



1-4-2022

Ethical Limits on Promising to Pay an Adverse Award of Attorney's Fees Against One's Client

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Recommended Citation

Chase C. Parsons, *Ethical Limits on Promising to Pay an Adverse Award of Attorney's Fees Against One's Client*, 12 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 186 (2022).

Available at: <https://commons.stmarytx.edu/lmej/vol12/iss1/6>

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COMMENT

*Chase C. Parsons**

Ethical Limits on Promising to Pay an Adverse Award of Attorney’s Fees Against One’s Client

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* St. Mary’s University School of Law, J.D., 2022. The author would like to thank those instructors he has been fortunate enough to learn from, most especially Mrs. Boeck, Mrs. Benoit, Mr. Shapiro, and Mr. Davidson—who above all others taught him a love of education and empathy for others; to Dr. Kolleen Guy, whose phenomenal guidance fortified his resolve to complete this work; to Professor Vincent Johnson for his sage words of wisdom in the creation of this Comment; and to Professors Colin Marks and David Grenardo for being constant examples upon which to emulate. Most thankfully the author would like to acknowledge Illiana, Maggi, Emma, Jaxon, and John—whose friendship it has been the greatest honor to earn—and without whom the author would not have succeeded. Finally, he would like to thank his parents and grandmother—Lorraine, John, & Dyphene—whose unwavering support continues to be the greatest blessing a son could pray for.

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I. INTRODUCTION

The ethical limitations on an attorney’s ability to assume financial responsibility for an adverse attorney’s fees award against one’s client is a topic of first impression in Texas. Because of this, attorneys who might wish to undertake this type of fee arrangement do so at their own peril. And while it is not currently widespread, it is possible that adopting the use of this practice would help expand access to the courts of justice. Plaintiffs who would otherwise forego bringing claims out of fear of being saddled with adverse attorney’s fees awards would gain an opportunity for redress.

Critics of this practice will be quick to point out that guaranteeing adverse attorney’s fees in a civil setting constitutes a breach of the Texas ethics rules. However, such is not automatically the case, and interpretations such as

these are a narrowly misguided approach to the rules. Therefore, it is the purpose of this Comment to further supplement and illuminate the several ethical underpinnings of guaranteeing adverse attorney's fees in a civil setting.

Like many states, Texas has inculcated its ethical rules within standardized Disciplinary Rules of Professional Conduct.¹ Texas patterns its disciplinary rules off the American Bar Association's *Model Rules of Professional Conduct*.² Because many other states follow a similar practice, their rules often parallel the form and intent of the Texas rules. It is due to these similarities that Texas can—and should—look to sister state jurisdictions for added guidance when deciding whether to adopt the practice of contingent adverse attorney's fee agreements.

II. TEXAS' RULES

A. *Disciplinary Rule of Conduct 1.04*

Being that the scenario proposed by this Comment is a form of contingency, Texas Disciplinary Rule of Professional Conduct 1.04 applies.³ Rule 1.04 provides the substantive regulations involving the fees that attorneys may charge their clients.⁴ The rule starts off with the notion of unconscionability and reasonableness⁵ and lists eight general non-exhaustive factors a court may consider when determining the reasonableness of a fee.⁶ The area of the rule that is of most importance to this analysis is found in subsection (d), and concerns itself exclusively with contingent fees.⁷ Subsection (d) provides:

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be

1. See generally TEX. DISCIPLINARY RULES PROF'L CONDUCT, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (outlining the disciplinary rules of professional conduct in Texas).

2. See generally MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2021) (providing guidance on how states should structure their disciplinary rules).

3. See generally TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.04 (addressing ethical standards relating to fees).

4. *Id.*

5. *Id.* at R. 1.04(a).

6. *Id.* at R. 1.04(b).

7. *Id.* at R. 1.04(d).

a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement 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.⁸

Like the drafters of the Texas Disciplinary Rules of Professional Conduct, this Comment realizes the important role of contingency fees while also acknowledging the precarious situation it can easily place clients in when abused.

The main purpose of contingency fee contracts is to provide representation to clients who would otherwise be incapable of affording legal services.⁹ Contingency fees protect the client from suffering a net financial loss should they fail to win their case.¹⁰ The upside for attorneys is they can charge higher fees than normally incurred under an hourly or up-front fee arrangement because of this increased risk.¹¹ This is exactly why an attorney might choose to guarantee the risk of adverse attorney's fees. The higher the risk, the more reasonable it is for an attorney to charge a higher percentage.

It is at this point where one can begin to see some of the possible issues which might arise in contingent fee contracts. There are some, like Professor Ted Schneyer, who might believe that contingency fees inherently give rise to situations which are not within the best interest of clients.¹² And while these issues are certainly possible, they are not inherently likely simply due to the nature of percentage fee agreements.

8. *Id.* at R. 1.04(d).

9. *See* Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 561 (Tex. 2006) (citing *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997)) (explaining the ways attorneys and courts can help indigent clients); Harold See, *An Alternative to the Contingent Fee*, 1984 UTAH L. REV. 485, 490 n.14 (1984); *see also* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 43 (1989) (describing the justifications for contingent fee agreements).

10. *Hoover Slovacek LLP*, 206 S.W.3d at 561.

11. *Id.* (citing *Arthur Andersen & Co.*, 945 S.W.2d at 818).

12. *See* Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DEPAUL L. REV. 371, 388-94 (1998) (prognosticating percentage contingency fee agreements give rise to agency issues, encouragement of frivolous claims, subornation of perjury, etc.).

The Texas Ninth Court of Appeals similarly voiced its concern for unilateral option provisions which shift the agreement from an hourly fee agreement to a contingent fee agreement.¹³ The ninth court correctly held that unilateral option provisions lessen the legitimate justifications for contingent fee's higher payout.¹⁴ In the situation posited by the ninth court, the client must pay either the hourly rate upon losing or a percentage fee upon success. This however is a simple issue to fix through proper contract drafting. The solution is to create a guaranteed contingency which actually benefits the client. A representation agreement needs to merely specify that the client will simply pay an hourly fee if his or her action is successfully disposed of in a short enough period of time as to make a percentage fee unconscionable.

B. *Disciplinary Rule of Conduct 1.08*

Texas Disciplinary Rule 1.08 covers the issue of conflicts of interest as they relate to transactions made between attorneys and their clients.¹⁵ It is Rules 1.08(d) & (h) of the Texas Disciplinary Rules of Professional Conduct which specifically limit the modes of assistance attorneys may offer their clients. Rule 1.08(d) states:

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that: (1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.¹⁶

Rule 1.08(h) states:

(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or

13. *Wythe II Corp. v. Stone*, 342 S.W.3d 96, 103 (Tex. App.—Beaumont 2011, pet. denied).

14. *Id.*

15. *See generally* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08, *reprinted in* TEX. GOV'T CODE Ann., tit. 2, subtit. G, app. A (discussing the various conflicts of interest issues that may arise in an attorney-client relationship).

16. *Id.* at R. 1.08(d).

expenses; and (2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.¹⁷

Case law surrounding the application of these provisions is sparse, and the Texas Supreme Court has yet to give much detailed analysis of the correct application of Rule 1.08(d).¹⁸ It is Rule 1.08(d) that would provide the crux of the guarantee of adverse attorney's fees. However, a fuller understanding of both the underlying historical considerations and how Rule 1.08 intersects with the other disciplinary rules is required before discussing the specifics of how this practice would work.

C. *Disciplinary Rule of Conduct 7.03*

Texas Disciplinary Rule 7.03(e) provides that “[a] lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting or referring prospective clients for professional employment”¹⁹ The rule goes on to say in subsection (f) that “[a] lawyer shall not, for the purpose of securing employment, pay, give, advance, or offer to pay, give, or advance anything of value to a prospective client, other than actual litigation expenses and other financial assistance permitted by Rule 1.08([e])”²⁰ It must be emphatically stated that the suggested practice of guaranteeing an award of adverse attorney's fees is not to be used as a lure by attorneys fishing for clients.

D. *Disciplinary Rule of Conduct 8.04(a)(9)*

Texas Disciplinary Rule 8.04(a)(9) states that a lawyer shall not “engage in conduct that constitutes barratry as defined by the law of this state[.]”²¹ Barratry, as far as Rule 8.04 is concerned,²² is defined under Section 38.12

17. *Id.* at R. 1.08(h).

18. *See* Tex. Comm. on Prof'l Ethics, Op. 542, 2002 WL 405093 (2002) (stating without explanation or authorities, besides Rule 1.08(d), that “[a] fee arrangement with an insurance company under which the lawyer is required to pay the costs and expenses of litigation, regardless of the outcome of the litigation, would constitute a violation of Rule 1.08(d)”).

19. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.03(e).

20. *Id.* at R. 7.03(f).

21. *Id.* at R. 8.04(a)(9).

22. Like champerty and maintenance, barratry is a nearly ancient common law crime that involves “[v]exatious incitement to litigation, esp. by soliciting potential legal clients.” *Barratry*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* Neese v. Lyon, 479 S.W.3d 368, 382 (Tex. App.—Dallas 2015, no pet.) (allowing clients to bring suit “to avoid contingency-fee agreements procured by barratry and seek the remedy of rescission and restitution”); *see generally Solicitation and Barratry*, STATE BAR OF TEXAS, <https://www.texasbar.com/Content/NavigationMenu/ForLawyers/Grievan>

of the Texas Penal Code.²³ Among other inapplicable violations, Section 38.12 provides that a person commits a barratry offense if he or she “pays, gives, or advances or offers to pay, give, or advance to a prospective client money or anything of value to obtain employment as a professional from the prospective client[.]”²⁴ However, the only way in which an attorney could execute the practice proposed here would be under a contingent fee agreement which meets the requirements of Rule 1.04. Subsequently, any client who could receive the benefit of this practice would be a current—rather than a prospective—client. This practice is not to be used as a means of soliciting clients. Rather, it should be used as a means of protecting existing clients from the threat of adverse attorney’s fees, thus expanding access to justice, most especially for indigent clients. Furthermore, as there is a prosecutorial exception for conduct which is authorized by the Texas Disciplinary Rules of Professional Conduct,²⁵ there is a necessity for the guaranteeing of adverse attorney’s fees to be explicitly approved by the Texas Supreme Court.²⁶

Barratry is still an all too common issue in Texas, and has even been litigated over while this Comment was being written.²⁷ The Texas Legislature saw fit to enact Section 82.0651 of the Texas Government Code, entitled “Civil Liability for Prohibited Barratry.”²⁸ Under Section 82.0651, a person who is found to be in violation of either the Penal Code²⁹ or Disciplinary Rule of Professional Conduct³⁰ can be assessed a \$10,000 penalty, actual damages springing from their conduct, and attorney’s fees.³¹

ceandEthics/SolicitationandBarratry/default.htm [https://perma.cc/6KV5-PZJ2](summarizing the relevant provisions and prohibitions under the Texas Disciplinary Rules of Professional Conduct).

