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What Should (and Should Not Be) in Your Appellate Representation Agreement

Scott Rothenberg

Scott Rothenberg
Law Offices of Scott Rothenberg
6575 West Loop South, Suite 500
Bellaire, TX 77401-3509

scott@rothenberglaw.com
713.667.5300

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Law Offices of Scott Rothenberg
6575 West Loop South, Suite 500
Bellaire, Texas 77401-3509
(713) 667-5300 telephone
(713) 667-0052 telecopier
scott@rothenberglaw.com email

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I. Introduction

How old is your form of appellate representation agreement? Was it originally drafted before your 32-year old son was born? Was it last revised when the Houston Astros won the World Series? If so, this is the year to set aside a few hours to review it and make changes. Why now? Because on May 25, 2021, all 9 justices of the Supreme Court of Texas signed an order revising the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure. Those amendments will go into effect on July 1, 2021 – less than one month from now. "That's great," you say, "but what do disciplinary rules amendments have to do with my appellate representation agreement?" Excellent question. Last month's amendments provide Texas attorneys with unprecedented flexibility in the manner in which they interact with clients. Last months' amendments provide Texas attorneys with new tools for their appellate toolkits in preparing appellate representation agreements. But these new flexible tools make it important for Texas attorneys to review the disclosures contained in their appellate representation agreements in order to advise clients and prospective clients of the potential for their use. Section __ of this paper addresses the new amendments at length, and provides recommendations for incorporating them into your appellate representation agreement.

Your appellate representation agreement is (or should be) a document that clearly defines the rights, responsibilities and expectations of you– the appellate legal service provider– and your potential new appellate client. By the time the ink is dry on the parties' signatures, both attorney and client should know what is expected of them, and what they can expect to receive in return, for entering into the appellate representation agreement. If this paper were written in or before the mid-1980's, this paragraph would both begin and end this paper. It was not. This paper is written in the early-two thousand twenties. As Bob Dylan warned us half a century ago, the times (and a small, but very dangerous percentage of our clients), they are a changin'.

It is a scene that repeats itself over and over again throughout the years. New Appellate Client shows up in your office for an appointment asking you to draft a petition for writ of mandamus, to perfect an interlocutory appeal, or to handle a pending appeal in one of our State's appellate costs. After a discussion of the facts surrounding the potential representation, the client's expectations, the anticipated costs of the representation, your background, experience, and ability, and your firm's resources and reputation, New Appellate Client agrees to hire you to represent him, her, or it.

You or your legal assistant pull up your firm's existing form of representation agreement from the firm's administrative database. The form agreement was originally created while Texaco v. Pennzoil was still pending in the First Court of Appeals. The firm's managing partner works under the theory that "if it was good enough to use then, it is good enough to use now." Or if you or your firm are like a small percentage of firms, the representation agreement has actually been tweaked a few times after the turn of the century (the 2000's, not the 1900's) to reflect new developments in attorney-client relationships, attorney ethics, and legal malpractice law. How do I know this? Because I have been asked to consult with lawyers and law firms about the representation agreements that they use. In the course of doing so, I have found many to be woefully inadequate.

Why do I say woefully inadequate? Back in the early 1980's, the typical species of bee found in the United States was fairly docile, would only attack when it was itself attacked, and usually only as a last resort at self-preservation. Its main interest in life was to fly from flower to flower, collect pollen and convert it to honey back at the hive. They were dependable, productive, hard-working, diligent and rarely aggressive.

In the mid-1980's, a new breed of bee– often referred to as killer bees– began to spread throughout North America. Killer bees react aggressively to disturbances as much as ten times faster than traditional honey bees. They have been known to chase humans for a quarter of a mile or more. To-date, killer bees have killed thousands, with their victims sometimes receiving vastly more stings than from their traditional counterparts. The aggressiveness of killer bees is not solely directed at humans. They frequently attack and kill horses and other livestock, as well as domestic pets.

Imagine that you are hiking through a state park. You come upon a tree laden with several bee hives. Knowing what you've read about killer bees, are you going to automatically assume that the bees flying nearby are gentle, docile traditional honey bees? Will you assume that they mean you no harm and walk as close to the hives and bees as possible? Or will you seek to manage the risk that this is a hive full of angry, aggressive, killer bees and take steps to protect yourself from the potential risk that results therefrom?

The prudent hiker will obviously seek to protect himself or herself from unnecessary risk. Doing so minimizes the risk of injury or death in case the hives turn out to be full of angry killer bees.

What do bees have to do with legal clients? Simply this. The overwhelming majority of potential clients who pass through your doors are comparable to traditional honey bees.

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