

American Arbitration Association
Case No. 01-22-0000-9524

Nicholas Abaza, et al.,

Claimants/Counter-Respondents

vs.

Richard Allison, Jr. and
Caroline Allison,

Respondents/Counter-Claimants

EXPERT REPORT OF
DANIEL D. TOSTRUD

December 20, 2023

Background

General experience. I am a lawyer licensed by the State Bar of Texas (1989). For 34 years, my practice has focused on professional liability matters, primarily representing lawyers and accountants. I have obtained summary judgments or dismissals on the merits for my professional clients on more than 65 occasions and has successfully tried more than 20 professional liability cases to verdict. For my entire career, at least fifty percent of my time has been devoted to legal malpractice cases, fee disputes, ethical issues, and grievance defense.

Professional accolades. I am fortunate to have been the recipient of various honors and awards during my career. Among other professional honors and awards, I have been named "Lawyer of the Year 2022 and 2024 – Professional Malpractice Law - Defendants " by BL Rankings, Named to the list of "The Best Lawyers in America" by BL Rankings in Professional Malpractice Law-Defendants, 2020-2024, named to the list of "Best Lawyers in Dallas" by D Magazine, 2012-2017; 2019-2023, and named to the list of Texas Super Lawyers by Thomson Reuters, 2004-2023.

Education. I obtained my undergraduate degree from the University of Mary Hardin-Baylor (1986) and my law degree from Baylor University School of Law (1989). I have worked at Cowles & Thompson (1989-1999), Hermes Sargent Bates (2000-2011), and Cobb Martinez Woodward (2011-present).

Prior service as an expert witness. While I have been retained as an expert on five other occasions, I have not previously issued an expert report or testified as an expert by deposition or at trial.

Resume. A copy of my most current resume is attached as Exhibit A.

Compensation. I am billing my time on this matter at \$400 per hour. To date, I have spent approximately 90 hours on this matter.

Scope of Assignment

I have been retained as an independent expert witness by Joseph R. Little of The Little Law Firm, P.C. on behalf of Nicholas Abaza, Jorge Borunda, and Richard Trevino (and their firms) (collectively, the "Lawyers") in connection with AAA Arbitration No. 01-22-0002-9524.

I was asked to review the Contingent Fee Contracts of Representation between Richard Allison and Nicholas Abaza and Jorge Borunda (the "Richard Contingency Fee Agreement"), and between Caroline Allison and Nicholas Abaza, Jorge Trevino and Michael Trevino (the "Caroline Contingency Fee Agreement") (collectively, the "Contingency Fee Agreements"), the facts and circumstances surrounding the engagement that resulted in the Contingency Fee Agreements, and the lawyers' representation of Richard and Caroline in the underlying litigation. I was asked to

assess whether the Contingency Fee Agreements and the process of entering into them were fair and reasonable; whether the proposed fees sought by the Lawyers under the Contingency Fee Agreements were fair and reasonable; whether the Contingency Fee Agreements and the proposed fees were unconscionable; and whether the Lawyers breached their fiduciary duty owed to the clients.

I have also been asked to review the experts reports of Lillian Hardwick regarding the conduct of the Lawyers and the claimed breaches of fiduciary duty and causation and damages issues, including claimed fee forfeiture, and provide a rebuttal report. As Ms. Hardwick's final report on the counterclaims is not expected to be served until December 20, 2023, my rebuttal expert opinions will be provided by the January 17, 2024 rebuttal report deadline.

Overview of Key Facts and Opinions

In accordance with my standard practice, I initially reviewed the pleadings on file in this arbitration. I then reviewed key documents and the depositions of the principal players. A complete list of all materials I reviewed is submitted as Exhibit B.

Key Facts Related To Opinions

I do not try to recite all of the facts related to this dispute. Set out below is a brief summary of some of the key facts as I understand them.

Original engagement by Richard Allison and Caroline Allison. Richard Allison retained Messrs. Borunda and Abaza on a contingency fee basis on June 13, 2019. A number of interlineations to the agreement were made by Richard and he signed the Agreement with his interlineations. Later, the agreement was re-typed incorporating his interlineations, and he signed it again. An electronic signature by Mr. Abaza is affixed to the Agreement. From the evidence I have reviewed, there was a clear meeting of the minds between Richard and the Lawyers that the Lawyers would represent him in connection with investigation and planned probate litigation, and Richard would compensate the Lawyers by paying 35% of all money and/or property recovered. The Richard Contingency Fee Agreement was between Richard and Mr. Abaza, but it expressly stated that Mr. Borunda was an associated attorney under the agreement and the contingency fee would be shared 60/40 between Mr. Borunda and Mr. Abaza. Throughout the representation, Richard never complained about the representation and fee sharing between Mr. Abaza and Mr. Borunda. Further, in the fall of 2020, Mr. Trevino joined Richard's litigation team and actively took on a large role in the representation. Clearly, Richard was aware and there is no evidence of any objection by Richard to Mr. Trevino joining the representation team.

The Richard Contingency Fee Agreement was signed several months after the initial discussions between Richard and Messrs. Abaza and Borunda. During that several month pre-representation, there were numerous discussions and meetings between Richard, Caroline, and Messrs. Abaza and Borunda regarding the underlying facts, analysis of issues, and potential terms of representation. Richard chose to retain the Lawyers on a 35% contingency fee basis. It is clear that he read and understood the agreement as he made numerous interlineations throughout the agreement, including circling the 35% contingency fee percentage right above the fee sharing clause. In my opinion, there was nothing procedurally or substantively unconscionable about the process or the Contingency Fee Agreement, and there was a meeting of the minds and an understanding between Richard and the Lawyers on the terms of the agreement.

