Settlement Issues In Multi-Plaintiff Litigation

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I. Applicable Ethical Rules of Multi-Party Representation

A. "Scope and Objectives of Representation"

1. " … a lawyer shall abide by a client's decisions: (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law."

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT § 1.02(a)(2) (Ex. 1).

2. Therefore, the client is the ultimate decision maker with respect to the objectives of the engagement, including settlement. This rule can sometimes be problematic in multi-plaintiff cases.

B. "Communication"

1. "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT § 1.03 (Ex. 1).

2. In large multi-plaintiff cases, this obviously presents challenges for plaintiffs' lawyers, but the rule is not waived for class actions.

C. "Confidentiality of Information"

1. Except as permitted [elsewhere in the rule], a lawyer shall not knowingly: (1) Reveal confidential information of a client or a former client to: (i) a person that the client has instructed is not to receive the information; or (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm; (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations; (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known; (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after

consultation.

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT § 1.05(b) (Ex. 1).

2. A lawyer's ethical duty of confidentiality can present a potential conflict of interest when that lawyer represents multiple clients. An ethical duty of confidentiality to one client may be at odds with a duty of candor and disclosure to other clients.

D. "Conflict of Interest: General Rule"

1. "In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person: (2) reasonably appears to be or become adversely limited by the lawyer's or the law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests."

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT § 1.06(b) (Ex. 1).

2. The Rule permits an attorney to undertake or continue to represent multiple clients only if "(1) the lawyer reasonably believes that the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT § 1.06(c) (Ex. 1).

3. Consent *does not* have to be in writing, but "it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed."

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT § 1.06 cmt. 8 (Ex. 1).

E. Attorney Client and Work Product Privileges

1. "In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation, except as to such clients. … Complying with both requirements while acting as intermediary requires a delicate balance. If the

balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the general rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised."

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT § 1.07 cmt. 6 (internal citations omitted) (Ex. 1).

2. "Where parties display mutual trust in a single attorney by placing their affairs in his hands, the attorney must disclose to the others all opinions, theories, or conclusions regarding the client's rights or position to other parties the attorney represented in the same matter."

Ex. 2; *Scrivner v. Hobson*, 854 S.W.2d 148, 151 (Tex. App.—Houston [1st Dist.] 1993, no writ) (citing *Cousins v. State Farm Mut. Auto. Co.,* 258 So.2d 629, 636 (La. App. 1972).

3. "With regard to the attorney-client privilege, the general rule is that, as between commonly represented clients, the privilege does not attach to matters that are of mutual interest. … Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised."

Ex. 2; *Scrivner v. Hobson*, 854 S.W.2d 148, 151 (Tex. App.—Houston [1st Dist.] 1993, no writ) (citing TEX. R. CIV. EVID. 503(d)(5)).

II. Applicable Settlement Rules

A. Potential Problems

1. "Conflict of Interest: Prohibited Transactions" "A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients … unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or please involved and of the nature and extent of the participation of each person in the settlement."

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT § 1.08(f) (Ex. 1).

2. Breach of Duties of Loyalty & Good Faith. "The attorney owes a duty of loyalty and good faith to *each* client, and it is the ethical responsibility of an attorney representing multiple clients to obtain individual settlements, unless those clients are informed and consent."

   Ex. 3; *Arce v. Burrow*, 958 S.W.2d 239, 245 (Tex. App.—Houston [14th Dist.] 1997) (emphasis in original), *rev'd in part on other grounds*, 997 S.W.2d 229 (Tex. 1999) (citing *Judwin Properties v. Griggs & Harrison,* 911 S.W.2d 498, 506 (Tex. App.—Houston [1st Dist.] 1995, no writ) (Ex. 4)).

3. "Settling a case in mass without consent of the clients is unfair to the clients and may result in a benefit to the attorney (speedy resolution and payment of fees) to the detriment of the clients (decreased recovery). Unfairness is the cornerstone in an action for breach of fiduciary duty. Thus, when an attorney enters into an aggregate settlement without the consent of his or her clients, the attorney breaches the fiduciary duty owed to those clients."

   Ex. 3; *Arce v. Burrow*, 958 S.W.2d 239, 245 (Tex. App.—Houston [14th Dist.] 1997) *rev'd in part on other grounds*, 997 S.W.2d 229 (Tex. 1999) (citing *Judwin Properties v. Griggs & Harrison,* 911 S.W.2d 498, 506 (Tex. App.—Houston [1st Dist.] 1995, no writ) (Ex. 4)).

B. Definition of "Aggregate Settlement"

1. An "aggregate settlement" is when "two or more clients who are represented by the same lawyer together resolve their claims or defenses or please."

   ABA STANDING COMMITTEE ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OPINION 06-438 (2006) (addressing the meaning of "aggregate settlement" in the context of the applicable Model Rule (1.8(g)).

2. "An aggregate settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client."

   Ex. 3; *Arce v. Burrow*, 958 S.W.2d 239, 246 (Tex. App.—Houston [14th Dist.] 1997), *rev'd in part on other grounds*, 997 S.W.2d 229 (Tex. 1999) (citing *Scrivner v. Hobson,* 854 S.W.2d

148, 152 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding) (Ex. 2)).

3. Thus, when any two or more clients consent to have their matters resolved together, disclosure to all plaintiffs of other plaintiff's settlement terms is required if defendants require all plaintiffs to resolve their claims together.

4. In *Authorlee v. Tuboscope Vetco Int'l, Inc.*, 274 S.W.3d 111 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (Ex. 5), the Court looked at a case where multiple silicosis plaintiffs agreed to negotiate their claims at the same time but each claim was individually settled.

   a. "[E]ach appellant signed an authorization to settle, which specifically acknowledged that each appellant's claim was negotiated with other similar claims but was not part of an aggregate settlement." *Id.* at 116.

   b. After an unsuccessful mediation, the plaintiffs "made settlement demands on [defendants], based on factors specific to each of their claims, and appellees accepted their demands and paid them. This *is* the essence of negotiation." *Id.* at 121.

   c. "Thus, there were individual negotiations on behalf of appellants." *Id. "*[E]ach appellant's case was settled individually, after a lengthy negotiation process involving individual offers and acceptances." *Id.* "[W]e conclude that the settlements at issue in this case were not aggregate settlements …" *Id.*

C. <u>Remedy</u>

1. "As a remedy for a breach of a fiduciary duty, Texas has long recognized the concept of fee forfeiture in the principal-agent relationship. While we have found no Texas cases specifically involving fee forfeiture for a breach of the fiduciary duty in the attorney-client relationship, we discern no reason to carve out an exception for breaches of fiduciary duty in the attorney-client relationship. Thus, we hold that fee forfeiture is a recognized remedy when an attorney breaches a fiduciary duty to his or her client."

   Ex. 3; *Arce v. Burrow*, 958 S.W.2d 239, 246 (Tex. App.—Houston [14th Dist.] 1997), *rev'd in part on other grounds*, 997 S.W.2d 229 (Tex. 1999) (citing *See, e.g., Kinzbach Tool,* 160

S.W.2d at 514 (Tex. 1942). *See also* Restatement (Second) of Agency § 469 (1958)).

2. "[A] client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client."

   Ex. 6; *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999).

3. "[W]e conclude that whether an attorney must forfeit any or all of his fee for a breach of fiduciary duty to his client must be determined by applying the rule as stated in section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* and the factors we have identified to the individual circumstances of each case."

   Ex. 6; *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999).

EXHIBIT 1

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

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TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Preamble: A Lawyer's Responsibilities

1. A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

2. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the clients position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's affairs and reporting about them to the client or to others.

3. In all professional functions, a lawyer should zealously pursue client's interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Texas Disciplinary Rules of Professional Conduct or other law.

4. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

5. As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

6. A lawyer should render public interest legal service. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal

involvement in the problems of the disadvantages can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees is a moral obligation of each lawyer as well as the profession generally. A lawyer may discharge this basic responsibility by providing public interest legal services without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, the administration of justice, and by financial support for organizations that provide legal services to persons of limited means.

7. In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from apparent conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests. The Texas Disciplinary Rules of Professional Conduct prescribe terms for resolving such tensions. They do so by stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of these Rules many difficult issues of professional discretion can arise. The Rules and their Comments constitute a body of principles upon which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment. In applying these rules, lawyers may find interpretive guidance in the principles developed in the Comments.

8. The legal profession has a responsibility to assure that its regulation is undertaken in the public interest rather than in furtherance of parochial or self-interested concerns of the bar, and to insist that every lawyer both comply with its minimum disciplinary standards and aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

9. Each lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

Preamble: Scope

10. The Texas Disciplinary Rules of Professional Conduct are rules of reason. The Texas Disciplinary Rules of Professional Conduct define proper conduct for purposes of professional discipline. They are imperatives, cast in the terms shall or shall not. The comments are cast often in the terms of may or should and are permissive, defining areas in which the lawyer has professional discretion. When a lawyer exercises such discretion, whether by acting or not acting, no disciplinary action may be taken. The Comments also frequently illustrate or explain applications of the rules, in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules. The Comments do not, however, add

obligations to the rules and no disciplinary action may be taken for failure to conform to the Comments.

11. The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The rules and Comments do not, however, exhaust the moral and ethical considerations that should guide a lawyer, for no worthwhile human activity can be completely defined by legal rules.

12. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. For purposes of determining the lawyer's authority and responsibility, individual circumstances and principles of substantive law external to these rules determine whether a client-lawyer relationship may be found to exist. But there are some duties, such as of that of confidentiality, that may attach before a client-lawyer relationship has been established.

13. The responsibilities of government lawyers, under various legal provisions, including constitutional, statutory and common law, may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the public interest in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.

14. These rules make no attempt to prescribe either disciplinary procedures or penalties for violation of a rule.

15. These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached. Likewise, these rules are not designed to be standards for procedural decisions. Furthermore, the purpose of these rules can be abused when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

16. Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

Terminology

"Adjudicatory Official" denotes a person who serves on a Tribunal.

"Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

"Consult" or "Consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

"Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Law firm" : see Firm.

"Partner" denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.

"Person" includes a legal entity as well as an individual.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

"Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

"Tribunal" denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. Tribunal includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

I. CLIENT-LAWYER RELATIONSHIP

Rule 1.01 Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

> (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or
>
> (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(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.

Comment:

Accepting Employment

1. A lawyer generally should not accept or continue employment in any area of the law in which the lawyer is not and will not be prepared to render competent legal services. Competence is defined in Terminology as possession of the legal knowledge, skill, and training reasonably necessary for the representation. Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client.

2. In determining whether a matter is beyond a lawyer's competence, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience in the field in question, the preparation and study the lawyer will be able to give the matter, and whether it is feasible either to refer the matter to or associate a lawyer of established competence in the field in question. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequences.

3. A lawyer may not need to have special training or prior experience to accept employment to handle legal problems of a type with which the lawyer is unfamiliar. Although expertise in a particular field of law may be useful in some circumstances, the appropriate proficiency in many instances is that of a general practitioner. A newly admitted lawyer can be as competent in some matters as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.

4. A lawyer possessing the normal skill and training reasonably necessary for the representation of a client in an area of law is not subject to discipline for accepting employment in a matter in which, in order to represent the client properly, the lawyer must become more competent in regard to relevant legal knowledge by additional study and investigation. If the additional study and preparation will result in unusual delay or expense to the client, the lawyer should not accept employment except with the informed consent of the client.

5. A lawyer offered employment or employed in a matter beyond the lawyer's competence generally must decline or withdraw from the employment or, with the prior informed consent of the client, associate a lawyer who is competent in the matter. Paragraph (a)(2) permits a lawyer, however, to give advice or assistance in an emergency in a matter even though the lawyer does not have the skill ordinarily required if referral to or consultation with another lawyer

would be impractical and if the assistance is limited to that which is reasonably necessary in the circumstances.

Competent and Diligent Representation

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. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer. A lawyer's workload should be controlled so that each matter can be handled with diligence and competence. As provided in paragraph (a), an incompetent lawyer is subject to discipline.

Neglect

7. Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Under paragraph (b), a lawyer is subject to professional discipline for neglecting a particular legal matter as well as for frequent failures to carry out fully the obligations owed to one or more clients. A lawyer who acts in good faith is not subject to discipline, under those provisions for an isolated inadvertent or unskilled act or omission, tactical error, or error of judgment. Because delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness, there is a duty to communicate reasonably with clients; see Rule 1.03.

Maintaining Competence

8. Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law. To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances. Isolated instances of faulty conduct or decision should be identified for purposes of additional study or instruction.

Rule 1.02 Scope and Objectives of Representation

(a) Subject to paragraphs (b), (c), (d), and (e), (f), and (g), a lawyer shall abide by a clients 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.

(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

Comment:

Scope of Representation

1. Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the objectives to be served by legal representation, within the limits imposed by law, the lawyer's professional obligations, and the agreed scope of representation. Within those limits, a client also has a right to consult with the lawyer about the general methods to be used in pursuing those objectives. The lawyer should assume responsibility for the means by which the client's objectives are best achieved. Thus, a lawyer has very broad discretion to determine technical and legal tactics, subject to the client's wishes regarding such matters as the expense to be incurred and concern for third persons who might be adversely affected.

2. Except where prior communications have made it clear that a particular proposal would be unacceptable to the client, a lawyer is obligated to communicate any settlement offer to the client in a civil case; and a lawyer has a comparable responsibility with respect to a proposed plea bargain in a criminal case.

3. A lawyer should consult with the client concerning any such proposal, and generally it is for the client to decide whether or not to accept it. This principle is subject to several exceptions or qualifications. First, in class actions a lawyer may recommend a settlement of the matter to the court over the objections of named plaintiffs in the case. Second, in insurance defense cases a lawyer's ability to implement an insured client's wishes with respect to settlement may be qualified by the contractual rights of the insurer under its policy. Finally, a lawyer's normal deference to a client's wishes concerning settlement may be abrogated if the client has validly relinquished to a third party any rights to pass upon settlement offers. Whether any such waiver is enforceable is a question largely beyond the scope of these rules. But see comment 5 below. A lawyer reasonably relying on any of these exceptions in not implementing a client's desires concerning settlement is, however, not subject to discipline under this Rule.

Limited Scope of Representation

4. The scope of representation provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined objective. Likewise, representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. Similarly when a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The scope within which the representation is undertaken also may exclude specific objectives or means, such as those that the lawyer or client regards as repugnant or imprudent.

5. An agreement concerning the scope of representation must accord with the Texas Disciplinary Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.01, or to surrender the right to terminate the lawyer's services or the right to settle or continue litigation that the lawyer might wish to handle differently.

6. Unless the representation is terminated as provided in Rule 1.15, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's representation is limited to a specific matter or matters, the relationship terminates when the matter has been resolved. If a lawyer has represented a client over a substantial period in a variety of matters, the client may sometimes assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice to the contrary. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal,

the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Criminal, Fraudulent and Prohibited Transactions

7. A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

8. When a client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer may not reveal the client's wrongdoing, except as permitted or required by Rule 1.05. However, the lawyer also must avoid furthering the client's unlawful purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required. See Rule 1.15(a)(1)

9. Paragraph (c) is violated when a lawyer accepts a general retainer for legal services to an enterprise known to be unlawful. Paragraph (c) does not, however, preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.

10. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

11. Paragraph (d) requires a lawyer in certain instances to use reasonable efforts to dissuade a client from committing a crime or fraud. If the services of the lawyer were used by the client in committing a crime or fraud paragraph (e) requires the lawyer to use reasonable efforts to persuade the client to take corrective action.

Client Under a Disability

12. Paragraph (a) assumes that the lawyer is legally authorized to represent the client. The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally effective appointment of the lawyer to represent a person. Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for the purpose of this rule.

13. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to

take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests. See Rule 1.05 (c)(4), d(1) and (d)(2)(i) in regard to the lawyer's right to reveal to the court the facts reasonably necessary to secure the guardianship or other protective order.

Rule 1.03 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment:

1. The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel either an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Comment 2 to Rule 1.02.

2. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. Moreover, in certain situations practical exigency may require a lawyer to act for a client without prior consultation. The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the clients overall requirements as to the character of representation.

3. Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impractical, as for example, where the client is a child or suffers from mental disability; see paragraph 5. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13.

Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

4. In some circumstances, a lawyer may be justified in delaying transmission of information when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. Similarly, rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.04(d) sets forth the lawyer's obligations with respect to such rules or orders. A lawyer may not, however, withhold information to serve the lawyer's own interest or convenience.

Client Under a Disability

5. In addition to communicating with any legal representative, a lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, childrens' opinions regarding their own custody are given some weight. The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect. See also Rule 1.02(e) and Rule 1.05, Comment 17.

1.04 Fees (*Effective March 1, 2005*)

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(d) 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 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.

(e) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is:

(i) in proportion to the professional services performed by each lawyer; or

(ii) made between lawyers who assume joint responsibility for the representation; and

(2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including

(i) the identity of all lawyers or law firms who will participate in the fee-sharing arrangement, and

(ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and

(iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

(3) the aggregate fee does not violate paragraph (a).

(g) Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, shall be confirmed by an arrangement conforming to paragraph (f). Consent by a client or a prospective client without knowledge of the information specified in subparagraph (f)(2) does not constitute a confirmation within the meaning of this rule. No attorney shall collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way, except for:

(1) the reasonable value of legal services provided to that person; and

(2) the reasonable and necessary expenses actually incurred on behalf of that person.

(h) Paragraph (f) of this rule does not apply to payment to a former partner or associate pursuant to a separation or retirement agreement, or to a lawyer referral program certified by the State Bar of Texas in accordance with the Texas Lawyer Referral Service Quality Act, Tex. Occ. Code 952.001 et seq., or any amendments or recodifications thereof.

Comment:

1. A lawyer in good conscience should not charge or collect more than a reasonable fee, although he may charge less or no fee at all. The determination of the reasonableness of a fee, or of the range of reasonableness, can be a difficult question, and a standard of reasonableness is too vague and uncertain to be an appropriate standard in a disciplinary action. For this reason, paragraph (a) adopts, for disciplinary purposes only, a clearer standard: the lawyer is subject to discipline for an illegal fee or an unconscionable fee. Paragraph (a) defines an unconscionable fee in terms of the reasonableness of the fee but in a way to eliminate factual disputes as to the fees reasonableness. The Rules unconscionable standard, however, does not preclude use of the reasonableness standard of paragraph (b) in other settings.

Basis or Rate of Fee

2. When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. If, however, the basis or rate of fee being charged to a regularly represented client differs from the understanding that has evolved, the

lawyer should so advise the client. In a new client-lawyer relationship, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, in order to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding, and when the lawyer has not regularly represented the client it is preferable for the basis or rate of the fee to be communicated to the client in writing. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth. In the case of a contingent fee, a written agreement is mandatory.

Types of Fees

3. Historically lawyers have determined what fees to charge by a variety of methods. Commonly employed are percentage fees and contingent fees (which may vary in accordance with the amount at stake or recovered), hourly rates, and flat fee arrangements, or combinations thereof.

4. The determination of a proper fee requires consideration of the interests of both client and lawyer. The determination of reasonableness requires consideration of all relevant circumstances, including those stated in paragraph (b). Obviously, in a particular situation not all of the factors listed in paragraph (b) may be relevant and factors not listed could be relevant. The fees of a lawyer will vary according to many factors, including the time required, the lawyer's experience, ability and reputation, the nature of the employment, the responsibility involved, and the results obtained.

5. When there is a doubt whether a particular fee arrangement is consistent with the client's best interest, the lawyer should discuss with the client alternative bases for the fee and explain their implications.

6. Once a fee arrangement is agreed to, a lawyer should not handle the matter so as to further the lawyer's financial interests to the detriment of the client. For example, a lawyer should not abuse a fee arrangement based primarily on hourly charges by using wasteful procedures.

Unconscionable Fees

7. Two principal circumstances combine to make it difficult to determine whether a particular fee is unconscionable within the disciplinary test provided by paragraph (a) of this Rule. The first is the subjectivity of a number of the factors relied on to determine the reasonableness of fees under paragraph (b). Because those factors do not permit more than an approximation of a range of fees that might be found reasonable in any given case, there is a corresponding degree of uncertainty in determining whether a given fee is unconscionable. Secondly, fee arrangements normally are made at the outset of representation, a time when many uncertainties and contingencies exist, while claims of unconscionability are made in hindsight

when the contingencies have been resolved. The unconscionability standard adopts that difference in perspective and requires that a lawyer be given the benefit of any such uncertainties for disciplinary purposes only. Except in very unusual situations, therefore, the circumstances at the time a fee arrangement is made should control in determining a question of unconscionability.

8. Two factors in otherwise borderline cases might indicate a fee may be unconscionable. The first is overreaching by a lawyer, particularly of a client who was unusually susceptible to such overreaching. The second is a failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated. For example, a fee arrangement negotiated at arms length with an experienced business client would rarely be subject to question. On the other hand, a fee arrangement with an uneducated or unsophisticated individual having no prior experience in such matters should be more carefully scrutinized for overreaching. While the fact that a client was at a marked disadvantage in bargaining with a lawyer over fees will not make a fee unconscionable, application of the disciplinary test may require some consideration of the personal circumstances of the individuals involved.

Fees in Family Law Matters

9. Contingent and percentage fees in family law matters may tend to promote divorce and may be inconsistent with a lawyer's obligation to encourage reconciliation. Such fee arrangements also may tend to create a conflict of interest between lawyer and client regarding the appraisal of assets obtained for client. See also Rule 1.08(h). In certain family law matters, such as child custody and adoption, no res is created to fund a fee. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.

Division of Fees

10. A division of fees is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fees facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring or associating lawyer initially retained by the client and a trial specialist, but it applies in all cases in which two or more lawyers are representing a single client in the same matter, and without regard to whether litigation is involved. Paragraph (f) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes joint responsibility for the representation.

11. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (d) of this Rule.

12. A division of a fee based on the proportion of services rendered by two or more lawyers contemplates that each lawyer is performing substantial legal services on behalf of the client with respect to the matter. In particular, it requires that each lawyer who participates in the fee have performed services beyond those involved in initially seeking to acquire and being engaged

by the client. There must be a reasonable correlation between the amount or value of services rendered and responsibility assumed, and the share of the fee to be received. However, if each participating lawyer performs substantial legal services on behalf of the client, the agreed division should control even though the division is not directly proportional to actual work performed. If a division of fee is to be based on the proportion of services rendered, the arrangement may provide that the allocation not be made until the end of the representation. When the allocation is deferred until the end of the representation, the terms of the arrangement must include the basis by which the division will be made.

13. Joint responsibility for the representation entails ethical and perhaps financial responsibility for the representation. The ethical responsibility assumed requires that a referring or associating lawyer make reasonable efforts to assure adequacy of representation and to provide adequate client communication. Adequacy of representation requires that the referring or associating lawyer conduct a reasonable investigation of the client's legal matter and refer the matter to a lawyer whom the referring or associating lawyer reasonably believes is competent to handle it. See Rule 1.01. Adequate attorney-client communication requires that a referring or associating lawyer monitor the matter throughout the representation and ensure that the client is informed of those matters that come to that lawyer's attention and that a reasonable lawyer would believe the client should be aware. See Rule 1.03. Attending all depositions and hearings, or requiring that copies of all pleadings and correspondence be provided a referring or associating lawyer, is not necessary in order to meet the monitoring requirement proposed by this rule. These types of activities may increase the transactional costs, which ultimately the client will bear, and unless some benefit will be derived by the client, they should be avoided. The monitoring requirement is only that the referring lawyer be reasonably informed of the matter, respond to client questions, and assist the handling lawyer when necessary. Any referral or association of other counsel should be made based solely on the client's best interest.

14. In the aggregate, the minimum activities that must be undertaken by referring or associating lawyers pursuant to an arrangement for a division of fees are substantially greater than those assumed by a lawyer who forwarded a matter to other counsel, undertook no ongoing obligations with respect to it, and yet received a portion of the handling lawyer's fee once the matter was concluded, as was permitted under the prior version of this rule. Whether such activities, or any additional activities that a lawyer might agree to undertake, suffice to make one lawyer participating in such an arrangement responsible for the professional misconduct of another lawyer who is participating in it and, if so, to what extent, are intended to be resolved by Texas Civil Practice and Remedies Code, ch. 33, or other applicable law.

15. A client must consent in writing to the terms of the arrangement prior to the time of the association or referral proposed. For this consent to be effective, the client must have been advised of at least the key features of that arrangement. Those essential terms, which are specified in subparagraph (f)(2), are

> 1) The identity of all lawyers or law firms who will participate in the fee-sharing agreement,

(2) Whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and

(3) The share of the fee that each lawyer or law firm will receive or the basis on which the division will be made if the division is based on proportion of service performed. Consent by a client or prospective client to the referral to or association of other counsel, made prior to any actual such referral or association but without knowledge of the information specified in subparagraph (f)(2), does not constitute sufficient client confirmation within the meaning of this rule. The referring or associating lawyer or any other lawyer who employs another lawyer to assist in the representation has the primary duty to ensure full disclosure and compliance with this rule.

16. Paragraph (g) facilitates the enforcement of the requirements of paragraph (f). It does so by providing that agreements that authorize an attorney either to refer a person's case to another lawyer, or to associate other counsel in the handling of a client's case, and that actually result in such a referral or association with counsel in a different law firm from the one entering into the agreement, must be confirmed by an arrangement between the person and the lawyers involved that conforms to paragraph (f). As noted there, that arrangement must be presented to and agreed to by the person before the referral or association between the lawyers involved occurs. See subparagraph (f)(2). Because paragraph (g) refers to the party whose matter is involved as a "person" rather than as a "client," it is not possible to evade its requirements by having a referring lawyer not formally enter into an attorney-client relationship with the person involved before referring that person's matter to other counsel. Paragraph (g) does provide, however, for recovery in quantum meruit in instances where its requirements are not met. See subparagraphs (g)(1) and (g)(2).

17. What should be done with any otherwise agreed-to fee that is forfeited in whole or in part due to a lawyer's failure to comply with paragraph (g) is not resolved by these rules.

18. Subparagraph (f)(3) requires that the aggregate fee charged to clients in connection with a given matter by all of the lawyers involved meet the standards of paragraph (a)—that is, not be unconscionable.

Fee Disputes and Determinations

19. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by a bar association, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, or when a class or a person is entitled to recover a reasonable attorney's fee as part of the measure of damages. All involved lawyers should comply with any prescribed procedures.

Rule 1.05 Confidentiality of Information

(a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:

1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyers firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(d) A lawyer also may reveal unprivileged client information.

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyers representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.
(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

Comment:

Confidentiality Generally

1. Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought to employ the lawyer. Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the

full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance.

2. Subject to the mandatory disclosure requirements of paragraphs (e) and (f) the lawyer generally should be required to maintain confidentiality of information acquired by the lawyer during the course of or by reason of the representation of the client. This principle involves an ethical obligation not to use the information to the detriment of the client or for the benefit of the lawyer or a third person. In regard to an evaluation of a matter affecting a client for use by a third person, see Rule 2.02.

3. The principle of confidentiality is given effect not only in the Texas Disciplinary Rules of Professional Conduct but also in the law of evidence regarding the attorney-client privilege and in the law of agency. The attorney-client privilege, developed through many decades, provides the client a right to prevent certain confidential communications from being revealed by compulsion of law. Several sound exceptions to confidentiality have been developed in the evidence law of privilege. Exceptions exist in evidence law where the services of the lawyer were sought or used by a client in planning or committing a crime or fraud as well as where issues have arisen as to breach of duty by the lawyer or by the client to the other.

4. Rule 1.05 reinforces the principles of evidence law relating to the attorney-client privilege. Rule 1.05 also furnishes considerable protection to other information falling outside the scope of the privilege Rule 1.05 extends ethical protection generally to unprivileged information relating to the client or furnished by the client during the course of or by reason of the representation of the client. In this respect Rule 1.05 accords with general fiduciary principles of agency.

5. The requirement of confidentiality applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Disclosure for Benefit of Client

6. A lawyer may be expressly authorized to make disclosures to carry out the representation and generally is recognized as having implied-in-fact authority to make disclosures about a client when appropriate in carrying out the representation to the extent that the client's instructions do not limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion. The effect of Rule 1.05 is to require the lawyer to invoke, for the client, the attorney-client privilege when applicable; but if the court improperly denies the privilege, under paragraph (c)(4) the lawyer may testify as ordered by the court or may test the ruling as permitted by Rule 3.04(d).

7. In the course of a firms practice, lawyers may disclose to each other and to appropriate employee's information relating to a client, unless the client has instructed that particular

information be confined to specified lawyers. Sub-paragraphs (b)(l) and (c)(3) continue these practices concerning disclosure of confidential information within the firm.

Use of Information

8. Following sound principles of agency law, sub-paragraphs (b)(2) and (4) subject a lawyer to discipline for using information relating to the representation in a manner disadvantageous to the client or beneficial to the lawyer or a third person, absent the informed consent of the client. The duty not to misuse client information continues after the client-lawyer relationship has terminated. Therefore, the lawyer is forbidden by sub-paragraph (b)(3) to use, in absence of the client's informed consent, confidential information of the former client to the client's disadvantage, unless the information is generally known.

Discretionary Disclosure Adverse to Client

9. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's information-usually unprivileged information-even though the client's purpose is wrongful. On the other hand, a client who knows or believes that a lawyer is required or permitted to disclose a client's wrongful purposes may be inhibited from revealing facts which would enable the lawyer to counsel effectively against wrongful action. Rule 1.05 thus involves balancing the interests of one group of potential victims against those of another. The criteria provided by the Rule are discussed below.

10. Rule 5.03 (d)(l) Texas Rules of Civil Evidence (Tex. R. Civ. Evid.), and Rule 5.03(d)(1), Texas Rules of Criminal Evidence (Tex R. Crim. Evid.), indicate the underlying public policy of furnishing no protection to client information where the client seeks or uses the services of the lawyer to aid in the commission of a crime or fraud. That public policy governs the dictates of Rule 1.05. Where the client is planning or engaging in criminal or fraudulent conduct or where the culpability of the lawyers conduct is involved, full protection of client information is not justified.

11. Several other situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.02(c). As noted in the Comment to that Rule there can be situations where the lawyer may have to reveal information relating to the representation in order to avoid assisting a client's criminal or fraudulent conduct, and sub-paragraph (c)(4) permits doing so. A lawyer's duty under Rule 3.03(a) not to use false or fabricated evidence is a special instance of the duty prescribed in Rule 1.02(c) to avoid assisting a client in criminal or fraudulent conduct, and sub-paragraph (c)(4) permits revealing information necessary to comply with Rule 3.03(a) or (b). The same is true of compliance with Rule 4.01. See also paragraph (f).

12. Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.02(c), because to counsel or assist criminal or fraudulent conduct requires knowing that the conduct is of that character. Since the lawyer's services were made an instrument of the client's crime or fraud, the lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable. Sub-paragraph (c)(6) and (8) give the lawyer professional discretion to reveal both unprivileged and privileged information in order to serve those interests. See paragraph (g). In view of Tex. R. Civ. Evid. Rule 5.03(d)(1), and Tex. R. Crim. Evid. 5.03(d)(1), however, rarely will such information be privileged.

13. Third, the lawyer may learn that a client intends prospective conduct that is criminal or fraudulent. The lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. When the threatened injury is grave, the lawyer's interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information. As stated in sub-paragraph (c)(7), the lawyer has professional discretion, based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act. In some situations of this sort, disclosure is mandatory. See paragraph (e) and Comments 18-20.

14. The lawyers exercise of discretion under paragraphs (c) and (d) involves consideration of such factors as the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question. In any case a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by paragraphs (c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.

15. A lawyer entitled to a fee necessarily must be permitted to prove the services rendered in an action to collect it, and this necessity is recognized by sub-paragraphs (c)(5) and (d)(2)(iv). This aspect of the rule, in regard to privileged information, expresses the principle that the beneficiary of a fiduciary relationship may not exploit the relationship to the detriment of the fiduciary. Any disclosure by the lawyer, however, should be as protective of the client's interests as possible.

16. If the client is an organization, a lawyer also should refer to Rule 1.12 in order to determine the appropriate conduct in connection with this Rule.

Client Under a Disability

17. In some situations, Rule 1.02(g) requires a lawyer representing a client under a disability to seek the appointment of a legal representative for the client or to seek other orders for the

protection of the client. The client may or may not, in a particular matter, effectively consent to the lawyer's revealing to the court confidential information and facts reasonably necessary to secure the desired appointment or order. Nevertheless, the lawyer is authorized by paragraph (c)(4) to reveal such information in order to comply with Rule 1.02(g). See also paragraph 5, Comment to Rule 1.03.

Mandatory Disclosure Adverse to Client

18. Rule l.05(e) and (f) place upon a lawyer professional obligations in certain situations to make disclosure in order to prevent certain serious crimes by a client or to prevent involvement by the lawyer in a client's crimes or frauds. Except when death or serious bodily harm is likely to result, a lawyer's obligation is to dissuade the client from committing the crime or fraud or to persuade the client to take corrective action; see Rule 1.02 (d) and (e).

19. Because it is very difficult for a lawyer to know when a client's criminal or fraudulent purpose actually will be carried out, the lawyer is required by paragraph (e) to act only if the lawyer has information clearly establishing the likelihood of such acts and consequences. If the information shows clearly that the client's contemplated crime or fraud is likely to result in death or serious injury, the lawyer must seek to avoid those lamentable results by revealing information necessary to prevent the criminal or fraudulent act. When the threatened crime or fraud is likely to have the less serious result of substantial injury to the financial interests or property of another, the lawyer is not required to reveal preventive information but may do so in conformity to paragraph (c) (7). See also paragraph (f); Rule 1.02 (d) and (e); and Rule 3.03 (b) and (c).

20. Although a violation of paragraph (e) will subject a lawyer to disciplinary action, the lawyer's decisions whether or how to act should not constitute grounds for discipline unless the lawyer's conduct in the light of those decisions was unreasonable under all existing circumstances as they reasonably appeared to the lawyer. This construction necessarily follows from the fact that paragraph (e) bases the lawyer's affirmative duty to act on how the situation reasonably appears to the lawyer, while that imposed by paragraph (f) arises only when a lawyer "knows" that the lawyers services have been misused by the client. See also Rule 3.03(b).

Withdrawal

21. If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule l.15(a)(l). After withdrawal, a lawyer's conduct continues to be governed by Rule 1.05. However, the lawyer's duties of disclosure under paragraph (e) of the Rule, insofar as such duties are mandatory, do not survive the end of the relationship even though disclosure remains permissible under paragraphs (6), (7), and (8) if the further requirements of such paragraph are met. Neither this Rule nor Rule 1.15 prevents the lawyer from giving notice of the fact of withdrawal, and no rule forbids the lawyer to withdraw or disaffirm any opinion, document, affirmation, or the like.

Other Rules

22. Various other Texas Disciplinary Rules of Professional Conduct permit or require a lawyer to disclose information relating to the representation. See Rules 1.07, 1.12, 2.02, 3.03 and 4.01. In addition to these provisions, a lawyer may be obligated by other provisions of statutes or other law to give information about a client. Whether another provision of law supersedes Rule 1.05 is a matter of interpretation beyond the scope of these Rules, but sub-paragraph (c)(4) protects the lawyer from discipline who acts on reasonable belief as to the effect of such laws.

Rule 1.06 Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

> (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyers firm; or
>
> (2) reasonably appears to be or become adversely limited by the lawyers or law firm's responsibilities to another client or to a third person or by the lawyers or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

> (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
>
> (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Comment:

Loyalty to a Client

1. Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer must take effective action to eliminate the conflict, including withdrawal if necessary to rectify the situation. See also Rule 1.16. When more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by this Rule and Rules 1.05 and 1.09. See also Rule 1.07(c). Under this Rule, any conflict that prevents a particular lawyer from undertaking or continuing a representation of a client also prevents any other lawyer who is or becomes a member of or an associate with that lawyer's firm from doing so. See paragraph (f).

