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re: Allison v. Borunda, ARBITRATION No. 02-22-0002-4507 (Allison v. Borunda, No. 20218-0256, 268th Dist., Harris County, Texas)

Dear Mr. Kassab:

At your request I prepared a report in the referenced matter, prior to the arbitration. I indicate in that report (dated November 9, 2023) the materials I had reviewed in arriving at my opinions. Mainly I reviewed the deposition testimony of the three lawyers who formerly represented Rich and Caroline Allison, along with that of Rich and Caroline, and the deposition exhibits.

You have asked that I prepare this report, reflecting my review of the arbitration testimony. Following is my summary opinion, with a detailed analysis of my reasoning. After the summary opinion, I have provided an outline reflecting where the specific topics are addressed.

Summary Opinion

In their deposition and trial testimony, confirmed by the testimony of their former lawyers Nicholas Abaza, Jorge Borunda, and Michael Trevino, the plaintiffs explained their expectation of any outcome challenging the trust(s) that determined their inheritance from their father after his death. The former lawyers take the position that they achieved what the plaintiffs expected, seeking a contingent fee from what the plaintiff received. The lawyers take this position based on terminology used by laypeople, arguing this was what the plaintiffs wanted.

In my opinion, the former lawyers breached the duty of loyalty in general or communication in particular in failing to clarify the nature of their undertaking and the recovery, how it would be calculated for purposes of their fees, and how they did calculate it. They entered a transaction with a client without complying with the requisite fiduciary duties, using a contingent fee agreement that, on its face, usurps the clients right to direct the litigation.

In spite of the breadth and specificity of my original opinions, the testimony of the lawyers at trial supports the general argument of their own lawyer: that any failure to abide by the relevant Texas Disciplinary Rules of Professional Conduct was a distinction without a difference:

there was a meeting of the minds, everybody knew that the lawyers represented Rich. Everybody knew that the lawyers represented Caroline. But somehow, because somebody didn't do this in the contract, somehow king's X, you get nothing. Thanks for your work, but you get nothing. (TR 1568-59)

This position ignores—perhaps because lawyers Borunda, Abaza, and Trevino simply do not know it—the rationale underlying the prohibition on a lawyer recovering pursuant to contingent fee agreements like those with Rich and Caroline. Thus, the lawyers respond that they have not memorized certain of the relevant Rules, as if doing so is not worth the effort. And they know the terms of the agreements were fair and reasonable because that is what they, the lawyers, believed and because they can state their fiduciary duties in broad terms without showing compliance with the specific Rule guidelines meant to ensure compliance. Plus, while any one of them might not have done what the Rules require, probably one or both of the others did.

As the following analysis shows, the lawyers knowing and complying with the provisions of just Rule 1.04 (in particular, Rules 1.04(f) and (g)) would have averted virtually all of the issues they now rebut. And I share the sentiment of Judge David L. Evans, a member of the Task Force that suggested the provisions ultimately promulgated, in his March 2005 seminar on the new Rules: “It is difficult to imagine that there is a lawyer in Texas today that is not aware of the debate over referral fees, the Referral Fee Task Force (Task Force), and the referendum.”¹

Per guidance from the Texas Supreme Court in *Burrow v. Arce*,² following the analysis regarding noncompliance with Rule 1.04 below is an analysis of the additional Rule violations reflected in the materials I reviewed.

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¹Judge David L. Evans, the Practicalities of the New Referral Fee To Refer or Not to Refer? That Is the Question, State Bar of Texas, State Bar College “Spring Training” Course, March 10-11, 2005, Fort Worth, 1.

²997 S.W.2d 229 (Tex.1999).

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I. Background & Experience

A. Disciplinary Rules of Professional Conduct

In addition to the qualifications set forth in my resume (attached), my particular qualifications for forming my opinions are based on my being a member of the drafting committee (a standing State Bar committee from around 1991 until its dissolution in April 2018; "Committee") for the Texas Disciplinary Rules of Professional Conduct

("Rulea") from early 2001 until it dissolved. I served as co-chair in 2006-2007 and chair in 2007-2008, 2008-2009, and 2009-2010.

The relevance of my extensive work on and familiarity with the Rules lies in their reflection of fiduciary duties owed to their clients, reflected in the Preamble to the Rules:

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 [sic] 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.³

In response to a request from the Supreme Court of Texas (ASCOT@), the Committee compared all of the current Texas Disciplinary Rules to those adopted by the ABA after a review of the Model Rules by the ABA's Ethics 2000 Commission. This was the first comprehensive review by Texas of its Rules since the mid-1980s. The Committee was already engaged in discussing changes to the Texas Rules, based on anticipated changes to the Model Rules, when I became a member in early 2001, and had compiled a small binder of Texas Rules it had finished, pending changes suggested to

³Tex. Disciplinary Rules Prof I Conduct preamble ¶¶ 1-3.

still other Rules. Our mandate from the SCOT clarified our focus and changed our primary audience.⁴

Beginning in 2004, the Committee conducted extensive meetings (in number and duration⁵) regarding revisions to the Texas Disciplinary Rules and (via its co-chairs) drafted and submitted to the SCOT reports concerning its recommended changes.⁶ In 2007, the Committee presented its views on recommended changes to representatives of the SCOT in multiple all-day conferences and drafted comments for the less controversial Texas Disciplinary Rules, both of which activities I oversaw.⁷ I was privileged to receive that year a Certificate of Merit from the State Bar of Texas in connection with my work on the Texas Disciplinary Rules.

In the three years while I served as sole chair, the Committee drafted interpretive comments for virtually all of the Texas Disciplinary Rules, finalized definitions for terms (modifying some and adding some), and responded to the SCOT's inquiries regarding proposed changes to drafted Rule language in light of certain of the public comments. This multi-year undertaking of revisions to the Texas Disciplinary Rules involved exhaustive research on and discussion of various issues pertinent to those raised in this case. As a culminating event to this lengthy process, it was my privilege to recommend to the State Bar Board of Directors at the 2010 Annual Bar Meeting in Fort Worth the entire body of Texas Disciplinary Rules and interpretive comments as a collaborative effort of the Committee and the SCOT. I was honored at that meeting with another Certificate of Merit in connection with my work.

After extensive review by the SCOT and the State Bar Board of Directors, along with two opportunities for Texas lawyers and the public to comment on proposed revisions,

⁴As a Bar committee, we had previously reported to the State Bar President, who later became a co-recipient of our work

⁵Between November 12, 2004, and November 12, 2006, the Committee met 39 times, for a total of 35 days (we often met for 2 days, being Friday, Saturday, and half of Sunday). An average of 16 members attended each meeting. In addition to the meetings of the full Committee, we had 3-4 subcommittees in 2005 and 3 in 2006. The subcommittees coordinated their work with the chair and then shared their conclusions in meetings of the full Committee.

⁶See 2006-2007 State Bar of Texas Committee Reports, 70 Tex. B.J. 612, 620 (2007).

⁷See 2007-2008 State Bar of Texas Committee Reports, 71 Tex. B.J. 562, 571 (2008).

the SCOT authorized the publication of proposed New Disciplinary Rules.⁸ At the time, State Bar Rules provided that the SCOT would promulgate New Disciplinary Rules following their acceptance by Texas lawyers in a referendum. Texas lawyers did not vote for the New Disciplinary Rules, and the SCOT (although it had the power to do so) did not independently promulgate them. Since then, the Texas Legislature has enacted a New State Bar Act, which made significant changes to the referendum process. Also, since then, based on its inherent power, the SCOT has promulgated certain changes to the Texas Disciplinary Rules.⁹

During the time I served as chair, I usually spent 50-100 hours monthly on the work of the Committee, particularly during the months that we had meetings. To facilitate the Committee's consideration of revisions, especially when language of another state's Rules of Professional Conduct differed from that of the Model Rules, I also communicated with the chair of the equivalent committee in Washington, D.C., and in South Carolina, as well as with a member of New York's committee. Moreover, although I selected members of the Committee to assist me in making presentations to the SCOT on the proposed revisions (which occurred in October 2007, December 2007, February 2008, and March 2008), I prepared presentations on all of the proposals and personally made presentations on several of them.

In addition to having studied extensively the Texas Disciplinary Rules for which a lawyer may be sanctioned for violating, I have also studied the Texas Rules of Disciplinary Procedure, which set forth the attorney grievance process in Texas. Specifically, I am co-author with Bob Schuwerk of Handbook of Texas Lawyer & Judicial Ethics, published by Thomson West. The initial volume was published in 2002, and my co-author and I supplement it extensively each year. The current edition is dated 2023 and comprises four volumes.

In 2021, following a referendum, revised Texas Disciplinary Rules were promulgated. The starting point for those revised Rules was the language suggested in the failed 2011 referendum, along with the Committee's work product.

Finally, regarding lawyer "ethics,"¹⁰ I have provided expert/consulting services on the attorney disciplinary process and standards and the issue of breach of fiduciary duty for

⁸Misc. Docket No. 10-9190, Texas Supreme Court Order, Approval of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct, Exhibit A to Referendum Order, Tex. B.J., Dec. 2010, at 900 et seq.

⁹See, e.g., Misc. Docket 18-9030, Order Adopting Amendments to Texas Disciplinary Rule of Professional Conduct 8.03, (March 1, 2018).

¹⁰This is an umbrella term, referencing Rules of Professional Conduct and statutory and case law regarding lawyers obligations.

several years, which has required me to conduct extensive research regarding these topics. I have also made numerous CLE presentations on these topics.

B. Rules of Disciplinary Procedure

As a state agency, the SBOT is subject to Sunset Review, which typically happens every twelve years (though the 2016 review was the first since that in 2002). Sunset Review results in a legislative determination whether an agency should be discontinued or continued with specific changes. The primary legislative outcome for a continued, but different, SBOT is a New State Bar Act, which modifies the one being reviewed. The State Bar Act sets out--broadly (as statutes do) the attorney disciplinary process. The SCOT then crafts and promulgates, with guidance mainly from the Chief Disciplinary Counsel, specific Rules of Disciplinary Procedure to implement the revised process. Thus, the disciplinary process changed effective January 1, 2004 (in response to the 2002 Sunset Review), and June 1, 2018 (in response to the 2016 Sunset Review). Disciplinary cases filed on or after June 1, 2018, are subject to the new Rules of Disciplinary Procedure, regardless of when the behavior occurred. I researched and prepared Part III of the Handbook of Texas Lawyer and Judicial Ethics from the time of the initial publication in 2002 through the 2023 edition,¹¹ updating it extensively in subsequent years.

C. Case Law

Application of the Disciplinary Rules and the Rules of Disciplinary Procedure naturally implicates the disciplinary process, as details on public sanctions suggest how the substantive language of the Disciplinary Rules is applied. The disciplinary process that became effective in June 2018 also impacts the application of the substantive Rules, particularly in the sanction guidelines.

While disciplinary cases may begin and end in the disciplinary system, that is only a possibility. A respondent lawyer may choose to have a disciplinary petition heard in district court, rather than by a grievance panel. A respondent may appeal the outcome of a grievance panel to the Board of Disciplinary Appeals (BODA) which issues opinions that are published similarly to appellate court opinions, another form of case law. A BODA outcome may be appealed to the SCOT.

Apart from results of a complaint filed with the State Bar, judges may sanction attorneys for behavior specified (either required or prohibited) in the Rules. If details of such a sanction are shared with the Chief Disciplinary Counsel, the lawyer could become the subject of a disciplinary petition and receive a sanction for the same behavior in both arenas.

¹¹At my request, Scott Durfee agreed to take over Part III starting with the 2024 edition.

Standards in the Disciplinary Rules also appear in other contexts in litigation. For example, the SCOT has said that the nature and extent of a breach of fiduciary duty to a lawyer's client that results in fee forfeiture absent any demonstration of monetary damages to the client depends on a presentation and evaluation of all of the Disciplinary Rules that were violated:

. . . 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. 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.¹²

Consequently, behavior that results in sanctions from a court can also lead to a disciplinary sanction and be the basis for civil liability. Thus, I have tracked relevant case law when studying and analyzing the Disciplinary Rules and the Rules of Disciplinary Procedure.

D. Ethics Opinions

Although called the Professional Ethics Committee for the State Bar of Texas, the PEC is not a committee created by the State Bar Board of Directors. Rather, its nine members OF the State Bar of Texas are appointed by the SCOT. Its primary statutory mandate is to express its opinion on the propriety of professional conduct other than on a question pending before a court of this state, while it is also required to advise or otherwise assist state bar committees or local bar associations relating to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure and recommend appropriate amendments or clarifications of the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary

¹²*Burrow v. Arce*, 997 S.W.2d 229, 246 (Tex.1999) (footnote omitted; emphasis added). See also *Sealed Party v. Sealed Party*, 2006 WL 1207732, *16 (S.D. Tex. 2006) (The Court finds and concludes that the mandates of Texas rule 1.05 are extremely probative in defining the scope of an attorney's continuing fiduciary duty of confidentiality to a former client after termination of the attorney-client relationship.).

Procedure that it considers advisable.¹³

Because of reliance on the PEC opinions, I also routinely consult the analysis in them when considering issues they address.

II. Materials reviewed

For consideration in reaching my opinions, you provided me with the depositions of the plaintiffs and the defendant lawyers, along with the exhibits, and the plaintiffs active petition in this lawsuit. I have seen references to other case filings, in Collin County, and you have provided me what I have requested from those filings. You have also provided me with the testimony in the arbitration, along with the clients' and the lawyers' exhibits, and interrogatory answers by Abaza, Borunda, and Trevino.

III. Methodology

While fiduciary duties may be variously expressed in case law, the core duties may be stated as the duty of loyalty, the duty of candor, and the duty of confidentiality. Although a single Rule may reflect more than one of these duties, I have selected and analyzed the application of Rules embodying the duties of candor and loyalty to the facts alleged in this case. All of the Rules in Part I, entitled Client-Lawyer Relationship, are designed to protect the client, particularly from conflicts with lawyers:

. . . 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.¹⁴

Thus, I agree with Borunda that the Rules set forth a floor and not a ceiling: "I think that the law and the rules should be applied to me and the facts." (TR 325-26)

A. Breaches of Fiduciary Duty and Conflicts of Interest

Acting as an agent for the client, an attorney assumes the overarching duty of loyalty to a client. Loyalty is paramount because, in representing the client, the lawyer is retained purely to advance the client's interest. Components of the duty of loyalty or separate fiduciary duties on their own are the duties of candor and confidentiality. Candor refers not only to disclosure of important facts but also honesty in the disclosure, requiring

¹³Tex. Govt. Code " 81.091-81.095.

¹⁴Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 7.

accuracy and sufficient completeness. Not only does the duty of loyalty require the lawyer to convey to the client all important aspects of the matter the lawyer is handling for the client, as it literally is the client's matter, but the client needs sufficiently complete and accurate information in order to direct the lawyer in handling the matter, which is the prerogative of the client, as it is the client's matter.

Confidentiality includes not only the duty to maintain client confidential information but also the duty not to misuse that information, such as for the benefit of the lawyer or a third party and the detriment to the client. If clients could not completely trust their lawyer with their confidential information, they could be inclined to withhold information, which could hamper the lawyer's handling of their case, which could negatively impact a recovery for the client. Because the lawyer is in a much better position than the client to say what information could be helpful or harmful, full disclosure from the client can benefit both the client and the lawyer who has a financial interest in any recovery, and the fact that it is supposed to be and remain confidential and protected induces clients to disclose that information. Simply, a lawyer depends upon what the client says, often before any documentary verification or sworn testimony by anyone (and sometimes in spite of the foregoing)Bin deciding to take the case and, later, in determining where to file the case, what defendants to name, the claims to file, and the recovery to seek.

The duty of loyalty requires the lawyer to place the client's interests first and even to avoid situations in which the client's interests may be pitted against those of the lawyer or third parties. "The basis for fiduciary responsibility is dominance of one person over another. The law [of] fiduciary obligations presumes from the lawyer's expertise and professionalism a lawyer's dominance over her client. . . . Fiduciary obligation is shaped by the discretionary control that an attorney usually has over a significant aspect of the client's life or assets, and by the fact that very often the interests of the lawyer are not always the same as, and may be in conflict with, those of the client."¹⁵

1. Fee Forfeiture

By way of background, in 1999, the Texas Supreme Court extended principles of compensation forfeiture for agents (fiduciaries) in general to lawyers.¹⁶ Thus, an attorney risks fee forfeiture for breach of fiduciary duty without the need for a client to show damages. The harm is in the breach of the duty of loyalty itself, through the lawyer putting his or her interests (or those of a third party) above those of the client. According to *Burrow*, the jury (or fact-finder) determines the existence of a breach--unless its determination can be made as a matter of law--and the court determines,

¹⁵Ray Ryden Anderson and Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: a Primer on the Legal Malpractice Puzzle*. 47 SMU L. Rev. 235, 240, 244 (1994).

¹⁶*Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

based on a set of factors, whether there should be a forfeiture and, if so, in what amount.

The *Burrow* factors include the following, which the Texas Supreme Court said should be applied in the case of “ ‘clear and serious’ “ violations: “ ‘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.’ “¹⁷

In its opinion in *Burrow*, the Texas Supreme Court observed that “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.”¹⁸

Apart from the focus on Rule 1.08(f), the SCOT acknowledged “other alleged disciplinary rules violations [which] might also justify forfeiture.”¹⁹ In fact, the court said that it could not decide the fee forfeiture question based purely on the arguments made regarding Rule 1.08(f), as it would need to assess whether other rule violations might call for forfeiture. Thus, which and how many Rules were violated provide relevant information for forfeiture purposes. More importantly, it is the acts that the Rules call for or prohibit that indicate whether a lawyer has breached fiduciary duties.

2. Fee Forfeiture Based on Rule Violations

By way of example, because Houston lawyers Earle Lilly and Bob Piro had their existing client Linda Lowe Sarofim sign a new employment agreement with them, followed later by a release of them, which they prepared, the State Bar commenced a disciplinary action. In their petition,²⁰ the Commission for Lawyer Discipline summarized that the new agreement was not “fair and equitable” to the client and that the lawyers failed to place the interests of their client before their own, used and abused their position as fiduciaries to gain a benefit at the expense of their client, failed to clarify how the fee was determined, sought to have themselves released from future liability but never recommended that their client consult independent counsel before agreeing to do so, and failed to disclose to her the true intent of the “release.”

¹⁷997 S.W. 2d at 241 (citing to Restatement (Third) of The Law Governing Lawyers § 49 (Proposed Final Draft No. 1, 1996)).

¹⁸997 S.W.2d at 246 (footnote omitted).

¹⁹*Id.*

²⁰Attached.

