“WHAT WE’VE GOT HERE IS A FAILURE TO COMMUNICATE”

UPDATE ON THE LAW OF LAWYERING

KENDALL M. GRAY\(^1\)
Andrews & Kurth L.L.P.
600 Travis, Suite 4200
Houston, Texas 77002
(713) 220-3981
(713) 238-7183 (fax)
kendallgray@andrews-kurth.com

15TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE

September 20-21, 2001
San Antonio, Texas

CHAPTER 10

\(^1\) Kendall Gray is an associate in the Houston office of Andrews & Kurth L.L.P. whose practice focuses on civil appellate matters in state and federal court. He graduated summa cum laude from Baylor Law School in 1994 and served as a briefing attorney to The Hon. Jack Hightower of the Supreme Court of Texas during the 1994-95 term.
TABLE OF CONTENTS

TABLE OF AUTHORITIES .......................................................... ii

INTRODUCTION ........................................................................... 1

A. Duties To The Client ................................................................. 1
   1. Sure, I’m A Lawyer, And I Worked For You, But I’m Not Your Lawyer  ........................................ 1
   2. “God Works Wonders Now And Then; Behold! A Lawyer, An Honest Man”–The Duty Of Clear And Complete Communication ......................................................... 2
   3. “A Verbal Contract Isn’t Worth The Paper It’s Written On”–The Security Of A Written Fee Agreement ............................................................................................................ 4
   4. She’s Not Your Lawyer Anymore–Disqualification ........................................................................ 6
   5. The Legal Assistant Who Knew Too Much–Of Legal Assistants And Chinese Walls .......................... 7
   6. “If You Want To Take Dough From A Murderer For Helping Him Beat The Rap You Must Be Admitted To The Bar”–Causation In Criminal Defense Malpractice Cases ................................................................. 8

B. Duties To Third Parties ............................................................... 9
   1. There Is No Private Cause Of Action For War Reparations ................................................................. 9
   2. “War Is Hell”–Or Why You Should Never Believe A Trial Lawyer .................................................. 10

C. Duties To The Courts And The System ........................................ 11
   1. Good Lawyers Make Bad Witnesses ............................................................................................... 11
   2. “When You Call Me That, Smile”–The Limits Of Advocacy And Of Judicial Opprobrium .................. 12

CONCLUSION .................................................................................... 13
## TABLE OF AUTHORITIES

### CASES

**In re American Home Prods. Corp.,**  
985 S.W.2d 68 (Tex. 1998) (orig. proceeding) ........................................... 8

**In re Bahn,**  
13 S.W.3d 865 (Tex. App.–Fort Worth 2000, orig. proceeding) .......................... 6, 11

**In re Bank of America,**  

**Bradt v. Sebek,**  
14 S.W.3d 756 (Tex. App.–Houston [1st Dist.] 2000, pet. denied) ...................... 9

**In re Chonody,**  
No. 2-00-305-CV, ___ S.W.3d ___, 2000 WL 1509311  
(Tex. App.–Fort Worth Oct. 9, 2000, orig. proceeding) .................................. 6

**Chapman Children's Trust v. Porter & Hedges, L.L.P.,**  
32 S.W.3d 429 (Tex. App.–Houston [14th Dist.] 2000, pet. denied) ...................... 9, 10

**Curtis v. Commission for Lawyer Discipline,**  
20 S.W.3d 227 (Tex. App.–Houston [14th Dist.] 2000, no pet.) .......................... 2, 3

**Estate of Degley v. Vega,**  
797 S.W.2d 299 (Tex. App.–Corpus Christi 1990, no writ) ................................ 6

**Gaspard v. Beadle,**  

**In re George,**  
28 S.W.3d 511 (Tex. 2000) (orig. proceeding) ........................................ 6, 7

**In re Godt,**  
28 S.W.3d 732 (Tex. App.–Corpus Christi 2000, orig. proceeding) ..................... 5, 6

**In re Greene,**  
213 F.3d 223 (5th Cir. 2000) (per curiam) ........................................... 12, 13

**Haase v. Herberger,**  
44 S.W.3d 267 (Tex. App.–Houston [14th Dist.] 2001, no pet.) ........................... 4

**Henry v. Gonzalez,**  
18 S.W.3d 684 (Tex. App.–San Antonio 2000, pet. dism’d by agr.) ...................... 5

**Hines v. The Commission for Lawyer Discipline,**  
28 S.W.3d 697 (Tex. App.–Corpus Christi 2000, no pet.) ................................. 1, 2

**Jackson Law Office, P.C. v. Chappell,**  
37 S.W.3d 15 (Tex. App.–Tyler 2000, pet. denied) .................................... 3, 4

**Jones v. Lurie,**
32 S.W.3d 737 (Tex. App.–Houston [14th Dist.] 2000, no pet.) .............................. 6

Lesikar v. Rappeport,
33 S.W.3d 282 (Tex. App.–Texarkana 2000, no pet.) ........................................... 10, 11

Levine v. Bayne, Snell & Krause, Ltd.,
40 S.W.3d 92 (Tex. 2001) ........................................................................... 5

Longaker v. Evans,
32 S.W.3d 725 (Tex. App.–San Antonio 2000, pet. withdrawn) ............................... 5

Lopez v. Munoz, Hockema & Reed, L.L.P.,
22 S.W.3d 857 (Tex. 2000) ........................................................................... 5

Macias v. Moreno,

In re Maloney,
949 S.W.2d 385 (Tex. App.–San Antonio 1997, orig. proceeding) (per curiam) ........... 12

McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests,
991 S.W.2d 787 (Tex. 1999) ........................................................................... 9, 10

In re Meador,
968 S.W.2d 346 (Tex. 1998) (orig. proceeding) ...................................................... 7

Medlock v. Commission for Lawyer Discipline,
24 S.W.3d 865 (Tex. App.–Texarkana 2000, no pet.) ............................................. 13

Mellon Serv. Co. v. Touche Ross & Co.,
17 S.W.3d 432 (Tex. App.–Houston [1st Dist.] 2000, no pet.) ................................. 2

Mendoza v. Fleming,
41 S.W.3d 781 (Tex. App.–Corpus Christi 2001, no pet.) ......................................... 10

Mitchell v. Chapman,
10 S.W.3d 810 (Tex. App.–Dallas 2000, pet. denied) .............................................. 9, 10

Owens v. Harmon,
28 S.W.3d 177 (Tex. App.–Texarkana 2000, pet. denied) (Grant, J. concurring) ........... 9

Peeler v. Hughes & Luce,
909 S.W.2d 494 (Tex. 1995) ........................................................................... 8-9

In re Polybutylene Plumbing Litig.,
23 S.W.3d 428 (Tex. App.–Houston [1st Dist.] 2000, no pet.) ................................. 4, 5

Porter & Clements v. Stone,
935 S.W.2d 217 (Tex. App.–Houston [1st Dist.] 1996, orig. proceeding) .................... 5

Richards v. Commission for Lawyer Discipline,
35 S.W.3d 243 (Tex. App.–Houston [14th Dist.] 2000, no pet.) ............................. 3
Chapter 10 “What We’ve Got Here Is A Failure To Communicate”: Update On The Law of Lawyering

In re Rubin,
   23 S.W.3d 382 (Tex. App.–Amarillo 2000, orig. proceeding) ................................. 8

