

EXHIBIT 11

Lillian B. Hardwick
4013 Dominion Cove
Austin, Texas 78759
lbhardwick@sbcglobal.net
512/372-3600

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David Kassab
The Kassab Law Firm
1214 Elgin Street
Houston, Texas 77004

via e-mail: david@kassab.law

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

Dear Mr. Kassab:

You have asked me to prepare a report in the referenced matter, addressing the extent to which the defendant lawyers in the referenced matter complied with their fiduciary duties to the plaintiffs in their representing the plaintiffs in the probate matter regarding their father. Following is my summary opinion, with a detailed analysis of my methodology and reasoning. After the summary opinion, I have provided an outline reflecting where the specific topics are addressed.

Summary Opinion

In their testimony, confirmed by their lawyers' testimony, the plaintiffs explained their expectation of any outcome challenging the trust(s) that determined their inheritance from their father after his death. The defendant lawyers take the position that they achieved what the plaintiffs expected, seeking a contingent fee from what the plaintiffs received. The lawyers take this position based on terminology used by laypeople, arguing this was what the plaintiffs wanted. In my opinion, the defendant 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.

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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 (“Rules”) 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.¹

¹Tex. Disciplinary Rules Prof'l Conduct preamble ¶¶ 1-3.

In response to a request from the Supreme Court of Texas (“SCOT”), 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 still other Rules. Our mandate from the SCOT clarified our focus and changed our primary audience.²

Beginning in 2004, the Committee conducted extensive meetings (in number and duration³) regarding revisions to the Texas Disciplinary Rules and (via its co-chairs) drafted and submitted to the SCOT reports concerning its recommended changes.⁴ 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.⁵ 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.

²As a Bar committee, we had previously reported to the State Bar President, who later became a co-recipient of our work.

³Between November 12, 2004, and November 12, 2006, the Committee met 39 times, for a total of 35 days (we often met for 2 ½ 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.

⁴See *2006-2007 State Bar of Texas Committee Reports*, 70 Tex. B.J. 612, 620 (2007).

⁵See *2007-2008 State Bar of Texas Committee Reports*, 71 Tex. B.J. 562, 571 (2008).

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, the SCOT authorized the publication of proposed New Disciplinary Rules.⁶ 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.⁷

⁶Misc. 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.

⁷See, e.g., Misc. Docket 18-9030, Order Adopting Amendments to Texas Disciplinary Rule of Professional Conduct 8.03, (March 1, 2018).

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,"⁸ I have provided expert/consulting services on the attorney disciplinary process and standards and the issue of breach of fiduciary duty for 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

⁸This is an umbrella term, referencing Rules of Professional Conduct and statutory and case law regarding lawyers' obligations.

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,⁹ 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.

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

⁹At my request, Scott Durfee agreed to take over Part III starting with the 2024 edition.

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.**¹⁰

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 Procedure that it considers advisable.”¹¹

¹⁰*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.”).

¹¹Tex. Govt. Code §§ 81.091-81.095.

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.

IV. 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.¹²

Thus, I agree with Jorge Borunda ("Borunda") that the Rules "are the minimum standards, but you can and should strive to do better." (depo. 38-39)

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 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

¹²Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 7.

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)—in 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."¹³

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.¹⁴ 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, based on a set of factors, whether there should be a forfeiture and, if so, in what amount.

¹³Ray 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).

¹⁴*Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

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.’ ”¹⁵

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.”¹⁶

Apart from the focus on Rule 1.08(f), the SCOT acknowledged “other alleged disciplinary rules violations [which] might also justify forfeiture.”¹⁷ 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,¹⁸ 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.”

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)

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

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

¹⁷*Id.*

¹⁸Attached.

(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.¹⁹ Seven months later, an agreed judgment of public reprimand was entered, concerning only Rule 1.04(d).²⁰

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.²¹

At the request of the parties, Judge Christopher also made findings of fact and conclusions of law.²² 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 that the breaches were grave, serious, clear, and willful, she determined a fee forfeiture of \$3 million.²³

¹⁹*Id.*

²⁰Based 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.

