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This newsletter is intended to summarize the most significant recent cases impacting non-medical professional malpractice litigation. It is not a comprehensive digest of every case involving professional liability issues during the period or of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice. Any opinions expressed herein are those of the author and do not necessarily reflect the views of Shannon, Gracey, Ratliff & Miller, LLP.

Imputed Disqualification

In re Columbia Healthcare Sys., L.P., 320 S.W.3d 819 (Tex. 2010)

In the action underlying this mandamus proceeding, Yvonne and Alberto Leal sued Columbia Valley Healthcare System. Brin & Brin, P.C. represented Columbia Valley. Brin & Brin also employed Margarita Rodriguez as a custodian of records. In her capacity as custodian of records, Rodriguez filed many privileged documents relating to the suit. She also prepared correspondence to Columbia Valley and its insurer.

Rodriguez left Brin & Brin after signing a confidentiality agreement. Approximately 11 months later, Magellanes & Hinojosa hired her as a legal assistant for J.A. Magellanes. Magellanes represented the Leals in the suit. Magallanes also knew Rodriguez had worked on the Leal's case at Brin & Brin. He ordered her not to work on any case she had prior involvement, specifically including the cases she had worked on at Brin & Brin. Luz Castro, the other legal assistant at the firm, was assigned the Leal file.

Despite instructions not to work on any case in which she had prior involvement, Rodriguez worked on the Leal file. Magellanes again instructed Rodriguez not to work on the case after learning she scheduled the docket control conference, and he warned Rodriguez and Castro they would be dismissed if it happened again. Nevertheless, Rodriguez continued to work on the file, including once making copies at Magellanes' instruction.

Opposing counsel at Brin & Brin moved to disqualify Magellanes & Hinojosa from the Leal suit after learning they employed Rodriguez. The trial court denied the motion but ordered Rodriguez not to be involved in any of the cases in which she had worked while at Brin & Brin. Dissatisfied with the trial court's ruling, Columbia Valley sought mandamus relief. The court of appeals denied the requested relief, concluding Magellanes & Hinojosa took sufficient precautions to prevent disclosure of confidential information. The Supreme Court of Texas determined otherwise and conditionally granted mandamus.

Like attorneys, non-attorney employees of a law firm are deemed to be imparted confidential information. Non-attorney employees of law firms are also presumed to share confidential information with other members of the firm. In the case of non-

attorney employees, however, the presumption may be rebutted, but only on a showing that: (1) the employee was instructed not to work on any matter in which he or she worked on during prior employment; and (2) the firm took other reasonable steps to ensure the employee does not work on any matters he or she worked on during prior employment. The effectiveness of the other reasonable steps are evaluated against a number of factors the court enumerated: how substantial the relationship is between the current and former matters; the time elapsed between current and former matters; the size of the firm; the number of individuals presumed to have confidential information; the nature of their involvement in the former matter; and the timing and features of any measures taken to reduce the danger of disclosure. In this case, Magellanes instructed Rodriguez not to work on any matter she had previously worked on, which satisfied the first element. As to the second element, however, the court found the firm's actions to be insufficient.

The Supreme Court of Texas concluded that a simple, informal admonition to a non-attorney employee not to work on a matter the employee previously worked on, even if repeated twice and with the threat of termination, does not satisfy the requirement of other reasonable measures. The minimum requirement is formal, institutionalized screening measures that render the possibility of the non-attorney employee having contact with the file less likely. Moreover, the court held that when the employee actually works on the file and the employer reasonably should know about the conflict of interest, the risk of shared confidential information is great enough that it will be deemed to exist and disqualification is required no matter what the screening procedures are or how trivial the involvement is. The court pointed out that involvement for a simple, clerical task such as making copies signals that guarding against conflicts of interest is not important. In this case, Rodriguez indisputably worked on the Leal file at Magellnes & Hinojosa after working on the Leal file at Brin & Brin. Magellanus indisputably knew of the conflict of interest. Consequently, confidential information was deemed shared and the firm's disqualification was required.

In re ProEducation Int'l, Inc., 587 F.3d 296 (5th Cir. 2009)

In *ProEducation*, the Fifth Circuit Court of Appeals considered whether representing a client adverse to a former associate's client created a conflict of interest.