Sample v. Freeman,
   873 S.W.2d 470 (Tex. App.–Beaumont 1994, writ denied) ...................................... 6

San Benito Bank & Trust Co. v. Landair Travels,
   31 S.W.3d 312 (Tex. App.–Corpus Christi 2000, no pet.) ...................................... 11

Sandoval v. Commission for Lawyer Discipline,

Sanes v. Clark,
   25 S.W.3d 800 (Tex. App.–Waco 2000, pet. denied) ............................................. 5

Satterwhite v. Jacobs,
   26 S.W.3d 35 (Tex. App.–Houston [1st Dist.] 2000, pet. filed) ................................. 9

Sears v. Olivarez,
   28 S.W.3d 611 (Tex. App.–Corpus Christi 2000, no pet.) (en banc) .......................... 12

Smith v. Commission for Lawyer Discipline,
   42 S.W.3d 362 (Tex. App.–Houston [14th Dist.] 2001, no pet.) ............................... 13

Smith v. McCleskey, Harriger, Brazill, & Graf, L.L.P.,
   15 S.W.3d 644 (Tex. App.–Eastland 2000, no pet.) ............................................. 1

Spera v. Fleming, Hovenkamp & Grayson, P.C.,
   25 S.W.3d 863 (Tex. App.–Houston [14th Dist.] 2000, no pet.) ............................... 5

Stephenson v. LeBouf,
   16 S.W.3d 829 (Tex. App.–Houston [14th Dist.] 2000, no pet.) ............................... 1

Texas-Ohio Gas, Inc. v. Mecom,
   28 S.W.3d 129 (Tex. App.–Texarkana 2000, no pet.) ........................................ 12

Van Polen v. Wisch,

White v. Bayless,
   32 S.W.3d 271 (Tex. App.–San Antonio 2000, pet. denied ) .................................. 9, 10

STATUTES


TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(c) (Vernon Supp. 2000) ........................ 6

TEX. GOV’T CODE ANN. § 82.065(a) (Vernon 1998) ............................................. 6

RULES

TEX. DISCIPLINARY R. PROF’L CONDUCT 1.01(b)(1), reprinted in TEX. GOV’T CODE ANN.,
<table>
<thead>
<tr>
<th>Document References</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>TEX. DISCIPLINARY R. PROF’L CONDUCT 1.03(b), reprinted in TEX. GOV’T CODE ANN.,</strong></td>
<td>3</td>
</tr>
<tr>
<td><strong>TEX. DISCIPLINARY R. PROF’L CONDUCT 1.04(a), reprinted in TEX. GOV’T CODE ANN.,</strong></td>
<td>3</td>
</tr>
<tr>
<td><strong>TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06(a), reprinted in TEX. GOV’T CODE ANN.,</strong></td>
<td>3</td>
</tr>
<tr>
<td><strong>TEX. DISCIPLINARY R. PROF’L CONDUCT 2.01, reprinted in TEX. GOV’T CODE ANN.,</strong></td>
<td>3</td>
</tr>
<tr>
<td><strong>TEX. DISCIPLINARY R. PROF’L CONDUCT 3.04(b), reprinted in TEX. GOV’T CODE ANN.,</strong></td>
<td>11</td>
</tr>
<tr>
<td><strong>TEX. DISCIPLINARY R. PROF’L CONDUCT 7.01(d), reprinted in TEX. GOV’T CODE ANN.,</strong></td>
<td>3</td>
</tr>
<tr>
<td><strong>TEX. DISCIPLINARY R. PROF’L CONDUCT 7.02(a)(1), reprinted in TEX. GOV’T CODE ANN.,</strong></td>
<td>3</td>
</tr>
<tr>
<td><strong>TEX. DISCIPLINARY R. PROF’L CONDUCT 8.04(a), reprinted in TEX. GOV’T CODE ANN.,</strong></td>
<td>3</td>
</tr>
</tbody>
</table>

**MISCELLANEOUS**

<table>
<thead>
<tr>
<th>Reference</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ALVA JOHNSTON, THE GREAT GOLDFYN 16 (1937)</strong></td>
<td>4</td>
</tr>
<tr>
<td><strong>BENJAMIN FRANKLIN, Poor Richard’s Almanack, 1734 in</strong></td>
<td>2</td>
</tr>
<tr>
<td>PAPERS OF BENJAMIN FRANKLIN 1:354 (Leonard W. Labaree ed.)</td>
<td></td>
</tr>
<tr>
<td><strong>FRANK R. PIERSON, COOL HAND LUKE (Screenplay) (1967)</strong></td>
<td>1</td>
</tr>
<tr>
<td><strong>OWEN WISTER, THE VIRGINIAN ch. 2 (1902)</strong></td>
<td>12</td>
</tr>
<tr>
<td><strong>RESTATEMENT (SECOND) OF TORTS § 552 (1977)</strong></td>
<td>10</td>
</tr>
<tr>
<td><strong>RESTATEMENT (SECOND) OF TORTS § 552(2) (1977)</strong></td>
<td>9</td>
</tr>
<tr>
<td><strong>REX STOUT, IN THE BEST FAMILIES 199 (1950)</strong></td>
<td>8</td>
</tr>
<tr>
<td><strong>ROBERT BYRNE, 1,911 BEST THINGS ANYBODY EVER SAID 345 (1988)</strong></td>
<td>13</td>
</tr>
<tr>
<td><strong>William Tecumseh Sherman, Graduation address at</strong></td>
<td>10</td>
</tr>
<tr>
<td>Michigan Military Academy (June 19, 1879)</td>
<td></td>
</tr>
</tbody>
</table>
“WHAT WE’VE GOT HERE IS A FAILURE TO COMMUNICATE”: UPDATE ON THE LAW OF LAWYERING

INTRODUCTION

The title of this paper is taken from the mouth of the prison warden in COOL HAND LUKE,” and some might approach a lecture on ethics and a day under the warden with similar feelings. Even so, there is more to the title than meets the eye. The title reflects the problems actually experienced by the real persons in the cases set out below. Many of the problems either were caused or exacerbated by poor communication by lawyers. The cases discussed have been divided by the party to whom the attorney owes a duty, although the cases obviously overlap because (for example) violating a duty to a client will almost always result in the violation of a duty to the system at large. Section A deals with an attorney’s duties to the client, whether in terms of the duty of care, duty of confidentiality, duty of loyalty, or fiduciary duties generally. Section B deals with the attorney’s duties to third parties—an ever expanding and treacherous area of Texas law and one which appears to divide litigators from transactional practitioners. Section C deals with an attorney’s duties to the courts and the legal system, including such topics as attorney fact witnesses, and the bounds of forceful advocacy.

A. Duties To The Client

1. Sure, I’m A Lawyer, And I Worked For You, But I’m Not Your Lawyer

Many of the claims brought against lawyers depend upon the existence of an attorney-client relationship to create a legally enforceable duty. For example, an attorney is not under a fiduciary duty to a former client after the attorney-client relationship ends, but even the comparatively minimal relationship between class counsel and a member of the class will support the imposition of fiduciary duties upon an attorney. Thus, the first communication task faced by the attorney is to clarify who the attorney represents, and who the attorney does not represent. The careful practitioner will also notify the client when a representation has concluded. A well-crafted engagement letter can accomplish the first two functions, and should be undertaken in every representation, especially when repeat clients might take representation for granted. The last function can be accomplished when the representation concludes by promptly closing the file, and sending a “thank you” letter to the client communicating that the representation has concluded. Such clarity may prevent claims arising from misunderstandings or enable an attorney to establish as a matter of law that no duty was owed to the complaining party.