2. A fundamental principle recognized by paragraph (a) is that a lawyer may not represent opposing parties in litigation. The term opposing parties as used in this Rule contemplates a situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party. Moreover, as a general proposition loyalty to a client prohibits undertaking representation directly adverse to the representation of that client in a substantially related matter unless that client's fully informed consent is obtained and unless the lawyer reasonably believes that the lawyer's representation will be reasonably protective of that client's interests. Paragraphs (b) and (c) express that general concept.

Conflicts in Litigation

3. Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation are not actually directly adverse but where the potential for conflict exists, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist or develop by reason of substantial discrepancy in the party's testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 1.07 involving intermediation between clients.

Conflict with Lawyers Own Interests

4. Loyalty to a client is impaired not only by the representation of opposing parties in situations within paragraphs (a) and (b)(l) but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the

lawyer's own interests or responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b)(2) addresses such situations. A potential possible conflict does not itself necessarily preclude the representation. The critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. It is for the client to decide whether the client wishes to accommodate the other interest involved. However, the client's consent to the representation by the lawyer of another whose interests are directly adverse is insufficient unless the lawyer also believes that there will be no materially adverse effect upon the interests of either client. See paragraph (c).

5. The lawyer's own interests should not be permitted to have adverse effect on representation of a client, even where paragraph (b)(2) is not violated. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.01 and 1.04. If the probity of a lawyer's own conduct in a transaction is in question, it may be difficult for the lawyer to give a client detached advice. A lawyer should not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Meaning of Directly Adverse

6. Within the meaning of Rule 1.06(b), the representation of one client is directly adverse to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests. Even when neither paragraph (a) nor (b) is applicable, a lawyer should realize that a business rivalry or personal differences between two clients or potential clients may be so important to one or both that one or the other would consider it contrary to its interests to have the same lawyer as its rival even in unrelated matters; and in those situations a wise lawyer would forego the dual representation.

Full Disclosure and Informed Consent

7. A client under some circumstances may consent to representation notwithstanding a conflict or potential conflict. However, as indicated in paragraph (c)(l), when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the full disclosure necessary to obtain informed consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the

disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

8. Disclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. While it is not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed.

9. In certain situations, such as in the preparation of loan papers or the preparation of a partnership agreement, a lawyer might have properly undertaken multiple representation and be confronted subsequently by a dispute among those clients in regard to that matter. Paragraph (d) forbids the representation of any of those parties in regard to that dispute unless informed consent is obtained from all of the parties to the dispute who had been represented by the lawyer in that matter.

10. A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

11. Ordinarily, it is not advisable for a lawyer to act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated and even if paragraphs (a), (b) and (d) are not applicable. However, there are circumstances in which a lawyer may act as advocate against a client, for a lawyer is free to do so unless this Rule or another rule of the Texas Disciplinary Rules of Professional Conduct would be violated. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in a matter unrelated to any matter being handled for the enterprise if the representation of one client is not directly adverse to the representation of the other client. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for declaratory judgment concerning statutory interpretation.

Interest of Person Paying for a Lawyers Service

12. A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.08(e). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Non-litigation Conflict Situations

13. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

14. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation may be permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

15. Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration it may be unclear whether the client is the fiduciary or is the estate or trust including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

16. A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporations obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

17. Raising questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with great caution, however, for it can be misused as a technique of harassment. See Preamble: Scope.

18. Except when the absolute prohibition of this rule applies or in litigation when a court passes upon issues of conflicting interests in determining a question of disqualification of counsel, resolving questions of conflict of interests may require decisions by all affected clients as well as by the lawyer.

Rule 1.07 Conflict of Interest: Intermediary

(a) A lawyer shall not act as intermediary between clients unless:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the client's best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.

(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

Comment:

1. A lawyer acting as intermediary may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. For example, the lawyer may assist in organizing a business in which two or more clients are entrepreneurs, in working out the financial reorganization of an enterprise in which two or more clients have an interest, in arranging a property distribution in settlement of an estate or in mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

2. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship; hence, the requirement of written consent. Moreover, a lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. See also Rule 1.06 (b).

3. The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

4. In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible. Moreover, a lawyer cannot undertake common representation of clients between whom contested litigation is reasonably expected or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the client's interests can be adjusted by intermediation ordinarily is not very good.

5. The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the client's interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

6. A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation, except as to such clients. See Rules 1.03 and 1.05. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the general rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

7. Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer

who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

8. In acting as intermediary between clients, the lawyer should consult with the clients on the implications of doing so, and proceed only upon informed consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

9. Paragraph (b) is an application of the principle expressed in Rule 1.03. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

10. Under this Rule, any condition or circumstance that prevents a particular lawyer either from acting as intermediary between clients, or from representing those clients individually in connection with a matter after an unsuccessful intermediation, also prevents any other lawyer who is or becomes a member of or associates with that lawyer's firm from doing so. See paragraphs (c) and (e).

Withdrawal

11. In the event of withdrawal by one or more parties from the enterprise, the lawyer may continue to act for the remaining parties and the enterprise. See also Rule 1.06 (c) (2) which authorizes continuation of the representation with consent.

Rule 1.08 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client unless:

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.

(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(c) Prior to the conclusion of all aspects of the matter giving rise to the lawyers employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(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.

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents;

(2) there is no interference with the lawyers independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.05.

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

(g) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(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 expenses; and

(2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

(i) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

(j) As used in this Rule, "business transactions" does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.

Comment:

Transactions between Client and Lawyer

1. This rule deals with certain transactions that per se involve unacceptable conflicts of interests.

2. As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, such as banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing, with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

3. A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (b) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

4. An agreement by which a lawyer acquires literary or media rights concerning the conduct of representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (c) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.04 and to paragraph (h) of this Rule.

Person Paying for Lawyers Services

5. Paragraph (e) requires disclosure to the client of the fact that the lawyers services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule

1.05 concerning confidentiality and Rule 1.06 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure. Where an insurance company pays the lawyer's fee for representing an insured, normally the insured has consented to the arrangement by the terms of the insurance contract.

Prospectively Limiting Liability

6. Paragraph (g) is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

Acquisition of Interest in Litigation

7. This Rule embodies the traditional general precept that lawyers are prohibited from acquiring a proprietary interest in the subject matter of litigation. This general precept, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for contingent fees set forth in Rule 1.04 and the exception for certain advances of the costs of litigation set forth in paragraph (d). A special instance arises when a lawyer proposes to incur litigation or other expenses with an entity in which the lawyer has a pecuniary interest. A lawyer should not incur such expenses unless the client has entered into a written agreement complying with paragraph (a) that contains a full disclosure of the nature and amount of the possible expenses and the relationship between the lawyer and the other entity involved.

Imputed Disqualifications

8. The prohibitions imposed on an individual lawyer by this Rule are imposed by paragraph (i) upon all other lawyers while practicing with that lawyer's firm.

Rule 1.09 Conflict of Interest: Former Client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

EXHIBIT 2

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854 S.W.2d 148
Court of Appeals of Texas,
Houston (1st Dist.).

Vernon SCRIVNER and Josette Scrivner, Relators,
v.
The Honorable Carolyn Day HOBSON, Judge of the County Civil Court at Law Number Three of Harris County, Texas, Respondent.

No. 01–92–01011–CV. | Feb. 25, 1993.

Clients brought legal malpractice action against attorney who represented them and other families in environmental lawsuit, alleging that attorney settled lawsuit without their authority, incorrectly calculated value of their share of settlement proceeds, and impermissibly divided share of settlement attributable to their property with prior landowners. The County Civil Court at Law, No. Three, Harris County, Carolyn Day Hobson, J., granted attorney's motion for protection of documents regarding actual basis for calculation of amounts due each plaintiff. Clients petitioned for writ of mandate. Upon rehearing, the Court of Appeals, Wilson, J., held that: (1) documents came within exceptions to attorney-client or attorney-product privilege, and (2) adequate remedy by way of appeal was unavailable.

Writ conditionally granted.

West Headnotes (11)

[1] Mandamus
Nature and Scope of Remedy in General

Mandamus is proper remedy only when trial court has clearly abused its discretion, and offended party has no other adequate remedy by law.

1 Cases that cite this headnote

[2] Appeal and Error
Power to Review

With respect to resolution of factual issues or matters committed to trial court's discretion, reviewing court may not substitute its judgment for that of trial court.

[3] Mandamus
Presumptions and Burden of Proof

With respect to petition for writ of mandamus, relator's burden is to establish that trial court could reasonably have reached only one decision.

[4] Mandamus
Discretion of Lower Court

With respect to petition for writ of mandamus, reviewing court cannot disturb trial court's decision unless it is shown to be arbitrary and unreasonable.

[5] Privileged Communications and Confidentiality
Common Interest Doctrine; Joint Clients or Joint Defense

Where parties display mutual trust in single attorney by placing their affairs in his hands, attorney must disclose to others all opinions, theories or conclusions regarding client's rights or position to other parties the attorney represented in such matter. Rules of Civ.Evid., Rule 503(d)(5).

[6] Privileged Communications and

Confidentiality
Common Interest Doctrine; Joint Clients or Joint Defense

With regard to attorney-client privilege, general rule is that between commonly represented clients privilege does not attach. Rules of Civ.Evid., Rule 503(d)(5).

1 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**
Common Interest Doctrine; Joint Clients or Joint Defense

Where attorney represents clients in obtaining aggregate settlement for which no individual negotiations on behalf of any one client were undertaken by attorney, client's "file" becomes any and all documents pertaining to case. Rules of Civ.Evid., Rule 503(d)(5).

3 Cases that cite this headnote

[8] **Pretrial Procedure**
Work Product Privilege; Trial Preparation Materials
Privileged Communications and Confidentiality
Common Interest Doctrine; Joint Clients or Joint Defense

For purposes of legal malpractice action against attorney who represented joint clients in environmental lawsuit, and who allegedly settled lawsuit without plaintiff clients' authority, exception to attorney-client privilege and attorney-work product privilege for representation of joint clients applied to portions of attorney's file including information regarding actual basis for calculations of amount due each client on behalf of whom attorney settled lawsuit. Rules of Civ.Evid., Rule 503(d)(5).

4 Cases that cite this headnote

[9] **Pretrial Procedure**
Work Product Privilege; Trial Preparation Materials
Privileged Communications and Confidentiality
Documents and Records in General

Attorney cannot invoke attorney-client privilege or attorney-work product privilege to shield documents from disclosure to individual to whom privilege belongs, i.e., client. Rules of Civ.Evid., Rule 503(d)(5).

1 Cases that cite this headnote

[10] **Pretrial Procedure**
Work Product Privilege; Trial Preparation Materials
Privileged Communications and Confidentiality
Self-Defense Exception; Breach of Duty Between Attorney and Client

Exception to attorney-client or attorney-work product privilege regarding breach of duty by lawyer permitted clients, who sued attorney for legal malpractice for attorney's alleged settlement of group environmental lawsuit without their authority, to discover documents in attorney's file regarding actual basis for calculating amounts due each plaintiff in environmental lawsuit; contents of documents were relevant to clients' claims that proceeds of aggregate settlement were improperly and fraudulently distributed among various plaintiffs in lawsuit. Rules of Civ.Evid., Rule 503(d)(3).

2 Cases that cite this headnote

[11] **Mandamus**
Evidence, Witnesses, and Depositions

Clients who sued their attorney for malpractice arising from his allegedly settling environmental lawsuit without their authority were entitled to mandamus relief from trial court's order granting attorney's motion for protection of

documents in attorney's file pertaining to actual basis for calculations of amounts due each plaintiff in underlying action; documents came within exceptions to attorney-client or attorney-work product privilege, and trial court's order severely compromised clients' ability to present their claims at trial, as preventing discovery of those documents effectively denied clients opportunity to develop merits of case.

1 Cases that cite this headnote

Attorneys and Law Firms

***149** Dana Andrew LeJune, Jeff Nobles, Houston, for relators.

Joel Randal Sprott, Sally T. Miller, Houston, for respondent.

Before OLIVER–PARROTT, C.J., and HEDGES, JJ.

Opinion

OPINION ON MOTION FOR REHEARING

WILSON, Justice.

We have considered the motion for rehearing filed by the real parties in interest. We now grant the motion and, without hearing oral argument, withdraw our opinion of January 28, 1993, and substitute the following opinion. Relators Vernon and Josette Scrivner, plaintiffs in the underlying lawsuit, seek relief from respondent's order of May 20, 1992, which grants defendants' motion for protection of documents sought by relators in the underlying lawsuit. Real parties in interest are Anthony Roisman and the law firm of Cohen, Milstein, Hausfeld & Toll, a partnership, and Anthony Roisman, Jerry S. Cohen, Herbert E. Milstein, Michael D. Hausfeld, Stephen J. Toll, Ann C. Yahner, and Lisa M. Mezzetti (collectively, Roisman), who are defendants, along with James and Ola Mae Synnott.

The Scrivners allege Roisman settled an environmental lawsuit without their authority, thereby committing legal malpractice. Roisman represented the Scrivners and 100 other families, including the Synotts, who sued corporations that allegedly caused or contributed to a toxic waste site known as the French Limited Site, in the cases styled *Whiddon et al. v. Reichhold Chemicals Co., et al.* and *Whiddon et al v. ARCO, et al.* The Scrivners contend that Roisman incorrectly calculated the value of their share of the settlement proceeds and impermissibly divided the share of the settlement attributable to their property with the prior land owners. They also claim Roisman fraudulently apportioned the settlement proceeds by paying certain landowners "bonuses."

In conjunction with the legal malpractice action, the Scrivners' attorney requested, by duces tecum to the deposition notice of Anthony Roisman, certain parts of Roisman's file, including information regarding the actual basis for calculations of the amounts due each plaintiff. Roisman objected and filed a motion for protection claiming the documents were not relevant to the claims asserted by the Scrivners, were privileged under Texas Rules of Civil Evidence 503, the attorney-client privilege, and were exempt from discovery under Texas Rules of Civil Procedure 166b(3)(a), ***150** the attorney-work product privilege. He filed a motion for protection on these bases. Judge Hobson ordered the documents produced for in camera inspection and held a hearing on April 23, 1992. She signed Roisman's order for protection on May 20, 1992. The order provides, in pertinent part:

> [B]ecause good cause has been shown ... the deponent is not required to produce any documents:
>
> 1) Relating to agreements between Anthony Z. Roisman and/or Cohen, Milstein, Hausfeld & Toll and Melvin and Margarette Whiddon, Mr. and Ms. Tony Spence, Mr. and Ms. Dave Shade, Mr. and Ms. Jake McCallister and Mr. and Ms. Wilbur Collins;
>
> 2) Used by Anthony Z. Roisman and/or Cohen, Milstein, Hausfeld & Toll to calculate the amount of money Melvin and Margarette Whiddon, Mr. and Ms. Tony Spence, Mr. and Ms. Dave Shade, Mr. and Ms. Jake McCallister and Mr. and Ms. Wilbur Collins were entitled to receive in the settlements with the Defendants in the case styled *Whiddon v. Arco* and *Whiddon v. Reichhold;* and
>
> 3) Relating to the settlements of Melvin and Margarette Whiddon, Mr. and Ms. Tony Spence, Mr. and Ms. Dave Shade, Mr. and Ms. Jake McCallister and Mr. and Ms. Wilbur Collins, including documents used to calculate said settlements.

The Scrivners maintain this order effectively makes their claim to recoup the allegedly misapplied funds impossible to prove. They assert 10 bases for relief by way of mandamus, including the following:

1. The documents sought by plaintiffs are not privileged because they concern the aggregate settlement of the underlying case.

2. The documents sought by plaintiffs do not fall within the attorney-client privilege because they do not contain advice given by the attorney to the client, nor do they concern secret information related to the attorney by the client.

3. The documents sought by plaintiffs fall within the crime-fraud exception to privilege found in Texas Rule of Civil Evidence 503(d)(1).

4. The documents sought by plaintiffs fall within the breach of duty by a lawyer exception to privilege found in Texas Rules of Civil Evidence 503(d)(3).

5. The documents sought by plaintiffs fall within the joint clients exception to privilege found in Texas Rules of Civil Evidence 503(d)(5).

6. The defendants are estopped from raising any privilege of the plaintiffs' former colitigants because they failed to raise that privilege against an attorney representing the minors in the underlying case.

7. The documents sought by plaintiffs fall within the "contents of settlement agreements" work product exception found in Texas Rules of Civil Procedure 166b(2)(f)(2).

8. Defendants waived their privilege claims by failure to plead, prove, and preserve the alleged privileges.

9. The trial court abused its discretion in granting protection to all of the documents because the defendants waived any exemption by having already produced documents showing their "mental processes, conclusions and/or legal theories."

10. The trial court abused its discretion by failing to order the defendants to produce redacted copies of the documents sought by the Scrivners, on motion for rehearing by the Scrivners.

Roisman argues that a remedy by way of writ of mandamus is improper because the trial court did not abuse its discretion in granting the protective order and that the Scrivners have other legal remedies. We granted relators' motion for leave to file petition for writ of mandamus and heard argument of the parties.

Abuse of Discretion

[1] Mandamus is a proper remedy only when the trial court has clearly abused its discretion, and the offended party has no other adequate remedy by law. *Johnson v. Fourth Court of Appeals,* 700 S.W.2d 916, 917 (Tex.1985). In the case of ***151** *Walker v. Packer,* 827 S.W.2d 833 (Tex.1992), the Texas Supreme Court articulated the standard to which a litigant must be held in order to obtain a writ of mandamus in a discovery dispute. The court noted that the Rules of Civil Procedure require a "flexible approach to discovery." *Id.* 827 S.W.2d at 838. A party is afforded the opportunity to seek any information that "appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* at 838–39; TEX.R.CIV.P. 166b(2)(a).
[2] [3] [4] With respect to resolution of factual issues or matters committed to the trial court's discretion, the reviewing court may not substitute its judgment for that of the trial court. *Walker,* 827 S.W.2d at 839. The relator's burden is to establish that the trial court could reasonably have reached only one decision. *Id.* at 840. A reviewing court cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable. *Id.*

Review of a trial court's determination of the legal principles controlling its ruling is afforded less deference. *Id.* "A trial court has no 'discretion' in determining what the law is or applying the law to the facts." *Id.* The supreme court concluded that the trial court abuses its discretion if it fails to analyze or apply the law correctly. *Id.* We utilize this standard to determine whether the trial court correctly applied exceptions to the attorney-client privilege, as stated in the Texas Rules of Civil Evidence, to the documents in question.

Exceptions to Privilege

To the extent the attorney-client or attorney-work product privileges apply to the documents in question, the Scrivners assert that the exceptions to the attorney-client privilege set forth in Texas Rules of Civil Evidence 503(d)(3) and 503(d)(5) allow discovery of the documents in this case. Rule 503(d) states, in pertinent part:

(d) Exceptions. There is no privilege under this rule:

(3) *Breach of duty by a lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer.

....

(5) *Joint clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of

> them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

TEX.R.CIV.EVID. 503(d)(3), (5). In the present action, James and Ola Mae Synnott, who were clients of Roisman for purposes of the aggregate settlement negotiations, are named defendants in the underlying suit in the trial court, along with Roisman.

Joint Clients

[5] **[6]** Where parties display mutual trust in a single attorney by placing their affairs in his hands, the attorney must disclose to the others all opinions, theories, or conclusions regarding the client's rights or position to other parties the attorney represented in the same matter. *Cousins v. State Farm Mut. Auto. Co.,* 258 So.2d 629, 636 (La.App.1972). With regard to the attorney-client privilege, the general rule is that, as between commonly represented clients, the privilege does not attach to matters that are of mutual interest. *See* TEX.R.CIV.EVID. 503(d)(5). Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised. *Id. See, e.g.,* SUPREME COURT OF TEXAS, STATE BAR RULES art. X, § 9 (Texas Disciplinary Rules of Professional Conduct) Rule 1.07 comment 6 (1989) [hereinafter TEX.DISCIPLINARY RULES OF PROF.CONDUCT] (located in the pocket part for Volume 3 of the Texas Government Code in title 2, subtitle G app., following § 83.006 of the Government Code). The Rules of Professional Conduct expressly provide

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients ... unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved ***152** and of the nature and extent of the participation of each person in the settlement.

TEX.DISCIPLINARY RULES OF PROF.CONDUCT 1.08(f) (1989).

[7] The particular documents at issue in this case address matters of interest common to all the plaintiffs involved in the aggregate settlement. Where the attorney represents clients in obtaining an aggregate settlement for which no individual negotiations on behalf of any one client were undertaken by the attorney, the client's "file" becomes any and all documents pertaining to the case.

[8] **[9]** The attorney cannot, therefore, invoke the attorney-client privilege or attorney-work product privilege in all cases to shield documents from disclosure to the individual to whom the privilege belongs—the client. In the present case, we hold the exception to the attorney-client privilege and the attorney-work product privilege for representation of joint clients applies to the documents. TEX.R.CIV.EVID. 503(d)(5). In so holding, however, we do not deny Roisman or the other clients their right to assert that certain documents, or information contained in the file, are otherwise exempt or immune from discovery under other provision of the Rules of Civil Procedure, TEX.R.CIV.P. 166b(3)(b), (c), (d), (e), or are not calculated to lead to evidence relevant to the cause of action alleged. TEX.R.CIV.P. 166b(2)(a). We also reiterate that, under the Rules of Civil Procedure, the party seeking to shield the information from discovery must fully comply with rule 166b(4).

Breach of Duty by Lawyer

[10] The contents of the documents are relevant to claims of the Scrivners that the proceeds of the aggregate settlement were improperly and fraudulently distributed among the various plaintiffs in the environmental lawsuit. As such, we hold the exception to the attorney-client or attorney-work product privileges regarding breach of duty by a lawyer also permits discovery of the documents by the Scrivners. TEX.R.CIV.EVID. 503(d)(3).

We hold that Judge Hobson clearly abused her discretion in denying the Scrivners discovery of documents that come within exceptions to the attorney-client or attorney-work product privilege.

Adequate Remedy at Law

[11] We next determine whether the Scrivners met the second prong of the test for issuance of relief by way of mandamus, no adequate remedy by way of appeal. *Walker,* 827 S.W.2d at 840–44. The Scrivners assert that the trial court's order denying discovery of the requested documents effectively prevents them from proving their actual and punitive damages in their causes of action for negligence, gross negligence, violations of the Deceptive Trade Practices—Consumer Protection Act, breach of contract, breaches of fiduciary duties and good faith and fair dealing, and conversion. Roisman claims the Scrivners have other remedies, including moving forward

with the deposition of Anthony Roisman, requesting the other clients to waive the privilege, or utilizing the discovery process against nonparties.

We hold that the trial court's order severely compromises the ability of the Scrivners to present their claims at trial. In preventing discovery of the requested documents, the trial court has effectively denied the Scrivners the opportunity to develop the merits of their case. *Id.* at 843. Denial of discovery of the documents goes to the heart of the Scrivner's case. As such, they have shown that an adequate remedy by way of appeal is not available.

Conclusion

Based on our disposition of ground numbers one, four, and five, as asserted by relators, we conditionally grant the writ of mandamus and order Judge Hobson to vacate her order of May 20, 1992. We are confident Judge Hobson will comply with the order of this Court. The writ of mandamus will issue only if she fails to do so.

End of Document

EXHIBIT 3

958 S.W.2d 239
Court of Appeals of Texas,
Houston (14th Dist.).

Carol ARCE, Individually and as Next Friend of Lyndsey Arce and Lauren Arce, Raul S. Alvarado, David H. Anderson, Freddy Barfield, Dorothy Barfield, Mercer Black, Richard W. Bradley, Jr., James Karl Bryant, Sandra Bryant, Stephen Lloyd Bryant, Thomas G. Butcher, Julane Campbell, Jason Campbell, Justin Campbell, Jaret Campbell, Dennis M. Curry, Ricky L. Dannelley, Glenn E. Deshotel, John L. Dixon, Silverrol Ferguson, Julian Garcia, Jr., Austin Gill, Robert F. Gudz, Joe Alan Holzworth, Wesley S. Hood, Bobby Ray Jones, James E. Kerr, Stanley P. Korenek, James L. Lauderdale, Jesse H. Luna, Ronald D. Lyon, Walter E. Marbury, Jr., John Martinez, Patrick McCourtney, Gary Mcpherson, Lisa McPherson, Carol D. Montelongo, Pete Montoya, Iii, Herver Mosley, Terry L. Mullins, Adolfo Ochoa, Jr., Philip Owens, Jesus R. Pena, Carl T. Richardson, Glenn W. Robbins, Johnnie Rogers, Stephen R. Ross, Amanda Ann Seaman, Terry Wayne Simpson, Allen Smith, Jr., Helga Sieglinde Thompson, Robert A. Wash, and Calvin L. Williams, Appellants,
v.
David BURROW, Walter Umphrey, John E. Williams, F. Kenneth Bailey, Wayne Reaud, and Umphrey, Burrow, Reaud, Williams & Bailey, Appellees.

No. 14–95–00360–CV. | Oct. 30, 1997. | Rehearing Overruled Jan. 15, 1998.

Clients filed suit against attorneys who represented them in personal injury litigation, alleging breach of fiduciary duty, fraud, violations of Deceptive Trade Practices Act (DTPA), negligence, and breach of contract. The 11th District Court, Harris County, Mark Davidson, J., entered summary judgment for attorneys, and clients appealed. On motion for rehearing, the Court of Appeals, Fowler, J., held that: (1) client had only to prove existence of breach of fiduciary duty to be entitled to fee forfeiture; (2) entire fee was not necessarily subject to forfeiture; (3) expert testimony was required to establish causation and damage elements of remaining claims; (4) clients failed to create genuine issue of material fact on causation and damage issues; and (5) complaint could be amended to name additional plaintiffs.

Reversed and remanded in part; affirmed in part.

West Headnotes (43)

[1] Appeal and Error
Matters or Evidence Considered in Determining Question

Judgment is only place appellate court can look for reasons judgment was entered.

[2] Appeal and Error
Extent of Review Dependent on Nature of Decision Appealed from

In reviewing trial court's order granting summary judgment, appellate court must determine whether summary judgment proof establishes, as matter of law, that there is no genuine issue of material fact as to one or more of the essential elements of plaintiff's cause of action.

[3] Attorney and Client
Conduct of Litigation

"Aggregate settlement" which may breach fiduciary duty, occurs when attorney, who represents two or more clients, settles entire case on behalf of those clients without individual negotiations on behalf of any one client.

3 Cases that cite this headnote

[4] Attorney and Client
Conduct of Litigation

Attorney owes duty of loyalty and good faith to each client, and it is ethical responsibility of attorney representing multiple clients to obtain individual settlements, unless those clients are informed and consent.

2 Cases that cite this headnote

[5] Attorney and Client
Conduct of Litigation

When attorney enters into aggregate settlement without consent of his or her clients, attorney breaches fiduciary duty owed to those clients.

1 Cases that cite this headnote

[6] Principal and Agent
Nature of Agent's Obligation

Inherent in any agency relationship is fiduciary duty agent owes to his or her principal.

[7] Fraud
Fiduciary or Confidential Relations

"Fiduciary duty" is formal, technical relationship of confidence and trust imposing great duties upon fiduciary as matter of law.

1 Cases that cite this headnote

[8] Fraud
Fiduciary or Confidential Relations

When parties enter fiduciary relationship, each consents to have its conduct toward the other measured by high standards of loyalty as exacted by courts of equity.

[9] Fraud
Fiduciary or Confidential Relations

Term fiduciary refers to integrity and fidelity.

1 Cases that cite this headnote

[10] Fraud
Fiduciary or Confidential Relations

Law requires more of fiduciary than arm's length marketplace ethics; duty owed is one of loyalty and good faith, strict integrity, and fair and honest dealing.

3 Cases that cite this headnote

[11] Fraud
Fiduciary or Confidential Relations

There is general prohibition against fiduciary's using relationship to benefit his personal interest, except with full knowledge and consent of principal.

[12] Fraud
Fiduciary or Confidential Relations

Fiduciaries may not benefit from their own misdeeds or use effects of their own actions as shield from liability.

1 Cases that cite this headnote

[13] Attorney and Client
Trial and Judgment

Fiduciary relationship exists between attorneys

and clients as matter of law.

3 Cases that cite this headnote

[14] **Attorney and Client**
Nature of Attorney's Duty

Because relationship between attorney and client is highly fiduciary in nature, dealings between attorney and client require utmost good faith, and dealings, intentions, and intendments between attorney and client are subject to exacting scrutiny.

[15] **Attorney and Client**
Deductions and Forfeitures

Fee forfeiture is recognized remedy when attorney breaches fiduciary duty to his or her client.

2 Cases that cite this headnote

[16] **Attorney and Client**
Deductions and Forfeitures

Client who claims attorney breached fiduciary relationship need only prove existence of breach, and need not show causation or damage, to be entitled to fee forfeiture.

11 Cases that cite this headnote

[17] **Attorney and Client**
Elements of Malpractice or Negligence
Action in General

Simple negligence action against attorney requires client to prove duty, breach, causation, and damage.

[18] **Attorney and Client**
Deductions and Forfeitures

Attorney need not necessarily forfeit his or her entire fee because of breach of fiduciary duty, and factors to be considered in determining amount of forfeiture include: nature of wrong committed; character of attorney's conduct; degree of culpability, that is, whether the attorney committed breach intentionally, willfully, recklessly, maliciously, or with gross negligence; situation and sensibilities of all parties, including any threatened or actual harm to client; extent to which attorney's conduct offends public sense of justice and propriety; and adequacy of other available remedies.

[19] **Jury**
Issues of Law or Fact in General
Jury
Issues of Fact in Equitable Actions

Right to jury trial extends to disputed issues of fact in equitable, as well as legal, proceedings. Vernon's Ann.Texas Const. Art. 1, § 15; Art. 5, § 10.

[20] **Jury**
Issues of Fact in Equitable Actions

Jury may not determine expediency, necessity, or propriety of equitable relief.

[21] **Jury**
Fraud

While parties are entitled to have jury determine whether attorney breached fiduciary duty to client, they are not entitled to have jury determine amount, if any, of resulting fee forfeiture, because fee forfeiture is not issue of fact, but is a remedy.

1 Cases that cite this headnote

[22] **Attorney and Client**
Pleading and Evidence
Antitrust and Trade Regulation
Weight and Sufficiency

Issues of causation and damages were not within common knowledge of lay persons, and thus expert testimony was required, in clients' suit against attorneys for fraud, violations of Deceptive Trade Practices Act (DTPA), negligence, and breach of contract, for attorneys' allegedly unreasonable settlement of personal injury and wrongful death claims. V.T.C.A., Bus. & C. § 17.41 et seq.

3 Cases that cite this headnote

[23] **Judgment**
Weight and Sufficiency

Movant can establish its right to summary judgment solely on uncontroverted testimony of expert witness if subject is one in which trier of fact would be guided solely by opinion testimony of experts.

2 Cases that cite this headnote

[24] **Attorney and Client**
Pleading and Evidence

Causation and damage, in tort and contract claims based on alleged breaches of fiduciary duty by lawyer, are matters upon which trier of fact must be guided by expert testimony unless matters are plainly within common knowledge of lay persons.

14 Cases that cite this headnote

[25] **Judgment**
Matters of Fact or Conclusions

Affidavit included sufficient legal basis and reasoning for expert's opinion that nothing attorneys did in settling personal injury and wrongful death claims harmed clients so as not to be conclusory, and thus affidavit was sufficient to support summary judgment against clients on their claims for fraud, violations of Deceptive Trade Practices Act (DTPA), negligence, and breach of contract, though expert did not list each client or each damage component separately. V.T.C.A., Bus. & C. § 17.41 et seq.

2 Cases that cite this headnote

[26] **Judgment**
Weight and Sufficiency

Summary judgment may not be granted on conclusory evidence.

[27] **Judgment**
Matters of Fact or Conclusions

Affidavits containing conclusory statements are not competent summary judgment proof.

[28] **Judgment**
Weight and Sufficiency

If expert's testimony is comprised of mere legal conclusions or conclusory statements, it is

insufficient to support summary judgment.

[29] Judgment
Weight and Sufficiency

Expert's opinion is conclusory and will not support summary judgment if it does not contain basis or reasoning for opinion.

[30] Judgment
Presumptions and Burden of Proof

On defendants' motion for summary judgment, after defendants demonstrated right to judgment by negating necessary elements of proof, burden shifted to plaintiffs to introduce evidence that raised issue of fact on such elements.

[31] Judgment
Weight and Sufficiency

Lay testimony would be insufficient to refute expert testimony, and to avoid summary judgment, on issue which required expert testimony.

[32] Judgment
Attorneys

Nonexpert affidavits and deposition testimony of certain individual clients were insufficient to raise fact issue precluding summary judgment on clients' claims for fraud, violations of Deceptive Trade Practices Act (DTPA), negligence, and breach of contract, for attorneys' allegedly unreasonable settlement of personal injury and wrongful death claims, after attorneys presented expert's affidavit that nothing attorneys did in settling claims harmed clients. V.T.C.A., Bus. & C. § 17.41 et seq.

[33] Attorney and Client
Pleading and Evidence
Antitrust and Trade Regulation
Admissibility

Notes in attorneys' files concerning dollar amount assigned to each client was relevant to whether aggregate settlement occurred, and not to whether attorneys caused any injury or damage to clients, for purposes of clients' claims for fraud, violations of Deceptive Trade Practices Act (DTPA), negligence, and breach of contract. V.T.C.A., Bus. & C. § 17.41 et seq.

[34] Judgment
Attorneys

Expert's affidavit was not competent summary judgment evidence regarding issues of causation and damages caused to clients by attorneys' allegedly unreasonable settlement of personal injury and wrongful death claims, where affidavit stated that expert was medical doctor and licensed attorney, without stating whether she practiced law in relevant fields, or even practiced at all, or whether she had any relevant experience. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(f).

1 Cases that cite this headnote

[35] Evidence
Necessity of Qualification
Evidence
Preliminary Evidence as to Competency

When party relies on expert testimony, party

must prove expert's qualifications, and burden of establishing expert's qualifications is on offering party.

1 Cases that cite this headnote

[36] Judgment
Admissibility

Standard for admissibility of evidence is same in summary judgment proceeding as in regular trial.

[37] Judgment
Affidavits, Form, Requisites and Execution of

In summary judgment context, if party relies on expert's affidavit to support or oppose motion for summary judgment, proof of expert's qualifications must necessarily be stated in his or her affidavit. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(f).

4 Cases that cite this headnote

[38] Judgment
Attorneys

Affidavit by licensed attorney stating that clients were damaged by attorneys' allegedly unreasonable settlement of personal injury and wrongful death claims, but that amount of damage was incapable of calculation without reopening of underlying suit, was insufficient to create genuine issue of material fact on issue of damages to preclude summary judgment on clients' claims for fraud, violations of Deceptive Trade Practices Act (DTPA), negligence, and breach of contract. V.T.C.A., Bus. & C. § 17.41 et seq.

1 Cases that cite this headnote

[39] Damages
Weight and Sufficiency

Statement that damages are incapable of calculation is legally insufficient evidence of damages; it is, in fact, no evidence of damages.

[40] Pleading
Condition of Cause and Time for Amendment

Plaintiffs should be granted leave to amend complaint, even within seven days of trial, in absence of any showing of prejudice or surprise to defendants. Vernon's Ann.Texas Rules Civ.Proc., Rule 63.

1 Cases that cite this headnote

[41] Pleading
Notice of Application and Presentation and Service of Amendment

Defendant who has been served but has not answered must be notified of every amendment to complaint which sets up new cause of action or requires more onerous judgment of him; but if defendant has pleaded to action or otherwise entered appearance, he is before court for all purposes and is charged with notice of all amendments thereafter filed, and new citation is not necessary.