23. See generally TEX. PENAL CODE ANN. § 38.12 (providing a series of violations which constitute barratry); Tex. Comm. on Prof’l Ethics, Op. 623, 76 Tex. B.J. 823 (2013) (discussing the prohibition of barratry and solicitation).

24. PENAL § 38.12.

25. *Id.* § 38.12(c); Tex. Comm. on Prof’l Ethics, Op. 623, 76 Tex. B.J. 823 (2013).

26. See *Medlock v. Comm’n for Lawyer Discipline*, 24 S.W.3d 865, 867 (Tex. App.—Texarkana 2000, no pet.) (upholding a twelve-month suspension and a fine of \$3,000 as attorney’s fees for committing a Rule 7.07(a) & 8.04(a)(9) violation via written solicitation).

27. See generally *Sullo v. Kubosh*, 616 S.W.3d 869 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (litigating three consolidated barratry cases with at least seventy-four plaintiffs).

28. TEX. GOV’T CODE ANN. § 82.0651; *Sullo*, 616 S.W.3d at 875.

29. PENAL § 38.12.

30. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 7.03, reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A.

31. GOV’T § 82.0651(b).

III. HISTORICAL CONSIDERATIONS

A. *Constitutional Values Invoked*

As previously mentioned, the Texas Rules of Professional Conduct are based on the American Bar Association's (ABA) *Model Rules of Professional Conduct*. However, in order to fully appreciate the historical significance of the concepts at hand, one must have a more in-depth idea of how the current ABA rules came about. The current rules were first adopted by the American Bar Association House of Delegates in 1983³² which replaced the 1969 *Model Code of Professional Responsibility*.³³ The Model Rules have frequently been revisited.³⁴

Those who cast dispersions against the notion put forth by this Comment fail to realize that the underpinnings of this notion span much wider than any state codes or the ABA *Model Rules of Professional Conduct*. The Constitution of the State of Texas has existed throughout history in six separate iterations.³⁵ In every version there has contained an open courts provision consisting of identical words.³⁶ The open courts provision reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."³⁷ While it is certain that the freedoms enshrined in the Texas Constitution significantly predate the adoption of even the *Canons of Professional Ethics*, one must look deeper into the tides of history to understand the true import of the open courts doctrine.

32. See generally MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2021) (showcasing the current rules issued by the ABA).

33. *Id.*; see also MODEL CODE OF PROF'L RESP. (AM. BAR ASS'N 1969) (serving as ABA's model rules before being replaced by the current *Model Rules of Professional Conduct*).

34. The Model Code was in turn preceded by the 1908 *Canons of Professional Ethics*. MODEL RULES OF PROF'L CONDUCT.; see also CANNON OF PROF'L ETHICS (AM. BAR. ASS'N 1908) (showing how the Model Code evolved into its current form).

35. *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 n.4 (Tex. 1986) ("Texas has had six constitutions: The Republic Constitution of 1836, the Statehood Constitution of 1845, the Confederate Constitution of 1861, the Union Constitution of 1866, the Reconstruction Constitution of 1869, and the present Post-Reconstruction Constitution of 1876."); see GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 2 (1977) (highlighting the evolution of the bill of rights through the six versions of the Texas Constitution).

36. *LeCroy*, 713 S.W.2d at 339; BRADEN ET AL., *supra* note 35, at 2.

37. TEX. CONST. art. I, § 13.

The open courts doctrine in the Texas Constitution is derived in large part from the Magna Carta.³⁸ The provision, which protects a remedy for every person by due course of law, does not create any new rights by itself, but rather, it highlights a principle of law which predates the English common law.³⁹ Despite being removed from the Magna Carta's⁴⁰ signing by over half a millennia, Texas has been outright in its adoption of the values inculcated within the Magna Carta.⁴¹ The open courts doctrine found in every version of the Texas Constitution is a derivation of the great liberties first guaranteed by the Magna Carta in 1215.⁴² The Texas Supreme Court has itself stated on separate occasions that “[a]ll grants of power are to be interpreted in the light of the maxims of Magna Charta and the Common Law as transmuted into the Bill of Rights[]”⁴³ and “[t]he open courts provision’s history also reflects its significance Colonists brought to America and then to Texas their belief in the historic rights guaranteed by Magna Carta.”⁴⁴

The impact of the Magna Carta on Texas law is incalculable. It was directly relied upon when drafting the 1836 Constitution of the Republic of

38. TEX. CONST. art. I, § 13 interp. commentary (West 2007).

39. *Id.*

40. For those rusty on their English history, the Magna Carta has been a cornerstone of western legal history for over eight centuries. Its inception came out of a civil rebellion against King John I which took place in 1215. *What is Magna Carta?*, BRITISH LIBRARY, <https://www.bl.uk/magna-carta/videos/what-is-magna-carta#> [<https://perma.cc/6BJU-J3FA>] (discussing the history behind the Magna Carta as well as its importance in today’s legal traditions). Fed up at the King’s immense taxes to fuel costly foreign wars, combined with his tyrannical disregard for the law, the barons of England took hold of London and captured the King. *Id.* This forced King John to sign into law certain rights and protections of the people. *Id.* The Magna Carta was the first major example of limiting the power of the sovereign in western history. *Id.*

41. Vincent Johnson, *The Great Charter A Look at the History and Texas Legacy of the Magna Carta, Which Celebrates Its 800th Anniversary This Year*, 78 TEX. B.J. 266, 266 (2015).

42. *See* *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986) (citing BRADEN ET AL., *supra* note 35, at 77) (providing a mechanism for the open courts doctrine to be used in modern day courts); *see also* Johnson, *supra* note 41, at 267 (quoting *LeCroy*, 713 S.W.2d at 339) (explaining the use of the open courts doctrine).

43. *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921); *see also* Johnson, *supra* note 41, at 267 (quoting *Spann*, 235 S.W. at 515) (expressing the continuing use of the open courts doctrine).

44. *LeCroy*, 713 S.W.2d at 339 (citing BRADEN ET AL., *supra* note 35, at 3; *see* Johnson, *supra* note 41, at 267 (quoting *LeCroy*, 713 S.W.2d at 339) (discussing the use of the open courts doctrine by the Texas Supreme Court).

Texas.⁴⁵ Furthermore, it was similarly used as a foundation for the Texas Bill of Rights.⁴⁶

The open courts doctrine stems from chapter 40 of the Magna Carta, which reads in English “[t]o no one will we sell, to no one deny or delay right or justice.”⁴⁷ While the concept of the open courts doctrine cannot be found in the United States Constitution, it has nonetheless “been a part of our constitutional law since our republic.”⁴⁸ It can be said with much historical foundation that the open courts doctrine as well as the very concept of due process “are rooted in the Magna Carta and represent a ‘basic consensus in our society about how government should act.’”⁴⁹

B. *The English System*

Having established the palpable impact of the Magna Carta on Texas law, it becomes necessary to point out a harmful concept in English law—known as the “English rule” of recovery. Under the English system, the losing party must pay the attorney’s fees of the opposing side.⁵⁰ While this “winner takes all” type of recovery method might seem the fairer way to go, it is indeed not. Our learned founders saw the crippling effect the English system could have on losing parties, as well as the chilling effect it had on plaintiffs bringing suit. In response to this, the “American rule” dictates that each party pays its own way with limited exceptions⁵¹ which were

45. Johnson, *supra* note 41, at 267; Jadd F. Masso, *Mind the Gap: Expansion of Texas Governmental Immunity Between Takings and Tort*, 36 ST. MARY’S L.J. 265, 272 (2005).

46. Johnson, *supra* note 41, at 267; Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY’S L.J. 93, 119 (1988).

47. *English Translation of Magna Carta*, Brit. Libr., <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation> [perma.cc/T7LJ-5TQ5] (furnishing a full-text translation of the Magna Carta) [hereinafter Magna Carta].

48. *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988); see Johnson, *supra* note 41, at 267 (affirming the continuity of the open courts doctrine into modern law).

49. *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984) (Robertson, J., concurring) (quoting BRADEN ET AL., *supra* note 35, at 51).

50. The power to award attorney’s fees and costs has existed for centuries in the English Court of Chancery. See *Guardian Trust Co. v. Kansas City S. Ry. Co.*, 28 F.2d 233, 240 (8th Cir. 1928) (citing *Stallo v. Wagner*, 245 F. 636, 638 (2d Cir. 1917)) (expressing the inequity in the English system).

51. In particular circumstances, an admiralty plaintiff can receive attorney’s fees, though they are technically considered to be included in compensatory damages. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (citing *Vaughan v. Atkinson*, 369 U.S. 527 (1962)). Attorney’s fees have been awarded in anti-discrimination suits as well. *Rolax v. Atl. Coast Line R. Co.*, 186 F.2d 473, 481 (4th Cir. 1951).

inherited from the common law⁵² and later expanded. The traditional exceptions being: cases of gross misconduct and fraud which were not sustained; where the basis of the suit is “false, unjust, vexatious, wanton, or oppressive and so shown to be[;]”⁵³ or for breach of fiduciary duty.⁵⁴ The American rule stretches all the way back to the foundation of our republic.⁵⁵ As early as 1796, the Supreme Court of the United States held against an award of attorney’s fees and required the parties to pay their own fees, stating: “The general practice of the United States is in opposition to [the general award of attorney’s fees]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.”⁵⁶ Rather than reversing this approach, the Legislature chose instead to codify the American rule by act of Congress in 1853.⁵⁷

52. *Russel v. Farley*, 105 U.S. 433, 437 (1881) (“But the Circuit Court of the United States . . . [is governed by] the rules of practice prescribed by this court and by the Circuit Court not inconsistent therewith; and, . . . by the practice of the High Court of Chancery in England prevailing when the equity rules were adopted . . . Equity Rule 90.”); *Payne v. Hook*, 74 U.S. 425, 430 (1868) (“The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses . . .”); *Fountain v. Ravenel*, 58 U.S. 369, 384 (1854) (“The courts of the United States cannot exercise any equity powers, except those conferred by acts of [C]ongress, and those judicial powers which the high court of chancery in England . . . possessed and exercised, at the time of the formation of the [C]onstitution of the United States.”); *Guardian Trust Co.*, 28 F.2d at 240 (citation omitted) (“The United States courts of equity at the time of their creation became endowed with the powers, including that over costs, possessed by the English Chancery Court.”).

