

THE SAN ANTONIO DEFENDER

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THIS IS YOUR ORGANIZATION!

*Season's
Greetings*

In this issue:

- *Attorney Client Contracts*
- *Criminal Justice Act & Retained Counsel Contracts*
- *Law Practice Databases*
- *Practical Advice for your Business*
- *Federal Supervised Release*
- *State Community Supervision*



LESSONS LEARNED ABOUT CRIMINAL JUSTICE ACT (CJA) & RETAINED COUNSEL CONTRACTS - COURT'S PERCEIVED OBLIGATION WHEN CLIENT BECOMES INDIGENT

By Robert H. Featherston & Louis W. Correa

Contract, - Contract, we don't need no stinking Contract!

More than just a few attorneys will represent a retained client without one. You should think twice about that, considering what the Texas Disciplinary Rules of Professional Conduct have to say about client representation.

A good sea story always gets the blood flowing, so read on and see what happened to us in Federal Court and how our contract saved the day!

Bubba Gump is a young man from Laredo Texas. He is the son of a politically well-connected father whose family has a long history of leadership within the community. At the time of Bubba's difficulties with law enforcement, Bubba was a student living at home with no independent income.

An allegation was made that Bubba was visiting the home of a known drug dealer and involved in a transaction whose object was 67 grams of cocaine.

The local District Attorney initially charged Bubba with possession, however every District Judge in the County then recused themselves for various reasons. The local District Attorney then asked the Federal Government to take over the case, which they did.

That was when our law firm was hired by the family to represent Bubba. A 3rd party contract for the employment of our firm was drawn up and signed by Bubba's father. Bubba was made aware of the contract and its objective and agreed to our assistance.

It is important to note that under the Texas Disciplinary Rules of Professional Conduct the client must be advised and consent to a 3rd party paying for his representation (Rule 1.06 Conflict of Interest: General Rule, Comment: Interest of Person Paying for a

Lawyers Service). Additionally, both the third party and the Client must also be advised that the third party will not be able to interfere with the lawyer's independence of professional judgment or with the Confidentiality of the client-lawyer relationship (Rule 1.05 Confidentiality of Information, Rule 1.08 Conflict of Interest: Prohibited Transactions).

Take a look at the language of the attached contract, as it covers these rules and a little bit more.

The first order of business for Bubba was the detention hearing in Laredo. Twelve witnesses were called on his behalf, including teachers, principals, long time family friends, an English Naval Officer and members of his family. The hearing lasted all day, the Magistrate, after considering the case for 3 additional days, detained him (that's "no bond" for State only practitioners).

After the detention hearing, every Federal judge in Laredo recused themselves. The case was then transferred to McAllen, Texas where the trial was held.

If you have not done a Federal trial in McAllen, you are in for a treat! Defense attorneys get to park across the street from the courthouse in a pothole filled dirt lot. Everyone else parks in paved or covered parking next to the courthouse. Security procedures are the same for defendants and defense attorneys who walk through the front door, - shoes off, belt off, empty pockets, no cell phone If you have computer equipment the Court must authorize it before a defense attorney can bring it in. The entire atmosphere is rather chilly, so bring a jacket (it will be searched also).

The Court held a hearing on our motion to suppress, taking up a full day of testimony. The motion was denied. The case was set for trial a few months later and after four days of testimony Bubba was found guilty of possessing



with intent to distribute a controlled substance by the jury.

Bubba was quite satisfied with our representation, however we advised him that it would be in his best interests if he hired appellate counsel to grade our papers. Bubba, as a student, had no funds so the family hired appellate counsel for him.

The attorney doing the appeal then asked the Court for a free copy of the trial

transcript because Bubba was indigent. The Government objected to this and the Court ordered appellate counsel to disclose her fee before the Court would consider her application. Appellate counsel did so but the Judge was not satisfied with her response and decided to get us, as trial counsel, involved in the dispute over a free transcript.

So, eight months after the trial, the Judge sent us the following order:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

UNITED STATES OF AMERICA)	
)	CRIMINAL NUMBER
VS.)	
)	L-07-CR-9999 (1)
BUBBA GUMP)	

MINUTE ENTRY

Defendant Bubba Gump has filed a "Motion for a Free Record on Appeal" (Docket Entry Number 118) and alleges that because of his poverty he is unable to pay the cost to obtain a copy of the trial record so that he may pursue his appeal. Defendant now seeks the right to proceed with an appeal in Forma Pauperis for the sole purpose of obtaining a copy of the trial record without payment of the cost. However, the Court notes that Defendant has had retained counsel represent him in this action. To evaluate the merits of this motion, the fees paid by the Defendant to trial counsel must be evaluated. For, in such a case,

. . . it becomes the duty of the Court to meticulously examine into the nature and extent of the services rendered for the purpose of determining whether or not the fees charged were reasonable under the circumstances. In making this determination it is appropriate to use the guidelines set forth in the Criminal Justice Act (18 U.S.C. § 3006A) since the kind of appeal sought by the defendant involves the use of public funds.