²¹See judgment in *Piro* case.

²²*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.).

²³Judge Christopher reduced the \$6 million total by half, characterizing the \$3 million remaining as breach of fiduciary duty damages or fee forfeiture. See judgment.

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.”²⁴ 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.”²⁵

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.”²⁶ 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.”²⁷

“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.

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

²⁴David J. Beck, *Legal Malpractice in Texas, Second Edition*, 50 Baylor L. Rev. 547, 605 (1998).

²⁵*Id.* at 606.

²⁶*Cosgroves v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989).

²⁷Beck, at 613-14.

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, Borunda explains that he "was going to be indisposed for some time" due to an accident involving his 80-year-old mother, who lives in Mexico, but "wanted to make sure that we kept things moving forward," so he thought of bringing Trevino on board. (Borunda depo. 126, 265) 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.²⁸

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

²⁸See, e.g., Texas Pattern Jury Charge, Business, Consumer, Insurance & Employment, Chapter 101 (2018).

- (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

Comment

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

Rule 1.03 Communication

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

Comment:

- 1. The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel either

an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Comment 2 to Rule 1.02.

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

Comment

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

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

Comment

Full Disclosure and Informed Consent

- 7. A client under some circumstances may consent to representation notwithstanding a conflict or potential conflict. However, as indicated in paragraph (c)(1), when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for

such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the full disclosure necessary to obtain informed consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

8. Disclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. While it is not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed.
9. In certain situations, such as in the preparation of loan papers or the preparation of a partnership agreement, a lawyer might have properly undertaken multiple representation and be confronted subsequently by a dispute among those clients in regard to that matter. Paragraph (d) forbids the representation of any of those parties in regard to that dispute unless informed consent is obtained from all of the parties to the dispute who had been represented by the lawyer in that matter.

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 1.02, 1.04, 1.06, and 1.08 depend on an assessment of the adequacy (clarity and completeness) of the communication in each instance.

IV. Analysis

A. Contingent Fee Agreement

Several aspects of the contingent fee agreement, first with Rich Allison and later with Caroline Allison, comprise failures to comply with fiduciary duty. As observed earlier, a practice area specialist needs to particularize the standard of care for a lawyer undertaking the representation that the plaintiffs sought. Possibly that specialist (expert) would indicate shortcomings on behalf of the defendant lawyers that would implicate aspects of the standard of conduct, which would occur to me once I heard that expert's testimony. Thus, the following areas of concern reflect my non-practice-area-specialty perspective.

1. Attorney signatures

Rule 1.04(a) prohibits a lawyer from entering into an arrangement for, charging, or collecting 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:

- (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 client²⁹

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.

Moreover, although I am not an expert in contract law (which may not be subject to expert opinion at all), Abaza is a party to Caroline's contract as an individual, Borunda is a party via his PC (but not as an individual), and Trevino is a party as an individual. The lawyer parties to Caroline's hourly fee contract are Abaza individually and Borunda P.C., not in his personal capacity.

The petition in intervention names the intervenors as individuals only. It is nonetheless signed by Borunda, apparently not as an individual, but on behalf of his P.C. Less clearly, Trevino and Abaza may be signing on behalf of their law offices, instead of or along with signing as individuals.

The lawyer-parties to the contingent fee agreement with Caroline are Abaza, Borunda, and Trevino. However, it contains the signature of just lawyer Abaza. Thus, lawyers Borunda and Trevino are seeking a contingent fee based on a contract that does not comply with statute, which mean they are seeking an illegal fee.³⁰

²⁹Misc. 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.

³⁰See *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.").

2. Out-of-firm lawyers

The contingent fee agreement signed by Caroline on Oct. 16, 2020, contains three troubling provisions regarding lawyers not in the firm of the lawyers whose agreement the client is signing:

. . . 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.