53. *Guardian Trust Co.*, 28 F.2d at 241.

54. It should be noted that at least in Texas—unlike in other jurisdictions—attorney’s fees are generally unrecoverable for breaches of fiduciary duty. *See Messier v. Messier*, 458 S.W.3d 155, 165 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Hollister v. Maloney, Martin & Mitchell LLP*, No. 14-12-00529-CV, 2013 WL 2149823 (Tex. App.—Houston [14th Dist.] May 16, 2013, no pet.)) (expressing the oppressive nature of the “winner take all” mentality); *see also W. Reserve Life Assur. Co. of Ohio v. Graben*, 233 S.W.3d 360, 377 (Tex. App.—Fort Worth 2007, no pet.) (exploring the unjust nature of the English rule).

55. Daniel H. Fehderau, Comment, *Rule 11 and the Court’s Inherent Power to Shift Attorney’s Fees: An Analysis of Their Competing Objectives and Applications*, 33 SANTA CLARA L. REV. 701, 702–03 (1993).

56. *Arcambel v. Wiseman*, 3 U.S. 306, 306 (1796); *see id.* at 703 (highlighting the Supreme Court’s consistent reaffirmation of the American rule); Sande L. Buhai, *Everyone Makes Mistakes: Attorney’s Fee Recovery in Legal Malpractice Suits*, 6 ST. MARY’S J. ON LEGAL MAL. & ETHICS 32, 48 (2016) (describing the more than 200-year roots of the American rule).

57. Act of Feb. 26, 1853, ch. 171, 10 Stat. 161 (current version at 28 U.S.C. §§ 1920, 1923 (1988)); Fehderau, *supra* note 55, at 703 (1993) (highlighting the change in previous rules to modern law); Buhai, *supra* note 56, at 48 (underscoring the change to modern law enacted by Congress).

The most important issue surrounding the English system for this Comment is the loss of access to the courts litigants face.⁵⁸ The English legal system seems to loathe litigation and will punish anyone who dares bring an unsuccessful claim to court.⁵⁹ Courts under the English rule value settlement and deterrence over litigation and access to the courts.⁶⁰

The Supreme Court has repeatedly upheld the American rule, opining in *Fleischmann Distilling Corp. v. Maier Brewing Co.*⁶¹ that “since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents’ counsel.”⁶² Furthermore, the Court noted that the labor, time, expense, and difficulty in properly determining what a “reasonable” attorney’s fees award should be in every case would create “substantial burdens for judicial administration.”⁶³

Though on the rise in America, awards of adverse attorney’s fees are an institutionally disfavored practice and are relatively uncommon.⁶⁴ In order to overcome the general rule against adverse attorney’s fees there usually must be overriding considerations of justice which warrant such a practice.⁶⁵ This said, Texas has followed the path of other states by legislatively expanding the loser pay system for certain statutory

58. Allison F. Aranson, *The United States Percentage Contingent Fee System: Ridicule and Reform From an International Perspective*, 27 TEX. INT’L L.J. 755, 774 (1992) (“[T]he structure of the British system did deny parties access to justice whether or not they had meritorious claims.”); Michael Napier, *Counterpoint: For Many, English Rule Impedes Access to Justice*, WALL ST. J., Sep. 24, 1992, at A17 (“Essentially the English Rule requires the loser in a lawsuit to pay the winner’s attorney fees and court costs The plaintiff who cannot risk paying everyone’s legal costs effectively forfeits his or her access to justice. Thus the litigation disincentive sometimes caused by the English Rule has more to do with the client’s fear of costs than worry about the merits of the claim.”); Edward F. Sherman, *From “Loser Pays” to Modified Offer of Judgement Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1863 (1998) (“Perhaps the strongest historical justification for the American rule is centered in the American faith in liberal access to the courts for righting wrongs.”).

59. See Aranson, *supra* note 58, at 774 (“British courts employ clear categorical rules and adhere rigidly to stare decisis, aiding out of court settlements and guarding against change and experimentation in the courtroom.”).

60. *Id.*

61. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967).

62. *Id.* at 718 (citing *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964)).

63. *Id.* (citing *Oelrichs v. Spain*, 82 U.S. 211, 231 (1872)).

64. See David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule,”* 15 IND. INT’L & COMPAR. L. REV. 583, 584–85 (2005) (discussing the history of the “American rule” for adverse attorney fees).

65. *Fleischmann Distilling Corp.*, 386 U.S. at 718.

violations.⁶⁶ While it is true that under the American system plaintiffs are not truly made whole with awards of consequential damages, this is not an issue which has bearing on this discussion.⁶⁷

There are those who feel that the British system is a more equitable and expedient system. Those who propose this notion fail to consider the coercion that goes on in the British system towards indigent plaintiffs with otherwise meritorious claims. The same motivation felt by opposing parties of similar or at least moderate wealth are disproportionately impactful on indigent clients. Proponents of the “loser pays” mentality claim that the English system discourages parties from dragging out litigation in order to induce settlement.⁶⁸ The bottom line is that the English rule is manifestly unfair. It brings with it an undue hardship on those who lose their case. For plaintiffs who cannot prove their cause it creates liability when there has been no wrongdoing, and for defendants it adds insult to injury. Despite all its reforms, the English legal system is still based on the notion that all claims which fail to win are inherently unmeritorious.

Adverse attorney’s fees are just as damaging to those they are imposed upon regardless of whether they stem from some state or federal statutory provision, or due to a specific contract clause. The important thing to take away from the English rule is it has a deleterious effect on its target, as well as a prospective one to the courts through intimidation of plaintiffs. Conveniently, for anyone making such a claim it is difficult to determine the metrics of how many plaintiffs fail to bring otherwise legitimate lawsuits simply because they are indigent and petrified of financial ruin.

Allowing for the practice of guaranteeing adverse attorney’s fee awards would insulate plaintiffs and defendants from the harsh nature of the English rule.⁶⁹ Attorneys would simply analyze the facts surrounding each individual case and make a determination of the likely outcome. While there are those that might say allowing for this practice might well lead to attorneys pushing harder on their clients to settle early, this is non-sequitur

66. Gregory E. Maggs & Michael D. Weiss, *Progress on Attorney’s Fees: Expanding the “Loser Pays” Rule in Texas*, 30 HOUS. L. REV. 1915, 1937 (1994); Buhai, *supra* note 56, at 51–67 (detailing the main categories in which adverse attorney’s fees awards are upheld).

67. Michael C. Moore, *Legal Malpractice and the Bad Faith Exception to the American Rule: A Suggested Approach for Addressing Intentional Lawyer Misconduct*, 48 WASH. & LEE L. REV. 1141, 1152 (1991).

68. Aranson, *supra* note 58, at 779.

69. See Napier, *supra* note 58, at A17 (“It is hard to imagine how in the [United States] any individual or business, short of a corporate giant, can afford to risk the result of an English rule award of costs. In England, the system has survived primarily because of a government-funded Legal Aid scheme, which cushions the effect the rule has on many losing plaintiffs.”).

of sorts. In a normal situation where defendants are faced with the threat of adverse attorney's fees, there are only two good options: (1) prevail on the merits and avoid an adverse award; or (2) settle early so opposing counsel's fees are lower. In the end it comes down to allocating the risk on the attorneys rather than the clients. Indigent clients are already more vulnerable and less likely to take a case to trial as it is, so adopting this safety net would be a meaningful way to open-up access to the courts of justice.

The judiciary has an interest in making sure that all parties in a possible lawsuit have access to the courts. Allowing for the guarantee of adverse attorney's fees expands access to the courts in exchange for a nominal expansion of contingency fee agreements. Such an expansion is unlikely to lead to disciplinary violations that are not already provided for in the current ethical regulations.

IV. MECHANISMS THAT DISCOURAGE ABUSE OF CONTINGENT FEE AGREEMENTS

A. *Fee Forfeiture*

There are a number of remedial measures that have been put in place to ensure attorneys do not abuse their discretion in accepting contingent fee clients. The strongest of these remedies is arguably fee forfeiture,⁷⁰ which has been put in place “to protect relationships of trust by discouraging agents’ disloyalty.”⁷¹ However, only serious and clear violations of duty will be actionable.⁷² Courts consider “the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer’s work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies” when determining seriousness.⁷³ Clear violations are those

70. See *Webb v. Crawley*, 590 S.W.3d 570, 587 (Tex. App.—Beaumont 2019, no pet.) (citing *Burrow v. Acre*, 997 S.W.2d 229, 237, 246 (Tex. 1999)) (outlining when a court may order forfeiture of a fee); *Izen v. Laine*, 614 S.W.3d 775, 791 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (citing *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 221–22 (Tex. 2017)) (highlighting when fee forfeiture may be awarded as an equitable remedy).

71. *Wythe II Corp. v. Stone*, 342 S.W.3d 96, 104 (Tex. App.—Beaumont 2011, pet. denied) (quoting *Burrow*, 997 S.W.2d at 238).

72. *Id.* (citing *Burrow*, 997 S.W.2d at 241); see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (AM. L. INST. 2021) (“[A] lawyer is civilly liable to a client if the lawyer breaches a fiduciary duty to the client set forth in § 16(3) and if that failure is a legal cause of injury within the meaning of § 53, unless the lawyer has a defense within the meaning of § 54.”).