United States v. Martinez, 385 F. Supp. 323, 325 (W.D. Tex. 1974), aff'd, 522 F.2d 1279 (5th Cir. 15175), cert. denied, 425 U.S. 906





(1976); see also United States v. Lopez-Flores, 701 F.Supp. 597 (S.D. Tex. 1988). As the Court further stated in Martinez:

[W]hen an employed attorney undertakes to limit his representation of a defendant in a criminal case to the trial on the merits, and receives a substantial fee for his services, a showing of extraordinary good cause, taking into consideration the guidelines of the Criminal Justice Act will be required before the taxpayers will be called upon to pay any part of the fees, costs or expenses on appeal, even though the defendant is then destitute.

The Court, therefore, instructs counsel for the Defendant, Mr. Louis W. Correa and Mr. Robert Featherston, to file their respective affidavits indicating the amount of time spent in this cause, including the amount of time spent in court and the amount of time spent out of court, the fee to be paid, and the amount still owed, if any. The affidavits must be filed within ten (10) days from the date of this Minute Entry.

The Clerk shall send a copy of this Minute Entry to the Defendant, counsel for Defendant, and counsel for the Government. Done this 25TH day of March, 2008, at McAllen, Texas.

/s/

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

To say the least we were appalled. We consulted other local attorneys to see if any one had encountered this demand before. We also contacted the TCDLA strike team for assistance. We researched the 5th Circuit cases cited by the Court and expanded our research to all of the Circuits.

After at least 17 hours of legal research and consultation with other attorneys we filed the following response:





SEALED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

SEALED

UNITED STATES OF AMERICA

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VS.

CAUSE NO.: L-07-CR-9999 (1)

BUBBA GUMP

**RESPONSE TO JUDGE'S INSTRUCTION
IN MINUTE ENTRY DATED 25 MARCH 2008
AND BRIEF IN SUPPORT**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE RICARDO H. HINOJOSA:

COMES NOW, LOUIS W. CORREA and ROBERT H. FEATHERSTON trial attorneys of record, for BUBBA GUMP and files this their affidavit and Brief in Support, averring to this Honorable Court as follows.

I.

As a general matter, "differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." *Roberts v. LaVallee*, 389 U.S. 40, 42, 19 L. Ed. 2d 41, 88 S. Ct. 194 (1967) (per curiam); see, e.g., *Ross v. Moffitt*, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974); *Mayer v. City of Chicago*, 404 U.S. 189, 30 L. Ed. 2d 372, 92 S. Ct. 410 (1971); *Draper v. Washington*, 372 U.S. 487, 9 L. Ed. 2d 899, 83 S. Ct. 774 (1963); *Lane v. Brown*, 372 U.S. 477, 9 L. Ed. 2d 892, 83 S. Ct. 768 (1963); *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956) (plurality opinion); *id. at 20* (Frankfurter, J., concurring in the judgment). A trial transcript may be such an instrument. *Fullan v. Commissioner of Corrections of N.Y.*, 891 F.2d 1007, 1010 (2d Cir. 1989), cert. denied, 496 U.S. 942 (1990).





II.

On 25 March 2008 in a Minute Entry from this Honorable Court, trial counsel for the Defendant, BUBBA GUMP, were instructed to provide this Honorable Court with an affidavit stating the fee to be paid by the Defendant, BUBBA GUMP, any amount that is still owed, if any, the amount of attorney time in court and the amount of attorney time out of court.

III.

Representation of Defendant BUBBA GUMP was undertaken via a signed contract of employment between Mary Gump and the Law Firm of Correa & Featherston, P.C. (known as "Law Firm"). BUBBA GUMP did not sign the contract of employment and was not responsible for any fees. Only signees to the contract are financially responsible to "Law Firm" for any payments of fees. Additionally, "Law Firm's" civil employment contracts do not call for representation in any Motion for New Trial, Notice of Appeal or Appeal.

It is the understanding of both Louis W. Correa and Robert H. Featherston that at the time of the signing of this contract of employment with Mary Gump, BUBBA GUMP had no funds for legal representation in the above-entitled cause. BUBBA GUMP owed "Law Firm" nothing at the beginning of representation and owes "Law Firm" nothing now because he did not sign the contract of employment.