Lionel Schooler, an attorney with Jackson Walker, represented MindPrint, Inc. He had represented MindPrint since 1999 in a state-court suit against ProEducation. Several shareholders of ProEducation, including Dr. Mark D'Andrea, intervened in the suit and took positions adverse to MindPrint. In 2000, while the suit was still pending, ProEducation filed for Chapter 7 bankruptcy. The state-court suit was subsequently removed to bankruptcy court as an adversary proceeding. In 2005, MindPrint and the shareholders prevailed over ProEducation in the adversary proceeding. The bankruptcy court denied MindPrint's motion for sanctions against the shareholders, however. MindPrint appealed the denial of sanctions.

Attorney Kirk Kennedy came to work for Jackson Walker in the bankruptcy section in February 2003. He worked down the hall from Schooler. In November 2004 Kennedy left Jackson Walker and became general counsel for Gulf Coast Cancer Center. Dr. D'Andrea was medical director of the center.

In November 2005, Dr. D'Andrea's attorney, Tom Schmidt, informed Schooler that he was planning to withdraw and Kennedy would be Dr. D'Andrea's counsel. MindPrint objected to Kennedy's involvement because of his previous connection to Jackson Walker and moved to disqualify him.

The bankruptcy court granted MindPrint's motion to disqualify Kennedy. It first presumed that the client provided confidential information to the attorney who did the work, then presumed that an individual lawyer will share confidences with the other members of his firm. The court treated the presumptions as irrebuttable, and declined to consider Kennedy's evidence that he did not receive MindPrint's confidential information. The district court affirmed the bankruptcy court.

The court of appeals would later note that the case the bankruptcy court relied on for the proposition that the presumptions were irrebuttable did not apply the presumptions, and thus the comments regarding the presumption were dicta. Moreover, the cases the opinion cited in its dicta were cases applying the superseded Texas rules.

In its analysis, the court of appeals looked to the local rules for the source of law to apply. The Local Rules of the Southern District of Texas stated that the minimum standard was the Texas Disciplinary Rules of Professional Conduct, but that the court is not limited to that code. As the Texas rules are not the sole authority, the court of appeals also looked to the ethical rules announced by the national profession—the ABA Model Rules of Professional Conduct.

The relevant Texas rule, 1.09, and the relevant model rule, 1.9(b), reach the same result. Personal conflicts of one attorney are imputed to all members of the firm. However, the imputation to other lawyers is removed when they are no longer in the same firm as the affected lawyer. The court of appeals noted that the Texas Supreme Court has not addressed the precise fact pattern, but the Texas Commission on Professional Ethics has. In its opinion no. 501, the commission concluded that so long as the attorney does not personally come within the provisions of the rule, he may represent a client adverse to his former associate's client. The court of appeals also noted the commission's opinion no. 483 reached a contrary conclusion, but was based on a superseded version of the Texas Rules.

The evidence available showed that Kennedy did not personally represent MindPrint, gain any actual knowledge of MindPrint, attend meetings where MindPrint's representation was discussed, or meet MindPrint's principal. Kennedy did not learn Schooler represented MindPrint until about six months after he left Jackson Walker. MindPrint did not present any contrary evidence. In the course of the proceedings, Schooler made equivocal statements that he did not know of any information Kennedy acquired, and that he did not ask Kennedy to assist in the case, but he also did not know what might have been discussed at section meetings Kennedy might have attended, what Kennedy might have heard in the halls, or what Kennedy might have seen in the file. The court of appeals held the evidence was sufficient to demonstrate Kennedy did not have a conflict of interest and reversed.

Legal Malpractice – Privity

Smith v. O'Donnell, 288 S.W.3d 417 (Tex. 2009)

In *O'Donnell,* the Texas Supreme Court addressed whether a third party may bring a

legal malpractice claim against a lawyer. The Supreme Court previously held in *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996), that third party beneficiaries of an estate could not bring legal malpractice actions. A few years later, in *Belt v. Oppenheimer*, 192 S.W.3d 780 (Tex. 2006), the court held that an executor was in privity with the decedent's attorney and could bring an action against the attorney for estate-planning malpractice. Further, the court held that claims for pure economic loss are survivable and an estate's personal representative may bring survivable claims on behalf of the estate.