3 Cases that cite this headnote

[42] Parties
Proceedings in Cause After Adding Parties

Defendant who is in court by reason of having filed answer is not entitled to service of new process after amendment of plaintiff's petition even if amendment brings new parties into case.

[43] Parties
Proceedings in Cause After Adding Parties

If plaintiff amends his original petition to add name of additional plaintiff, it does not constitute new cause of action requiring additional service of process.

Attorneys and Law Firms

***243** William V. Dorsaneo, III, Dallas, William J. Skepnek, Lawrence, KS, for appellants.

David M. Gunn, Houston, for appellees.

Before YATES, FOWLER and EDELMAN, JJ.

Opinion

CORRECTED OPINION ON MOTION FOR REHEARING

FOWLER, Justice.

Our opinions of August 28, 1997, and October 23, 1997, are withdrawn and this one substituted for them. The issues presented in this appeal from a summary judgment all revolve around one main issue: whether fee forfeiture is a viable remedy in Texas when an attorney breaches a fiduciary duty to a client, and, if fee forfeiture is a viable remedy, how it is applied. Concluding that fee forfeiture is a viable remedy, we reverse and remand in part and affirm in part.

On October 23, 1989, a series of explosions rocked the Phillips 66 chemical plant in Pasadena, Texas. Twenty-three people were killed and hundreds were injured. Appellants hired appellees to file their individual suits against Phillips. All appellees agreed to payment on a contingency fee basis.

According to appellants, appellees did not develop or evaluate their claims individually, and instead, without discussion or authority, reached an "aggregate settlement" with Phillips for the entire suit. Only then were appellants "summoned" for a brief, twenty-minute meeting to discuss the settlement arrangements. Appellants allege appellees lied, and/or intimidated them into accepting the settlement and, in the process, "skimmed-off" sixty million dollars in attorneys' fees.

Appellees, on the other hand, claim appellants became unhappy with their settlements when rumors began to circulate about larger settlements received by plaintiffs who were represented by other attorneys. Appellees allege appellants then began to believe their settlements were unfair and blamed their attorneys. Appellees contend there was no "aggregate settlement," the settlements were adequate and fair.

Ultimately, appellants filed suit against appellees alleging breach of fiduciary duty, fraud, violations of the Texas Deceptive Trade Practices Act (DTPA), negligence, and breach of contract. They asked to be awarded all fees paid to appellees, punitive or special damages under the DTPA, prejudgment and postjudgment interest, and attorney's ***244** fees. According to appellees, however, appellants' pleadings covered liability, but were "strangely vague" about damages. Appellees filed a motion for summary judgment and a first supplemental motion for summary judgment alleging three grounds: (1) no aggregate settlement took place; (2) estoppel and ratification barred appellants from attacking the settlement agreements; and (3) nothing appellees did caused any damage to appellants, i.e., appellees' settlements were fair and reasonable.
[1] On January 11, 1995, the trial court held a hearing on the original and first supplemental motion for summary judgment. The court denied the motions and sent a letter to the parties explaining its ruling. The letter first stated that a fact issue existed "on whether there was an aggregate settlement of the plaintiffs' claims against Phillips" and second, that the defendants had not addressed the plaintiffs' claims for damages on the aggregate settlement.[1]

Subsequently, the court held another hearing on appellees' second supplemental motion for summary judgment, which included and incorporated their original and first supplemental motions for summary judgment. After the hearing, the trial court entered an order in which it found the motion should be denied as to the claim that there was no breach of duty because the court found there was evidence of an aggregate settlement sufficient to create a fact issue. The court also found, however, that the motion should be granted because (1) the summary judgment proof established that appellants suffered no damages as a result of any breach of duty, (2) the affidavits of Roberta Edwards, M.D., and Harry Wilson

did not controvert the affidavit of Robert Malinack with competent evidence, and (3) fee forfeiture is not an element of damages, but a legal remedy that a court may apply only after a jury has found a breach of duty with resulting actual damages. Appellants perfected this appeal.

[2] In reviewing a trial court's order granting summary judgment, the court must determine whether the summary judgment proof establishes, as a matter of law, that there is no genuine issue of material fact as to one or more of the essential elements of the plaintiff's cause of action. *Gibbs v. General Motors Corp.,* 450 S.W.2d 827, 828 (Tex.1970). The movant has the burden to show there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546, 548–49 (Tex.1985). Evidence favorable to the non-movant will be taken as true and every reasonable inference indulged in its favor. *Id.*

In points of error one through four, appellants contend the trial court erred in granting summary judgment in favor of appellees.[2] Within these points of error, appellants raise several arguments. We will begin our review by addressing appellants' third point of error concerning the concept of fee forfeiture and its application, if any, in Texas.

I. FEE FORFEITURE

In their third point of error, appellants argue that summary judgment was improper because they were inherently damaged by breaches of several fiduciary duties, and fee forfeiture is the appropriate remedy for those breaches.[3] To be entitled to the remedy of fee forfeiture, they do not have to prove ***245** appellees caused actual damage—proof of a breach is enough. In support of this position, they remind us that the trial court found that a fact issue exists on at least one of the claimed breaches, aggregate settlement.

[3] [4] [5] An aggregate settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client. *See Scrivner v. Hobson,* 854 S.W.2d 148, 152 (Tex.App.—Houston [1st Dist.] 1993, orig. proceeding). The attorney owes a duty of loyalty and good faith to *each* client, and it is the ethical responsibility of an attorney representing multiple clients to obtain individual settlements, unless those clients are informed and consent.[4] *See Judwin Properties v. Griggs & Harrison,* 911 S.W.2d 498, 506 (Tex.App.—Houston [1st Dist.] 1995, no writ). Settling a case in mass without consent of the clients is unfair to the clients and may result in a benefit to the attorney (speedy resolution and payment of fees) to the detriment of the clients (decreased recovery). Unfairness is the cornerstone in an action for breach of fiduciary duty. *Id.* Thus, when an attorney enters into an aggregate settlement without the consent of his or her clients, the attorney breaches the fiduciary duty owed to those clients.[5] Appellants contend that when such a breach occurs, forfeiture, without the need for proof of damage, is the appropriate remedy.

As to the amount of forfeiture, appellants argue that once a breach is proved, the entire fee must be forfeited. In response, appellees contend (1) there can be no forfeiture without actual harm to the client, and (2) total fee forfeiture is not automatic, rather the amount of forfeiture, if any, is in the trial court's discretion.

Considering the points appellants have raised and the responses to them, the main issue we must determine is whether an attorney's fees can be forfeited when the attorney has breached a fiduciary duty owed the client by entering into an aggregate settlement.[6] If so, we must decide: (1) what a party must prove to be entitled to the remedy of fee forfeiture; (2) whether forfeiture of the entire fee is automatic or whether a portion of the fee be forfeited, with the attorney retaining the remainder; and (3) whether forfeiture is a question for the trial court or the trier of fact.[7] There is a corollary to the second question: if only part of the fee is subject to forfeiture, what factors should be considered in determining the amount?

[6] [7] [8] [9] [10] [11] [12] [13] [14] Inherent in any agency relationship is the fiduciary duty an agent owes to his or her principal. *Maryland Ins. Co. v. Head Indus. Coatings and Servs., Inc.,* 906 S.W.2d 218, 233 (Tex.App.—Texarkana 1995), *rev'd on other grounds,* 938 S.W.2d 27 (Tex.1996); *Republic Bankers Life Ins. Co. v. Wood,* 792 S.W.2d 768, 778 (Tex.App.—Fort Worth 1990, writ denied). A fiduciary duty is a formal, technical relationship of confidence and trust imposing great duties upon a fiduciary as a matter of law. *Central Sav. & Loan Ass'n v. Stemmons Northwest Bank,* ***246** *N.A.,* 848 S.W.2d 232, 243 (Tex.App.—Dallas 1992, no writ). When parties enter a fiduciary relationship, each consents to have its conduct toward the other measured by high standards of loyalty as exacted by courts of equity. *S.V. v. R.V.,* 933 S.W.2d 1, 34 (Tex.1996) (J. Owen, dissenting) (citing *Courseview, Inc. v. Phillips Petroleum Co.,* 158 Tex. 397, 312 S.W.2d 197, 205 (1958)); *Murphy v. Canion,* 797 S.W.2d 944, 948 (Tex.App.—Houston [14th Dist.] 1990, no writ) (citing *Johnson v. Peckham,* 132 Tex. 148, 120 S.W.2d 786, 788 (1938)). The term fiduciary "refers to integrity and fidelity." *Kinzbach Tool*

Co. v. Corbett–Wallace Corp., 138 Tex. 565, 160 S.W.2d 509, 512 (Tex.1942). The law requires more of a fiduciary than "arms-length marketplace ethics." *Douglas v. Aztec Petroleum Corp.,* 695 S.W.2d 312, 318 (Tex.App.—Tyler 1985, no writ); *see Kinzbach Tool Co. v. Corbett–Wallace Corp.,* 138 Tex. 565, 160 S.W.2d 509, 514 (1942). The duty owed is one of loyalty and good faith, strict integrity, and fair and honest dealing. *Id.* There is a "general prohibition against the fiduciary's using the relationship to benefit his personal interest, except with the full knowledge and consent of the principal." *Hawthorne v. Guenther,* 917 S.W.2d 924, 934 (Tex.App.—Beaumont 1996, writ denied) (quoting *Chien v. Chen,* 759 S.W.2d 484, 495 (Tex.App.—Austin 1988, no writ)). Fiduciaries may not benefit from their own misdeeds or use the effects of their own actions as a shield from liability. *S.V.,* 933 S.W.2d at 35 (J. Owen, dissenting). Fiduciary relationships are recognized historically in a variety of legal relations, including those between attorney and client. *Thompson v. Vinson & Elkins,* 859 S.W.2d 617, 623 (Tex.App.—Houston [1st Dist.] 1993, writ denied); *see Willis v. Maverick,* 760 S.W.2d 642, 645 (Tex.1988). A fiduciary relationship exists between attorneys and clients as a matter of law. *See Cooper v. Lee,* 75 Tex. 114, 12 S.W. 483, 486 (1889). Because the relationship between attorney and client is highly fiduciary in nature, *Willis,* 760 S.W.2d at 645, dealings between attorney and client require the utmost good faith. *Judwin Properties,* 911 S.W.2d at 506. For the same reasons, dealings, intentions, and intendments between attorney and client are subject to exacting scrutiny. *Archer v. Griffith,* 390 S.W.2d 735, 739 (Tex.1964). As long ago as 1930, Texas courts recognized that public policy and the standards of the legal profession required this strict scrutiny. *Bryant v. Lewis,* 27 S.W.2d 604, 606 (Tex.Civ.App.—Austin 1930, writ dism'd w.o.j.).

[15] As a remedy for a breach of a fiduciary duty, Texas has long recognized the concept of fee forfeiture in the principal-agent relationship.[8] *See, e.g., Kinzbach Tool,* 160 S.W.2d at 514 (Tex.1942). *See also* RESTATEMENT (SECOND) OF AGENCY § 469 (1958). While we have found no Texas cases specifically involving fee forfeiture for a breach of the fiduciary duty in the attorney-client relationship, we discern no reason to carve out an exception for breaches of fiduciary duty in the attorney-client relationship. Thus, we hold that fee forfeiture is a recognized remedy when an attorney breaches a fiduciary duty to his or her client.

[16] That leaves us with four sub-issues: (1) what a plaintiff must prove to be entitled to fee forfeiture, (2) whether forfeiture should be automatic and total or decided on a case by case basis, (3) who should decide the forfeiture issue, judge or jury, and (4) what factors should be considered in deciding whether to forfeit fees. To answer the first of these—what a plaintiff must prove to be entitled to fee forfeiture—we refer to those Texas cases dealing with forfeiture in the typical principal-agent relationship. In *Kinzbach Tool,* Corbett–Wallace Corporation desired to sell its patent rights on a tool to Kinzbach Tool. 160 S.W.2d at 510. To facilitate the sale, Corbett contacted an employee of Kinzbach Tool, G.E. Turner. *Id.* Corbett ***247** agreed to pay Turner a commission out of the money paid to it if the contract was sold to Kinzbach Tool. *Id.* At their meeting, Corbett told Turner that it wanted at least $20,000 for the contract, but instructed Turner to keep this information to himself. *Id.* Turner, a trusted Kinzbach Tool employee, returned to his own employer and approached the officers of the company about the contract. *Id.* at 510–11. The president instructed Turner to find out Corbett's asking price, and advised Turner that Kinzbach Tool would be willing to pay as much as $25,000. *Id.* at 511. Turner never told anyone at Kinzbach Tool that Corbett would be willing to sell the contract for $20,000, nor did he tell anyone he would receive a commission from Corbett. *Id.* Ultimately, the companies closed the deal and Kinzbach Tool agreed to pay Corbett $25,000 for the contract. *Id.* Corbett paid Turner a commission, but Kinzbach Tool found out about it and refused to pay the full sale price. *Id.* Corbett in turn refused to accept less than $25,000, so Kinzbach filed suit against the company and Turner to recover Turner's commission. *Id.* at 511–12. Corbett cross-claimed for breach of contract. *Id.*

Corbett and Turner answered Kinzbach Tool's claim by arguing that Kinzbach Tool was not damaged because the patent was worth what the company paid for it. *Id.* at 514. The supreme court rejected their argument. After finding that Turner was in a fiduciary relationship with his employer, the court wrote the following:

> A fiduciary cannot say to the one whom he bears such relationship: You have sustained no loss by my misconduct in receiving a commission from a party opposite to you, and therefore you are without remedy. It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired. It is the law that in such instances if the fiduciary "takes any gift, gratuity, or benefit in violation his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received."

Id. (quoting *United States v. Carter,* 217 U.S. 286, 305–08, 30 S.Ct. 515, 520, 54 L.Ed. 769, 775 (1910)). *See also Douglas,* 695 S.W.2d at 318 (holding it is fundamental

principal of Texas law that agent who acts adversely to principal or otherwise breaches fiduciary obligation is not entitled to compensation); *Russell v. Truitt,* 554 S.W.2d 948, 951 (Tex.Civ.App.—Fort Worth 1977, writ ref'd n.r.e.) (quoting *Moore v. Kelley,* 162 S.W. 1034, 1037 (Tex.Civ.App.—Amarillo 1914, writ ref'd)) (holding agent who acts adversely to principal or fails to disclose material information forfeits right to compensation); *Anderson v. Griffith,* 501 S.W.2d 695, 702 (Tex.Civ.App.—Fort Worth 1973, writ ref'd n.r.e.) (holding that when agent breaches his fiduciary obligation to his principal, he forfeits all compensation for his service as agent). *See also* RESTATEMENT (SECOND) OF AGENCY § 469 cmt. a (1958).

Russell v. Truitt, a case decided by the Second Court of Appeals, is similar to *Kinzbach Tool.* Several joint venturers in an apartment project appointed Russell their agent for the project. *Russell,* 554 S.W.2d at 950. After the project's failure, the joint venturers brought suit against Russell and an individual joint venturer, Campbell, for breach of fiduciary duty, *Id.* at 951, and a jury found in favor of the joint venturers on the issue. Russell and Campbell appealed, alleging that their actions were not the proximate cause of the project's failure. *Id.* at 952. In affirming the judgment in favor of the joint venturers, the court of appeals rejected this argument, finding that it ignored the real issue in the case. Specifically, the court held:

> If the letter agreement constitutes a breach of the defendants' [Russell's and Campbell's] equitable duties as a fiduciary, *it is unnecessary to decide whether the breach was the proximate cause of the project's failure. The breach automatically results in the forfeiture of the agent's compensation.*

Id. (emphasis added).

More recently, the First Court of Appeals reached the same result in *Judwin Properties,* ***248** 911 S.W.2d at 507. In that case, Judwin alleged that its attorneys disclosed confidential and privileged information concerning the attorneys' representation of Judwin in certain lawsuits. *Id.* Judwin contended this was a breach of fiduciary relationship. *Id.* While the court found there was no breach of fiduciary duty, it noted that when an attorney has used the attorney-client relationship to the detriment of the client, the client need not prove causation for breach of fiduciary duty. *Id.* (citing *Kinzbach Tool,* 160 S.W.2d at 514).

We interpret the holdings in these cases by the Supreme Court and the First and Second Courts of Appeals to hold that the breach of the fiduciary relationship inherently damaged the plaintiff, and thus, there was no need to prove causation or damage. *See Kinzbach Tool,* 160 S.W.2d at 514; *Judwin Properties,* 911 S.W.2d at 507; *Russell,* 554 S.W.2d at 952. Under all three cases, one who claims a breach of fiduciary relationship need only prove the existence of a breach to be entitled to fee forfeiture. *See Kinzbach Tool,* 160 S.W.2d at 514; *Judwin Properties,* 911 S.W.2d at 507; *Russell,* 554 S.W.2d at 952. The basis for such a rule is clear: there should be a deterrent to conduct which equity condemns and for which it will grant relief. *International Bankers Life Ins. Co. v. Holloway,* 368 S.W.2d 567, 584 (Tex.1963). Courts impose damages on parties who violate a fiduciary duty to punish the party's breach of trust. *Phillips v. Phillips,* 820 S.W.2d 785, 792 (Tex.1991) (J. Gonzalez, dissenting). Fee forfeiture provides the injured client with a remedy, but it also punishes the attorney for the breach of fiduciary duty and deters further lapses in professional conduct. *Perl v. St. Paul Fire & Marine Ins. Co.,* 345 N.W.2d 209, 214 (Minn.1984).

[17] Texas is not the only state to require fee forfeiture in a fiduciary context. In fact, our holding is supported by cases from other jurisdictions addressing the issue specifically in the context of the attorney-client relationship. In the *Perl* trilogy, the Minnesota Supreme Court held that no causation or damage need be proved to invoke fee forfeiture because "the injury lies in the client's justifiable perception that he or she has or may have received less than the honest advice and zealous performance to which a client is entitled." *Gilchrist v. Perl,* 387 N.W.2d 412, 415 (Minn.1986); *Perl v. St. Paul Fire & Marine Ins. Co.,* 345 N.W.2d 209, 213 (Minn.1984); *Rice v. Perl,* 320 N.W.2d 407, 411 (Minn.1982). *See also Hendry v. Pelland,* 73 F.3d 397 (D.C.Cir.1996) (holding forfeiture for conflict of interest appropriate regardless of lack of harm); *Silbiger v. Prudence Bonds Corp.,* 180 F.2d 917, 921 (2d Cir.1950) (stating attorney with conflict of interest may not avoid forfeiture solely by showing no actual harm), *cert. denied,* 340 U.S. 831, 71 S.Ct. 37, 95 L.Ed. 610 (1950); *Eriks v. Denver,* 118 Wash.2d 451, 824 P.2d 1207, 1213 (Wash.1992) (holding court may require fee forfeiture for conflict of interest without showing of harm); Thomas D. Morgan, *Sanction and Remedies for Attorney Misconduct,* 19 S. ILL. U. L.J.. 343, 351 (1995) (stating that fee forfeiture is available even where client has suffered no loss as a result of attorney's alleged misconduct).9 ***249** Furthermore, the proposition that a client need only prove a breach is consistent with Texas case law regarding the general principal-agent relationship. This approach is more appropriate because it can be difficult to ascertain the harm resulting from an attorney's misconduct. The harm may be intangible, such as the client's loss of

loyalty in the attorney and faith in the legal system itself.

[18] Having determined that fee forfeiture exists in Texas in the context of the attorney-client relationship, and that all the client need prove is a breach of fiduciary duty by the attorney, we must now address appellants' claim that forfeiture is complete and automatic upon proof of a breach. This position has support in the Texas cases involving the general principal-agent relationship. The courts have sanctioned complete forfeiture, *see Kinzbach Tool,* 160 S.W.2d at 514; *Douglas,* 695 S.W.2d at 318; *Russell,* 554 S.W.2d at 951 (quoting *Moore,* 162 S.W. at 1037); *Anderson,* 501 S.W.2d at 702, requiring the agent to forfeit the fee usually earned in a single, specific transaction. *See also* RESTATEMENT (SECOND) OF AGENCY § 469 cmt. a (1958). Yet, none of these cases applied forfeiture within the context of the attorney-client relationship. The attorney's service to the client frequently is more complex than a principal-agent relationship created for a single transaction such as the building of an apartment complex as in *Russell.* The attorney performs many functions for a client throughout the representation. Some of the acts performed on behalf of the client inure to the client's benefit and may occur before any breach of fiduciary duty. It would be unfair to require a total forfeiture in such a situation. *See Searcy, Denney, Scarola, Barnhart & Shipley, v. Scheller,* 629 So.2d 947, 954 (Fla.Dist.Ct.App.1993). Thus, we find a distinction, for purposes of the potential amount of forfeiture, between the typical agency relationship and the attorney-client relationship. For guidance, we look once again to other jurisdictions addressing the forfeiture question in the context of the attorney-client relationship.

In the first case of the *Perl* trilogy, the Minnesota Supreme Court held the failure by an attorney to disclose his conflict of interest constituted a breach of fiduciary duty entitling the client to a complete forfeiture of attorney's fees. *Rice v. Perl,* 320 N.W.2d at 411. Two years later, in dictum, the same court noted that fee forfeiture is similar to a punitive damage, and that exceptions might exist to complete and automatic forfeiture. *Perl v. St. Paul Fire & Marine Ins. Co.,* 345 N.W.2d at 214 n. 5. The court then suggested that the factors the trier of fact might consider in determining the amount of fee forfeiture, if any, were factors contained in Minnesota's punitive damages statute, and used when awarding punitive damages. *Id.* This suggestion became the rule two years later. The Minnesota Supreme Court held when no actual fraud or bad faith is involved, when no actual harm to the client is sustained, and particularly when there are multiple plaintiffs, the better approach is to determine the amount of the fee forfeiture by considering the punitive damage factors in the Minnesota punitive damage statute. *Gilchrist v. Perl,* 387 N.W.2d at 417.

We agree with the Minnesota Supreme Court that an attorney need not necessarily forfeit his or her entire fee because of a breach of fiduciary duty. It is possible that, before the breach occurred, the attorney may have provided valuable services to the client for which compensation is appropriate. *See Scheller,* 629 So.2d at 950. Denying the attorney all compensation in such situations would be excessive, giving the client a windfall, allowing the client to benefit from the attorney's services without having to pay for them. *See,* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. b (Proposed Final No. 1, 1996).[10] The harshness of ***250** complete forfeiture, moreover, could lead to rare enforcement. *Id.* Fee forfeiture is an equitable remedy, and, as such, the amount of the forfeiture is dependent upon the facts of each case. *See International Bankers,* 368 S.W.2d at 584 (holding that equity allows forfeiture of profits when officers and directors of corporation breach their fiduciary duty); *Russell,* 554 S.W.2d at 955 (stating that forfeiture of agent's fee is a form of equitable relief awarded for breach of fiduciary duty). As the Texas Supreme Court stated, "The limits beyond which equity should not go in its reactions are discoverable in the facts of each case which give rise to equitable relief." *Holloway,* 368 S.W.2d at 584. In determining the amount of forfeiture, if any, to which the client may be entitled, certain factors should be considered. We have studied the factors suggested by the Restatement (Third) of the Law Governing Lawyers and the Minnesota Supreme Court's suggestion to refer to the factors used to determine the award of punitive damages. The Restatement suggests consideration of four factors: (1) the extent of the attorney's misconduct; (2) the willfulness of the attorney's misconduct; (3) any threatened or actual harm to the client; and (4) the adequacy of other available remedies. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. d (Proposed Final No. 1, 1996). Under the Texas punitive damage statute, the trier of fact considers:

> (1) the nature of the wrong;
>
> (2) the character of the conduct involved;
>
> (3) the degree of culpability of the wrongdoer;
>
> (4) the situation and sensibilities of the parties concerned;
>
> (5) the extent to which such conduct offends a public sense of justice and propriety; and
>
> (6) the net worth of the defendant.

TEX. CIV. PRAC. & REM.CODE ANN. §

41.011(a) (Vernon 1997).

We have considered all of the factors listed above, and hold that in determining the amount, if any, of the fee forfeiture, the entity assessing forfeiture should consider: (1) the nature of the wrong committed by the attorney or law firm; (2) the character of the attorney's or firm's conduct; (3) the degree of the attorney's or firm's culpability, that is, whether the attorney committed the breach intentionally, willfully, recklessly, maliciously, or with gross negligence; (4) the situation and sensibilities of all parties, including any threatened or actual harm to the client; (5) the extent to which the attorney's or firm's conduct offends a public sense of justice and propriety; and (6) the adequacy of other available remedies.

[19] [20] [21] Having decided that fee forfeiture is an equitable remedy, *see International Bankers,* 368 S.W.2d at 584 (holding that equity allows forfeiture of profits when officers and directors of corporation breach their fiduciary duty); *Russell,* 554 S.W.2d at 955 (stating that forfeiture of agent's fee is a form of equitable relief awarded for breach of fiduciary duty), we now must determine if a judge or jury should decide whether forfeiture is to be applied as a remedy. As appellees point out in their brief on rehearing, there is no common-law right to a jury trial in equity. *See Casa El Sol–Acapulco, S.A. v. Fontenot,* 919 S.W.2d 709, 715 (Tex.App.—Houston [14th Dist.] 1996, writ dism'd by agreement) (citing *Trapnell v. Sysco Food Servs. Inc.,* 850 S.W.2d 529, 543 (Tex.App.—Corpus Christi 1992), *aff'd,* 890 S.W.2d 796 (Tex.1994)). Two provisions of the Texas Constitution, however, insure the right to a jury trial in Texas. *See* Tex. Const. art. 1, § 15 and art. V, § 10. Consequently, in Texas, the "traditional distinctions between actions at law and suits in equity have never carried the procedural significance accorded to them in other states of the Union." *Fontenot,* 919 S.W.2d at 715 (quoting 1 ROY W. MCDONALD, TEXAS CIVIL PRACTICE § 4:4 (rev.1992)). The law in Texas, then, is that the right to a jury trial extends to disputed issues of fact in equitable, as well as legal, proceedings. *Fontenot,* 919 S.W.2d at 715. But, it is equally clear that a jury may not ***251** determine the expediency, necessity or propriety of equitable relief. *Id.* (citing *State v. Texas Pet Foods, Inc.,* 591 S.W.2d 800, 803 (Tex.1979)). So while the parties are entitled to have the jury determine whether there has been a breach of fiduciary duty, they are not entitled to have the jury determine the amount, if any, of the fee forfeiture because fee forfeiture is not an issue of fact, it is a remedy. As stated by the supreme court in *Caballero v. Central Power and Light Co.,* 858 S.W.2d 359, 361 (Tex.1993), "[W]e hold that when properly requested, jury trials are appropriate for finding the ultimate issues of fact ... but not for fashioning appropriate equitable relief." In light of this longstanding tradition, we are compelled to hold that the trial court is to determine the amount of forfeiture, if any, and in making this decision, is to consider the factors held by this court to be relevant to that determination.

In reaching our decision that fee forfeiture is a valid remedy, we do not confuse our role with that of the state bar disciplinary committee, whose job is to oversee violations of disciplinary rules in this state. That the disciplinary committee may reprimand or sanction an attorney for certain misconduct, however, provides no relief to the client whose trust and faith have been abused. While the disciplinary committee serves the role of maintaining standards of the legal profession, the courts serve the role of compensating the client for the injury created by the client's justifiable perception that he or she may have received less than the honest advice and zealous performance to which a client is entitled. *See Gilchrist v. Perl,* 387 N.W.2d at 415; *Perl v. St. Paul Fire & Marine Ins. Co.,* 345 N.W.2d at 213; *Rice v. Perl,* 320 N.W.2d at 411.

In sum, we hold that Texas recognizes fee forfeiture in the context of the attorney-client relationship. To be entitled to forfeiture, the client need only prove the existence of a breach; proof of causation and/or damage is not necessary. The amount of forfeiture, if any, is to be determined by the trial court, using the factors set out in this opinion. Because the trial court determined a fact issue exists as to one of the breaches claimed by appellants, i.e., whether appellants obtained an aggregate settlement on behalf of appellees, we must reverse and remand this case to allow appellants an opportunity to prove a breach. That there may be no causation and no damage as a matter of law is irrelevant to the availability of the remedy of fee forfeiture; proof of breach is enough. Thus, the trial court erred in finding that proof of causation and damage is a prerequisite to the invocation of the remedy of fee forfeiture. We sustain point of error three.

II. THE AFFIDAVIT OF ROBERT MALINACK

In addition to alleging several breaches of fiduciary duty, appellants alleged fraud, negligence, breach of contract, and violations of the DTPA. These claims require proof of causation and damage, and therefore, we must review appellants' contentions regarding the alleged deficiencies of Robert Malinack's affidavit, an affidavit submitted by appellees to support their motion for summary judgment.

In point of error two, appellants argue the trial court erred in granting summary judgment because the affidavit of

Robert Malinack (1) does not concern a subject upon which the trier of fact must be guided solely by expert testimony, and (2) is too conclusory to support summary judgment. We disagree with both contentions.

[22] [23] [24] In his affidavit, Malinack essentially avers that appellees caused no damage to appellants, thereby negating the elements of causation and damage; he ultimately concludes the settlements appellants received were reasonable. A movant can establish its right to summary judgment solely on the uncontroverted testimony of an expert witness if the subject is one in which the trier of fact would be guided solely by the opinion testimony of experts. *Anderson v. Snider,* 808 S.W.2d 54, 55 (Tex.1991); *Republic Nat'l Leasing Corp. v. Schindler,* 717 S.W.2d 606, 607 (Tex.1986); *Perez v. Cueto,* 908 S.W.2d 29, 31 (Tex.App.—Houston [14th Dist.] 1995, no writ); TEX.R. CIV. P. 166a(c). We have found no cases specifically addressing the issue of whether causation and damage, in a claim based on alleged breaches of fiduciary duty by a lawyer, are matters upon which the ***252** trier of fact must be guided solely by expert testimony. There are cases, however, addressing this issue in the context of a legal malpractice claim based on negligence.

These cases, *Delp v. Douglas,* 948 S.W.2d 483, 495 (Tex.App.—Fort Worth 1997, pet. filed 9–15–97), and *Onwuteaka v. Gill,* 908 S.W.2d 276, 281 (Tex.App.—Houston [1st Dist.] 1995, no writ), hold that expert testimony on proximate cause is required where the determination of the issue "is not one that lay people would ordinarily be competent to make." *See also, 2175 Lemoine Ave. Corp. v. Finco, Inc.,* 272 N.J.Super. 478, 640 A.2d 346, 353 (1994); *Meyer v. Mulligan,* 889 P.2d 509, 516 (Wyo.1995). This rule was previously applied in medical malpractice cases, *Pennington v. Brock,* 841 S.W.2d 127, 129 (Tex.App.—Houston [14th Dist.] 1992, no writ); *Hart v. Van Zandt,* 399 S.W.2d 791, 792 (Tex.1965); *Chapman v. Wilson,* 826 S.W.2d 214, 220 (Tex.App.—Austin 1992, writ denied); *Wendenburg v. Williams,* 784 S.W.2d 705, 706 (Tex.App.—Houston [14th Dist.] 1990, writ denied), which do not require expert testimony when the malpractice "is plainly within the knowledge of laymen." *See Onwuteaka,* 908 S.W.2d at 281. We see no reason why the rule should not apply to this case as well. Thus, the question before us is whether the causation and damage issues are plainly within the common knowledge of laymen.

Settlements of personal injury and wrongful death cases involve experience and specialized knowledge. An attorney must review and analyze, among other things, the underlying liability facts, the identity of the defendant, the damage elements available to a plaintiff, the specific injuries or losses incurred by a plaintiff, the settlement amounts received in similar cases, the complexity of the case, as well as the strength and resources of the opposing counsel. This information and its evaluation in the context of a settlement offer requires specialized knowledge of the law. This is a skill not ordinarily possessed by lay persons. A lay jury cannot be expected to ascertain, without guidance from a legal expert, whether an attorney obtained a reasonable settlement for his or her client. We hold that whether the attorneys in this case caused damage to appellants is a question upon which the trier of fact must be guided solely by expert testimony. Therefore, the Malinack affidavit does concern an issue upon which the trier of fact must be guided solely by expert testimony.

[25] Now we must address whether the Malinack affidavit is sufficient to establish appellees' right to judgment as a matter of law. Appellees contend the affidavit is comprised of mere legal conclusions and is therefore insufficient to support summary judgment.

[26] [27] [28] [29] Summary judgment may not be granted on conclusory evidence. *Aldridge v. De Los Santos,* 878 S.W.2d 288, 296 (Tex.App.—Corpus Christi 1994, writ dism'd w.o.j.). Affidavits containing conclusory statements are not competent summary judgment proof. *Id.* If an expert's testimony is comprised of mere legal conclusions or conclusory statements, it is insufficient to support summary judgment. *Anderson,* 808 S.W.2d at 55; *Mercer v. Daoran Corp.,* 676 S.W.2d 580, 583 (Tex.1984). An expert's opinion is conclusory and will not support summary judgment if it does not contain the basis or reasoning for the opinion. *Jensen Constr. Co. v. Dallas County,* 920 S.W.2d 761, 768 (Tex.App.—Dallas 1996, writ denied) (citing *Anderson,* 808 S.W.2d at 55)).

The Malinack affidavit states:

* * *

> 5. I have reviewed the following, and base my opinions in this Affidavit, in part, upon the following:
>
> a. Plaintiffs' Original Petition;
>
> b. Affidavit of David Burrow;
>
> c. Affidavit of Blake Tartt;
>
> d. Plaintiff Case Analysis on each Plaintiff;

e. Plaintiff deposition summaries;

f. Excerpts from David Burrow's deposition relating to liability issues.

My opinions as expressed are based upon facts in these documents, as well as upon my experience and training as a personal injury civil trial lawyer.

***253** 6. Based upon the foregoing my opinions are:

It is important as an attorney in evaluating cases for settlement to consider the underlying liability facts involved, and in this instance the underlying liability facts with reference to the Phillips explosion of 1989. In my opinion it is critical to the settlement evaluation of the cases arising out of that explosion to consider the identity of the employer of the plaintiffs and/or decedents at the time of the explosion. Moreover, I believe that it is important to consider the elements of damages available to each Plaintiff, whether it be an injury case, or a death case, and to consider the losses that occurred to each Plaintiff as a result of the explosion. I have considered the underlying liability facts, the employment status of the Plaintiffs and/or decedents, and have considered the elements of and damage facts on each Plaintiff to render my opinions expressed in this Affidavit.

The Plaintiffs were caused no damages by reason of any and/or all of the allegations made by them against the Defendants. Each and all of the Plaintiffs were reasonably and fairly compensated by way of settlement for those elements of damages that were available to them as Plaintiffs in the cases against Phillips, taking into account the employment, liability, and injury facts involved. I have not addressed the issues concerning the allegation of malpractice, wrongdoings, or omissions which allegedly resulted in damages to Plaintiffs. Irrespective of the validity of those allegations, it is my opinion that the Plaintiffs have not been damaged as a result of any of these allegations, whether groundless or valid.

Deciding whether an affidavit is sufficient, or instead, is conclusory and without basis can be a difficult matter. Nonetheless, it is a decision we must reach. In those cases in which the courts found an expert's affidavit insufficient to support summary judgment, they often based their findings on the expert's failure to provide any legal basis or reasoning for his or her conclusion. *See Lara v. Tri–Coastal Contractors, Inc.,* 925 S.W.2d 277, 279 (Tex.App.—Corpus Christi 1996, no writ); *Hamlin v. Gutermuth,* 909 S.W.2d 114, 117 (Tex.App.—Houston [14th Dist.] 1995, writ denied).