The Commission alleged violations of Rules 1.03 (failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions), 1.04(a) (charging or collecting an unconscionable fee), 1.04(d) (failing to give the client a written statement showing the method of determination of the outcome), 1.06(b) (continuing a representation that has become adversely limited by the lawyer's own interests), 1.08(a) (entering into a business transaction with a client), 1.08(g) (making an agreement to prospectively limit the lawyer's liability unless the client is independently represented by counsel), and 1.14 (failing to keep separate property in which the client and a third person claim interest), among other Rules.²¹ Seven months later, an agreed judgment of public reprimand was entered, concerning only Rule 1.04(d).²²

Prior to the prosecution by the State Bar, the client had sued lawyers Piro and Lilly for breach of fiduciary duty. Judge Tracy Christopher also viewed the new fee agreement thrust upon the client after the representation had begun as a transaction between the lawyers and their client. The first question submitted to the jury tracked Pattern Jury Charge 104.2, asking whether the transaction was fair and equitable to the client, whether the attorneys made reasonable use of the confidences the clients had placed in them, whether the attorneys acted in the utmost good faith and with scrupulous honesty, whether the attorneys placed their interests before those of their client, and whether the attorneys fully and fairly disclosed all important information to their client about the transaction. The jury answered, "No," and found actual damages from the breach of fiduciary duty in the amount of \$3 million.²³

At the request of the parties, Judge Christopher also made findings of fact and conclusions of law.²⁴ Her initial findings were that the contract and the conduct of the lawyers were not fair and equitable to the client and that the lawyers did not disclose all important information to the client about the agreement. Concluding as matters of law

²¹*Id.*

²²Based on my study of the disciplinary process over several years, the agreed judgment is the equivalent of a plea bargain, but results in an early termination of the matter and does not suggest the inability of the Commission to prove the other allegations.

²³See judgment in Piro case

²⁴*Piro v. Sarofim*, 2002 WL 538741, at *7 - *10 (Tex. App.- Houston [1st Dist.] Apr 11, 2002) (not designated for publication). See also *Piro v. Sarofim*, 80 S.W.3d 717 (Tex. App. -Houston [1st Dist.] 2002, no pet.) (without findings and conclusions).

that the breaches were grave, serious, clear, and willful, she determined a fee forfeiture of \$3 million.²⁵

Based on the standards in the Rules relevant to the instant facts, *Burrow v. Arce* permits if not invites a forfeiture.

B. Standard of Conduct versus Standard of Care

“Although there are several theories under which one might seek recovery against an attorney, the ultimate issue in a legal malpractice case is whether there has been a breach of duty which has caused damage.”²⁶ Thus, from the perspective of what may damage a client, negligence and breaches of fiduciary duty in some sense comprise “legal malpractice.” However, courts have differentiated between “the competence required by the standard of care” and “the fiduciary obligations required by the standard of conduct.”²⁷

The foregoing is a logical distinction, given the simple statements by the Texas Supreme Court that “[a]n attorney malpractice action in Texas is based on negligence” and “[a] lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney.”²⁸ The standard of care encompasses both diligence and the display of skill and knowledge. Thus, whether an attorney has exercised reasonable skill and care is determined by the extent to which the attorney has varied from the diligence and skill that “a practicing lawyer of ordinary skill, prudence and knowledge of the law would exercise in a similar case under similar circumstances.”²⁹

“Standard of care” therefore implies particularity of practice area, which would be beyond the possible specificity of the Rules. Put more simply, the Rules do not detail how to draft a will or an MSA or how to challenge a trust or a will; but the duty to communicate spans all practice areas, and a lawyer may fail to meet the standard of care by not communicating with a client as the Rules require.

²⁵Judge Christopher reduced the \$6 million total by half, characterizing the \$3 million remaining as breach of fiduciary duty damages or fee forfeiture. See judgment.

²⁶David J. Beck, *Legal Malpractice in Texas*, Second Edition, 50 *Baylor L. Rev.* 547, 605 (1998).

²⁷*Id.* at 606.

²⁸*Cosgroves v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989).

²⁹Beck, at 613-14.

Similarly, in my opinion, failure of a lawyer to achieve a client's specific objective is due to the relative weakness of the legal claim or objective as compared to that of opposing parties or an opposing interpretation of legal authority, the degree of stamina on the part of all parties, negligence or lack of competence on the lawyer's part, or breach of contract on the lawyer's part. The Rules do not address the strength of a legal claim for disciplinary purposes (other than in connection with frivolous claims), the persistence of parties, or breach of contract (apart from statements like that in Rule 1.01(b)(2)).

Rule 1.01(a)(1) does require a lawyer to decline a representation if the lawyer knows or should know that he or she lacks the competence to handle it unless the client permits the lawyer to associate another lawyer, who does have the competence, on the matter.

A lawyer, then, breaches the standard of conduct simply by taking a representation that the lawyer knows or reasonably should know is beyond that lawyer's competence. Though the comments to Rule 1.01 explain that a lawyer may appropriately contemplate becoming competent in the area, the lawyer who does not do so may wind up breaching the standard of care.

A lawyer who was able to handle a representation at the outset may face unexpected restrictions on his or her time. For example, as Borunda explains,

3 . . . I think
4 it's important to note one of the reasons why I thought
5 to bring on Mike was because shortly -- or essentially
6 contemporaneously with this switch to a contingency --
7 my mother lives by herself in Mexico and had fallen and
8 shattered her hip. And so I was going to be having to
9 travel back and forth to make sure that everything was
10 handled properly. And so I saw myself being a little
11 bit short on time, which was going to be another benefit
12 of having Michael around.
13 And then when I got back from the last
14 trip to see my mother, I caught a nasty strain of COVID
15 and I was sidetracked for a while.
16 So Mike came aboard and he took the
17 laboring oar on the day-to-day operations on this case. (TR 238)

Trevino actually testified that he was filling a need expressed by Borunda: "I need you to step up and take over here." (TR 717)

As Trevino was an out-of-firm lawyer who would share in the fees from a recovery, Caroline certainly had to consent to his addition in that regard.

A practice-area specialist who determines that a lawyer has been negligent may conclude that the definition of neglect in Rule 1.01(b)(1) and Rule 1.01(c) supports a

conclusion of gross negligence on the part of the lawyer. That specialist could also conclude that a lawyer who “fail[ed] to carry out . . . the obligations . . . owe[d] to a client or clients” (Rule 1.01(b)(2)) has breached the standard of care and/or breached the contract itself, with a fact-finder deciding the significance of the obligations the lawyer failed to carry out and/or whether the lawyer’s failure was excused.³⁰

C. Purpose of the Texas Disciplinary Rules of Professional Conduct

The State Bar committee on which I served for seventeen years, charged with constantly reviewing the Texas Disciplinary Rules of Professional Conduct and suggesting revisions, acknowledged our guiding purpose to be protection of the public. By protecting the public, we also protected lawyers, by setting out a standard of conduct that could steer them clear of conflicts between their goals and interests and those of their clients:

If all lawyers were paragons of virtue and ethics the concept of legally enforceable, penalizing disciplinary standards for lawyers would be a puzzling anathema. Lawyers' innate allegiance to moral ideals such as loyalty, honesty, fidelity, faithfulness, and reliability would give ample protection to courts, clients, and others involved in the legal system. Hortatory guidance in applying those morality principles to problems of legal practitioners might be helpful, but no more would be needed.

.
The 1908 ABA Canons, without force on their own, were adopted by various states. In Texas our Canons followed the ABA Canons verbatim. But during the following decades, amendments to ABA Canons and state canons were adopted, designed to turn the hortatory statements into legally enforceable disciplinary rules. Thus, the ABA and Texas Canons became a mish-mash, a hopeless mixture of hortatory statements of morality and ethics with statements resembling enforceable law. Mere ethical guidance had proved insufficient to control misbehaving lawyers. Mandatory rules were needed.

.
Disciplinary standards must have the precision of well-drafted criminal statutes. Precise drafting is vital to secure proper application of a rule.

The Rules are mandatory not only in terms of their language, but also insofar as lawyers' knowledge of them is concerned, indicated in comment 1 to Rule 8.04::

³⁰See, e.g., Texas Pattern Jury Charge, Business, Consumer, Insurance & Employment, Chapter 101 (2018).

There are four principal sources of professional obligations for lawyers in Texas: these rules, the State Bar Act, the State Bar Rules, and the Texas Rules of Disciplinary Procedure (TRDP). All lawyers are presumed to know the requirements of these sources. Rule 8.04(a)(1) provides a partial list of conduct that will subject a lawyer to discipline.

1. Compliance with New Lawyer's Oath

How a new lawyer might comply with the oath required to practice law, absent knowledge of the Disciplinary Rules, is unclear:

I, _____, do affirm that I will support the Constitutions of the United States, and of this State; that I will honestly demean myself in the practice of law; that I will discharge my duties to my clients to the best of my ability; and, that I will conduct myself with integrity and civility in dealing and communicating with the court and all parties.

While variations of the language appear, all contain the promise to "discharge my duties to my clients to the best of my ability." As Borunda explained in his deposition and repeated in trial, the floor of such duties appears in the Rules. (TR 325) Abaza indicates the challenge in learning all of the fiduciary duties a lawyer owes to a client:

11Q. What fiduciary duties do lawyers owe to their
12 clients?

13 A. I haven't memorized it, but loyalty, full
14 disclosure. But I'd like to -- again, I don't have an
15 elephant memory here.

16 Q. Can you give me any other fiduciary duties
17 that lawyers owe their clients as an expert on
18 fiduciary duties?

19 A. I know there's others. You know, not here in
20 the spotlight. (Abaza, TR 591)

Even were a lawyer to learn what particular acts would discharge his or her fiduciary duties to a client, that knowledge would, at best, substitute for an understanding of only the provisions in Part I of the Rules, Client-Lawyer Relationship. Those Rules are based on fiduciary duty, to the extent to which the drafting Committee could articulate those duties in a Rule having the specificity of a well-drafted criminal statute.

Understanding the foundation duties of Part I would not completely inform a lawyer of the duties to prospective clients, with which lawyers can comply by also following the Rules in Part VII. Nor would it tell a lawyer what to do in complying with the guidelines in Parts III, IV, V, or VI. Per Rule 8.04(a), a lawyer is subject to discipline for violating any of the Rules, on his or her own or through another person:

- (a) A lawyer shall not:
 - (1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client lawyer relationship

2. Compliance with Duty to Report Misconduct

A lawyer could likely discharge his or her reporting duties in Rule 8.03 as to another lawyer only by knowing the guidance in the Rules:

- (a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority. (emphasis added)

C. Applicable Texas Disciplinary Rules

1. Candor

Candor refers not only to disclosure of important facts but also honesty in the disclosure, requiring accuracy and sufficient completeness. The following Rules, based in part on the duty of candor in particular and/or the overarching duty of loyalty, specify what is required of the lawyer in communicating with the client.

Rule 1.02 Scope and Objectives of Representation

- (a) Subject to paragraphs (b), (c), (d), (e), and (f), a lawyer shall abide by a clients [sic] decisions:

. . .

- (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law

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.

Rule 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. . . .

. . .

- (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.

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

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 [sic] 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.
-
- (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.

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.

2. Loyalty

The duty of loyalty requires the lawyer to place the client's interests first and even to decline a representation if the lawyer cannot provide competent representation. The following Rules reflect the duty of loyalty applicable to your case.

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

The lawyer demonstrates loyalty to the client by providing the client with all settlement offers and settling only on terms to which the client consents (relevant language in Rule 1.02 appears above).

The lawyer demonstrates loyalty to the client by informing the client of the status of a matter, explaining it in such a way that the client may direct the engagement (relevant language in Rule 1.03 appears above).

The provisions in Rule 1.04 are designed to prevent the lawyer from favoring his or her own interests over those of the client by specifying requirements for fee agreements (relevant Rule 1.04 language appears above).

Rule 1.06 indicates how a lawyer can avoid representations in which the lawyer's loyalty to himself or herself or to a third party may trump the lawyer's loyalty to a client (relevant Rule 1.06 language appears above).

Rule 1.08 specifies how a lawyer may conduct transactions with a client without breaching the duty of loyalty to a client by favoring the lawyer's interests over those of the client (relevant Rule 1.08 language appears above).

Compliance with all of the duties reflected in Rules 1.01, 1.02, 1.04, 1.06, and 1.08 depend on an assessment of the adequacy (clarity and completeness) of the communication in each instance, described in Rule 1.03.

E. Purpose of March 2005 Revisions to Rules 1.04(f) and 1.04(g)

The revisions to Rules 1.04(f) and 1.04(g) serve the dual purpose of protecting lawyers and the public. In and of themselves, the provisions in Rule 1.04 encapsulate the duties of loyalty and candor to the client.

The lawyers they sought to protect were the handling lawyers who were in the position, via Part VII-compliant advertising and marketing, to attract contingent fee clients without the aid of a referring lawyer. Those lawyers, though quite competent to handle the representation, were at risk of lawyers who did not comply with Part VII advertising and marketing guidelines, diverting clients from the handling lawyers, even if the handling lawyers had already signed them, offering enticing sign-up "bonuses" to the clients.

The revisions protected clients in two ways. One, they permitted clients to select lawyers, even to decide whether to pursue litigation, on their own schedule, based on their own research, not responding to referring lawyers who would accost them at the funerals of their loved ones, offering to pay for funeral and other expenses.

Two, they changed the standard of care for referring lawyers. That is, before the changes that became effective in March 2005, all a referring lawyer had to do to rebut a discharge for cause under *Mandel & Wright v. Thomas*³¹ was show that he or she had referred a case.

³¹441 S.W.2d 841 (Tex. Apr 16, 1969).

A particular disciplinary action, *Commission for Lawyer Discipline v. Silvas*, shows the predicament in which a client was placed with that prior standard of care for a referring lawyer. Then, prior to the enactment of the civil barratry statutes and the promulgation of the referral fee provisions in March 2005, lawyers knew to hide the fact that they acquired a case through unauthorized contact with a prospective client. They would even have clients swear that they were not contacted in the very way in which they were contacted. In *Silvas*, the client discovered that her case had been referred, without her knowledge and consent, and rejected the handling lawyer. However, when she tried to shop her case to a handling lawyer of her choice, she met resistance due to the pending interest of the referring lawyer. He could not be discharged under *Mandel & Wright v. Thomas*, as he had done all that a referring lawyer was required to do—refer the case—and he did or would receive a handsome referral fee for doing nothing more. He was disciplined under a number of the Rules.³²

The 1990 Texas Disciplinary Rules of Professional Conduct permitted a forwarding lawyer to receive a referral fee for doing nothing but acquiring and forwarding a case to a handling lawyer. This was in spite of the fact that, under the ABA Model Code of Professional Responsibility, Canon 34 eliminated the economic incentive for improper solicitation by condemning the payment of referral fees when the forwarding lawyer did nothing but acquire and then refer the case.

1. Formulation and Adoption of the New Referral Fee Changes

While, in one view, the path to the revised referral fee provisions was rocky, it was, in another view, incredibly thorough and well-considered. But the entirety of the path was disclosed to the Bar members at large, with them having an opportunity all along the way both to become informed of the process and to contribute their views.

a. SCOT Misc. Docket 03-9160

The educational process began when the Texas Supreme Court submitted for publication in the November 2003 issue of the Texas Bar Journal its proposed order for Amendments to the Texas Rules of Civil Procedure. As the face of the order indicates, this is how the SCOT informs "each registered member of the State Bar of Texas" (along with sending a copy to "each elected member of the Legislature") about the proposed change and invites comments. The order contains proposed Rule 8a, which establishes a cap on a referral fee of "\$50,000 or 15% of the attorney fees for the party in the case, whichever is less."

³²See attached disciplinary materials.

b. Background to Misc. Docket 03-9160

The December 2003 issue of the TBJ provides a "special section" of thirteen pages of background materials in response to "an unprecedented level of discussion regarding the proposed rule and the process that led to its adoption." An included timeline indicates that proposed Rule 8a was the culmination of nearly 50 events, beginning in 1969. The State Bar Executive Committee voted to request that the SCOT delay implementation of Rule 8a, proposing in a letter that "Bar leadership will appoint a special task force that will review Rule 8a and possible changes to Rule 1.04 and Part VII of the Texas Disciplinary Rules of Professional Conduct related to referral fees and advertising." The message from the SBOT, on behalf of its membership, was that it could improve upon the provisions in Rule 8a. That improvement ultimately came in newly promulgated Rules 1.04(f) and 1.04(g), with an effective date of March 2005.

c. SCOT Misc. Docket 03-9270

On December 29, 2003, the SCOT issued Misc. Docket 03-9270, which is actually a per curiam opinion thirty pages long, ending with the following:

The State Bar's written proposal, attached as Appendix B, has been further explained by the Bar leadership in their meeting with the Court.⁸⁴ The proposal calls for the Bar to appoint a special task force with diverse representation that will conduct public hearings in five cities in January and February and solicit input through other means. A verbatim record will be made of these hearings. It is likely that the task force will also consider related advertising issues. The task force will present the State Bar Board of Directors with a preliminary report on April 16, 2004, and a final report at least thirty days before the Board's meeting on June 23-24, 2004. The task force and the Board will regularly apprise the Court of their progress. As soon as the Board has acted on the report, it will present its recommendations to the Court. Those recommendations, which may be modified by the Court, will then be submitted to a referendum of the members of the Bar in the fall of 2004. If this process satisfactorily addresses the issues that have been raised, proposed Rule 8a will be withdrawn.

The order appears, with footnotes, in the February 2004 issue of the TBJ. It appears, with appendix items, on the SCOT's website for 2003 administrative orders.

d. SCOT Misc. Docket 04-9220

On October 1, 2004, the SCOT issued this order: Approval of Referendum on Proposed Changes in the Texas Disciplinary Rules of Professional Conduct. Also thirty pages, it contains the form of ballot, along with proposed revisions to Rule 1.04

and to the advertising Rules in Part VII, which were published in the November 2024 issue of the TBJ.

e. SCOT Misc. Docket 05-9013

On January 28, 2005, the SCOT issued the Order Promulgating Amendments to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, with an effective date of March 1, 2005. There it states that "[t]he proposed amendments to Part VII of the Texas Disciplinary Rules of Professional Conduct are still under consideration and are not promulgated by this Order."

2. Informing Bar Members of the Process

In July 2009, then State Bar President Roland Johnson wrote Chief Justice Wallace Jefferson, thanking the CJ for his request of SBOT Directors input on the issue of attorney disclosure of the existence or non-existence of professional liability insurance. Johnson explained that

we are planning a process, much like the process that was employed when the State Bar held hearings on new referral fee rules in 2004. Our goal is to give as much notice as possible to both attorneys and members of the public throughout the state so that they may give input at the hearings or through written comments.

In my opinion, Johnson fairly summarized the Bar's efforts to keep the Bar members informed and involved, to the extent they wanted, in the process, based on the following:

a. Notifications in the Texas Bar Journal

- (1) Identification of Task Force members and meeting schedule (Feb. 2004, at 125)
- (2) Task Force meeting schedule update (Mar. 2004, at 181)
- (3) Report that Dickie Hile, Task Force chair, was working hard (Apr. 2004, at 264)
- (4) Notification that Task Force had finalized its report, with download link (July 2004, at 602)
- (5) Request for public comments to suggestions made by Task Force, with download link to report (Sept. 2004, at 632)
- (6) Reminder of State Bar President to vote and summarizing proposed changes (Nov. 2004, at 832)

b. CLEs

The Bar offered presentations on the proposed revisions. I attended one, given by Bennie Agosto, who reviewed the substance of the changes. He clearly stated that, if we did not vote for the referral Rule changes, the SCOT would promulgate Rule 8a.