A proper concluding letter might have ameliorated the problems in Hines v. The Commission for Lawyer Discipline, arising from the dismissal of a client’s claim because of inadequate pleadings. The lawyer made clear to the client that she could appeal the decision, but did not make clear that he no longer intended to represent her. He simply did not return her phone calls, did not comply with reasonable requests for information, and failed to take the actions necessary to appeal the ruling. The court correctly noted that “if appellant believed that his representation had terminated or that [another lawyer] was going to further advise [his client], he could easily have made that clear to...”

2 FRANK R. PIERSON, COOL HAND LUKE (Screenplay) (1967).

3 What follows is a survey of the law of lawyering in Texas for the years 2000-2001. It is called a survey rather than an annotation because every case dealing with attorneys and their duties has not been annotated herein. Instead, the author analyzed every published Texas decision under the “Attorney and Client” topic and organized what appeared to be the more significant cases.

---

4 Stephenson v. LeBouf, 16 S.W.3d 829, 836 (Tex. App.–Houston [14th Dist.] 2000, no pet.) (attorney attempting to collect fees from proceeds of sale of former client’s house owed no fiduciary duty to client because attorney-client representation terminated upon the completion of the client’s divorce representation).

5 Smith v. McCleskey, Harriger, Brazill, & Graf, L.L.P., 15 S.W.3d 644, 647 (Tex. App.–Eastland 2000, no pet.) (reversing “no duty” summary judgment because “it was undisputed that McCleskey was lead counsel for the class and that appellants were class members”).

6 28 S.W.3d 697, 699 (Tex. App.–Corpus Christi 2000, no pet.).

7 Id. at 702.

8 Id. at 701-02.
her, either orally or in writing. He did neither.\footnote{9} As a result, the attorney was disciplined, but more significantly, the client suffered.

The First Court of Appeals recently dealt with the uncertainty caused by the lack of a written fee agreement and the uncertainty of the attorney’s status. In \textit{Gaspard v. Beadle}, an attorney filed an extremely ill-advised fee dispute.\footnote{10} The former “client” was also the attorney’s former paramour with whom he had taken up while she was still married and undergoing a divorce.\footnote{11} According to the former client, the attorney at some point claimed he could no longer work for free, broke off the romantic involvement and sent a bill.\footnote{12} The client counterclaimed in the fee dispute for fraud, misrepresentation, and intentional infliction of emotional distress.\footnote{13} The attorney prevailed as a matter of law on the counterclaims. Acting as if one is in love is not an actionable misrepresentation and sending a bill to a former love interest was deemed not to be outrageous as a matter of law.\footnote{14} Even so, the case is a caution to any attorney who allows his or her status and payment expectations to become clouded with personal issues.

With the blurring boundaries between public accountancy, consulting, and legal work, situations will inevitably arise in which an individual licensed to practice law is sued on attorney-liability theories when no attorney-client relationship existed. \textit{Mellon Service Co. v. Touche Ross & Co.}\footnote{15} is just such a case. In \textit{Mellon}, the plaintiff claimed that an attorney-client relationship existed between itself and Touche Ross & Co. because two members of the tax team were also lawyers.\footnote{16} The First Court of Appeals had little difficulty concluding, based upon the affidavits of the “lawyers,” that “Touche offered, and was hired by Granada, to perform accounting, auditing and management consulting services, not legal services.” \footnote{17} Even so, it is easy to conceive of a situation in which so-called “management consulting” looks suspiciously like the provision of legal advice, making it impossible to avoid a jury on such a claim. Thus, multi-disciplinary attorneys would be well-advised to craft engagement letters making clear that the attorney is being hired for purposes that do not involve the practice of law, and that the “non-client” will need to hire and look to someone else for the provision of legal advice.

2. “God Works Wonders Now And Then; Behold! A Lawyer, An Honest Man”\footnote{18}–The Duty Of Clear And Complete Communication

Observers have tainted our profession with a reputation for dishonesty even before Benjamin Franklin penned the words set out above in 1734. Doubtless, some of this reputation arises from misunderstanding the duties of zealous advocacy, even on behalf of distasteful clients. If the cases are any indication, however, some of the reputation is deserved. Lawyers are privy to client confidences and possess specialized knowledge enabling them to accomplish serious misdeeds. Thus, any missive on the importance of communication would be incomplete without addressing the attorney’s duty of candor to the client.

The duty of truthful, clear communication obviously extends to the fee agreement at the inception of the attorney-client relationship. \textit{Curtis v. Commission for Lawyer Discipline}\footnote{19} illustrates this point with an extreme set of facts. In \textit{Curtis}, two individual plaintiffs were represented by one lawyer who associated a second attorney (officing in the same building) to help with the cases. The second attorney contacted the plaintiffs, convinced them to execute a \textit{second} fee contract requiring the payment of hourly fees plus an additional

\footnotesize{\begin{itemize}
\item \textit{Hines,} 28 S.W.3d at 702.
\item \textit{Id.} at 233.
\item \textit{Id.} The representation apparently began on an unrelated real estate matter pursuant to a formal written agreement. Although the attorney did not formally represent his romantic interest during the divorce, he assisted with a usury matter. \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 235-38.
\item \textit{17 S.W.3d} 432 (Tex. App.–Houston [1st Dist.] 2000, no pet.).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{BENJAMIN FRANKLIN, Poor Richard’s Almanack,} 1734 \textit{in PAPERS OF BENJAMIN FRANKLIN} 1:354 (Leonard W. Labaree ed.).
\item \textit{20 S.W.3d} 227 (Tex. App.–Houston [14th Dist.] 2000, no pet.).
\end{itemize}}
contingency percentage, and misrepresented to the clients that their original attorney was so ill that she probably could not handle their cases. The second fee contract would have gobbled up all of the client’s recovery if enforced. Not surprisingly, the attorney was disciplined for charging an unconscionable fee, misrepresenting that she was partnered with the originating attorney, making a false or misleading communication about another lawyer and general misconduct.

When the very object of a representation is questionable, it becomes even more important to communicate with crystalline clarity. In the case of Richards v. Commission for Lawyer Discipline, communication should have gone to both of the clients. Richards is the story of H, an attorney sued for malpractice, and W, his wife. H wanted to “protect” his assets, so he essentially instructed his lawyer/friend Richards to obtain a “pretend” divorce. With nary a meeting or a discussion with W, Richards filed a divorce petition on her behalf. Although W later paid Richards a retainer as H instructed, she thought it was only in the event she and H later decided that a divorce was necessary. If this were not enough, Richards’ office also prepared an answer and cross-petition for H, and thus represented both parties to the divorce proceeding. H presented W with a final decree, which she reluctantly signed, but she confided in “her” attorney (Richards) that she did not understand what was going on and that she did not want a divorce. “Her” attorney (Richards) reassured her that she was doing the right thing to protect their assets, and that H really did love her after all. Unfortunately for W (and “their” attorney), H really remarried and really evicted W from their home shortly after their pretend divorce was final. Richards took the fall for neglecting a legal matter entrusted to her, failing to provide reasonable explanation to W, representing opposing parties to the same litigation, and failing to exercise independent professional judgment and render candid advice.