We do not find the Malinack affidavit deficient in this respect. Malinack carefully included the legal basis and reasoning for his opinion that nothing appellees did caused any damage to appellants and this reason is more than a general statement or conclusory opinion. Malinack's affidavit shows that he formed a specific opinion, taking into account numerous factors an attorney must necessarily consider in determining whether to settle a lawsuit, and using specific information about each plaintiff in applying to those factors. Particularly, Malinack stated that he considered the underlying liability facts, employment status, available damages, and specific damage facts "on each Plaintiff" in rendering his opinion that nothing appellants did caused any damage to appellees.

Malinack could have addressed the issues by listing each plaintiff separately, with the relevant data concerning them. Although that may have been clearer and more direct, we are of the opinion it is not required. As written, the affidavit gave appellants enough information, by referring to the specific items relied on, to enable them to controvert it. In fact, appellants did understand precisely what Malinack relied on because one of their experts, Dr. Edwards, referred to the case summaries Malinack consulted and proclaimed them deficient. Malinack also could have listed what he considered to be the components of damages for each plaintiff, such as actual damages, mental anguish, and past and future pain and suffering, and this, too, would have made the affidavit clearer, but it is not deficient for lack of these items.

We hold the affidavit is not conclusory, and is sufficient to negate the elements of causation and damage as a matter of law. In short, based on the Malinack affidavit, and setting aside the issue of fee forfeiture, appellees were entitled to judgment as a matter of law on causation and damages and, therefore, we overrule point of error two.

III. THE AFFIDAVITS OF ROBERTA EDWARDS AND HARRY WILSON

[30] The burden then shifted to appellants, as non-movants, to introduce evidence ***254** that raised an issue of fact on the elements of causation and damage. *See Lentino v. Cullen Ctr. Bank and Trust,* 919 S.W.2d 743, 745 (Tex.App.—Houston [14th Dist.] 1996, writ denied) (stating that if movant's motion and summary judgment

proof facially establish right to judgment as a matter of law, burden shifts to non-movant to raise fact issues precluding summary judgment); *Holcomb v. Randall's Food Markets, Inc.,* 916 S.W.2d 512, 514 (Tex.App.—Houston [1st Dist.] 1995, writ denied) (stating that once defendant has produced competent evidence to negate necessary element of non-movant's cause of action, burden shifts to non-movant to introduce evidence that raises issue of fact on that element); *Hubert v. Illinois State Assistance Comm'n,* 867 S.W.2d 160, 162 (Tex.App.—Houston [14th Dist.] 1993, no writ) (stating burden never shifts to non-movant until movant has established entitlement to summary judgment as a matter of law).

[31] Because we have held that expert testimony was required, appellees had to present expert evidence raising an issue of fact on the elements of causation and damage. *See Anderson,* 808 S.W.2d at 55 (holding that lay testimony is insufficient to refute an expert's testimony); *Rallings v. Evans,* 930 S.W.2d 259, 264 (Tex.App.—Houston [14th Dist.] 1996, no writ) (same); *Perez,* 908 S.W.2d at 31 (same). Therefore, now we must consider the affidavits and other summary judgment proof appellants allege raise fact issues precluding summary judgment.

In their fourth point of error, appellants raise two contentions. First, they contend summary judgment should not have been granted in favor of appellees because the affidavits of Roberta Edwards and Harry Wilson controvert the Malinack affidavit.[11] Second, appellants claim that even if the affidavits of Edwards and Wilson are insufficient to create a fact issue precluding summary judgment, certain other evidence in the record is sufficient and raises fact issues precluding summary judgment. This other evidence includes deposition testimony and affidavits containing statements by individual appellants in which they evaluate their own claims and conclude they were under compensated and therefore, suffered injury. Additionally, appellants cite to "anecdotal evidence from the lawyers' files regarding dollar amounts assigned to each claimant."

[32] We hold the affidavits and deposition testimony of certain individual appellants are insufficient to raise a fact issue precluding summary judgment. As we discussed in regard to the Malinack affidavit, the question of damages in this case was directly dependent on whether appellants received reasonable settlements. This question was a matter upon which the jury had to be guided solely by expert testimony. *See* TEX.R. CIV. P. 166a(c). And, as we noted above, lay testimony is insufficient to refute an expert's testimony. *See Anderson,* 808 S.W.2d at 55; *Perez,* 908 S.W.2d at 32; *Selig v. BMW of North America, Inc.,* 832 S.W.2d 95, 100 (Tex.App.—Houston [14th Dist.] 1992, no writ). As a result, appellants' own evaluations and conclusions regarding their settlements do not raise a fact issue precluding summary judgment.

[33] As to the notes in the attorneys' files concerning a dollar amount assigned to each plaintiff, this "anecdotal evidence" relied upon by appellants goes to whether an aggregate settlement occurred, not whether appellees caused any injury or damage to appellants. It too, is insufficient to create a fact issue on causation or damages.

***255** Thus we are left with the Edwards and Wilson affidavits. Appellants introduced these affidavits to controvert the Malinack affidavit. To accomplish this result the affidavits must present some probative evidence of the facts at issue, specifically causation and damages. *Ryland Group, Inc. v. Hood,* 924 S.W.2d 120, 122 (Tex.1996).

[34] We look first at the Edwards affidavit. The trial court found that Edwards' affidavit did not controvert Malinack's affidavit "with competent evidence." The trial court did not explain why the evidence in the Edwards affidavit was incompetent. We have reviewed the affidavit and agree with the trial court. Edwards' affidavit is incompetent, and therefore, does not raise a fact issue defeating summary judgment because there is nothing in the affidavit to show she is competent to testify on the reasonableness of settlements in personal injury and wrongful death cases.
Roberta M. Edwards stated her qualifications as an expert in paragraph two of her affidavit:[12]

> I am a medical doctor. I have been licensed since 1963 and am currently licensed to practice medicine in the state of Oklahoma. I am also a lawyer. I have been licensed to practice law by the State of Oklahoma since 1982.

[35] [36] [37] Texas Rule of civil Procedure 166a(f) requires that in summary judgment proceedings, supporting and opposing affidavits "shall set forth such facts as would be admissible in evidence, and *shall show affirmatively that the affiant is competent to testify to the matters stated therein.*" *United Blood Servs. v. Longoria,* 938 S.W.2d 29, 30 (Tex.1997). (quoting TEX.R. CIV. P. 166a(f)) (emphasis added). When a party relies on expert testimony, the party must prove the expert's qualifications and the burden of establishing an expert's qualifications is on the offering party. *Longoria,* 938 S.W.2d at 31. The standard for admissibility of evidence is the same in a summary judgment proceeding as in a regular trial. *Id.* at 30. In the summary judgment context, then, if a party relies on an expert's affidavit to support or oppose a

motion for summary judgment, proof of the expert's qualifications must necessarily be stated in his or her affidavit.

To be qualified to render an expert opinion, the party offering the expert testimony must show the expert has "knowledge, skill, experience, training, or education" that would "assist the trier of fact." *Id.* at 30–31 (citing TEX.R. CIV. EVID. 702). If the party offering the expert testimony fails to make the showing required by rule 702, the trial court acts within its discretion in rejecting such testimony as incompetent. *See id.* at 31.

We find appellants completely failed to carry their burden of establishing Edwards' qualifications. Her mere recitation that she is a lawyer, licensed by the state of Oklahoma since 1982, is inadequate to establish that she is competent to testify to the matters stated in her affidavit. *See* TEX.R. CIV. P. 166a(f). Edwards attempted to render an opinion on the alleged unreasonableness of the settlements received by the appellants. The settlements arose out of personal injury and wrongful death claims. The affidavit does not state whether Edwards actively practices law, much less in the relevant fields of wrongful death and personal injury. She does not state whether she even *has* any experience in personal injury law, or has ever evaluated, tried, or settled such a case. For comparison, we note the extensive statement of qualifications listed by Malinack. In his affidavit, Malinack stated that he has been a civil trial attorney for thirty-three years, settling and trying personal injury and death cases, he knows the duties and responsibilities of attorneys practicing in personal injury law and he is familiar with evaluating, trying, and settling personal injury and death cases. We conclude that the Edwards affidavit failed to establish that she is qualified to render the opinions stated in her affidavit ***256** and hold the affidavit does not raise a fact issue that would defeat summary judgment.

[38] Appellants also introduced the affidavit of Harry A. Wilson, an attorney licensed by the state of Indiana. The majority of the Wilson affidavit addresses the issue of breach of fiduciary duty. As we have already stated, the trial court found there was a fact issue on this question. But, in one paragraph, Wilson addresses the causation and damage:

> The plaintiffs were damaged by the wrongful and improper conduct of the defendant lawyers by (1) the loss of the important right of the plaintiffs to control and make decisions regarding the ultimate disposition of the claims of the plaintiffs against the Phillips defendants, (2) the uninformed and involuntary waiver by the plaintiffs of their right to have their case tried to a jury, and (3) the difference between (a) the amount received by the plaintiffs and (b) the amount they should have received if the case was handled properly by lawyers without breach of professional standards and fiduciary duties, *which exact amount is incapable of exact calculation* unless and until the plaintiffs have the opportunity to reopen the case against the Phillips defendants with competent, professional, and ethical legal representation and individual not aggregate handling of the case.

(emphasis added)

[39] While Wilson does opine that appellants were damaged, he also states that the amount of the damage is incapable of calculation barring a reopening of the underlying suit against Phillips. In effect, the Wilson affidavit says that there is no figure, no specific or estimated amount or range of money appellants should have received or by which they were damaged. According to the affidavit, determining appellants' damages is impossible without going through settlement negotiations once again with lawyers who are faithfully adhering to their fiduciary duty to the client. A statement that damages are incapable of calculation is legally insufficient evidence of damages. *See, e.g., International & G.N.R. v. Simcock,* 81 Tex. 503, 17 S.W. 47 (1891) (holding that proof is required to show the extent and amount of damages). It is, in fact, no evidence of damages. *See Hall v. Stephenson,* 919 S.W.2d 454, 466 (Tex.App.—Fort Worth 1996, writ denied) (holding that equivocal statements or statements based on affiant's "best knowledge" constitute no evidence). If the amount is unascertainable, too illusory for one to determine in a trial of the case, then under our system the party is not entitled to receive damages. For example, if Wilson's opinion were read to a jury, a jury would not have sufficient evidence before it on which to render an amount of damages, because the jury would not have received any evidence of an amount of damages. If that jury did give an amount of damages on appeal we would be obligated to say that it was not supported by any evidence. *See St. Paul Surplus Lines Ins. Co., Inc. v. Dal–Worth Tank Co., Inc.,* 917 S.W.2d 29, 61 (Tex.App.—Amarillo 1995, no writ) (holding evidence legally insufficient to support jury determination that future damages would continue for 10 years when expert testified damages would continue for "several years" and conceded that he could not give a set number of years.)

Thus, we hold that the Wilson affidavit did not controvert the Malinack affidavit. Having concluded that neither of plaintiff's experts controverted the Malinack affidavit, we overrule point of error four.

IV. DECISION TO STRIKE FOUR PLAINTIFFS

We now turn to the last point of error raised by appellants, their fifth point of error. In it appellants complain the trial court erred in striking four plaintiffs added in appellants' First Amended Original Petition. Plaintiffs Gary McPherson, Jason Campbell, Justin Campbell, and Jaret Campbell were first added as plaintiffs in appellants' First Amended Original Petition filed January 25, 1995. When the petition was filed, appellees objected on grounds of lack of service of citation and the untimeliness of the appearance of these four plaintiffs. Relying on rule 124, appellees contend the trial court properly struck the four plaintiffs because these plaintiffs had failed to serve appellants with process and appellants did not waive service. *See* TEX.R. CIV. P. 124 (stating that no judgment ***257** shall be rendered against any defendant unless there is service, acceptance or waiver or process, or an appearance); *Commodore County Mut. Ins. Co. v. Tkacik,* 802 S.W.2d 913, 914 (Tex.App.—Amarillo 1991), *clarified on reh'g,* 809 S.W.2d 630 (Tex.App.—Amarillo 1991, writ denied). The policy underlying rule 124 is to assure the defendant knows about the proceedings and can, therefore, defend against them. *Terry v. Caldwell,* 851 S.W.2d 875, 876 (Tex.App.—Houston [14th Dist.] 1993, no writ).

[40] Rule 63 of the Texas Rules of Civil Procedure provides that parties may amend their pleadings freely. TEX.R. CIV. P. 63. The only limitation to free amendment is that pleadings offered within seven days of the date of trial or thereafter shall be filed only after leave of the judge is obtained. *Id.; Chapin v. Texas Sand & Gravel Co.,* 844 S.W.2d 664, 665 (Tex.1992); *Rose v. Kober Fin. Corp.,* 874 S.W.2d 358, 361 (Tex.App.—Houston [14th Dist.] 1994, no writ). The rule further provides the judge shall grant such leave "unless there is a showing that such filing will operate as a surprise to the opposite party." *Id.*

According to appellees' own objection, the First Amended Original Petition, which added the four additional plaintiffs, was filed "less than two weeks before trial," not less than seven days. Because it was filed more than seven days before trial, appellants were entitled to amend their petition without leave of court. *See Chapin,* 844 S.W.2d at 665; *Rose,* 874 S.W.2d at 361. Assuming the petition was filed less than seven days before trial, the trial court should still have allowed the amendment unless appellees showed prejudice or surprise. *See Porter v. Nemir,* 900 S.W.2d 376, 384 (Tex.App.—Austin 1995, no writ). In their objection to the additional plaintiffs, appellees did not allege surprise or prejudice, much less demonstrate their existence.

Thus, assuming the petition was filed less than seven days before trial, appellants were free to amend their petition under rule 63 because there was no showing of prejudice or surprise. *Cf. American Petrofina, Inc. v. Allen,* 887 S.W.2d 829, 831 (Tex.1994) (holding defendants failed to meet burden to plead to prove limitations because they presented no summary judgment proof that they were prejudiced by plaintiffs' naming, omission, and renaming of a plaintiff in the petitions). The only question remaining is whether the additional plaintiffs could be struck because they failed to provide service of citation on appellees.

[41] It has long been the rule in this state that a defendant who has been served but has not answered must be notified of every amendment which sets up a new cause of action or requires a more onerous judgment of him. *Weaver v. Hartford Accident and Indem. Co.,* 570 S.W.2d 367, 370 (Tex.1978); *Rabb v. Rogers,* 67 Tex. 335, 3 S.W. 303, 304 (1887); *Payne & Keller Co. v. Word,* 732 S.W.2d 38, 42 (Tex.App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); *Reyman v. Reyman,* 308 S.W.2d 595, 597 (Tex.Civ.App.—Waco 1957, writ dism'd); 59 TEX. JUR.3D *Process, Notices, and Subpoenas* § 8 (1988). If, however, the defendant has pleaded to the action or otherwise entered an appearance, he is before the court for all purposes and is charged with notice of all amendments thereafter filed, and new citation is not necessary. *Rabb,* 3 S.W. at 304 (1887); *Morrison v. Walker,* 22 Tex. 18, 20 (1858); *Citizens State Bank of Dickinson v. Bowles,* 663 S.W.2d 845, 849 (Tex.App.—Houston [14th Dist.] 1983, writ dism'd); *Slattery v. Uvalde Rock Asphalt Co.,* 140 S.W.2d 987, 991 (Tex.Civ.App.—Beaumont 1940, writ ref'd); 59 TEX. JUR.3D *Process, Notices, and Subpoenas* § 8 (1988).

[42] [43] In addition, even as long ago as 1883, Texas courts have held that a defendant who is in court by reason of having filed an answer is not entitled to service of new process after an amendment of the plaintiff's petition even if the amendment brings new parties into the case. *Roberson v. McIlhenny, Hutchins & Co.,* 59 Tex. 615, 617 (1883); *Blakeney v. Johnson County,* 253 S.W. 333, 334–335 (Tex.Civ.App.—San Antonio 1923, writ dism'd); *Pecos & N.T. Ry. Co. v. Porter,* 156 S.W. 267, 269 (Tex.Civ.App.—Amarillo 1913, no writ); 59 TEX. JUR.3D *Process, Notices, and Subpoenas* § 9 (1988). Specifically, if the plaintiff amends his original petition ***258** to add the name of an additional plaintiff, it does not constitute a new cause of action requiring additional

service of process. *Roberson,* 59 Tex. at 617; *Porter,* 156 S.W. at 269. As the supreme court stated in *Roberson,* "It would not be in keeping with the spirit of our very liberal law of amendment, to hold that such changes in the names of the parties set up a new cause of action ..." 59 Tex. at 617; *see Laughlin v. Tips,* 8 Tex.Civ.App. 649, 28 S.W. 551, 552 (San Antonio 1894, no writ).13

In this case, appellees answered the original petition, and therefore, were bound to take notice of the pleading that added the four additional plaintiffs. They obviously did take notice, because they quickly filed an objection to the addition of the four plaintiffs. Based on the cases cited above, we hold the addition of the four plaintiffs did not set up a new cause of action, and service of citation from these plaintiffs was not required. Therefore, the trial court erred in striking plaintiffs Gary McPherson, Jason Campbell, Justin Campbell, and Jaret Campbell. We sustain point of error five.

In conclusion, we sustain point of error three concerning the fee forfeiture issue and hold that fee forfeiture is recognized in this state and requires only proof of a breach of fiduciary duty. We also sustain point of error five and hold the trial court erred in striking plaintiffs Gary McPherson, Jason Campbell, Justin Campbell, and Jaret Campbell. We overrule point of error two and hold the Malinack affidavit was sufficient to support summary judgment on those claims where causation and damage was necessary. We also overrule point of error four and hold that none of the summary judgment evidence submitted by appellants was sufficient to raise a fact issue.14 Based on these rulings, we reverse the trial court's judgment and remand the case. Upon any trial of this case, the only issues remaining are whether there was a breach of any fiduciary duty, and if so, the amount, if any, of the fee forfeiture. The issues of causation and damage as to all other claims have been negated as a matter of law.

V. CONCLUSION

Footnotes

1 The letter's only import is background information, for the judgment is the only place we can look for the reasons the judgment was entered. *Shannon v. Tex. Gen. Indem. Co.,* 889 S.W.2d 662, 663 (Tex.App.—Houston [14th Dist.] 1994, no writ); *Martin v. Southwestern Elec. Power Co.,* 860 S.W.2d 197, 199 (Tex.App.—Texarkana 1993, writ denied).

2 Point of error one is a general point stating "The trial court erred in granting the defendants' motion for summary judgment." Points of error two through four are specific contentions subsumed under this general contention. We will refer to a specific argument by the point of error to which it relates. So, we will rule on point of error one by ruling on the points containing a specific contention.

3 Appellants contend appellees breached their fiduciary duties by (1) soliciting business through a lay intermediary, (2) failing to fully investigate and assess individual claims, (3) failing to communicate offers received and demands made, (4) entering into an aggregate settlement, (5) agreeing to limits on their practice of law, and (6) intimidating clients into settlement through subtle and overt threats, coercion, and false entreaties or promises.

4 Furthermore, it is a violation of the Texas Disciplinary Rules of Professional Conduct of an attorney who represents two or more clients to make an aggregate settlement without the clients' consent. Rule 1.08(f) states:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients ... unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extend of the participation of each person in the settlement. TEX. DISCIPLINARY R. PROF. CONDUCT 1.08(f) (1991), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Pamph. 1997) (STATE BAR RULES art. X, § 9).

5 We note that neither appellants nor appellees have argued that entering into an aggregate settlement without the clients' consent is not a breach of fiduciary duty.

6 This opinion is limited to the type of fiduciary duty potentially breached in this case. It does not address or consider if breaches of *any* fiduciary duty owed by a lawyer to a client would support fee forfeiture.

7 We must address this last issue because the trial court notified the parties by letter that "... fee forfeiture is not an element of damages, but a legal remedy that a Court (as opposed to a jury) *may* apply as a matter of law *after* a jury has found both breach of duty by an attorney and damages arising out of that breach."

8 Texas also recognizes other equitable remedies for breaches of fiduciary duty including rescission or the imposition of a

constructive trust. *Chien v. Chen,* 759 S.W.2d 484, 497 (Tex.App.—Austin 1988, no writ) (citing *Thigpen v. Locke,* 363 S.W.2d 247, 252 (Tex.1962) (constructive trust); *Consolidated Gas & Equip. Co. of America v. Thompson,* 405 S.W.2d 333, 336 (Tex.1966) (constructive trust)). *See also Wils v. Robinson,* 934 S.W.2d 774, 782 (Tex.App.—Houston [14th Dist.] 1996) (recission), *vacated without reference to the merits,* 938 S.W.2d 717 (Tex.1997); *Miller v. Miller,* 700 S.W.2d 941, 945 (Tex.App.—Dallas 1985, writ ref'd n.r.e.) (recission).

9 Though some jurisdictions require a showing of damage, we find the better approach is that represented by the Minnesota cases. *See Frank v. Bloom,* 634 F.2d 1245, 1257 (10th Cir.1980) (requiring client to show damage to obtain forfeiture); *Crawford v. Logan,* 656 S.W.2d 360, 365 (Tenn.1983) (relying on *Bloom* to require client to show prejudice to obtain fee forfeiture). The court in *Bloom* approached the forfeiture issue as arising in the context of a legal malpractice action, *not a claim of breach of fiduciary duty.* 634 F.2d at 1257. In fact, the court discussed how the plaintiff failed to present an expert or other evidence to prove that the lawyer's allegedly improper actions were illegal or unethical. Failing this, the evidence merely supported a claim for legal malpractice. Thus, being presented only with a claim for legal malpractice, the court refused to order a forfeiture without a showing of damages. We agree that a simple negligence action requires a client to prove duty, breach, causation, and damage, and, later in this opinion, we affirm that portion of the trial court's judgment granting judgment against appellants on their negligence and other claims because they did not prove damages. But, a breach of fiduciary duty claim, is not the same as an ordinary claim of malpractice based on negligence. Because we are of the opinion that *Bloom* involved a cause of action that requires different proof than a breach of fiduciary duty claim, we do not find it persuasive authority for this case. For the same reason, we consider *Crawford* reasoning to be flawed. Although *Crawford did* involve a breach of fiduciary duty claim, it relied exclusively on *Bloom* to support its conclusion that the plaintiff client must show prejudice or damages before a forfeiture will be ordered. However, since *Bloom* involved a different cause of action, we do not think it supports the *Crawford* conclusion.

10 At the time of this writing, the draft of the Restatement (Third) of the Law Governing Lawyers has not been considered by the members of The American Law Institute. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 n.a (Proposed Final Draft No. 1, 1996). Therefore, we refer to it cautiously, acknowledging that any portions cited by this court do not reflect the position of any member of the Institute. Nevertheless, those sections cited by this court reflect our opinion on the issue, regardless of subsequent approval or disapproval by the Institute.

11 Appellants also claim the trial court abused its discretion by striking Edwards' affidavit. Appellee John E. Williams, individually and as a partner in Umphrey, Burrow, Reaud, Williams & Bailey, objected to and moved to strike Edwards' affidavit on the ground that she was not designated as an expert witness and appellants' deadline to designate experts had expired. In its judgment, the trial court denied the objection; however, the trial court also specifically stated "the Affidavits of Roberta Edwards, M.D. and Harry Wilson do not controvert the Affidavit of Robert Malinack with competent evidence." Thus, it appears the trial court did consider Edwards' affidavit, but found that it was insufficient to raise a fact issue precluding summary judgment. In their brief, appellees admit the trial court considered the affidavit and raise no complaint to its consideration. In light of these facts, we will consider the Edwards affidavit in our review, and therefore, it will be unnecessary to determine whether the trial court abused its discretion in sustaining the objection based on the competency of the evidence.

12 Edwards' qualifications as a medical doctor are irrelevant insofar as the issue of causation and damage are concerned. As we discussed with regard to the Malinack affidavit, the question of causation and damage in this case was a matter requiring expert *legal* testimony. Thus, our review is limited to the two statements in Edwards' affidavit concerning her qualifications in the legal field.

13 This rule is analogous to the rule that an intervener need not have formal service of process issued on a defendant who has made an appearance in a case. 1 MCDONALD, TEXAS CIVIL PRACTICE, § 5.81.

14 As we noted at the beginning of this opinion, point of error one is a general point of error complaining that the trial court erred in granting summary judgment. The remaining points of error are specific complaints about the summary judgment. By ruling on points of error two through five, we have ruled on point of error one.

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EXHIBIT 4

911 S.W.2d 498
Court of Appeals of Texas,
Houston (1st Dist.).

JUDWIN PROPERTIES, INC., Appellant,
v.
GRIGGS AND HARRISON, a Professional Corporation, Appellee.

No. 01–95–00381–CV. | Nov. 9, 1995.

In law firm's action against client to recover for services rendered, client asserted counterclaims for breach of contract, breach of warranty, breach of fiduciary duty, and negligence and gross negligence based on firm's alleged disclosure of confidential information through statement of services attached to firm's petition. The 281st District Court, Harris County, William F. Bell, J., granted summary judgment for firm on client's counterclaims, and client appealed. The Court of Appeals, Hutson-Dunn, J., held that: (1) firm's motion for summary judgment contemplated all causes of action set out in client's amended counterclaim; (2) client's supplemental answers to interrogatories were proper summary judgment evidence; (3) client's pleadings did not contain information that constituted judicial admission such that pleadings were proper summary judgment evidence; (4) client's contract, warranty, and fiduciary duty claims were in fact merely restatements of claim for legal malpractice; and (5) fact issue existed as to whether client sustained damage as result of firm's alleged disclosures, precluding summary judgment for firm.

Affirmed in part, reversed in part and remanded.

West Headnotes (20)

[1] Judgment
Presumptions and Burden of Proof
Judgment
Existence or Non-Existence of Fact Issue

In summary judgment proceeding brought by defendant, defendant must present summary judgment proof establishing, as a matter of law, that there is no genuine issue of material fact on one or more of essential elements of plaintiff's cause of action; defendant may do so by offering summary judgment evidence showing that at least one element of plaintiff's cause of action has been established conclusively against plaintiff, and it is not necessary for defendant to disprove all elements, and court should render summary judgment for defendant if defendant can disprove any one of essential elements.

1 Cases that cite this headnote

[2] Judgment
Presumptions and Burden of Proof

If defendant as party moving for summary judgment negates one or more of essential components of plaintiff's cause of action, burden is on plaintiff to produce controverting evidence raising fact issue as to elements negated.

3 Cases that cite this headnote

[3] Judgment
Presumptions and Burden of Proof

If summary judgment proof offered by defendant as moving party does not establish as a matter of law that there is no genuine issue of fact as to one or more of essential elements of each of plaintiff's causes of action, then plaintiff does not have burden, to avoid summary judgment, of going forward with summary judgment proof of like quality.

1 Cases that cite this headnote

[4] Appeal and Error
Judgment

On appeal, evidence most favorable to party opposing motion for summary judgment will be taken as true, and every reasonable inference must be indulged in favor of that party and any doubts resolved in that party's favor.

court. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

4 Cases that cite this headnote

[5] Judgment
Motion or Other Application

Examination of client's original counterclaim against law firm, firm's motion for summary judgment, and client's amended counterclaim established that firm's motion for summary judgment contemplated all causes of action set out in amended counterclaim, notwithstanding client's contention that only counterclaim asserted at time of firm's motion was one for breach of contract and that firm did not amend its motion thereafter with respect to newly asserted causes of action; there was no single cause of action pled as such in original counterclaim, which contained factual allegations that touched on tort, contract, and breach of fiduciary duty theories, and firm's motion for summary judgment was directed at "claim(s)" for damages that were remote and speculative; moreover, after client amended its counterclaim, it should have specially excepted asserting that grounds relied on by firm were unclear or ambiguous.

21 Cases that cite this headnote

[6] Judgment
Defects and Objections

If nonmovant fails to except by asserting that grounds relied on by party moving for summary judgment were unclear or ambiguous, he loses his right to have grounds for summary judgment narrowly focused.

[7] Judgment
Hearing and Determination

Proper scope for trial court's review of evidence for summary judgment encompasses all evidence on file at time of hearing or filed after hearing and before judgment with permission of

[8] Judgment
Hearing and Determination

Original counterclaim was not precluded from consideration in support of counterdefendant's motion for summary judgment by virtue of fact that amended counterclaim was on file with court at time motion for summary judgment was presented; original counterclaim contemplated causes of action that would later be specified in amended counterclaim. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

6 Cases that cite this headnote

[9] Judgment
Hearing and Determination

In considering counterdefendant's motion for summary judgment, trial court could consider counterplaintiff's supplemental answers to interrogatories that were not filed until after counterdefendant filed its motion for summary judgment; supplemental answers were on file before court rendered summary judgment, and counterdefendant referenced supplemental answers in its motion, acknowledging that counterplaintiff was under court order to supplement its answers. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

[10] Judgment
Documentary Evidence or Official Record

Pleadings may be used as summary judgment evidence when they contain statements rising to level of admitting fact or conclusion that is directly adverse to party's theory or defense of recovery. Vernon's Ann.Texas Rules Civ.Proc.,

Rule 166a(c).

9 Cases that cite this headnote

[11] **Judgment**
Documentary Evidence or Official Record

Client's original and amended counterclaims against law firm did not contain information that constituted judicial admission such that those pleadings should have been used as evidence on firm's motion for summary judgment; contrary to firm's contention, client's statements that certain public disclosures had caused and would continue to cause significant harm to client did not demonstrate that client filed counterclaims merely hoping for demonstrable damages, without ability to show any actual injury. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

4 Cases that cite this headnote

[12] **Attorney and Client**
Pleading and Evidence

Breach of contract, breach of implied warranty, and breach of fiduciary duty counterclaims asserted by client against law firm in fact were all tort claims for legal malpractice; claims were premised on firm's alleged public disclosure of confidential information in its statement of services rendered that was attached to petition against client, and contract, warranty, and fiduciary duty claims failed as a matter of law.

17 Cases that cite this headnote

[13] **Attorney and Client**
Actions for Compensation
Attorney and Client
Time to Sue, and Limitations

Action arising from disputed legal fees sounds in contract and should carry applicable contract statute of limitations period.

[14] **Attorney and Client**
Elements of Malpractice or Negligence Action in General

Attorney-client relationship is highly fiduciary in nature, and carries utmost good faith.

6 Cases that cite this headnote

[15] **Attorney and Client**
Pleading and Evidence

Cause of action for breach of fiduciary duty against attorney refers to unfairness in contract, and burden of showing fairness is on attorney; however, unless client raises issue of unfairness or inequitable conduct, presumption of unfairness will not arise.

1 Cases that cite this headnote

[16] **Attorney and Client**
Dealings Between Attorney and Client

For purposes of claim of breach of fiduciary duty in attorney-client context, transaction is unfair if fiduciary significantly benefits from it at expense of beneficiary as viewed in light of circumstances existing at time of transaction.

2 Cases that cite this headnote

[17] **Attorney and Client**
Acts and Omissions of Attorney in General

When attorney has stolen or used interest to detriment of his client, client need not prove causation for breach of fiduciary duty.

2 Cases that cite this headnote

[18] Attorney and Client
Elements of Malpractice or Negligence
Action in General

Attorney malpractice action is based upon negligence and requires proof of (1) existence of duty, (2) breach of that duty, (3) that breach was proximate cause of damages, and (4) that plaintiff was damaged; there must be showing of causal relation between act complained of and injury sustained.

5 Cases that cite this headnote

[19] Attorney and Client
Actions for Compensation

Recovery of fees paid to attorney may be appropriate when his or her negligence rendered services of no value.

3 Cases that cite this headnote

[20] Judgment
Attorneys, Cases Involving

Material fact issue existed as to whether law firm's alleged disclosure of confidential information, through statement of services attached to firm's petition against client to recover for services rendered, damaged client, precluding summary judgment for firm on client's legal malpractice counterclaim.

1 Cases that cite this headnote

Attorneys and Law Firms

***500** Thomas Kirkendall, Michael C. Falick, Houston, for Appellant.

Michael A. Hirsch, Houston, for Appellee.

Before HUTSON–DUNN, O'CONNOR and ANDELL, JJ.

Opinion

OPINION

HUTSON–DUNN, Justice.

This is an appeal from a summary judgment granted in favor of appellee, Griggs & Harrison (Griggs). We affirm the judgment for the breach of contract, breach of implied warranty, and breach of fiduciary claims, and reverse the judgment for the negligence and gross negligence claims.

Summary of Facts

Tenants of the Edgebrook Apartments complained to the owner, Judwin Properties, Inc. (Judwin), appellant, of exposure to a termiticide known as chlordane. When litigation ensued, Judwin had a general liability policy with Reliance Insurance Company. Judwin demanded a defense and coverage, but Reliance refused to respond to either provide or deny coverage. As a result, Judwin retained the services of Griggs to defend it in the "chlordane" lawsuits, while still maintaining that Reliance owed it coverage. When Judwin refused to pay Griggs for its services, Griggs brought suit against Judwin Properties and Reliance Insurance for recovery of attorneys fees due, approximately $56,000.[1]

In its petition, Griggs attached the hourly fee statements that described the nature and extent of the services performed for Judwin. Judwin filed a counterclaim against Griggs alleging that the statement of services Griggs attached to its petition contained confidential and privileged information concerning Griggs' representation of Judwin. Because Judwin was still involved in a number of lawsuits involving chlordane, Judwin alleged this public disclosure resulted in immediate and irreparable harm to it because the statements disclosed litigation strategy and other privileged communications.

Additionally, Judwin included two paragraphs in its counterclaim that demonstrated that Judwin contemplated additional claims to be asserted against Griggs. Paragraph six reads, "Judwin reserves the right to Amend the Original Answer, including the assertion of counterclaims and additional affirmative defenses." Paragraph seven reads, "Judwin requests that judgment be entered in its favor on all claims alleged by Plaintiff ... and that Judwin recover damages by reason of the counterclaims asserted against Griggs & Harrison...."

***501** In response to Judwin's counterclaim, Griggs filed a motion for summary judgment, alleging, "This Motion for Summary Judgment is limited to, and made upon one legal issue, only: the claim(s) of Judwin made for recovery of damages which are remote, contingent, and speculative; G & H reserves unto itself and intends the active defense of Judwin's claim(s) upon additional bases in law." Griggs also asserted that it was entitled to summary judgment because it conclusively negated the element of damages in each cause of action by showing that while Judwin claimed it sustained damages, it did not show any connection of cause and effect, and was only able (at best) to speculate as to any damages amount. In support of its motion, Griggs relied on the pleadings on file, and Judwin's responses to interrogatories.

Before the summary judgment hearing, Judwin amended its original counterclaim alleging the same facts which supported its original counterclaim and added that Griggs' conduct constituted a breach of contract, breach of implied warranty, breach of fiduciary duty, negligence (legal malpractice), and gross negligence. Under each of the headings, Judwin laid out an identical set of acts that it claimed caused it damages.

In its response to Griggs' motion for summary judgment, Judwin asserted that as to each cause of action, it created an issue of fact on the damages element. Judwin relied on an affidavit from its president, Jerold Winograd, and its supplemental answers to Griggs' interrogatories as its summary judgment proof. The trial court found that Griggs was entitled to judgment as a matter of law on all causes of action asserted by Judwin in its amended counterclaim. From this, Judwin appealed.

In its first point of error, Judwin contends that the judgment of the trial court should be reversed on Judwin's claims for breach of implied warranty, breach of fiduciary duty, and negligence because Griggs did not address these claims in its motion for summary judgment. In its second point of error, Judwin contends the judgment of the trial court should be reversed because Griggs did not conclusively disprove the damage elements of each of Judwin's causes of action as a matter of law.

