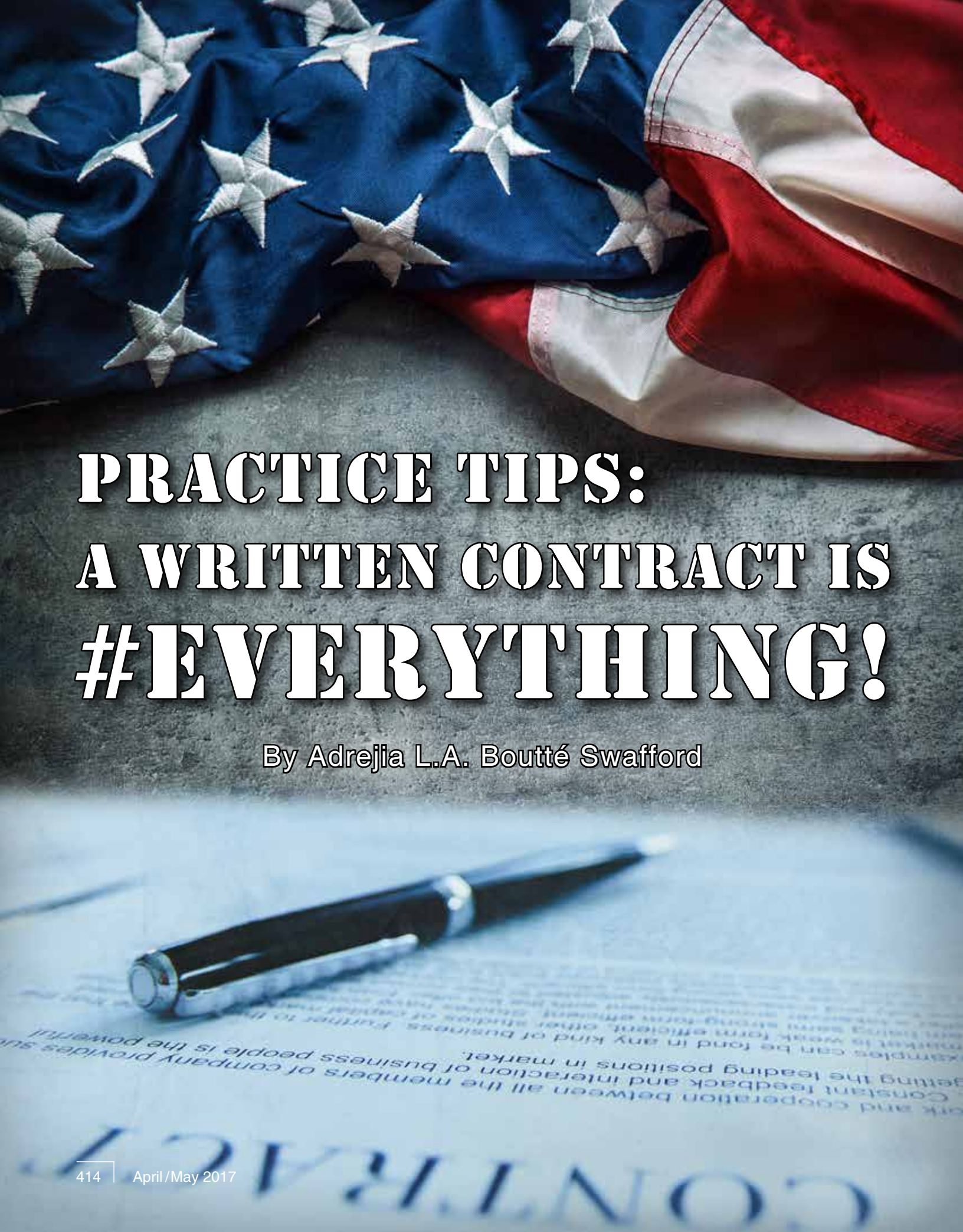

PRACTICE TIPS: A WRITTEN CONTRACT IS #EVERYTHING!

By Adrejia L.A. Boutté Swafford

Law school is the place where we first meet some of our future opposing counsel and co-counsel in the profession. Some of us find life-long mates with whom we could not remember life pre-them. Because of this bond, we decide there is no one better with whom to practice law. So, we become business partners — IN LAW! But, because the friendship is so strong (we have a meeting of the minds) and the trust is so deep (consent is there, too), we choose not to write the specific terms of our work agreement. After all, as we learned in law school, oral contracts are just as good as written contracts, unless stated otherwise by law.