At around the same time that Richard retained Messrs. Borunda and Abaza, Caroline also retained Messrs. Borunda and Abaza. The primary difference in Caroline's original engagement was that she retained Messrs. Borunda and Abaza on an hourly fee basis. That retention was also after several months of meetings and discussions, and was signed on May 29, 2019. Subsequently, after receiving and struggling to pay the hourly fee charges for about ten months, Caroline reached out to Messrs. Borunda and Abaza requesting that she be allowed to change from the hourly fee arrangement to a contingency fee arrangement, like her brother. At first, in March 2020, Messrs. Borunda and Abaza encouraged her to stay with hourly billing and agreed to work with her on past due amounts. However, Caroline continued to make repeated requests to change from the hourly arrangement to a contingency fee arrangement. Again, the Lawyers made concessions regarding her overdue bills and encouraged her to continue with the hourly fee arrangement. The Lawyers were sensitive to the fact that the case was going to mediation in July, and there was some chance it might settle at that time. Unfortunately, the first mediation failed miserably. After a third series of requests by Caroline in October 2020 to change to a contingency fee, and after Caroline appeared to be getting even more adamant in her request, Messrs. Borunda and Abaza agreed to accommodate Caroline's request and presented her with a Contingency Fee Agreement.

Similar to the process with Richard's Contingency Fee Agreement, there was nothing improper about the process, as the Lawyers presented and provided Caroline a full and fair opportunity to review the Agreement, take it to an outside counsel to review (if she chose to do so), and negotiate any provisions she deemed appropriate, which she did. Caroline was a sophisticated client who had previously hired lawyers on a contingency fee basis, and she made the thoughtful decision to do so again. She was given plenty of time to review and consider the proposed agreement, and she had been told that she could take it to outside counsel to review.

Just like with Richard's Contingency Fee Agreement, there was nothing procedurally or substantively unconscionable about the terms of the contingency fee agreement. Caroline's Contingency Fee Agreement provided a 35% contingency fee of all money and/or property received, to be divided between Messrs. Borunda, Abaza,

and Trevino, with a credit for attorney's fees she had already paid. From the evidence reviewed, in my opinion there was a meeting of the minds and an understanding between Caroline and the Lawyers on terms of the contingency fee agreement.

Both the Richard and Caroline Contingency Fee Agreements provide that if the Lawyers are successful in recovering money and/or property for the Clients, they shall receive 35% of the money and/or property recovered. The obligation to pay was clear and reasonably understood by the Clients.

As is typical in complex cases like this one, there was a real possibility that the Lawyers would work for years on the case, possibly through a lengthy trial, and recover nothing for the Clients. In that scenario, the Lawyers would recover zero. At the time Richard signed his contingency fee agreement, the case was at its inception. At the time Caroline signed her contingency fee agreement, a relatively recent mediation had been a complete failure, and there were numerous problems with the case.

Fortunately for the Clients, through significant efforts by the Lawyers during the lengthy litigation, the case was settled at a second mediation in April 2022. The Clients considered and decided to accept the final settlement proposal at the mediation, and signed the Mediation Settlement Agreement confirming their agreement to the terms.

By virtue of the settlement, the Clients received and gained access to over \$9.9 Million dollars. Prior to the settlement, and even prior to the retention of the Lawyers, Richard and Caroline's step-mother, Robin, had sole access, sole control, and sole discretion over all of the Estate funds. Because of the settlement, Richard and Caroline obtained access, control, and discretion to over \$9.9 Million of the Estate funds. Based on the written signed Contingency Fee Agreements, Richard and Caroline each owed 35% of the amounts recovered to the Lawyers who had worked so hard to help them obtain that recovery, and to whom they had contractually agreed to pay that 35%.

While Richard's Agreement does not identify Michael Trevino as part of his legal team, the course of conduct and course of dealing during the representation, in my opinion, demonstrates that Richard knew that Mr. Trevino was acting as his lawyer, and expected to be compensated. The consequences to Mr. Trevino of Mr. Trevino not being listed on the written Agreement with Richard is not clear as there appears to be a split among Texas appellate courts on this issue. However, what is clear is that Richard is required to pay the full 35% contingency fee (less appropriate deductions) to Messrs. Borunda and Abaza. Then it would be up to Mr. Trevino to address his fee requests directly with Messrs. Borunda and Abaza. In any event, the issue of Mr. Trevino not being identified in Richard's Contingency Fee Agreement should in no way impact Richard's obligation to pay his full 35% fee.

Following the settlement, Richard and Caroline began a series of efforts to attempt to avoid payment of their contractually agreed 35% contingency fees. These efforts included pretending not to have received or obtained control of the more than \$9.9 Million from the settlement. As a result of the Clients' refusal to pay, the Lawyers were forced to initiate this arbitration in order to get paid. As part of this arbitration, the Lawyers have presented a Settlement Statement dated August 17, 2023 that, in my opinion, complies with the applicable standards and rules. While a settlement statement is typically provided shortly after the settlement, in situations where the client is refusing to pay any contingency fee, it is not uncommon or inappropriate for the settlement statement to be submitted as part of the subsequent proceeding. Further, it is appropriate for lawyers to be thoughtful in calculating the settlement statement, including considering and applying appropriate credits, as was done here. In my opinion, the August 17, 2023 Settlement Statement provided is reasonable and appropriate in all respects, and accurately sets forth the specific fees owed.

Opinions

1. The Contingency Fee Agreements Comport with Standard Practice and Are Fair and Reasonable Under the Circumstances.

Summary of Opinion. I am of the opinion that the Richard and Caroline Contingency Fee Agreements are consistent with standard practice for such agreements and are reasonable and fair contingency fee agreements considering all relevant facts and circumstances. Accordingly, it is my opinion that the Richard and Caroline Contingency Fee Agreements are valid and enforceable agreements.