Standard of Review for Summary Judgment

[1] [2] [3] [4] In a summary judgment proceeding brought by a defendant,[2] the movant-defendant must present summary judgment proof establishing, as a matter of law, that there is no genuine issue of material fact on one or more of the essential elements of the plaintiff's cause of action. *Union Pump Co. v. Allbritton,* 898 S.W.2d 773, 774 (Tex.1995); *Gibbs v. General Motors Corp.,* 450 S.W.2d 827, 828 (Tex.1970). The movant-defendant may accomplish this by offering summary judgment evidence showing that at least one element of nonmovant's cause of action has been established conclusively against the nonmovant. *Union Pump Co.,* 898 S.W.2d at 774. It is not necessary for the movant-defendant to disprove all elements of the nonmovant's cause of action; rather, if a movant-defendant can disprove any one of the essential elements, then the court should render summary judgment for that movant-defendant. *Wheeler v. Yettie Kersting Memorial Hosp.,* 866 S.W.2d 32, 36 (Tex.App.—Houston [1st Dist.] 1993, no writ). If the movant-defendant negates one or more of the essential components of the nonmovant's causes of action, the burden is on the nonmovant to produce controverting evidence raising a fact issue as to the elements negated. *Pinckley v. Gallegos,* 740 S.W.2d 529, 531 (Tex.App.—San Antonio 1987, writ denied). However, if the movant-defendant's summary judgment proof does not establish as a matter of law that there is no genuine issue of fact as to one or more of the essential elements of each of the nonmovant's causes of action, then the nonmovant does not have the burden, to avoid summary judgment, of going forward with summary judgment proof of like quality. *Swilley v. Hughes,* 488 S.W.2d 64, 67–68 (Tex.1972). On appeal, evidence favorable to the nonmovant will be taken as true; every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its ***502** favor. *Montgomery v. Kennedy,* 669 S.W.2d 309, 311 (Tex.1984).

We consider each of the points of error in light of this standard.

Analysis

[5] In point of error one, Judwin contends that the judgment of the trial court should be reversed on its claims for breach of implied warranty, breach of fiduciary duty, and negligence because Griggs did not address these claims in its motion for summary judgment. Upon examining the original counterclaim, the motion for summary judgment, and the amended counterclaim, we hold that Griggs' motion for summary judgment contemplated all causes of action set out in Judwin's amended counterclaim.

Judwin argues that at the time Griggs moved for summary judgment, the only claim asserted by Judwin was a claim Griggs characterized in its motion for summary judgment as a breach of contract. Because Griggs did not amend its motion for summary judgment, Judwin argues Griggs did not seek summary judgment on Judwin's newly asserted causes of action.

Judwin relies on *Rose v. Kober Financial Corp.,* 874 S.W.2d 358 (Tex.App.—Houston [14th Dist.] 1994, no writ). In that case, the plaintiff, Philip Rose, initially filed suit against Kober solely under the Deceptive Trade Practices Consumer Protection Act. *Id.* When Kober moved for summary judgment on Rose's pleading, Rose amended his petition to assert additional causes of action for breach of contract, breach of fiduciary duty, misrepresentation, and negligence. *Id.* at 360. Kober did not amend its motion for summary judgment to address these causes of action. *Id.* Although the trial court granted summary judgment as to all causes of action, the appellate court held that since Kober had not amended its motion for summary judgment to address Rose's four additional causes of action, "the trial court erred in attempting to enter an all inclusive final summary judgment." *Id.* at 362. Arguing that the *Rose* case is factually similar, Judwin requests this Court to reverse the summary judgment on the causes of action not addressed in Griggs' summary judgment.

Griggs argues that the *Rose* decision would be on point but for the fact that its motion for summary judgment was made clearly upon the "*claim(s)* " asserted in Judwin's counterclaim which were contemplated and comprehended by the amended counterclaim. Moreover, Griggs argues that Judwin's original counterclaim made factual pleadings without clearly delineating each cause of action which it contemplated by those pleadings. Griggs refers to paragraph eight and nine of Judwin's original counterclaim:

> 8. G & H [Griggs] has attached to the Original Petition filed with this Court copies of G & H's statement of services rendered and expenses incurred that were previously transmitted to Judwin. These statements detail the legal services provided by G & H to Judwin in the chlordane lawsuits. G & H's statements contain confidential and privileged information concerning G & H's representation of Judwin in the chlordane lawsuits. Judwin never authorized G & H to disclose these confidential attorney-client communications publicly nor are these communications reasonably necessary to recover the claims asserted by G & H in this case.
>
> 9. The public disclosure of G & H's statements has resulted in immediate and irreparable harm to Judwin. Judwin is still embroiled in multiple, complex litigation matters related to chlordane lawsuits. The statements disclose litigation strategy and other privileged communications that have resulted in prejudice to Judwin's position in the pending lawsuits.

As a result, Griggs filed its motion for summary judgment with respect to the legal causes of action that were alleged under those factual allegations and which were ultimately clarified by Judwin's amended counterclaim. "This Motion for Summary Judgment is limited to, and made upon one legal issue, only: the *claim(s)* of Judwin made for recovery of damages which are remote, contingent, and speculative; G & H reserves unto itself and intends the active defense of Judwin's claim(s) upon additional bases in law." (Emphasis added). Accordingly, Griggs argues that its motion for summary judgment was, as it stated, on Judwin's ***503** "claim(s)," all of which were before the court when it ruled on its motion for summary judgment.

[6] We are not persuaded by Judwin that this case is factually similar to *Rose.* There was no single cause of action plead in Judwin's original counterclaim as such; rather, factual allegations of damages were made that were, on their face, couched in tort, contract, and breach of fiduciary duty. We hold that the causes of action eventually specified in Judwin's amended counterclaim were contemplated by Griggs' motion for summary judgment. Further, after Judwin amended its counterclaim and filed its response to Griggs' motion for summary judgment, Judwin should have specially excepted, asserting that the grounds relied on by the movant were unclear or ambiguous. *McConnell v. Southside Indep. Sch. Dist.,* 858 S.W.2d 337, 342 (Tex.1993). "Such an exception should be lodged to ensure that the parties, as well as the trial court are focused on the same grounds." *Id.* at 343. If the nonmovant fails to except, he loses his right to have the grounds for summary judgment narrowly focused. *Id.* This leaves the appellate court to determine the grounds it believes were expressly presented in the summary judgment. *Id.*

After reviewing Griggs' motion for summary judgment, we hold that Griggs was asserting it was entitled to summary judgment on the grounds that Judwin could not "draw any connection of cause and effect, and likewise, refuse[d] to quantify what is its supposed immediate harm" as to all contemplated claims in Judwin's original counterclaim eventually clarified in Judwin's amended counterclaim. Therefore, if Griggs showed in its motion for summary judgment that Judwin did not sustain damages as a result of Griggs' conduct as a matter of law, the summary judgment was proper.

We overrule Judwin's first point of error.

In point of error two, Judwin argues the judgment of the trial court should be reversed because Griggs did not conclusively disprove the damages element of each of Judwin's causes of action. Judwin argues that Griggs' summary judgment proof was not competent, and alternatively that Judwin came forward with sufficient

proof of its own as to the damages sustained to raise a fact issue.

To be entitled to summary judgment, Griggs was required to conclusively establish that no fact issue existed as to at least one essential element of each cause of action, specifically here as to damages. *Union Pump Co.,* 898 S.W.2d at 774. Griggs relied, among other things, on two categories of evidence in its motion for summary judgment: (1) Judwin's original counterclaim (attached to Griggs' motion as Exhibit A), and (2) Judwin's answers to Griggs' interrogatories (attached to Griggs' motion as Exhibit B).

[7] The proper scope for a trial court's review of evidence for a summary judgment encompasses all evidence on file at the time of the hearing or filed after the hearing and before judgment with the permission of the court. TEX.R.CIV.P. 166a(c); *Gandara v. Novasad,* 752 S.W.2d 740, 743 (Tex.App.—Corpus Christi 1988, no writ).

[8] Judwin argues that even if the pleadings were appropriate evidence, at the time the motion for summary judgment was presented to the trial court, Judwin's amended counterclaim was on file with the court, so the original counterclaim was no longer the "live" pleading, and therefore was not to be considered part of the case. We disagree. As noted above, Judwin's original counterclaim contemplated causes of action that would later be specified in an amended counterclaim. Accordingly, we hold that it was not improper for the trial court to consider Judwin's original counterclaim to support Griggs' motion for summary judgment. TEX.R.CIV.P. 166a(c).

[9] Judwin also argues that because the only answers to interrogatories on file at the time Griggs filed its motion for summary judgment were Judwin's first set of answers, it was improper for the trial court to consider Judwin's supplemental answers to interrogatories which were not filed until after Griggs filed its motion for summary judgment. Because the supplemental answers were on file before the court before it rendered summary ***504** judgment, the trial court was correct to consider them as evidence. TEX.R.CIV.P. 166a(c); *Gandara,* 752 S.W.2d at 743. Further, Griggs referenced the supplemental answers in its motion for summary judgment, acknowledging that Judwin was under a court order to supplement its answers to the interrogatories. As such, the court properly considered Judwin's supplemental answers on file as proof of the grounds for summary judgment presented in Griggs' motion.

[10] [11] Judwin argues that the counterclaims were not proper evidence because pleadings do not constitute summary judgment evidence. *City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 678 (Tex.1979). Pleadings may be used as summary judgment evidence when they contain statements rising to the level of admitting a fact or conclusion which is directly adverse to that party's theory or defense of recovery. *Hill v. Steinberger,* 827 S.W.2d 58, 61 (Tex.App.—Houston [1st Dist.] 1992, no writ); *Highlands Ins. Co. v. Currey,* 773 S.W.2d 750, 755 (Tex.App.—Houston [14th Dist.] 1989, no writ).

After reviewing both the original and amended counterclaims, these pleadings do not contain information therein which constitutes a "judicial admission." Judwin asserts in the original counterclaim that "the public disclosure of G & H's statements has resulted in immediate and irreparable harm to Judwin." In the amended counterclaim, Judwin states, "[t]he public disclosure of G & H's statements has caused and will continue to cause significant harm to Judwin." Griggs argues these statements operate as judicial admissions, demonstrating that Judwin has filed its claim merely hoping for demonstrable damages, without the ability to show any actual injury. These statements do not rise to the level of a judicial admission. We hold that in this case, the pleadings were not proper summary judgment evidence.

Griggs relies on Judwin's first set of answers and the supplemental answers to its interrogatories as conclusive proof to negate that Judwin sustained damages. For the causes of action of breach of contract, breach of implied warranty and breach of fiduciary duty, Judwin asserts, "As a result of G & H's breach, Judwin has suffered damages.... Judwin has been damaged in the chlordane lawsuits by G & H's breach and seeks damages, both past and future caused by G & H's wrongful conduct." As to the negligence cause of action, Judwin asserts, "As a result of G & H's negligence, Judwin has been damaged in the chlordane lawsuits by G & H's conduct and seeks damages, both past and future caused by G & H's wrongful conduct." Judwin alleges that Griggs' wrongful disclosure of confidential information diminished the value of Griggs' services.

As evidence to negate the element of damages, Griggs relies specifically on Judwin's supplemental answers to interrogatories questions number 9, 10 and 12.

Interrogatory number 9:

> Please state the nature and extent, by dollar amount, all damages claimed by Judwin to have been occasioned by G & H to Judwin, known by Judwin at this time, as well as believed by Judwin to accrue after this time,

from the alleged unauthorized and illegal disclosures of privileged and/or confidential matter and/or information.

Answer: While the full extent of the damage caused by the wrongful conduct of Griggs & Harrison has not yet been calculated at this time, Judwin has sustained significant damage as a result of the conduct of Griggs & Harrison and its counsel. *Specifically, the wrongful disclosure of privileged information has weakened Judwin's ability to defend and/or settle the existing chlordane cases, and will weaken Judwin's ability to defend and/or settle any chlordane cases filed in the future.* The various wrongful disclosures essentially provide current Plaintiffs' counsel and any future Plaintiffs' counsel in the chlordane cases with an outline of the defensive strategy utilized by Judwin and its then counsel Griggs & Harrison. The disclosure also [sic] identify and discuss in detail the relationship between Judwin and its insurer, Reliance Insurance Company. *As a result, Judwin claims present damages in the amount of $5,000,000.00.*

(Emphasis added.)

***505** Interrogatory number 10:

Please state the total and maximum amount of actual damages, if any, you seek to recover from Plaintiff in this lawsuit and include in your Answer each element and amount of damages included within that total.

Answer: Judwin seeks to recover all amounts it will be required to incur and/or pay in kind, as a result of the wrongful conduct of Griggs & Harrison. Without limiting the foregoing, Judwin seeks to recover its future and past attorney's fees and those amounts of additional damages (both actual and punitive) which might be incurred by Judwin as a result of the wrongful disclosure. These amounts may vary as additional information becomes available. *However, at this time, Judwin claims present damages in the amount of $5,000,000.00.*

(Emphasis added.)

. . . . .

Interrogatory number 12:

Please state each incident of prejudice to the financial interests, i.e., damages, claimed by Judwin to have resulted from the alleged disclosure of privileged and/or confidential communications by G & H, and in doing so, state when, how, and in what manner, the alleged disclosure of privileged or confidential communications have resulted in prejudice to Judwin's position in any pending lawsuits.

Answer: While the full extent of the damage caused by the wrongful conduct of Griggs & Harrison has not yet been calculated at this time, Judwin has sustained significant damage as a result of the conduct of Griggs & Harrison and its counsel. *Specifically, the wrongful disclosure of privileged information has weakened Judwin's ability to defend and/or settle the existing chlordane cases, and will weaken Judwin's ability to defend and/or settle any chlordane cases filed in the future.* The various wrongful disclosures essentially provide current Plaintiff's counsel and any future Plaintiff's counsel in the chlordane cases with an outline of the defensive strategy utilized by Judwin and its then counsel Griggs & Harrison. The disclosures also identify and discuss in detail the relationship between Judwin and its insurer, Reliance Insurance Company.

(Emphasis added).

Griggs argues that these responses contradict Judwin's assertions in its pleadings that the harm Judwin suffered is "immediate and irreparable." Griggs argues that these answers demonstrate that Judwin's damages are speculative, and Judwin cannot with specificity state what its damages are or identify the causal connection between Griggs' conduct and Judwin's damages. Further, Griggs argues that because Judwin's alleged damages are prospective and anticipated rather than real and present, Judwin cannot show it suffered any actual injury as a result of Griggs' conduct. Relying on this summary judgment evidence, Griggs asserts it has conclusively negated the damages element as to all of Judwin's causes of action.

In its amended counterclaim, Judwin sets out five causes of action: breach of contract, breach of implied warranty, breach of fiduciary duty, negligence (legal malpractice), and gross negligence. Under the headings of breach of contract, breach of implied warranty and breach of fiduciary duty, Judwin lays out an identical set of alleged acts that it claims caused it damages and alleges, "As a result of G & H's breach, Judwin has suffered damages. Specifically, since G & H failed to perform its obligations under the contract, Judwin seeks reimbursement for all attorneys' fees paid to G & H by Judwin. In addition, Judwin has been damaged in the chlordane lawsuits by G & H's breach and seeks damages, both past and future caused by G & H's wrongful conduct."

Under the negligence heading, Judwin relies on the same set of alleged acts as above, and alleges, "As a result of G

& H's negligence, Judwin has been damaged in the chlordane lawsuits by G & H's conduct and seeks damages, both past and future caused by G & H's wrongful acts." And finally, as to gross negligence, Judwin alleges that G & H's conduct was grossly negligent and is a proximate cause of Judwin's injury. As such, Judwin seeks exemplary damages in addition ***506** to any amount of its actual damages. Judwin also seeks exemplary damages for the breach of fiduciary duty owed to Judwin by Griggs.

Breach of Contract

[12] Judwin's attempts to label this action as a breach of contract are unavailing. It is well established under Texas law that suits for legal malpractice are in the nature of a tort action. *Pham v. Nguyen,* 763 S.W.2d 467, 469 (Tex.App.—Houston [14th Dist.] 1988, writ denied); *Gabel v. Sandoval,* 648 S.W.2d 398 (Tex.App.—San Antonio 1983, writ dism'd); *Woodburn v. Turley,* 625 F.2d 589, 592 (5th Cir.1980).
In *Bray v. Jordan,* 796 S.W.2d 296, 298 (Tex.App.—El Paso 1990, no writ), the plaintiff asserted that his attorney had breached an oral contract of employment. Following *Pham,* the court of appeals found that the contract issue should not have been submitted to the jury, "because legal malpractice is a tort action." *Id.*

In *Jampole v. Matthews,* 857 S.W.2d 57, 61 (Tex.App.—Houston [1st Dist.] 1993, writ denied), this Court recognized a cause of action for breach of contract independent of a legal malpractice claim. That case, however, limited this distinction to actions against attorneys for excessive legal fees.

> We distinguish ... between an action for negligent legal malpractice and one for fraud allegedly committed by an attorney relating to the establishing and charging of fees for services. Similarly, we distinguish between an action for negligent legal malpractice and one for breach of contract relating to excessive fees for services.

Id.

[13] We agree that an action arising from disputed legal fees sounds in contract and should carry the applicable contract statute of limitations period. Presumably, in an action concerning excessive legal fees, the attorney has completed his services. Afterwards, a dispute may arise as to the amount due the attorney under the agreement originally negotiated by the parties. In the present case, however, Judwin bases all of its causes of action on Griggs' public disclosure of confidential information in its statement of services rendered and expenses incurred to Judwin during the chlordane litigation. Judwin's claims are therefore in the nature of a tort action (malpractice), as opposed to contract (disputed legal fees). Since Judwin's claims are for tort, the breach of contract claim fails as a matter of law.

Breach of Implied Warranty

Judwin's cause of action for breach of implied warranty fails because it is a means to an end to assert legal malpractice. Judwin asserts that as a result of Griggs' failure to perform its contractual obligations, Griggs breached the implied warranty to perform good legal services. In *American Medical Elecs. v. Korn,* 819 S.W.2d 573 (Tex.App.—Dallas 1991, writ denied), the plaintiff asserted his attorney had breached his implied warranty based on their oral contract. The court held that "a cause of action for legal malpractice is in the nature of a tort," so the malpractice claim was governed by limitations applicable to the tort of malpractice rather than a longer period for breach of contract. *Id.* at 576; *see also Mackie v. McKenzie,* 900 S.W.2d 445, 451 (Tex.App.—Texarkana 1995, no writ). Just as the breach of contract claim must fail, so must this claim.

Breach of Fiduciary Duty

[14] [15] Judwin's cause of action for breach of fiduciary duty fails because it is also a means to an end to assert legal malpractice. The attorney-client relationship is highly fiduciary in nature. *O'Dowd v. Johnson,* 666 S.W.2d 619, 621 (Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). This relationship carries the utmost good faith. *State v. Baker,* 539 S.W.2d 367, 374 (Tex.Civ.App.—Austin 1976, writ ref'd n.r.e.). A cause of action for breach of fiduciary duty in Texas refers to unfairness in the contract, and the burden of showing fairness is on the attorney. *Archer v. Griffith,* 390 S.W.2d 735, 739–40 (Tex.1965); *Ames v. Putz,* 495 S.W.2d 581, 583 (Tex.Civ.App.—Eastland 1973, writ ref'd). Unless the client raises the issue of unfairness or inequitable conduct, however, the presumption of unfairness will not arise. *Giao v. Smith,* 714 S.W.2d 144, 147 (Tex.App.—Houston [1st Dist.] 1986, no writ); ***507** *Plummer v. Bradford,* 395 S.W.2d 856, 861 (Tex.Civ.App.—Houston 1965, no writ).

[16] [17] Judwin alleges in its counterclaim that Griggs disclosed confidential and privileged information concerning Griggs' representation of Judwin in the

chlordane lawsuits, and this breached the fiduciary relationship. A transaction is unfair if the fiduciary significantly benefits from it at the expense of the beneficiary as viewed in light of circumstances existing at the time of the transaction. *Miller v. Miller,* 700 S.W.2d 941, 947 (Tex.App.—Dallas 1985, writ ref'd n.r.e.). When an attorney has stolen or used the interest to the detriment of his client, the plaintiff need not prove causation for breach of fiduciary duty. *Kinzbach Tool Co. v. Corbett–Wallace Corp.,* 138 Tex. 565, 160 S.W.2d 509, 514 (1942). However, Judwin does not allege or even suggest that Griggs has stolen its interests. Nor do the alleged acts indicate any unfairness or deception in Griggs' use of the information. Judwin's claim is essentially for improper disclosure of confidential information; therefore it is couched entirely in legal malpractice. The breach of implied warranty claim fails as a matter of law.

Negligence and Gross Negligence

[18] [19] We are left with Judwin's claims for negligence (legal malpractice) and gross negligence. An attorney malpractice action in Texas is based upon negligence and requires proof of four well-known elements: (1) the existence of a duty; (2) the breach of that duty; (3) that the breach was a proximate cause of damages; and (4) that the plaintiff was damaged. *Cosgrove v. Grimes,* 774 S.W.2d 662, 665 (Tex.1989). The law requires a necessary showing of a causal relation between the act complained of and the injury sustained. *Brown v. Edwards Transfer Co.,* 764 S.W.2d 220, 223–24 (Tex.1988). Recovery of fees paid to an attorney may be appropriate when his or her negligence rendered the services of no value. *Cf. Yarbrough v. Cooper,* 559 S.W.2d 917, 920–21 (Tex.App.—Houston [14th Dist.] 1977, writ ref'd) (holding when client's reliance on attorney's advice caused him not to seek advice elsewhere, attorney was liable for entire tax liability at issue because attorney's decision destroyed client's opportunity to make money).

[20] We hold that the summary judgment evidence was insufficient to show as a matter of law that Griggs conclusively negated the element of damages. Griggs argues that Judwin neither showed how Griggs' actions caused it damages, nor did it show what damages, if any, it sustained. However, we disagree. In viewing the evidence in a light most favorable to the nonmovant, we hold that Judwin's supplemental answers to Griggs' interrogatories and Judwin's summary judgment affidavit establish a fact issue as to damages.

First, in its answers to interrogatories 9 and 10, Judwin asserts, "Judwin claims present damages in the amount of $5,000,000.00." Second, in its response to summary judgment, Judwin provided proof in the form of an affidavit from its president, Jerold Winograd, to demonstrate that a material fact issue existed on the element of damages for each of Judwin's causes of action. The affidavit reads:

> 1. My name is Jerold Winograd. I am over the age of eighteen and otherwise fully competent to make this affidavit under the laws of the State of Texas. I am the President of Judwin Properties, Inc (Judwin), and as such, I have personal knowledge of the facts stated in this affidavit.
>
> 2. There have been in excess of 700 plaintiffs who have sued Judwin alleging exposure to chlordane. Griggs and Harrison represented Judwin in these lawsuits until 1993, when Judwin retained other counsel.
>
> 3. *G & H has been paid approximately $928,690.62 (by Judwin) in attorney's fees to compensate G & H for its representation of Judwin in the chlordane litigation.*
>
> 4. I have reviewed the statements for legal services attached to the Original Petition filed by G & H in this litigation. The statements contain confidential and privileged information and disclose certain aspects of Judwin's litigation strategy in the chlordane lawsuits. Judwin never authorized G & H to disclose the confidential ***508** and privileged information in the statements.
>
> 5. Inasmuch as G & H's statements are now public record available for inspection by parties adverse to Judwin in the chlordane lawsuits, *Judwin's litigation posture in the chlordane litigation has been damaged.*
>
> 6. The confidential information contained in the fee statements improperly disclosed by G & H *has resulted in increased costs of both defense and settlement of the existing chlordane cases.*

(Emphasis added.) Although Griggs argues Judwin merely speculated as to the mere existence of damages, we find that both the interrogatories and the affidavit assert a "present damages" amount of $5,000,000.00. Griggs has not presented any other evidence to either counter the amount asserted or to show that Griggs did not cause or could not have caused damages to Judwin. We hold that Griggs did not show conclusively that Judwin did not sustain damages, and as such, a fact issue remains as to damages.

We sustain Judwin's second point of error as to the causes of action of negligence and gross negligence, and overrule Judwin's point of error as to the causes of action of

breach of contract, breach of implied warranty, and breach of fiduciary duty.

We reverse the summary judgment on the claims of negligence and gross negligence and remand the case to the trial court. We affirm the judgment of the trial court on the claims of breach of contract, breach of implied warranty, and breach of fiduciary duty.

Footnotes

1 Because Judwin maintained throughout the lawsuit that Reliance was obligated for the payment of the legal fees, Griggs sued Reliance, as well, as a third party beneficiary of the Judwin/Reliance insurance contract. Griggs settled with and dismissed its claims against Reliance, and contemporaneously dismissed its action against Judwin. The only claim that remained at issue was Judwin's counterclaim against Griggs. Accordingly, Reliance is not a party to this suit.

2 As a result of Judwin's counterclaim, Griggs becomes a counter-defendant, and therefore the "defendant" burden of proof for summary judgments applies.

End of Document

EXHIBIT 5

274 S.W.3d 111
Court of Appeals of Texas,
Houston (1st Dist.).

Anthony AUTHORLEE, Dexter Burnett, Robert Derousselle, John Henry Young, Jerome Stubblefield, and Floyd Moran, Appellants,
v.
TUBOSCOPE VETCO INTERNATIONAL, INC., AMF Incorporated, and Minstar, Inc., Appellees.

No. 01–06–00719–CV. | Aug. 28, 2008. | Dissenting Opinion Oct. 2, 2008. | Rehearing Overruled Oct. 7, 2008.

Synopsis

Background: After agreed judgment on settlement was entered with respect to employees' suit against employers, in which employees had sought damages for injuries they alleged were caused by their occupational exposure to silica while working for employers, employees hired new counsel and filed motion to retain and sever their claims, which motion was granted. Thereafter, employees filed suit against their former trial attorneys and employer, alleging that their former attorneys fraudulently induced them to enter into an impermissible aggregate settlement and that attorneys and employers conspired in that process. Employees filed motion for new trial, arguing that settlement agreement was void. The 295th District Court, Harris County, Tracy Christopher, J., denied motion. Employees appealed.

Holdings: The Court of Appeals, Sam Nuchia, J., held that:
[1] employees did not rely on any statements by employers or on contents of settlement agreement that allegedly contained false statements or omissions, as necessary for them to establish that employers committed fraud;
[2] no cause of action existed against employees' former trial counsel or employers for allegedly colluding or conspiring with each other to commit fraud on employees; and
[3] settlement agreements were not aggregate settlements.

Affirmed.

Evelyn V. Keyes, J., dissented, with opinion.

West Headnotes (9)

[1] Appeal and Error
Nature and Extent of Discretionary Power

Trial court has no discretion in determining what the law is or applying the law to the facts.

[2] Appeal and Error
Abuse of discretion

A clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in appellate reversal.

[3] Appeal and Error
On consent, offer, or admission
Judgment
Judgment by confession or on consent or offer

In general, a party may not appeal from or attack a judgment to which he has agreed, absent allegation and proof of fraud, misrepresentation, or collusion.

1 Cases that cite this headnote

[4] Fraud
Reliance on Representations and Inducement to Act

Employees, who had entered into settlement agreement with employers in mass tort case, in which they alleged they were caused injuries due to their occupational exposure to silica while working for employers, did not rely on

any statements by employers or on contents of settlement agreement that allegedly contained false statements or omissions, as necessary for them to establish that employers committed fraud by inserting false statements in settlement documents to protect employees' trial counsel from divulging aggregate settlement to them.

1 Cases that cite this headnote

[5] Fraud
Elements of Actual Fraud

The elements of fraud are that: (1) a material representation was made, (2) the representation was false, (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion, (4) the speaker made the representation with the intent that the other party should act upon it, (5) the party acted in reliance on the representation, and (6) the party thereby suffered injury.

[6] Attorney and Client
Fraud
Conspiracy
Persons Liable

No cause of action existed against employees' former trial counsel or employers for allegedly colluding or conspiring with each other to commit fraud on employees, who had entered into settlement agreement with employers in mass tort case, in which they alleged they were caused injuries due to their occupational exposure to silica while working for employers, as all actions of employees' former trial counsel were in connection with settlement of a lawsuit.

[7] Attorney and Client
Duties and liabilities to adverse parties and to third persons

It is the type of conduct in which the attorney engages, not whether it was meritorious in the underlying lawsuit, that governs a party's right to recovery against an adversary's former attorney.

[8] Attorney and Client
Miscellaneous particular acts or omissions

Settlement agreements entered into by employees and employers in mass tort case in which employees alleged they were caused injuries due to their occupational exposure to silica while working for employers were not "aggregate settlements," for purposes of disciplinary rule of professional conduct prohibiting undisclosed aggregate settlements, as employees, through their trial attorneys, had numerous and lengthy discussions regarding individual cases as well as similarities and differences among various cases, and, in employees' authorizations to settle, each employee acknowledged that his claim was negotiated with other similar claims. State Bar Rules, V.T.C.A., Government Code Title 2, Subtitle G App. A, Art. 10, § 9, Rules of Prof.Conduct, Rule 1.08(f).

[9] Attorney and Client
Miscellaneous particular acts or omissions

An "aggregate settlement," for purposes of disciplinary rule of professional conduct prohibiting undisclosed aggregate settlements, occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client. State Bar Rules, V.T.C.A., Government Code Title 2, Subtitle G App. A, Art. 10, § 9, Rules of Prof.Conduct, Rule 1.08(f).

Attorneys and Law Firms

***112** William J. Skepnek, Skepnek, Fagan, Meyer & Davis, P.A., Lawrence, KS, Steven Smoot, Smoot Law Firm, P.C., Frank W. Mitchell, Frank W. Mitchell & Associates, LLP, Houston, for appellants.

Philip T. Bruns, Jeffrey C. Kubin, Laura Hanley Carlock, Gibbs & Bruns, L.L.P., Troy Ray Ford, Andrea Jean Irey Paterson, Beck, Redden & Secrest, L.L.P., Houston, for appellees.

Panel consists of Justices NUCHIA, KEYES, and HIGLEY.

Opinion

OPINION

SAM NUCHIA, Justice.

In six issues, appellants, who were settling plaintiffs in the underlying lawsuit, ***113** seek to overturn the trial court's denial of their motion for new trial. Appellants argue here, as they did in the trial court, that their agreed judgment should be set aside as "void as against public policy" because their trial lawyers did not tell them it was an aggregate settlement and because their trial lawyers, along with the appellees, committed fraud.

We affirm.

BACKGROUND

History

This is a dispute about the propriety of settlements in a mass tort case. Before the lawsuit at issue in this appeal, appellants' trial attorney, Shelton Smith, had represented other plaintiffs in silicosis cases against appellees, the "AMF defendants," establishing a course of conduct for negotiating and resolving these claims with Daniel Shank, counsel for the AMF defendants. This course of conduct included evaluating the merits of each plaintiff's case based on work history, medical diagnosis and impairment, and other factors that might have impacted the outcome at trial. In those prior 40 lawsuits, Smith had recovered about $40 million in settlements for his clients.

Initial Settlement Negotiations

Appellants were among 176 plaintiffs who sued Tuboscope Vetco International, Inc., AMF, Inc., and Minstar, Inc., along with other defendants, for injuries they alleged were caused by their occupational exposure to silica while working for AMF Tuboscope in Midland, Texas. In January 1999, appellants' trial attorneys, Shelton Smith and Scott Hooper, approached appellees with vague, initial settlement demands. In one letter, Smith wrote:

> I am presently representing 55 former AMF Tuboscope sandblasters who suffer from silicosis or mixed dust pneumonoconiosis as a result of their employment at Tuboscope. Each of these 55 men has a serious occupational lung disease....
>
> As of this date, I have filed 25 lawsuits against AMF, Inc. The other 30 diagnosed cases are ready to be filed. There may be more....

From January through May, Smith and Hooper had a series of conversations—in person, by telephone, and by mail—with Daniel Shank, counsel for the AMF Defendants. They spoke about factors that would be involved in any settlement. Shank proposed, on behalf of his clients and their insurers, that all of Smith's silicosis claims be settled at one time, using the term "global" in several communications. Shank wrote:

> At this point in time, my client and its insurers are not interested in negotiating a settlement in individual cases on a case-by-case basis. Furthermore, my client and its [insurance] carriers are not interested in negotiating a resolution of cases on a subgroup basis. However, my client and its carriers are interested in a global settlement proposal. Accordingly, if you wish to resolve these cases, I would suggest that you proceed with preparing a global settlement proposal.... If the parties seem reasonably in contact with each other, then it may be appropriate for all parties to proceed with a global mediation....
>
> To the extent that my client and its insurers are not able to proceed with a global resolution of these matters, please be advised that my client and its insurers are not interested at this time in negotiating settlements on a piecemeal, case by case or subgroup basis. Rather, they would prefer pursuing a global approach without being

distracted by piecemeal or subgroup negotiations.

***114** Shank later testified that he and his clients were interested only in a global resolution to ensure that cases with similar liability and damages would settle for similar amounts. He said, "We were dealing with the strategy where he would hitch his wagon to a highly valued case and then later on we would be fighting about whether or not an apple is an apple or an apple is an orange."

Preparing for Mediation

The parties agreed to go to mediation in July. Before mediation, Shank suggested that they evaluate the first 21 cases to determine a method for resolving Smith's inventory of claims. Shank suggested this because he had more information on those 21 plaintiffs than on the other plaintiffs: they had deposed the plaintiffs, reviewed their medical records, and obtained "defense IMEs."[1] In addition, Smith sent Shank several boxes full of information about individual plaintiffs, including information on all the appellants. However, only some plaintiffs had complete case evaluations, including diagnosing medical reports and social security records verifying employment at AMF Tuboscope. For example, only summaries but no medical reports were available for Anthony Authorlee.

Smith also contacted his clients before mediation. In a June 30, 1999 letter, Smith told his clients, "There are very important events in July regarding your AMF Tuboscope case." He invited about half of the plaintiffs to a meeting to provide details about the upcoming mediation and stressed the importance of attending the meeting. With the invitation, Smith sent a report with questions and answers about the status of the litigation. In this report, Smith explained:

> We have a mediation scheduled for the second week of July. This is a negotiation session where we will meet with attorneys and insurance representatives for AMF and discuss settlement possibilities for our AMF clients. Your case could potentially be discussed at this three day session.
>
> To prepare for the possibility of discussing your case, we have computerized a large amount of information about you. Some of that information is printed on the Client Information Sheet. *We need you to review that information right now.*
>
> ...
>
> We know you have questions. But with the AMF mediation a few days away and since we represent more than 300 AMF clients, we simply cannot provide our typical personalized service for the next two weeks. We need to focus all of our attention on preparing for this session with the AMF attorneys.
>
> ...
>
> NO ONE ELSE EXCEPT YOU AND YOUR SPOUSE MAY ATTEND. THIS WILL BE A MEETING PROTECTED BY ATTORNEY–CLIENT PRIVILEGE, NO FRIENDS OR OTHER PERSONS MAY ATTEND.
>
> ...
>
> A very detailed overview of the AMF cases will be presented. Shelton Smith is your lead attorney who has successfully pursued cases against AMF for 15 years. He will be reviewing the current situation and will be discussing details of your case. Shelton has settled more than 40 cases against AMF.

***115** ...

> Because of space limitations, we are only meeting with about half our clients on July 10. Another meeting or meetings will be held this summer for the rest of our clients. ONLY THOSE CLIENTS WITH AN INVITATION LETTER SHOULD ATTEND THE MEETING.
>
> ...
>
> Though it is possible that some of these cases could be resolved soon, nothing is certain. Anything could happen. It is possible that a reasonable solution involving your case may not be resolved for months or possibly even years.
>
> ...
>
> The upcoming mediation will be the first time we have discussed the *possibility* of resolving all of our AMF cases with the AMF lawyers. But there is ABSOLUTELY NO GUARANTEE THAT ANY PROGRESS WILL BE MADE. We will know more in two weeks.