There is no safe harbor, however, in merely avoiding intentional falsehoods or directly conflicting representations. Carelessness in client communication is sometimes enough to sustain a breach of fiduciary duty finding. For example, in Jackson Law Office, P.C. v. Chappell, the attorneys sued their client for unpaid fees and were met with the usual counterclaim for (among other things) breach of fiduciary duty. In addition to their claim for fees, the lawyers alleged that their former client had fraudulently transferred property in an attempt to avoid their claim. Because there was no written fee agreement, the client claimed that the lawyers had agreed to handle her divorce for a maximum of $3,000 while the lawyers claimed that they were entitled to $150 per hour, resulting in a bill of over $60,000 to the client. Although the jury refused to believe the client’s flat fee story, and although the jury found the client’s transfers to be fraudulent, they also found that the lawyers had breached their fiduciary duty.

The court of appeals upheld the breach of fiduciary duty claim in part because of the attorneys’ carelessness:

20 Curtis, 20 S.W.3d at 230, 233.
21 Id.
22 Id. at 232-34. See also TEX. DISCIPLINARY R. PROF’L CONDUCT 1.04(a), 7.01(d), 7.02(a)(1) & 8.04(a), reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9).
23 35 S.W.3d 243 (Tex. App.–Houston [14th Dist.] 2000, no pet.).
24 Id. at 246.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id. at 247.
32 Id. See also TEX. DISCIPLINARY R. PROF’L CONDUCT 1.01(b)(1), 1.03(b), 1.06(a) & 2.01.
34 Id.
35 Id.
36 Id.
The evidence shows that the [lawyers] were vague about their fee arrangement, and did not reduce the fee agreement to writing. The [lawyers] failed to maintain billing records, failed to record services rendered, and failed to provide billing statements to [the client].

The jury refused to find any damage from the breach of fiduciary duty, yet the court ordered a partial fee forfeiture. Even further, the court upheld the jury finding that the client had fraudulently transferred her property, but refused to void the transfers because of the lawyers’ unclean hands.

Of course, a forfeiture need not be ordered for every breach of fiduciary duty. The Fourteenth Court of Appeals recently affirmed a trial court’s refusal to award a forfeiture as a matter of law. In that case, the lawyer had the misfortune of representing two clients who hated each other—a married couple who was going through a divorce and who had a defective house. While the divorce was pending, the construction company made a settlement offer that the wife (but not the husband) wished to accept. The wife’s divorce counsel filed a motion in the divorce proceeding asking the court to grant the wife the authority to accept the settlement, and the divorce court granted that motion. The construction defect lawyer followed the divorce court’s order, consummated the settlement and accepted the contingency fee, but was later sued by the husband for breach of fiduciary duty. The trial court refused to order a forfeiture, and the court of appeals affirmed. Without deciding whether it was a breach of fiduciary duty to represent two clients who hate each other, the court of appeals noted that counsel in the house dispute had not petitioned to settle the case, but had merely followed the orders of the family court.


If Jackson Law Office is an example of the perils that can befall a lawyer when fee agreements are left to chance and memory, other cases exhibit the power of the unambiguous written agreement. For example, the First Court of Appeals refused to allow mass tort (non-class action) clients to renegotiate their contingency fee agreement at the courthouse. Finding no fraud or breach of fiduciary duty, and the contingency agreement having been fully performed, the court ruled:

37 Jackson, 37 S.W.3d at 22. The court also opined that the record contained evidence that the attorneys refused to supply information on request, inflated the hours charged during the course of the representation, charged the client for defending a grievance filed by the client’s husband, required her to execute an assignment as a condition of continuing the representation, and failed to advise the client to seek outside counsel before executing the assignment. Id.

38 Id. at 23.

39 The court observed:

[T]he fiduciary duty owed by an attorney to his client is of such a magnitude that the [lawyers] did not come to the court of equity with clean hands. We hold that public policy of Texas is best preserved by applying the unclean hands doctrine in this case. Consequently, the trial court did not err when it denied the Jacksons the equitable set-aside of the fraudulent transfers.

Id. at 27.


41 Id. at 268.

42 Id.

43 Id.

44 Id.

45 Id. at 270.


47 See In re Polybutylene Plumbing Litig., 23 S.W.3d 428 (Tex. App.–Houston [1st Dist.] 2000, no pet.). The dispute involved 37,000 plaintiffs, each of whom signed a written contingency fee agreement, and who owned in excess of 67,000 property units containing allegedly defective polybutylene plumbing systems. Id. at 433. The settlement at issue involved $170 million in cash and $10 million in expenses. Id. at 433-34. The exact flip-side of the In re Polybutylene agreement is an unwritten contingency fee agreements, which, of course, is voidable at will by the client. See Sanes v. Clark, 25 S.W.3d 800, 805 (Tex. App.–Waco 2000, pet. denied).
As a general rule, a court has no authority to determine what fee a litigant should pay his or her own attorney, that being a matter of contract between attorney and client. . . . When the language in an attorney fee contract is plain and unambiguous, it must be enforced as written. . . . If an attorney fee contract was valid when made, and it was made by and between mentally competent persons, it is to be enforced without court review of the reasonableness of the attorneys' fees so fixed.48

Similar certainty accrued to the benefit of counsel in Lopez v. Munoz, Hockema & Reed, L.L.P., where the client agreed to pay the attorneys an additional 5% contingency if the case was “appealed to a higher court.”49 Although the parties to the underlying action tentatively agreed to a settlement, the defendant (as it often must) perfected its appeal in the event the settlement fell through.50 Although the plaintiffs argued (with some justification) that “appealed to a higher court” ought to mean something more than “initiating the appellate process,”51 the Supreme Court found the contract to be unambiguous, and held that the case was “appealed to a higher court” when Westinghouse perfected its appeal.52

The language of the fee agreement accrued to the benefit of the clients in Levine v. Bayne, Snell & Krause, Ltd, in which the lawyers and clients were at odds about the calculation of a contingency fee.53 The fee agreement promised the lawyers one-third of “any amount received by settlement or recovery.” The clients argued the fee should be computed after deducting the defendant’s successful counterclaim against them, meaning the lawyers would collect one-third of nothing. The lawyers argued it ought to be computed based upon the amount of the verdict prior to the offset.54 The Supreme Court, relying extensively upon the Restatement of the Law of Lawyers, held that the clients owed nothing further. The court squarely placed the burden of drafting and explaining clear fee agreements on attorneys, who are in a much better position than their clients to see that agreements are clearly worded and clearly explained.55

Of course one attorney must have wondered, “why bother” with written agreements after one intermediate appellate court refused to enforce the carefully crafted arbitration clause against a client suing him for malpractice.56 Although courts have previously enforced arbitration agreements in attorney malpractice cases,57 this court did not. First, the court refused to apply the Federal Arbitration Act because no interstate commerce was involved.58 Next, the court noted that the agreement was a contingency fee that was not signed by the lawyer as required by the Government Code.59 The court alternatively held that legal malpractice causes of action are “personal injury” claims, meaning that an arbitration agreement is invalid by statute unless each party is represented by counsel and the

48 In re Polybutylene, 23 S.W.3d at 436. Oddly, in a connected case, the Fourteenth Court of Appeals reversed and remanded summary judgment in favor of the law firm on the dissenting clients’ breach of fiduciary duty claim. While acknowledging that the clients could show no damages, the court found that a fact question existed concerning whether the firm had timely notified the plaintiffs to obtain other counsel to represent them in the fairness hearing. See Spera v. Fleming, Hovenkamp & Grayson, P.C., 25 S.W.3d 863, 873 (Tex. App.–Houston [14th Dist.] 2000, no pet.); but see Longaker v. Evans, 32 S.W.3d 725, 735-36 (Tex. App.–San Antonio 2000, pet. withdrawn) (breach of fiduciary duty claim fails in the absence of any damages). This is the same “fairness” hearing, ordered sua sponte by the trial court, that the First Court of Appeals found was unjustified because there was no breach of fiduciary duty shown. In re Polybutylene, 23 S.W.3d at 437.