IV.

At the time of the signing of the contract by Mary Gump, the business model for "Law Firm" was to bill as a flat fee for the services to be rendered per the contract, not on an hourly basis. Therefore, a billable hours log was not kept by "Law Firm" and any hours averred to below are only conservative estimates of actual time:

- The number of in Court hours worked by Louis W. Correa in the above entitled cause were approximately: 26 hours;





- The number of in Court hours worked by Robert H. Featherston in the above entitled cause were approximately: 26 hours;
- The number of out of Court hours worked by Louis W. Correa in the above entitled cause were approximately: 410 hours;
- The number of out of Court hours worked by Robert H. Featherston in the above entitled cause were approximately: 380 hours.

V.
BRIEF IN SUPPORT

This Honorable Court was kind enough to cite *United States v. Martinez*, 385 F.Supp. 323, (W.D. Tex. 1974), aff'd, 522 F.2d 1279 (5th Cir. 1975), cert. denied, 425 U.S. 906 (1976). and *United States v. Lopez-Flores*, 701 F.Supp. 597, (S.D. Tex. 1988), in its instruction for the above attorneys. It is instructive to note that in the *Martinez* case the Court makes the following statement (emphasis added):

“Ordinarily, this Court would not concern itself with the **fees paid to an attorney by his client**, but where, as here, **the client**, in order to pay the fee demanded by his attorney for services in the trial court alone, depletes his resources to the point where he **has become destitute**, and then seeks the right to prosecute an appeal *in forma pauperis*, it becomes the duty of the Court to meticulously examine into the nature and extent of the services rendered for the purpose of determining whether or not the fees charged were reasonable under the circumstances.” *United States v. Martinez*, 385 F.Supp. 323, 325 (W.D. Tex. 1974), aff'd, 522 F.2d 1279 (5th Cir. 1975), cert. denied, 425 U.S. 906 (1976).

Additionally, in the *Lopez-Flores* case the Court states, (emphasis added):

“Where, as here, **the client**, in order to pay the fee demanded by his attorney for services in the trial court alone, depletes **his** resources to the point where **he has become destitute**, and then seeks the **right** to prosecute an appeal *in forma pauperis*, it becomes the duty of the Court to meticulously examine into the nature and extent of the services rendered for the purpose of determining whether or not the fees charged were reasonable under the circumstances.” *United States v. Lopez-Flores*, 701 F.Supp. 597, (S.D. Tex. 1988).

Both of these cases address the use and depletion of “the client’s funds” and are therefore





distinguishable and inapplicable to BUBBA GUMP. A third party, not BUBBA GUMP contracted with "Law Firm" for the representation of BUBBA GUMP. The retained trial attorneys aver that BUBBA GUMP has paid them or their "Law Firm" nothing. Therefore, above counsel respectfully submit that both of the above cited cases by this Honorable Court do not apply to a fact inquiry by this Honorable Court into funds paid by a third party for trial representation of BUBBA GUMP.

Above counsel have been unable to find any 5th circuit case law discussing this Honorable Court's ability to inquire into a civil contract involving a 3rd party payment of a defendant's legal fees and the result when the 3rd party declines to contract and pay for further legal representation and how that should be addressed in an application by an indigent defendant for CJA funds. However, the Second Circuit has addressed the issue in *Fullan*.

"The possibility that a retained attorney will receive what appears to be a very large fee while the defendant's transcript is paid for by the tax payers is not an attractive scenario, but we cannot conclude that this possibility is dispositive. The determinative consideration is that a state has no right to dictate how the defendants' family and friends will spend their money. Insofar as the state's prosecution of a defendant is concerned, family and friends are bystanders". *Fullan v. Commissioner of Corrections of N.Y.*, 891 F.2d 1007, 1011 (2d Cir. 1989), cert. denied, 496 U.S. 942 (1990).

We respectfully submit that *Fullan* is dispositive as to BUBBA GUMP. Above counsel respectfully submit that this Honorable Court's inquiry into what fee was paid to the "Law Firm" should end with the averment of above counsel that places this Honorable Court on notice that BUBBA GUMP paid no funds to "Law Firm."

In *Martinez* the Court states: "But it should be emphasized that it is only when the question of probable abuse has arisen that the Criminal Justice Act comes into play." *United States v. Martinez*, 385 F.Supp. 323, 326 (W.D. Tex. 1974), aff'd, 522 F.2d 1279 (5th Cir. 1975),





cert. denied, 425 U.S. 906 (1976). Here there can be no abuse when the defendant has expended no funds and therefore, we respectfully submit, the Criminal Justice Act does not come into play.