73. *Burrow*, 997 S.W.2d at 243; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49.

where a “reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful.”⁷⁴

The trial court decides whether forfeiture is appropriate.⁷⁵ The court’s primary consideration in deciding this is “whether forfeiture is necessary to satisfy the public’s interest in protecting the attorney-client relationship.”⁷⁶ The Restatement gives the court wide discretion in crafting a forfeiture remedy.⁷⁷ Even though the immediate goal of this remedy is to safeguard the public’s confidence in attorney-client relationships, forfeiture is still capable of providing direct compensation to clients.⁷⁸ It should be noted that Texas has approved section 49 of the Restatement, along with most other jurisdictions who have considered like issues.⁷⁹

B. *Frivolous Claims*

Professor Schneyer opined in his article, *Legal-Process Constraints on the Regulation of Lawyers’ Contingent Fee Contracts*, that contingent fee agreements breed incentive for bringing frivolous lawsuits.⁸⁰ However, the learned professor himself discredits this notion by acknowledging the universal reality that attorneys utilizing contingent fees “will generally have stronger incentives than hourly-rate lawyers to reject weak cases.”⁸¹ It is not within the economic interest of a contingent-fee attorney to take frivolous claims, as they are inherently unlikely to prevail.⁸² Furthermore, besides the risk of

74. *Wythe II Corp.*, 342 S.W.3d at 104 (quoting *Burrow*, 997 S.W.2d at 241 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49, cmt. d (AM. L. INST., Proposed Final Draft No. 1, 1996))).

75. *Id.* at 105 (citing *Burrow*, 997 S.W.2d at 246); see also *Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 428–29 (Tex. 2008) (detailing the appropriate measure of forfeiture).

76. *Wythe II Corp.*, 342 S.W.3d at 105 (quoting *Burrow*, 997 S.W.2d at 246).

77. See *Burrow*, 997 S.W.2d at 241–42 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. b. (AM. L. INST., Proposed Final Draft No. 1, 1996)) (“The remedy of this Section should hence be applied with discretion.”).

78. *Burrow*, 997 S.W.2d at 243–44.

79. *Id.* at 242 (detailing with great depth the various jurisdictions that have adopted the restatement approach).

80. Schneyer, *supra* note 12, at 388–89.

81. *Id.* at 389–90 (reproducing empirical data which shows contingent lawyers substantially filter unmeritorious claims out of the court system).

82. See Michael P. Stone & Thomas J. Miceli, *The Impact of Frivolous Lawsuits on Deterrence: Do They Have Some Redeeming Value?*, 10 J.L. ECON. & POL’Y 301, 305 (2014) (explaining the Supreme Court’s view on what a frivolous claim may be described as); see also *Frivolous*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “frivolous” as “[j]acking a legal basis or legal merit”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 110 cmt. d (AM. L. INST. 2021) (“A frivolous position is one that

gaining nothing upon defeat in a contingency case, lawyers who bring frivolous claims are subject to both tort damages⁸³ and sanctions.⁸⁴

In order for a plaintiff to prevail in a claim of malicious prosecution in a civil case, the plaintiff has the burden to prove and establish: “(1) the institution or continuation of civil proceedings against the plaintiff; (2) by or at the insistence of the defendant; (3) malice in the commencement of the proceeding; (4) lack of probable cause for the proceeding; (5) termination of the proceeding in plaintiff’s favor; and (6) special damages.”⁸⁵ The last of the elements listed—special damages—has also been referred to as “special injury.”⁸⁶ The designation of “special damages” is meant to differentiate them from “the ordinary losses incident to defending a civil suit, such as inconvenience, embarrassment, discovery costs, and attorney’s fees.”⁸⁷

Texas has provided, in Rule 13 of the Texas Rules of Civil Procedure, that:

Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction

a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it.”)

83. *Airgas-Sw., Inc. v. IWS Gas & Supply of Tex., Ltd.*, 390 S.W.3d 472, 478 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (citing *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 207 (Tex. 1996) (recognizing the tort of malicious prosecution in Texas).

84. TEX. R. CIV. P. 13 (concerning sanctions for frivolous lawsuits); TEX. CIV. PRAC. & REM. CODE § 10.002 (providing for motions for sanctions to recover reasonable attorney’s fees and costs associated with frivolous litigation); *Id.* § 27.009(b) (“If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award costs and reasonable attorney’s fees to the responding party.”). It should be noted that statutes such as this would directly contradict the practice being suggested in this Comment. Should an attorney wish to guarantee the threat of adverse attorney’s fees it would be illogical for them to violate a statute which clearly provides for the awarding of adverse attorney’s fees when violated.

85. *Airgas-Sw., Inc.*, 390 S.W.3d at 478 (quoting *Tex. Beef Cattle Co.*, 921 S.W.2d at 207); *see also* *Kroger Tex. Ltd. P’ship v. Suberu*, 216 S.W.3d 788, 792 n.3 (Tex. 2006) (listing congruent requirements to that of *Airgas* to prevail on a malicious prosecution claim).

86. *Id.* (citing *Ross v. Arkwright Mut. Ins. Co.*, 892 S.W.2d 119, 128 (Tex. App.—Houston [14th Dist.] 1994, no writ)).

87. *Id.* (citing *Tex. Beef Cattle Co.*, 921 S.W.2d at 208).

available under Rule 215-2b, upon the person who signed it, a represented party, or both.⁸⁸

Indeed, it is a flimsy shield both counsel and client hide behind if they think the simple nature of a contingency fee agreement will insulate them from the swift rebuke of the court should they bring forth a frivolous lawsuit.⁸⁹ Texas courts have been known in the past to inflict harsh penalties on those who bring frivolous claims.⁹⁰

C. *Strong-Arming Clients and Rule 1.02 Violations*

Apart from fee forfeiture, clients are also protected under both the Model Rules⁹¹ and the Texas rules.⁹² Rule 1.02 of the Texas rules concerns the scope and objectives of representation. Subsection (a) of 1.02 states:

(a) Subject to paragraphs (b), (c), (d), and (e), (f), and (g), a lawyer shall abide by a client's decisions: (1) concerning the objectives and general methods of representation; (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law; (3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.⁹³

Subject to this, attorneys risk disciplinary hearings against them if they subvert the client's control over the substantive matters of a case.⁹⁴ There are those who might feel the guarantee of paying an adverse attorney's fee award creates too high of a risk that attorneys will strong-arm their clients into settlement to avoid paying out higher fees. However, these fears are largely faulty. It is clear and unequivocal in Texas that clients make the

88. TEX. R. CIV. P. 13.

89. *Cf.* Schneyer, *supra* note 12, at 389 (“The argument that contingent fees encourage frivolous claims by freeing clients of all fee obligations when a case fails begins to seem frivolous itself when one considers the incentives the fees create for lawyers.”).

90. *See, e.g.*, Bradt v. Sebek, 14 S.W.3d 756, 769 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (affirming a \$100,000 sanction for bringing a frivolous claim).

91. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (AM. BAR ASS'N 2021) (“[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . A lawyer shall abide by a client's decision whether to settle a matter.”).

92. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A.

93. *Id.*

94. *See id.* (outlining violations that would result in sanctions for an attorney).

substantive decisions in their cases. Courts have repeatedly invalidated contingency fee agreements which force the client to procure his or her attorney's approval before accepting a settlement offer, as these are against public policy.⁹⁵ Any attorney who strongarms a client into a settlement will risk landing in hot water with the state bar's disciplinary board.⁹⁶

V. FURTHER CONSIDERATIONS

A. *Interest in the Cause of Litigation*

There are those⁹⁷ who believe for an attorney to guarantee the possibility of adverse attorney's fees awards makes them "acquire a proprietary interest in the cause of action or subject matter of litigation . . ."⁹⁸ While it is curious that Oklahoma's Rule 1.8(e) significantly mirrors Texas⁹⁹, its reasoning behind the rule is flawed. In the Oklahoma Bar Association Legal Ethics Committee's Ethics Opinion 323, the Oklahoma Bar Association makes a critical error in judgement by ruling that indemnifying clients against the threat of adverse attorney's fees awards gives an attorney an unethical proprietary interest in the cause of action.¹⁰⁰

The committee took too narrow a view of the practice of adverse attorney's fee indemnification. Should an attorney choose to make a contractual agreement with a rationally informed client where the parties agree the attorney shall indemnify the client of any adverse attorney's fees,

95. *In re Plaza*, 363 B.R. 517, 521–22 (Bankr. S.D. Tex. 2007) (quoting *Lewis v. S.S. Baume*, 534 F.2d 1115, 1122 (5th Cir. 1976)); *Davis Law Firm v. Bates*, No. 13-13-00209-CV, 2014 WL 585855, at *3 (Tex. App.—Corpus Christi Feb. 13, 2014, no pet.).

96. *See 25 Texas Lawyers Gone Rogue, the December 2019 List of Judges and Texas Lawyer Sanctions & The 20 Bad Attorneys Who are Privately Disciplined*, LAWS IN TEXAS (Dec. 12, 2019), <https://lawsintexas.com/25-texas-lawyers-gone-rogue-the-december-2019-list-of-judges-texas-lawyer-sanctions/> [https://perma.cc/32C2-42X5] (detailing the various sanctions, suspensions, and reprimands given by the Texas Bar Disciplinary Actions committee in 2019, three of which are for violations of Rule 1.02).

97. The great state of Oklahoma is who I refer to here. *See generally* Okla. Comm. on Legal Ethics, Op. 323, 2009 WL 806564 (2009) (explaining the Oklahoma Bar Association's approach to adverse attorney's fee indemnification).

98. OKLA. RULES PROF'L CONDUCT R. 1.8(j); *see* Okla. Comm. On Legal Ethics, Op. 323, 2009 WL 806564 (arguing "[n]o exception is made for an indemnification agreement[]" to the general prohibitions of Rule 1.8(j)).

99. *Compare* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08(h) *with* OKLA. RULES PROF'L CONDUCT R. 1.8 (highlighting the similarities between the Texas and Oklahoma Rules of Professional Conduct).

100. Okla. Comm. on Legal Ethics, Op. 323, 2009 WL 806564 (2009).

such an agreement ought to be upheld on both the principles of public policy towards securing representation and the freedom to contract. The committee chose instead to bandy words, focusing on semantics rather than form. It felt that the term “indemnify” was inapplicable to a contingency fee agreement, as there can be, in their opinion, “no expectation of repayment under any circumstances.”¹⁰¹ This is an unpersuasive argument when one applies common sense rationality to it. An attorney who guarantees the threat of adverse attorney’s fees is not advancing anything at the time the contract is signed. They are simply adding to the contingency already being created in the agreement.

