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**ETHICAL CONSIDERATIONS  
IN RESPONDING  
TO AN RFP**

**Marilyn C. Maloney**

Marilyn C. Maloney  
Liskow & Lewis  
1001 Fannin, Suite 1800  
Houston, TX 77002

[mcmaloney@liskow.com](mailto:mcmaloney@liskow.com)  
713.651.2938

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## **I. Introduction**

Increasingly, real estate and other clients are soliciting or requiring alternate or appropriate fee arrangements (“AFAs”) rather than traditional hourly fee arrangements. Often these matters are awarded pursuant to requests for proposal or requests for information (“RFPs”) that are distributed to a panel of firms that have been approved to work for the client. Over the past several years clients have involved procurement officers in the selection of legal counsel, attempting to reduce the client’s legal spend while insuring competent representation.

While some law firms may have specialists on staff to help them bid on RFPs, many do not. In addition, many firms that have utilized an hourly rate structure for many years simply do not capture the data that would enable them to bid intelligently in response to an RFP.

As a result, a firm may submit an aggressive bid to obtain a piece of work, perhaps to expand their services into areas not previously served for the client, to solidify a client relationship, or perhaps simply because there is excess capacity within the firm at that time. AFAs may take any number of forms, including fixed fees, capped fees, loyalty credits (the ability to utilize a portion of the matters billed on one file as a credit against fees billed on another file), agreements to discount fees if a new lawyer has to be assigned to the matter due to the unavailability of a lawyer on the initial team, budget-driven fees, and many other permutations. Assume that a firm has been awarded a matter pursuant to an AFA and learns that its bid was too aggressive and potentially non-economic. This paper will consider some of the ethical issues that lawyers should consider in these cases and will review briefly both possible disciplinary action and malpractice claims that may arise from these transactions.

## **II. Texas Rules**

The Texas Disciplinary Rules of Professional Conduct (the “Rules”) govern a lawyer’s professional responsibilities. As noted in the Preamble to the Rules, “In all professional functions,

a lawyer should zealously pursue clients' interests within the bounds of the law. *In doing so, a lawyer should be competent, prompt and diligent.*" TEX. DISC. R. PROF'L CONDUCT, Preamble 3 (*emphasis supplied*). If a lawyer finds a matter to be or become uneconomic due to an aggressive AFA, he or she may consciously or unconsciously become less prompt and diligent while turning to other, more lucrative work. Such an event might lead to disciplinary action by the Chief Disciplinary Counsel and the Commission for Lawyer Discipline of the State Bar of Texas. TEX. RULES OF DISCIPLINARY PROCEDURE.

The primary Rules that a lawyer in such a position should consult are Rules 1.01, 1.02, 1.04, 5.01, 5.03, and 1.15.

**A. Rule 1.01**

Rule 1.01(b) provides that:

- (b) In representing a client, a lawyer shall not:
  - (1) neglect a legal matter entrusted to the lawyer; or
  - (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.
- (c) As used in this Rule, "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

TEX. DISC. R. PROF'L CONDUCT, 1.01 (b) and (c).

Official comments 6 and 7 to Rule 1.01 elaborate on the scope of subparts (b) and (c) and provide in part as follows:

- 6. Having accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf.

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