3. Educating Bar Members about the Changes

a. Post-referendum CLEs

Following is a screenshot of at least some of the CLEs provided following the referral fee changes, in reverse chronological order. David Evans, which would be Judge David Evans, listed as a presenter twice, was a member of the Referral Fee Task Force. Dickie Hile, listed once, was its chair. Ray Cantu, listed once, had long been affiliated with the Advertising Review Committee when I met and interacted with him during my work on the Disciplinary Rules drafting Committee.

Referral Fees and Advertising Legislative Update

 [Look Inside](#)

Aug 19, 2005 - [View TOC](#)

Richard C. Hile

The Practicalities of the New Referral Fee To Refer or Not to Refer? That is the Question.

Annual Meeting: General Practice

 [Look Inside](#)

Jun 23, 2005 - [View TOC](#)

David L. Evans

Advertising Rules and Referral Fees Residential Real Estate Construction Law 2006

 [Look Inside](#)

Jun 3, 2005 - [View TOC](#)

Robert F Pierry Jr

Brave New World or More of the Same? The New Referral Fee Rule Advanced Insurance Law 2005

 [Look Inside](#)

Mar 31, 2005 - [View TOC](#)

James L. Cornell

The Practicalities of the New Referral Fee. To Refer or Not to Refer. That is the Question.

State Bar College Spring Training 2005

 [Look Inside](#)

Mar 10, 2005 - [View TOC](#)

David L. Evans

Lawyer Advertising and Referral Fees: Understanding the Proposed Rule Changes

Advanced In House Counsel Course 2003

 [Look Inside](#)

Dec 31, 2004 - [View TOC](#)

Ray Cantu Jeffrey B. Ferguson CPA Mitchel Lane Winick

b. Concise summaries

Over the next couple of years following the March 2005 effective date, the Professional Ethics Committee issued opinions addressing specific scenarios posed to them by lawyers regarding the application of the revised referral fee Rules. These were published in the TBJ. However, a summary, largely reflecting what then State Bar President Kelly Frels had said in his get-out-the-vote message in November 2004, provides simple, straightforward guidance.³³ Under the "Main Components" heading appear the following:

1. Lawyers not in the same firm may divide a fee either on the basis of the proportion of services they render or if each lawyer assumes joint responsibility for the representation.

...
Joint Responsibility

- Joint responsibility 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.

...
b. **Adequacy of communication.** Referring or associating lawyer must monitor the matter throughout the representation by being reasonably informed about the matter, responding to client questions, and assisting the handling lawyer when necessary and ensure that the client is informed of the progress of the case.

2. Attorney must obtain client consent to ensure that clients are informed of the terms and conditions of any agreement among lawyers to divide a fee.

- Specifies that the referring or associating lawyer has the primary duty to ensure full disclosure and compliance with this rule.

The following FAQ and answer then appear:

How do the new rules affect referral fee arrangements entered into before the March 1, 2005, effective date?

The pre-March 1, 2005, version of Rule 1.04 applies to fee arrangements between lawyers not in the same firm entered into before

³³This is attached, though difficult to read due to the graphics.

March 1, 2005, so long as the client has been advised by that date of all lawyers participating in his or her case. All other fee arrangements entered into with a client that divide fees with lawyers not in the same firm should comply with the new rules after the effective date of the new rules.

The FAQ and answer clearly distinguish the pre-March 2005 referral fee Rules from those following the March 2005 changes: the client before March 2005 must only be aware of the lawyers working on his or her case by March 2005; after that date, the client must be advised of and approve in writing of the lawyers, their fee sharing arrangement, and other requirements in the revised Rules prior to the lawyers commencing their work. The Referral Fee Task Force Report further clarifies this dramatic change:

As one aspect of their duty to communicate with their clients, lawyers have a responsibility to ensure that clients are informed of the terms and conditions of any agreement to divide a fee. See Texas Disciplinary Rule 1.03. Texas Disciplinary Rule 1.04(f)(iii) presently requires a written agreement only where a lawyer assumes joint responsibility for the representation. Otherwise, a client need only be advised of, and not object to, the participation of all of the lawyers involved. See Texas Disciplinary Rule 1.04(f)(2). An affirmative act of consent is not required. Moreover, it is not clear that the present rule requires client non-objection or consent at the front end of the referral process rather than at some later point in time, and it also appears that lawyers need not disclose the terms of their fee division to the client. The Task Force believes that all of these aspects of the current rule are unacceptable.

The proposed amendment to Texas Disciplinary Rule 1.04(f)(2) requires that a client consent in writing prior to the time of the association or referral proposed to the terms of any arrangement regarding a division of fee, including the identity of all lawyers or law firms who will participate in the fee-sharing agreement, whether fees will be divided based on proportion of services performed or by the lawyers agreeing to assume joint responsibility for the representation, and the share of the fee that each lawyer will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made.

This is a distinction with a huge difference. It means that Abaza, Borunda, and Trevino base their contingent fee recovery arguments on guidelines that were superseded in March 2005. As Abaza and Borunda were licensed in 2000, I, as would apparently Judge Evans, find it jaw-dropping that they were unaware of the hullabaloo over fee sharing and the resulting fee agreement requirements. As Trevino was licensed in

2009, then he had only that set of requirements to learn and did not have to unlearn the pre-March 2005 ones.

IV. Analysis

A. Rule 1.04 Violations Bar Recovery on the Contingent Fee Agreement

The facts in the disciplinary matter *McCleery v. Commission for Lawyer Discipline*, while at first blush quite different from those here, actually invite the identical analysis and conclusions appearing there. The analysis of the magistrate judge and judge in *Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron and Blue* (“the Hill case”) also reflects a real-world application of the provisions in Rule 1.04 and the handling of unclear provisions for determining a fee.

The court in both cases assessed the enforceability of provisions in contingent fee agreements. In the former, McCleery began representing Williams after a referral from the Houston Volunteer Lawyers Program. McCleery acknowledged, based on the HVLP policies, that he would be representing Williams pro bono, and confirmed that in status reports to the HVLP for over a year. McCleery understood that, if necessary, he would file suit and try the case. McCleery filed a DTPA action, seeking treble and exemplary damages.

Following an unsuccessful mediation, the case was set for trial the next month. The night before trial, McCleery had dinner with Williams, who was “elderly, infirm, and indigent” and had traveled from Louisiana, where he had moved from Houston after the death of his wife. Then McCleery presented Williams with a contingent fee contract, which Williams signed. The new agreement, of which McCleery did not notify the HVLP, called for him “to receive ‘40% of all sums collected.’” “As the trial resulted in “a \$36,210 cash payment plus debt forgiveness of \$13,790,” McCleery calculated his 40% fee, based on a \$50,000 “recovery,” at \$20,000.³⁴

The Hill case comprised a dispute over attorney fees sought by prominent Dallas lawyers (Lisa Blue Baron, Charla Aldous, and Stephen Malouf, “BAM”) against a former client, Albert Hill, III. Hill had “challenged the validity of, and amount owed under, a contingency fee agreement entered into by BAM and Hill.” Mark Lanier had previously represented Hill, and Hill said his understanding was that “Malouf was his lawyer, ‘stepping into Lanier’s position in the case.’” Blue and Aldous were included, making the arrangement a splitting of fees among lawyers in different firms. Hill later challenged provisions in the fee agreement, particularly based on the fact that he did not sign it before the BAM lawyers started working on the case. Magistrate Toliver,

³⁴Findings of Fact and Conclusions of Law, Comm’n for Lawyer Discipline v. McCleery, No. 2003-26068, 55th Dist. Ct., Harris County, Tex., Sept. 21, 2004.

following an evidentiary hearing, entered an order, which both Hill and BAM challenged. The judge sustained one or more of the objections and overruled others.³⁵

1. Unconscionable Fee³⁶

a. “Totality of the circumstances”

(1) *McCleery*

In *McCleery*, the Commission for Lawyer Discipline charged in its original petition that McCleery had violated two parts of Rule 1.04, two parts of Rule 1.08, and Rule 1.06(b)(2).³⁷ The court entered judgment that McCleery had violated Rule 1.04(a) and Rule 1.04(c).³⁸ In its findings and conclusions, the court cited the two Rule violations without analysis, simply summarizing each Rule as the Commission had done. Of the \$36,210 cash Williams was to receive, McCleery had kept \$20,000, applied \$1,427 for expenses, and given to Williams \$14,783. Though McCleery said he would donate the \$20,000 to the HVLP, he did not. Thus, the court ordered that McCleery pay the \$20,000 to the estate of Williams (as he had died), along with nearly \$10,000 in attorney fees to the State Bar and nearly \$1500 of costs and expenses.³⁹

Among the fact findings made by the trial judge were that

34. This change in relationship would have benefited Respondent.
35. Williams would not have gained any additional or different benefit from this new arrangement than he would have received under the pro bono PSA.⁴⁰

³⁵*Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron and Blue*, 843 F. Supp.2d 673 (N.D. Tex. 2011).

³⁶This is a heading in the *McCleery* opinion.

³⁷Original Disciplinary Petition, Comm’n for Lawyer Discipline v. McCleery, No. 2003-26068, 55th Dist. Ct., Harris County, Tex., May 16, 2003.

³⁸Final Judgment of Public Reprimand, Comm’n for Lawyer Discipline v. McCleery, No. 2003-26068, 55th Dist. Ct., Harris County, Tex., July 8, 2004.

³⁹Findings of Fact and Conclusions of Law, Comm’n for Lawyer Discipline v. McCleery, No. 2003-26068, 55th Dist. Ct., Harris County, Tex., (filed) Sept. 21, 2004.

⁴⁰*Id.*

On appeal, McCleery argued that “[t]he forty percent (40%) contingent fee collected by KIM*MCCLEERY is unconscionable only if a competent lawyer could not form a reasonable belief that the forty percent (40%) fee is reasonable.” His reasoning was that

- (1) he had used “a standard and customary fee contract,”
- (2) “the forty percent (40%) contingent fee is the customary contingent fee for cases that proceed to trial in Harris County, Texas,”
- (3) “During the second unsuccessful mediation, Williams offered to pay KIM*MCCLEERY for their time and service in preparation for trial. actually [saying]: ‘I don’t want any money, I just want my house back. If I win any money you [KIM*MCCLEERY] keep it’, and
- (4) “the trial court refused to find McCleery exerted undue influence, intimidation, threats or coercion on Williams in order to procure [the] written fee agreement [and] declined to find the terms of [the] written fee contract to be overreaching.”⁴¹

Citing to and analyzing case law, the Commission responded that “[g]iven the totality of the circumstances, the trial court correctly concluded that McCleery’s 40% contingency fee was unconscionable.” The issue was not whether 40% was a reasonable contingent fee but whether the situation in which it was procured was unconscionable. In this situation, the Commission argued, “the charging of any fee would be unreasonable.”⁴²

Applying the two guidelines in comment 8 to Rule 1.04, to be used to decide an unconscionable fee “in otherwise borderline cases,” the Commission focused on the “failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated.”⁴³

The contract called for 40% “‘of all sums collected,’” which McCleery argued applied to the amount of the forgiven debt. That was not explained to Williams, although debt forgiveness was a remedy sought at trial. Thus, the Commission argued as follows:

. . . The burden was upon McCleery to either express in the contract or explain to Mr. Williams that his contingent fee would be calculated on non-cash benefits as well as money damages. *See Levine*

⁴¹Brief of Appellant, *McCleery v. Comm’n for Lawyer Discipline*, 2005 WL 1141905, at *9, *18-*20 (Tex. App.--Houston [1st Dist.] Apr. 22, 2005).

⁴²Brief of Appellee, *McCleery v. Comm’n for Lawyer Discipline*, 2005 WL 2841973, at *11 (Tex. App.--Houston [1st Dist.] July 8, 2005).

⁴³Brief of Appellee, *McCleery v. Comm’n for Lawyer Discipline*, 2005 WL 2841973, at *12 (Tex. App.--Houston [1st Dist.] July 8, 2005).

v. Bayne, Snell & Krause, LTD., 40 S.W.3d 92, 95 (Tex. 2001). But he did neither. And the letter McCleery characterized as his settlement statement sent to Mr. Williams said only that his claims had been settled for \$50,000.00 and that “per our agreement” he and Kim had taken 40% of that settlement plus expenses, leaving Mr. Williams with a “cash recovery of \$14,783.00.”⁴⁴

In affirming, the First Court of Appeals noted that, at trial, Williams directly contradicted McCleery on the conversation in which Williams supposedly asked for McCleery to take a fee. But the trial judge said he would take McCleery’s version:

. . . So, even ignoring Williams's testimony, the trial court found McCleery's 11th hour fee agreement unconscionable. We do, too.⁴⁵

(2) Allison fee agreement

Caroline signed her contingent fee agreement on October 16, 2020, which added Trevino to the attorney team. Trevino testified in his deposition (p. 237) that he likely had a conference call with Robin’s lawyer on October 19, 2020, when (or soon thereafter) Collins mentioned a second mediation. Caroline testified at trial that, once she became a contingent fee client, she felt downgraded as a client: “the difference was like night and day. . . . I was paying eventually more and getting a lot less.” (TR 1281).

Like the fact-finder (the judge) in *McCleery*, the arbitrator here could find that the attorney(s) stood to benefit from the changed agreement on the eve of trial, and the client did not (and actually did not benefit). If so, my opinion is that the analysis in *McCleery* supports a conclusion that, under the totality of the circumstances, Trevino, Abaza, and Borunda are seeking an unconscionable fee.

If, as a factual finding or a legal conclusion, the arbitrator here determines that the lawyers failed to clarify how the fee would be calculated, my opinion is that falls under the totality of circumstances, especially given the factor indicated in comment 8:

. . . Because the lawyer is better able than the client to predict and provide for fee arrangements based on recoveries diverging from the traditional payment actually received, the burden should fall on the lawyer

⁴⁴Brief of Appellee, *McCleery v. Comm’n for Lawyer Discipline*, 2005 WL 2841973, at *11-*12 (Tex. App.–Houston [1st Dist.] July 8, 2005).

⁴⁵*McCleery v. Comm’n for Lawyer Discipline*, 227 S.W.3d 99, 105 (Tex. App.–Houston [1st Dist.] 2006, pet. denied).

to express in a contract with the client whether the contingent fee will be calculated on non-cash benefits as well as money damages.⁴⁶

b. Hours and expenses

(1) Hours in Allison fee agreement

As an alternative to the contingent fee percentage based on an estimate of the recovery for Rich and Caroline, Abaza simply takes his percentage of the estimated recovery:

18 Q. So then after October 2020, can you provide me
19 with any estimation of the hours that you've spent on
20 the case until November of 2021?

21 A. It would be hard to do off the top of my head
22 here, but it's been -- I mean, we were getting ready
23 for trial, and Mike was being onboarded and so there
24 was a lot -- did I redo -- I don't know if -- okay.
25 I mean, probably double that.

5 Q. So a little -- about 230 hours?

6 A. That's a guess.

7 Q. Can you narrow it down and give us a better
8 approximation or tell us how we can do that?

9 A. I'd have to think about that.

10 Q. So if we take the 230, 250 hours that you
11 worked in the case and we multiply that by the fee
12 that you're seeking -- which is somewhere around
13 900,000, right?

14 A. What's 30 percent of the 2.7?

15 Q. I think it comes out to about 900,000. It's
16 actually --

17 A. Six -- 8.1.

18 Q. Right. The point is we can do the calculation
19 based upon that approximate 230-hour figure, yes, to
20 find out how much you're seeking on a per-hour basis?

21 A. Not really -- I mean, if you want to put a
22 guess in there, sure.

23 Q. Well, it's your opinion, isn't it, that the
24 fee that you are seeking is fair and reasonable?

25 A. Yes. (TR 602-603)

⁴⁶*Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 95 (Tex. 2001); *Johnson v. Stickney*, 152 S.W.2d 921, 924 (Tex. App.–San Antonio 1941, no writ) (citation omitted).

In other words, Abaza has not kept track, as he spent the time, on how much time he has spent. This is in spite of the fact that, in his deposition, he says that he often bills on an hourly or flat fee basis (p. 22).

Astonishingly, Trevino testified to doing the same thing, being able only to “estimate” the number of hours he had spent, “I’m not sure if it was 200 to 400, 200 to 500. Somewhere in that range.” (TR 886) While he said in his deposition that he could “recreate” what he had done and when, he had not done so at the time of trial. (TR 887) Thus, he calculates his hours spent based his normal hourly rate divided into a 30% contingent fee on the contracts for both Rich and Caroline. (TR 888-89)

Borunda did not keep track of hours once Caroline was on a contingent fee basis, saying he could provide expert testimony (presumably his own) as to the reasonable value of what he did. (TR 370) And he has not “calculated the number of hours [he] spent on this case and multiplied it by a reasonable attorney’s fee.” (TR 458)

However, though Borunda has not provided that information on his own fee (though he presumably opines that it is reasonable), he only thinks that he has been designated to do so regarding the fee of Abaza and Borunda:

19 Q. Are you here to talk about whether or not the
20 fees being sought by Mr. Treviño or Mr. Abaza are fair
21 and reasonable?

22 A. I believe so.

23 Q. And whether or not they’re unconscionable or
24 conscionable fees?

25 A. I believe so. (TR 448)

Though Borunda testifies that he does not know how many hours Abaza worked, Borunda nonetheless concludes as follows:

7 Q. So if you don’t know the number of hours that
8 he’s billing, that he actually worked on the case, how
9 can you state whether or not his fee is reasonable?

10 A. Because we were -- we ultimately ended up on a
11 contingency fee agreement with both our clients, we were
12 jointly responsible for litigation and he collaborated
13 with us. And because of that, his joint responsibility,
14 I think it is very reasonable for him to collect his
15 fee.

16 Q. Is that the extent of your opinion?

17 A. Well, like I said, he collaborated with us on
18 the underlying litigation, added value. He worked,
19 conducted depositions, as I recall, attended hearings,
20 helped with analysis. He did a variety of things. (TR 49)

Based on my experience, this process or rationale is both unreasonable for fee calculation and, as a lawyer practice, confusing. When I started in the legal profession as a paralegal at Vinson & Elkins, I was taught to keep track of and report my hours. While I was salaried, I understand that V&E passed on my hours in billing to their clients. Once I was hired by a smaller firm, I continued keeping track of my hours, both to enable my employers to pass along my time to clients, but also because I was paid by the hour. I continued billing by the hour as I began to provide contract paralegal services to a variety of clients while I was attending law school. I continued this practice after being licensed, submitting my hourly bills to lawyers who hired me as outside counsel on the Remington firearms litigation and, later, when I submitted those bills directly to the client for payment.

Once I was hired by a plaintiffs firm, although I was salaried (and allocated a portion of attorney fees recovered on each case on which I worked), I continued to keep track of my hours. All of the firm lawyers, including the two partners, did so. While the founding partner had initially worked at Bracewell Patterson, where he would have presumably been instructed to keep track of his hours, my understanding is that he did so for other reasons as a plaintiffs lawyer, working on contingent fee cases.