VI.

Undersigned Counsel aver that the obligations of "Law Firm" under the employment contract with Mary Gump ended at the time of sentencing of BUBBA GUMP. Therefore, in response to this Honorable Court's instruction to provide certain data, and the research involved to address the issues raised, "Law Firm" has expended 17 man hours of attorney time. "Law Firm" respectfully requests this Honorable Court issue a voucher number to cover the costs of responding to this Honorable Courts instruction.

Respectfully submitted,

/S/

LOUIS W. CORREA (Lead Attorney)
CORREA & FEATHERSTON, P.C.
The Travis Building, Suite 340
405 N. Saint Mary's
San Antonio, Texas 78205
Telephone: (210) 838-8582
Facsimile: (210) 479-3205
Email: louis@correafeatherston.com
State Bar No.: 04839600

Respectfully submitted,

/S/

ROBERT H. FEATHERSTON
CORREA & FEATHERSTON, P.C.
The Travis Building, Suite 340
405 N. Saint Mary's
San Antonio, Texas 78205
Telephone: (210) 838-8582
Facsimile: (210) 479-3205
Email: robert@correafeatherston.com
State Bar No.: 24004641

After we filed the above response, the Court was silent for two weeks and then set a telephone hearing for May 9th 2008.

At the telephone hearing, we lost one phone to over heating and the other has never been the same since. The Judge stated that we had not responded to his order regarding an itemization of the hours spent in the case and then went on to discuss a few other matters of his liking. Clearly our position was that we had complied with his order and we politely refrained to discuss the other matters. After approx 30min (or was it 4 hours?) the Judge ordered us to supplement our response by May 16th 2008.

On May 15th 2008 we filed a joint motion with the appellate attorney asking the Court to rule on the motion for a free transcript with no supplement to our previous filing.

On May 17th 2008, the Judge denied the request for a free transcript and certified the record for appeal to the 5th Circuit on June 20th 2008.

On July 31st 2008 the 5th Circuit gave Bubba a free record. We did not have to disclose our fee or disgorge any funds.

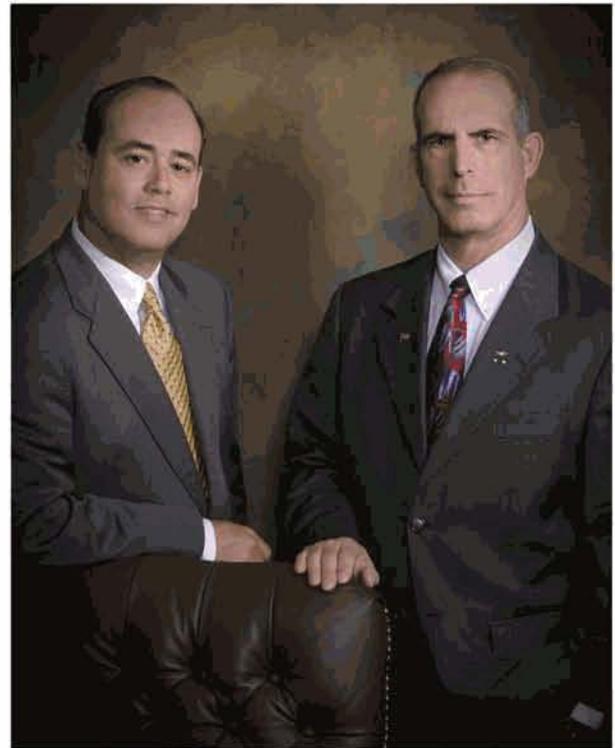




Bottom line, in the 5th circuit, according to *Martinez* and *Lopez-Flores* when a defendant who had retained counsel for trial subsequently claims indigency (requests CJA funds to pay for experts or transcripts), the Court is duty bound to inquire into how much the defendant paid his retained attorneys. The Court must then measure their fee and time spent on behalf of the defendant against the CJA court appointed rate. If retained counsel received more than the court appointed rate, the Court can order retained counsel to disgorge funds to pay for the requested services!

This type of inquiry has never happened to us before. The Court was correct to make the initial inquiry, but once the Court was informed that the defendant had not paid the trial attorneys, the inquiry should have ended and the trial transcript given to the defendant. That of course did not happen here and relief was not obtained until the 5th Circuit received the case.

For us, having a 3rd party contract saved us from revealing our fee and having to disgorge funds. By the way, we are still waiting for the Court to pay our bill for 17 hours of work.