Deciding to Go for It

"A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished." La. Civ.C. art. 1906

While it is true that *oral* contracts are enforceable, by creating obligations between parties, "[a] party who demands performance of an obligation [per the contract] must prove the existence of the obligation."[1] "Prov[ing] the existence of the obligation" in an *oral* contract between lawyers is a bit more difficult than simply producing a *written* contract which speaks for itself. For some reason, not nearly enough contracting lawyers, or joint venturer(s), consider the burden of proof required to evidence the obligation(s) allegedly agreed upon (if things go south) before they enter a work agreement.

Why do so many lawyers leave anything up for discussion or confusion? In my years in this profession, I have often read case opinions about lawyers suing former co-counsels for monies allegedly earned pursuant to an *oral* work agreement or heard complaints about former co-counsels who failed to honor the *oral* work agreement. The sad truth is that these are the perils and pitfalls of contract employment — which occur far too often.

The decision to enter into a work agreement with another lawyer requires an *honest* analysis of personal and professional goals and boundaries. During such healthy analysis, one first, and most important, task is to clearly designate how clients will be secured/retained and how the monies earned, while working for said client, will be shared with co-counsel. The best advice is to put it all DOWN IN WRITING. Think of it as a pre-nuptial agreement to your business marriage — IN LAW.

In *Duer & Taylor v. Blanchard, et al.*, the Louisiana Supreme Court said, "[W]here a retained attorney employs or procures the employment of another attorney to assist him in handling a case involving a contingency fee, the agreement regarding the division of the fee is a joint venture, which gives the parties to the contract the right to participate in the fund resulting from the payment of the fee by the client."[2] The "joint venture"[3] can be between two (or more) sole practitioners or between a sole practitioner and a firm or between multiple firms (of several lawyers). The combinations of work agreements among contracting lawyers not of the same firm are truly endless.

If the contracting relationship is a joint venture for a certain client, the written contract can be made a part of the overall client contract, with a provision referring to expressed terms and conditions of the shared fees,[4] costs, expenses and divided representation among the lawyers. However, if the contracting relationship is a long-term matter, it is best to have the work agreement provision in the client(s) contract *and* a separate working agreement between the lawyers. But, make sure the work agreement provision in the client contract does not conflict with the separate working agreement between lawyers. Regardless of whether lawyers are joining forces for a short-term or a long-term joint venture, keep the details *current* and in writing so the terms are "clear and unambiguous."[5]

I recently worked on a case where a lawyer left a firm and subsequently tried contracting certain existing clients to his new firm. When, and whether, departing lawyers may take existing clientele with them as they depart a firm is a good discussion for another time.[6] But, in this case, whose client is it? The departing lawyer asserted he had an agreement with former co-counsel that he would be responsible for procuring and directly communicating with clients, while the former co-counsel was responsible for the non-client relations work. This caused a huge issue when he departed the firm as some clients only knew him and desired to retain only him and his new law firm.

The moral of this story is to make sure all terms of working agreements are in writing. Do not simply use a "boiler-plate" contract without including any and all special conditions of the work arrangement with co-counsel. Remember, written contracts are only valuable if the intent is made clear.

"When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La. Civ.C. art. 2046

Once all the brainstorming is complete and you and your future co-counsel have had enough "working lunches" to hash out the details of your purported work agreement, keep in mind the Louisiana Rules of Professional Conduct as you set about to draft these terms. Then, consider getting some malpractice insurance if this relationship is purported to be one of longevity.

Getting Started

Of course, all the Louisiana Rules of Professional Conduct are important but pay attention to the following rules when forming a work agreement with another lawyer.

Fee Sharing

The client must give written consent to the association and participation of lawyers not of the same firm. Rule 1.5(e) states:

> A division of fee between lawyers who are not in the same firm may be made only if:
>
> (1) the client agrees in writing to the representation by all of the lawyers involved, and is advised

in writing as to the share of the fee that each lawyer will receive;

(2) the total fee is reasonable; and

(3) each lawyer renders meaningful legal services for the client in the matter.

The *Jumonville v. Cardenas* court further clarified that, "[e]ven though Rule 1.5 was amended in 2004 to require the client to agree in writing to an attorney fee-sharing agreement between attorneys not of the same firm, the Rules of Professional Conduct do not regulate or prohibit the enforcement of an agreement between attorneys."[7]

Restrictions on the Right to Practice?