In *O'Donnell,* the court considered whether an executor may bring suit against a decedent's attorney for malpractice committed outside the estate-planning context. Corwin Denney served as executor of his wife's estate upon her death. While serving as executor, Corwin retained Cox & Smith to advise him regarding the separate versus community characterization of the couple's assets. Cox & Smith advised Corwin that certain stock was presumed to be community property, but additional information was necessary before a proper classification of the assets could occur. Cox & Smith also stated that they advised Corwin he should pursue a declaratory judgment to properly classify the stock. After Corwin declined to obtain a declaratory judgment, Cox & Smith prepared an estate tax return that omitted the stock from a list of his wife's assets.

When Corwin died 29 years later he left the bulk of his estate to charity. One month after his death, the beneficiaries of his wife's trust sued Corwin's estate alleging that Corwin misclassified the stock as separate property and consequently underfunded the trust that was established at the time of her death. O'Donnell, the executor of Corwin's estate settled the beneficiary's claims and subsequently brought suit for legal malpractice against Cox & Smith alleging the attorneys failed to properly advise Corwin regarding the characterization of the assets.

The trial court granted summary judgment for the attorneys on every claim without stating a basis for the decision. The San Antonio Court of Appeals initially affirmed the summary judgment holding that no cause of action accrued to the decedent during his lifetime, and thus the executor lacked privity with the lawyers. The Texas Supreme Court remanded the case for reconsideration in light of the court's 2006 decision in *Belt v. Oppenheimer*. On remand, the court of appeals held: (1) a fact issue existed on whether the malpractice cause of action accrued during the decedent's lifetime; and (2) whether the claim would survive in favor the estate. The defendant attorneys appealed.

The Texas Supreme Court began its analysis by reiterating the general rule discussed in *Belt* that "legal malpractice claims alleging economic loss survive in favor of a deceased client's estate."

After identifying the claims as survivable, the court moved onto the issue of whether an executor should be permitted to bring the suit against the attorneys. The attorneys argued that *Barcelo* bars all legal malpractice suits brought by non-clients except estate-planning malpractice claims brought by executors similar to the one in *Belt*.

The Supreme Court rejected the argument holding that to adopt the rule would place Texas in the minority among the other states and would "immunize attorneys who commit malpractice." The court further explained that none of the concerns expressed in *Barcelo* were relevant in this

instance. "The threat of executor lawsuits will not impede the attorney-client relationship, because the estate's suit is based on injury to the deceased client, as opposed to any third party." Further, the court reasoned that the estate's suit is identical to the one that the client could have brought during his lifetime.

Justice Willett authored a dissent joined by Justice Wainwright. He wrote, "Unlike the Court, I believe today's case is governed by *Barcelo's* general privity barrier, as it is rife with *Barcelo* like concerns of divided loyalties and conflicts of interest." Further, Justice Willett explained that this case contained precisely the type of "gamesmanship" that *Belt* warned of when disappointed beneficiaries recast a malpractice claim for "lost" inheritance as a claim brought on behalf of the estate.

Justice Willett argued that *Barcelo*'s privity barrier should apply because of the numerous conflicts of interest. "While this case has a slightly altered procedural posture—suit filed by the executor, not the beneficiaries, directly—there is little confusion that the executor is a pass-through, essentially brining the children's claims in the estate's name." Consequently, the dissent emphasized that the privity rule should "preempt lawsuits where the executor effectively serves as a pass-through for the beneficiaries' claims."

Avery Pharmaceuticals, Inc. v. Haynes and Boone, L.L.P., No. 2-07-317-CV, 2009 WL 279334 (Tex. App.—Fort Worth Feb. 5, 2009, no pet.) (mem. op.)

In *Avery Pharmaceuticals,* a former CEO claimed that attorneys at Haynes and Boone committed malpractice, fraud, misrepresentation and conspiracy to defraud, and breached their fiduciary duty in connection with a start up entity that later failed.

The defendant attorneys moved for summary judgment on the legal malpractice, breach of fiduciary duty, fraud, negligent misrepresentation, and conspiracy to defraud claims. Specifically, they claimed there was no evidence that the CEO was ever their client. Consequently, they never owed him any duty. The trial court agreed.

On appeal, the court explained there are difficulties in determining whether an attorney-client relationship exists when a lawyer represents a small entity with "extensive common ownership and management." Generally, representing a corporation does not create privity between the attorney and the corporation's investors, officers, directors, or shareholders. The court further explained that because a corporation is a legal entity separate and apart from the persons that compose it, a cause of action against someone that injured the corporation belongs to the corporation. The importance of the subjective belief of the former CEO was insufficient to create the attorney-client relationship.