The contract with Rich names only lawyer Abaza as a party to the contract but contains similar provisions:

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.

That the same or similar language appears in both contracts suggests that all three attorneys had the same misunderstanding about the association of out-of-firm lawyers.

a. Association or referral

By its nature, the 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. Moreover, 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. These are necessary costs the lawyer must incur to take on the engagement, such as specialized CLE courses. Thus, why those out-of-firm lawyers are mentioned in the engagement agreement is totally unclear, and the client’s agreement to that provision is meaningless absent clarity. Rule 1.04(f) and (g) prohibit recovery from any agreement for a client to share a recovery with a lawyer whom the client has not approved prior to the lawyer doing any work on the case.

What is particularly baffling is the role of Trevino, from the standpoint of engagement. He had apparently “signed onto” the case, in some form or fashion, by Oct. 16, 2020 (Trevino Ex. 32). He testified that he was on a contingent fee basis from the outset:

Q. And so did they ask you to come onboard via a contingent fee?

A It was already contemplated that the client was going to a contingent fee in that conversation.

Q. So -- but did they ask you to come -- that's my question. Did they ask you to come on as part of a contingent fee, or did they want to pay you hourly?

A. No, I guess we're missing each other.· Yes, this was going to be contingent fee work.· That's how I was coming in.· That's what the arrangement was going to be is contingent fee.· Everyone was on contingent fee. (depo. 35)

However, he readily acknowledges that he had no engagement agreement with Rich:

Q. And did you comply with the rules with respect to Rich Allison's contingency fee agreement?

A. I thought that was complied with.

Q. I'm not asking if you thought it was complied with.· I'm asking if you did.· Sitting here today, do you know whether or not you did?

A.· · Sitting here today, I have answered this question before, I don't have a contract that's signed in writing identifying myself getting a 30 percent contingent fee similar to Caroline's. (depo. 247)

Although, based on his signing the Oct. 2020 petition, which names Rich and Caroline as plaintiffs, Trevino is not mentioned, in any capacity, in the undated contingent fee agreement Rich signed. Moreover, Rich testified that Trevino (1) “was [his] sister’s attorney” and (2) explained his communicating with Rich to be merely “a courtesy” he extended because he would be in California anyway, working on other cases, and “would drop in.” (Rich depo. 146) Rich’s undated contingent fee agreement with Abaza even states that Borunda represents his sister.

Trevino even appears unclear whether he has a claim against Abaza and Borunda for the work he did on the case or against the client(s):

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)

Trevino also appears to believe that his understanding of what his arrangement was, controls what it was:

Q. Were there any discrete tasks that you did that advanced Caroline's case solely but not Rich's case?

A. No.· I think that I had them both on

contingent fee. I did the same work for both clients.

Q. Did you have Rich on a contingent fee?

A. My understanding is I did.

Q. Was it on oral contingent fee agreement?

A. No, sir. I thought it was a written contingent fee at 35 percent that Rich understood. (depo. 102)

His position ignores the scienter (or lack thereof) in Rule 104(g), which is the equivalent of strict liability, not what the lawyer believes:

(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 . . . [emphasis added]

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." As Borunda acknowledged, "they're a floor, not a ceiling" (depo.38).

Finally, in what could be viewed as an attempted workaround to the (1) absence of any contingent fee with Rich and any lawyer apart from Abaza signed and the (2) complete omission of any reference to Trevino, the lawyers sought an order from the court saying (in Borunda's suggested words) the following:

"The Court also finds that a contingency fee of 35% of the value of the Allison Family Trust's assets is a reasonable and necessary attorney's fee incurred in connection with the above-captioned matter." (Borunda Ex. 31)

The actual language that was included in a proposed order for the court, which was sent to opposing counsel–