For one, should the payment of fees shift to the opposing party, the fees would need to be reasonable based on the factors in Rule 1.04(b), also known as the Arthur Andersen factors, of which Abaza is unaware (TR 604-605). In his view, recovery on the calculation based on the contingent fee contract is the equivalent of any equitable (presumably quantum meruit; if he means something else, that is not clear) recovery he might receive (TR 562-63). In addition, a guardian ad litem⁴⁷ or even a court could challenge a recovery based on a contingent fee agreement, and the time spent could be a justification of that percentage. In the Rule 1.04(b), that a fee agreement is contingent is only a single factor in assessing the reasonableness of a fee.

(2) Expenses in Allison fee agreement

Also, Abaza appears to believe that his omitting from the list of expenses on page 6 of the settlement statement, those he cannot document, is somehow magnanimous:

9 A. I don't know that that's all of the expenses
10 that we incurred. When I was putting this together, I
11 recall there being expenses that I incurred but for
12 which I could not find the receipt. And so for those,
13 I just opted to eat the expenses rather than try to

⁴⁷ See, e.g., discussion of order for GAL to review fee and outcome following GAL's recommendations, at *Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron and Blue*, 843 F. Supp.2d 673, 686 (N.D. Tex. 2011).

14 bill Caroline.
15 Q. Fair enough. I mean, I guess really the
16 principle that I'm trying to get at is this is your
17 attempt to come forward with a ledger of the expenses
18 that were incurred, correct?
19 A. At least some of them, yes. (TR 505)

While “fee” clearly encompasses the amount that an attorney purports to charge for legal services, logic dictates that it can include any amount of the client’s recovery that enhances the lawyer’s financial condition, such as reimbursed expenses that a lawyer might otherwise absorb or deem a part of overhead, in turn reflected in the lawyer’s fee.

Beyond logic, at least two Texas Ethics Opinions have recognized that fact. In one, the question was whether a private investigator retained by the lawyer could be paid on a contingent fee basis, along with the investigator’s costs and expenses being reimbursed. While the opinion addresses other applicable Rules, it acknowledges that the total of the amounts paid to the investigator and the lawyer could comprise an unconscionable fee if the lawyer typically absorbed such costs in his contingent fee percentage but, in this instance, did not reduce his contingent fee percentage.⁴⁸ Similarly, in the other opinion, the question was whether a fee arrangement could provide for the client to pay the defense costs of the lawyer if the lawyer were named as a defendant in the suit. The opinion concluded that the total amount of the lawyer’s fees in the case and the unknown defense costs could make the fee agreement unconscionable.⁴⁹

Additional expenses passed on to the client, otherwise being ones that the lawyer would pay, make a fee unconscionable by increasing the effective fee to the lawyer beyond that to which the client agreed. That is, if, in the first instance described above, the client agreed to a 45% contingent fee agreement but the combined fees and costs paid to the investigator amounted to 50% of the recovery, which the lawyer would otherwise have paid, the effective fee to the lawyer would be 50%, an amount to which the client did not agree. As to the second instance, if the agreed hourly sum were \$150, the defense costs (which the lawyer would otherwise be obligated to pay) could effectively increase the fee far beyond the hourly amount to which the client agreed.

In my opinion, Abaza was simply not permitted to pass on any expenses that he could not document, as he could not show they were reasonable. His failure to include them, then, was anything but gratuitous and should not, in and of itself, preclude any assessment of the expenses he did list.

⁴⁸Prof’l Ethics Op. 510 (1994).

⁴⁹Prof’l Ethics Op. 581 (2008).

(3) Conscience-shocking fee

When the mid-1980s committee in Texas was assembled for the purpose of reviewing the new ABA Model Code, it opted to take a different route than in prior years. Instead of essentially adopting the Model Code nearly verbatim, which many states did, the committee reviewed each provision for clarity and compliance with Texas law. Thus, it varied from the ABA's "unreasonable" standard for a fee. It varied even from the prior DR2-106 standard of "clearly excessive." In selecting "unconscionable," the committee thought it would more clearly protect lawyers from clients who, though satisfied with a fee agreement at the outset, later were unhappy paying the lawyer's fee. The committee actually thought that other states would follow the Texas lead. But only California did.⁵⁰

Thus, the successor committee (on which I sat) recommended a return to the "clearly excessive" standard. The SCOT included this standard in the proposed revisions in the failed February 2011 referendum.⁵¹ The referendum did not pass, the SCOT did not on its own promulgate the change, and the "unconscionable" standard remains.

In my opinion, in spite of the rare instances in which this may be true, the amount sought by Abaza (and inferentially Borunda and Trevino, who may have claims for fees against Abaza due to problematic drafting of the contingent fee agreements that could limit or preclude their fees) shocks the conscience in its sum and calculation. In addition to the foregoing analysis as to the hourly sum and expenses, the Texas Supreme Court concluded similarly, even before the implementation of the unconscionable standard:

We assume without deciding that the parties to this case were dealing at arm's length when the written contingent fee contract was signed by respondent. If such agreement had been binding upon both parties, it might afford a basis for upholding the deed without regard to the fairness of the transaction. In this instance, however, petitioner was married when the contract was made, and the agreement was voidable at her election.

. . .
. . . it is our opinion that the record will support the conclusion that the contingent fee contract was so exorbitant and unreasonable as to require that the conveyance be set aside.

⁵⁰At least this was true when the Committee on which I sat submitted its report on Rule 1.04 to the SCOT.

⁵¹Misc. Docket No. 10-9190, Texas Supreme Court Order, Approval of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct, Exhibit A to Referendum Order, Tex. B.J., Dec. 2010, at 900 et seq.

...
... Petitioner testified that the notation was made in connection with the settlement negotiations and had no meaning as far as value was concerned, but the trial court was not required to accept this explanation. In the light of the foregoing evidence and in view of the absence of any other proof of value, the court was entitled to conclude that the property was worth at least \$90,000.00 at the time the contract was made. On the basis of such valuation and after deducting the amounts unpaid on the outstanding encumbrance and the lien imposed on respondent's interest in favor of her former husband, the computed value of the one-eighth interest conveyed to petitioner is more than \$6,400.00. To this must be added the \$600.00 he was paid by respondent and her husband, which means that his total compensation was in excess of \$7,000.00.

One member of the Travis County Bar, who represented the husband in the divorce action and who was thus familiar with the issues and property involved in the suit, testified that from \$500.00 to \$750.00 would have been a reasonable fee for the services rendered by petitioner. This evidence is not necessarily controlling, because the witness was speaking of a fee that would be paid without regard to the outcome of the litigation. If accepted by the trial court, however, it shows that the contingent fee agreement yielded petitioner approximately ten times what he could reasonably have expected to receive under a fixed fee agreement.

...
... Whether the contingent fee contract and the conveyance executed pursuant thereto were so unfair and inequitable as to warrant the intervention of a court of equity is a question of fact, and that issue was resolved by the trial judge in respondent's favor.⁵²

My opinion is that the unconscionable standard warrants the same analysis and conclusions as reached in *Archer v. Griffith*.⁵³

(4) Quantum meruit

Offering what he apparently believes to be expert testimony on attorney fees, Borunda says the following about the fees Trevino is seeking:

5 A. I think it's certainly permissible as to
6 Caroline Allison.

⁵²*Archer v. Griffith*, 390 S.W.2d 735, 739-42 (Tex. 1964) (emphasis added).

⁵³The Committee's report to the SCOT on Rule 1.04 changes is attached.

7 Q. Okay. How about as to Rich Allison?
8 A. As to Rich Allison, I haven't researched the
9 issue, but I'll answer this way: I, Michael Treviño,
10 Nicholas Abaza, Caroline Allison, and Rich Allison all
11 understood that Michael was coming on board to represent
12 Caroline and also Rich on a contingency fee basis. Rich
13 understood this amply throughout the litigation and
14 referred to Mike as "my lawyer." We brought Mike aboard
15 to do these things, and so on.
16 I think Rich accepted Mike's services with
17 that understanding, yielded the benefit of Mike's
18 services, and I think that in fairness, in equity, Mike
19 is entitled to compensation that we all agreed or
20 understood that he was going to receive. I think Rich
21 should be equitably estopped from denying that. I think
22 in that case, if the arbitrator finds that is not an
23 appropriate result, I think Michael is entitled to the
24 reasonable value of his services he provided on a
25 quantum meruit basis to come up with a contingency fee
1 Nick and I are entitled to pursuant to our fee
2 agreement. And that is an amount to be determined by
3 the arbitrator. (TR 450-51)

The foregoing "analysis" looks nothing like the reasonable and necessary analysis conducted by the Fee Dispute Committee of the Houston Bar Association in the Bob Bennett matter. In that case, following a complaint filed with the Chief Disciplinary Counsel, Bennett proceeded through a bench trial, after which the judge disbarred him. On appeal, he received a new trial on punishment, resulting in a suspension of time served.⁵⁴

Bennett had included in his very detailed contract, which he advised Gary Land ("Land") to have another attorney review, which happened, a provision that any fee dispute would be submitted to the HBA Fee Dispute Committee ("FDC"). The FDC called for a reduction in fees, such that Bennett was required to issue Land a refund. Land sought enforcement of the award, which ultimately led to the Chief Disciplinary Counsel commencing the disciplinary action against Bennett. In its lengthy and highly detailed review of Bennett's invoices, the FDC reached the following conclusions:

. . . The Panel, moreover, concludes that a reasonable lawyer looking out for the interests of his client would have advised his client,

⁵⁴*Bennett v. Comm'n for Lawyer Discipline*, 489 S.W.3d 58 (Tex. App.--Houston [14th Dist.] 2016); *Bennett v. Comm'n for Lawyer Discipline*, 2018 WL 6722344 (Tex. App.--Houston [14th Dist.] 2018 , pet. denied);

before expending any significant time on [the investigative matters], that these were not matters worthy of pursuit. At a minimum, a reasonable lawyer would have advised his client that these matters could be pursued far more cost effectively without engaging a lawyer to handle them at an hourly rate of \$400. The evidence demonstrated that the charges for these items were unreasonable.⁵⁵

2. Failure to Communicate⁵⁶

a. How fee to be calculated

In *McCleery*, the Commission for Lawyer Discipline alleged that McCleery had violated Rules 1.08(a)(1) and 1.08(a)(2), regarding a transaction with a client, and Rule 1.04(c), based on the failure to clarify how the contingent fee would be calculated.⁵⁷ The trial court, however, in a bench trial, concluded that McCleery had violated Rule 1.04(c), and the appellate court agreed.

b. Advice to seek outside counsel

An opinion by the Professional Ethics Committee appears to distinguish the “re-negotiation” of a fee agreement from a new fee agreement altogether, which would be a transaction with a client.⁵⁸ In the facts suggested there, “litigation [was] underway [and] the matter turn[ed] out to be greater in scope and complexity than the lawyer and client contemplated” when entering into a fixed, flat fee. In such an instance, while the PEC did not view this as a transaction with a client, it nonetheless said that the criterion of Rule 1.08 (noted in comment 2) that the renegotiation “must still be on terms that are fair and reasonable for the client.”

⁵⁵Order on Motion and Amended Motion For Modification and Clarification, 8, Land v. Bennett, Arbitration Conducted by HBA Fee Dispute Committee, Mar. 2, 2012. This order is an attachment to Land's Motion to Confirm Arbitration Award, Land v. Bennett, No. 2012-20006, 133rd Dist. Ct., Harris County, Tex., Apr. 4, 2012. It is also attached to my report.

⁵⁶This is a heading in the *McCleery* opinion.

⁵⁷Original Disciplinary Petition, Comm'n for Lawyer Discipline v. McCleery, No. 2003-26068, 55th Dist. Ct., Harris County, Tex., May 16, 2003.

⁵⁸Prof'l Ethics Op. 679 (2008).

Courts, however, have determined that Rule 1.08(a) applies even when a lawyer has not inked an agreement with a client but has nonetheless established an attorney-client relationship.⁵⁹

Moreover, in applying the Disciplinary Rules, courts are not restrained by any supposed limitation applied by the Commission for Lawyer Discipline or Chief Disciplinary Counsel:

The Texas Disciplinary Rules of Professional Conduct are interpreted like statutes. And, because the interpretation of a statute is a question of law that a court determines *de novo*, the court is not bound to accept the Commission's interpretation. Thus, even if the trial court had disregarded the Commission's purported admission concerning the meaning of the rule, there would be no error.⁵⁹

(1) *McCleery*

The trial judge, without mentioning Rule 1.08, made the following factual findings supportive (in my opinion) of the conclusion of a violation of Rule 1.04(c):

23. In the evening of May 22, Respondent met Williams at a restaurant for dinner.
24. At this time, Respondent and Williams still had an attorney-client relationship under the pro bono PSA.
25. During the course of the one-hour dinner meeting, Respondent presented to Williams a Legal Representation and Fee Agreement ("Fee Agreement").
26. This document had not been sent to Williams prior to May 22. Thus, Williams saw this fee-based contract for the first time on May 22 when he had traveled to Houston from Louisiana awaiting the start of trial.
27. Prior to May 22, Respondent had never presented to either Mr. or Mrs. Williams any representation agreement other than the PSA.
28. Respondent did not tell Williams that he could have an independent legal review of that document done by another lawyer.

⁵⁹*Ponce v. Comm'n for Lawyer Discipline*, 2022 WL 1652147, at *5 (Tex. App.--San Antonio, 2022, no pet.) (mem.) ("Having agreed to render professional services to Alcala, an attorney-client relationship had already existed at the time Ponce asked Alcala to sign a separate contingency agreement..").

⁵⁹*Yetiv v. Comm'n for Lawyer Discipline*, 2019 WL 1186822, at *3 (Tex. App.--Houston [14th Dist.] 2019, no pet.) (mem.) (citations omitted).

29. The Fee Agreement was presented to Williams over two years after his attorney-client relationship with Respondent began.
30. Williams was elderly, infirm, indigent, and had only a grade school education.
31. Under these circumstances, Williams signed the Fee Agreement.
32. Respondent had a fiduciary relationship with Williams when he presented Williams with the Fee Agreement.
33. The Fee Agreement would have changed the attorney-client relationship between Respondent and Williams from pro bono to fee-based.
34. This change in relationship would have benefited Respondent.
35. Williams would not have gained any additional or different benefit from this new arrangement than he would have received under the pro bono PSA.⁶⁰

(2) Allison fee agreements

Obvious differences exist between Williams, as described in Finding #30, and Caroline (though probably to a lesser extent as between Williams and Rich). Apart from that, in my opinion, the parallels in the changing of the fee agreement in both *McCleery* and here, justify a conclusion that Abaza, Borunda, and Trevino failed to comply with Rule 1.04(c) to the same extent as Rules 1.08(a)(1) and 1.08(2). That is, had McCleery advised Williams to consult another lawyer, that lawyer could have told Williams all the things about the new agreement that McCleery had not told him. Inferentially, had McCleery complied with Rules 1.08(a)(1) and 1.08(a)(2), he would have also complied with Rule 1.04(c).

A new or even modified fee agreement, entered into with an existing client is a transaction with a client and subject to the provisions of Rule 1.08(a). The drafting committee on which I served suggested changes to Rule 1.08(a), along with comments, reflecting fiduciary law. The Texas Supreme Court tracked our suggestions in the failed 2011 referendum:

Rule 1.08. Conflicts of Interest: Prohibited Transactions [proposed]⁶¹

- (a) A lawyer shall not enter into a business transaction with a client, other than a standard commercial transaction between the lawyer and the

⁶⁰Findings of Fact and Conclusions of Law, Comm'n for Lawyer Discipline v. McCleery, No. 2003-26068, 55th Dist. Ct., Harris County, Tex., (filed) Sept. 21, 2004.

⁶¹See Misc. Docket No. 10-9190, Texas Supreme Court Order, Approval of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct, Exhibit A to Referendum Order, 73 Tex. B.J., Dec. 2010, at 900 et seq.

client for products or services that the client generally markets to others, unless:

- (1) the lawyer reasonably believes that the terms of the transaction between the lawyer and the client:
 - (i) are fair and reasonable to the client; and
 - (ii) if known to the lawyer and not known to the client, are fully disclosed in a manner that can be reasonably understood by the client;
- (2) the lawyer advises the client of the desirability of seeking, and gives the client a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
- (3) the client provides informed consent, confirmed in a writing signed by the client, to the material terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction

Comment

3. Paragraph (a) also does not apply to ordinary fee arrangements, such as hourly, fixed, or contingent-fee agreements entered into at the outset of the lawyer's representation of a client, which are governed by Rule 1.04. But it may apply to a modified fee agreement either proposed or agreed to in the course of the representation. And it typically will apply if a lawyer accepts an interest in the client's business or other nonmonetary property as payment for all or part of a fee.

Attached is the Committee's report to the SCOT, including its analysis and support and comparison with the then-current Texas Rule, the corresponding ABA Model Rule, and a revision suggested by a Task Force appointed by Chief Justice Phillips before he left the bench.

In March 2023, the Committee on Disciplinary Rules and Referenda proposed revisions to Rule 1.08(a):

Rule 1.08. Conflict of Interest: Prohibited Transactions

- (a) A lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless:
- (1) the terms of the transaction or acquisition are fair and reasonable to the client, and are fully disclosed and transmitted to the client in a writing that can be reasonably understood by the client;
 - (2) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(3) the client thereafter provides informed consent in writing to the terms of the transaction or acquisition, and to the lawyer's role in it, including whether the lawyer is representing the client in the transaction.⁶²

Thus, assuming that the changes proposed in February 2011 and in March 2023 reflect fiduciary law--and, in my opinion, they do--the defendant lawyers failed to comply with these duties. Borunda testified, regarding the advice that Caroline have another lawyer review the new agreement,

21 A. I think it -- I think it was Nicholas that told
22 her that that would be appropriate but she would have to
23 go consult her own attorney about doing so.
24 Q. But you did not give her that advice?
25 A. No, I did not. (TR 382)

Abaza testified that he often discussed a contingency fee contract with Caroline before she signed one. He calls Caroline "a sophisticated client," "a professional contract person," "a wheeler-dealer," who "knows what she's doing." (TR 568-69) If he means that Caroline is articulate, detailed, motivated, and bright, I would agree, having looked at her website and read her testimony.

Abaza implies that her sophistication excludes her from the requirements of Rule 1.08(a), but comment 2 says something other than his understanding:

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.

Caroline could undoubtedly hold her own with the defendant lawyers when it comes to real estate and possibly other matters, which is the application of comment 2. But she is not a lawyer. In my experience, laypeople retain lawyers to assist them with probating wills and other post-death instruments.

Abaza also reflects a misunderstanding of the language of Rule 1.08(a), saying that the new agreement was "fair and reasonable" with her based on a half-dozen factors he mentioned. However, when asked about them, he said that none of those things absolved him of his fiduciary obligations to her. (TR 566-689)

⁶²Committee on Disciplinary Rules and Referenda Proposed Rule Changes, Rule 1.08. Conflict of Interest: Prohibited Transactions, 86 Tex. B.J. 2003, 184-85.