Applying these principles, the court determined the prior CEO did not present any evidence that the attorneys represented him. Because no attorney-client relationship existed, no fiduciary duties were owed to the former CEO.

Fractured Professional Negligence Claims

Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C., 284 S.W.3d 416 (Tex. App.—Austin 2009, no pet.)

Gary Beck hired Ted Terry to represent him in his divorce. The central issue in the divorce was the characterization of assets as community or separate property. Beck argued the stock of two corporations he owned were his separate property, and advanced a tracing theory in support. His wife argued that the stock was community property. At mediation, the parties agreed to a 57%-43% split of the assets, including the stock. After they proved up the divorce and settlement agreement, the judge entered judgment. Subsequently Beck became displeased with the settlement and refused to sign the ancillary documents, doing so only under threat of arrest.

Beck sued Terry, his firm, and associates, alleging professional negligence, breach of fiduciary duty, DTPA violations, and breach of contract. The district court granted the defendants' motion for summary judgment as to breach of fiduciary duty, DTPA, and breach of contract claims. The professional negligence claim proceeded to trial and the jury determined there was no negligence. Beck appealed the grant of summary judgment. The court of appeals affirmed the district court's disposition of the breach of contract claim because the provision Beck relied on was not an enforceable promise.

The breach of fiduciary duty claim and the DTPA claim both required the court of appeals to determine whether the claims were improper "fractured" professional negligence actions or legitimately distinct causes of action. The court of appeals noted the fact that it is not bound by the labels the parties apply to their claims, and likened the analysis to determining whether claims are based on contract versus the DTPA or whether claims sound in contract or tort.

Beck's basis for the breach of fiduciary duty claim was that the defendants did not disclose Terry's alcohol and substance abuse problems. The court noted that this fact is sensational, but not unlike other factors that affect a lawyer's performance, whether physiological (such as sleep deprivation) or not (such as an absent secretary) in that the issue is the quality of the lawyer's performance. There was nothing to suggest that the defendants failed to disclose in order to obtain an improper benefit rather than because of the general aversion to disclose uncomfortable private facts to others. There was no evidence more was at stake than legal fees, which is present in virtually every attorney-client relationship. Because the claim goes to the quality of representation rather than the attorney's obtaining an improper benefit from failing to disclose, it is a fractured professional negligence claim. Similarly the DTPA claim, which was also based on Terry's undisclosed alcohol and substance abuse problem, went to the quality of representation. The district court was correct to grant summary judgment.

Cooper v. Harris, 329 S.W.3d 898 (Tex. App.—Houston [14th Dist.] 2010, pet. filed)

Harris hired Cooper to pursue employment discrimination claims on August 11, 2000, after BASF fired Harris the previous day. Six months later, Cooper filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), which was untimely as to Harris's state-law claims. The EEOC dismissed the charge and notified Harris that if he decided to sue, he must do so within 90 days of receipt of the notice. Six months after that, Cooper filed suit in state court. After removing to federal court, BASF moved for summary judgment on the basis that the claims were barred for

failure to pursue administrative remedies until more than 180 days after the alleged unlawful discrimination. The district court granted BASF's motion.

Harris sued Cooper alleging various claims including negligence and breach of contract. The trial court entered judgment on the jury's verdict, awarding a total judgment of over $2.9 million. Cooper challenged the legal sufficiency of the evidence on appeal.

On the negligence claim, the trier of fact must have some basis for understanding the causal link between the negligence and harm. Determining whether Harris would have recovered a judgment against BASF if he had been represented by a reasonably prudent attorney was beyond the jury's common understanding, so expert testimony was required. The only expert testimony offered were nonspecific and conclusory and failed to address the complicated factual and legal issues involved in determining causation. Therefore it was not sufficient to enable the trier of fact to determine causation.

The breach of contract claim failed because it was actually a fractured professional negligence claim, for which there was no evidence of causation. Where the gist of a client's complaint is that the attorney did not exercise the care, skill, and diligence of a reasonably prudent attorney, the claim should be pursued as a negligence claim. Where the complaint is more appropriately classified as another claim, then the client may assert a claim other than negligence.