The Oklahoma Committee failed to adequately show that attorneys who choose to indemnify their clients of the threat of adverse attorney’s fees are therefore more likely to either exert an undue influence or otherwise subvert the legal system in order to avoid their contractual obligations. Instead, they chose to focus on form over substance. However, it should be mentioned that the committee raised an interesting point: the common law offenses of *champerty* and *maintenance*.¹⁰²

The offense of *champerty and maintenance* is nearly as old as the common law itself, and traces its heritage all the way back to the time of Edward I.¹⁰³ It is defined as a “bargain between a stranger and a party to a lawsuit by which the stranger pursues the party’s claim in consideration of receiving part of any judgment proceeds.”¹⁰⁴ While the roots of this offense stretch all the way back to the heralded constitution of Roman Emperor Anastasius in 506 A.D., it has fallen largely by the wayside in light of more modern causes of action.¹⁰⁵

Even as far back as 1905 it was recognized that the common law interests behind these offenses had given way to the more appropriate consideration of contract legality.¹⁰⁶ Historically, these offenses were envisioned to protect against great lords intimidating the courts through the meddling and/or purchasing of an interest in litigation which did not pertain to

101. *Id.*

102. *Id.*

103. *Modern Views of Champerty and Maintenance*, 18 HARV. L. REV. 222, 222 (1905).

104. Ari Dobner, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1543 (1996) (footnote omitted) (analyzing with great detail the history of champerty and maintenance).

105. *Id.* at 1545 (quoting an excerpt from the constitution of Anastasius historian Max Radin found in *Maintenance by Champerty*, 24 CAL. L. REV. 48, 55 (1935)).

106. *Modern Views of Champerty and Maintenance*, *supra* note 103, at 223.

them.¹⁰⁷ Luckily enough, today, our modern requirements of standing are quite sufficient to keep those who have no business in a case from involving themselves.

The comment, *Modern Views of Champerty and Maintenance*, while no longer indicative of modern views, is still important for the purposes of this discussion.¹⁰⁸ While not only acting as a looking glass into the infancy of contingency fee agreements, the comment raised the legitimate notion that in the American court system there are few—if any—legitimately overriding public policy interests involving champerty and maintenance that ought to trump an otherwise valid and enforceable contract.¹⁰⁹ While it is not the position of this Comment that the remaining laws against champerty-esque violations of public policy be overturned, it is firmly its contention that this ancient common law notion ought not interfere with contracts which further public policy. When one thinks of the reasons why champerty and maintenance ought not to be allowed to interfere here, the oft quoted jurist Oliver Wendell Holmes Jr. comes to mind:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹¹⁰

Once again, the Oklahoma Committee failed to recognize the reality of the situation. There is a well-developed corpus of legal reasoning which shows the common law offenses of champerty and maintenance are largely defunct and have been replaced.¹¹¹ The overwhelming force of legal research and jurisprudence shows it is the validity of the contract itself which should take precedence when determining the overall validity of the agreement. The committee merely points to the possibility of abuse by attorneys, rather than being able to show documented proof of such occurrence.

107. *Id.*

108. *See generally id.* (discussing and analyzing twentieth century views on champerty and maintenance).

109. *Id.*

110. Oliver W. Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

111. *See* 14 C.J.S. *Champerty and Maintenance* § 24 (2020) (explaining the reasoning behind replacing champerty and maintenance from modern law); *see also* 7 WILLISTON ON CONTRACTS § 15:1 (4th ed. 2021) (providing the case illustration of *Papageorge v. Banks*, 81 A.3d 311 (D.C. 2013) for champerty).

The Alaska Bar Association Ethics Committee, on the other hand, has a more correct stance on the issue of contingently agreeing to guarantee adverse attorney's fees.¹¹² The Alaska Committee was given the question of "whether a plaintiff's attorney, who has a defense verdict returned in a contingency fee case, is ethically permitted to agree to pay the attorney fee award against his or her client, should an appeal of the verdict be unsuccessful."¹¹³ The committee based its decision on interpretation of Alaska Rules of Professional Conduct 1.8(e) and (j).¹¹⁴

The committee went on to comment that 1.8(j) is the "traditional rule" used to prohibit an attorney from acquiring a proprietary interest in the cause of litigation, and that the comments note it is based on the common law rules concerning champerty and maintenance.¹¹⁵ The committee took a real-world approach to the issue, and concluded that there was "no practical or rational basis for excluding an attorney fee award from the definition of 'expenses of litigation.'"¹¹⁶ I share the opinion of the Alaska Committee that agreements, such as the one posited, are either actually or practically indistinguishable from other bona fide contingency agreements.¹¹⁷

The Oklahoma Committee critiqued Alaska's interpretation of their own rules for not assigning what Oklahoma believes to be the proper distinction between "advances" and "payments."¹¹⁸ The Oklahoma Committee dug its heels in around the notion that an advance must carry with it the expectation of repayment.¹¹⁹ The committee failed to give equal weight to the entire rule, which goes on to say at the very end "the repayment of which may be contingent on the outcome of the matter."¹²⁰ It is odd that the committee would take such a narrow view of Rule 1.8(e), choosing to place an unbalanced importance on the Meriam Webster denotation of "advance" rather than assigning the clear and plain meaning of the four corners of the rule itself in equal measure.

112. Alaska Comm. on Ethics, Op. 2004-2, 2004 WL 1853007, at *1 (2004).

113. *Id.*

114. *Id.*

115. *Id.* at *2

116. *Id.*

117. *Id.* ("The Committee is also of the opinion that an attorney's agreement to pay an attorney fee award, is a natural extension of, or at least not sufficiently distinguishable from, a traditional and permissible contingency fee agreement.")

118. Okla. Comm. on Legal Ethics, Op. 323, 2009 WL 806564 (2009) at *2.

119. *Id.*

120. OKLA. RULES PROF'L CONDUCT R. 1.8(e).

Read as a whole, the rules of Texas, Alaska, and Oklahoma clearly support the notion that the so-called expectation of repayment which the Oklahoma Committee placed such importance on can be nested within, and thereby subsumed by the contingency that the client will be successful.¹²¹ The Oklahoma Committee took too narrow a view of the history behind both their rule and the ABA Model Rules.¹²² Alaska on the other hand accounted for the complex and important considerations of whether this would constitute an impermissible loan by the attorney, the possible negative impact on client's pre-filing merits, the implications of Alaska Rule of Civil Procedure 82 (which promotes avoiding protracted litigation and seeks settlement), the risks of frivolous litigation, the threat of compromised attorney loyalty, or overreaching due to counsel's economic self-interest.¹²³ These considerations yield a more logically persuasive argument than that given by the Oklahoma Committee.

B. *Colorado's Approach*

The Supreme Court of Colorado sat en banc when it faced a similar attorney's fee issue during a particularly litigious dispute in *Mercantile Adjustment Bureau, L.L.C. v. Flood*.¹²⁴ This case involved a trial attorney who paid an up-front fee to his client's appellate attorneys, repayment of which was contingent on a favorable appeal.¹²⁵ When the appeals court awarded attorney's fees opposing counsel appealed once again, claiming that the award was impermissible under the Colorado Rule of Professional Conduct 1.8(e). They claimed that the payment of appellate attorney's fees by the trial attorney "violated the ethics rules against providing financial assistance to clients"¹²⁶

121. Alaska Comm. on Ethics, Op. 2004-2, 2004 WL 1853007, at *1 (2004); Okla. Comm. on Legal Ethics, Op. 323, 2009 WL 806564 (2009) at *2.

122. Okla. Comm. on Legal Ethics, Op. 323, 2009 WL 806564 (2009), at *3 ("Rule 1.8(e) was amended in 1993. The 1993 language (set forth in Part I. above) tracks amendments to ABA *Model Rules of Professional Conduct*, and is the current rule.").

123. Alaska Comm. on Ethics, Op. 2004-2, 2004 WL 1853007, at *2 (2004).

124. *Mercantile Adjustment Bureau, L.L.C. v. Flood*, 278 P.3d 348 (Colo. 2012) (en banc).

125. *Id.* at 350.

126. *Id.* at 354.

Rule 1.8(e) of the Colorado Rules of Professional Conduct is very similar in both language and intent to its Texas counterpart, differing only in that the Texas rule includes the term “guarantee” in 1.08(d)(1).¹²⁷

The Colorado Supreme Court then made the important note that the Colorado Rules of Professional Conduct seek to further the equal access of justice towards all litigants.¹²⁸ The preamble to the Colorado rules even states that lawyers should “be mindful of deficiencies in the administration of justice” and should take into consideration that the poor and middle class alike sometimes cannot afford adequate counsel.¹²⁹ The preamble goes on, in section 6, to say that lawyers should devote themselves to “ensure equal access” to our justice system for those who are socially and economically barred from the courts.¹³⁰

The Colorado Supreme Court then went on to splice together the interplay between the use of contingency fees and the advancement of court costs and the expenses of litigation.¹³¹ The court chose to take the opposite view to Oklahoma, concluding that the rule “is ultimately defined by its exception distinguishing between permissible and impermissible types of financial assistance to clients, rather than its preliminary unequivocal prohibition against providing financial assistance to clients.”¹³² The court next took the approach of the Oklahoma Committee and parsed out the language of the exception to resolve the distinctions “between permissible and impermissible expenses.”¹³³

Instead of focusing on the semantics behind the word “advance,” the court took a plain meaning approach to the terms “expense” and “litigation.” The court defined expense as “[a]n expenditure of money, time,

127. Compare TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08, reprinted in TEX. GOV'T CODE ANN., TIT. 2, SUBTIT. G, APP. A, with COLO. RULES PROF'L CONDUCT R. 1.8(e) (highlighting the subtle difference between the Texas and Colorado Rules of Professional Conduct).

128. *Mercantile Adjustment Bureau, L.L.C.*, 278 P.3d at 355. Compare COLO. CONST. art. II, § 6 (“Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.”), with TEX. CONST. art. I, § 13 (“All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”).

129. COLO. RULES PROF'L CONDUCT PMBL. § 6.

130. *Id.*

131. See *Mercantile Adjustment Bureau, L.L.C.*, 278 P.3d at 355 (discussing the similar reasons the Colorado Rules of Professional Conduct permit contingency fee arrangements and advancements of court costs and litigation expenses).

132. *Id.* at 356.