49 22 S.W.3d 857, 859 (Tex. 2000).

50 Id. at 860.

51 Id. at 862.

52 Id. at 862.

53 40 S.W.3d 92 (Tex. 2001).

54 Id. at 93.

55 Id. at 95-96.


58 In re Godt, 28 S.W.3d at 737.

59 In re Godt, 28 S.W.3d at 738 (citing TEX. GOV’T CODE ANN. § 82.065(a) (Vernon 1998)).
agreement is signed by the parties and their counsel.\textsuperscript{60} Even at first blush, the outcome appears to be erroneous, at least on the last point.\textsuperscript{61}

4. \textbf{She’s Not Your Lawyer Anymore—Disqualification}

The remedy of disqualifying a litigant from using the counsel of its choice obviously imposes great hardship and has a high potential for mischief when parties are locked in litigation. Thus, courts properly “adhere to exacting standards when considering motions to disqualify so as to discourage their use as a dilatory trial tactic.”\textsuperscript{62} Several cases this year exhibit the continuing effort of Texas courts to apply those “exacting standards.”

The ethical rules prohibiting conflicting representations are obviously to protect the confidences of a client and to enforce the duties attorneys owe to clients and former clients. For this reason, the Fourteenth Court of Appeals has emphasized again that \textit{non-clients} of the offending attorney have no standing to move for disqualification based upon a conflict.\textsuperscript{63} Likewise, conflicts pose no jurisdictional impediment for the courts. Thus, they are waived if not timely raised.\textsuperscript{64}

Similarly, even a former client cannot succeed on a timely motion to disqualify in the absence of exacting proof. For example, \textit{In re Chonody} arose from a divorce action involving protective orders in which the wife’s attorney had formerly represented the husband in a criminal case.\textsuperscript{65} Notwithstanding the appearance of a potentially serious conflict, the Fort Worth Court of Appeals placed the burden squarely upon the movant to demonstrate a conflict requiring disqualification through a motion properly supported by evidence. The mere potential that the husband’s former attorney had confidential information concerning his propensity for violence or his past criminal conduct was not enough. The movant failed to offer sufficient proof and the motion ultimately failed notwithstanding circumstances that one would normally consider suspect.\textsuperscript{66}

Again, disqualifications occur, in part, to protect client confidences. In a very significant case this year, the Supreme Court of Texas answered the question of how to protect the movant’s confidences in the disqualified attorney’s work product from the eyes of the successor attorney. \textit{In re George}\textsuperscript{67} exhaustively surveyed various approaches from across the country,\textsuperscript{68} and opted to create a unique, Texas solution to the problem.

Under the Texas approach, there is a rebuttable presumption that the work product contains the movant’s confidential information.\textsuperscript{69} The presumption protects the former client in two ways. First, the former client need not reveal the confidences in order to protect them, and second, the presumption prevents the trial court from turning over any confidences unless and until the current

\textsuperscript{60} Id. at 739 (citing TEX. CIV. PRAC. \\ & REM. CODE ANN. §§ 171.002(a)(3) \\ & (c) (Vernon Supp. 2000)).

\textsuperscript{61} The cases cited by the Corpus Christi Court of Appeals for the proposition that legal malpractice claims are personal injury claims dealt with limitations and prejudgment interest. \textit{See Sample v. Freeman}, 873 S.W.2d 470, 476 (Tex. App.–Beaumont 1994, writ denied); \textit{Estate of Degley v. Vega}, 797 S.W.2d 299, 302-03 (Tex. App.–Corpus Christi 1990, no writ).

\textsuperscript{62} \textit{In re Bahn}, 13 S.W.3d 865, 873 (Tex. App.–Fort Worth 2000, orig. proceeding).

\textsuperscript{63} \textit{See Jones v. Lurie}, 32 S.W.3d 737, 744-45 (Tex. App.–Houston [14th Dist.] 2000, no pet.).

\textsuperscript{64} Id. at 744. In \textit{Jones}, the conflict was raised for the first time on appeal.

\textsuperscript{65} No. 2-00-305-CV, ___ S.W.3d ___, 2000 WL 1509311, at *3 (Tex. App.–Fort Worth Oct. 9, 2000, orig. proceeding).

\textsuperscript{66} Id. (“RPI presented no evidence to show that the prior criminal proceedings and the instant divorce proceedings are substantially related—\textit{i.e.}, that a genuine threat exists that Parham (the attorney) may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar”).

\textsuperscript{67} 28 S.W.3d 511 (Tex. 2000) (orig. proceeding).

\textsuperscript{68} Id. at 515-17. The court rejected a \textit{per se} ban for the reasons set out in the block quotation and because the work product generated in the second representation belongs to the client, counseling against an unnecessary deprivation of access. \textit{Id.} at 516. The court rejected putting the burden on the former client to demonstrate that specific confidences exist because a client should not have to reveal confidences in order to protect them. \textit{Id.} at 516-17. The court rejected a more amorphous “balancing test” for the simple reason that the “preservation of clients’ secrets and confidences is not an option.” \textit{Id.} at 517.

\textsuperscript{69} \textit{In re George}, 28 S.W.3d at 518.
client proves there are none to be had. The majority opinion chose a rebuttable presumption for attorney work product (as opposed to the irrebuttable presumption involved in disqualifying the attorney) because:

[unlike the contents of a lawyer’s mind, work product is tangible and can be examined. Untainted work product can be separated from tainted work product. Thus, a complete ban on work product would provide more relief than necessary to protect against the disclosure of confidential information.]

The court recognized the difficulty of placing the burden of proof on the current client, who by definition does not have access to the sequestered work product. Therefore, the court outlined a very specific procedure to follow. Once the successor counsel moves for access to the work product or the former client moves to restrict access, the trial court should order the disqualified attorneys to produce an inventory of the work product describing for each item (1) the type of work, (2) the subject matter of the item, (3) the claims it relates to, and (4) any other factor the court considers relevant. If the trial court is unsure at this point, it can receive further evidence, including an in camera inspection of the work product. If uncertainty still exists, the presumption is not rebutted and the material cannot be turned over.