**LAW OFFICES OF
CORREA & FEATHERSTON, P.C.**
Contract of Employment
Federal Cases

STATE OF TEXAS

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KNOW ALL MEN BY THESE PRESENTS:

COUNTY OF BEXAR

THAT I, MARY GUMP, hereinafter referred to as "Retainer," do by these presents employ the law office of Correa & Featherston, P.C., hereinafter referred to as "Law Firm," San Antonio, Texas to represent, BUBBA GUMP, hereinafter referred to as "Client," in a certain criminal proceeding which is presently pending against Client in the SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION. The cause number, if known, is: 07-CR-09999, charging the offense of CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE COCAINE, POSSESSION WITH INTENT TO DISTRIBUTE COCAINE.

This contract is enforceable for all purposes in Bexar County, Texas.

Retainer, hereby expressly authorizes the Law Firm, to handle this case in any manner deemed by it to be in the best interests of Client. Retainer, further understands, that Retainer is not privileged to receive any information about Client's case that is protected by the attorney-client privilege, unless specifically authorized by Client. Retainer also understands that Law Firm's duty of loyalty, in the above referenced cause, is to the client.

In consideration of the legal services rendered and to be rendered by the said Law Firm, Retainer, hereby agrees to pay a fee of \$100,000.00 payable as follows: At the signing of the contract.

Retainer, understands, however, that the above fee does not include any Motion for New Trial, Notice of Appeal, appeal to the Federal Court of Appeals, the Supreme Court of the United States, any Writ of Habeas Corpus or appeal to any Federal Court of the United States, nor does the above fee include any expense for preparing a record for any appeal, or any other appearance (except before a Federal Grand Jury). If any of these services are required, a reasonable charge will be agreed upon in advance by the parties.

It is further understood and agreed that should the case have to be retried for any reason after it has once been tried or partially tried, or a jury partially or wholly selected, or dismissed, a further reasonable fee will be agreed upon by the parties.

It is further understood that the above fee does not include any expense for special investigation, expert witnesses, scientific tests, photographs, witness expense, etc. Retainer, shall be responsible for all expenses, however, no such expenses will be incurred without client's permission.

It is further understood that should the case be settled in any other manner than by a contested trial, no part of the fee is to be returned. It is understood that this fee is a non-refundable retainer and absolute assignment of all of Retainer's interest in same to the Law Firm to assure the availability of Law Firm to represent Client.

Retainer and Client (by his acknowledgement of the contract below) hereby authorize the Law Firm to release privileged information, if the Law Firm is of the opinion it will benefit Client.



IT IS EXPRESSLY UNDERSTOOD AND AGREED BY THE PARTIES THAT NO PROMISES OR GUARANTEES OR REPRESENTATIONS AS TO THE OUTCOME OF THE CASE HAVE BEEN MADE OR IMPLIED, NOR HAVE ANY REPRESENTATIONS BEEN MADE TO IMPLY OR SUGGEST OR STATE SOME SORT OF "INSIDE DEAL" OR INSIDER INFORMATION OR INSIDER RELATIONSHIPS OR SPECIAL RELATIONSHIPS EXIST.

THE SOLE ATTRIBUTE THE DEFENSE FIRM POSSESSES IS IT'S EXPERIENCE, REPUTATION AND KNOWLEDGE OF THE LAW.

If Retainer/Client furnishes to Counsel any document or other tangible thing prior to or during Law Firm's representation of Client, at the conclusion of this matter Retainer/Client must advise and notify Law Firm of each item that Retainer/Client wishes returned. Law Firm agrees to return such item, provided Law Firm still possesses the item. It is Retainer/Client's obligation to notify Law Firm which, if any of the items that Retainer/Client wants returned. In the event that Retainer/Client fails to notify Law Firm to return any item, Law Firm may dispose of such items in accordance with Law Firm's policy concerning the disposal of files, in effect at that time. Retainer/Client, are on notice that Law Firm's policy is to destroy, at its option, Client's file at anytime after five years from the conclusion of Client's case.

The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas Lawyers. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar's Office of Chief Disciplinary Counsel will provide you with information about how to file a complaint. (You may call 1-800-932-1900 toll-free for more information.)

Retainer and Client has been advised that the State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys.

All persons who sign this Contract are financially responsible for all legal fees and expenses under this legally binding Contract.

Further, by signing, Client certifies he/she has received a copy of this Contract.

"I hereby certify under oath that all attorney's fees paid to Law Firm are from legitimate sources and not the proceeds of illegal activity."

EXECUTED on this the 01st day of May, 2007.

/S/

MARY GUMP

I have received a copy of this contract and agree that Law Firm's will represent my interests in the above-entitled cause, per this contract.

/S/

BUBBA GUMP

02 May, 2007