133. *Id.*

labor, or resources to accomplish a result.”¹³⁴ Litigation was denoted as “[t]he process of carrying on a lawsuit.”¹³⁵ Construing these terms in context, the court found that an expense of litigation constitutes “an expenditure of money, time, labor, or resources to accomplish the process of carrying on a lawsuit.”¹³⁶

Weighing the considerations in balance, the court determined that “[c]ontingent fees and advancement of litigation expenses are permitted as exceptions to the rule prohibiting financial assistance to clients because, despite their potential to create conflicts of interest, they ensure access to the courts.”¹³⁷ It was ultimately decided that the purpose of the expenditure was the controlling factor, not the means of repayment.¹³⁸ The court found that as long as an expense is rationally related to conducting litigation, it will fit within the exception.¹³⁹ However, unlike the Texas approach, loans for living expenses and other such things are still impermissible in Colorado regardless of contingent repayment.¹⁴⁰ Relying on many different sources the court upheld the award in its 5–2 decision.¹⁴¹

The approach of the Colorado Supreme Court is a more learned and bona fide analysis. The court not only took a plain meaning approach to the rule, but also considered the overall public policies involved in contingent fee agreements.¹⁴² Taking the open courts doctrine to heart, the court decided that the goal of open access to justice would be hampered by the curtailment of attorney’s fees guarantees.¹⁴³ The court deftly deemed that disallowing the award of otherwise reasonable attorney’s fees upon successful appeal would lead to critical limitations on a plaintiff’s ability to seek redress.¹⁴⁴

134. *Id.* (quoting *Expense*, BLACK’S LAW DICTIONARY (9th ed. 2019)).

135. *Id.* (quoting *Litigation*, BLACK’S LAW DICTIONARY 1017 (9th ed. 2019)).

136. *Id.*

137. *Id.* (citing *Rubio v. BNSF Ry. Co.*, 548 F. Supp. 2d 1220, 1224 (D.N.M. 2008), and *People v. Nutt*, 696 P.2d 242, 248 n.3 (Colo. 1984)); see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36 cmt. c (AM. L. INST. 2000) (citation omitted) (“Allowing lawyers to advance [litigation] expenses is indistinguishable in substance from allowing contingent fees and has similar justifications . . . notably enabling poor clients to assert their rights.”).

138. *Mercantile Adjustment Bureau, L.L.C.*, 278 P.3d.

139. *Id.*

140. *Id.*

141. *Id.* at 356–57 (citing Alaska Comm. on Ethics, Op. 2004-2, 2004 WL 1853007, at *1 (2004)).

142. See *id.* at 355–56 (explaining the court’s consideration of both the intent behind the rule and the plain language).

143. *Id.* at 357.

144. *Id.*

Defendants with deep pockets would be able to prevail simply through pursuing an appeal and bleeding plaintiffs dry.¹⁴⁵

And while *Mercantile Adjustment Bureau* was decided by a Colorado court with specific facts, the public policies and concerns underlying the decision are universal to all jurisdictions. It is poor and indigent clients who would reap the benefits of a policy such as the one proposed.

C. *Settlement Offers & Texas' Fee-Shifting Statutes*

There is an abundance of Texas statutes which allow parties to recover attorney's fees. These statutes range across the entire spectrum of civil practice, and include: shareholder derivative actions,¹⁴⁶ declaratory judgements,¹⁴⁷ DTPA claims,¹⁴⁸ breach of contract claims,¹⁴⁹ the Texas Property Code,¹⁵⁰ the Texas Family Code,¹⁵¹ and various other applications.¹⁵² These statutes all provide for awards of attorney's fees in a one-way scenario—either a party wins the case and prevails with the award or does not. There is, however, a certain provision of the Texas Civil Practice and Remedies Code¹⁵³ that creates unique problems for this discussion.

Unlike the previously mentioned provisions, Chapter 42 of the Civil Practice and Remedies Code allows for a two-way attorney's fee award

145. *Id.* (citing *Martin v. Allen*, 566 P.2d 1075, 1076 (Colo. 1977) (en banc)).

146. TEX. BUS. ORGS. CODE ANN. § 21.561.

147. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009; *see* *Heritage Res., Inc. v. Hill*, 104 S.W.3d 612, 617 (Tex. App.—El Paso 2003, no pet.) (discussing the application of Section 37.009 allowing for attorney's fees to be awarded).

148. TEX. BUS. & COM. CODE ANN. § 17.50(d) (concerning recoverability of attorney's fees under the Deceptive Trade Practices Act).

149. CIV. PRAC. & REM. § 38.001 (concerning recoverability of attorney's fees for breach of written or oral contracts); *see generally* *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 652 (Tex. 2009) (allowing for the recovery practice in principle but making a distinction based on whether the plaintiff can qualify as a "prevailing party").

150. TEX. PROP. CODE ANN. § 5.006 (concerning recoverability of attorney's fees for breach restrictive covenants).

151. TEX. FAM. CODE ANN. § 6.708(c) (concerning recoverability of attorney's fees in divorce suits); *Id.* § 106.002 (concerning recoverability of attorney's fees in suits affecting parent-child relationships).

152. *See* 48 Robert P. Schuwerk & Lillian B. Hardwick, *Texas Practice Series* § 1:17 (2020) (concerning recoverability of attorney's fees for the prevailing party in various types of lawsuits).

153. *See generally* CIV. PRAC. & REM. ch. 42 (regarding the effect of settlements on claims for monetary relief).

scenario.¹⁵⁴ Under Section 42.004 of the Civil Practice and Remedies Code, if a defendant makes a settlement offer in a case which the statute applies,¹⁵⁵ the plaintiff is then faced with the threat of adverse attorney's fees should he or she deny the offer.¹⁵⁶ Though the goal of the statute is to encourage litigants to accept otherwise "reasonable" settlement offers, the risks imposed on the parties favors wealthy litigants. This practice is further codified under Rule 167 of the Texas Rules of Civil Procedure.¹⁵⁷

Rule 167 and Chapter 42 of the Civil Practice and Remedies Code apply to all civil monetary claims filed on or after January 1, 2004,¹⁵⁸ but do not apply to shareholder's derivative actions, class actions, family cases, actions against the government, workers' compensation actions, and justice of the peace actions.¹⁵⁹ Additionally, Rule 167 does not apply to settlement offers made in arbitration or mediation.¹⁶⁰ Rule 167 sprung out of Chapter 42 of the Texas Civil Practice and Remedies Code during the legislative wave of Texas tort reform in 2003.¹⁶¹ State legislators decided that Texas was bloated by "a general environment of excessive litigation."¹⁶² Their solution was to pass Rule 167, which was part of House Bill 4. Through Rule 167 state legislators hoped that parties would be incentivized to either streamline litigation or seek settlement.¹⁶³ These incentives were brought about through the use of fee-shifting mechanisms found within Chapter 42.¹⁶⁴

Contingent fee agreements, such as the one proposed, are most likely to occur in tort cases as most contract cases are hourly fee agreements. Furthermore, cases where Chapter 42 of the code apply are more likely to

154. Two-way fee awards, in the simplest terms, means that even if the plaintiff prevails on the merits of the case, he or she can still end up liable for adverse attorney's fees. Most one-way provisions only offer the prospect of attorney's fees to plaintiffs.

155. See CIV. PRAC. & REM. § 42.002 (stating the actions to which Chapter 42 does and does not apply).

156. *Id.* § 42.004.

157. TEX. R. CIV. P. 167.

158. CIV. PRAC. & REM. §§ 42.002(a), .005.

159. *Id.* § 42.002(b); Elaine A. Carlson, *The New Texas Offer of Settlement Practice—the Newest Steps in the Tort Reform Dance*, 44 THE ADVOC. 105 (2008).

160. TEX. R. CIV. P. 167.7.

161. *Bobo v. Varughese*, 507 S.W.3d 817, 826 (Tex. App.—Texarkana 2016, no pet.).

162. House Comm. on Civ. Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2005).

163. Michael S. Hull et al., *Part Two: Detailed Analysis of the Civil Justice Reforms*, 36 TEX. TECH L. REV. 51, 66 (2005).

164. *Bobo*, 507 S.W.3d at 826.

be tort cases than other types of cases.¹⁶⁵ It is therefore reasonable to proceed on the notion that Chapter 42 settlements will often apply to many cases where contingent fee agreements are in use.

Under Chapter 42, if a plaintiff's final award is less favorable to them by a margin of 20% or more after rejecting a settlement offer, the plaintiff *must* be responsible for adverse litigation costs and attorney's fees despite winning at trial.¹⁶⁶ This raises completely different types of concerns than those normally involved in regular contingency scenarios. Unlike the traditional model, plaintiffs facing a settlement offer covered by Chapter 42 must take on the additional risk of getting a lower-than-expected award which triggers the statutory penalty.¹⁶⁷ A simple scenario detailing this dilemma is: a plaintiff who seeks one million dollars in monetary damages will be forced to pay their opponent's reasonable attorney's fees if they reject any settlement offer above \$800k.¹⁶⁸ While it is not the focus of this Comment to argue whether \$200k is an "unreasonable" margin to reject, it must be acknowledged that for many plaintiffs their decision to refuse offers of settlement come with extensive risk even without statutorily imposed punishments for rejection.

The greater the damages sought the more significant the divide becomes between what the defendant can low-ball offer to still recoup litigation costs.¹⁶⁹ Deep-pocketed defendants can afford to roll the dice and offer plaintiff's low figures in hopes that the threat of adverse attorney's fees and litigation costs will be enough to scare their opponents into settling.¹⁷⁰

165. Fee-shifting under Chapter 42 of the Code is available only when other statutes do not provide for it. Fee-shifting in contract cases is covered under TEX. CIV. PRAC. & REM. CODE ANN. § 38.001.

166. Carlson, *supra* note 159, at 107; CIV. PRAC. & REM. § 42.004(a).

167. See 6 TEXAS TORTS AND REMEDIES § 103.02A (2021) (explaining the details of when "a party can be held liable for the other party's litigation costs after the date the offer is made if that party rejects a reasonable settlement offer . . ."); 7 DORSANEO, TEXAS LITIGATION GUIDE § 102.55 (2021) (discussing how to obtain attorney's fees if settlement negotiations fail).

168. See 6 TEXAS TORTS AND REMEDIES § 103.02A (2021) (providing an example of when the plaintiff's "ultimate recovery is less than 80[%] of the rejected offer, or for a defendant if the ultimate recovery is more than 120[%] of the rejected offer"); CIV. PRAC. & REM. § 42.004(a) (defining what constitutes a significantly less favorable judgement); 7 DORSANEO, TEXAS LITIGATION GUIDE § 102.55 (2021) (describing what a significantly less favorable judgement is).