Background on Contingency Fees and Their Benefit to the Clients. Contingency fee arrangements serve a valuable role in society because they allow Clients to retain lawyers when they might otherwise not be able to afford to do so. Even Clients with sufficient resources to pay for counsel often elect to engage lawyers on a contingency fee basis because they do not wish to incur legal fees in a case on which they might not ultimately prevail.

In either case, the lawyer takes on significant risk because he or she is required to provide legal representation with no guarantee of any payment whatsoever. Agreeing to a contingency fee arrangement “offers ‘the potential of a greater fee than might be earned under an hourly billing method’ in order to compensate the attorney for the risk that he or she will receive ‘no fee whatsoever if the case is lost.’” *Hoover Slovacek, LLP v. Walton*, 206 S.W. 3d 557, 561 (Tex. 2006) (citing *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W. 2d 812, 818 (Tex. 1997)).

The overall benefit to Richard and Caroline of the contingency fee nature of the Contingency Fee Agreements. The record indicates that Richard lacked the financial resources to retain the Lawyers on an hourly basis for the type of intense litigation this matter was expected to be, and that Caroline had continual difficulty paying the hourly fees and she repeatedly requested over a period of 7-8

months that she be allowed to change to a contingency fee, which the Lawyers ultimately agreed to do after Caroline persisted with her request for a third time. While Richard and Caroline lacked the funds to hire (or in Caroline's case to continue to pay) lawyers on an hourly basis, they also needed first rate lawyers.

This use of a contingency fee agreement¹ therefore benefitted Richard and Caroline greatly. They not only obtained the resources of well regarded and experienced lawyers, but they would not owe or incur any fees if they did not prevail. Further, 35% was a fair and favorable percentage for the Clients to pay for this type of intense probate litigation.

Specific Contingency Fee Requirements. While general principles of contract apply to contracts between lawyers and Clients, there are also ethical considerations overlaying the contractual relationship. The Texas Supreme Court set forth some factors for determining the reasonableness of a fee in *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W. 2d 812 (Texas Sup. Ct. 1997) and those guidelines later became part of Tex. R. Disc. Prof'l Cond. 1.04.

While not setting the standard of care for attorney conduct, these factors provide persuasive authority on evaluating contingency fee agreements outside of the disciplinary context. Rule 1.04(d) sets forth the following:

(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.

Analysis of the Fee Agreement under the Anderson Factors/Rule 1.04(d). It is my opinion that the Contingency Fee Agreements are well within the range of typical and customary contingent fee arrangements.

First, the Contingency Fee Agreements satisfy all of the requirements of Rule 1.04(d). They are in writing; clearly set out the method by which the fee is to be

¹ The Texas Supreme Court has noted that contingency fees also serve to reduce frivolous litigation and encourage lawyers to be efficient and seek the best possible result for their clients.

determined; and state how costs and expenses are to be handled.

Second, as noted below, the Contingency Fee Agreements came about through a fair and transparent process. Richard originally retained Messrs. Borunda and Abaza on a contingency fee basis after a several month process in discussing the underlying facts, issues, and potential fee arrangement. Richard also carefully reviewed and revised the agreement, as his interlineations in the agreement show. Caroline had originally retained Messrs. Borunda and Abaza on an hourly basis. Later, she initiated the discussion about changing to a contingency fee arrangement, and a 7-8 month lengthy process ensued with the Lawyers encouraging her to stay with the hourly agreement by working with her to make accommodations on payment terms and addressing the unpaid balance. However, Caroline persisted, as she had a right to do, and by the third separate time the Lawyers were approached with this request, the Lawyers agreed and presented her with a Contingency Fee Agreement for review and consideration.

Further, Caroline has specific experience in previously hiring lawyers on a contingency fee basis, and thus had an understanding and awareness as to how contingency fee agreements worked. In addition, she was aware from her brother's previous retention of the Lawyers on a contingency fee basis. Caroline was also advised to seek outside counsel to review the potential change from an hourly fee to a contingency fee agreement, and she made revisions to the draft agreement.

To be sure, there are circumstances where it is not appropriate for fee agreement to be changed during an existing attorney/client relationship. However, those circumstances almost always involve over-reaching by lawyers to obtain an unfair advantage to the detriment of the client. That is in no way the situation here. In fact, this change was initiated by Caroline and it was initially rejected by the Lawyers, who did not accept it the first two times that she requested the change. This was a client driven change and the client viewed the change as advantageous to her and in her best interest. In fact, at the time it was entered into, it was objectively in the best interest of the client, who could not and did not want to keep up with the hourly fees, and it was far from certain that any recovery would be obtained. It is understandable that the Lawyers were reluctant to accept the requested change, especially until after the first mediation took place, but they did so because of the client's repeated requests and it was the arrangement they had with her brother.

Caroline's attitude about her change to a contingency fee agreement was only altered after the case surprisingly settled sooner and for a larger amount than anticipated, and the fees owed were greater than they would have been had she kept the hourly fee arrangement. This appears to be Buyer's Remorse, and it not fair to the Lawyers who honored their client's third request for the contractual change, and who without question faced a serious risk of recovering no further compensation at all.

Third, none of the terms of the Contingency Fee Agreements are unorthodox, improper, or unfair. While the Clients are making an argument that the clause stating that “clients will not make a settlement or offer of settlement without the approval of attorneys,” that is a red herring. There was never an issue during the representation where this clause was ever raised by either the Lawyers or the Clients. This is also a clause that is included in a large percentage of contingency fee agreements in Texas, as it attempts to protect lawyers for clients going rogue. More importantly, if that clause is determined to be impermissible, then it can simply be severed from the rest of the contract, with the contract remaining enforceable. *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 565 (Tex. – 2006); *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. – 1978); *Casa Ford, Inc. v. Warner*, 656 S.W.3d 816, 822 (Tex. App. – El Paso, 2022). (While a severance clause evidences the parties’ intent for a contract to survive invalid provisions, courts have relied on their inherent power to sever non-essential unconscionable contract provisions.)