Abaza is assessing compliance with the first part of Rule 1.08(a) using a subjective standard, his own. Rule 1.08(a) requires an objective standard: the transaction and its terms must be "fair and reasonable to the client." As to the second part, that the terms must be "fully disclosed in a manner which can be reasonably understood by the client," Abaza relies on hearsay, what Borunda told him Borunda told Caroline, or what he, Abaza, said at the start of the representation, when no contingent fee agreement was involved. Incredibly, Abaza says that he will consider, in the future, putting in writing advice to a client to have outside counsel review a new agreement only because Caroline has sued him this time. (TR 571-73)

Notably, in the Piro & Lilly case, which led to a public disciplinary sanction and fee forfeiture in civil court, the Chief Disciplinary Counsel charged that, among other things, the lawyers violated "Rule 1.08(a) [entering into a business transaction with a client]" when they switched to a contingent fee contract.⁶³

In my opinion, an independent lawyer should have reviewed an actual version of the contract Caroline was later asked to sign (which she was not provided), paying attention to the different lawyers/law firms engaged in the contingent fee enragement than the hourly arrangement, and advised her of the implications of those and other provisions.

Thus, in my opinion, as in *McCleery*, the failure of Abaza, Borunda, and Trevino to communicate as required by Rule 1.04(c), makes contingent fee agreement unenforceable as written.⁶⁴

c. Nature of the representation

(1) Goals of the client

A lawyer ill-equipped to handle a representation may err in taking a meritless case, although the lawyer may not know that at the outset, especially if relying on only the

⁶³*Comm'n for Lawyer Discipline v. Piro & Lilly*, 7, No. 2003-30856, 125th Dist. Ct., Harris County, Tex., May 30, 2003 [?], attached. See also *Piro v. Sarofim*, 2002 WL 538741, at *7 - *10 (Tex. App.- Houston [1st Dist.] Apr 11, 2002) (not designated for publication); *Ponce v. Comm'n for Lawyer Discipline*, 2022 WL 1652147, at *5 (Tex. App.--San Antonio , 2022, no pet.) (mem.).

⁶⁴See discussion of enforceability for purposes of quantum meruit/equity below, regarding *Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron and Blue*, 843 F. Supp.2d 673, 686 (N.D. Tex. 2011). See also *Johnson v. Stickney*, 152 S.W.2d 921, 926-27 (Tex. Civ. App.–San Antonio 1941, no writ) ("This decree giving Gonzales the right of redemption of the interest awarded Johnson in trust for Gonzales is too indefinite to render it effective . . . The decree is too indefinite to support enforcement.").

client's version of the facts, which is often all the lawyer has then. Rule 3.01 provides as follows:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

While the first comment indicates this is largely to deter the lawyer from "abus[ing] legal procedure," it also keeps the client from spending money with little hope of recovery. Thereby, it curtails a lawyer's income incentive from overreaching the client's desires, which may not be warranted by the facts and possible legal arguments.

While lawyers may believe that anyone has a right to representation, that is indisputable only regarding criminal defendants. The disbarment of Houston attorney Bob Bennett, a sanction later reduced to a suspension, instructs that legal fees and expenses by a lawyer may be second-guessed, even if the lawyer does what he or she thinks the client wants and expects.⁶⁵ Bennett took on a representation of a client for two matters, one of which was described as follows by the Houston Bar Association Fee Dispute Committee:

The "potential federal civil rights violations" is a reference to Mr. Land's desire to investigate and file suit against various governmental agencies that Mr. Land believed had been illegally targeting him for many years and who had, among other things: (a) conducted illegal surveillance of him; (b) repeatedly broken into his property; (c) damaged his property (by spreading acid or other corrosive material); (d) injured him by attacking him with invisible energy beams and microwaves; and (e) implanted materials under his skin.

. . .

. . . the Panel was left with the firm conviction that Respondents took advantage of Mr. Land. The issues that Mr. Land brought to Respondents' attention would have raised immediate and significant flags with any reasonable lawyer. A lawyer in Respondents' position should have counseled Mr. Land against spending significant sums investigating and pursuing most of the matters about which he was concerned. Mr. Land should have been told that the investigation he sought was almost certain to be futile. Respondents failed to do so, and instead appeared to actively encourage Mr. Land's pursuit of these matters. And, once they undertook the representation, Respondents billed substantial sums without ever advancing the matter to any significant degree.

⁶⁵An overview of the disciplinary matter and the appellate issues appears in my amicus brief, attached to this report, filed May 4, 2015.

. . . Respondents knew, or should have known, that they were embarking on a questionable representation that did not appear reasonably calculated to be in the client's best interest.⁶⁶

(2) Timeline in this case

By no means am I suggesting a parallel between the stated goals and concerns of the plaintiffs in this case with those of Land in the Bennett case. I would defer to a practice-area specialist to say whether a reasonable attorney would have proceeded as the defendant lawyers did here, with the information they had at the time, at various points in time. As they gained more information, whether the lawyers appropriately adjusted the expectations of the clients and the means to achieve those, would also be in the purview of that specialist.

Simply as a point of observation, the defendant lawyers entered into a fee contract with Caroline in May 2019. However, Borunda explains that this "was an ongoing conversation beginning in March." (TR 345)

Trevino, Abaza, and Borunda formed their own impressions, based on discussions with Rich and Caroline and their own expertise, about the strength of the claims or potential claims and readily shared them with their clients:

2 Q. (BY MR. DAVID KASSAB) This is the email from
3 Mr. Abaza to Rich, Caroline, and you, dated July 30,
4 2019, correct?

5 A. From Nick Abaza to Rich, Caroline, and myself,
6 yes.

7 Q. Where he is saying, "This alleged Will is
8 problematic and needs to be challenged," right?

9 A. Yes, correct.

10 Q. Do you know where in this email there's any
11 advice to Rich or Caroline that by contesting the will,
12 the no-contest clause is going to be invoked and they
13 can put their inheritance at risk?

14 A. What do you mean by "put their inheritance at
15 risk"?

. . .

24 Q. There are some emails that kind of discuss that
25 issue, the no-contest clause issue, and I think that
1 your advice to Caroline and Rich was not to worry about

⁶⁶Order on Motion and Amended Motion For Modification and Clarification, 8, 13, 14-16, Land v. Bennett, Arbitration Conducted by HBA Fee Dispute Committee, Mar. 2, 2012. This report is attached.

2 that because they are routinely denied. Is that right?

3 A. I recall some discussions about no-contest
4 clauses, either in person or via email, and I think our
5 general sense was, based on their representations to us,
6 we were in good shape with respect to the no-contest
7 clause.

8 Q. You didn't think it was a valid claim made by
9 Robin?

10 A. Not initially, no. (TR 372, 373)

20 Q. Now, the lawsuit that you filed on behalf of
21 Rich and Caroline, the will contest case in Collin
22 County, would you agree that you brought that case in
23 good faith?

24 A. Yes.

25 Q. Would you agree that you maintained that case
1 in good faith?

2 A. Well, we -- in our part, yes. We had to
3 eventually amend since that standard -- there was
4 concerns because the case was deteriorating. (TR 654-55)

Caroline was presented for deposition in November 2019. Trevino signed the Oct. 2020 Plaintiffs' Third Amended Petition and Third Amended Objection to Probate of Will, Will Contest and Request for Declaratory Relief, so he was apparently comfortable doing that, (1) knowing everything that Abaza and Borunda knew at the time and (2) hearing everything that Caroline and Rich had to say by then.

In November 2020, the defendant lawyers filed Plaintiffs' Third Amended Petition and Third Amended Objection to Probate of Will, Will Contest and Request for Declaratory Relief, where they stated the following:

STANDING AND GOOD FAITH

8. Plaintiffs, who have standing to oppose probate of the proffered will as surviving children of the Decedent, bring this action in good faith, based upon the information available to [sic] as of the present date. Through investigation and personal knowledge, there are facts sufficient to support a contest [of] this purported Last Will and Testament of Richard Allison (the "Purported Will") based on lack of testamentary capacity and undue influence. Those facts, summarized below, justify the contest of the Purported Will. . . .

Inferentially, then, the defendant lawyers still believed the plaintiffs had a case, over a year after their initial filing in August 2019, in which they included the same language, though using single person nouns and pronouns instead of plural.

STANDING AND GOOD FAITH

Contestant, who has standing to oppose probate of the proffered will as a surviving child of the Decedent, brings this action in good faith, based upon the information available to [sic] as of the present date.

Through investigation and her personal knowledge, there are facts sufficient to support a contest [sic] this purported Last Will and Testament of Richard Allison (the "Purported Will") based on lack of testamentary capacity and undue influence. Those facts, summarized below, justify this contest.

Borunda answers, in his deposition, the question whether, going into the first mediation, he felt he had sufficient information to "make intelligent decisions," this way: "we felt we had a decent understanding of the assets that we were talking about." (depo. 268-69)

However, Caroline sent an email inquiring specifically about the information—or lack thereof—they had:

3 Q. Throughout the litigation you would often
4 request Mr. Borunda and Mr. Abaza to obtain complete
5 accountings from Robin. Do you remember those?

6 A. There were numerous requests for a complete
7 accounting from Robin, yes.

8 Q. Let's just pull up one as an example. It's in
9 June 2020 right before the first mediation.

10 MR. DAVID KASSAB: It is Clients' Exhibit
11 73, please.

12 Q. In this email at the top you state, "Jorge, I
13 am not understanding why they are pushing for mediation
14 when we are missing evidence. We need the full set of
15 medical records and financials."

16 Correct?

17 A. Yes, that's correct.

18 Q. But the first mediation went forward anyway,
19 right?

20 A. Yes, that's correct.

21 Q. In July of 2020, correct?

22 A. Yes. (TR 1255)

More information came out in the first mediation (although Caroline's perception is that her lawyers gave up more information than they received about Robin and her intentions, and Rich testified that he saw nothing of substance in that proceeding), with the shift to a contingent fee agreement with Caroline following.

The defendant lawyers took the deposition of Robin Allison in December 2020 and had received by December 2020 certain of the documents being challenged. Borunda's deposition testimony is that Robin's deposition could have been taken earlier, but he "thought we were better off deposing her later on." (depo. 267) Borunda later concluded how strongly the family dynamics impacted his clients' case. (depo. 216)

In light of the reasons Caroline and Rich had given for wanting a clean break from Robin, a practice-area specialist could question why Borunda did not want to assess Robin for himself at some earlier time. In fact, at trial, he explained that he learned not only about the family's interactions but that he had a tough opponent (again, something he could have learned in Robin's deposition):

25 Q. The family dynamics were challenging, to say

1 the least, right?

2 A. They were.

3 Q. And Mr. Collins, being on the other side, I

4 think you had described him as a zealous advocate for

5 his client, right?

6 A. He is that. (TR 518-19)

The family interactions could have been explored by the first attorney on the job, Abaza, in his communications with Rich and Caroline, whom later Trevino contacted:

16 Q. Tell me about that first conversation with

17 Caroline and/or Rich, whoever it was.

18 A. I want to say that the call with Caroline was

19 within the week after this phone call with Jorge and

20 the individual meeting with Nick, but we had a general

21 conversation about where the case was. (TR 708)

...

12 Q. Okay. Well, let's move forward to your next

13 communication with either Rich or Caroline or both. I

14 don't know exactly the way to frame the question

15 because I don't know who the next conversation was

16 with, but let's go to the next conversation.

17 A. My recollection is I talked to Rich next, and

18 either I got that phone number from Jorge or Nick or

19 Caroline. I'm not sure, sitting here. But I talked

20 to Rich at some point -- I want to say again within

21 that same week. Talked to Rich about similar issues

22 with capacity, with undue influence.

23 Rich had less details. He did mention

24 that there was a lot of issues with the family

25 dynamics, specifically with his ex-wife, and he did

1 not get along -- or it did not appear he got along

2 with Robin Allison. (TR 711-12)

Rich had also detailed in writing problems with Robin and his ex, Kim:

14 Q. Were you reporting this information, as you
15 would hear it, back to Mr. Borunda, Mr. Abaza and
16 Mr. Trevino?

17 A. Yes, sir, and to my sister.

18 Q. And did you want the lawyers to find out
19 information about that?

20 A. Yes, sir. There was a -- I thought it helped.

21 Q. And did you feel you were ever getting an
22 answer to your requests for them to look into that
23 information?

24 A. No, sir, not me particularly.

25 Q. All right. So also during the course of the
1 litigation, did you also try to keep the lawyers,
2 Mr. Borunda, Mr. Abaza and Mr. Trevino, updated with
3 family dynamics insofar as Robin trying to get people
4 over to her side of the dispute?

5 A. Yes, sir, I did.

6 Q. Let's take a look at Clients' No. 107 [dated Sept. 14, 2020]. Can
7 you see that, Mr. Allison?

8 A. Yes, sir.

9 Q. So, basically, what were you communicating to
10 Mr. Borunda and Mr. Abaza on this email?

11 A. Okay. Well, Kim is my ex-wife, and there was
12 some back deals going on that I wanted to make sure my
13 attorneys knew about. You know, that -- and I was just
14 relaying this information to let them know if it was
15 something that could be important or -- to our case.

16 Q. If you were getting information like this from
17 Kim or Marilyn, I guess, is that something that you
18 would then relay to the lawyers, in the event they
19 needed it in the case?

20 A. Yes, sir, just in case they needed it, I
21 wanted -- I mean, I was putting my trust in them to say
22 like, hey, they're going to be using this. They're
23 working for us, and I thought it would be important for
24 helping -- helping the case. (TR 115-16)

Borunda, not Trevino, took Robin's deposition, although the contingent fee agreement was signed in Oct. 2020, so Trevino was on board. I would defer to the assessment of a practice-area specialist whether such a change to the lawyer team and how the lawyers would be compensated--regardless of what any independent lawyer would have said

about the disclosures in that agreement--was warranted by what the defendant lawyers had learned by then.

(3) Client settling

The contingent fee contracts purport to forbid the client from settling "without the approval of Attorneys." This comprises an egregious usurpation of a client's rights and glaring breach of the fiduciary duty of loyalty, as it is always the client's case. While the defendant lawyers might have quibbled about the meaning of that language, maybe attributing it to some outdated or untested contingent fee form they obtained elsewhere, Trevino said that the plain meaning of the provision is exactly what the lawyers had intended:

Q. Do you think it's improper to have a clause in a contingency fee contract that requires the client to obtain the consent of the lawyer prior to settling the case?

...

A. I think to the extent that the clause is there to ensure that the client does not try to circumvent the lawyer in a contingency fee contract, I don't think that's improper. (depo., 44-45)

Borunda admitted the provision could be problematic:

24 If that language is strictly construed,

25 you agree with me that that is an unethical provision?

1 A. I think it is -- it is possible that that runs

2 afoul of Rule 1.04. (TR 360-61)

Abaza seemed to have little problem with it, advancing a rationale for it similar to that of Trevino in his deposition but also recognizing yet another failure to communicate:

2 Q. And you drafted this provision, I take it.

3 Yes?

4 A. I believe so.

5 Q. And the plain language of it provides that the

6 client will not make a settlement or offer of

7 settlement without your approval. Yes?

8 A. That's not what it says verbatim, no.

9 Q. Okay. Well, isn't that the message that's

10 being stated to the client?

11 A. No. The message is they won't go behind your

12 back and try to make offers that undermine the case.

13 Q. Where is that written in here?

14 A. Well, if you read -- it doesn't say what

15 you're trying to say either, so I disagree with you.

16 Q. Okay. So this provision, which says, "Client

17 will not make a settlement or offer of settlement
18 without the approval of attorneys," you're stating
19 that the client did not have to get your approval
20 prior to settling?
21 A. The approval -- no, they don't have to get my
22 consent, permission. Approval being is that they
23 communicate with me, they don't go behind my back like
24 Caroline actually did once or twice in this case when
25 she tried to negotiate with Robin.

. . . .
5 But the idea there, the language there --
6 and I'm not a wordsmith -- was that they wouldn't go
7 behind her back. (TR 581-82)

This kind of provision grants the defendant lawyers "an impermissible interest," via their attempted control through settlement "approval," in the plaintiffs' claims and, in my opinion, "is unconscionable as a matter of law."⁶⁷ Attorneys are in a far better position than clients to assess the value of a case, particularly if there is a contingent fee arrangement, and to protect their own interests: "if [a lawyer] cannot persuade the client of his own views he can protect himself at the early stage by refusing to take the case, by charging higher than normal fees in other cases, or by limiting the scope of representation through contract."⁶⁸

Ironically, the position of the plaintiffs here is that the settlement effected by the MSA was what the lawyers wanted and in no way what they wanted.

d. Settlement statement

Rule 1.04(d) requires that "[u]pon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter." This communicates to the client the amount of recovery, along with the calculation of attorneys fees, who was entitled to them, and what expenses would be deducted. If Trevino, Borunda, and Abaza did not know that the contingent fee matter with Rich and Caroline had ended, as to those lawyers, prior to Rich and Caroline hiring separate counsel, the lawyers certainly knew before they filed their petition in intervention on December 7, 2021. However, they did not submit the required written statement until after Judge Ashby ordered them to do so, in clear disregard—in my opinion—of the communication requirement in Rule 1.04(d).

⁶⁷See *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 566 (Tex. 2006).

⁶⁸*Augustson v. Linea Aerea Nacional-Chile S.A. (LAN-Chile)*, 76 F.3d 658, 664 (5th Cir.

That the lawyers delayed from the time an accounting was requested by Caroline and Rich's new counsel has been held "legally sufficient evidence that [a lawyer] violated Rule 1.14(b)."⁶⁹

The following Rule comment indicates that compliance with Rule 1.04(d) is a prerequisite to any fee division:

Division of Fees

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

A lawyer is required ("shall") to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." (Rule 1.02(b)) The duty of candor naturally requires the lawyer to be honest. In fact, Rule 8.04(a)(3) instructs that a lawyer "shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Here is how Trevino described the settlement offer that he, Abaza, and Borunda urged Rich and Caroline to take:

11 Q. What did you tell them, and how did they
12 respond? I mean, did they indicate whether they were
13 confused or didn't understand or whether they were with
14 you?
15 A. No, there was not confusion about where the
16 offers were and where we ended up. And ultimately they
17 were comfortable with receiving the entirety of the
18 Minaki Limited Partnership held underneath the family
19 trust which they would be in control of, and they would
20 have unfettered access to and be beneficiaries of the
21 Family Trust. (TR 786, (emphasis added))

Abaza qualifies his answer as to a question about unfettered access:

5 Q. Do you agree that under the 2013 amendment to
6 the trust, Robin Allison did not have unfettered
7 discretion to just go and blow the money?
8 A. You have to break down the trusts.
9 Q. Let's start with the Family Trust.
10 A. The Family Trust, no, she didn't have

⁶⁹*Wade v. Comm'n for Lawyer Discipline*, 961 S.W.2d 366, 375 (Tex. App.–Houston [1st Dist.] 1997, no pet.) (per curiam).

11 unfettered -- she didn't have discretionary as far as
12 to herself. She had a standard.