Mediation

According to Shank, several plaintiffs as well as representatives of appellees' lead insurance carriers attended the mediation. The attorneys spent the first few days trying to agree on what criteria to use to establish the value of each plaintiff's claim. For example, Smith had a

matrix in which he had ranked the relative value of each plaintiff's claim based on factors like: (1) length of exposure to silica while working at the Tuboscope plant, (2) age, (3) marital status, (4) number and age of children, (5) severity of diagnosis and whether the diagnosis was made by a doctor that the AMF defendants respected, (6) prior drug use, and other factors that may have influenced a jury verdict at trial. On the other hand, appellees had their own matrix, and they wanted to focus on exposure dates, pulmonary function test results, and impairment ratings.

Smith would not agree to appellees' criteria. He later testified that most of his clients were not symptomatic, "[V]ery few of these men ever—ever had a complaint about a pulmonary problem. Very few, very few ever saw a doctor for one or had any kind of treatment." He testified that at least one appellant's case would have been "valueless" had he agreed to appellees' settlement criteria.[2]

Both Smith and Hooper stated that they did not discuss appellants' individual cases during the mediation. Smith testified that they discussed a few cases individually as a means of reality testing the effect of the criteria each side proposed. Smith testified that they did not discuss settling any particular plaintiff's case during the first few days of the mediation. Scott Hooper testified that he was not aware of any individual negotiation for Anthony Authorlee. Smith also said that at least twenty additional plaintiffs were added to the litigation after the mediation.

Shank also testified that he understood that they were discussing not just the 150 or so positively diagnosed plaintiffs and that there would be additional plaintiffs added to the group prior to settlement. He said that there were some offers made during the mediation, "I think there were matrix predicated conditional offers made ***116** because obviously we had to get carrier approval ... there were discussions involving numbers and matrixes, and I believe we floated some of those with an actual number...."

Most notably, however, Shank testified that he had no settlement authority at the mediation. He said he could only agree to a framework for settlement, saying, "I was making proposals that I would recommend to my clients...." Shank explained that over the period for which liability may exist for AMF Tuboscope, roughly from 1961 to 1986, when the plants stopped using silica, there were numerous different insurance policies issued to AMF Tuboscope by different carriers. Shank explained that he was not "coverage counsel" for the AMF defendants and that other lawyers were responsible for allocations among the various insurance carriers depending on the facts of a particular case. He testified that before any settlement could be funded, coverage counsel for the AMF defendants would establish where and when the diagnosed individual plaintiff worked and in what job function (*i.e.,* a job that exposed him to silica or not) based on Social Security records and AMF Tuboscope personnel records. Using this information, coverage counsel would allocate responsibility in order to seek coverage from the insurance carriers. Shank said that seven to fifteen separate carriers might be involved in an individual settlement and different layers of insurance may also be involved. Therefore, each settlement had to be done individually.

After several days of fruitless mediation about which factors should be used to value the plaintiffs' claims, they switched gears and decided to talk about a total amount of money needed to resolve all the claims at one time. Appellees' attorney agreed that so long as the individual demands did not exceed $45 million, he would recommend to his clients and their many insurance carriers to settle the claims, but only if 95% of Smith's clients agreed.[3] They signed a Rule 11 agreement memorializing their understanding, although the Rule 11 agreement did not include the $45 million figure—or *any* sum of money—for settling Smith's inventory of claims.

Post–Mediation Negotiations and Settlement Agreements

After the mediation, appellants' attorneys recalculated the settlement amounts for each plaintiff, including about twenty plaintiffs who were diagnosed with silicosis after the mediation. Smith then sent each appellant a letter detailing an offer of settlement, based on the numbers he calculated using his matrix. The letters were substantially the same, except for the settlement amounts, which, for the appellants, ranged from $209,000 to $662,000, and which were characterized as a "final offer" made by defendants.[4] All but one or two plaintiffs of the 178 or 179 pending claims agreed to settle.

In early August, each appellant signed an authorization to settle, which specifically acknowledged that each appellant's claim was negotiated with other similar claims but was not part of an aggregate settlement. After each appellant signed the authorization to settle, appellant's attorneys forwarded an individual, formal ***117** demand letter to appellees, which appellees could accept or reject. From mid-September through mid-October, appellees accepted all but one demand, at one point asking for additional time to review certain plaintiffs' settlement demands.

In late October, before the settlements actually closed,

Hooper wrote to Shank, requesting certain additions and revisions to the Settlement Agreements, including the addition of the following language:

> This Agreement supersedes all previous agreements, written or oral. Plaintiff and Defendants have been involved in lengthy settlement negotiations, involving a variety of settlement offers, and proposals. This agreement reflects the final settlement offer made by the Defendants and accepted by the Plaintiff. Any and all previous settlement offers, by either party, are hereby revoked.
>
> Defendants' payment of the settlement amounts stated herein are [sic] independent of its agreement to make payments to other plaintiffs in the same or related lawsuits. Plaintiff and Defendants have negotiated this settlement based upon the individual merits of the Plaintiff's claims. Defendants have not made any aggregate settlement offer and this settlement is not part of any aggregate settlement.
>
> Nothing in this Agreement shall be construed as a release, discharge, settlement or compromise of Plaintiff's right to pursue Workers' Compensation benefits.
>
> The release, settlement, assignment and indemnity of claims stated in this Agreement do not apply to Plaintiff's claims against [the non-settling defendants].

This language was inserted verbatim, and Shank later testified by affidavit, "This language was drafted by Plaintiffs' attorneys and was inserted into the Settlement Agreements without change at their request. Defendants did not seek to include, draft, or edit this language."

In November, each appellant signed a Settlement, Indemnity and Release agreement and an affidavit that stated each had relied on his lawyer's legal advice. Later that month, the 129th District Court granted the 177 settling plaintiffs' motion to consolidate their cases.[5] In December, the trial court entered an agreed judgment on the settlement.

Appellants Hire New Counsel

In 2002, four appellants and eleven other settling plaintiffs terminated their attorney-client relationship with Shelton Smith & Associates, engaged Robins, Cloud, Greenwood & Lubel, LLP, and moved to retain and sever their claims, which were set to be dismissed for want of prosecution. The court granted their motion. In 2004, all six appellants sued their trial attorneys, Smith and Hooper, and the appellees, alleging that Smith fraudulently induced them to enter into an impermissible aggregate settlement and that appellees conspired in that process.

The Motion for New Trial

In May 2006, more than six years after the entry of the agreed judgment in appellants' silicosis cases, the trial court severed appellants' claims, making the agreed judgment final as to them. Appellants then filed a motion for new trial, arguing that: (1) the settlement agreements were void because they violated the aggregate settlement rule in the Texas Rules of Professional Conduct, and therefore, the ***118** agreed judgment was also void; (2) Tuboscope Vetco, AMF, and Minstar committed actual fraud in connection with the settlements; and/or (3) Tuboscope Vetco, AMF, and Minstar conspired to commit fraud with appellants' trial counsel in connection with the settlements.

Trial Court Denies Motion for New Trial

Two months later, the trial court[6] denied appellants' motion for new trial. The trial court's order denying the motion for new trial included significant findings of fact and conclusions of law. First, the trial court found that appellants' trial attorney "violated Rule 1.08(f) of the Texas Disciplinary Rules, the 'aggregate settlement rule.' " However, the trial court concluded that such violation did not void the agreed judgment. Next, the trial court concluded that there was no actual fraud committed by appellees because appellants could not prove reliance and because it is "unreasonable for a person to rely on statements of the opposing party in settling litigation."[7] Finally, the trial court concluded that "there can be no conspiracy to commit fraud in the litigation setting."

Appeal

Appellants challenge the trial court's denial of their motion for new trial with six issues on appeal:

> (1) Did the trial court correctly find that there was an aggregate settlement between the AMF defendants and the original six plaintiffs that sued them?
>
> (2) Are undisclosed aggregate settlements void as a matter of public policy?
>
> (3) If undisclosed aggregate settlements are void as a matter of public policy, are they nevertheless enforceable by defendants that enter into them with the knowledge that the Plaintiffs' lawyers have

deceived their clients about the character of the settlement?

(4) If undisclosed aggregate settlements are void as a matter of public policy, are they nevertheless enforceable by defendants who collude with Plaintiffs' counsel and allow the Plaintiffs' lawyers to deceive their clients about the character of the settlement?

(5) If undisclosed aggregate settlements are void as a matter of public policy, are they nevertheless enforceable by defendants who knowingly include false representations in settlement agreements prepared by defendants?

(6) Does a defendant have a duty to provide all material information about the true nature of a settlement once he voluntarily includes misleading representations about the nature of the settlement in his settlement papers? If a defendant breaches such a duty and thereafter secures a settlement, should such a settlement and agreed judgment be set aside as a matter of law?

Motion for New Trial

[1] [2] We review a trial court's denial of a motion for new trial for abuse of discretion. *Jackson v. Van Winkle,* 660 S.W.2d 807, 809 (Tex.1983), *overruled on other grounds by Moritz v. Preiss,* 121 S.W.3d 715, 720–21 (Tex.2003). With respect to determination of the facts, we will ***119** not substitute our judgment for that of the trial court. *Walker v. Packer,* 827 S.W.2d 833, 839 (Tex.1992). Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless the decision is shown to be arbitrary and unreasonable. *Id.* at 840. On the other hand, review of a trial court's determination of the legal principles controlling its ruling is much less deferential. *Id.* A trial court has no discretion in determining what the law is or applying the law to the facts. *Id.* Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in appellate reversal. *Id.*

Agreed Judgment

[3] In general, a party may not appeal from or attack a judgment to which he has agreed, absent allegation and proof of fraud, misrepresentation, or collusion. *Henke v. Peoples State Bank of Hallettsville,* 6 S.W.3d 717, 720 (Tex.App.-Corpus Christi 1999, pet dism'd w.o.j.); *Bexar County Criminal Dist. Attorney's Office v. Mayo,* 773 S.W.2d 642, 644 (Tex.App.-San Antonio 1989, no writ); *Gillum v. Republic Health Corp.,* 778 S.W.2d 558, 562 (Tex.App.-Dallas 1989, no writ); *Charalambous v. Jean Lafitte Corp.,* 652 S.W.2d 521, 525 (Tex.App.-El Paso 1983, writ ref'd n.r.e.). Therefore, absent allegation and proof of fraud, misrepresentation, or collusion, appellants would not be entitled to a new trial.

Fraud

[4] Appellants argue that "AMF's lawyers knowingly agreed to insert false statements in the settlement documents to protect Smith and Hooper from divulging the aggregate settlement to their clients." The allegedly false statements were:

> Defendants' payment of the settlement amounts stated herein are independent of its agreement to make payments to other plaintiffs in the same or related lawsuits. Plaintiff and Defendants have negotiated this settlement based upon the individual merits of the Plaintiff's claims. Defendants have not made any aggregate settlement offer and this settlement is not part of any aggregate settlement.

[5] The elements of fraud are that: (1) a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *In re FirstMerit Bank, N.A.,* 52 S.W.3d 749, 758 (Tex.2001) (orig.proceeding) (citing *Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc.,* 960 S.W.2d 41, 47 (Tex.1998)). As the trial court noted, "A crucial element to a fraud cause of action is reliance. Appellants all testified that they did not rely on any statements by appellees or on the contents of the settlement agreement with the alleged false statements or omissions." In fact, in their brief, appellants expressly concede that they did not rely on any statements by appellees or on the contents of the settlement agreement with the alleged false statements or omissions.

The trial court found that appellees did not commit actual fraud. We cannot say the trial court erred in so doing. Therefore, we hold that the trial court did not abuse its discretion by denying the motion for new trial on this basis. Because we construe appellants' issues 5 and 6 as relating to their allegations that appellees ***120** committed fraud, we overrule issues 5 and 6.

Conspiracy to Commit Fraud or Collusion

[6] Similarly, we construe appellants' issues 3 and 4 as their argument that the trial court erred by denying the motion for new trial because appellees allegedly colluded with or conspired with appellants' trial counsel to commit fraud on appellants. The trial court held, "[T]here can be no conspiracy to commit fraud in the litigation setting." We agree.

In *Bradt v. West,* we found no cause of action by one attorney against his former adversary for litigation conduct. 892 S.W.2d 56, 71–2 (Tex.App.—Houston [1st Dist.] 1994, writ denied). We noted that an attorney must zealously represent his clients within the bounds of the law because "the public has an interest in 'loyal, faithful and aggressive representation by the legal profession.' " *Id.* at 71 (citing *Maynard v. Caballero,* 752 S.W.2d 719, 721 (Tex.App.-El Paso 1988, writ denied)).

[7] Finding no private cause of action for litigation conduct, we opined:

> An attorney should not go into court knowing that he may be sued by the other side's attorney for something he does in the course of representing his client; such a policy would favor *tentative* representation, not the *zealous* representation that our profession rightly regards as an ideal and that the public has a right to expect. That policy would dilute the vigor with which Texas attorneys represent their clients, which would not be in the best interests of justice.

Id. at 72. Moreover, we explicitly noted that unmeritorious litigation conduct could properly be the subject of sanctions, not a private cause of action. *Id.* Other courts have agreed that it is the type of conduct in which the attorney engages, not whether it was meritorious in the underlying lawsuit that governs a party's right to recovery against an adversary's former attorney. *See Taco Bell Corp. v. Cracken,* 939 F.Supp. 528, 532 (N.D.Tex.1996); *Chapman Children's Trust v. Porter & Hedges,* 32 S.W.3d 429, 440 (Tex.App.—Houston [14th Dist.] 2000, pet. denied).

Here the trial court noted, "All of the actions of the defendants were in connection with the settlement of a lawsuit." We cannot say the trial court abused its discretion in denying the motion for new trial on this basis. We overrule appellants' issues 3 and 4.

Aggregate Settlements

[8] Finally, as an alternative to fraud, collusion, or conspiracy to commit fraud, appellants argue that the settlement agreements and, therefore, the agreed judgment are void because the settlement agreements were undisclosed aggregate settlements and, as such, were void as against public policy. We disagree.

[9] An aggregate settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client. *Arce v. Burrow,* 958 S.W.2d 239, 245 (Tex.App.—Houston [14th Dist.] 1997) reversed in part on other grounds, *Burrow v. Arce,* 997 S.W.2d 229, 247 (Tex.1999); *see Scrivner v. Hobson,* 854 S.W.2d 148, 152 (Tex.App.—Houston [1st Dist.] 1993, orig. proceeding). The Texas Disciplinary Rules of Professional Conduct prohibit only *undisclosed* aggregate settlements.

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients ... unless each client has consented after consultation, including ***121** disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(f) (1991), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Pamph. 1997) (State Bar R. art. X, § 9).

Prior to the settlements, both sides conducted discovery, and they had numerous and lengthy discussions regarding individual cases as well as similarities and differences among the various cases. Moreover, in their authorizations to settle, each appellant acknowledged that

his claim was *negotiated* with other similar claims. Appellants argue, essentially, that there were no specific, individual negotiations during the mediation, and there were not back-and-forth, demand-and-offer discussions after the mediation regarding their settlements. We find no authority—and they do not direct us to any—that proscribes the manner in which negotiations must occur or that requires haggling or horse-trading between the parties. After the mediation, appellants made settlement demands on appellees, based on factors specific to each of their claims, and appellees accepted their demands and paid them. This *is* the essence of negotiation.

Thus, there were individual negotiations on behalf of appellants. The Rule 11 agreement did not actually settle any case, let alone all of the cases as an aggregate settlement. No amount of money was stated in the Rule 11 agreement, and, indeed, the Rule 11 agreement did not bind the defendants to a lump sum to be paid to the plaintiffs' lawyers and divided among his clients. Shank testified that he had no settlement authority at the mediation. Later, appellees rejected one plaintiff's settlement demand.

In addition, as Shank explained in his deposition, each appellant's case was settled individually, after a lengthy negotiation process involving individual offers and acceptances. Shank explained that each settlement *had to be* negotiated individually in order to determine issues of insurance coverage and allocation. Therefore, we hold that the trial court erred in concluding that the settlements here were aggregate settlements. We overrule appellants' first issue. Because we conclude that the settlements at issue in this case were not aggregate settlements, we decline to address appellants' second issue, which asks whether undisclosed aggregate settlements are void as against public policy.

Conclusion

We affirm the judgment of the trial court.

Justice KEYES, dissenting.

EVELYN V. KEYES, Justice, dissenting.

I withdraw my dissent that issued on August 28, 2008 and substitute the following opinion in its stead.

I respectfully dissent. Appellants are mass tort plaintiffs. In six issues, they argue, as they did in the trial court, that their individual settlement agreements are part of an undisclosed aggregate settlement agreement reflected in the agreed judgment and that both their individual settlement agreements and the agreed judgment are "void as against public policy" and should be set aside and a new trial ordered. Appellants contend the settlement agreement is void (1) because their trial counsel induced them to accept the aggregate settlement without disclosing that it was an aggregate settlement, without disclosing the existence and nature of all the claims involved in the aggregate ***122** settlement, and without disclosing the nature and extent of the participation of each person in the settlement, in violation of Texas Disciplinary Rule of Professional Conduct 1.08(f) and (2) because appellees, defendants at trial, conspired with appellants' trial counsel to defraud appellants by making material misrepresentations and omissions regarding the nature of the negotiations and the settlement, both in the agreed judgment and in the settlement documents appellees drafted and that were presented to each plaintiff to secure his agreement to the agreed judgment. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(f) (1991), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

I agree with appellants. I would hold that their individual settlement agreements and the agreed judgment are void as against public policy and must be set aside. Therefore, I would reverse the case and remand to the trial court for a new trial.

BACKGROUND

Appellants were among over a hundred plaintiffs who brought several different suits against Tuboscope Vetco International, Inc., AMF, Inc., and Minstar, Inc., in 1998, along with other defendants, for injuries allegedly caused by their occupational exposure to silicosis while working for AMF Tuboscope in Midland, Texas.

In January 1999, appellants' trial attorneys, Shelton Smith and Scott Hooper, approached the appellees with settlement demands. In one letter, Smith wrote:

> I am presently representing 55 former AMF Tuboscope sandblasters who suffer from silicosis or mixed dust pneumonoconiosis as a result of their employment at Tuboscope. Each of these 55 men has a serious occupational lung disease....
>
> As of this date, I have filed 25 lawsuits against AMF,

> Inc. The other 30 diagnosed cases are ready to be filed. There may be more....

Appellees' trial counsel questioned the diagnoses and the expertise of the diagnosing doctor, referred to prior settlements, and suggested a "global meeting" to discuss settlements in these cases.[1] About a month later, appellees' counsel again wrote to appellants' counsel, indicating, *inter alia,* that, "[a]t this point in time, my client and its insurers are not interested in negotiating a settlement in individual cases on a case-by-case basis" or "on a subgroup basis." Rather, "my client and its carriers are interested in a global settlement proposal. Accordingly, if you wish to resolve these cases, I would suggest that you proceed with preparing a global settlement proposal.... If the parties seem reasonably in contact with each other, then it may be appropriate for all parties to proceed with a global mediation...." Appellees' counsel further indicated that "[t]o the extent that my client and its insurers are not able to proceed with a global resolution of these matters, ... that my client and its insurers are not interested at this time in negotiating settlements on a piecemeal, case by case or subgroup basis."

Shortly thereafter, the parties went to mediation. About half of the plaintiffs were invited and told their cases might be discussed, and a few attended. They were instructed not to bring anyone else. Appellants' former counsel, Smith, later testified ***123** that his goal had been to settle all the claims for about $25 million. At mediation, each side had different criteria it wished to use to establish the value of each plaintiff's claim. The parties discussed a few cases individually as a means of reality testing the effect of the matrix criteria each side proposed, but they did not discuss settling the individual claim of any particular plaintiff.

After several days of mediation, appellees' attorney told the plaintiffs' counsel, Smith, that so long as the individual demands did not exceed $45 million he would recommend to his clients and their insurance carriers to settle the claims, but only if 95% of Smith's clients agreed. Smith agreed, and plaintiffs' and defendants' attorneys signed a Rule 11 agreement memorializing their understanding. At least twenty additional plaintiffs were added to the litigation after the mediation. Appellants then recalculated the settlement amounts for each plaintiff.

After the mediation, Smith sent each appellant a letter detailing an offer of settlement, based on numbers he had calculated using his matrix. The letters were substantially the same, except for the settlement amounts. The letters stated, in part:

> I, [name of client], understand and acknowledge that my attorney, Shelton Smith, has fully and completely investigated my claim for damages arising from my occupational lung disease.
>
> I understand and acknowledge that my attorney, Shelton Smith, has adequately, fully and competently worked up and prepared my claim for damages arising from my occupational lung disease.
>
> I understand and acknowledge that my claim was negotiated individually and not as part of any aggregate settlement.
>
> I understand and acknowledge that the AMF Defendants have made a final offer of $[spreadsheet figure for the client] to fully and finally compromise and settle all my claims against the AMF defendants.
>
> I understand and acknowledge that my attorney, Shelton Smith, has recommended and advised me to accept this settlement and that it is in the best [interest] of myself and my family to accept this settlement.

The settlement offers stated in the letters ranged from $209,000 to $662,000.[2] All but one or two of the 178 or 179 plaintiffs with pending claims agreed to settle.

To effectuate the settlements, appellee AMF prepared—and each of Smith's 177 settling clients, including each appellant, executed—a Settlement, Indemnity, Assignment and Release Agreement, as well as an affidavit and authorization to settle. Each settlement agreement provided in part:

> Plaintiffs and Defendants have been involved in lengthy settlement negotiations, involving a variety of settlement offers and proposals. This Agreement reflects the final settlement offer made by the Defendants and accepted by Plaintiff.... Defendants' payment of the settlement amounts stated herein are independent of its agreement to make payments to other plaintiffs in the same or related lawsuits. Plaintiff and Defendants have negotiated this settlement based on the individual merits of the Plaintiff's claims. Defendants have not made any aggregate offer and this settlement is not part of any aggregate settlement.

***124** Both appellees' counsel and appellants' former counsel testified that this language was requested by

appellants' former counsel and inserted verbatim into the settlement documents by appellees' counsel.

The settlement documents drafted by AMF's counsel and presented to each plaintiff for his signature included a release of the settling defendants that released "any and all past, present or future claims ... arising out of or in any way connected with any and all claimed injuries allegedly sustained by Plaintiff," any and all claims "arising out of or in any way connected with those claims made by Plaintiff in the above-captioned action," and "any and all claims for bad faith settlement practices which might be asserted against Defendants and/or their insurers." In addition, each settlement agreement and accompanying settlement affidavit prepared by AMF and executed by each plaintiff contained a disclaimer of reliance, which stated:

> C) I have had the benefit of professional advice of attorneys and physicians of my choosing, I am fully satisfied with the advice, and have relied completely upon my own judgment together with that professional advice.

The trial court granted the settling plaintiffs' motion to consolidate their cases. The 80th District Court of Harris County then approved the underlying settlement agreements and found them to be "fair, reasonable, and just" and "in the best interests of the Plaintiffs and Defendants." On December 21, 1999, it entered an agreed judgment on the settlement (the "agreed judgment").

In 2002, four appellants and eleven other settling plaintiffs terminated their attorney-client relationship with Shelton Smith & Associates, engaged Robins, Cloud, Greenwood & Lubel, LLP, and moved to retain and sever their claims. The court granted their motion. In 2004, all six appellants sued Shelton Smith & Associates, and appellees, the settling defendants, alleging that Smith fraudulently induced them to enter into an aggregate settlement and that appellees conspired in that process. On May 8, 2006, the trial court severed appellants' claims, making the agreed judgment final as to them. Appellants then filed a motion for new trial, arguing that: (1) the settlement agreement was void because it violated the aggregate settlement rule in the Texas Rules of Professional Conduct, and, therefore, the agreed judgment was also void; (2) appellees Tuboscope Vetco, AMF, and Minstar committed actual fraud in connection with the settlement; and/or (3) Tuboscope Vetco, AMF, and Minstar conspired to commit fraud with appellants' trial counsel in connection with the settlement.

By order dated July 20, 2006, the trial court denied appellants' motion for new trial and made findings of fact and conclusions of law. The trial court found that appellants' trial attorney "violated Rule 1.08(f) of the Texas Disciplinary Rules, the 'aggregate settlement rule.' " However, relying on the dissent to the denial of the motion for rehearing in *Quintero v. Jim Walter Homes,* the trial court concluded that the violation did not void the agreed judgment. 709 S.W.2d 225, 232–33 (Tex.App.-Corpus Christi 1985, writ ref'd n.r.e.). Next, the trial court stated, "As fact finder, the court finds no actual fraud committed by the defendants in this case."

The court concluded that appellants could not prove reliance and that it is "unreasonable for a person to rely on statements of the opposing party in settling litigation." The court also concluded that "there can be no conspiracy to commit fraud in the litigation setting."

Appellants challenge the trial court's denial of their motion for new trial with six issues on appeal:

> ***125** (1) Did the trial court correctly find that there was an aggregate settlement between the AMF defendants and the original six plaintiffs that sued them?
>
> (2) Are undisclosed aggregate settlements void as a matter of public policy?
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> (3) If undisclosed aggregate settlements are void as a matter of public policy, are they nevertheless enforceable by defendants that enter into them with the knowledge that the Plaintiffs' lawyers have deceived their clients about the character of the settlement?
>
> (4) If undisclosed aggregate settlements are void as a matter of public policy, are they nevertheless enforceable by defendants who collude with Plaintiffs' counsel and allow the Plaintiffs' lawyers to deceive their clients about the character of the settlement?
>
> (5) If undisclosed aggregate settlements are void as a matter of public policy, are they nevertheless enforceable by defendants who knowingly include false representations in settlement agreements prepared by defendants?
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> (6) Does a defendant have a duty to provide all material information about the true nature of a settlement once he voluntarily includes misleading representations about the nature of the settlement in his settlement papers? If a defendant breaches such a duty and thereafter secures a settlement, should such

a settlement and agreed judgment be set aside as a matter of law?

I would consider these issues together.

STANDARD OF REVIEW

Motion for New Trial

We review a trial court's denial of a motion for new trial for abuse of discretion. *In re R.R.,* 209 S.W.3d 112, 114 (Tex.2006) (per curiam). With respect to determination of the facts, we will not substitute our judgment for that of the trial court. *Walker v. Packer,* 827 S.W.2d 833, 839 (Tex.1992). Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable. *Id.* at 840. On the other hand, review of a trial court's determination of the legal principles controlling its ruling is much less deferential. *Id.* A trial court has no "discretion" in determining what the law is or applying the law to the facts. *Id.* Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and it may result in appellate reversal. *Id.*

Agreed Judgment

In general, a party may not appeal from or attack a judgment to which he has agreed, absent allegation and proof of fraud, misrepresentation, or collusion. *Henke v. Peoples State Bank of Hallettsville,* 6 S.W.3d 717, 720 (Tex.App.-Corpus Christi 1999, pet dism'd w.o.j.); *Bexar County Criminal Dist. Attorney's Office v. Mayo,* 773 S.W.2d 642, 644 (Tex.App.-San Antonio 1989, no writ); *Gillum v. Republic Health Corp.,* 778 S.W.2d 558, 562 (Tex.App.-Dallas 1989, no writ); *Charalambous v. Jean Lafitte Corp.,* 652 S.W.2d 521, 525 (Tex.App.-El Paso 1983, writ ref'd n.r.e.).

Fraud and Civil Conspiracy

The elements of fraud are: (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the ***126** other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *In re FirstMerit Bank, N.A.,* 52 S.W.3d 749, 758 (Tex.2001) (orig.proceeding) (citing *Formosa Plastics Corp. v. Presidio Eng'rs. & Contractors, Inc.,* 960 S.W.2d 41, 47 (Tex.1998)). When fraud is used, a release or disclaimer of reliance and subsequent agreed judgment must be set aside regardless of exculpatory language in the release. *See Prudential Ins. Co. v. Jefferson Assocs. Ltd.,* 896 S.W.2d 156, 162 (Tex.1995); *Rodriguez v. Am. Home Assurance Co.,* 735 S.W.2d 241, 242 (Tex.1987); *Kolb v. Tex. Employers' Ins. Ass'n,* 585 S.W.2d 870, 871–72 (Tex.Civ.App.-Texarkana 1979, writ ref'd n.r.e.). The elements of civil conspiracy are (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *See Operation Rescue–Nat'l v. Planned Parenthood,* 975 S.W.2d 546, 553 (Tex.1998).

DISCUSSION

The essential questions raised in appellants' six issues are (1) whether the individual settlement agreements are void as against public policy because the settlement was an undisclosed aggregate settlement that was actively misrepresented to each appellant as an individually negotiated settlement of his own case and, if so, (2) whether the agreed judgment is void and must be set aside. I would hold that the individual settlement agreements and the agreed judgment are void, and I would order that the settlement agreements and the agreed judgment be set aside and new trials granted.

An aggregate settlement occurs when an attorney who represents two or more clients settles the entire case on behalf of those clients without individual negotiations on behalf of any one client. *Arce v. Burrow,* 958 S.W.2d 239, 245 (Tex.App.-Houston [14th Dist.] 1997), *aff'd as modified, Burrow v. Arce,* 997 S.W.2d 229, 247 (Tex.1999); *see Scrivner v. Hobson,* 854 S.W.2d 148, 152 (Tex.App.-Houston [1st Dist.] 1993, orig. proceeding). There is nothing illegal about an aggregate settlement in itself. However, an attorney owes a duty of loyalty and good faith to each client, and, therefore, "it is the ethical duty of an attorney who represents multiple clients to obtain individual settlements for them unless those clients are informed and consent." *Burrow,* 958 S.W.2d at 245. Thus, when an attorney enters into an aggregate settlement without the informed consent of the affected clients, the attorney breaches the fiduciary duty owed those clients. *Id.*

Moreover, the aggregate settlement rule incorporated into

the Texas Disciplinary Rules of Professional Conduct expressly requires full disclosure to each client of "the existence and nature of all the claims or pleas involved" and of "the nature and extent of the participation of each client in the settlement." Specifically, Texas Disciplinary Rules of Professional Conduct, Rule 1.08(f) states:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients ... unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(f).

It is undisputed that, in this case, appellants' counsel violated Rule 1.08(f). The plaintiffs' attorneys not only failed to disclose ***127** to their clients, including appellants, "the existence and nature of all the claims or pleas" involved in the settlement and "the nature and extent of the participation of each person in the settlement," they also actively misrepresented that the settlement was *not* an aggregate settlement when it was, that their claims had been individually negotiated when they had not been, and that the number of claimants was smaller than in fact it was. With only those unrebutted misrepresentations before them, each plaintiff signed an individual settlement agreement and affidavit and authorization of settlement. These individual agreements were then presented to the trial court by the parties and formed the basis of that court's finding that the settlement was fair and its approval of the agreed judgment reflecting the terms of the aggregate settlement. Therefore, appellants' counsel not only violated Rule 1.08(f) and breached their fiduciary duties to their clients, they also committed fraud. *See In re FirstMerit Bank,* 52 S.W.3d at 758 (reciting elements of fraud).

Very importantly, however, the misrepresentations and omissions were not confined to plaintiffs' counsel's representations to their clients. They were also included in the settlement agreements and affidavits prepared by *appellees'* counsel and relied upon and executed by each claimant, including each appellant, in effectuating the settlement. Not only did the Settlement, Indemnity, Assignment and Release Agreement drafted by appellees fail anywhere to state that the individual settlement was part of a negotiated $45 million total recovery for all clients represented by the Smith firm, but the Settlement, Indemnity, Assignment and Release Agreement presented to each plaintiff, including each appellant, to induce that plaintiff's agreement to the aggregate settlement, included the following falsehoods:

- Plaintiffs and Defendants have been involved in lengthy settlement negotiations, involving a variety of settlement offers and proposals.

- Defendants' payment of the settlement amounts stated herein are independent of its agreement to make payments to other plaintiffs in the same or related lawsuits.

- Plaintiff and Defendants have negotiated this settlement based on the individual merits of the Plaintiff's claims.

- Defendants have not made any aggregate offer;

- and this settlement is not part of any aggregate settlement.

Appellants argue that they were fraudulently induced to accept their individual settlements and to sign these documents to effectuate the aggregate settlement and procure the agreed judgment by the misrepresentations of appellees as well as by the omissions and misrepresentations of their own counsel. They urge this court to follow *Quintero v. Jim Walter Homes,* in which the Corpus Christi Court of Appeals set aside an aggregate settlement made in violation of Disciplinary Rule 5–106 as void as against public policy and void and reinstated an individual settlement procured for the Quinteros but not disclosed to them. *See* 709 S.W.2d at 227–30.

Appellees argue that, unlike appellants' former counsel, who had a fiduciary duty to his clients, they had no such duty and only inserted appellants' counsel's representations into the settlement documents without change at the request of appellants' counsel. They also point to the disclaimers of reliance and releases each plaintiff signed and to the plaintiffs' affirmative representations that they relied solely on the advice of their own counsel and on their own judgment in deciding to accept their individual settlements and to ***128** authorize the agreed judgment. Appellees urge the Court to follow the dissent in *Quintero* on motion for rehearing, which would have followed "the established rule that the misconduct of one attorney [the plaintiff's attorney] will not vitiate a settlement agreement so that a litigant is not bound by the agreement." *Id.* at 236 (Benavides, J., dissenting).

The majority accepts the appellees' argument. Relying on the trial court's statement that "[a]ppellants all testified

that they did not rely on any statements by appellees or on the contents of the settlement agreement with the alleged false statements or omissions," and citing appellants' 'concession' in their brief that "they did not rely on any statements by appellees or on the contents of the settlement agreement with the alleged false statements or omissions," the majority reasons that the "[t]he trial court found that appellees did not commit actual fraud" and that "[w]e cannot say the trial court erred in so doing." It, therefore, overrules appellants' fraud claims. *Authorlee v. Tuboscope,* 01–06–00719–CV, Op. at 119 (Tex.App.-Houston [1st Dist.] Aug. 28, 2008, no pet. h.).

The majority likewise agrees with the trial court's legal conclusion that "there can be no conspiracy to commit fraud in the litigation setting." *Id.* at 120. It observes that this Court has previously found "no private cause of action for litigation conduct." *Id.* at 120. Noting that the trial court in this case found that "[a]ll of the actions of the defendants were in connection with the settlement of a lawsuit," the majority again concludes that it "cannot say the trial court abused its discretion in denying the motion for new trial on this basis." *Id.* at 120.

Finally, the majority disagrees that the individual settlement agreements were part of an undisclosed aggregate settlement. *Id.* at 121. It finds, as a matter of fact, that "[p]rior to the settlements, both sides conducted discovery, and they had numerous and lengthy discussions regarding individual cases as well as similarities and differences among the various cases" and that "in their authorizations to settle, each appellant acknowledged that his claim was *negotiated* with other similar claims." *Id.* at 121. Concluding that "there were individual negotiations on behalf of appellants," it holds that "the trial court erred in concluding that the settlements here were aggregate settlements." *Id.* at 121.

The majority does not address *Quintero* or any of the other cases relied on by appellants, and it does not cite any applicable law in support of its legal conclusions or its holding.

Procedurally, I disagree with the majority's application of an abuse of discretion standard to the trial court's legal conclusions that there was no fraud in the settlement agreements and no civil conspiracy in this case. The trial court's conclusions of law are not binding on this Court and are reviewed de novo. *Eller Media Co. v. City of Houston,* 101 S.W.3d 668, 674 (Tex.App.-Houston [1st Dist.] 2003, pet. denied). I likewise disagree with the majority's application of a de novo standard of review to the facts of the case in determining, contrary to the finding of the trial court, that there was no aggregate settlement in this case. *See Walker,* 827 S.W.2d at 839.

On the merits, I disagree with the majority's holding that there is no fraud in this case because there is "no private cause of action for litigation conduct" and with its holding that the trial court erred in concluding that the individual settlements were part of an aggregate settlement.