Further, the 35% fee percentage is well within the standard percentage ranges charged by lawyers of similar skill and ability and for similar cases.

2. The Lawyers Earned Their Contingency Fee under the Terms of the Fee Agreement.

Summary of Opinion. Having determined that the Contingency Fee Agreements themselves are reasonable and valid, I next determined whether the Lawyers earned a fee under the terms of that agreement. I am of the opinion that the Lawyers earned a contingency fee under the Contingency Fee Agreements because the Lawyers were successful in recovering more than \$9.9 Million in money and/or property for Richard and Caroline. As referenced earlier, prior to the settlement, the Clients had no access, control, or discretion over the Estate funds, but as a result of the settlement, they obtained access, control and discretion of more than \$9.9 Million of Estate funds.

Thus, in summary, the Lawyers are owed a fee under the Contingency Fee Agreements of 35% of the more than \$9.9 Million recovered, less the offsets set forth in August 17, 2023 Settlement Statement.

3. The Contingency Fee Is Fair and Reasonable and Is Not Unconscionable.

Summary of Opinion. Having formed an opinion that the Lawyers are entitled to a contingency fee under the Caroline and Richard Contingency Fee Agreements, I then reviewed whether the fee sought was fair and reasonable. Based on my review, I am of the opinion that the fee sought is fair and reasonable and is certainly not unconscionable.

Standards for Assessing Contingency Fee Agreements. Like all fees charged by lawyers, contingency fees generally must comport with the *Arthur Anderson* factors which have been ratified into Tex. R. Disc. Prof'l. Cond. 1.04(b). Rule

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

Arthur Anderson (and Rule 1.04(b)) sets out a series of non-exclusive factors to consider in determining whether a particular fee is reasonable. Those factors include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Assessing Unconscionability. “Whether a particular fee amount or contingency percentage charged by the attorney is unconscionable under all relevant circumstances of the representation is an issue for the fact-finder.” *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 562 (Tex. 2006). On the other hand, whether a contract, including a fee agreement between attorney and client, is contrary to public policy and unconscionable at the time it is formed is a question of law. *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136 (Tex.App.—Waco 2005, pet. denied) (“The ultimate question of unconscionability of a contract is one of law, to be decided by the court.”). As questions of law are reserved for the court’s determination, I do not attempt to make such determinations in this Report, but instead offer my opinion on certain professional matters to aid the court in making that assessment.

The Contingency Fee provided for in the Contingency Fee Agreements is Not Unconscionable. First, the Contingency Fee Agreements, in and of themselves at the time of formation, were not unconscionable or against public policy. To the contrary, they are fairly standard and typical contingency fee agreements that provide significant benefit to the clients. This includes a lower than standard business contingency fee percentage of 35%.

Second, the Contingency Fee Agreements contain none of the hallmarks that courts have found to constitute unconscionable provisions. For example, the agreements ensure that the client recovers a larger share of any recovery than the lawyers (because the total fee is a less-than-fifty percent share of anything of value).

Third, the amounts to be charged are fundamentally fair. The percentage is fair and within the standard range of percentages used by lawyers in similar business cases. The clients owed no fees unless they obtained money or something of value. Further, the clients would never owe a fee greater than the value they obtained. Thus, the contracted fee is fundamentally fair and not unconscionable.

Fourth, the Contingency Fee Agreements set forth in bold and underline type the manner and order for applying the contingency fee and then the costs and expenses.

Fifth, the arbitration clause within the agreements is conspicuous, with a bold heading, and it clearly spells out how the arbitration process will work. The Texas Supreme Court has expressly stated that there is no requirement that attorneys explain to prospective clients, either orally or in writing, arbitration provisions in attorney-client employment agreements. *Royston Razor v. Lopez*, 467 S.W.3d 494, 504 (Tex. 2015). As discussed earlier, both Richard and Caroline carefully reviewed the Contingency Fee Agreements before signing them, as reflected in the revisions that each made. Having signed the Contingency Fee Agreements with this conspicuous arbitration clause, they are deemed to know and understand its terms, and are bound by it.

Sixth, there is a Consent and Association clause that spells out the specific outside attorneys working on the case at the time the agreements were signed, and how the 35% contingency fee will be divided among them. There is nothing misleading or unclear about this clause. The fact that the agreements are only signed by Nick Abaza, on the Lawyers' side, does not impact the clear and easily understood terms that any attorney's fees recovered would be divided as set forth in the fee sharing provision in each contract. Further, under Texas law, there is no question about the enforceability of an electronic signature, such as the one affixed by Mr. Abaza. See *Rush Truck Centers of Texas v. Mendoza*, 676 W.W.3d 821, 829 (Tex. App. – El Paso, 2023); *Aerotek, Inc. v. Boyd*, 624 S.W.3d 199, fn 36, (Tex. – 2021).

We have previously discussed that the issue of including the provision that the “clients will not make a settlement or offer of settlement without approval of attorneys” is a red herring issue as that frequently used clause can simply be severed and the rest of the Contingency Fee Agreements enforced. Further, the cases cited by the Clients' counsel to attempt to justify the draconian result of voiding the entire contract are easily distinguishable and not even close to being on point with these facts.

Finally, the argument that the Contingency Fee Agreements are somehow unenforceable because the contracting parties on the Lawyers' side are not identical to the signatures and the fee sharing provision is also a red herring. Under general contract principles, what is important is whether there was a meeting of the minds on the essential terms. Under both agreements, and under the course of conduct and course of dealing, it was clear and understood that Messrs. Abaza, Borunda, and Trevino were representing Richard and Caroline, and were expecting to be paid. At the very least, under the Contingency Fee Agreements, both Richard and Caroline will need to pay their entire 35% contingency fee to Mr. Abaza (who signed the agreements and was identified as a party), and then Mr. Abaza would distribute to Messrs. Mr. Borunda and Trevino as appropriate. This argument by Richard and Caroline's counsel should in no way result in Richard and Caroline not paying the entire 35% contingency fee, less applicable credits.