Caroline and Richard Allison have/will pay a contingent fee of 35 percent of the value of the Allison Family Trust. Robin has incurred attorneys' fees and expenses in this matter as well. The Parties [sic] respective attorneys' fees were proper, reasonable and necessary attorneys' fees

incurred in connection with the above-captioned matter, as this was a difficult, complicated and prolonged dispute that was essential to the proper settlement of the estate and/or Trusts. (Borunda Ex. 31)

--adds gratuitous language about what a good job the lawyers did and characterizes the nature of the settlement as "proper." When asked whether he actually read this language to Rich and Caroline or sent it to them, he testified he was not sure. (Trevino depo. 212)

b. Outside counsel

In the same respect, who are, generically, the "special outside counsel to represent Client [whose] fees will be deducted from Client's share of recovery"? If they are lawyers who will literally take a percentage of the recovery, the client must approve of them ahead of their working on the case. If they are lawyers who enable the lawyer who took the case actually to handle it, the lawyers who took the case should bear those costs.

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 has complained that the MSA created a "heavy tax burden" (Oct. 11, 2023, depo., p. 27), inferentially being something she did not expect and did not want. However, 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.³¹

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.

In his Nov. 12, 2021, email to Caroline and Rich, Trevino passes along tax advice from “the tax advisors we spoke to [being that] you are only responsible for the appreciation and/or gains since your father passed away.” (Trevino Ex. 29) Who are those tax advisors—Strug? When, after his bill in Aug. 2020, was he involved?

Trevino also passes on the speculation—whether (1) his or (2) that of the tax advisors or his (3) takeaway from what the tax advisors said being unclear—that “financial advisors at Fidelity actively trading the account. As a result, for some of the securities, the taxes were probably already paid” (Trevino Ex. 29, emphasis added). A practice-area specialist could speak specifically to this, but, given the concern of Rich and Caroline about the tax burden effected by the MSA, they were asking the right questions and appear to have been voicing concern about taxes all along:

[Rich:] I thought we were going to avoid getting hit with taxes . . . It seems like we stepped on a landmine of taxes getting this [Fidelity] account.
(Trevino Ex. 29)

3. Nature of the representation

³¹https://www.wkpz.com/attorney/paul_d_strug

a. 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 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 (“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.³² 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.³³

Bennett 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

³²An overview of the disciplinary matter and the appellate issues appears in my amicus brief, attached to this report, filed May 4, 2015.

³³Order 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.

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 a disciplinary action against Bennett, resulting in his disbarment (which effectively became a two-year suspension after a new trial on punishment). 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, 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.

. . . .

. . . 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.

. . . 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.³⁴

b. 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

³⁴*Id.*, at 13, 14-15, 16.

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 followed many in-person communications, along with his review of the trust documents:

Q. Okay. Did you meet either Caroline or Rich in person before they signed the engagement agreements with your law firm?

A. Quite a bit, yes.

Q. About how many times?

A. I couldn't tell you, but the conversations went on for a period of months. There were lengthy conversations about every aspect of what we understood at the time, the case, the possibilities, the pitfalls, the types of financial arrangements to engage us. All of it. I think we started talking to them maybe three months before they ultimately signed any sort of a contract with us.

. . . Talking to them, getting their understanding of the facts and whether we had a solid basis to pursue a claim.(depo. 73-74)

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 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)

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 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 he did not want to assess Robin for himself at some earlier time.

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.

c. 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)

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.”³⁵ 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.”³⁶

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.

4. Disclosures for joint representation

The defendant lawyers 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:

³⁵See *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 566 (Tex. 2006).

³⁶*Augustson v. Linea Aerea Nacional-Chile S.A. (LAN-Chile)*, 76 F.3d 658, 664 (5th Cir. 1996).

. . . 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 properly 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 Matter³⁷

- (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; and
 - (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.

Comment

³⁷This 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.