In this case, Harris sought the same damages for his negligence and "breach of contract" claims. The basis of the breach of contract claim was also Cooper's failure to timely file the EEOC charge. The court of appeals determined that Harris's complaint was about Cooper's failure to exercise the degree of care, skill, and diligence as a reasonably prudent attorney, and thus a fractured negligence claim.

<u>Breach of Fiduciary Duty</u>

Franks v. Roades, 310 S.W.3d 615 (Tex. App.—Corpus Christi 2010, no pet.)

Attorney John Roades began representing Christine Franks in 1999, when he prepared a durable power of attorney appointing her son, Michael Franks, as her attorney-in-fact. In 2001, Franks changed the power of attorney to appoint her daughter, Carol Thompson, as her attorney-in-fact.

Over time Franks' condition deteriorated and Carol would help her with various activities. In 2003, Franks was diagnosed with "severe and global cognitive dysfunction." She was informed she should have complete supervision in tasks that require memory, such as managing the meals and medications. Due to her history of mini-strokes and nighttime hallucinations, 24-hour care was recommended. Carol arranged for sitters to assist with household tasks to aid in Franks' care.

Michael disagreed with the diagnoses, however. He encouraged Franks to not take her medicine and threatened Carol and her family. Because of these difficulties, Carol sought Roades' assistance on multiple occasions.

Eventually, unable to work things out with Michael, Carol decided to seek a guardianship for Franks. She retained Roades to file the application. The same day, Michael and Franks came to Roades' office because Michael wanted him to change Franks' power of attorney and appoint Michael her attorney-in-fact. Roades told Michael that he could not

represent him and that he should seek another attorney.

In the guardianship proceeding, Franks' attorney ad litem moved to disqualify Roades from representing Carol based on his prior representation of Franks. Roades nonsuited the guardianship proceeding after Franks, Michael, and Carol entered into a mediated settlement agreement in December 2003.

In July 2005, Franks sued Roades and Carol, asserting negligence, breach of fiduciary duty, gross negligence, conversion, fraud, and deceptive trade practices. Roades filed a traditional and no-evidence motion for summary judgment. In response to the summary judgment motions, Franks attached the affidavit of an expert in guardianship law, who opined Roades breached his fiduciary duty and was negligent. Without stating any grounds, the trial court granted Roades' motion.

On appeal, Franks argued the trial court erred because Roades offered no expert testimony to rebut her expert, and fact issues existed as to the breach of fiduciary duty and negligence claims. The court of appeals concluded Franks' expert's affidavit was conclusory and thus not competent summary judgment evidence. Franks' expert opined that Roades wrongfully initiated the guardianship proceedings, but offered no basis for that conclusion. She opined that wrongfully bringing a guardianship proceeding would obviously be a breach of duty, but does not explain the legal basis for that conclusion. She stated $120,000 were spent in attorney's fees and costs, but does not explain how Roades' negligence, if any, actually damaged Franks. She opined that Roades breached his fiduciary duty based on his representation of Franks' attorney-in-fact, Carol, but she did not state the standard by which Roades' fiduciary duty is measured and did not explain how Roades' representation of Franks' chosen attorney-in-fact acting under the power Franks gave her places Roades in the position of representing two different parties or how the parties were adverse. She opined that Roades personally benefited while obtaining no benefit to Franks, but does not clarify how Franks received no benefit. The court of appeals also pointed out that personal benefit cannot be the sole measure for breach of fiduciary duty, because like any other professionals, attorneys expect to be paid.

Franks' allegation that Roades breached his duty of loyalty to her was based on his pursuing the guardianship over her objections, the objections of her attorney ad litem, and over the objections of her privately retained counsel, and by representing Carol in the proceedings. The court of appeals pointed out that there was no evidence anyone objected to the guardianship. The attorney ad litem generally denied, as required to force the guardianship applicant to prove all elements necessary to its case. At the time Roades filed the application, he believed Franks was incapacitated, and undisputed facts supported that belief. As his client, disciplinary rule 1.02(g) required him to seek the guardianship. The rule does not limit the attorney from filing the proceeding on behalf of the person the client has already empowered with the ability to act on her behalf. Additionally, guardianship proceedings are not inherently adversarial. Anyone may bring a guardianship proceeding so long as their interests are not adverse to the proposed ward.

