see also* TEX. CIV. PRAC. & REM. CODE § 38.003 (rebuttable presumption exists that the usual and customary attorney's fees for a claim pursuant to that chapter are reasonable).

[11] *Id.* In *Walton*, the court found unconscionable as a matter of law an employment contract which provided for attorneys' fees due on termination of representation based on the present value of the claim with no basis for calculation because it effectively penalized the client for refusing a settlement offer and deciding to change counsel; the fee was tied to neither the work performed nor the actual recovery. *See also Goodyear Dunlop Tires of N. Am., Ltd. v. Gamez*, 151 S.W.3d 574 (Tex. App.—San Antonio 2004, no pet.) (guardian ad litem fees billed in excess of 24 hours for one day unconscionable).

high or even one that is in fact high is not the same as an unconscionable fee."[12] Consequently, it is important to distinguish between the standards for civil fee disputes and disciplinary proceedings, as many jurisdictions will not discipline an attorney for charging a merely unreasonable fee.[13]

The Commission argues that a presumption of unfairness or invalidity attaches to a fee agreement and that the attorney bears the burden of proving that the agreement is fair or reasonable. While the attorney seeking to recover fees *in a civil action* carries the burden of proving reasonableness,[14] in a disciplinary proceeding, the Commission must prove the material allegations of the Evidentiary Petition by a preponderance of the evidence.[15] The presumption of invalidity arises as to a fee contract entered into during the existence of the attorney-client relationship due to the fiduciary nature of that relationship, and the burden of showing fairness and reasonableness *of the new agreement* is on the attorney.[16] There is no allegation in the present case that Weir attempted to change or modify the fee agreement after the representation began.

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[12] *Aronin v. State Bar of California*, 52 Cal.3d 276, 801 P.2d 403, 407 (1990) citing *Herrscher v. State Bar*, 4 Cal.2d 399, 49 P.2d 832, 833 (1935) (internal quotation marks omitted). California is the only other state which, like Texas, has adopted a disciplinary rule prohibiting charging or collecting an "illegal or *unconscionable* fee."*Cal. Bar Rules*, Prof. Conduct Rule 4-100 (2005) (emphasis added).

[13] *Restatement (Third) of the Law Governing Lawyers* § 34 cmt. a (2000).

[14] *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991).

[15] TRDP 2.16M (predecessor Rule 2.17I).

[16] *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964), on which *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) relied.

The Commission also seeks to support the finding of unconscionability with evidence of the work Weir actually performed. However, unconscionability for disciplinary purposes is generally determined at the outset of the representation:

> [F]ee arrangements are normally made at the outset of representation, a time when many uncertainties and contingencies exist. . . . The "unconscionability" standard adopts that difference in perspective and requires that a lawyer be given the benefit of any such uncertainties for disciplinary purposes only. Except in very unusual situations, therefore, the circumstances at the time a fee arrangement is made should control in determining a question of unconscionability.[17]

Thus the tribunal normally determines whether a fee is unconscionable based on what the parties knew at the time of the fee agreement, not "with 20-20 hindsight."[18] If the tribunal examines the agreement in light of what happened after the fact, it is, in effect, rewriting the agreement.[19] The amount of work performed, "tangible" and "intangible," for the fee charged goes to a determination of "reasonableness," which is a fact inquiry.[20] The Commission did not charge Weir with failure to return an unearned fee[21] but relied solely on a violation of Rule 1.04(a).

The Commission also argues that the absence of a written fee contract supports the finding of an unconscionable fee because it is some evidence that Weir did not explain the basis of the fee to Tyler at the outset of the representation. However, written fee contracts are only required for

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[17] Rule 1.04(a) cmt. 7.

[18] Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics* 136 (2005-2006); Schuwerk & Hardwick at 358.

[19] Rotunda & Dzienkowski, *Id.*

[20] Rule 1.04(b).

[21] Rule 1.15(d) requires: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payments of fee that has not been earned."

contingent fee matters,[22] and the Commission did not pursue a violation of Rule 1.04(c).[23] Although lack of a written contract could be relevant to whether an attorney failed to give a clear and accurate explanation of how a fee was to be calculated in deciding a "borderline" case,[24] Tyler did not complain that she did not understand the basis of the fee. She testified that she had previously worked for an attorney, and "kind of [knew] the way that lawyers charge."

Tyler's testimony at the evidentiary hearing underscores that this is a fee dispute case. Tyler explained that, when she first hired Weir and paid her the $3,000, the immediate priority was for Weir to write a letter to her employer as Tyler knew she was about to be fired. She said that she expected that the fee would cover other work that Weir would do. When asked by a panel member at the hearing:

> Panel: Okay, So your problem today is that you've not been refunded the amount of money that you think you should be; is that right?
>
> The Witness: Yes, sir.
>
> Panel: How much money do you think you should have been refunded?
>
> The Witness: Oh, I – I don't know.
>
> Panel: Do you have any idea what work or efforts that their office did?
>
> The Witness: No, sir . . . . I just didn't think it was $3,000 worth of work.

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[22] Rule 1.04(d).

[23] Rule 1.04(c) requires: "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."

[24] Rule 1.04 cmt 8.

The Commission investigator testified that when Tyler called him initially about the matter, her concern was that she needed money to buy her children Christmas presents and just didn't think that the work justified the fee. "Her issue was more about getting the money back, not so much on the grievance itself."

The Commission offered no evidence that a competent lawyer could not form a reasonable belief that the fee Weir charged Tyler was reasonable at the outset of the employment or even that the client believed the fee was not reasonable when she retained Weir. All the evidence related to Weir's failure to refund an amount satisfactory to Tyler after the representation ended.

Conclusion

A $3,000 retainer to make demand and pursue a contested law suit does not meet the test for unconscionability as a matter of law under Rule 1.04(a). Rather, the evidence focused on whether, after-the-fact, the amount of work performed justified the fee after Weir refunded two-thirds of the initial retainer to Tyler. This is a "reasonableness" question, not a Rule 1.04(a) action.

Accordingly, we grant Appellee's motion to strike and sustain Appellant Weir's issue that the Commission failed to prove an unconscionable fee as a matter of law and reverse the judgment, dismissing the grievance against Weir. Weir's disciplinary and State Bar membership records shall be corrected immediately to remove the disciplinary action and sanction, and the Chief Disciplinary Counsel's office shall immediately return to Weir the restitution funds it is holding and refund to her the attorney's fees and costs.

IT IS SO ORDERED.

S. Jack Balagia, Jr., Chairman

James S. Frost, Vice Chairman

Kathy J. Owen

William D. Greenhill

Robert Flowers

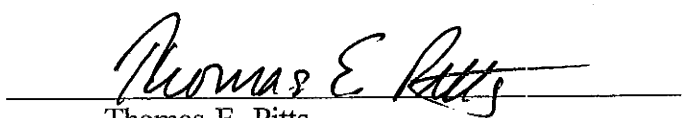
Karen L. Watkins

Paul D. Clote

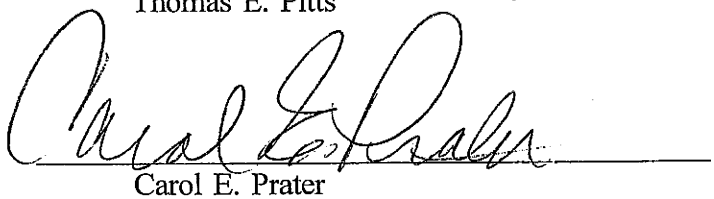
Yolanda de León

Clement H. Osimetha

Jose I. Gonzalez-Falla



Thomas E. Pitts



Carol E. Prater