First, this is not a case where one attorney has sued his adversary. Therefore, I find the majority's statement that there is ***129** no cause of action in such a situation inapplicable to this case and inexplicable. Nor is it the case that defendants cannot be sued for their actions "in connection with the settlement of a lawsuit." *Authorlee,* 01–06–00719–CV, Op. at 120. Indeed, it is well established that they can be. *See, e.g., Quintero,* 709 S.W.2d at 227–30 (voiding aggregate settlement in suit brought by plaintiffs against their own counsel and defendants in underlying litigation); *Schlumberger Tech. Corp. v. Swanson,* 959 S.W.2d 171, 178, 181 (Tex.1997) (holding that misrepresentations in settlement documents are actionable as fraud). Therefore, I cannot agree with the majority's conclusion that, on this issue as well, the trial court did not "abuse[ ] its discretion." *Authorlee,* Op. at 120.

Second, I cannot agree with the majority's factual conclusion that the agreed judgment is not an aggregate settlement and that the individual plaintiffs' claims were not settled as part of an aggregate settlement, and thus I cannot agree with its conclusion that the trial court erred in finding that the agreed judgment reflected an aggregate settlement. The majority's factual finding that the plaintiffs' claims were individually negotiated is belied by the record, which plainly shows that all claims were negotiated as part of a single global settlement of the claims of all plaintiffs represented by Smith for a fixed sum of money and apportioned according to a matrix agreed upon by counsel for both plaintiffs and defendants. Its conclusion that a single global settlement of the claims of multiple individual plaintiffs that satisfies these criteria is *not* an aggregate settlement is contradictory to the definition of an aggregate settlement in both *Burrow,* 958 S.W.2d at 245, and Rule 1.08(f) of the Texas Disciplinary Rules of Professional Conduct (the aggregate settlement disclosure rule).

I would hold that the agreed judgment reflects an aggregate settlement whose terms were not disclosed and, in fact, were actively misrepresented to appellants. I would further hold that appellees, the settling defendants, committed fraud and civil conspiracy in procuring the consent of appellants to their individual settlements and to the agreed judgment and that the individual settlement agreements and the agreed judgment are, therefore, void as against public policy and should be set aside.

Appellants do not allege that the defendants breached a fiduciary duty to them or violated Rule 1.08(f), like their own counsel. Rather, appellants sued appellees, the settling defendants, for the defendants' own false representations in the settlement documents the plaintiffs were required to sign to effectuate the settlement and for the defendant's conspiracy with the plaintiffs' attorneys in obtaining the individual plaintiffs' agreement to the aggregate settlement through false representations and material omissions. The question, therefore, is whether the false representations and material omissions in the Settlement, Indemnity, Assignment and Release Agreements are actionable under the circumstances of this case and, if so and if proved, what remedy should follow.

Material misrepresentations of fact and material omissions in settlement documents are actionable as fraud. *See Schlumberger,* 959 S.W.2d at 178, 181. "[W]here a contract is induced by fraud, there is in reality no contract because there is no 'real assent' to the agreement." *Id.* (quoting *Edward Thompson Co. v. Sawyers,* 111 Tex. 374, 234 S.W. 873, 874 (Tex.1921)). Therefore, "the defrauded party is not bound by any of the contractual provisions, 'including those relating to presentation or guaranties which induced its execution.' " *Id.* (quoting *Edward* ***130** *Thompson Co.,* 234 S.W. at 874–75). In order to vitiate the contract, however, "the fraud must be such that it 'prevents the coming into existence of any valid contract at all.' " *Id.* (quoting *Distributors Inv. Co. v. Patton,* 130 Tex. 449, 110 S.W.2d 47, 48 (Tex.1937)). Fraud by nondisclosure is a subcategory of fraud because, when a party has a duty to disclose, nondisclosure may be as misleading as a positive misrepresentation of fact. *Id.* Reliance is an element of a claim of fraud by non-disclosure, as it is for any other type of fraud. *See id.* Moreover, a release containing a disclaimer of reliance (such as that in the settlement documents provided each plaintiff in this case) is a contract, and, like any other contract, it is subject to avoidance on grounds of fraud or mistake. *Id.* at 178, 110 S.W.2d 47. Whether a disclaimer of reliance precludes a fraudulent inducement claim depends on "[t]he contract and the circumstances surrounding its formation." *Id.* at 181, 110 S.W.2d 47.

In this case, quite apart from appellants' counsel's duty of disclosure, appellees had a duty not to make misrepresentations of fact in the Settlement, Indemnity, Assignment and Release Agreements that they drafted and that they required 95% of the plaintiffs represented by the Smith firm to sign in order to effectuate the agreed judgment. Nevertheless, appellees knowingly incorporated false information into each Settlement, Indemnity, Assignment and Release Agreement, which the plaintiffs' attorneys then presented to their clients for execution, and then, with the plaintiffs' attorneys, appellees presented the executed individual settlement agreements, affidavits, and authorizations to settle to the trial court, causing the court to accept the terms of the aggregate settlement as fair and to approve the agreed judgment.

The settling defendants knew that the settlement agreement was an aggregate settlement for a total sum of $45 million, yet they failed to disclose that material fact in any of the individual Settlement, Indemnity, Assignment and Release Agreements, affidavits, and authorizations to settle they drafted. They also knew that no plaintiff's claims had been individually negotiated and settled. Rather, an interdependent matrix agreed upon by plaintiffs' and defendants' counsel had been used to decide the value of each plaintiff's claim. And they knew that after a sum had been apportioned to each individual claimant in accordance with the matrix, additional plaintiffs had been added who shared in the same total aggregate settlement, reducing each plaintiff's original individual settlement.

Yet, knowing each of these material facts, and knowing, as attorneys, that Rule 1.08(f) of the Texas Rules of Disciplinary Rules of Professional Conduct required disclosure to each of the settling plaintiffs of "the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement," the settling defendants withheld the information that each plaintiff's settlement was part of a $45 million aggregate settlement, and they falsely represented to each plaintiff in documents they drafted that "Defendant's payment of the settlement amounts stated herein are independent of its agreement to make payments to other plaintiffs in the same or related lawsuits"; that "Plaintiff and Defendants have negotiated this settlement based on the individual merits of the Plaintiff's claims"; and that "Defendants have not made any aggregate offer and this settlement is not part of any aggregate settlement."

Appellees not only should have known of the falsity of these statements, which they ***131** claim were simply passed on to them by appellants' counsel, they plainly did know. And they knew the purpose to which these false statements were intended to be put: they were intended by both plaintiffs' counsel and the settling defendants to be presented to the individual settling plaintiffs to secure their agreement to the terms of the aggregate settlement, to the benefit of both plaintiffs' counsel and the settling defendants. With both their own counsel and appellees' counsel's collusion in the misrepresentations made to them, appellants were in no position to discover the truth regarding the aggregate settlement they were induced to approve. Instead, they relied upon the representations in

the documents provided to them, as evidenced by their signatures accepting the factual representations in those documents as the basis for their authorization of the settlement of their cases. Plaintiffs' counsel and the settling defendants then presented the individual signed Settlement, Indemnity, Assignment and Release agreements, affidavits, and authorizations to settle to the trial court as evidence that the settlement was "fair and reasonable" in order to procure the court's approval of the settlement terms and the agreed judgment. This is fraud under Texas law. *See In re FirstMerit Bank,* 52 S.W.3d at 758 (reciting elements of fraud).3 Nor can I agree that, under the circumstances of this case, appellants are held to their disclaimer of reliance on appellees' representations. *See Prudential Ins. Co.,* 896 S.W.2d at 162 (holding that when fraud is used, release or disclaimer of reliance and subsequent agreed judgment must be set aside).

Because plaintiffs' counsel and the settling defendants agreed upon their course of action and cooperated in achieving the goal of obtaining the plaintiffs' acceptance of the terms of the aggregate settlement and the trial court's approval of the agreed judgment on the basis of false representations and material omissions, these facts also rise to the level of civil conspiracy. *See Operation Rescue–National,* 975 S.W.2d at 553. I thus cannot agree with the majority's conclusion holding that "there can be no conspiracy to commit fraud in the litigation setting," which simply adopts the trial court's legal conclusion. *See Authorlee,* Op. at 120.

I would hold that, under the circumstances of this case, appellees clearly committed fraud in drafting the settlement agreements, authorizations of settlements, and disclaimers they included in the agreements they knew were to be presented to appellants by their counsel to effectuate the agreed judgments. They then conspired with appellants' counsel to insure that 95% of the fraudulent agreements they drafted were executed as a pre-condition to effectuating the aggregate settlement and presenting the individual settlement agreements and the agreed judgment to the court. Therefore, I would hold that the settlement agreements and the agreed judgment are void as against public policy and that appellants are entitled to have them set aside. *See Schlumberger,* 959 S.W.2d at 181.

This holding is supported by the only other Texas law directly on point. Indeed, the scenario in this case is virtually identical to that in *Quintero,* 709 S.W.2d 225, urged by appellants, in which the Corpus ***132** Christi Court of Appeals held that an aggregate settlement agreement in which the Quinteros' claims were included was void as against public policy. In that case, the Quinteros' attorney, Hector Gonzales, had filed a lawsuit on their behalf against Jim Walter Homes for violations of the Texas Deceptive Trade Practices Act and the Consumer Credit Code. However, because Gonzales had several hundred other similar cases, he arranged for another attorney, Francis Gandy, to try the Quinteros' claims, with the result that the Quinteros received a substantial verdict in their favor. *Id.* Meanwhile, Gonzales negotiated an aggregate agreement for all his clients, including the Quinteros. Unaware of the verdict obtained by Gandy, the Quinteros agreed to share in the settlement and signed a release of their claims against Jim Walter Homes. *Id.* at 227–28. Gonzales and Jim Walter Homes then moved to dismiss the Quinteros' suit as a condition precedent to effectuation of the aggregate settlement. *See id.* Upon being informed by Gandy of the much larger verdict in their favor, the Quinteros revoked their consent to the motion to dismiss their individual suit. *Id.* at 228. The attorneys for Jim Walter Homes nevertheless filed the motion to dismiss the Quinteros' individual suit with the trial court, which granted it. *Id.*

On appeal, the supreme court ordered that the dismissal of the Quinteros' suit be set aside, and it remanded the case to the trial court to determine whether Jim Walter Homes could plead and prove an enforceable settlement agreement under the release signed by the Quinteros. *Quintero v. Jim Walter Homes, Inc.,* 654 S.W.2d 442 (Tex.1983). On remand, the trial court held that the release was valid and enforceable, although it found that Gonzales had violated former Rule 5–106, now Rule 1.08(f), by not informing the Quinteros of the nature and settlement amounts of all claims involved in the aggregate settlement and although it found that the Quinteros had not been given a list showing the names and amounts to be received by the other plaintiffs, as also required by the aggregate settlement disciplinary rule. 709 S.W.2d at 228–29. The Quinteros appealed again, arguing that, because Gonzales violated the Code of Professional Responsibility in the method by which he acquired their consent, the release and settlement agreement were unenforceable. *Id.* at 229.

The Corpus Christi Court of Appeals, relying on *Fleming v. Campbell,* 537 S.W.2d 118 (Tex.Civ.App.-Houston [14th Dist.] 1976, writ ref'd n.r.e.), agreed with the Quinteros. *Quintero,* 709 S.W.2d at 229. The *Quintero* court pointed out that, in *Fleming,* the Court of Appeals had addressed the enforceability of a contract formed in violation of a Disciplinary Rule DR 2–107, which provided that a lawyer may not divide his fee with another, non-affiliated lawyer unless the client consents after full disclosure of the fee division arrangement; the *Fleming* court had held that the fee agreement procured without full disclosure was "as a matter of law against the public policy expressed in Disciplinary Rule 2–107 that no attorney's fees shall be divided unless the client's

consent is obtained after full disclosure"; and the *Fleming* court had, therefore, concluded that the fee agreement, "*being violative of law and public policy is void and unenforceable.*" *Id.* (quoting *Fleming,* 537 S.W.2d at 119). The *Quintero* court reasoned analogously to the *Fleming* court:

> Like DR 2–107, DR 5–106 [now Rule 1.08(f)] requires that the client be *fully informed* before his consent to an agreement is obtained. Although the decision in *Fleming* was also supported on another theory, namely lack of consideration for the alleged contract, ***133** we find the reasoning of the *Fleming* court, as quoted above, to be sound. The policy expressed in DR 5–106 is clearly to ensure that people such as the Quinteros do not give up their rights except with full knowledge of the other settlements involved. That policy was violated when Gonzalez did not inform the Quinteros of the matters required by DR 5–106.

Id. Like the *Fleming* court before it, the *Quintero* court observed, "Courts will not enforce contracts made in contravention of the law or public policy of this State." *Id.* (citing *Woolsey v. Panhandle Ref. Co.,* 131 Tex. 449, 116 S.W.2d 675 (1938); *Dodd v. Harper,* 670 S.W.2d 646, 650 (Tex.App.-Houston [1st Dist.] 1983, no writ)); *cf. Baron v. Mullinax, Wells, Mauzy & Baab, Inc.,* 623 S.W.2d 457 (Tex.App.-Texarkana 1981, writ ref'd n.r.e.). It held, therefore, that the contract for the release and settlement of the Quinteros' cause of action was void and unenforceable, and it reversed and remanded the cause to the trial court with instructions to reinstate the verdict in favor of the Quinteros in their individual suit. *Id.* at 229, 231.

I would hold that the exact same reasoning applies to the facts of this case and mandates the same result.

I realize that the result I believe mandated by this case is harsh when the agreed judgment settled the claims of 177 plaintiffs for a large aggregate sum of money that may well be fairly apportioned among the claimants, as the trial court found, and when that agreed judgment allowed the defendants to put the uncertainty of litigation over numerous similar claims behind them once and for all for a fixed sum of money. Nevertheless, I cannot agree with the proposition that counsel for the parties to an aggregate settlement may collude to avoid making the disclosures required by the disciplinary rules to procure an aggregate settlement, that attorneys may even actively misrepresent the nature of the settlement to unsophisticated litigants, and that the courts, in turn, may turn a blind eye to such wrong-doing out of an apparently equitable concern that a large aggregate settlement that benefitted many people, both plaintiffs and defendants, not be disturbed. Not to insist that the disclosure rule governing aggregate settlements be followed in this case is to permit the rule to be disregarded in every case.

Accordingly, I would sustain appellants' first and second issues on appeal.

Conclusion

I would reverse the judgment of the trial court and render judgment that appellants' individual settlement agreements and the agreed judgment in the underlying case are void as against public policy. I would remand the case to the trial court with orders that appellants' settlement agreements and the agreed judgment be set aside and that appellants be granted a new trial on their claims.

Footnotes

1 In mass-tort litigation, IMEs, or independent medical evaluations, are not independent in the traditional sense, but rather IME is used as a term of art for a medical examination conducted by a doctor of the defendant's choosing. Usually only one IME is done per plaintiff, with the defendants sharing in the cost and using the same report in litigation.

2 "Dan's [appellees' attorney] whole deal when he was arguing about this matrix, you know, he wanted—he wanted—he wanted a matrix that was heavily weighted to exposure dates, FVC [forced vital capacity], and impairment rating. And if I would have ever agreed to that, then Dexter—Dexter Burnett's case would have been basically worthless because he had 115 percent predicted FVC, which, you know, is no impairment, I mean, you know, zero impairment. And if I would have ever agreed to Dan's form of matrix, that case would have been basically valueless."

3 Smith testified, "My understanding with Dan [appellees' attorney] was that if all of my clients made individual demands, that when you added them all up totaled in the range of $45 million, that he would then recommend to his carriers and his client that they—that they pay those demands."

4 Anthony Authorlee ($488,000), Dexter Burnett ($384,000), Robert Derousselle ($209,000), Floyd Moran ($314,000), Jerome Stubblefield ($384,000), John Young ($662,000).

5 They were consolidated in Cause No. 98–03885, *John George Baxter, et al. v. Tuboscope Vetco International, Inc., formerly AMF, Inc., et al.,* in the 80th District Court of Harris County, Texas.

6 This "trial court" is the 295th District Court of Harris County, Texas.

7 Generally, courts have acknowledged that a third party's reliance on an attorney's representation is not justified when the representation takes place in an adversarial context. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests,* 991 S.W.2d 787, 794 (Tex.1999).

1 References in this opinion to "plaintiffs' counsel," "appellants' counsel," "defendants' counsel," "AMF's counsel," and "appellees' counsel" refer solely to the parties' trial counsel, not to any party's appellate counsel. Neither appellants nor appellees are represented by their trial counsel on appeal.

2 Anthony Authorlee ($488,000), Dexter Burnett ($384,000), Robert Derousselle ($209,000), Floyd Moran ($314,000), Jerome Stubblefield ($384,000), John Young ($662,000).

3 I would hold that the injury to the plaintiffs consisted in their not being able to present their claims individually and in their being lured into an aggregate settlement in which they were prevented by the actions of counsel on both sides from determining whether their claims were settled fairly vis a vis the other plaintiffs. In other words, the harm consisted in their being bound by their counsel's and the defendant's fraudulent actions and conspiracy to a settlement agreement made in violation of public policy.

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EXHIBIT 6

997 S.W.2d 229
Supreme Court of Texas.

David BURROW, et al., Petitioners,
v.
Carol ARCE, et al., Respondents.

No. 98–0184. | Argued Nov. 18, 1998. | Decided July 1, 1999.

Clients filed suit against attorneys who represented them in personal injury litigation, demanding forfeiture of all attorney fees for alleged breach of fiduciary duty, fraud, violations of Deceptive Trade Practices Act (DTPA), negligence, and breach of contract. The 11th District Court, Harris County, Mark Davidson, J., entered summary judgment for attorneys. Clients appealed. The Houston Court of Appeals, Fourteenth District, 958 S.W.2d 239, affirmed in part, and reversed and remanded in part. Both attorneys and clients petitioned for review. The Supreme Court, Hecht, J., held that: (1) conclusory assertions in summary judgment affidavits of experienced personal injury trial lawyers that clients' settlement agreements were all fair and reasonable were insufficient to establish as a matter of law that clients suffered no actual damages as a result of alleged misconduct by their attorneys; but (2) a client need not prove actual damages to obtain forfeiture of an attorney's fee due to the attorney's breach of duty to the client; and (3) additional plaintiffs were entitled to be added as parties by amended pleadings.

Court of Appeals affirmed as modified and remanded.

West Headnotes (23)

[1] Evidence
Testimony of Experts

An expert's opinion testimony can defeat a claim as a matter of law, even if the expert is an interested witness.

23 Cases that cite this headnote

[2] Evidence
Testimony of Experts
Evidence
Knowledge or skill of expert

It is the basis of the expert witness' opinion, and not the witness' qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere ipse dixit of a credentialed witness.

50 Cases that cite this headnote

[3] Judgment
Weight and sufficiency

Conclusory statements made by an expert witness are insufficient to support summary judgment.

26 Cases that cite this headnote

[4] Judgment
Matters of fact or conclusions

Conclusory assertions in summary judgment affidavits of experienced personal injury trial lawyers that they each considered the relevant facts and concluded that the clients' settlement agreements were all fair and reasonable were insufficient to establish as a matter of law that clients suffered no actual damages as a result of alleged misconduct by their attorneys in handling their personal injury lawsuits and negotiating settlements.

31 Cases that cite this headnote

[5] Principal and Agent
Deductions and forfeitures

The main purpose of forfeiture of compensation when an agent breaches his duty of loyalty is not to compensate an injured principal, even though it may have that effect; rather, the central purpose of the equitable remedy of forfeiture is

to protect relationships of trust by discouraging agents' disloyalty.

12 Cases that cite this headnote

[6] **Attorney and Client**
Deductions and forfeitures

A client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client.

73 Cases that cite this headnote

[7] **Attorney and Client**
Deductions and forfeitures

A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter.

17 Cases that cite this headnote

[8] **Attorney and Client**
Deductions and forfeitures

A violation of a lawyer's duty to a client is a "clear violation," for purposes of determining appropriateness of remedy of forfeiture of some or all of lawyer's compensation, if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful.

6 Cases that cite this headnote

[9] **Attorney and Client**
Deductions and forfeitures

A lawyer is not entitled to be paid for services rendered in violation of the lawyer's duty to a client, or for services needed to alleviate the consequences of the lawyer's misconduct.

1 Cases that cite this headnote

[10] **Attorney and Client**
Deductions and forfeitures

Ordinarily, forfeiture of compensation for a lawyer's violation of duty to a client extends to all fees for the matter for which the lawyer was retained, but sometimes forfeiture for the entire matter is inappropriate, for example when a lawyer performed valuable services before the misconduct began, and the misconduct was not so grave as to require forfeiture of the fee for all services.

2 Cases that cite this headnote

[11] **Attorney and Client**
Deductions and forfeitures

Forfeiture of fees is not justified in each instance in which a lawyer violates a legal duty, nor is total forfeiture always appropriate; denying the lawyer all compensation would sometimes be an excessive sanction, giving a windfall to a client, this remedy should hence be applied with discretion.

6 Cases that cite this headnote

[12] **Attorney and Client**
Deductions and forfeitures

The following non-exclusive list of factors are to be considered in determining whether a violation of a lawyer's duty to a client is clear and serious, whether forfeiture of any fee should be required, and if so, what amount: the gravity and timing of the violation, its wilfulness, 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, with great weight given to the public interest in maintaining the integrity of attorney-client

relationships.

19 Cases that cite this headnote

[13] **Attorney and Client**
Deductions and forfeitures

The wilfulness factor for determining whether and how to apply the remedy of fee forfeiture to attorneys requires consideration of the attorney's culpability generally; it does not simply limit forfeiture to situations in which the attorney's breach of duty to a client was intentional.

[14] **Attorney and Client**
Deductions and forfeitures

The adequacy-of-other-remedies factor for determining whether and how to apply the remedy of fee forfeiture to attorneys who breach their duty to a client does not preclude forfeiture when a client can be fully compensated by damages.

3 Cases that cite this headnote

[15] **Attorney and Client**
Deductions and forfeitures

Even though the main purpose of forfeiture remedy is not to compensate the client whose attorney breached his fiduciary duty, if other remedies do not afford the client full compensation for his damages, forfeiture may be considered for that purpose.

34 Cases that cite this headnote

[16] **Principal and Agent**
Deductions and forfeitures

Forfeiture of an agent's compensation is an equitable remedy similar to a constructive trust.

5 Cases that cite this headnote

[17] **Trial**
Authority and discretion of court in general

As a general rule, a jury does not determine the expediency, necessity, or propriety of equitable relief.

5 Cases that cite this headnote

[18] **Principal and Agent**
Questions for jury

Whether to forfeit all or part of an agent's compensation must be determined by a court based on the equity of the circumstances; however, when contested fact issues must be resolved before equitable relief can be determined, a party is entitled to have that resolution made by a jury.

9 Cases that cite this headnote

[19] **Attorney and Client**
Deductions and forfeitures

The ultimate decision on the amount of any fee forfeiture must be made by the court, in the case of attorneys who breach their duty to a client.

11 Cases that cite this headnote

[20] **Attorney and Client**
Deductions and forfeitures

In a fee forfeiture case involving an attorney who has breached his duty to a client, the value of the legal services rendered does not dictate either the availability of the remedy or amount of the forfeiture; both decisions are inherently

equitable and must thus be made by the court.

12 Cases that cite this headnote

[21] Attorney and Client
Deductions and forfeitures

When forfeiture of an attorney's fee is claimed, a trial court must determine from the parties whether factual disputes exist that must be decided by a jury before the court can determine whether a clear and serious violation of duty has occurred, whether forfeiture is appropriate, and if so, whether all or only part of the attorney's fee should be forfeited; such factual disputes may include, without limitation, whether or when the misconduct complained of occurred, the attorney's mental state at the time, and the existence or extent of any harm to the client.

13 Cases that cite this headnote

[22] Appeal and Error
Damages or amount of recovery

A trial court's decision whether to forfeit any or all of an attorney's fee for breach of duty to a client is subject to review on appeal as any other legal issue.

[23] Parties
Application and proceedings thereon

Additional plaintiffs were entitled to be added as parties by amended pleadings, even though they did not serve defendants with citation, where two days after plaintiffs first amended their pleadings, defendants filed a supplemental answer, and defendants did not claim or show surprise. Vernon's Ann.Texas Rules Civ.Proc., Rules 63, 121.

7 Cases that cite this headnote

Attorneys and Law Firms

***232** Kenneth Tekell, David M. Gunn, Houston, for Petitioners.

Mike A. Hatchell, Tyler, William V. Dorsaneo, III, Dallas, William J. Skepnek, Lawrence, KS, Molly H. Hatchell, Tyler, Steven M. Smoot, Austin, for Respondents.

Opinion

Justice HECHT delivered the opinion of the Court.

The principal question in this case is whether an attorney who breaches his fiduciary duty to his client may be required to forfeit all or part of his fee, irrespective of whether the breach caused the client actual damages. Like the court of appeals,[1] we answer in the affirmative and conclude that the amount of the fee to be forfeited is a question for the court, not a jury. We reverse the court of appeals' judgment only insofar as it affirms defendants' summary judgment based on affidavits we find to be conclusory.

I

Explosions at a Phillips 66 chemical plant in 1989 killed twenty-three workers and injured hundreds of others, spawning a number of wrongful death and personal injury lawsuits. One suit on behalf of some 126 plaintiffs was filed by five attorneys, David Burrow, Walter Umphrey, John E. Williams, Jr., F. Kenneth Bailey, Jr., and Wayne Reaud, and their law firm, Umphrey, Burrow, Reaud, Williams & Bailey. The case settled for something close to $190 million, out of which the attorneys received a contingent fee of more than $60 million.

Forty-nine of these plaintiffs then filed this suit against their attorneys in the Phillips accident case alleging professional misconduct and demanding forfeiture of all fees the attorneys received. More specifically, plaintiffs alleged that the attorneys, in violation of rules governing their professional conduct, solicited business through a lay intermediary,[2] failed to fully investigate and assess individual claims,[3] failed to communicate offers received and demands made,[4] entered into an aggregate settlement with Phillips of all plaintiffs' claims without plaintiffs' authority or approval,[5] agreed to limit their law practice

by not representing others involved in the same incident,[6] and intimidated and coerced their clients into accepting the settlement.[7] Plaintiffs asserted causes of action for breach of fiduciary duty, fraud, violations of the Deceptive Trade Practices—Consumer Protection Act,[8] negligence, and breach of contract. The attorneys have denied any misconduct and plaintiffs' claim for fee forfeiture.

The parties paint strikingly different pictures of the events leading to this suit:

> · The plaintiffs contend: In the Phillips accident suit, the defendant attorneys signed up plaintiffs *en masse* to contingent fee contracts, often contacting plaintiffs through a union steward. In many instances the contingent fee ***233** percentage in the contract was left blank and 33–1/3% was later inserted despite oral promises that a fee of only 25% would be charged. The attorneys settled all the claims in the aggregate and allocated dollar figures to the plaintiffs without regard to individual conditions and damages. No plaintiff was allowed to meet with an attorney for more than about twenty minutes, and any plaintiff who expressed reservations about the settlement was threatened by the attorney with being afforded no recovery at all.
>
> · The defendant attorneys contend: No aggregate settlement or any other alleged wrongdoing occurred, but regardless of whether it did or not, all their clients in the Phillips accident suit received a fair settlement for their injuries, but some were disgruntled by rumors of settlements paid co-workers represented by different attorneys in other suits. After the litigation was concluded, a Kansas lawyer invited the attorneys' former clients to a meeting, where he offered to represent them in a suit against the attorneys for a fee per claim of $2,000 and one-third of any recovery. Enticed by the prospect of further recovery with minimal risk, plaintiffs agreed to join this suit, the purpose of which is merely to extort more money from their former attorneys.

These factual disputes were not resolved in the district court. Instead, the court granted summary judgment for the defendant attorneys on the grounds that the settlement of plaintiffs' claims in the Phillips accident suit was fair and reasonable, plaintiffs had therefore suffered no actual damages as a result of any misconduct by the attorneys, and absent actual damages plaintiffs were not entitled to a forfeiture of any of the attorneys' fees. In disposing of all plaintiffs' claims on these grounds, the court specifically noted that factual disputes over whether the attorneys had engaged in any misconduct remained unresolved.

Before summary judgment was granted and less than two weeks before trial was set, plaintiffs amended their pleadings and named four additional plaintiffs. Defendants objected to the addition of these plaintiffs "due to the lack of service of citation and untimeliness of their appearance". In its summary judgment, the district court granted defendants' objection and struck the additional plaintiffs as parties.

All but one of the plaintiffs (Austin Gill, pro se) appealed. The court of appeals agreed with the district court that defendants had established that plaintiffs had suffered no actual damages caused by any misconduct, and thus it affirmed the summary judgment on all plaintiffs' claims except breach of fiduciary duty.[9] The court disagreed, however, that actual damages are a prerequisite for fee forfeiture.[10] Observing that Texas law has long recognized fee forfeiture as a remedy for an agent's breach of fiduciary duty to his principal with or without actual damages, the court discerned "no reason to carve out an exception for breaches of fiduciary duty in the attorney-client relationship."[11] However, the court refused to hold that fee forfeiture was either automatic or total for an attorney's breach of fiduciary duty to his client;[12] rather, the court concluded that whether a fee should be forfeited, and how much of it, depends on the following factors:

> (1) the nature of the wrong committed by the attorney or law firm; (2) the character of the attorney's or firm's conduct; (3) the degree of the attorney's or firm's culpability, that is, whether the attorney committed the breach intentionally, ***234** willfully, recklessly, maliciously, or with gross negligence; (4) the situation and sensibilities of all parties, including any threatened or actual harm to the client; (5) the extent to which the attorney's or firm's conduct offends a public sense of justice and propriety; and (6) the adequacy of other available remedies.[13]

The appeals court concluded that while the parties were entitled to have a jury determine whether the defendant attorneys breached their fiduciary duties, the court was required to determine the amount of any fee forfeiture because forfeiture is an equitable remedy.[14] Accordingly, the court of appeals reversed the summary judgment and remanded the case for a determination of whether the defendants breached their fiduciary duty to their former clients, and if so, what amount, if any, of their fee should be forfeited to plaintiffs.[15] The court also held that the four plaintiffs added by the amended pleadings should not have been struck.[16]

Shortly before the court of appeals' opinion issued, plaintiffs settled with three of the defendants, Walter Umphrey, John E. Williams, and Wayne Reaud. The three remaining defendants, David Burrow, F. Kenneth Bailey,

Jr., and the law firm of Umphrey, Burrow, Reaud, Williams & Bailey, petitioned this Court for review. Plaintiffs (including Gill) also petitioned this Court for review.[17] We refer collectively to the petitioner-plaintiffs as "the Clients", and to the petitioner-defendants as "the Attorneys".

The Clients contend that the Attorneys' serious breaches of fiduciary duty require full forfeiture of all their fees, irrespective of whether the breaches caused actual damages, but if not, that a determination of the amount of any lesser forfeiture should be made by a jury rather than the court. The Clients also contend that their lack of actual damages has not been established as a matter of law. The Attorneys argue that no fee forfeiture can be ordered absent proof that the Clients sustained actual damages, but even if it could, no forfeiture should be ordered for the misconduct the Clients allege.
We granted both petitions.[18]

II

At the outset we consider whether the Attorneys have established as a matter of law that the Clients have suffered no actual damages as a result of any misconduct by the Attorneys. The lower courts concluded that Robert Malinak's affidavit offered by the Attorneys in support of their motion for summary judgment established that they caused the Clients no actual damages. The Clients argue that Malinak's affidavit is too conclusory to support summary judgment.

***235 [1] [2] [3]** An expert's opinion testimony can defeat a claim as a matter of law, even if the expert is an interested witness, such as the defendant.[19] But it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.[20] Thus, as we held in *Anderson v. Snider,* "conclusory statements made by an expert witness are insufficient to support summary judgment."[21] In that case, an attorney sued for malpractice moved for summary judgment supported by his own affidavit, which stated in substance:

> I have reviewed the Plaintiff's Original Petition, my file and the relevant and material documents filed with the Court, and it is clear that I acted properly and in the best interest of [my client] when I represented her, and that I have not violated the [DTPA]. I did not breach my contract with [my client], and have not been guilty of any negligence or malpractice. [My client] has suffered no damages or legal injury as a result of my representation of her.[22]

We held that this affidavit, which gave no basis for its conclusions, was nothing more than a sworn denial of plaintiff's claims and could not support summary judgment.[23]

[4] Here, Malinak's affidavit states that his opinions are based on the pleadings and evidence in the case and his experience and training as a personal injury trial lawyer. The affidavit then avers in substance:

> It is important as an attorney in evaluating cases for settlement to consider the underlying liability facts involved, and in this instance the underlying facts with reference to the Phillips explosion of 1989. In my opinion it is critical to the settlement evaluation of the cases arising out of that explosion to consider the identity of the employer of the plaintiffs and/or decedents at the time of the explosion. Moreover, I believe that it is important to consider the elements of damages available to each Plaintiff, whether it be an injury case, or a death case, and to consider the losses that occurred to each Plaintiff as a result of the explosion. I have considered the underlying liability facts, the employment status of the Plaintiffs and/or decedents, and have considered the elements of and damage facts on each Plaintiff to render my opinions expressed in this Affidavit.
>
> The Plaintiffs were caused no damages by reason of any and/or all of the allegations made by them against the Defendants. Each and all of the Plaintiffs were reasonably and fairly compensated by way of settlement for those elements of damages that were available to them as Plaintiffs in the cases against Phillips, taking into account the employment, liability, and injury facts involved. I have not addressed issues concerning the allegations of malpractice, wrongdoings, or omissions which allegedly resulted in damages to Plaintiffs. Irrespective of the validity of those allegations, it is my opinion that the Plaintiffs have not been damaged as a result of any of these allegations, whether groundless or valid.

These assertions are as deficient as those in the *Anderson* affidavit. The affidavit says no more than that Malinak, an experienced attorney, has considered the relevant ***236** facts and concluded that the Clients' settlements were all fair and reasonable. Malinak's training and experience qualify him to offer opinions on the fairness of the Clients' settlements, but he cannot simply say, "Take my word for it, I know: the settlements were fair and reasonable." Credentials qualify a person to offer opinions, but they do not supply the basis for those opinions. The opinions must have a reasoned basis which the expert, because of his "knowledge, skill, experience,

training, or education",[24] is qualified to state. That basis is missing in Malinak's affidavit. He does not explain why the settlements were fair and reasonable for each of the Clients. His affidavit, like the affidavit in *Anderson,* is nothing more than a sworn denial of plaintiffs' claims and no more entitles the Attorneys to summary judgment than a lawyer's equally conclusory affidavit stating that the Clients had suffered $10 million damages would entitle them to summary judgment.

In reaching the contrary conclusion, the court of appeals reasoned:

> Malinack [sic] could have addressed the issues by listing each plaintiff separately, with the relevant data concerning them. Although that may have been clearer and more direct, we are of the opinion it is not required. As written, the affidavit gave appellants enough information, by referring to the specific items relied on, to enable them to controvert it.[25]

The issue, however, is not whether Malinak's affidavit was controvertible; it clearly was. The Clients could simply have filed an affidavit by an attorney who had reviewed all the relevant facts and concluded that the settlements were not fair and reasonable. There is no suggestion that such testimony was unavailable to the Clients or even hard to come by. Instead, the issue is whether Malinak's affidavit states a sufficient basis for his opinions. Malinak might have analyzed the Clients' injuries by type, or related settlement amounts to medical reports and expenses, or compared these settlements to those of similar claims, or provided other information showing a relationship between the plaintiffs' circumstances and the amounts received. He did not do so. The absence of such information did not merely make the affidavit unclear or indirect; it deprived Malinak's opinions of any demonstrable basis. We therefore conclude that summary judgment could not rest on Malinak's affidavit.