169. Cf. Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROBS. 13, 18 (1988) (describing the analogous dangers and problems seen by Federal Rule of Civil Procedure 68).

170. Cf. Stacy Williams & Gregory F. Burch, *Texas' New Fee-Shifting Statute*, 24 THE ADVOC. 18, 19 (2003) (comparing the differing power structures between wealthy and indigent clients); Napier, *supra* note 58, at A17 (describing the similar negative effects seen by the English rule).

Most plaintiffs, on the other hand, bare significant personal risk when deciding to reject settlement offers covered by Chapter 42. Not only would they be required to pay their own attorney's fees and litigation costs, but they would have to do so for the other side as well—despite prevailing. Insult would be added to injury as these fees and costs increase due to extended litigation spent on figuring up what are considered reasonable attorney's fees.

All this considered, it is easy to see how indigent clients in Texas might be led to accept settlement offers out of fear rather than a true meeting of the minds. An attorney who is confident that he or she can win an award beyond a 20% margin to a settlement offer would be better enabled to convince their client to hold out if they were able to guarantee these statutorily imposed adverse attorney's fees. Despite claimants getting a 20% margin of error, "case evaluations by parties and their attorneys often lack exact precision."¹⁷¹ Though these fees can only be used as an offset to a prevailing plaintiff's award, they have the ability to swallow up a large percentage of a victorious claimant's award.¹⁷²

The harsh effects of the English system have previously been discussed in this Comment. These fee-shifting statutes are an erosion of the American system of recovery and pose real risks to indigent clients. Just as the English system does, these statutes may very well exclude plaintiffs from access to justice for fear of having to pay the other side's costs.¹⁷³ For many indigent plaintiffs this added cost could prove too discouraging, thus preventing otherwise meritorious claims from being brought to the court. Many sister state jurisdictions have fee-shifting statutes, thus making these inherent threats to poorer plaintiffs a national phenomenon.¹⁷⁴

Allowing attorneys to guarantee shifting attorney's fees is a viable way of striking balance between the English and American systems. Defendants would still be incentivized to make reasonable offers of settlement with the prospect of remuneration of costs upon rejection while plaintiffs would be

171. Sherman, *supra* note 58, at 1887–88.

172. *Cf.* Rowe, Jr. & Vidmar, *supra* note 165, at 18 (describing the analogous dangers and problems seen by Federal Rule of Civil Procedure 68); Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW AND CONTEMP. PROBS. 139, 168–69 (1984) (predicting negative effects of implementing fee-shifting arrangements).

173. Napier, *supra* note 58, at A17; *see* Herbert M. Kritzer, *The English Rule*, 78 ABA J. 54, 57 (1992) (discussing the financial impact the English system has on meritorious plaintiffs).

174. *See* FED. R. CIV. P. 68 (creating a federal procedure for fee-shifting); *see also* Carlson, *supra* note 159, at 104 n.11 (detailing the various other states with some form of fee-shifting statute).

insulated from the threats of low-ball offers. This type of practice should once again come down to informed consent between client and counsel rather than a *carte blanche* violation of ethics rules. The situations and motivations of settlement negotiation are often nuanced, and so too should be an attorney's ability to respond to them. Under the current Texas Rules of Professional Conduct, clients involved in Rule 167 negotiations face a difficult decision either way.

In exchange for higher contingency percentages, attorneys would be better enabled to convince clients that their case is worth substantially more than what the other side is offering. Clients who fail to get beyond the statutory margins could simply receive an offset from their attorney should they still prevail at court despite receiving a lower-than-expected award.¹⁷⁵ It is entirely admitted that this might put attorneys at odds with the will of the government by hindering settlement. However, it would still be the attorney who bears the risk of his intervention, not the client.

D. *Expense of Litigation*

When considering the Texas Disciplinary Rules of Professional Conduct in unison, the most logical solution to the issue of whether an attorney can ethically guarantee the threat of adverse attorney's fee awards comes down to the nature of the expense. In a more simplistic Occam's Razor¹⁷⁶ style solution, counselors can turn once again to Rule 1.08(d) to find illumination. Under the current Texas rules an attorney is allowed to guarantee the "expenses of litigation[,] . . . the repayment of which may be contingent on the outcome of the matter."¹⁷⁷ And for indigent clients no repayment is necessary at all.¹⁷⁸

And while it is still true that attorney's fees are generally unrecoverable in Texas absent a contractual or statutory provision,¹⁷⁹ this is not always the

175. In jurisdictions such as California, which allows for defendants to actually recover costs from losing plaintiffs, the guaranteeing of shifting attorney's fees would better support the public policy goals behind contingent fee agreements. CAL. CIV. PROC. CODE § 1021.5.

176. Made in reference to the oft quoted fourteenth century maxim "the simpler explanation of an entity is to be preferred." *Occam's Razor*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Occams-razor> [<https://perma.cc/272R-P3VN>].

177. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08(d)(1), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A.

178. *See id.* at R. 1.08(d)(2) (allowing an indigent's attorney to cover attorney's fees and litigation costs on behalf of client).

179. *Baja Energy, Inc. v. Ball*, 669 S.W.2d 836, 838 (Tex. App.—Eastland 1984, no writ) (citing *New Amsterdam Casualty Co. v. Texas Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967)).

case. There are instances of Texas and federal¹⁸⁰ courts allowing attorney's fees to be considered expenses of litigation. The Texas Supreme Court has emphatically stated in *Ortiz v. State Farm Lloyds*¹⁸¹ that "Texas law is clear that attorney's fees and costs incurred in the prosecution or defense of a claim, although 'compensatory in that they help make a claimant whole,' are not damages."¹⁸² And though the court in *Ortiz* relied on the general rule of recovery stated in *New Amsterdam Casualty Co. v. Texas Industries, Inc.*,¹⁸³ the court has stated, in the interim of those two cases, in *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corp.*¹⁸⁴ that "[o]ur statement, considered without reference to the facts of the case, could be read out of context as generally precluding recovery of attorney's fees for prosecuting or defending a suit. It was not intended to extend so far."¹⁸⁵

Thus, recovering attorney's fees as a matter of course should not be classified as damages. Instead, where statute permits, adverse attorney's fees ought to be considered part of the costs and expenses of litigation.¹⁸⁶ All things considered, a strong argument exists that adverse¹⁸⁷ attorney's fees are firmly within the class of expenses which Rules 1.08(d)(1) and (2) permit the guarantee of. Once again there is no clear bright-line answer to the

180. See *S. Nat. Bank of Houston v. Crateo*, 458 F.2d 688, 698 (5th Cir. 1972) (applying the *Erie* doctrine with Texas law, allowing the award of attorney's fees as an expense of litigation on principle, but reversed for the trial court to determine the reasonable amount).

181. *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127 (Tex. 2019) (rehearing denied Dec. 13, 2019).

182. *Id.* at 135 (quoting *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 173 (Tex. 2013)); see *In Re Xerox Corp.*, 555 S.W.3d 518, 529 (Tex. 2018) (defining damages as a compensation for a loss); *Wal-Mart Stores, Inc. v. Forte*, 497 S.W.3d 460, 465 (Tex. 2016) (explaining that compensatory damages are not the same as civil penalties, especially in light of TEX. CIV. PRAC. & REM. CODE ANN. ch. 41); *Huff v. Fid. Union Life Ins. Co.*, 312 S.W.2d 493, 501 (Tex. 1958) (treating attorney's fees awards as more of a penalty than an actual damages claim); *Sherrick v. Wyland*, 37 S.W. 345, 345 (Tex. Civ App. 1896, no writ) ("[F]ees of counsel, incurred in prosecuting a suit for or defending against a wrong, are not ordinarily recoverable as actual damages, because they are not considered proximate results of such wrong.").

183. *New Amsterdam Cas. Co. v. Tex. Indus., Inc.*, 414 S.W.2d 914 (Tex. 1967).

184. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Rsch. Corp.*, 299 S.W.3d 106 (Tex. 2009).

185. *Id.* at 120.

186. This position applies to attorney's fee awards that are not treated as damages by statute. See James M. Stanton, 29 T. MARSHALL L. REV. 243, 248–49 (2004) (reviewing the exceptions Texas courts recognize to the American rule that both parties pay for its own court costs "unless provided for by statute or by contract between the parties . . .").

187. It must be noted that the ethical legitimacy of the practice being recommended in this Comment does not apply to one's own attorney's fees. These have already been provided for by statute and are regulated by the rules of professional conduct. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.04, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A.

question presented that can be found in case law or statutes. Not only is guaranteeing adverse attorney's fees an incredibly rare—or completely nonexistent—practice in Texas, it is one that is equally rare in other states. Authority on this issue is sparse, and indirect at best. That said, lack of scholarship on the issue should not be deemed adequate grounds for dismissing the importance of the question presented.

The very same ethical requirements that pertain to all contingent fee agreements would still apply to guaranteeing adverse attorney's fee awards.¹⁸⁸ Any fee that an attorney guaranteed would still have to be conscionable.¹⁸⁹ The Texas Disciplinary Rules of Professional Conduct prohibit the *charging* of unreasonable fees.¹⁹⁰ But the practice of guaranteeing adverse attorney's fees is in fact the exact opposite—the client does not get charged these fees. Whatever extra award percentage an attorney would get from this extra risk would still need to be conscionable under the rules. So long as a competent lawyer can form “a reasonable belief that the fee is reasonable” there is no conflict with Rule 1.04.¹⁹¹ The rule gives us multiple reasonableness factors that we may consider when analyzing any type of fee.¹⁹²

Nothing about guaranteeing adverse attorney's fees would negatively impact the time and labor required,¹⁹³ the skill required to carry out the legal work correctly,¹⁹⁴ or the difficulty and novelty of the questions involved.¹⁹⁵ Guaranteeing adverse attorney's fee awards would in no way lead to a rise of conflicts of interests.¹⁹⁶ The amount of attorney's fees to be guaranteed would be on a case-by-case basis, and thus would be unlikely to raise the overall percentage “customarily charged in the locality for similar legal services[.]”¹⁹⁷ However, like any contingency fee agreement, the contingent nature of the adverse attorney's fee award guarantee and the

188. *Id.* at R. 1.08(d).

189. *Id.* at R. 1.04.

190. *Id.* at R. 1.04(a) (requiring that all contingent fee agreements be conscionable).

191. *Id.* (“A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable”).