13 Q. And then with regard to the Marital Trust?

14 A. She had more -- more discretion there under
15 HEMS and -- I have to look at the exact language. She
16 had to look at some other resources as well but she
17 had -- there was some restraint on what she could do. (TR 639, emphasis
added)

Borunda is more direct in his answer, which agrees in part with Abaza's but contradicts Trevino's:

16 Q. All right. And then there's the next trust;
17 there's a marital trust; and then there's the family
18 trust.

19 A. Yes.

20 Q. All right. With regard to those trusts, could
21 Robin have unfettered access to the principal and the
22 interest?

23 A. Not unfettered access, no. (TR 330, emphasis added)

In my opinion, if the arbitrator determines, based on expert testimony (which guided Judge O'Connor in the Hill case) or otherwise that (1) Rich and Caroline ultimately signed the MSA because of the assurance of "unfettered access" and (2) they did not have that, then the settlement statement inaccurately sets out the recovery on which the lawyers' claim are based.

e. Joint responsibility

Based on their frequent testimony, a portion of which appears below, Abaza, Borunda, and Trevino appear to believe that, as long as one of them many have made required disclosures to the clients, in whatever form or fashion, that absolves the others of the responsibility to do so:

2 Q. Did you provide any advice to Caroline Allison
3 regarding this waiver of conflict at any time prior to
4 this contract being signed?

5 A. I did not have a conversation about the terms
6 of the contract with Caroline Allison.

7 Q. Okay --

8 A. Other than -- I'm sorry. Just to finish.
9 Other than the 35 percent contingency fee number.

10 Q. Which means you gave her no disclosures
11 regarding this paragraph. We can agree with that,
12 right?

13 A. I did not go over this contract with Caroline
14 Allison.
15 Q. Did you hear Mr. Borunda or Mr. Abaza give any
16 disclosures to Caroline Allison with regard to this
17 waiver of conflict?
18 A. I didn't hear Nick or Jorge go over this
19 contract with Caroline Allison.
20 Q. So you don't know if they made any
21 disclosures, written or oral, to her regarding the
22 waiver, right?
23 A. Not something I have personal knowledge of. (Trevino, TR 949)

As clarified in the simple guidance published in the TBJ in April 2005, the month after the effective date of revised Rule 1.04 and echoing the guidance in the Referral Fee Task Force Report,

Joint Responsibility

- Joint responsibility 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.

.....

- b. **Adequacy of communication.** Referring or associating lawyer must monitor the matter throughout the representation by being reasonably informed about the matter, responding to client questions, and assisting the handling lawyer when necessary and ensure that the client is informed of the progress of the case.

In my opinion, the burden of communication expressed above fell on the original attorney engaged (who later became a referring or associating lawyer) because of methods of communication at the time and the fact that the clients originally met and selected the original attorney. In my experience, the burden of providing the clients sufficient information for the association or referral to comply with revised Rule 1.04(f) also fell on the original attorney for those same reasons. In later years, though, handling or associated attorneys often signed the clients to their own contracts, naming the referring or original attorney, to assure themselves that (1) the clients had been sufficiently informed and, in some cases, (2) the clients had been properly solicited.

Thus, I have no opinion as to what “joint responsibility” means as a legal term these days. In an ethical sense, my opinion is that it would definitely not mean that a duty to communicate could be abdicated without assurance that it was nonetheless met.

Moreover, the duty of communication (candor) requires the communication of all relevant aspects of a contract, including not only information (1) regarding association of or referral to other counsel and how fees will be divided, but also (2) concerning provisions material to the representation, such as conflicts, arbitration provisions, allocation of expenses, and transactions with a client.

3. Unenforceable Provisions

In the Albert Hill fee dispute,⁷⁰ the magistrate judge and the judge distinguished an unenforceable provision from a Rule-compliant provision from a provision that comprises breach of fiduciary duty. Case law reflects that an entire contingent fee agreement may be unenforceable based on unconscionable settlement provisions.⁷¹ The magistrate and judge also mentioned an argument made by Hill as to the disputed fee agreement being unconscionable, but they did not explain it or use that term in their conclusions.

a. Hill case

(1) Release

Magistrate Toliver issued an order regarding, among other things, Hill's allegation that BAM's attempt to obtain a release from him (as part of a settlement) was "a breach of fiduciary duty justifying fee forfeiture." BAM, on the other hand, claimed that the release was "valid and enforceable."⁷² She determined, based on Texas law, that there was "insufficient evidence that Hill III was fully informed of all material facts relating to the release, considering that such releases are presumptively unfair and invalid."

⁷⁰*Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron and Blue*, 843 F. Supp.2d 673, 687 (N.D. Tex. 2011). Much of the Hill fee dispute filings were sealed. If interested, counsel may be able to locate unsealed filings that illuminate any discussion and arguments of counsel, the guardian ad litem, and the magistrate and/or judge involved in those filings in related dockets.

⁷¹*Davis Law Firm v. Bates*, 2014 WL 585855, at *4 (Tex. App—Corpus Christi-Edinburg 2014, no pet.) (mem.) ("By its fifth issue, Davis argues that even if the provision prohibiting settlement without its consent is invalid, the provision is severable and the remainder of the agreement is enforceable. . . . Assuming, without deciding, that the provision prohibiting settlement without Davis's consent was severable, we nonetheless conclude that Davis is not entitled to enforcement of the agreement because charging a \$70,000 fee for no legal services performed is an unconscionable fee." _/

⁷²Findings of Fact and Conclusions of Law (Doc. 319), 15, Blue/Baron vs. Hill, 3:10-CV-02269-O-BK, N.D. Tex., June 15, 2011.

However, she did not find that “BAM’s attempt to secure a release from Hill III was a violation of BAM’s fiduciary duty.”⁷³

Jude O’Connor agreed with the analysis and conclusion of the magistrate regarding the release. The court’s decision went only to the particular provision, not the fee agreement itself. By analogy, then, the arbitrator could determine here whether Rich and Caroline were sufficiently informed of “all material facts relating to” the following matters:

- multiple client conflicts
- attorneys involved
- fee division
- expense split
- arbitration clause
- transaction with client

(2) Rule 1.04 compliance

Both Magistrate Toliver and Judge O’Connor reached conclusions about the impact of Rule 1.04 compliance on the enforceability of fee agreement. Toliver found compliance, so she apparently thought that was necessary for enforcement. O’Connor said she was wrong, that BAM did not comply:

Having conducted a *de novo* review, including weighing and evaluating the trial testimony and evaluating the email correspondence cited by Magistrate Judge Toliver as evidence of compliance with Rule 1.04, the Court rejects Magistrate Judge Toliver’s finding that Rule 1.04 was satisfied in this instance. Simply stated, as Hill III correctly notes, there are no documents in the record dated on or before December 22, 2010 (the undisputed date on which Malouf entered into a contingent fee sharing agreement with Blue and Aldous and began holding himself out as Hill III’s attorney) that evidence Hill III’s written consent to a fee sharing agreement among the three BAM firms.⁷⁴

(a) Toliver’s reasoning in Hill case

It was Toliver who heard evidence on Rule 1.04. Geoffrey Hazard, though a non-Texas lawyer with an expertise in the ABA Model Rules, testified that BAM had not complied. Curiously, Vince Johnson (a professor at St. Mary’s Law School) testified BAM “ ‘fully

⁷³*Id.*, 18.

⁷⁴*Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron and Blue*, 843 F. Supp.2d 673, 681 (N.D. Tex. 2011) (footnote omitted).

complies with the disclosure and written consent provisions of 1.04.’ ” I know Vince, and the only reasons I can suggest why he got that wrong are that (1) he is an academic, not a practitioner; (2) as a law professor, he teaches the ABA Model Rules (few law professors, in my experience, in Texas law schools teach the Texas Disciplinary Rules, as the graduates may be licensed elsewhere); (3) his publications on ethics are often jointly done with Susan Saab Fortney, who is an ABA Model Rules specialist;⁷⁵ and (4) he was neither on the drafting Committee on which I served during our Rule review (he became a member in 2017, years after the Committee had completed its review of all of the Texas Disciplinary Rules) nor on the Referral Fee Task Force (the then-chair of our Committee and the to-be chair of our Committee were both on the Task Force).

(b) O’Connor’s reasoning in the Hill case

BAM quotes from and cites to both Hazard’s and Johnson’s testimony in appellate briefing:

. . . During the trial of BAM v. Hill, two ethics experts - BAM's and Hill [III's], respectively - testified on the issue of Rule 1.04(f) compliance; neither testified that the Court was required to void the fee agreement.

Hill III's ethics expert, Geoffrey Hazard, testified that so long as Hill III understood the Second Fee Agreement, BAM are entitled to its enforcement . . .⁷⁶

Regarding “enforcement,” O’Connor said “[s]imply stated, while BAM failed to comply with Rule 1.04(g), under the unique circumstances presented, Hill III fails to mount a credible case that the BAM Fee Agreement violated public policy such as to render it unenforceable.”⁷⁷ As a starting point, that the contract was “enforceable” meant that BAM—instead of any other of the 100,000+ lawyers in Texas--was potentially entitled to some form of recovery. However, “the Court nevertheless [found] that on the record before it, application of Rule 1.04(g) to disallow BAM's recovery for anything more than quantum meruit recovery is unwarranted.” That record included the facts that (1) Hill entered into the same agreement with his new lawyers that he had had with his prior

⁷⁵I recruited Susan to be on our drafting Committee once I learned of this, as we needed the most accurate interpretation possible of the Model Rules in our review.

⁷⁶Brief of Appellees, Hill v. Schilling, 2012 WL 4208144, at *43-*44 (5th Cir. Sept. 5, 2012).

⁷⁷*Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron and Blue*, 843 F. Supp.2d 673, 683 (N.D. Tex. 2011).

lawyers,⁷⁸ (2) he understood these were his lawyers, as he started sharing confidential information the very first day, and (3) his lawyers' work was "well underway" at the time.⁷⁹

That record does not appear with the Allison contingent fee agreements, as (1) Abaza, Borunda, and Trevino were already Rich and Caroline's lawyers, but on different terms; (2) the terms changed dramatically at a pivotal point in the litigation; and, (3) at least in Caroline's estimation, the work also slowed dramatically, right at that pivotal point in the litigation, when the lawyers stood to make the most recovery on a contingent fee basis. This is much more of the scenario Williams experienced in *McCleery*.

O'Connor recognized that "that BAM knew it was likely that Hill III would in short order obtain a large recovery in the Underlying Litigation," while acknowledging "the substantial work performed by BAM on behalf of Hill III, and the not insignificant results achieved."⁸⁰ Still, because of lack of clarity in the contract as to how the fee would be calculated—alternatively said to be based on the "gross affirmative recovery" or "affirmative recovery"—due to Hazard's expert testimony, O'Connor made adjustments in Hill's favor.⁸¹

b. Allison fee agreements

The contingent fee agreements with Rich and Caroline do not comply with Rule 1.04 regarding the identification of the lawyers who would be working on their case and sharing in the fees. And they fail to comply in ways not even envisioned by the highly publicized revisions to Rules 1.04(f) and 1.04(g).

(1) Attorney signatures

In the Hill case, it was the client's signature that was missing, the absence of which could have made the fee agreement unenforceable under Rule 1.04, had O'Connor not made the findings he did, none of which is applicable to the Allison case. Rule 1.04(a) prohibits an attorney from seeking to arrange for, charge, or collect an illegal fee. A contingent fee agreement that is not signed by the lawyer does not meet the requirements of Tex. Gov't Code § 82.065:

⁷⁸"In this case, the BAM Fee Agreement is virtually identical to the Lanier Fee Agreement, the terms of which Hill III knew well before Malouf's representation began on December 22, 2009." *Id.* at 684.

⁷⁹*Id.* at 682-83.

⁸⁰*Id.* at 684.

⁸¹*Id.* at 690-91.

(a) A contingent fee contract for legal services must be in writing and signed by the attorney and client.

At the suggestion of the Committee on which I served, the Texas Supreme Court added the requirement of an attorney signature in the failed 2011 referendum:

Rule 1.04(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 law or (f). A contingent fee agreement shall:

(1) be in writing, and signed by the lawyer and the client.⁸²

As neither Trevino nor Borunda signed Caroline's agreement, in my opinion both have arranged for and are seeking to charge an illegal fee.

The contingent fee agreement with Rich contains the signature of lawyer Abaza, though I understand that lawyers Borunda and Trevino are seeking a contingent fee based on this agreement. Borunda is not a party to the contract (which may be why he did not sign it), but his failure to sign it--were he a party to it--would mean he is seeking to collect an illegal fee. But neither Borunda nor Trevino signed it, meaning that any attempt to collect on it shows that they are charging and attempting to collect an illegal fee, which is prohibited by Rule 1.04(a).

(2) Attorney parties

A different set of attorney parties to the contingent fee agreements appears in the agreements versus the petition in intervention versus the interrogatory responses, as indicated below:

Rich's contract

party to contract	mentioned in contract	signed contract	named in pet in intervention	signed pet in intervention	interrog. answer re recovery
Abaza		Abaza	Abaza	Law Office of Abaza	Law Office of Abaza PC & Abaza
	Borunda		Borunda	Borunda PC	Borunda PC & Borunda

⁸²Misc. Docket No. 10-9190, Texas Supreme Court Order, Approval of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct, Exhibit A to Referendum Order, Tex. B.J., Dec. 2010, at 900 et seq.

			Trevino	Law Office of Trevino PLLC & Trevino	Law Office of Trevino PLLC & Trevino
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Caroline's contract

party to contract	mentioned in contract	signed contract	named in pet in intervention	signed pet in intervention	interrog. answer re recovery
Abaza		Abaza	Abaza	Law Office of Abaza	Law Office of Abaza PC & Abaza
Borunda PC			Borunda	Borunda PC	Borunda PC & Borunda
Trevino			Trevino	Law Office of Trevino PLLC & Trevino	Law Office of Trevino PLLC & Trevino

Regardless of any application of contract law as to who (Abaza, Borunda, and/or Trevino) is entitled to recover on the contracts and in what capacity (individually, Law Office, PC, PLLC), Rich entered into a contract only with Abaza (not his law office or his PC).

Caroline entered into a contract with Abaza (not his law office or his PC), Borunda PC (not Borunda), and Trevino (not his PLLC), and Rule 1.04(a) precludes recovery (even charging for or seeking to collect) a fee by anyone but Abaza.⁸³ Rule 1.04(f) provides for splitting a fee between or among lawyers of different firms only if

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

⁸³See *In re Godt*, 28 S.W.3d 732, 738 (Tex.App. Corpus Christi, Aug. 24, 2000) (“Section 82.065(a) of the government code provides, “[a] contingent fee contract for legal services must be in writing and signed by the attorney and client.” tex. [sic] Gov’t Code Ann. § 82.065(a) (emphasis added). It is undisputed that the agreement was signed only by Godt; neither Henry nor anyone from his office signed the agreement. We hold, therefore, that Henry may not enforce the arbitration agreement because it fails to comply with the requirements set forth in the government code.”).

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

Based on the petition in intervention and the interrogatory answer given as to who all was entitled to share in damages in the arbitration, neither Rich nor Caroline was informed of and consented to “the identity of all lawyers or law firms who will participate in the fee-sharing arrangement.”

Rule 1.04(g) provides that “No attorney shall collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way [referring to Rule 1.04(f)], 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.” Incredibly, Trevino says that he is the one who was “personally involved in the negotiation and signing of those contracts,” along with their drafting. (TR 547, 562)

(3) Out-of-firm lawyers

In his deposition, Trevino says that he typically bills on a contingent fee basis, on a 70/30 basis: “most of the commercial litigation cases are hourly and then some of the estate litigation cases are also hourly.” (Oct. 25, 2023 depo, page 6) That comports with the following screenshot from his website:



Trevino also analogizes there a will contest to trust-busting:

Challenge/Contest a Trust in Texas

Similar to will contests, an interested heir/beneficiary may challenge trust documents executed by the Grantor/Settlor if he or she lacked contractual capacity or was unduly influenced into executing the trust. We have invalidated trusts, "busted" improper or unnecessary trusts or even recovered trust assets that were stolen.

That Trevino markets on the basis of handling will contests on a contingent fee basis suggests his expertise in drafting contingent fee agreements to net him precisely what he wants to be netted. However, he is not even mentioned in Rich's fee agreement.

Instead, Rich's agreement contains troubling language providing the following:

Client does not object to the participation of any lawyers Attorneys may choose to involve in this action including Jorge Borunda who is representing his sister and waives any potential conflict should one arise.

In some instances, it may be necessary for Attorneys to retain special outside counsel to assist on matters other than prosecuting Client's claims for damages as a result of injuries sustained by Client.

. . . Client agrees that attorneys may retain such special outside counsel to represent Client when Attorneys deem such assistance to be reasonably necessary, and that the fees for such counsel will be deducted from Client's share of recovery. (emphasis added)

These unnamed lawyers, who will be doing something "other than prosecuting Client's claims for damages" will nonetheless be sharing in "Client's share of recovery." Quite literally, no out-of-firm ("outside counsel"), special or otherwise, has made a claim to a share of the fee from Rich's recovery apart from Borunda and Trevino (along with their law firms and Abaza's law firm). Although Borunda is named as someone Abaza "may choose to involve in this action," the choice is not Abaza's, it is the client's, which the client reflects by providing written consent to a contingent fee agreement setting out the information in Rule 1.04(f).

Similar language appears in Caroline's contract:

. . . client does not object to the participation of any lawyers Attorneys [Abaza, Borunda, and Trevino] may choose to involve in this action.

In some instances, it may be necessary for Attorneys to retain special outside counsel to assist on matters other than prosecuting Client's claims for damages as a result of injuries sustained by Client.

. . . . Client agrees that attorneys may retain such special outside counsel to represent Client when Attorneys deem such assistance to be reasonably necessary, and that the fees for such counsel will be deducted from Client's share of recovery.

Here it is the "attorneys" identified in the first line of the contract—Abaza, Borunda, and Trevino—who "may choose to involve" other lawyers of their own selection, who will also share in the fees based on Caroline's recovery. Again, such choice is not up to them, but to the client.

While, in my opinion, the language on its face supports the finding of a breach of fiduciary duty, that the most contingent-fee lawyer of the three drafted it suggests he meant what he said. In fact, when asked about the first provision above, Trevino said it "says and means exactly what it says there." (TR 946) That is, the plan all along was for Abaza to get some help when the engagement slipped beyond his competence, and Borunda and Trevino agreed to pitch in, with them agreeing among themselves what the latter would receive from Abaza's take. That interpretation explains why (1) Trevino is not mentioned in Rich's contract, (2) Borunda is only mentioned (which could induce Rich to talk to him, as Borunda was presumably agreeing to keep information confidential), (3) neither Borunda nor Trevino signed Rich's contract, and (4) neither Borunda nor Trevino signed Caroline's contract.

That also explains why Borunda and Trevino boldly add in their law firms for collection purposes, as Abaza may have said it mattered not to him whether he paid them as lawyers or as law firms. That also explains Trevino's equivocation in his deposition:

Q. Well, you're the master of your claim. So are you seeking it against Rich or are you seeking it against Nick and Jorge?