The First Court of Appeals also had occasion to signal the primacy of client confidences in a case that serves as a warning for those unwilling to acquiesce to a voluntary stay while one’s opponent seeks review of an order requiring the production of privileged documents. In the underlying lawsuit, the trial court reviewed privileged documents in camera and then immediately handed them over to the opposition. The opposition thoroughly analyzed and catalogued the documents, even quoting at length from them in their brief during the ensuing mandamus proceeding. The court of appeals ultimately granted a writ of mandamus finding that the documents were privileged. Then, the party whose secrets had been laid bare moved to disqualify its opponent’s counsel on the grounds that they had improperly reviewed privileged materials. The successor trial court refused to order disqualification but the court of appeals granted a writ of mandamus. The court balanced the factors from In re Meador, and disqualified the plaintiff’s counsel, largely because of the extent to which plaintiff had engrafted that privileged information into its case after the trial court had improperly and summarily turned the secrets over to it.

5. The Legal Assistant Who Knew Too Much—Of Legal Assistants And Chinese Walls

Similar confidentiality issues are raised when a legal assistant changes employers. In 1998, the Supreme Court of Texas struck a balance between client confidences and legal assistants who “switch sides” by taking a job at a firm adverse to the clients of his or her former employer. Under such circumstances, it is the attorney’s responsibility:

- To instruct the legal assistant not to work on any matter on which the legal assistant worked during the prior employment, or regarding which the legal assistant had information relating to the former employer’s representation; and

---

70 Id.
71 Id. at 519.
72 Id. at 518.
73 Id.
74 Id.
76 Id. at 243.
77 Id. at 240.
78 968 S.W.2d 346 (Tex. 1998) (orig. proceeding). Those factors are (1) whether the attorney knew or should have known that the material was privileged; (2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information; (3) the extent to which the attorney reviews and digests the privileged information; (4) the significance of the privileged information, i.e., the extent to which its disclosure may prejudice the movant’s claim or defense, and the extent to which return of the documents will mitigate that prejudice; (5) the extent to which the movant may be at fault for the unauthorized disclosure; and (6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney. Id. at 351-52.
79 In re Bank of America, 45 S.W.3d at 244-45.
• To take other reasonable steps to ensure that the legal assistant does not work in connection with the matters on which the legal assistant worked during the prior employment, absent client consent.80

_In re Rubin_,81 from the Amarillo Court of Appeals provides the key map for how to satisfy the supreme court’s requirements, and how to make a record of that compliance with the trial court. The former employer in _In re Rubin_ relied upon affidavits setting out the legal assistant’s access to confidential client information, and principally argued that the successor firm was so small that it would be impossible to protect that information from disclosure. On the other side, the subsequent employer tendered the memo from the managing partner identifying the cause numbers about which the legal assistant possessed confidential information, warning firm personnel of the duty to protect that information, and setting out policies to protect that information:

• The legal assistant was forbidden from working on or taking any action in connection with the cases.
• Discussion of the cases with the legal assistant was forbidden.
• All computer information relating to the cases was removed from the firm’s computer system and no future information concerning either case was to be stored electronically, but was to be kept only in hard copy.82
• The files for the cases were to be kept locked under the supervision of the managing partner and replaced in locked storage at the end of each day.
• The legal assistant was prohibited from accessing the files under any circumstances.

In addition to the memo containing the policies, the record contained the affidavit of the managing partner (and the legal assistant) detailing how the firm implemented its Chinese Wall—individual meetings with the attorneys and staff, individual signatures on the policy, a written understanding that violations were a firing offense, etc.83 The affidavit proved that client contact was restricted, by client agreement, to one lawyer at the firm and one in-house lawyer.84 The subsequent employer even took the trouble to prove the geography of the firm—that the files and the legal assistant would be located in opposite sides of the office.85

The protections appeared very stringent on paper, and the record before the court was very thorough. The court of appeals therefore found no abuse of discretion in the trial court’s refusal to disqualify the legal assistant’s new employer.86

6. “If You Want To Take Dough From A Murderer For Helping Him Beat The Rap You Must Be Admitted To The Bar”87—Causation In Criminal Defense Malpractice Cases

In 1995, the Supreme Court of Texas decided _Peeler v. Hughes & Luce_, holding that a client’s own criminal conduct is the sole proximate cause of any damage in a subsequent malpractice case against criminal defense counsel, unless the client can show he has since been exonerated of the crime.88 One concurring judge has since characterized _Peeler_ as the “incompetent criminal lawyer defense act—and the more incompetent, the stronger the defense.”89 Nevertheless, _Peeler’s_ sole proximate cause defense has been applied in the last year, even where the defense lawyer admitted to actions that were

80 See _In re American Home Prods. Corp._, 985 S.W.2d 68, 75 (Tex. 1998) (orig. proceeding).


82 Id. at 386. Query how one would keep no electronic record of any document created unless all the attorneys and staff reverted to the IBM Selectric.

83 Id. at 386-87.

84 Id. at 387.

85 Id.

86 Id. at 389.

87 REX STOUT, IN THE BEST FAMILIES 199 (1950).

88 _Peeler v. Hughes & Luce_, 909 S.W.2d 494, 497-98 (Tex. 1995).

89 _Owens v. Harmon_, 28 S.W.3d 177, 179 (Tex. App.–Texarkana 2000, pet. denied) (Grant, J. concurring). See also id. (“If a criminal lawyer can bungle a case sufficiently so that his client will never get out of prison, then the attorney can never be responsible for malpractice”).
“questionable.” In that particular case, the court concluded that “[a]ctual error . . . is insufficient to overcome the public policy considerations articulated in Peeler.”

Courts have also found opportunities to avoid Peeler by refusing to apply it where guilt or innocence were not a causal factor in the damages alleged by a plaintiff. For example, the sole proximate cause defense will not apply to a breach of contract action seeking the return of fees paid when the attorney wholly fails to show up for a hearing. Similarly, the First Court of Appeals has refused to apply the rule where the malpractice claim was limited to the contention that the client was prematurely incarcerated and suffered loss as a result of an attorney’s negligence at the bond hearing.

B. Duties To Third Parties

In 1999, the Supreme Court of Texas decided McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, in which the Court imposed upon attorneys the duty to use reasonable care to avoid misrepresentations to non-clients. Relying upon RESTATEMENT (SECOND) OF TORTS § 552(2) (1977), the Court held that the duty arises when (1) the attorney is aware of the non-client and intends for the non-client to rely on the representation, and (2) the non-client justifiably relies on the attorney’s representation of a material fact. Several cases this year tested the limits of the new duties attorneys have to non-clients. In surveying the cases, one can draw an immediate distinction between the factual situations often encountered by transactional lawyers, and those encountered by litigators.

1. There Is No Private Cause Of Action For War Reparations

One of the biggest differences between the exposure faced by transactional and litigation practitioners is the quasi-immunity that is developing for causes of action arising from conduct in representing a litigation client. Four Texas intermediate appellate courts have recently emphasized that an attorney cannot be held liable by an opposing party for wrongful litigation conduct. Indeed, the First Court of Appeals enthusiastically upheld $100,000 in sanctions, in part because the offending attorney dared file a pleading containing such a claim. The reason for the rule is part legal and part public policy. Legally, the attorney generally owes his or her allegiance only to the client, not the litigation adversary. As a matter of public policy, the public has an interest in assuring that the attorney pursues that duty single-mindedly in litigation, without the chilling effect that potential liability to an adversary might have. Thus, so long as the conduct of which the adversary complains is undertaken in representing the client, no complaint can be made. In determining whether the conduct qualifies for such protection, the courts focus upon the nature of the conduct (e.g., filing motions,

90 Peeler, 909 S.W.2d at 497-98 (defense applied even where attorney “admitted to actions that are questionable, such as his admission that he directed Owens not to testify at his criminal trial and that he did not know whether Owens knew he had a right to testify”).