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 has cited no oral disclosures he made to Rich and Caroline about a joint representation. And, as he made no notes, handwritten or digital (depo. 120), he had 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:

Q. So you have this initial conversation with Rich and -- about the same length of time as the one you had with Caroline?

A. I'm not sure.

Q. And did he tell you anything specifically other than what you had already kind of gathered from Caroline?

A. Well, his was a different perspective about Robin specifically and their relationship. It seemed to be very strained, specifically related to his children and his ex-wife. Kim, the ex-wife, was a focus of a lot of our conversations because he felt that she was manipulating the children, she was involved with Robin. And that was something that concerned him is that she was always messing things up for him. (Trevino depo. 44-45)

3. Rich never indicated any interest in being co-trustee with Robin, though Caroline did. (Trevino depo. 116-18)

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:

Robin was at all times trying to either intimidate or entice them into testifying unfavorably toward Richard and Caroline and favorably towards her. Kim, Rich's ex-wife, was at all times working to see that that happened. Hunter at some point, I think because of a religious experience of some kind, said you know what, I don't want to even fight about this stuff anymore. Let Robin handle it all. (depo. 216)

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 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.

5. Disclosures for arbitration provision in fee agreement

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.³⁸

³⁸See 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.

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.³⁹

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:

. . . 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).⁴⁰

Trevino testified 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.

Borunda testified as follows regarding his disclosures to Caroline about the arbitration provision, which did not appear in her hourly contract, which she had at the time:

Q. So I take it you never explained to her the implications of the arbitration provision that were contained in the new contingency fee agreement?

³⁹Professional Ethics Comm. Op. 586 (Oct. 2008).

⁴⁰See attached brief, pp. 58-59.

A. I do not recall discussing the arbitration provision with Caroline at that time.

Q. Okay. How about any time?

A. When we first were discussing with Rich and Caroline becoming -- representing them in this case, we walked them through the provisions of the contract, the contingency fee contract, including that.

...

Q. So were you walking Caroline through the provisions of an agreement that does not apply to her?

A. We were walking Caroline and Rich through the provisions of the agreements that were options for them.

...

Q So what specifically do you recall with regard to the advice you gave them concerning the arbitration provision?

A. Just explaining what it meant, what it is.

Q. I want to know specifically.

A. I don't recall specifically. (depo. 135-37)

In my opinion, as he cannot say what he said, Borunda cannot show compliance with the fiduciary duty of loyalty and communication to explain this provision to the clients.

Similarly, Abaza cannot say what was said to Caroline about the arbitration provision in her contract, only what the lawyers "would have" told her, particularly in a phone call when the lawyers were explaining the arbitration clause in Rich's contract, before one appeared in hers:

Q. My question was simply: Did you explain the arbitration provision in multiple meetings?

A. I'm saying that everything was covered more than once because I would have covered it, Jorge would have covered it, there was multiple meetings. I can't tell you specifics right now because it's been a long time ago. (depo. 23-26)

Thus, Abaza has no recollection of providing even orally the specific plusses and minuses of a client agreeing to arbitration, must less provide any notations he made at the time regarding these disclosures. In my opinion, then, he did not comply with his fiduciary duty to make those disclosures.

6. Description of recovery and settlement

Rule 1.04(d) requires (“shall”) 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 and, if there is a recovery, showing the remittance to the client and the method of its determination.” All three defendant lawyers allege in their petition in intervention in Collin County, filed May 10, 2022, that “Contestants have now fired Intervenor from representing them in the signing and execution of documents implementing the MSA’s terms.” From their perspective, at the least, the contingent fee matter was concluded, as to them.