The Fees Sought Are Fair and Reasonable. Having concluded that the Contingency Fee Agreements themselves are not unconscionable, I then examined the specific fees sought in this case. To do this, I used the August 17, 2023 Settlement Statement provided by the Lawyers as part of this arbitration. I find the resulting fees, (\$1,416,915.68 estimated fees and expenses owed by Richard, and \$1,352,149.80 estimated fees and expenses owed by Caroline), which included appropriate offsets, to be fair, reasonable, and not unconscionable.

4. The Fees Calculated by the Lawyers are Fair and Reasonable in accordance with the Factors Set Out in *Arthur Anderson* and Rule 1.04(b).

Summary of Opinion. Not only is the contingency fee specified in the Fee Agreement not unconscionable, but the actual fees sought in this case are not unreasonable when analyzed under the factors set out in *Arthur Anderson* and Tex. Disc. R. Prof'l. Cond. 1.04(b). In my opinion, a review of the foregoing factors supports a finding that the requested fees are reasonable.

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

Analysis. This matter presented novel and difficult questions. This case also involved complex will contest proceedings involving multiple estate planning documents and changes that had been made by the testator over different periods of time. At the time the Lawyers were retained, Richard and Caroline had no access, no control, and no discretion to any of the Estate funds, which were all controlled by their step-mother, Robin. Richard and Caroline faced a true risk of receiving none or very little of those funds, and they were powerless, except through the court process with capable legal counsel.

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

Analysis. From the evidence reviewed, it appears that the Lawyers had busy practices. Taking on a significant matter such as this one would necessarily preclude the Lawyers from working on or accepting additional cases, at least at certain very busy times during the representation.

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

The Contingency Fee Agreements are in line with the custom and practice of similar contingency fee agreements entered into in Collin County and the State of Texas. Further, the format and terms within the Contingency Fee Agreements were typical of those expected and utilized in most contingency fee agreements. The 35% contingency fee was a reasonable of contingency fee percentage for these types of matters.

(4) the amount involved and the results obtained;

Analysis. This was a very significant matter in terms of the amounts involved. It was also of special significance to the Clients as it related to potential recovery out of their father's Estate, to which they had no access, control, or discretion at the time they retained the Lawyers. Moreover, the results achieved were significant as the settlement provided the clients access, control, and discretion over more \$9.9 Million Estate funds, which provided them significant financial security. Accordingly, the results obtained weigh heavily in favor of finding that the fees sought are reasonable.

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

Analysis. The time limitations were set by the Court. The Clients chose to settle this at a second mediation, which provided a significant recovery, and allowed them access, control, and discretion over significant funds at an earlier time frame than if the case had gone to trial, and without the risk of losing at trial and not improving their dire position.

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

Analysis. This was the first representation between the Clients and the Lawyers, so this factor is neutral.

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

Analysis. The Lawyers were sophisticated and experienced in probate litigation, and that shows in the way they handled the case from the beginning until the settlement.

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

Analysis. This matter was a pure contingency fee case. Unless the Lawyers obtained something of value for the Clients, they would not earn any fee.

5. The Lawyers Have Not Breached Any Fiduciary Duty to the Clients.

Summary of Opinion. Having reviewed the issues related to the Contingency Fee Agreements and the other ethical issues alleged based on the totality of the circumstances, including the issue of unconscionability, I am of the opinion that the Lawyers (i) did not breach any fiduciary duty to the Clients; and (ii) even the claimed issues raised by the Clients do not support causation, damages, or fee forfeiture.

The Lawyers did not breach their fiduciary duty to the Clients. Based on my review of the work performed and the totality of the circumstances, I do not see evidence sufficient to justify any claim that the Lawyers breached any fiduciary duty to the Clients. Based on the testimony and evidence submitted, I am of the opinion that the Clients were aware of the nature, term and application of the Contingency Fee Agreements, that there was a meeting of the minds as to the terms of the Contingency Fee Agreements, that the Lawyers performed valuable services that resulted in a substantial recovery for the Clients of over \$9.9 Million dollars, and that the Clients are required to pay the 35% contingency fees, less appropriate offsets, as set forth in the August 17, 2023 Settlement Statement issued by the Lawyers.

The Clients have incurred no harm. Even if there was some legitimacy to the minor complaints about the Lawyers' conduct, and acknowledging that some of the language in the Contingency Fee Agreements is less than perfect, there was no injury or harm to the Clients. The settlement was for a significant recovery by the Clients, the Clients agreed to the settlement and signed the Mediation Settlement Agreement confirming those terms, and the Clients have had full access and use of the more than \$9.9 Million of Estate funds recovered.

Nor have the Clients paid any improper or unfair fee. In fact, they have not paid any contingency fee at all for the work that led to the settlement and \$9.9 Million recovery. But they have reaped the benefits of the settlement, and have continued to hold onto funds that they rightly should pay to their lawyers under the Contingency Fee Agreements.

Minor complaints by the Clients. I have reviewed the testimony of the parties and lawyers, and the arguments of counsel, with respect to the circumstance leading to the signing of the Contingency Fee Agreements and the terms of the Contingency Fee Agreements. The complaints appear to be minor or technical issues that the Clients have raised solely as an attempt to avoid paying the contingency fees.

Based on my review of the totality of the circumstances, I can discern no impact or disadvantage to the Clients based on any of the ethical issues raised. At the outset, as I noted above, I am of the opinion that no breach of fiduciary duty was committed by the Lawyers. That said, I am also of the opinion that no aspect of the ultimate settlement reached by the parties was adversely affected by any *claimed* ethical misconduct, or any of the claimed imperfect wording in the Contingency Fee Agreements. This means that even if the Clients are correct and the Lawyers were not technically perfect in all of their conduct and documents, that supposed ethical misconduct and imperfect wording did not adversely affect the Clients in any meaningful way.