A. My understanding is it would be against the client. (Trevino depo. 104)

In trial, Trevino repeatedly said his claim was against both Rich and Caroline, but his earlier equivocation is understandable.

Of course, the language in both contracts could mean that all three lawyers had the same misunderstanding, approaching a total lack of understanding, about the association of out-of-firm lawyers.

Finally, in what could be viewed as an attempted workaround to the (1) failure of any lawyer apart from Abaza signing either contingent fee agreement and the (2) complete omission of any reference to Trevino in Rich's contract, the lawyers (per Borunda,

drafted by him and/or Trevino) included the following language in a proposed order to the court:

16 . . . "the Parties
17 have incurred attorneys' fees and expenses in this
18 litigation. This litigation was related to the estate
19 and Trust; specifically, the litigation was necessary
20 and proper in determining the property/beneficiaries of
21 the estate."

. . .
10 Q. And then you state, or perhaps Mr. Treviño
11 states, "Caroline and Richard Allison have/will pay a
12 contingent fee of 35 percent of the value of the Allison
13 Family Trust," correct?

14 A. That's what it says.

15 Q. Now, in reality, they -- you stated, in your
16 settlement statement that you ultimately provided me in
17 this case, they weren't actually going to pay 35 percent
18 of the value of the Allison Family Trust, correct?

19 A. Right. It was going to be less than 35 of the
20 total value of the Allison Family Trust.

21 Q. Right. So had this been approved by the court,
22 that just would have been incorrect?

23 A. I suppose. (TR 435)

In my opinion, aside from being incorrect, the language about what a good job the lawyers did and characterizing the nature of the settlement as "proper" is purely gratuitous. Borunda testified that neither Rich nor Caroline asked him to file that motion to approve the settlement. (TR 436)

(4) Association or referral

By its nature, a contingent fee agreement is already between lawyers from different firms, and the client consents to the sharing of the recovery to the extent of the percentages allocated to these lawyers in different firms. The language in Rule 1.04(f) refers to a referral or an association with lawyers from different firms, and Abaza, Borunda, and Trevino are from different firms.

The client has an absolute right to consent to the addition of any lawyer, prior to that lawyer working on the case, who may "share" in the client's recovery. However, if a lawyer is not sufficiently equipped to handle a matter that the lawyer accepts, it is the obligation of the lawyer to shoulder any cost for obtaining the expertise required to handle the matter. If the lawyer cannot handle the matter without acquiring that additional expertise, at the lawyer's own cost, the lawyer has an obligation to decline the representation. If the lawyer does not decline, the client has the right to presume

that the lawyer can handle the matter. The lawyer may secure the client's consent to the lawyer acquiring the necessary expertise along the way (Rule 1.01, Comment 4: "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."). However, the lawyer must make the disclosure of how the lawyer intends to handle the representation, in case the client chooses to find a lawyer already equipped.

If the lawyer who takes the representation "choose[s] to involve [other lawyers] in this action," the lawyers (based on that language) are necessarily either (1) those who will share in the recovery, and to whom the client must consent prior to their association, or (2) those whose expertise the lawyer requires to handle the matter, which means that neither will those out-of-firm lawyers participate in the recovery on a fee percentage basis nor be accounted for in the lawyer's case expenses.

In order to take an engagement, a lawyer may need to "associate" a lawyer with the requisite expertise, which may mean simply that the lawyer hires another lawyer just for that engagement.⁸⁴ These are necessary costs the lawyer must incur to take on the engagement, such as specialized CLE courses. Thus, why that kind of out-of-firm lawyers (who actually become in-firm lawyers once hired) are mentioned in the engagement agreement is totally unclear, and the client's agreement to that provision is meaningless absent clarity.

(5) Actual special outside counsel

At trial, Trevino was asked about some of the problematic provisions in the contingent fee contracts set out earlier:

- 4 A. It says, "Moreover, client does not object to
5 the participation of any lawyers attorneys may choose
6 to involve in this action."
7 Q. What does that mean? Means what it says,
8 right?
9 A. Exactly what it says.
10 Q. Right?
11 A. Has nothing to do with a split of a contingent
12 fee. (TR 946)

⁸⁴When I began working for a plaintiffs firm, I was hired to work on only two matters, a polybutylene mass action and a polybutylene class action. While I was salaried, I also had a percentage of any fees recovered. When those two matters ended, I was hired, on the same basis, to work on a different case. Only my share of any fees would need to be disclosed to the client; my salary and other overhead costs were paid by my employer.

However, the language in both contracts provides that

. . . . Client agrees that attorneys may retain such special outside counsel to represent Client when Attorneys deem such assistance to be reasonably necessary, and that the fees for such counsel will be deducted from Client's share of recovery.

Presumably, then, if the deduction is not in the form of a fee sharing, it is an expense. If the special outside counsel is instead equipping the lawyer to handle the engagement, then the expense may be one the lawyer is obliged to incur and not pass on to the client.

The hourly fee agreement contains the following disclosure:

TAX DISCLOSURE AND ACKNOWLEDGMENT:

THE CLIENT IS ADVISED TO OBTAIN INDEPENDENT AND COMPETENT TAX ADVICE REGARDING THESE LEGAL MATTERS SINCE LEGAL TRANSACTIONS CAN GIVE RISE TO TAX CONSEQUENCES.

THE UNDERSIGNED LAW FIRM AND ATTORNEY HAVE NOT AGREED TO RENDER ANY TAX ADVICE AND ARE NOT RESPONSIBLE FOR ANY ADVICE REGARDING TAX MATTERS OR PREPARATION OF TAX RETURNS, OR OTHER FILINGS, INCLUDING, BUT NOT LIMITED TO, STATE AND FEDERAL INCOME AND INHERITANCE TAX RETURNS

The contingent fee agreement does not mention the word "tax." Caroline testified about the tax consequences, some known after the signing of the MSA and some still not known, being something she did not expect and did not want. (TR 1122, 1132-33)

Rich expressed concerns, as well, about the tax consequences that would follow liquidation:

8 Q. And what are you communicating in this email
9 to Mr. Trevino?

10 A. I was saying that I thought that Fidelity was
11 a cash account and that there wouldn't -- you know,
12 that I find out that these stocks you have to liquidate
13 and get capital gains -- you know, that they would be
14 taxable events, and this is something that I was
15 suspecting, like anything that we were getting, that
16 would -- I mean, this is something that I wasn't --

17 promised that I wouldn't be having this happen. So
18 then I was upset about finding out about all these
19 taxes that we'd have to be paying to liquidate the
20 account if we liquidated it.

21 Q. Are there, to your knowledge, still unresolved
22 potential capital gains tax issues with the Minaki
23 funds?

24 A. Yes, sir. (TR) 1132)

The Borunda invoice for July 2020 reflects telecons with Paul Stugg [sic; "Strug"]. The webpage of Strug shows that

Mr. Strug assists clients with estate and business planning, ranging from tax-planned wills and trusts to advanced planning techniques. Mr. Strug uses family limited partnerships, charitable remainder trusts, grantor retained annuity trusts, and partition and property agreements in order to address client planning objectives, whether it be driven by taxes or driven by asset protection concerns.

In the area of probate administration, Mr. Strug handles entire aspects of estate administration, from admitting a will to probate to preparing a federal estate tax return. He works closely with families to navigate through the probate process, assisting with any number of issues which they may face, from conveying title to the house to funding an estate credit shelter trust to communicating with the IRS about a potential estate audit.⁸⁵

Strug submitted an invoice dated Aug. 3, 2020, showing an initial payment from the "trust" (perhaps a reference to the retainer Caroline paid), with the remaining sum reflected as paid on the Borunda invoice for Aug. 2020.

Thus, Caroline had paid for tax advice, to guide the lawyers who were representing her, before entering into the contingent fee agreement in Oct. 2020. A practice-area specialist could assess the nature of the advice her lawyers obtained from Strug, whether or to what extent they used it for Caroline's benefit in negotiating the MSA, and to what extent they should have been able to advise her about the tax consequences of the MSA, along with-in her mind-urging her to enter into it.

When asked about Strug, Trevino testified as follows:

1 . . . We had conversations before that. I
2 think specifically Nick Abaza with Mr. Strug on the tax

⁸⁵https://www.wkpz.com/attorney/paul_d_strug

3 planning.
4 Thereafter, I had conversations with a
5 CPA. These were all contemplated for their benefit.
6 They were aware of it at mediation. They knew about it
7 before. They were limited partners inside of these
8 apartment complexes. They knew the values at their
9 father's date of death. They knew those would
10 appreciate. There's going to be a capital gain on
11 either side of the equation.
12 At the end of the day, this is a deal
13 where they're getting approximately half, maybe even
14 more than half, of the full value of the trust, which
15 is better than what they would have done at trial. (TR 814)

However, Trevino also testified that

17 A. I did not have a written opinion from a tax
18 attorney or a CPA going into mediation.
19 Q. Is it fair to say that no tax expert was
20 present, either in person or by Zoom, on Caroline and
21 Rich's behalf during the mediation?
22 A. I'm not sure -- I know there wasn't a tax
23 attorney or CPA present at mediation. I want to say
24 that perhaps Mr. Abaza made a phone call to Mr. Strug.
25 But I'm not certain of that, sitting here today.
1 Q. You didn't have a call with Mr. Strug?
2 A. I did not.
3 Q. You didn't have a call with Mr. Robertson [CPA]
4 either during the mediation?
5 A. No, sir. I talked to him after this . (TR 899-900)

Borunda acknowledges that Rich sent emails expressing concern about the nature of the Fidelity account, suggesting that Rich was simply ignoring what he was being told:

23 Q. Have you seen the emails from Rich Allison
24 where he's talking about not knowing that the Fidelity
25 account was a tax account?
1 A. Yes. They're baffling.
2 Q. My question was going to be to you, why would
3 he say that if he was truly told at mediation that the
4 Fidelity account is a securities account?
5 A. I can only speculate as to why he's saying it.
6 It's simply not true. (TR 437-38)

But Borunda realizes that the lawyers really did not know what was going on with the Fidelity account:

1 What we didn't know was what had happened
2 within the account in the intervening time. So we
3 didn't know, to a certainty, what the present tax
4 liability was.
5 In any event, we discussed all of these
6 things. And Richard and Caroline expressed that they
7 didn't want the Fidelity account. They wanted cash. We
8 tried to get the cash. (TR 247)

Then the mediator sort of went rogue and began characterizing the Fidelity account:

15 A. Well, we were all in the room. We discussed,
16 "Look, these are the terms. You're going to get named
17 trustees and beneficiaries of the family trust. It's
18 going to contain the Minaki Limited Partnership's
19 Fidelity account with a guaranty of at least
20 \$9.5 million in it. You are going to have free rein
21 over all that money to do as you wish, except for the
22 million-dollar educational holdback." And then we
23 talked, also, about the ranch and all those other
24 things.
25 And Mr. Yates took it upon himself, with
1 no prompting from us, to explain to them that, given
2 their best likely outcome at trial, which would be to
3 undo the 2013 trust amendment and go back to 2011, they
4 were better off, by a lot, under the terms of this
5 settlement agreement and they would get to sidestep the
6 idea of risk. (TR 255-56)

But though they were no better informed, the lawyers went with what they could get:

14 Additionally, it was understood at all
15 times that the Fidelity account contained securities,
16 securities that had appreciated since the date of the
17 decedent's death. We roughly knew what the basis -- or
18 the step-up in basis was then. We didn't know what had
19 transpired within the account in the intervening time,
20 so we couldn't know precisely what the capital gains tax
21 liability, or capital gains, were because there was no
22 liability unless and until those amounts are liquidated.
23 But we didn't know what the capital gains precisely
24 were.

25 But it was known that these were issues.
1 That's why we tried to get cash instead, and we couldn't
2 get cash. And so with knowledge that these were
3 securities in these accounts, the clients accepted the
4 deal. (TR 263-64)

Thus, Rich and Caroline appear to have been asking the right questions all along about the tax burden effected by the MSA. But the lawyers' testimony indicates their inability to answer those questions. And/or their inability or failure to answer them correctly. However, it is far from clear that the lawyers indicated their uncertainty to Rich and Caroline.

Thus, the advice by Strug did not enable Trevino, Borunda, and Abaza to alleviate the tax concerns of Rich and Caroline, but the lawyers apparently had no other source of tax information at the time of the mediation or even when Rich and Caroline sought clarification after signing the MSA. If the lawyers were inadequately prepared, on their own, to alleviate these concerns, then, in my opinion, they were obliged—in order to comply with Rule 1.01(a)—to become so prepared. Apparently this was the intent of the provision in the contingent fee contracts regarding the “any lawyers” the lawyers could hire at will if, as Trevino says, it “[h]as nothing to do with a split of a contingent fee.” (TR 946). A practice-area specialist could say whether the cost of any tax lawyer advising Trevino, Borunda, and Abaza should be absorbed by them or passed on to the client as an expense.

B. Breaches of Fiduciary Duty Based on Rules Supports Fee Forfeiture

In my understanding, fee forfeiture is a two-step process. First, the fact-finder makes a determination of breach of fiduciary duty based on Disciplinary Rule violations. The SCOT could not, in fact, render in *Burrow v. Arce* because the lower courts had not determined the number and kind of Rule violations:

. . . 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.⁸⁶

Second, the court determines the extent to which, if any, a lawyer forfeits a fee based on the breach(es). The SCOT explains how the court proceeds in its analysis; but, in my opinion, Judge Nancy Atlas sets it out more clearly.⁸⁷ That process presumes that

⁸⁶*Burrow v. Arce*, 997 S.W.2d 229, 246 (Tex. 1999).

⁸⁷*Sealed Party v. Sealed Party*, 2006 WL 1207732 (S.D. Tex. 2006).

the court first determines the amount of any fees to which the attorney is entitled, based on the enforceability of the fee agreement itself and/or its individual provisions. The court determines then what sum of that amount is forfeited due to the breach(es).

The breaches of fiduciary duty that Hill enunciated as warranting fee forfeiture were all outside of the contingent fee agreement:

- (i) BAM's communication with the Guardian Ad Litem regarding its fee award;
- (ii) BAM's attempt to secure a release from prospective liability;
- (iii) BAM's attempt to add favorable language to the Global Settlement;
- (iv) BAM's threats to the Hills; and
- (v) BAM's failure to fulfill promises to Hill III regarding suing other entities in the Underlying Litigation.⁸⁸

After analyzing each of them, O'Connor concluded that they did not call for fee forfeiture.⁸⁹

However, in my observation, multiple breaches of fiduciary duty in the subject matter are within or involving the contingent fee agreements and the MSA, in the lawyers' failures to make required disclosures regarding them.

1. Lawyers Who Would be Participating in Fee Sharing

Failure to disclose, as required by Rule 1.04, the lawyers who would be fee-sharing violates the duty of communication and candor in Rules 1.04(f) and (g) and Rule 1.03, along with the underlying duty of loyalty.

2. Viability of Rich's and Caroline's Case

If the arbitrator finds that Abaza, Borunda, and Trevino undertook a representation that was beyond their competence, this violates the duty of loyalty in Rule 1.01(a).

3. How the Case Was Handled

If the arbitrator finds that Aabaza, Borunda, and Trevino proceeded in spite of Rich's and Caroline's decisions "concerning the objectives and general methods of representation," this violates the duty of loyalty in Rule 1.02(a)(1).

⁸⁸*Id.* at 865.

⁸⁹*Id.* at 699.

4. Calculation of the Fee

Failure to disclose clearly to Caroline and Rich how the fee would be calculated at the outset and how it was calculated in the settlement statement, violates the duty of communication and candor in Rules 1.04(a), (c), (d) and Rule 1.03, along with the underlying duty of loyalty.

5. Decision to Settle

If the arbitrator finds that Abaza, Borunda, and Trevino essentially convinced Rich and Caroline to settle on the terms of the MSA, by misrepresenting those terms and/or that the MSA could be revoked, this violates the duty of loyalty in Rule 1.02(a)(2).

6. Fee Division in the Settlement Statement

A failure to set out the fee division in the settlement statement violates the duty of loyalty in Rules 1.04(a), (d), (f), and (g) and the duty of communication and candor in Rules 1.04(d), (f), and (g) and in Rule 1.03.

7. Expense Split

A failure to clarify in the contingent fee agreements how expenses would be allocated between Rich and Caroline violates the duty of loyalty in Rules 1.04(a), (d), (f), and (g) and Rule 1.06 and the duty of communication and candor in Rule 1.03.

8. Transaction with Client

A transaction with a client absent compliance with Rule 1.08(a) violates the duty of loyalty in Rule 1.08 and the duty of communication and candor in Rule 1.03.

9. Settlement and Settlement Statement

If the arbitrator finds that the lawyers misrepresented the settlement to Rich and Caroline, this violates the duty of loyalty in Rules 1.04(a), (d), (f), and (g) and the duty of candor and communication in Rules 1.03 and 8.04(a)(3), along with the underlying duty of loyalty. In not providing the settlement statement until after being ordered to do so by the arbitrator, the lawyers clearly did not provide the settlement statement in accordance with the requirements of Rule 1.04(d) and Rule 1.14(b).

10. Multiple Client Conflicts

The failure to disclose conflicts among multiple clients in the same representation violates the duty of loyalty in Rule 1.06 and the duty of communication and candor in Rule 1.03.

Abaza, Borunda, and Trevino recognized the existence of conflicts among multiple clients in the same matter, as the following language appears in the contingent fee agreement Caroline signed in Oct. 2020:

. . . Client understands that Attorneys may, if appropriate, negotiate a settlement of Client's claim and the claims of other clients similarly situated on an aggregate basis.

Attorneys may represent multiple individuals with separate claims arising out of this matter. Clients acknowledge that conflicts may arise during the negotiations and or settlement discussions if Clients are faced with the task of dividing settlement proceeds among such individual claims. In such circumstances, Clients understand that Attorneys cannot determine such allocation for Clients and cannot favor one Client over the other(s). Clients understand that they will need to come to agreement amongst themselves regarding such division. Having been fully informed, Clients hereby agree to waive any such conflicts that exist, and request that Attorneys represent them collectively and individually.

Costs and Other Expenses: It will be necessary for the Attorneys to incur and advance certain court costs and expenses for the Client. These costs and other expenses may include, but are not limited to . . . common benefit costs. Common benefit costs are those court costs and expenses that are property chargeable for the investigation, preparation, trial, and/or settlement of more than one Client's cause of action. Common benefit costs are routinely shared by more than one Claimant and shall be deducted from the Client's recovery in an equitable and reasonably proportionate manner.

. . . .
Waiver of Conflict:

If several members of the same family and/or heirs of the same deceased person have retained Attorneys to represent them in a single lawsuit, these clients understand that a potential conflict of interest may exist between them concerning the division of proceeds from the lawsuit, and hereby waive any real or potential conflict of interest and agree that Attorneys may represent them all.