However, when asked how he typically handles the requirement in Rule 1.04(d), Trevino said,

Once we receive a recovery, either that's proceeds in cash or maybe it's an asset, perhaps it's land, any combination of those items, if we receive it, it's been recovered for the client. We send out a settlement statement outlining what we recovered for them, what the fees are, what our expenses were, and we attach to that a list of expenses so they can see it. (depo. 16)

Trevino explains that, with a settlement statement,

you're accounting for what you've done throughout the case, certainly with the expenses and certainly pursuant to your contingent fee contract, if it's on a contingency. And you want to make sure the client knows everything that you've done, what the recovery was, how you're calculating your fee and what the expenses were. That way that client can look at things and ask you questions if they have questions about. If they approve it, then they sign the settlement statement. (depo. 16-17)

Trevino agrees that values of what assets Rich and Caroline would receive were written—by him—on a whiteboard in mediation. But, because he and his co-counsel were fired, they did not know those values, so as to generate a statement, until some time later. (depo, 17-19) Borunda prepared it, along with “our attorney.” While Trevino does not recall, when before the statement was sent, he looked at it, he did look at it later and approved its contents. (depo. 26) He then clarifies that the statement, dated Aug. 17, 2023, “outlines” the fee and expenses and their calculation. (depo. 27) He does not recall Kassab’s letter, dated Dec. 9, 2021, requesting Caroline’s file, as her lawyer (along with Crouch), and specifically asking for “an accounting and invoice reflecting the fee that you are claiming and how it is calculated along with all supporting documentation.” (depo. 257)

When asked if he was involved in preparing the statement, Borunda says he “believes” he was. (depo. 259)

In my opinion, the testimony of the defendant lawyers reflects a cavalier attitude about something very important to their clients. One might wonder how their clients could even pay them without having an invoice in hand or knowing what range of compensation the lawyers had in mind. The defendant lawyers are also seeking pre-judgment interest on a sum they never articulated until two years after they stopped working on the matter. Under Rule 1.04(d), no pre-judgment on any fee owed the lawyers that is not paid to the lawyers, exists at the time the client is provided with the required "written statement." Thus, even the fact that the defendants seek this signals their noncompliance with Rule 1.04(d). Accordingly, they are not entitled to recovery on a contingent fee basis.

7. Disclosures re transactions with a client

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).⁴¹ 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]⁴²

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

⁴²See 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.

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.⁴³

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

⁴³Committee on Disciplinary Rules and Referenda Proposed Rule Changes, Rule 1.08. Conflict of Interest: Prohibited Transactions, 86 Tex. B.J. 2003, 184-85.

these duties. Borunda testified that he mentioned to Caroline, prior to the time she actually switched to the contingent fee agreement, that she should see another lawyer and did so again once she did switch: “And by that time, having gone through it at the outset of the litigation and twice before, I didn't see any need to go through things again.” (depo. 134) There is no detail of any reasoning he provided to her or any written informed consent to the shift in fee agreements.

Trevino testified that he never told Caroline himself to go see another lawyer about the new agreement. (depo. 262)

Abaza testified that he reviewed a contingency fee contract with Caroline “numerous times” before she signed one, saying—in response to a question of whether she did consult another attorney before entering into it—“[s]he took a long time to get back to us . . . I don't remember specifically.” He does recall that she did not have an actual contingency fee contract in hand to take for another lawyer to review, just her brother's. (depo. 18-19) Many times he calls Caroline “sophisticated,” finally clarifying that “she's sophisticated as far as making deals, financial analysis, negotiating contracts. She's set up a business like VRBO. I mean, I can go on. But she's quite accomplished.” (depo. 116-17) If he means that Caroline is articulate, detailed, motivated, and bright, I would agree, having looked at her website and read her depositions.

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. But she is not a lawyer. In my experience, laypeople retain lawyers to assist with probating wills and other post-death instruments.

Abaza also reflects a misunderstanding of the language of Rule 1.08(a), saying that, with the new agreement, “[w]e were fair and reasonable with her based on the circumstances and what she wanted.” (depo. 157). He is assessing using a subjective standard, his own. Rule 1.08(a) requires an objective standard: the transaction must be “fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client.”