192. *Id.* at R. 1.04(b).

193. *Id.* at R. 1.04(b)(1).

194. *Id.*

195. *Id.*

196. *Id.* at R. 1.04(b)(2).

197. *Id.* at R. 1.04(b)(3).

necessary events to trigger the contingency¹⁹⁸ should be laid out in writing.¹⁹⁹

Looking at the situation realistically, should a client be assessed adverse attorney's fees they must pay them either way. This practice would not change this. However, if these adverse attorney's fees were treated as an offset to a client's own attorney's fees in an "unsuccessful outcome,"²⁰⁰ it would better serve the interests of the client if they did not have to end up paying two sets of attorney's fees. If an attorney is comfortable with risking a lower payout due to an offset of adverse attorney's fees this should be left up to them. This is the way in which contingent fee agreements are handled in Alabama. In 1995, the Alabama Supreme Court amended their equivalent to Texas Rule 1.08 to expressly provide that in a percentage award fee agreement "a lawyer may pay, for his own account, court costs and expenses of litigation. The fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred."²⁰¹

The higher the total adverse attorney award, the less money that ends up in the pockets of the plaintiff. Guaranteeing these adverse attorney's fees, and treating them as an offset of one's own fees as an expense of litigation simply allows plaintiffs to keep at least some measurable remainder of their awards. However, it is important to note that the increased percentage for successful actions involving the threat of adverse attorney's fees should not be greater than the actual percentage that adverse attorney's fees would be of the plaintiff's award, i.e., if the adverse attorney's fees were 5% of the overall award the plaintiff's attorney should not be allowed to charge much more than 5% extra for taking on this risk. The issue becomes predicting what the percentage of adverse fees will be at the offset. However, language to the effect of "such additional fee shall not be ___% higher than what the actual reasonable expenses of the opposing side shall be" could serve as a possible example of how to contract around this issue.

198. *Id.* at R. 1.04(b)(8).

199. *Id.* at R. 1.04(c).

200. Here the term "unsuccessful" requires a looser meaning than what it is typical. Unlike in normal contingent-fee agreements, which assess success based on whether the defendant is found liable, the term "success" here can be more malleable. Success can be determined by a certain pecuniary threshold that a client wishes to reach, or even an adverse attorney's fee award figure that they wish to avoid.

201. Joseph W. Blackburn, *Deductibility of Litigation Expenses Paid by Alabama Attorney's*, 67 ALA. LAW. 445, 447 (2006).

As with any other fee, attorneys would not be allowed to use the guaranteeing of adverse attorney's fees as a means to solicit prospective clients through advertising.²⁰² Attorneys would still be prohibited from utilizing any sort of practice that constitutes barratry under the laws of the State of Texas.²⁰³ While it is true that under the current Texas rules repayment is required, this has not always been the case. The Texas rule is already more forgiving in its scope than the ABA equivalent.²⁰⁴ Unlike many states, the Texas rules expressly include the ability to guarantee the expenses of litigation for any client, regardless of ability to pay.²⁰⁵

As for indigent clients, Texas—as well as most states—do not require that advanced expenses of litigation be repaid.²⁰⁶ The practical impact of treating adverse attorney's fee awards as an expense of litigation would be that indigent clients would be completely insulated from risk in a contingent situation. The drafters of the Texas Disciplinary Rules of Professional Conduct²⁰⁷, as well as the Model Code of Professional Conduct²⁰⁸, acknowledged this.

202. See TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.03 (regulating the manner in which attorneys are allowed to solicit clients and prohibiting an exchange of anything of value to gain prospective clients except in very limited situations).

203. See TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04(a)(9) (stating that a lawyer shall not "engage in conduct that constitutes barratry").

204. See Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to The Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 136 (1990) (dissecting the complexities of the Texas Disciplinary Rules of Professional Conduct).

205. Compare TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08(d)(1) ("[A] lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter."), with ARIZ. RULES PROF'L CONDUCT R. 1.8(e)(1) ("[A] lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."), and COLO. RULES PROF'L CONDUCT R. 1.8(e)(1) ("[A] lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."), and FLORIDA RULES PROF'L CONDUCT R. 4-1.8(e)(1) ("[A] lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."), and KY. RULES PROF'L CONDUCT R. 3.130(1.8)(e)(1) ("[A] lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.").

206. Compare TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08(d)(2) ("[A] lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client."), with ALA. RULES PROF'L CONDUCT R. 1.8(e)(2) ("[A] lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client."), and ARIZ. RULES PROF'L CONDUCT R. 1.8(e)(2) ("[A] lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client."), and COLO. RULES PROF'L CONDUCT R. 1.8(e)(2) ("[A] lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client").

207. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08(d)(2).

208. MODEL CODE OF PROF'L CONDUCT R. 1.8(e)(2) (AM. BAR ASS'N 1983).

Ethically there is little ground to support the notion that allowing adverse attorney's fees to be guaranteed as a cost of litigation would somehow lead to a rise in predatory contingent fee agreements. Ethical attorneys who take the risk of guaranteeing adverse attorney's fees create two types of scenarios: (1) the attorney would be more likely to counsel their clients on a losing case to reach settlement; (2) the attorney would be even more incentivized to win the case. Neither of these scenarios compromises the ethics of an attorney's actions under the rules. Conspiracy fears that this would further fuel the fires of drawn-out litigation are based in conjecture rather than concrete data. What is concrete however, is that the expenses of litigation all too often keep meritorious cases from ever seeing the light of a courtroom because one of the parties is terrified of the economic impacts of litigation.

VI. THE REAL-WORLD IMPACT AND POSSIBLE SOLUTIONS

Having established the philosophical and somewhat arcane²⁰⁹ foundation of the Texas Disciplinary Rules of Professional Conduct, a more pragmatic approach would help provide a broader analysis of the subject. It is all good and well to demonstrate the historical roots of the argument proposed, but this does little to further the likelihood of use by practicing attorneys. The practice of guaranteeing adverse attorney's fees is a subject which has little to no scholarship before now. An attorney wishing to utilize the practice has little to go on to keep from landing in front of a disciplinary board.

A. *Eliminate or Reduce Third-Party Litigation Financing*

Allowing counselors to guarantee adverse attorney's fees awards will hopefully reduce or eliminate all or part of the market for third-party litigation financing. Since the inception of the Texas rules an entire industry of private lenders for litigation costs has sprung up, with estimated output totaling in excess of \$1 billion loaned out to plaintiffs alone.²¹⁰ It is true that similar to contingent fee agreements private third-party financing allows plaintiffs who otherwise would not be able to afford legal fees the

209. While it is true that discussing the Magna Carta and the Texas rules in the same context might be a bit esoteric, this only goes to show just how ancient the values embodied in this paper's argument are. A deep river of history flows throughout the body of this proposal, and the goal of opening the doors of justice to all who have a worthy cause lie at the heart of it.

210. George J. Lysaught & D. Scott Hazelgrove, *Economic Implication of Third-Party Litigation Financing on the U.S. Civil Justice System*, 8 J.L. ECON. & POL'Y 645, 645 (2012).

opportunity to pay for an attorney.²¹¹ However, unlike contingent fee agreements with attorneys there are few, if any, ethical considerations enforced upon lenders to protect clients. Instead of involving the ethical, moral, and fiduciary nature of the attorney-client relationship, clients are turning more and more towards arm's-length transactions with lending institutions who value profit over results.

An attorney's first and most solemn interest is always that of the client. And allowing them to hop in bed with a sparsely regulated,²¹² self-interested business to be able bring suit is a betrayal of that obligation when there is a more equitable solution within our grasp. Texas Disciplinary Rule of Professional Conduct 1.04 already bars attorneys from taking advantage of their clients. These lenders on the other hand are not subject to Rule 1.04. There is little to keep third-party financiers from taking advantage of clients in their contracts to pay back their loans with a percentage of their awards. Meanwhile, duties separately owed to clients by their attorney will always be a greater protection than individual regulations. Furthermore, if an attorney takes their percentage of the award and the bank takes theirs, what is there really left to make the client whole? This Comment has highlighted the fact that under the American system the parties are not completely made whole. Allowing third-party litigation financiers to take part of client's awards further exacerbate the situation—not to mention it is a near textbook definition of champerty.

B. *Amend the Texas Rules of Professional Conduct*

One possible way of creating a solution is to amend the Texas Rules of Professional Conduct. Hopefully this Comment has proven that guaranteeing adverse attorney's fees is ethical—now it must be legal as well. Adding in a provision in Rule 1.08(d)(1) to allow for this is one possible path, and one that ought to be given strong consideration. If one takes a practical look at the term “expense of litigation,” how could attorney's fees not be part of it? The Model Rules allow the advancement of expenses of litigation because “the advances are practically indistinguishable from contingent fees and help ensure access to the courts.”²¹³ Thus, changing

211. *Id.* at 646.

212. *See e.g.*, Susan L. Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 57 (2004) (highlighting the fact the entire litigation finance industry is unregulated).

213. MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 10 (AM. BAR ASS'N 2021).

the Texas rules requires great consideration by the drafters of the State Bar. However, incorporating language to fix one problem might create another.

C. *Texas Commission on Professional Ethics*

The more prudent option might well be within the power of the Texas Commission on Professional Ethics. Should a case involving these issues come before the Commission, it would be possible for that body to simply state that the suggested practice of guaranteeing a client's adverse attorney's fees comports with the Texas rules. This would avoid having to go through the effort and risk involved in changing the Texas Rules of Professional Conduct themselves.

VII. CONCLUSION

Allowing attorneys to guarantee all or a portion of any adverse attorney's fees awarded against their client is an ethical solution to many problems. Chief among these solutions is the expansion of the open courts doctrine to worthy claimants. The sanctity of contract law ought to prevail in an otherwise ethical situation, and Texas should make it clear that this practice is ethical. Those who would subvert the ethical parameters of contingent fee agreements would likely do so all the same without addition of any guarantees of adverse attorney's fees to the state rules. This is something the bar is already equipped to handle, and it is a legitimate issue. However, the bigger problem involved is that otherwise meritorious parties either forego bringing suit or accept a settlement out of fear of the costs and expenses of litigation. What good is reaching the marble rooms of justice if you are quickly forced out of them by pecuniary limitations? Guaranteeing the threat of adverse attorney's fees is a legitimate and practical means of assisting clients to navigate the financially murky waters of litigation and should be widely accepted.