91 Id. Cf. Macias v. Moreno, 30 S.W.3d 25, 27-28 (Tex. App.–El Paso 2000, pet. denied) (applying Peeler but holding that exoneration occurred when the charges against the client were dismissed, making the sole proximate cause instruction improper).


93 See Satterwhite v. Jacobs, 26 S.W.3d 35, 36 (Tex. App.–Houston [1st Dist.] 2000, pet. filed); see also id. at 37 (“Here Satterwhite’s action against Jacobs is based solely on a transaction that occurred prior to the criminal trial. Thus, Satterwhite’s subsequent conviction is irrelevant to the cause-in-fact issue involved in his civil action against Jacobs”).

94 991 S.W.2d 787 (Tex. 1999).

95 McCamish, 991 S.W.2d at 793-794.


97 Bradt, 14 S.W.3d at 769 (noting that the frivolous pleadings had caused nearly a million dollars in defense costs, and observing that “[i]f anything, appellant’s sanction was disproportionately small”).

98 White, 32 S.W.3d at 275.

99 Chapman Trust, 32 S.W.3d at 440; White, 32 S.W.3d at 275; Mitchell, 10 S.W.3d at 812.
obtaining orders, producing or withholding documents etc.) and not on whether the conduct was meritorious.\textsuperscript{100} The remedy for unmeritorious litigation conduct is public, not private.\textsuperscript{101} Because court-imposed sanctions are available, an attorney’s conduct is not actionable even if it is frivolous or without merit, as long as the conduct was part of discharging duties to the client.\textsuperscript{102}

Instead of focusing on the type of conduct as all prior courts have done, one court has focused upon the motive underlying the lawyer’s conduct. In Mendoza v. Fleming,\textsuperscript{103} the court reversed a summary judgment granted to the defendant attorney because there was some evidence the garnishment procedure instituted by the attorney was timed “to wrongfully interfere with appellant’s judicial campaign.”\textsuperscript{104} This focus on motive is dangerously misfocused. If litigation is to be kept from spinning into satellite litigation about litigation, and if litigators are to be safe in the performance of vigorous advocacy for their clients, courts must allow suits for wrongful garnishment against clients, but must sanction attorneys for improper litigation conduct (with greater frequency and severity than they are doing now) when and if they find it. Otherwise, the effective and aggressive strategy of your own attorney becomes your adversary’s asset, and the truth-seeking attributes of the adversary system become chilled.

2. “War Is Hell”\textsuperscript{105}–Or Why You Should Never Believe A Trial Lawyer

The question remains whether this Nuremberg-like defense translates from war (litigation) to diplomacy (transactions). Some post-McCamish cases would indicate that it does not. Courts considering whether to extend McCamish into the litigation context have refused to do so on the basis that one is not justified as a matter of law in relying upon the statements of the opponent’s trial counsel.\textsuperscript{106} For example, the Texarkana Court of Appeals specifically distinguished McCamish based upon the differences between litigation and transactions. In a case involving two co-executrixes, only one of whom was represented by counsel, the court noted:

This case is distinguishable from McCamish, which occurred in a transactional, as opposed to litigation, setting. In this case, the parties had engaged in numerous, protracted suits. . . . Under these facts, she was not justified in relying on Werley’s statements, even if they were material and Werley [the attorney] intended that she rely on them.\textsuperscript{107}

The same court refused to impose a duty upon litigation counsel to volunteer information to correct a false impression or prevent fraudulent conduct on the part of the client:

[A]n attorney has no duty to reveal information about a client to a third party when that client is perpetrating a nonviolent, purely financial fraud through silence. . . . When an attorney does make misrepresentations on behalf of a client, the general standard for fraud applies. But the attorney has no duty to correct representations that prove to be false.\textsuperscript{108}

Although Werley escaped these claims on summary judgment, a cautionary word is nevertheless appropriate. It is easy to imagine how the co-executrix in Lesikar could have assumed that the attorney would look after her interests, aligned as

\begin{itemize}
\item \textsuperscript{100} Chapman Trust, 32 S.W.3d at 440; White, 32 S.W.3d at 276.
\item \textsuperscript{101} Mitchell, 10 S.W.3d at 812.
\item \textsuperscript{102} Chapman Trust, 32 S.W.3d at 440.
\item \textsuperscript{103} 41 S.W.3d 781 (Tex. App.–Corpus Christi 2001, no pet.).
\item \textsuperscript{104} Id. at 787.
\item \textsuperscript{105} William Tecumseh Sherman, attributed to a graduation address at Michigan Military Academy (June 19, 1879).
\item \textsuperscript{106} See Lesikar v. Rappeport, 33 S.W.3d 282, 319 (Tex. App.–Texarkana 2000, no pet.) (holding that attorney had no duty to client’s litigation opponent); Mitchell, 10 S.W.3d at 812 (holding that representation of adverse client could create no duty under RESTATMENT (SECOND) OF TORTS § 552, and alternatively that defendant attorney had not provided false information for the guidance of the opposing client in a business transaction).
\item \textsuperscript{107} Id. See also McCamish, 991 S.W.2d at 794 (noting that the reviewing court must consider the nature of the relationship between the attorney, client, and non-client for purposes of determining whether there is justifiable reliance).
\item \textsuperscript{108} Lesikar, 33 S.W.3d at 319-320.
\end{itemize}
she was with the client/co-executrix. Here, good communication on the part of the attorney in the form of a letter setting out who he represented, and more importantly, who he did not represent, would have strengthened the motion for summary judgment, and might even have prevented the claim.

Finally, the Corpus Christi Court of Appeals decided a case that will have application primarily in the employment or criminal context. In San Benito Bank & Trust Co. v. Landair Travels,109 the court refused to impose any duty to warn upon the attorney (and former employer) of an embezzler who promptly embezzled from her next employer to pay the settlement she had worked out with her former employer.110

C. Duties To The Courts And The System

1. Good Lawyers Make Bad Witnesses

Although most disqualifications occur in an effort to protect the duties of confidentiality and loyalty that attorneys have for their clients, some disqualifications occur to protect the integrity of the system. One example is the prohibition against trial counsel acting as an essential fact witness. Because client confidences are not at issue, the standard for disqualification is higher. The party seeking disqualification must present evidence that the lawyer’s testimony is “necessary” in the sense that it goes to an essential fact in the nonmovant’s case, and must demonstrate actual prejudice to itself resulting from the opposing lawyer’s services in the dual roles.111 Likewise, the nonmovant may avoid disqualification by promptly notifying opposing counsel of his dual role and advising him that disqualification would work a hardship on his client.112 If disqualified, the “disqualified” lawyer is not prohibited from working on the case; he or she simply cannot try the case, thereby causing potential confusion to the jury and handicapping the opponent’s ability to challenge his credibility.113

In In re Bahn, the movant satisfied its disqualification burden because the alleged acts of improper debt collection of which the plaintiff complained occurred over the phone to the plaintiff’s attorney.114 The plaintiff failed to qualify for the “hardship” safe harbor because sending the hardship letter three days after the motion to disqualify was not “prompt” notification.115 The movant cleverly argued that the plaintiff’s whole firm ought to be disqualified because payment under the plaintiff’s contingency fee contract would result in improper payment to a fact witness for his testimony.116 The court, however, opted for the less draconian remedy of allowing the plaintiff to rework his fee agreement before disqualifying all of his preferred counsel.117

2. “When You Call Me That, Smile”– The Limits Of Advocacy And Of Judicial Opprobrium

Courts are frequently required to set the line of demarcation between forceful advocacy and the type of disrespect that trained advocates should never show. This year was no exception.