Rule 5.6 generally prohibits lawyers from entering non-competition, or non-solicitation, agreements with other lawyers. While these employment-related agreements are legal in Louisiana under general contract law,[8] this does not apply to lawyers. Rule 5.6 states:

A lawyer shall not participate in offering or making:

(a) A partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) An agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

When It All Goes South and You Are Missing Your Money

Hopefully, you have taken my advice and have a written contract, coupled with good billing records of your time spent on each case at issue. If, however, you ignored my advice and engaged in an *oral* working agreement anyway, be prepared to fight it out in court. It will be your word versus your former co-counsel's word (with, if you were good, the aid of a billing paper trail).

According to the Louisiana Supreme Court in *Duer & Taylor*, *supra,* lawyers sue other lawyers for damages resulting from a breach of contract regarding fee sharing, not for attorney's fees.[9] Absent a written agreement to the contrary, when fee sharing between lawyers (based on joint representation of a client) is at issue, the court generally finds a joint venture and divides fees equally between the lawyers.[10] If the court fails to find a joint venture agreement existed, recovery of fees will likely be awarded under the theory of *quantum meruit* by which fees are assessed based on services performed. In a case where the lawyer was either discharged or did not work the case from its inception to its conclusion, the court will usually apply the *quantum meruit* theory.[11]

"If the price or value [of an oral contract] is in excess of five hundred dollars, the contract must be proved by at least one witness and other corroborating circumstances." La. Civ.C. art. 1846

Something to keep in mind is Louisiana Civil Code Article 1846. Under 1846, it is not necessary to provide independent evidence of every detail of an oral contract.[12] However, an oral contract of more than $500 must be proven by "at least one witness and other corroborating circumstances." The witness can be the plaintiff himself, but the corroborating circumstances must come from a source other than the plaintiff.[13]

In the End

No matter how much trust and comradery existed at the beginning of the journey into contract lawyering, the bridge back to that warm, fuzzy place of happiness and friendship is usually difficult. While nothing is impossible and business is business, disputes and confusion over money have ruined many relationships. If you care about your friendship and value any potential business relationship-IN LAW, do the right thing, put it in writing and keep it current. Good luck!

FOOTNOTES

1. La. Civ.C. art. 1831.

2. Duer & Taylor v. Blanchard, Walker, O'Quin & Roberts, 354 So.2d 192, 194-95 (La. 1978).

3. "The joint venture theory has been utilized to apportion the attorney fee equally between the attorneys where the attorneys failed to execute a contract between themselves as to how a fee should be divided between them." W. Carl Reynolds, P.C. v. McKeithen, 14-0171 (La. App. 1 Cir. 5/6/15), 2015 WL 21657862014, at *2; *rev'd in part*, 15-1122 (La. 10/9/15), 176 So.3d 399 (*citing*, McCann v. Todd, 203 La. 631, 14 So.2d 469, 471 (La.1943) (a case where the court held that lawyers who jointly represent a client are entitled, when an agreement stating otherwise exists, to an equal share in the compensation. It is irrelevant which lawyer provided the most labor or skill.)).

4. *See*, Louisiana Rules of Professional Conduct Rule 1.5.

5. Murray v. Harang, 12-0384 (La. App. 4 Cir. 11/28/2012), 104 So.3d 694 at 698.

6. *See*, Louisiana Rules of Professional Conduct, Rules 1.10(b) and 7.4. *Also*, Frank Maraist, N. Gregory Smith, Judge Thomas F. Daley, Thomas C. Galligan, Jr. and Catherine Maraist, 21 Louisiana Civil Law Treatise, *Louisiana Lawyering* § 8.13 (updated June 2016).

7. Jumonville v. Cardenas, 2013 WL 6506205, at *5, 13-0037 (La. App. 1 Cir. 12/10/13).

8. La. R.S. 23:921 A (1) sets forth the requirements for a valid "non-solicitation" clause under general contract law. *See also*, Maestri v. Destrehan Veterinary Hospital, Inc., 554 So.2d 805, at 810, 89-473 (La. App. 5 Cir. 12/13/89).

9. Duer & Taylor, 354 So.2d at 194-95.

10. 2015 WL 21657862014, at *5. *See also*, Rice, Steinberg & Stutin, P.A. v. Cummings, Cummings & Dudenhefer, 97-1651 (La. App. 4 Cir. 3/18/98); and Dukes v. Matheny, 02-0652 (La. App. 1 Cir. 2/23/04), 878 So.2d 517, at 520-521.

11. *Id.*, at *14-*15.

12. 2013 WL 6506205, at *3.

13. *Id.*

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