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.⁴⁴

In my opinion, an independent lawyer should have reviewed an actual version of the contract Caroline was later asked to sign, paying attention to the different lawyers/law firms engaged in the contingent fee arrangement than the hourly arrangement, and advised her of the implications of those and other provisions.

B. Fee Calculation

The fee calculation in a contingent fee matter necessarily depends on the recovery, usually a monetary sum. I lack the expertise of a practice-area specialist to say on what value any contingent fee should be calculated. However, what the lawyer deems to have recovered could be assessed by a judge as something that the client did not receive by virtue of the lawyer’s effort. Presumably ruling out the possibility of the lawyers seeking, via his representation, a contingent fee on the ownership interests he already had in the family partnerships, Rich has that exclusion in his contingent fee contract.

Similarly, Judge Tracy Christopher, in her findings and conclusions following the Piro and Lilly trial, determined that “[t]he contingent fee on the River Oaks house, the ranch and the art was not justified under the circumstances.”⁴⁵ Although The State Bar charged the lawyers in that case with violating Rule 1.08(a) by entering into the new agreement with their client, it can get to the same place with an application of Rule 1.04, finding an unconscionable fee. It did so in *McCleery v. Commission for Lawyer Discipline*, saying that the lawyer inappropriately based his fee on a \$50,000 recovery, resulting in an unconscionable fee.⁴⁶ Although fee forfeiture is not a remedy in the disciplinary arena, restitution comes pretty close to that.

Here, one or more of the defendant lawyers explained that they simply did not know the value of what they had recovered, which apparently explained the two-year delay in

⁴⁴*Comm’n for Lawyer Discipline v. Piro & Lilly*, 7, No. 2003-30856, 125th Dist. Ct., Harris County, Tex., May 30, 2003 [?], attached.

⁴⁵ *Piro v. Sarofim*, 2002 WL 538741, at *8 (Tex. App.--Houston [1st Dist.] 2002, no pet.); published at 80 S.W.3d 717 (Tex. App.--Houston [1st dist.] 2002, no pet.), without findings and conclusions.

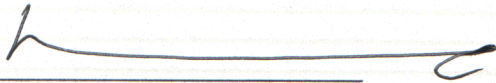
⁴⁶ *McCleery v. Comm’n for Lawyer Discipline*, 227 S.W.3d 99 (Tex. App.--Houston [1st Dist.] 2006,, pet. denied).

providing a statement, essentially in the form of a demand for payment. If they did not know that value, how they could have expected their clients to consent to receiving that value from the settlement at the time Caroline and Rich signed the MSA is utterly unclear. Trevino's equivocation about what the taxes would be via the MSA—that "financial advisors at Fidelity actively trading the account. As a result, for some of the securities, the taxes were probably already paid" (Trevino Ex. 29, emphasis added)—suggests that the lawyer did not know at the time what Caroline and Rich would net after taxes. The lawyers were unable to communicate something they did not know, meaning that Caroline and Rich had inadequate information to decide how to direct the handling of their case.

V. Conclusion

Based on the foregoing analysis, my opinion is that the defendant lawyers breached their fiduciary duties in multiple ways, with their testimony and documentation suggesting their unawareness or incomplete understanding of these duties. The proposed revisions to Rule 1.08(a) (attached) incorporate additional fiduciary law into the Rule. Tellingly, Abaza testified that Caroline's degree of sophistication did not eliminate any fiduciary obligations he owed to her. (depo. 157)

My opinion is based on what I have reviewed. A more careful review of the materials I have seen and/or a review of additional materials, could affect my opinion. Moreover, based on my analysis and Rules cited above, I understand I may be asked about my opinions on other but related questions.



Lillian B. Hardwick

attachments:

resume

Order from HBA FDC

LBH amicus filing in Bennett disciplinary matter

TDRPC report on arbitration clause to SCOT

TDRPC report on Rule 1.08 to SCOT

CDC petition against Piro & Lilly

proposed changes to Rule 1.08(a)