The political smoke fairly billows from Sears v. Olivarez, in which the appellant sought (without opposition) to recuse the entire Thirteenth Court of Appeals and transfer the case to another court.119 Although most lawyers have fairly good success with unopposed motions, the movant in Sears surely hurt his chances by the argument he chose. The motion states:

109 31 S.W.3d 312, 321 (Tex. App.–Corpus Christi 2000, no pet.).
110 Id. at 321 (“The experience of becoming a crime victim cannot carry with it a duty to protect against the future tortious conduct of the criminal. . . . The criminal alone is responsible for his conduct, and we find no social utility whatever of imposing any duty upon a victim to ensure the safety of potential future victims”).
111 In re Bahn, 13 S.W.3d at 873.
112 Id.
113 Id. at 875 (“[T]he rationales for disqualifying an attorney from trying a case because he will testify ‘do not apply when the testifying lawyer is merely performing out-of-court functions, such as drafting pleadings or assisting with pre-trial strategy’ ”).
114 Id. at 874.
115 Id. at 874–75.
116 Id. at 876. See also TEX. DISCIPLINARY R. PROF’L CONDUCT 3.04(b).
117 Id. at 876–77.
118 OWEN WISTER, THE VIRGINIAN ch. 2 (1902).
119 28 S.W.3d 611, 613 (Tex. App.–Corpus Christi 2000, no pet.) (en banc).
As you know, Mr. Condit is the only Republican candidate seeking a position on this Court that has been dominated by democratic party members.

* * *

It is Mr. Condit’s and his clients’ belief that the Court will decide this case not on the well-established law cited in the briefs and not on the factual merits of this case, but solely to promote the democratic agenda in order to assist the Court’s democratic colleagues and/or retaliate (sic) against him.120

None of the judges of the Thirteenth Court of Appeals voluntarily recused him or herself. The court, sitting en banc (but excluding each justice in turn), voted on and denied the appellant’s motion.121 Thus, as is always the case when crossing the line, the heated verbiage drew ire rather than results. Ineffective writing is bad writing, even if it is within the bounds of the rules. But more than that, it earned Mr. Condit a trip to the State Commission on Judicial Conduct.122 Quoting the San Antonio Court of Appeals, Sears observed:

A distinction must be drawn between respectful advocacy and judicial denigration. Although the former is entitled to a protected voice, the latter can only be condoned at the expense of the public’s confidence in the judicial process. Even were this court willing to tolerate the personal insult levied by [counsel], we are obligated to maintain the respect due this Court and the legal system we took an oath to serve.123

Similarly, the previously-discussed lawyer who ill-advisedly sued his former love interest for legal fees, drew the ire of the court by filing a frivolous counter-counterclaim with unnecessarily incendiary language. The attorney suggested that his former lover and her attorney were in league with “the devil” and ought to be “horse-whipped.”124 He even served requests for admission concerning his former lover’s sex drive.125 Although the court of appeals was forced by the record to let the attorney skate the underlying claims of the former client/lover, the court had plenty of evidence in the record to uphold the finding that the attorney’s “conduct was not up to the standards of how lawyers should conduct themselves in a lawsuit.”126 Twenty thousand dollars was awarded.127

If advocates can sometimes transgress the limits of propriety, so can the courts. In fact, the Fifth Circuit classified In re Greene as “a classic case of a judge making a mountain out of a molehill.”128 Mr. Greene, a federal public defender, had the misfortune of showing up ten minutes late for an arraignment docket before a federal district judge.129 Rather than accept Mr. Greene’s apology or his proof that his secretary had mistakenly listed the arraignment as being before the magistrate at 9:30, the judge announced his intent to immediately try Greene for criminal contempt.130 During the immediate trial, the judge came to the conclusion that Greene had misrepresented to the court the location of an inconsequential letter within the lawyer’s own file.131 The judge found Greene guilty of two counts of contempt, one for being twelve minutes late and one for lying about the location of the letter.132

---

120 Id.

121 Id. at 615-16.

122 Id. at 617.

123 Id. at 616 (quoting In re Maloney, 949 S.W.2d 385, 388 (Tex. App.–San Antonio 1997, orig. proceeding) (per curiam)). In contrast to the Corpus Christi Court Of Appeals’ approach in protecting its honor, the Texarkana Court of Appeals was more lax in letting appellate counsel slide with a warning for its briefing practices. See Texas-Ohio Gas, Inc. v. Mecom, 28 S.W.3d 129, 145-46 (Tex. App.–Texarkana 2000, no pet.). While not quibbling with the fact that errors took place, the court left unnecessary leeway for the possibility that the “errors were not made in bad faith.” Id. at 146.

124 Gaspard, 36 S.W.3d at 239.

125 Id.

126 Id.

127 Id. at 239-40.

128 213 F.3d 223, 224 (5th Cir. 2000) (per curiam).

129 In re Greene, 213 F.3d at 224.

130 Id.

131 Id.

132 Id. at 225.
Thankfully, the Fifth Circuit did not let the matter drop. It held that when a lawyer has never before been late and offers a reasonable explanation, criminal contempt should not even be “on the judge’s radar screen” for such a “minor infraction.”\(^{133}\) As for the letter, the record showed that Greene truly was uncertain about its location in the file and that he was “justifiably bewildered about [the judge’s] intense interest in such a peripheral point.”\(^{134}\)

3. “I’m Not An Ambulance Chaser. I’m Usually There Before The Ambulance.”\(^{135}\)

These last cases are included mostly because their facts are irresistible, not because of any subtle ethical principle that they have to teach.

This just in: the State Bar of Texas has a problem with soliciting accident victims. So, when you send a letter addressed to a four-year-old accident victim on your stationary, they are not going to buy the “someone stole my letterhead” defense.\(^{136}\) Similarly, you might want to pause for a moment of quiet reflection before settling a personal injury case on behalf of a client that has never hired you, forging the non-client’s signature, and cashing the check. The State Bar frowns on it.\(^{137}\) Finally, if you suffer a default judgment at the hands of the Commission on Lawyer Discipline, be sure and get that motion for new trial in the mail before the end of the thirtieth day. The courts do not cut any slack for clients whose lawyers miss jurisdictional deadlines, and they will not be any more gracious for the lawyers.\(^{138}\)

---

\(^{133}\) Id. at 225.

\(^{134}\) Id.

\(^{135}\) Melvin Belli, quoted in ROBERT BYRNE, 1,911 BEST THINGS ANYBODY EVER SAID 345 (1988).

\(^{136}\) See generally Medlock v. Commission for Lawyer Discipline, 24 S.W.3d 865 (Tex. App.–Texarkana 2000, no pet.).


\(^{138}\) See Smith v. Commission for Lawyer Discipline, 42 S.W.3d 362, 363 (Tex. App.–Houston [14th Dist.] 2001, no pet.) (“Because appellant’s motion for new trial was mailed on October 1, 1999, thirty-one days after the judgment was signed on August 31, 1999, it was not timely filed”).