The Attorneys argue that even if Malinak's affidavit cannot establish that the Clients suffered no actual damages, the affidavits of attorney Burrow, a defendant, and attorney Allison, can. After stating that it was his goal "to see that each of these clients were reasonably compensated for their losses sustained as a result of the Phillips explosion", Burrow, a very experienced attorney, stated:

> To that end I developed the liability facts through on site inspection, discovery, and depositions. I considered the liability facts, the appropriate elements of damages for my clients, individually evaluated their cases, and I and my partners participated in the individual settlement of our individual client cases. It is my opinion that my goal was accomplished for all of the Plaintiffs now suing me.

Attorney Allison, another highly qualified attorney, stated that he was "familiar with the processes of evaluating, trying, and settling personal injury and death cases on both sides of the docket", and that "[t]he personal injury elements of recovery and 'wrongful death' case elements of recovery were individually considered toward the goal of arriving at individually evaluated settlements that would fairly and reasonably compensate each Plaintiff, such goal being accomplished in each case." Neither Burrow's nor Allison's affidavit is as detailed as Malinak's. Like Malinak, Burrow ***237** and Allison have substantial credentials to render expert opinions on issues of attorney practice, but their affidavits, like Malinak's, offer no basis for the opinions stated. Together, these two affidavits add nothing to the Attorneys' summary judgment evidence.

Accordingly, we conclude that the Attorneys failed to establish as a matter of law that the Clients did not suffer actual damages, and thus the Attorneys were not entitled to summary judgment dismissing the Clients' claims on that basis.

III

The Attorneys nevertheless argue that the Clients have not alleged grounds that would entitle them to forfeiture of any of the Attorneys' fees. Alternatively, the Attorneys contend that at most a portion of their fees is subject to forfeiture, and that that portion should be determined by the court rather than by a jury. The Clients counter that whether they sustained actual damages or not, the Attorneys, for breach of their fiduciary duty, should be required to forfeit all fees received, or alternatively, a portion of those fees as may be determined by a jury. These arguments thus raise four issues: (a) are actual damages a prerequisite to fee forfeiture? (b) is fee forfeiture automatic and entire for all misconduct? (c) if not, is the amount of fee forfeiture a question of fact for a jury or one of law for the court? and (d) would the Clients' allegations, if true, entitle them to forfeiture of any or all of the Attorneys' fees? We address each issue in turn.

A

To determine whether actual damages are a prerequisite to forfeiture of an attorney's fee, we look to the jurisprudential underpinnings of the equitable remedy of forfeiture. The parties agree that as a rule a person who renders service to another in a relationship of trust may be denied compensation for his service if he breaches that trust. Section 243 of the *Restatement (Second) of Trusts* states the rule for trustees: "If the trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him a reduced compensation or allow him full compensation."[26] Similarly, section 469 of the *Restatement (Second) of Agency* provides:

> An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.[27]

Citing these two sections, section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* applies the same rule to lawyers, who stand in a relation of trust and agency toward their clients. Section 49 states in part: "A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter."[28]

Though the historical origins of the remedy of forfeiture of an agent's compensation are obscure, the reasons for the remedy are apparent. The rule is founded both on principle and pragmatics. In principle, a person who agrees to perform compensable services in a relationship of trust and violates that relationship breaches the agreement, express or implied, on which the right to compensation is based. The person is not entitled to be paid when he has not provided the loyalty bargained for ***238** and promised. Thus, for example, comment a to section 243 of the *Restatement (Second) of Trusts* explains:

> When the compensation of the trustee is reduced or denied, the reduction or denial is not in the nature of an additional penalty for the breach of trust but is based upon the fact that the trustee has not rendered or has not properly rendered the services for which compensation is given.[29]

Along the same lines, comment b to section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* explains: "The remedy of fee forfeiture presupposes that a lawyer's clear and serious violation of a duty to a client destroys or severely impairs the client-lawyer relationship and thereby the justification of the lawyer's claim to compensation."[30] Pragmatically, the possibility of forfeiture of compensation discourages an agent from taking personal advantage of his position of trust in every situation no matter the circumstances, whether the principal may be injured or not. The remedy of forfeiture removes any incentive for an agent to stray from his duty of loyalty based on the possibility that the principal will be unharmed or may have difficulty proving the existence or amount of damages. In other words, as comment b to section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* states, "[f]orfeiture is also a deterrent."[31]

[5] To limit forfeiture of compensation to instances in which the principal sustains actual damages would conflict with both justifications for the rule. It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation. An agent's compensation is not only for specific results but also for loyalty. Removing the disincentive of forfeiture except when harm results would prompt an agent to attempt to calculate whether particular conduct, though disloyal to the principal, might nevertheless be harmless to the principal and profitable to the agent. The main purpose of forfeiture is not to compensate an injured principal, even though it may have that effect. Rather, the central purpose of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty.

In the one case in which we have considered the subject, *Kinzbach Tool Co. v. Corbett–Wallace Corp.*,[32] this Court held that an agent was required to forfeit a secret commission received from a conflicting interest even though the principal was unharmed. There, an oil field tool company, Corbett–Wallace, wanted to sell its sales rights contract on a patented tool, the whipstock, to another company, Kinzbach Tool, and was willing to go as low as $20,000 on the price. Corbett–Wallace contacted a Kinzbach Tool employee, Turner, and offered him a secret commission if he could get Kinzbach Tool to buy the whipstock contract. Corbett–Wallace instructed Turner not to disclose its bottom-line price to his employer but to get as large an offer as possible. Turner approached his superiors about buying the contract without disclosing his conversations with Corbett–Wallace or the price it was willing to take. Turner's superiors told him that Kinzbach Tool would pay as much as $25,000 for the contract and asked him to find out what price Corbett–Wallace would take. Turner did not tell his employer that Corbett–Wallace was willing to accept $5,000 less than Kinbach Tool was willing to offer. Kinzbach Tool bought the whipstock contract for $25,000, payable in installments, and Corbett–Wallace agreed to pay Turner a $5,000 commission. When Kinzbach Tool learned of ***239** Turner's secret

commission arrangement, it sued Corbett–Wallace and Turner, claiming that the secret commission should be credited to the sale price. We agreed, holding that Turner had breached his fiduciary duty to his employer.[33] Rejecting Corbett–Wallace's argument that the commission should not be forfeited because Kinzbach Tool paid no more for the whipstock contract than it was worth, we explained:

> It is beside the point for either Turner or Corbett to say that Kinzbach suffered no damages because it received full value for what it has paid and agreed to pay. A fiduciary cannot say to the one to whom he bears such relationship: You have sustained no loss by my misconduct in receiving a commission from a party opposite to you, and therefore you are without remedy. It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired. It is the law that in such instances if the fiduciary "takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received."[34]

Texas courts of appeals,[35] as well as courts in other jurisdictions[36] and respected commentators,[37] have also held that forfeiture ***240** is appropriate without regard to whether the breach of fiduciary duty resulted in damages.

The Attorneys nevertheless argue that forfeiture of an attorney's fee without a showing of actual damages encourages breach-of-fiduciary claims by clients to extort a renegotiation of legal fees after representation has been concluded, allowing them to obtain a windfall. The Attorneys warn that such opportunistic claims could impair the finality desired in litigation settlements by leaving open the possibility that the parties, having resolved their differences, can then assert claims against their counsel to obtain more than they could by settlement of the initial litigation. The Attorneys urge that a bright-line rule making actual damages a prerequisite to fee forfeiture is necessary to prevent misuse of the remedy. We disagree. Fee forfeiture for attorney misconduct is not a windfall to the client. An attorney's compensation is for loyalty as well as services, and his failure to provide either impairs his right to compensation. While a client's motives may be opportunistic and his claims meritless, the better protection is not a prerequisite of actual damages but the trial court's discretion to refuse to afford claimants who are seeking to take unfair advantage of their former attorneys the equitable remedy of forfeiture. Nothing in the caselaw in Texas or elsewhere suggests that opportunistically motivated litigation to forfeit an agent's fee has ever been a serious problem.

The Attorneys also argue that without a determination of a client's actual damages there is nothing to measure whether the fee forfeiture is excessive in a case. The Attorneys point out that one measure of whether punitive damages are excessive is the amount of actual damages awarded. While this is true, forfeiture of an agent's compensation is not mainly compensatory, as we have already noted, nor is it mainly punitive. Forfeiture may, of course, have a punitive effect, but that is not the focus of the remedy. Rather, the central purpose of the remedy is to protect relationships of trust from an agent's disloyalty or other misconduct. Appropriate application of the remedy cannot therefore be measured by a principal's actual damages. An agent's breach of fiduciary duty should be deterred even when the principal is not damaged.

[6] We therefore conclude that a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client.

B

The Clients argue that an attorney who commits a serious breach of fiduciary duty to a client must automatically forfeit all compensation to the client. This, the Clients contend, is the import of our decision in *Kinzbach* and is necessary to thoroughly discourage attorney misconduct. But *Kinzbach* did not involve issues of whether forfeiture should be limited by circumstances or in amount. The agent there intentionally breached his fiduciary duty in a single, narrow transaction, and his only compensation was a commission. Our holding that his entire compensation was subject to forfeiture cannot fairly be said to require automatic, complete forfeiture of all compensation for any misconduct of an agent.

***241** Nor is automatic and complete forfeiture necessary for the remedy to serve its purpose. On the contrary, to require an agent to forfeit all compensation for every breach of fiduciary duty, or even every serious breach, would deprive the remedy of its equitable nature and would disserve its purpose of protecting relationships of trust. A helpful analogy, the parties agree, is a constructive trust, of which we have observed:

> Constructive trusts, being remedial in character, have the very broad function of redressing wrong or unjust enrichment in keeping with basic principles of equity and justice....

> Moreover, there is no unyielding formula to which a court of equity is bound in decreeing a constructive trust, since the equity of the transaction will shape the measure of relief granted.[38]

Like a constructive trust, the remedy of forfeiture must fit the circumstances presented. It would be inequitable for an agent who had performed extensive services faithfully to be denied all compensation for some slight, inadvertent misconduct that left the principal unharmed, and the threat of so drastic a result would unnecessarily and perhaps detrimentally burden the agent's exercise of judgment in conducting the principal's affairs.

[7] [8] [9] [10] [11] The proposed *Restatement (Third) of The Law Governing Lawyers* rejects a rigid approach to attorney fee forfeiture. Section 49 states:

> A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. In determining whether and to what extent forfeiture is appropriate, relevant considerations include the gravity and timing of the violation, its wilfulness, 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.[39]

The remedy is restricted to "clear and serious" violations of duty. Comment d to section 49 explains: "A violation is clear if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful."[40] The factors for assessing the seriousness of a violation, and hence "whether and to what extent forfeiture is appropriate", are set out in the rule. Elaborating on the rule, the comments to section 49 make it clear that forfeiture of fees for clear and serious misconduct is not automatic and may be partial or complete, depending on the circumstances presented. Comment a states: "A lawyer is not entitled to be paid for services rendered in violation of the lawyer's duty to a client, or for services needed to alleviate the consequences of the lawyer's misconduct."[41] And comment e observes: "Ordinarily, forfeiture extends to all fees for the matter for which the lawyer was retained...."[42] But comment e adds: "Sometimes forfeiture for the entire matter is inappropriate, for example when a lawyer performed valuable services before the misconduct began, and the misconduct was not so grave as to require forfeiture of the fee for all services."[43] And comment b expands on the necessity for exercising discretion in applying the remedy:

> Forfeiture of fees, however, is not justified in each instance in which a lawyer violates a legal duty, nor is total forfeiture always appropriate. Some violations are inadvertent or do not significantly harm the client. Some can be adequately dealt with by the remedies described in Comment *a* or by a partial forfeiture (see Comment *e*). Denying ***242** the lawyer all compensation would sometimes be an excessive sanction, giving a windfall to a client. The remedy of this Section should hence be applied with discretion.[44]

The *Restatement* 's approach, as a whole, is consistent with Texas law concerning constructive trusts, and we agree with the forfeiture rule stated in section 49 as explained in the comments we have quoted. This rule, or something similar, also appears to have been adopted in most other jurisdictions that have considered the issue.[45]

The rule is not dependent on the nature of the attorney-client relationship, as the ***243** court of appeals thought,[46] but applies generally in agency relationships. Thus, as we have already seen, section 243 of the *Restatement (Second) of Trusts* sets out a similar rule for forfeiture of a trustee's compensation: "If the trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him a reduced compensation or allow him full compensation."[47] Comment c to section 243 elaborates:

> It is within the discretion of the court whether the trustee who has committed a breach of trust shall receive full compensation or whether his compensation shall be reduced or denied. In the exercise of the court's discretion the following factors are considered: (1) whether the trustee acted in good faith or not; (2) whether the breach of trust was intentional or negligent or without fault; (3) whether the breach of trust related to the management of the whole trust or related only to a part of the trust property; (4) whether or not the breach of trust occasioned any loss and whether if there has been a loss it has been made good by the trustee; (5) whether the trustee's services were of value to the trust.[48]

Section 469 of the *Restatement (Second) of Agency* requires forfeiture of all compensation that cannot be apportioned for properly performed services if the agent willfully and deliberately breaches his duty to his principal,[49] and as we have noted, comments to section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* echo this view.[50] But we do not read section 469 to mandate automatic forfeiture or preclude consideration of factors other than an agent's willfulness any more than comments to section 49 do.

[12] [13] [14] [15] Section 49 sets out considerations similar to those for trustees in applying the remedy of fee

forfeiture to attorneys. As we have already noted, they are: "the gravity and timing of the violation, its wilfulness, 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."[51] These factors are to be considered in determining whether a violation is clear and serious, whether forfeiture of any fee should be required, and if so, what amount. The list is not exclusive. The several factors embrace broad considerations which must be weighed together and not mechanically applied. For example, the "wilfulness" factor requires consideration of the attorney's culpability generally; it does not simply limit forfeiture to situations in which the attorney's breach of duty was intentional. The adequacy-of-other-remedies factor does not preclude ***244** forfeiture when a client can be fully compensated by damages. Even though the main purpose of the remedy is not to compensate the client, if other remedies do not afford the client full compensation for his damages, forfeiture may be considered for that purpose.

To the factors listed in section 49 we add another that must be given great weight in applying the remedy of fee forfeiture: the public interest in maintaining the integrity of attorney-client relationships. Like the fifth factor identified by the court of appeals—"the extent to which the attorney's or firm's conduct offends a public sense of justice and propriety"[52]—concern for the integrity of attorney-client relationships is at the heart of the fee forfeiture remedy. The Attorneys' argument that relief for attorney misconduct should be limited to compensating the client for any injury suffered ignores the main purpose of the remedy.

Amici curiae, Professor Charles Silver and Professor Lynn Baker of the University of Texas School of Law, argue that section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* differs from the rule applicable to other agency relationships and is bad policy. They contend that in general the remedy of forfeiture applies only when the agent is suing for payment of compensation, and for a good reason. A principal dissatisfied with an agent's conduct, they argue, should terminate the agency and withhold compensation; the principal should not be allowed to wait until after the agent has completed his service and then try to take unfair advantage by suing to recover compensation already paid. We disagree that section 49 states a different rule for attorneys. As we have already noted, section 469 of the *Restatement (Second) of Agency* provides:

> An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.[53]

Amici argue that this rule is limited by the caption of section 469, "Disloyalty or Insubordination *as Defense* ".[54] But the comments to section 469 do not limit application of the rule to the defense of an agent's claim for compensation. Comment a states in part: "An agent is entitled to no compensation for a service which constitutes a violation of his duties of obedience."[55] Comment e adds that a "principal can maintain an action to recover the amount" of compensation paid to an agent to which the agent is not entitled.[56] Amici argue that the scope of the rule should not be found in the comments, but we think there is more justification for looking to the comments than to two words in the title.

Nor do we agree with amici that forfeiture should, as a matter of policy, be limited to the defense of an agent's claim for compensation. A client may well not know of his attorney's breach of fiduciary duty until after the relationship has terminated. An attorney who has clearly and seriously breached his fiduciary duty to his client should not be insulated from fee forfeiture by his client's ignorance of the matter. Nor should an attorney who has deliberately engaged in professional misconduct be allowed to put his client to the choice of terminating the relationship and risking that the outcome of the litigation may be adversely affected, or continuing the relationship despite the misconduct. The risk that a client will try to take unfair advantage of his former attorney does not justify ***245** restricting forfeiture to a defensive remedy when the trial court is easily able to prevent inequity in applying the remedy.

Accordingly, we conclude that whether an attorney must forfeit any or all of his fee for a breach of fiduciary duty to his client must be determined by applying the rule as stated in section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* and the factors we have identified to the individual circumstances of each case.

C

The parties agree that the determination whether to afford the remedy of forfeiture must be made by the court. The Clients argue, however, that they are entitled to have the amount of the forfeiture set by a jury. The Attorneys argue, and the court of appeals held,[57] that the amount of any forfeiture is also an issue to be decided by the court.
[16] [17] [18] Forfeiture of an agent's compensation, we

have already explained, is an equitable remedy similar to a constructive trust. As a general rule, a jury "does not determine the expediency, necessity, or propriety of equitable relief."[58] Consistent with the rule, whether a constructive trust should be imposed must be determined by a court based on the equity of the circumstances.[59] However, when contested fact issues must be resolved before equitable relief can be determined, a party is entitled to have that resolution made by a jury.[60]

[19] These same principles apply in deciding whether to forfeit all or part of an agent's compensation. Thus, for example, a dispute concerning an agent's culpability—whether he acted intentionally, with gross negligence, recklessly, or negligently, or was merely inadvertent—may present issues for a jury, as may disputes about the value of the agent's services and the existence and amount of any harm to the principal. But factors like the adequacy of other remedies and the public interest in protecting the integrity of the attorney-client relationship, as well as the weighing of all other relevant considerations, present legal policy issues well beyond the jury's province of judging credibility and resolving factual disputes. The ultimate decision on the amount of any fee forfeiture must be made by the court.

[20] The Clients argue that the determination of the amount of fees to be paid an attorney for his services is usually a factual matter for the jury, even in actions for quantum meruit, which are also based in equity,[61] and declaratory judgment actions in which the decision whether to award attorney fees is within the trial court's sound discretion.[62] But in such actions the issue for the jury is the value of the attorney's reasonable and necessary services, not whether a reasonable fee thus determined should nevertheless be withheld for some reason. In declaratory judgment actions, once the jury has found the value of reasonable and necessary legal services, the court must decide whether the award would be equitable and just.[63] In a forfeiture case the value of the legal services rendered does not, as we have explained, dictate either the availability of the remedy or amount of the forfeiture. ***246** Both decisions are inherently equitable and must thus be made by the court.

[21] [22] Thus, when forfeiture of an attorney's fee is claimed, a trial court must determine from the parties whether factual disputes exist that must be decided by a jury before the court can determine whether a clear and serious violation of duty has occurred, whether forfeiture is appropriate, and if so, whether all or only part of the attorney's fee should be forfeited. Such factual disputes may include, without limitation, whether or when the misconduct complained of occurred, the attorney's mental state at the time, and the existence or extent of any harm to the client. If the relevant facts are undisputed, these issues may, of course, be determined by the court as a matter of law. Once any necessary factual disputes have been resolved, the court must determine, based on the factors we have set out, whether the attorney's conduct was a clear and serious breach of duty to his client and whether any of the attorney's compensation should be forfeited, and if so, what amount. Most importantly, in making these determinations the court must consider whether forfeiture is necessary to satisfy the public's interest in protecting the attorney-client relationship. The court's decision whether to forfeit any or all of an attorney's fee is subject to review on appeal as any other legal issue.

D

Finally, the Attorneys argue that none of the misconduct the Clients have alleged justifies a forfeiture of any fees. Although the Clients make numerous allegations of misconduct against the Attorneys, the parties' arguments have tended to focus on the assertion that the Attorneys reached an aggregate settlement in violation of Rule 1.08(f) of the Texas Disciplinary Rules of Professional Conduct.[64] The Attorneys and amici curiae argue that this rule is too vague and impractical for any violation to warrant forfeiture of an attorney's fee. The lower courts did not find it necessary to address this argument, and given the difficult considerations involved, we believe it to be imprudent for us to decide the matter in the first instance without a full airing below. Even were we to address it, we could not render judgment for the Attorneys without considering whether the other alleged disciplinary rules violations might also justify forfeiture, an issue barely mentioned in all the parties' briefing. All these issues must be considered by the district court on remand.

IV

Two minor matters require brief attention.

[23] First: The Attorneys argue that the district court correctly struck the four plaintiffs added in amended pleadings as parties. The Attorneys objected to the addition of the four plaintiffs on two grounds: that they had not served the Attorneys with citation, and that the addition was untimely. The first ground was not sufficient. Two days after plaintiffs first amended their pleadings, defendants filed a supplemental answer. The filing of an answer dispenses with the necessity of service of citation.[65] As for the second ground, the district court

was obliged to allow the pleading amendment absent a showing that the defendants were surprised by it.66 The defendants did not claim, much less show, surprise. Therefore, the four added plaintiffs should not have been struck.

Second: The court of appeals dismissed plaintiff Austin Gill's appeal as not having been timely filed. Although Gill is listed as a petitioner in this Court, petitioners do ***247** not complain of the court of appeals' dismissal of his appeal. We must therefore affirm that dismissal.

* * * * *

For the reasons explained, we modify the court of appeals' judgment to reverse the district court's judgment in its entirety except as to plaintiff Austin Gill, and we remand the case to the district court for further proceedings.

Footnotes

1 958 S.W.2d 239.

2 *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 7.03(b), *reprinted in* TEX. GOV'T CODE ANN. , tit. 2, subtit. G app. A (1998) (TEX. STATE BAR R. art. X, § 9).

3 *See id.* Rules 1.01, 2.01.

4 *See id.* Rule 1.03.

5 *See id.* Rule 1.08(f).

6 *See id.* Rule 5.06(b).

7 *See id.* Rules 1.02, 2.01.

8 TEX. BUS. & COM.CODE §§ 17.41–.63.

9 958 S.W.2d at 251–256.

10 *Id.* at 244–249.

11 *Id.* at 246.

12 *Id.* at 249–250.

13 *Id.* at 250.

14 *Id.* at 251.

15 *Id.* at 251, 258.

16 *Id.* at 258.

17 The petitioner-plaintiffs are: Carol Arce, individually and as next friend of Lyndsey Arce and Lauren Arce; Raul S. Alvarado; David H. Anderson, Jr.; Freddie Barfield; Dorothy Barfield; Mercer Black; Richard W. Bradley, Jr.; James Karl Bryant; Sandra Bryant; Stephen Lloyd Bryant; Thomas G. Butcher; Julane Campbell, individually and as next friend of Jason Campbell, Justin Campbell, and Jaret Campbell; Dennis Mike Curry; Ricky L. Dannelley; Glenn E. Deshotel; John L. Dixon; Silverrol Ferguson; Julian Garcia, Jr.; Austin Gill; Robert F. Gudz; Joe Alan Holzworth; Wesley S. Hood; Bobby Ray Jones; James M. Kerr; Stanley P. Korenek; James L. Lauderdale; Jesse H. Luna; Ronald D. Lyon; Walter E. Marbury, Jr.; John Martinez; Patrick McCourtney; Gary McPherson; Lisa McPherson; Carol D. Montelongo; Pete Montoya III; Herbert Mosley; Terry L. Mullins; Adolfo Ochoa, Jr.; Philip Owens; Jesus R. Pena; Carl T. Richardson; Glenn W. Robbins; Johnnie Rogers; Stephen R. Ross; Amanda Ann Seaman; Terry Wayne Simpson; Allen Smith, Jr.; Helga Sieglinde Thompson; Robert A. Wash; and Calvin L. Williams.

18 41 TEX. SUP.CT. J. 1318 (Aug. 25, 1998).

19 *Anderson v. Snider,* 808 S.W.2d 54, 55 (Tex.1991) (per curiam).

20 *Gammill v. Jack Williams Chevrolet, Inc.,* 972 S.W.2d 713, 726–727 (Tex.1998) (citing *General Elec. Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)); *Merrell Dow Pharm., Inc. v. Havner,* 953 S.W.2d 706, 711–712 (Tex.1997); *Schaefer v. Texas Employers' Ins. Ass'n,* 612 S.W.2d 199, 202–204 (Tex.1980).

21 808 S.W.2d at 55.

22 *Id.* at 54 (second alteration in original).

23 *Id.* at 55.

24 TEX.R. EVID. 702.

25 958 S.W.2d at 253.

26 RESTATEMENT (SECOND) OF TRUSTS § 243 (1959).

27 RESTATEMENT (SECOND) OF AGENCY § 469 (1958); *see also id.* § 399(k) (one remedy for a principal whose agent violates a fiduciary duty is the refusal to pay compensation).

28 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996).

29 RESTATEMENT (SECOND) OF TRUSTS § 243 cmt. a (1959).

30 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. b (Proposed Final Draft No. 1, 1996).

31 *Id.*

32 138 Tex. 565, 160 S.W.2d 509 (1942).

33 *Id.* at 513.

34 *Id.* at 514 (quoting *United States v. Carter,* 217 U.S. 286, 30 S.Ct. 515, 54 L.Ed. 769 (1910)).

35 *See, e.g., Watson v. Limited Partners of WCKT, Ltd.,* 570 S.W.2d 179, 182 (Tex.Civ.App.—Austin, 1978, writ ref'd n.r.e.) (holding that limited partners may recover against general partner without a showing of actual damages); *Russell v. Truitt,* 554 S.W.2d 948, 952 (Tex.Civ.App.—Fort Worth 1977, writ ref'd n.r.e.) (holding that plaintiffs were entitled to recovery of agency fees as a matter of law if the breach of fiduciary duty was proved without regard as to whether the breach caused any harm); *Anderson v. Griffith,* 501 S.W.2d 695, 701 (Tex.Civ.App.—Fort Worth 1973, writ ref'd n.r.e) (explaining that, even though the principal was not injured, " '[t]he self-interest of the agent is considered a vice which renders the transaction voidable at the election of the principal without looking into the matter further than to ascertain that the interest of the agent exists' ") (quoting *Burleson v. Earnest,* 153 S.W.2d 869, 874 (Tex.Civ.App.—Amarillo 1941, writ ref'd w.o.m.)); *see also Judwin Properties, Inc. v. Griggs & Harrison, P.C.,* 911 S.W.2d 498, 507 (Tex.App.—Houston [1st Dist.] 1995, no writ) (stating in dicta that "[w]hen an attorney has stolen or used the interest to the detriment of his client, the plaintiff need not prove causation for breach of fiduciary duty"); *Bryant v. Lewis,* 27 S.W.2d 604, 608 (Tex.Civ.App.—Austin 1930, writ dism'd) (holding that attorney who represented clients with conflicting interests was not entitled to any compensation for legal services rendered without addressing whether actual damages were sustained).

36 *See, e.g., Hendry v. Pelland,* 73 F.3d 397, 402 (D.C.Cir.1996) ("[C]lients suing their attorney for breach of the fiduciary duty of loyalty and seeking disgorgement of legal fees as their sole remedy need prove only that their attorney breached that duty, not that the breach caused them injury."); *In re Estate of Corriea,* 719 A.2d 1234, 1241 (D.C.1998) (holding that the plaintiff's inability to quantify the damages suffered did "not disqualify the profits ordered disgorged as 'just compensation for the wrong' ") (quoting *Sheldon v. Metro–Goldwyn Pictures Corp.,* 309 U.S. 390, 399, 60 S.Ct. 681, 84 L.Ed. 825 (1940)); *Eriks v. Denver,* 118 Wash.2d 451, 824 P.2d 1207, 1213 (1992) (en banc) (rejecting the argument that a finding of damages and causation is required to order fee forfeiture); *Rice v. Perl,* 320 N.W.2d 407, 411 (Minn.1982) (holding that the client need not prove actual harm to obtain fee forfeiture); *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller,* 629 So.2d 947, 952 (Fla.Dist.Ct.App.1993) (holding that "fee forfeiture should be considered only when an ordinary remedy like offsetting damages is plainly inadequate"); *see also Frank v. Bloom,* 634 F.2d 1245, 1258 (10th Cir.1980) (recognizing that "when the attorney is representing clients with actual existing conflicts of interest ... the attorney's compensation may be withheld even where no damages are shown").

37 *See, e.g.,* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. d (Proposed Final Draft No. 1, 1996) ("But forfeiture is justified for a flagrant violation even though no harm can be proved."); Thomas D. Morgan, *Sanctions and Remedies for Attorney Misconduct,* 19 S. ILL. U.L.J. , 351 (1995) ("[T]he fee forfeiture sanction is available even where a client has suffered no loss as a result of an attorney's alleged misconduct."); 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.5:108 (2d ed. Supp.1998) ("Generally speaking, where the claim rests on the disloyalty of the lawyer, and the remedy sought is forfeiture or disgorgement of fees already paid, rather than compensatory damages for poor service, the breach of the duty of loyalty *is* the harm, and the client is not required to prove causation or specific injury.").

38 *Meadows v. Bierschwale,* 516 S.W.2d 125, 131 (Tex.1974).

39 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996).

40 *Id.* cmt. d.

41 *Id.* cmt. a.

42 *Id.* cmt. e.

43 *Id.*

44 *Id.* cmt. b.

45 *See, e.g., International Materials Corp. v. Sun Corp.,* 824 S.W.2d 890, 895 (Mo.1992) (en banc) (holding that complete forfeiture is not warranted unless there is a clear and serious violation of the lawyer's duty destroying the client-lawyer relationship, thereby removing the justification for the lawyer's compensation, and that recovery could be in quantum meruit for benefits conferred); *Kidney Ass'n of Oregon, Inc. v. Ferguson,* 315 Or. 135, 843 P.2d 442, 447 (1992) (favoring consideration of factors in determining whether attorney's fee should be reduced or denied when attorney breaches duty of loyalty); *In re Marriage of Pagano,* 154 Ill.2d 174, 180 Ill.Dec. 729, 607 N.E.2d 1242, 1249–1250 (1992) ("[W]hen one breaches a fiduciary duty to a principal the appropriate remedy is within the equitable discretion of the court. While the breach may be so egregious as to require the forfeiture of compensation by the fiduciary as a matter of public policy, such will not always be the case.") (citations omitted); *Gilchrist v. Perl,* 387 N.W.2d 412, 417 (Minn.1986) (holding that the amount of fee forfeiture should be determined by consideration of the relevant factors set out in the state's punitive damage statute); *Crawford v. Logan,* 656 S.W.2d 360, 365 (Tenn.1983) (holding that any misconduct of an attorney does not automatically result in fee forfeiture but rather "[e]ach case ... must be viewed in the light of the particular facts and circumstances of the case"); *Cal Pak Delivery, Inc. v. United Parcel Serv., Inc.,* 52 Cal.App.4th 1, 60 Cal.Rptr.2d 207, 216 (1997) (recognizing California courts allowed partial fee recovery by the attorney "for services rendered before the ethical breach ... or ... on an unjust enrichment theory where the client's recovery was a direct result of the attorney's services"); *Fairfax Sav., F.S.B. v. Weinberg & Green,* 112 Md.App. 587, 685 A.2d 1189, 1209 (1996) (holding that law firm was not obligated to disgorge entire fee because firm rendered valuable legal services to clients, and because other remedies of actual and punitive damages and sanctions would be adequate); *Lindseth v. Burkhart,* 871 S.W.2d 693, 695 (Tenn.Ct.App.1993) (holding that fee forfeiture for a breach of fiduciary duty is not automatic but depends on the facts and circumstances of each case); *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller,* 629 So.2d 947, 953 (Fla.Dist.Ct.App.1993) (rejecting a mechanical application of fee forfeiture and approving the multi-factor approach to fee forfeiture as stated in the *Restatement (Third) of The Law Governing Lawyers*); *Seeman v. Gumbiner (In re Life Ins. Trust Agr. of Julius F. Seeman),* 841 P.2d 403, 405 (Colo.Ct.App.1992) ("[A] conflict of interest is only one of many factors to be considered in determining the award of fees; it does not mandate a denial of all compensation."); *Lurz v. Panek,* 172 Ill.App.3d 915, 123 Ill.Dec. 200, 527 N.E.2d 663, 671 (1988) ("[W]e do not believe defendant should have to forfeit the entire fee.... Rather, we agree with the trial court that the jury was capable of apportioning the contingent fee."); *Mar Oil, S.A. v. Morrissey,* 982 F.2d 830, 840 (2d Cir.1993) (stating that "[u]nder New York law, attorneys may be entitled to recover for their services, even if they have breached their fiduciary obligations"); *Sweeney v. Athens Reg'l Med. Ctr.,* 917 F.2d 1560, 1573–1574 (11th Cir.1990) (holding that under Georgia law, if an attorney has engaged in unethical conduct, "the court may thus have a duty to require forfeiture of some portion of the fees"); *Iannotti v. Manufacturers Hanover Trust Co. (In re New York, New Haven & Hartford R.R. Co.),* 567 F.2d 166, 180–181 (2d Cir.1977) (holding that the court properly tailored the amount of fee forfeiture based on the nature of the breach of fiduciary duty found, as well as evidence that the attorney had, prior to the breach, performed valuable services for the estate); *see also Brandon v. Hedland, Fleischer, Friedman & Cooke (In re Estate of Brandon),* 902 P.2d 1299, 1317 (Alaska 1995) (noting that existing Alaska law appeared to require full fee forfeiture, but directing the trial court on remand to make alternative findings under the multi-factor approach in *Kidney Ass'n* "to reduce chances of a second remand following further appeal"); *Hendry v. Pelland,* 73 F.3d 397, 403 (D.C.Cir.1996) (leaving open the extent of forfeiture to which the plaintiffs might be entitled if they succeed in proving that the attorney breached his duty of loyalty); *Musico v. Champion Credit Corp.,* 764 F.2d 102, 112–113 (2d Cir.1985) (describing trend in New York law away from automatic full fee forfeiture); *Littell v. Morton,* 369 F.Supp. 411, 425 (D.Md.1974) (characterizing strict fee forfeiture as "inequitable" unless a deliberate scheme to defraud the client exists). *But see, e.g., Pessoni v. Rabkin,* 220 A.D.2d 732, 633 N.Y.S.2d 338, 338 (N.Y.App.Div.1995) (holding that an attorney who violates the disciplinary rules

is not entitled to fees for any services rendered); *In re Estate of McCool,* 131 N.H. 340, 553 A.2d 761, 769 (1988) (holding that "an attorney who violates our rules of professional conduct by engaging in clear conflicts of interest, of whose existence he either knew or should have known, may receive neither executor's nor legal fees for services he renders an estate").

46 958 S.W.2d at 249 ("Thus, we find a distinction, for purposes of the potential amount of forfeiture, between the typical agency relationship and the attorney-client relationship.").

47 RESTATEMENT (SECOND) OF TRUSTS § 243 (1959).

48 *Id.* cmt. c.

49 RESTATEMENT (SECOND) OF AGENCY § 469 (1958).

50 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. a, b (Proposed Final Draft No. 1, 1996).

51 *Id.* § 49.

52 958 S.W.2d at 250.

53 RESTATEMENT (SECOND) OF AGENCY § 469 (1958).

54 *Id.* (emphasis added).

55 *Id.* cmt. a.

56 *Id.* cmt. e.

57 958 S.W.2d at 250–251.

58 *State v. Texas Pet Foods, Inc.,* 591 S.W.2d 800, 803 (Tex.1979).

59 *See Meadows,* 516 S.W.2d at 131.

60 *See Texas Pet Foods,* 591 S.W.2d at 803 (stating that in an equitable proceeding, "ultimate issues of fact are submitted for jury determination").

61 *See Truly v. Austin,* 744 S.W.2d 934, 938 (Tex.1988).

62 *See Bocquet v. Herring,* 972 S.W.2d 19, 20 (Tex.1998).

63 *Id.* at 21.

64 *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(f), *reprinted in* TEX. GOV'T CODE ANN. , tit. 2, subtit. G app. A (1998) (TEX. STATE BAR R. art. X, § 9).

65 TEX.R. CIV. P. 121.

66 TEX.R. CIV. P. 63.

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