One point of clarification needs to be made with respect to the clients' allegations regarding alleged disciplinary rule violations, as they are being asserted in a way that contravenes Texas law. The preamble to the Texas Disciplinary Rules of Professional Conduct states:

“Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached.” ¶15 (emphasis added) . . . “The fact that a rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule.” *Id.* “Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.” *Id.*; *see also Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 158 n. 2 (Tx. 2004). (“[W]e note that the Rule do not define standards of civil liability for lawyers for professional conduct.”)

6. The Clients Have Not Complied with the Contingency Fee Agreements and Equitable Estoppel Applies.

The Clients have failed and refused to pay the 35% contingency fees owed to the Lawyers under the terms of the Contingency Fee Agreements. The failure to do so is a breach of contract by the Clients.

It is further my opinion that, in addition to breach of contract, under the principles of equitable estoppel, the Clients owe the 35% contingency fees to the Lawyers. See *Enochs v. Brown*, 872 S.W.2d 312, 319 (Tex. App. – Austin 1994). The Lawyers have fully performed, the Clients have accepted the benefits, and all that is

required is for the Clients to pay the contingency fees. It is my opinion that the specific amount of the contingency fees to be paid by the Clients are those amounts set forth in the August 17, 2023 Settlement Statement.

Dated: December 20, 2023

By: /s/ Daniel D. Tostrud

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EXHIBIT A

Daniel Tostrud

Dan Tostrud devotes his practice to assisting lawyers, accountants, and other professionals in resolving complex legal issues. He offers more than 30 years of experience in defending malpractice claims, resolving fee disputes, and guiding his clients through administrative proceedings.

Dan's broad experience enables him to quickly assess the subject matter and legal issues facing his clients. A formidable adversary in the courtroom, he also knows the value of cooperatively working with opposing counsel to gain a beneficial settlement for his client. He regularly speaks at conferences and on webinars, both locally and nationally, before lawyers and accountants on the topics of risk management, ethical issues, and strategies in defending malpractice claims.

Practice Areas

Legal Malpractice Defense
Attorney Grievance Defense
Accountant Malpractice Defense
Professional Licensure Defense
Ethics and Professional Responsibility Law

Education

Baylor University School of Law, Waco, Texas
J.D., 1989
University of Mary Hardin-Baylor
B.B.A., cum laude, 1986

Admissions

Texas, 1989
U.S. Court of Appeals for the Fifth Circuit
U.S. District Courts for the Eastern, Northern, Southern and Western Districts of Texas

Experience

Dan has obtained summary judgments or dismissals on the merits for his professional clients on more than 65 occasions and has successfully tried more than 20 professional liability cases to verdict.

This work includes serving as:

- Lead trial counsel for a national trial firm in a five-day arbitration. Successfully defeated all malpractice and breach of fiduciary duty claims based on lack of proximate causation. The claims related to the client law firm's representation of a private equity fund and two managers in a dispute with a third manager, and the private equity fund's subsequent inability to raise a second fund.

- Lead trial counsel for a national law firm in a two-day arbitration in a dispute between the client law firm and two former partners regarding rights to unpaid client receivables and certain payment obligations. Successfully defeated all claims brought by the former partners, obtained a declaratory judgment in favor of law firm client on all issues presented, and law firm client was awarded all of the requested actual damages, plus recovery of attorney's fees.
- Co-lead trial counsel for a large Texas law firm in a two-day arbitration proceeding related to an underlying divorce proceeding. Successfully defeated all malpractice and breach of fiduciary duty claims in which the underlying client-claimant argued that an alleged drafting error in an agreement incident to the divorce was financially unfavorable to him.
- Lead trial counsel for a small Austin law firm in a six-day arbitration. Defeated malpractice and breach of fiduciary duty claims related to alleged mishandling of a complex probate matter and obtained and collected the client's unpaid contingency fee in full, plus attorney's fees.
- Lead trial counsel for a small Dallas law firm in a five-day jury trial related to alleged misconduct in defending a suit over a guaranty, and obtained and collected a judgment for the law firm client for all unpaid legal fees at issue.
- Lead trial counsel for mid-size Dallas law firm in six-day jury trial. Defeated malpractice claims related to alleged overbilling and other ethical issues and obtained and collected a judgment of more than \$600,000 for unpaid legal fees.
- Lead trial counsel for a small Dallas law firm in a three-day jury trial and successfully reduced damages to \$23,000 when a previous jury had awarded more than ten times that amount.
- Lead trial counsel for a national trial firm in a six-day arbitration, defeating malpractice claims related to alleged mishandling of employment litigation, and obtained and collected a judgment of more than \$1 million for unpaid legal fees.
- Lead trial counsel for a large Texas law firm in five-day arbitration. Defeated malpractice claims related to the handling of a prenuptial agreement and divorce action and obtained a judgment on counterclaim for unpaid attorney's fees.
- Co-lead trial counsel for a small Colorado law firm in a ten-day jury trial, defeating malpractice claims related to an alleged unauthorized settlement.
- Co-lead trial counsel for a Dallas lawyer in a state district court proceeding brought by the State Bar seeking suspension or revocation of the client's law license on barratry-related allegations. Obtained a finding for the attorney on all claims.
- Lead trial counsel for managers of a venture capital fund in an arbitration regarding claims of alleged mismanagement. Defeated all claims and obtained recovery of all arbitration costs and attorney's fees.
- Lead counsel for a large Fort Worth law firm in obtaining a complete summary judgment, based on attorney immunity defense, in state court.