The foregoing reflects an astonishingly inadequate set of disclosures for representation of multiple clients in the same matter. The disclosures provided rest on an apparent misunderstanding that potential conflicts do not materialize between or among clients until the time of negotiating and settling a case and allocating expenses. Long before the negotiating and the settling come the advising, the sharing of confidential information, and the directing of the litigation by the clients.

Comments 7-9 to Rule 1.06, stated above, indicate, respectively, that (1) some representations of multiple parties may be nonconsentable, meaning that the conflicts so defy adequate disclosure that consent could not cure any prohibition on representation; (2) disclosures should be written, at least in summary form, to deter a later swearing match between attorney and client as to what was said and what should have been understood; and (3) a lawyer may wind up, down the road, in a multiple client representation that arguably could have been permissible at the outset, but has become one from which the lawyer must withdraw.

While fiduciary duty requires the disclosures appropriate for each practice area, to which a practice-area specialist could speak, the failed 2011 referendum, which included changes to virtually all of the Rules, converted current Rule 1.07 from covering a lawyer acting as an intermediary to one representing multiple clients in the same matter. Thus, it, along with the comments, offers specific guidance for disclosures, which lawyers could otherwise locate in fiduciary law (such as relied on in ethics opinions):

Rule 1.07. Conflicts of Interest: Multiple Clients in the Same Matter⁹⁰

- (a) A lawyer shall not represent two or more clients in a matter unless:
- (1) the representation complies with Rule 1.06;
 - (2) prior to undertaking the representation or as soon as reasonably practicable thereafter, the lawyer discloses to the clients that during the representation the lawyer:
 - (i) must act impartially as to all clients;
 - (ii) cannot serve as an advocate for one client in the matter against any of the other clients, as a consequence of which each client must be willing to make independent decisions without the lawyer's advice to resolve issues that arise among the clients concerning the matter;
 - (iii) may be required to withdraw from representing some or all of the clients before the matter is completed due to events that occur during the representation; and
 - (3) as soon as reasonably practicable after making the disclosures required by (a)(2), the lawyer obtains each client's informed consent, confirmed in writing, to the representation.

⁹⁰This Rule was not promulgated, as the referendum did not pass. See Misc. Docket No. 10-9190, Texas Supreme Court Order, Approval of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct, Exhibit A to Referendum Order, 73 Tex. B.J., Dec. 2010, at 900 et seq.

Comment

4. A joint representation of multiple clients requires a lawyer to strike the delicate balance between the lawyer's obligation to keep each client reasonably informed about the status of a matter, see Rule 1.03, and the lawyer's obligation to keep confidential the information obtained from a client, see Rule 1.05. When the lawyer is balancing these two requirements, the lawyer's duty of disclosure generally will outweigh the lawyer's duty of confidentiality. Therefore, a lawyer representing joint clients will be required to share material information regarding the representation and correct material false or misleading statements or omissions made by or on behalf of one client to the other jointly represented clients. If the lawyer is concerned whether such disclosures would violate the lawyer's duty of confidentiality to a joint client, the lawyer should obtain that client's informed consent for the disclosure. If one or more clients ask the lawyer not to share material information or correct material false or misleading statements or omissions, then the lawyer should consider whether withdrawal from the representation of some or all clients is necessary.

Required Disclosures and Informed Consent

11. Subparagraph (a)(2) requires lawyers to make specific disclosures concerning the lawyer's role in a joint representation of multiple clients. The lawyer is not required to make such disclosures in writing, but a lawyer should consider doing so to avoid difficulties that may arise when a lawyer claims to have made the disclosures and the client claims otherwise. The client's informed consent to the joint representation must be confirmed in writing under subparagraph (a)(3). [emphasis added].

12. A lawyer should consider making additional disclosures to obtain clients' informed consent to a joint representation under subparagraph (a)(3). For example, as detailed in Comment 4, the lawyer should disclose the effect of joint representation on the lawyer's duties of confidentiality and disclosure. Additionally, the lawyer should disclose that while joint representation might be less expensive and more efficient than independent representation, it might also be more expensive and might delay resolution of the matter. Additional costs and delay might occur, for example, when the lawyer withdraws from representing some or all of the joint clients during a representation, particularly if it is late in the matter, which would substantially increase the matter's ultimate cost if the clients are required to expend additional fees and expenses to hire and educate new lawyers.

The revisions added a definition, in the Terminology section, for "confirmed in writing":

(f) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is provided in writing by the person, or a writing that a lawyer promptly transmits to the person confirming an oral informed consent.

Trevino could not cite to any disclosures he, Abaza, or Borunda made to Rich and Caroline about a joint representation:

12 Q. Then the next paragraph down, first sentence
13 says, "Attorneys may represent multiple individuals
14 with separate claims arising out of this matter."

15 Did I read that accurately?

16 A. Yes.

17 Q. And you don't have any problem with that term
18 either, right?

19 A. No.

...

2 Q. Did you provide any advice to Caroline Allison
3 regarding this waiver of conflict at any time prior to
4 this contract being signed?

5 A. I did not have a conversation about the terms
6 of the contract with Caroline Allison.

7 Q. Okay --

8 A. Other than -- I'm sorry. Just to finish.

9 Other than the 35 percent contingency fee number.

10 Q. Which means you gave her no disclosures
11 regarding this paragraph. We can agree with that,
12 right?

13 A. I did not go over this contract with Caroline
14 Allison.

15 Q. Did you hear Mr. Borunda or Mr. Abaza give any
16 disclosures to Caroline Allison with regard to this
17 waiver of conflict?

18 A. I didn't hear Nick or Jorge go over this
19 contract with Caroline Allison.

20 Q. So you don't know if they made any
21 disclosures, written or oral, to her regarding the
22 waiver, right?

23 A. Not something I have personal knowledge of. (TR 946, 949)

And, as he said in his deposition that he made no notes, handwritten or digital (depo. 120), he has no summary of such disclosures that could have been provided to Rich and Caroline to confirm they received such disclosures.

A practice area specialist could detail the potential conflicts for multiple clients in the positions of Rich and Caroline and specify the kinds of disclosure that would be required by fiduciary law prior to their entering into a representation like that in this case.

However, differences between the clients, some acknowledged by the lawyers, suggest disclosures that should have been made:

1. Rich lived out of state and was often limited to communicating via phone, though often with video. The extent to which Rich learned of things "their lawyers" said from Caroline comprised a different form of communication than occurred with Caroline.
2. Rich had a much greater incentive than Caroline to "divorce" from Robin, per Trevino's observations.
3. Rich never indicated any interest in being co-trustee with Robin, though Caroline did:

24 . . . Even months before
25 that, I was not involved in some of the conversations.
1 I think Caroline at some point said she
2 wanted to be a co-trustee along with Robin, and Rich
3 said he wanted closure. He wanted money now. He
4 wanted this thing over with. There were real
5 difficulties with the families. He did not want to
6 deal with Robin. (TR 783-84)

4. The description Rich provided in his deposition of his living conditions and daily challenges suggests, in my opinion, a more dire need for cash and aversion to more responsibilities (like a trustee position) than Caroline has.

5. Unlike Caroline, Rich has adult children, each of whom has different personal challenges, due to their ages and stages of life (vis-a-vis education, employment, marriage, and children), than Rich, and different financial needs and desires than Rich. Moreover, both Caroline and Rich testified to the influence over them by their mother, Rich's ex-wife, who Caroline, Rich, and Robin all testified had little to no interest in Rich's well-being. Borunda testifies to a realization of issues involving Rich's children that could (and perhaps did) rise to a conflict that should have prompted the dissolution of the representation of both Caroline and Rich:

9 Q. Did you have any involvement in getting the
10 consent forms signed by Rich's children?
11 A. No.

12 Q. Were you ever told by either Mr. Borunda or
13 Mr. Trevino or Mr. Abaza that if Rich's skids did not
14 consent to the settlement, that it might blow the whole
15 deal?

16 A. No, they did not advise us of that.

17 Q. There's an email that you sent asking about a
18 consent agreement for Kensington. Do you recall that
19 email?

20 A. Yes.

21 Q. And what's the reason you asked about that?

22 A. I believe that email was also in April, shortly
23 after the dinner, and he just -- Mr. Trevino, at the
24 dinner, explained the process for what happens next
25 after he told us we couldn't rescind. And so I -- he
1 mentioned about the ad litem and the ad litem's role as
2 it relates to my daughter, and so I just asked about
3 that. But I never had an opportunity to talk to the
4 ad litem.

5 Q. That was going to be my next question. You
6 never spoke with the ad litem?

7 A. No. I mean, from what I read, they were
8 supposed to do their own independent review, and that
9 was a big deal. That actually could have been a
10 possibility for pulling out of the deal. (Caroline, TR 1299-300)

The lawyers discussed among themselves how the problematic family dynamics, which they had known about for some time, could derail the deal:

22 Q. (BY MR. DAVID KASSAB) Mr. Borunda, this [CX 167] is a
23 email between you and Mr. Abaza and Mr. Treviño, dated
24 April 20, 2021. That looks like an email exchange.

. . .
23 A. This goes back to the difficult family dynamic
24 between Rich; his ex-wife, Kim; and their children.
25 And, frankly, Kim, according to Rich, was at all times
1 trying to derive some personal benefit from this ongoing
2 litigation, whether by extracting it from Robin, from
3 her kids, or in some other fashion.
4 Rich and Caroline expressed to us that
5 they were concerned that Kim was angry that she wasn't
6 getting anything out of this deal and would try to
7 derail.
8 And, in particular, one of our concerns
9 was that Erik, who is -- who seems to be most
10 susceptible to Kim's manipulations, or seemed to us at

11 that time to be most susceptible to Kim's manipulation,
12 would in some way try to work with her to interfere in
13 some fashion with this. (TR 423, 425-26)

6. The expenses were to be divided equally between Caroline and Rich. However, whether any benefit to Rich's adult children meant that Caroline disproportionately shared those expenses does not appear to have been disclosed, so that she could have consented to it. While a disclosure to both of them about an ad litem being a likely expense for Caroline's child may have caused Rich and Caroline to say the expenses were off-setting is not known, as they apparently were not advised of that.

7. Rich and Caroline were being billed under contracts with different provisions, until they both signed a contingent fee agreement. A practice-area specialist could speak to how the hourly billing lawyers would keep track of their time for billing purposes to for each client. For example, if Borunda spent 1 hour on the case, would he note .5 hour for Caroline, to be billed to her, assuming with each hour spent for her, it also benefitted Rich?

The contract Rich signed with Abaza states that Rich "waives any potential conflict should one arise," but that language appears to pertain only to Borunda having some unspecified involvement in the action. Without Rich having been told what any potential or realized conflict might be, his waiver is meaningless.

11. Arbitration Clause

This failure to disclose violates the duty of loyalty in Rule 1.08 and the duty of communication and candor in Rule 1.04(c) and in Rule 1.03.

When the Committee on which I served for 17 years was reviewing virtually all of the Rules for changes, we recommended adding a provision to Rule 1.08 (prohibited transactions with a client). The Committee believed that such a provision tracked fiduciary law. Our rationale for the suggested language appears in our report (attached), which was submitted to the SCOT in December 2006.

The SCOT included a provision on arbitration in the failed February 2011 referendum:

Rule 1.08(g)(2) [proposed; this was not promulgated]

(g) A lawyer shall not:

...

- (2) make an agreement with a client that requires a dispute between the lawyer and client to be referred to binding arbitration unless either:
- (i) the client is represented by independent legal counsel in making the agreement; or

(ii) the lawyer discloses to the client, in a manner that can reasonably be understood by the client, the scope of the issues to be arbitrated, the fact that the client will waive a trial before a judge or jury on these issues, and that the rights of appeal may be limited

Comment

19. Similarly, subparagraph (g)(2) prohibits a lawyer from entering into an agreement with the client to arbitrate a dispute between the lawyer and client, unless the client has independent legal counsel regarding the agreement. Alternatively, the lawyer may agree with the client to have disputes between them referred to binding arbitration in the absence of the client being independently represented, but only if the lawyer makes the disclosures in subparagraph (g)(2)(ii) in such a way that the client is reasonably likely to understand them. Other disclosures likely to aid the client in understanding the effect of the agreement include that arbitration proceedings may not be faster than a lawsuit tried to a judge or jury and that the client may ultimately pay as much or more in arbitration costs as the client would pay were the matter to be tried in court.⁹¹

While the SCOT did not independently promulgate this provision, not has it been included via the current Rule changing process (e.g., the statutorily created Committee on Disciplinary Rules and Referenda), the following ethics opinion tracks the fiduciary duties requiring the disclosures to the client:

It is permissible under the Texas Disciplinary Rules of Professional Conduct to include in an engagement agreement with a client a provision, the terms of which would not be unfair to a typical client willing to agree to arbitration, requiring the binding arbitration of fee disputes and malpractice claims provided that (1) the client is aware of the significant advantages and disadvantages of arbitration and has sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision, and (2) the arbitration provision does not limit the lawyer's liability for malpractice.⁹²

Moreover, the Chief Disciplinary Counsel in the disciplinary suit of Bennett (earlier referenced) made an argument that reflects the importance of disclosures for an arbitration provision, which I observed in my amicus brief:

⁹¹See Misc. Docket No. 10-9190, Texas Supreme Court Order, Approval of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct, Exhibit A to Referendum Order, 73 Tex. B.J., Dec. 2010, at 900 et seq.

⁹²Prof'l Ethics Op. 586 (2008).

. . . Mr. Bersch told the court that "it is very rare in the State of Texas when an attorney drafts an Attorney Fee Agreement with his client [and] makes his client agree that any disputes arising out of that agreement are going to be handled at arbitration " (Mar. 17, 2014, transcript, 190-91; emphasis added). The allusion is to the argument that an arbitration clause in an attorney-fee agreement can be overreaching, such that the attorney should disclose the plusses and minuses of such a provision, as described in Texas Ethics Opinion No. 586 (2008).⁹³

Abaza testified that he "would" typically disclose the following about the arbitration provision, without saying whether he recalls having done so:

- 4 Q. Specifically with the arbitration provision,
5 what disclosures did you make to Caroline and Rich
6 concerning that provision?
7 A. What I would say about an arbitration
8 provision is that it's basically a private court
9 system and it's like a tollway. It's usually faster.
10 You don't have a judge, per se. It's an arbitrator,
11 which usually is a judge or former judge, and that,
12 you know, they're going to be more versed on the law.
13 But it's not something I would go into great detail
14 about.
15 Q. So did you disclose the costs that are
16 associated with arbitration?
17 A. I can't recall.
18 Q. The arbitration provision in the contingency
19 fee contract calls for the AAA commercial arbitration
20 rules to apply?
21 A. Right.
22 Q. Did you go over with Caroline and Rich what
23 those rules entailed?
24 A. I don't recall. (TR 611)

Borunda also had no recollection of what he disclosed concerning Rich and Caroline, just what he and Abaza would typically do:

- 19 Q. Okay. And so when you're saying you're walking
20 through the terms of these various engagement
21 agreements, was it just generally the terms of an hourly
22 fee versus a contingency fee? Or what do you mean by
23 that?

⁹³See attached brief, pp. 58-59.

24 A. So Nick and I have worked together on a lot of
25 cases, and I tend to know -- I know the standard
1 terms -- or I knew the standard terms of his form at
2 that time. And so -- and Nick certainly knew. We
3 didn't have a printout of the document to go through
4 with them at the time. We talked about the terms that
5 were in the document.

6 Q. When you said "standard terms," can you explain
7 to me what you mean by that?

8 A. Everything from the -- how -- the scope of
9 engagement and how things outside the scope have to be
10 in writing and the amount of the fee and how it's to be
11 calculated, the deduction of expenses, the association
12 of other counsel, the client's approval needed for
13 settlement, the apportionment of the fee amongst the
14 attorneys involved in the case, Texas law governs,
15 arbitration clause. I'm having a hard time, as I sit
16 here, going through all of them, but in essence . . .

17 Q. Okay. Well, I want to be clear because the
18 hourly engagement agreement that you drafted does not
19 have an arbitration clause, right?

20 A. That is correct.

21 Q. Okay. So why would you be discussing an
22 arbitration clause as a general standard term if you
23 don't have it in your agreement?

24 A. Because we discussed both types of agreements.
25 We discussed the hourly agreement and contingency fee
1 agreement.

. . .
6 Q. Okay. And specifically with regard to the
17 arbitration provision, what advice did you provide
18 Caroline and Rich concerning that?

19 A. I don't recall the specifics of it. I would
20 have discussed in general terms what --

21 Q. If you don't recall, you don't recall. I don't
22 want to know what you think you might have discussed.
23 If you don't recall it, that's fine.

24 A. I know we had discussions about the arbitration
25 clause. I don't recall in detail the substance . . . (TR 347-49)

Consistent with the foregoing, Trevino testified in his deposition that he does not recall having any discussions with Caroline about the arbitration provision. (depo. 262) Again, as Trevino has no notes in any form about discussions he had with her (or Rich) (depo. 120), he certainly cannot say that he gave her (or Rich) the disclosures required by fiduciary duty.

12. Mistakes or Misrepresentations Concerning Any of the Above

A fiduciary “has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes,”⁹⁴

Regrettably, one or more of the lawyers in this case readily acknowledge, without a concomitant explanation of error or mistake,

- (1) the absence of disclosures regarding the foregoing (e.g., Borunda, regarding absence of fee division in settlement statement, TR 301), and
- (2) the effect of violation of Rule 1.04 (e.g., Trevino, “If they don't comply with the rules, then they shouldn't be allowed to get a contingent fee,” depo. 247, and “That’s what this provision says,” (TR 945); Borunda, “this provision . . . might run afoul of Rule 1.04, but I don't remember” (TR 359)),

offering an excuse of only substandard conduct (e.g., Abaza, regarding a failure to include Trevino in the contingent fee contract, “that's where I dropped the ball or I don't know what happened” (TR 577)).

The lawyers all testify to their compliance with requisite fiduciary guidelines based on a broadly stated belief that they have done so. However, this ignores the lack of scienter in all of the Rules stated above, in that they contain the mandatory language of “shall.” This is the equivalent of strict liability.

As indicated in the Preamble section of the Rules, “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.” No such professional discretion that Abaza, Borunda, and Trevino seem to think they had appears in any of the relevant guidelines.

IV. Conclusion

All of the absent disclosures could and should have been made in accordance with Rule 1.04, the most highly publicized Disciplinary Rule since the promulgation of the Texas Disciplinary Rules of Professional Conduct in 1990. In failing to comply with

⁹⁴*Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 22 (Tex. App.--Tyler 2000, pet denied).

Rule 1.04, Abaza, Borunda, and Treveno also failed to comply with numerous others, in numerous ways, increasing dramatically the basis for fee forfeiture.

Sincerely,



Lillian B. Hardwick

attachments:

LBH resume

Order from HBA FDC Bennett matter

LBH amicus filing in Bennett disciplinary matter

TDRPC Committee Report on arbitration clause

TDRPC Committee Report on Rule 1.08 to SCOT

CDC petition against Piro & Lilly

2023 proposed changes to Rule 1.08(a)

Silvas disciplinary materials

“Understanding the New Rules Governing the Division of Fees”

TDRPC Committee Report on Rule 1.04