Honors and Awards

- Named "Lawyer of the Year 2022, 2024 – Professional Malpractice Law - Defendants " by BL Rankings
- Named to the list of "The Best Lawyers in America" by BL Rankings in Professional Malpractice Law-Defendants, 2020-2024
- Named to the list of "Best Lawyers in Dallas" by D Magazine, 2012-2017; 2019-2023
- Named to the list of Texas Super Lawyers by Thomson Reuters, 2004-2023
- University of Mary Hardin-Baylor, Outstanding Alumnus Award, 1998
- Am-Jur Award for Insurance Law, 1989

Professional Associations and Memberships

- State Bar of Texas, Litigation Section
- Dallas Bar Association, Tort and Insurance Practices Section and Business Litigation Section
- University of Mary Hardin-Baylor, Board of Trustees

Speaking Engagements and Presentations

- ABA Fall 2023 National Legal Malpractice Conference in Chicago, IL (Panel Member) "Holding Your Nerve: How to Stand by Your Evaluation as Trial Nears"
- Dallas CPA Society, Convergence 2019 (Co-Presenter), "Professional Standards and Rules Frequently Arising in Accounting Malpractice Claims"
- Guest Lecturer at SMU Dedman School of Law, "Ethical Issues in Externships: Confidentiality and Conflicts of Interest"
- Lawyer Risk Management Seminar in Dallas, Texas (Co-Presenter), "Shifting Landscapes & Adapting Your Firm to Emerging Threats"
- Webinar to IP Lawyers (Co-Presenter), "Embracing Change, Moving Forward – Ethics and Risk Management Insights for IP Lawyers"
- Lawyer Risk Management Seminar in Dallas, Texas (Co-Presenter), "Ahead of the Curve – Risk Management for Lawyers"
- Texas Bar CLE Advanced Civil Trial Course in San Antonio, Texas (Presenter), "Legal Malpractice Update"
- Lawyers Risk Management Seminar in Dallas, Texas (Co-Presenter), "The Adaptive Lawyer: Staying Practical in Today's Complex Legal Environment"
- Webinar to IP Lawyers (Co-Presenter), "Following Alice Down the Rabbit Hole: A New Perspective on Risk Trends in the Intellectual Property Law Practice"
- Lawyers Risk Management Seminar in Dallas, Texas (Co-Presenter), "The Competitive Edge: Law Practice Risk Management/ Conflicts of Interest"
- Author, "Payability" as the Logical Corollary to "Collectibility" in Legal Malpractice St. Mary's Journal on Legal Malpractice & Ethics, Vol. 4, No. 1, 2014, pp 408-439

- State Bar of Texas 12th Annual Choice & Acquisition of Entities in Texas Course (Co-Presenter), "Procedures and Potential Pitfalls in Acquisitions of Accounting Firms"
- St. Mary's Symposium on Legal Malpractice and Professional Responsibility (Presenter), "Payability" as the Logical Corollary to "Collectibility" in Legal Malpractice
- Lawyers Risk Management Seminar in Dallas, Texas (Co-Presenter), "The Adaptable Lawyer: Staying Practical in Today's Complex Legal Environment"
- Webinar to IP Lawyers (Co-Presenter), "Managing IP Malpractice Risk by Effectively Managing Your IP Practice"
- Accountants and Lawyers Defense Network in Chicago, Illinois (Presenter), "Defending Conflict of Interest Allegations in Accounting Malpractice Cases"
- ABA Fall 2012 National Legal Malpractice Conference in Chicago, Illinois (Panel Member), "Managing Risk in High Exposure, Low Liability Cases"
- Co-Author, "The Flip Side of Collectibility: Putting Legal Malpractice Plaintiffs to the Test for Proof of Payability" for the ABA Fall 2012 National Legal Malpractice Conference
- AICPA Professional Liability Insurance Program in Amarillo, Texas (Co-Presenter), "Accountant Liability: No Good Deed Goes Unpunished"
- Webinar to IP Lawyers (Co-Presenter), "The Adaptable Intellectual Property Lawyer: Staying Practical in Today's Complex Legal Environment"
- Webinar to IP Lawyers (Co-Presenter), "Avoiding IP Malpractice: How to Avoid Bad Practices While Protecting Great Ideas"
- Lawyers Risk Management Seminar in Dallas, Texas (Co-Presenter), "Building a Solid Foundation: Managing Law Practice Risk"
- AICPA Professional Liability Insurance Program in Shreveport, Louisiana (Presenter), "Accountant Liability: No Good Deed Goes Unpunished"
- Dallas Association of Young Lawyers CLE in Dallas, Texas (Panel Member), "Ethical Issues in the Tripartite Relationship"
- Webinar to AICPA Forensic and Valuation Services Section (Co-Presenter), "Business Valuations: How to Manage Your Malpractice Risk"
- ACI's Second National Forum on LPL/Legal Malpractice Issues in New York City (Panel Member), "Law Firm Risk Management in the New Economy: Minimizing Exposure to Liability and Applying the Lessons Learned from the Economic Downturn"
- Accountants and Lawyers Defense Network Conference in Chicago (Co-Presenter), "Effects of the Down Economy on Legal Malpractice Claims"
- ASWA/AWSCPA's Inspired Solutions in Dallas, Texas Conference (Presenter), "Professional Liability Primer for Accountants"
- ACI's Regional and Mid-Size Law Firm Forum in Chicago (Panel Member), "Tackling the Unique Risk Management Issues of the Mid-Size Firm"
- Dallas CPA Society Free CPA Conference in Dallas, Texas (Co-Presenter), "Liability Exposure for CPAs in Texas – What You Need to Know"
- Risk Management Seminar for lawyers in Albuquerque, New Mexico (Co-Presenter), "Packing Your Parachute: Preparing for Law Practice Risk"

- ACI's National Forum on LPL/Legal Malpractice in Miami (Panel Member), "Helping Insureds Prevent Conflicts of Interest that Lead to Malpractice Claims"
- 2005 Ethics CLE in Las Vegas (Presenter), "Navigating Dangerous Waters – Addressing and Dealing with Potential Conflicts of Interest"

EXHIBIT B

Arbitration Docs:

12/02/22	Richard Allison's Answering Statement and Statement of Claims
12/07/22	Caroline Allison's Second Amended Complaint and First Amended Answering Statement to Counter-Claim
04/03/23	The Lawyers' Amended Statement of Claims
05/01/23	The Lawyers' Consolidated and Amended Answering Statement to the Clients' Statement of Claims

From Suit Compelled to Arbitration:

05/03/22	Defendants' Motion to Compel Arbitration and Stay all Proceedings
05/10/22	Plaintiff's Response to Defendants' Motion to Compel Arbitration w/exhibits
05/12/22	Defendants' Reply Regarding Their Motion to Compel Arbitration and Stay all Proceedings

Other Docs from Arbitration:

- Expert Designations
- Affidavit of Jorge Borunda
- Expert Report of Lillian Hardwick
- Settlement Statement of August 17, 2023
- Fee Agreements from Underlying Case

Depositions and Exhibits from Arbitration:

Caroline Allison
Richard Allison
Nick Abaza
Jorge Borunda
Michael Trevino

Arbitration Hearing Transcripts:

Transcripts from all 7 days of Final Arbitration Hearing

Underlying Case Documents:

Billing Fee Agreements

Subfolder “agreement” include Employment Agreement and POA between Caroline, Abaza, Borunda and Trevino

 agreement	5/12/2023 9:38 AM	File folder	
 Fwd_ Follow up proposal.eml	5/12/2023 9:53 AM	E-mail Message	11 KB
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 Re_ Allison Matter - Billing.eml	5/24/2023 2:25 PM	E-mail Message	100 KB
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 updated fee agreement - Allison Matter.e...	5/24/2023 2:25 PM	E-mail Message	136 KB

Caroline

Document entitled “Undue Influence Caroline – Why she decided to bring a claim”

Depo of Caroline – Excerpts and Condensed

EXP Reality – The Caroline Alison Team

Correspondence

47 documents

Correspondence 2

387 documents

Depos

 Fwd_ Allison Exhibit & court reporter.eml	5/24/2023 2:18 PM	E-mail Message	448 KB
 Richard Allison, Jr._SIGNATURE PAGES.pdf	5/12/2023 9:40 AM	Adobe Acrobat D...	70 KB

Discovery

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	RGAllisonEstate2017 - Invitation to view.e...	5/24/2023 2:18 PM	E-mail Message	12 KB

Docs

	Confidential Mediation Memorandum wi...	5/12/2023 9:41 AM	Adobe Acrobat D...	1,157 KB
	EX 2 - Richard Allison Trust RAA 000158-0...	5/12/2023 9:41 AM	Adobe Acrobat D...	8,525 KB
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	RE_ Allison Mediation Memo and Exhibit...	5/24/2023 2:18 PM	E-mail Message	28,800 KB
	Richard Allison Trust.PDF.eml	5/24/2023 2:18 PM	E-mail Message	11,167 KB

Experts

44 documents

Notes

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	Fwd_ Allison 5.eml	5/24/2023 2:17 PM	E-mail Message	20 KB
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Pleadings w/subfolders

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 Robin's MSJ	5/12/2023 9:44 AM	File folder	
 Robin's Response to Ps' MPSJ	5/12/2023 9:44 AM	File folder	
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 20.7.14 - Amended and Supplemental Dis...	5/12/2023 9:44 AM	Adobe Acrobat D...	16,189 KB
 20.7.14 - Plaintiffs' MPSJ re No Contest Cl...	5/12/2023 9:43 AM	Adobe Acrobat D...	22,064 KB
 20.11.1 - Third Amended Petition and Thi...	5/12/2023 9:43 AM	Microsoft Word D...	120 KB
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 nicks.19.10.24 - Caroline Allison's Motion...	5/12/2023 9:44 AM	Microsoft Word D...	71 KB
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Research

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 Richard G. Allison Company L.C. Taxes N...	5/12/2023 9:38 AM	Microsoft Excel 97...	58 KB
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Allison Matter w/ subfolders below:

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 Info from clients	11/8/2021 11:27 PM	File folder	
 Mediation materials	11/11/2021 4:11 PM	File folder	
 Post-mediation settlement approval	11/10/2021 11:21 PM	File folder	
 Probate Court Matter	11/11/2021 5:29 PM	File folder	
 Representation, costs, invoicing	11/11/2021 7:10 PM	File folder	
 Research re FTD	11/8/2021 11:30 PM	File folder	
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Trevino File:

	DATE/TIME	TYPE
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 Correspondence	5/12/2023 10:04 AM	File folder
 Depositions	5/12/2023 10:04 AM	File folder
 Discovery rec'd 1 12 2021	5/12/2023 10:05 AM	File folder
 Docs scanned from Collins' Office Docu...	5/12/2023 10:06 AM	File folder
 Email Correspondence with Clients	5/12/2023 10:11 AM	File folder
 Email Correspondence with Opposing C...	5/12/2023 10:26 AM	File folder
 Expenses	5/12/2023 10:06 AM	File folder
 Filings & Pleadings	5/12/2023 10:09 AM	File folder
 Jorge's File 11 11 2021	5/12/2023 10:10 AM	File folder
 JRL SECOND COPY OF E-MAILS	5/12/2023 10:11 AM	File folder
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 New Scheduling Order	5/12/2023 10:16 AM	File folder
 RAA 003444-003576 Addl Tax Returns	5/12/2023 10:16 AM	File folder
 Subpeona(s)	5/12/2023 10:17 AM	File folder
 Text Messages with Caroline Allison	5/12/2023 10:17 AM	File folder
 zAdditional Documents	5/12/2023 10:18 AM	File folder