The court of appeals also concluded that Roades satisfied his duties under the attorney-client relationship with regard to the duty of full disclosure. A fiduciary has a duty of full disclosure of all material facts

known to him that might affect his client's rights, and the relationship between an attorney and client is a fiduciary relationship. However, the disciplinary rules acknowledge that the client's situation may hamper an attorney's communication with his client. In this case, Roades reasonably believed his client was not competent, giving rise to his duty to seek a guardianship. The court of appeals concluded that Roades acted in accordance with his clients' instructions and under the guidance of the disciplinary rules, and thus did not breach his duty of full disclosure to Franks.

The basis of Franks' negligence claim was that Roades filed the guardianship application on behalf of Thompson. The court of appeals held that it is not unreasonable for an attorney to follow the mandates of the disciplinary rules.

<u>Evidence Necessary to Prove Damages Collectible in Prior Malpractice Case</u>

Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corporation, 299 S.W.3d 106 (Tex. 2009)

In *Akin, Gump*, the Texas Supreme Court considered what evidence is necessary to prove damages would have been collectible in the underlying case and whether a client may recover attorney's fees and expenses paid for representation in the prior case as damages in the malpractice case.

National Research and Development (NDR) hired Akin Gump to represent the company in a dispute with Panda Energy Corporation and its affiliates. After a jury trial, the trial court entered judgment generally in favor of Panda. NDR sued Akin Gump arguing that Akin Gump failed to request proper jury questions.

In the malpractice suit, the jury returned a verdict against Akin Gump and awarded damages for the following: "(1) $168,667.41 for the judgment paid by NDR in the Panda lawsuit; (2) $427,777.77 that was owed to NDR for the fair market value of its Pan-Sino stock; (3) $109,596.68 for success fees owed to NDR; and (4) $216,590.00 for attorney's fees and expenses paid by NDR in the Panda lawsuit." Akin Gump did not appeal the negligence award, but it appealed the other damage awards.

The Court of Appeals struck the $216,590.00 for attorney's fees paid by NDR in the Panda lawsuit, but affirmed the award of $427,777.77 for the fair market value of the Pan-Sino stock and success fees. Akin Gump challenged this on the grounds that the evidence was legally insufficient to support the jury's findings that NDR would have collected damages awarded in the Panda suit for the value of NDR's Pan-Sino stock and for success fees. NDR challenged the court of appeals' determination that attorney's fees it paid for representation in the Panda suit were not recoverable as damages.

The Texas Supreme Court first addressed the collectability of a judgment in the underlying case. It stated the general rule that "[w]hen the claim is that lawyers improperly represented the plaintiff in another case, the plaintiff must prove and obtain findings as to the amount of damages that would have been recoverable and collectible if the other case had been properly prosecuted." The relevant time period was after the judgment was signed: "[W]e conclude that evidence a defendant in the underlying suit could have satisfied a judgment at times *prior* to the time a judgment is signed generally will not be relevant to and will not be probative of the judgment's collectability…"

The court then addressed the evidence required to prove collectability. Proving the defendant was solvent is one way to prove collectability when "solvent" means the underlying defendant owned sufficient property subject to legal process to satisfy all outstanding debts and have property remaining to satisfy some or all of the damages the malpractice plaintiff would have recovered. Additionally, if the judgment creditor could show that the insolvent debtor had access to other ways to satisfy a judgment, then that evidence would be probative. Consequently, the amount that would have been collectible—provided the judgment is not dormant or preempted—will be the greater of either (1) the fair market value of the underlying defendant's net assets that would have been subject to legal process for satisfaction of the judgment as of the date the first judgment was signed or at some point thereafter, or (2) the amount that would have been paid on the judgment by the defendant or another, such as a guarantor or insurer.

The supreme court considered the sufficiency of the evidence proffered by NDR in the malpractice suit and determined it was legally insufficient to prove collectability of damages it would have been awarded in the Panda suit for the stock value and success fees.

Turning to attorney's fees, the Texas Supreme Court reversed the court of appeals holding that attorney's fees paid in the Panda suit were not recoverable. The Supreme Court held that the general rule as to recovery of attorney's fees from an adverse party in litigation does not bar a malpractice plaintiff from claiming damages in the malpractice case for fees it paid its attorneys in the underlying suit.

The situation in this case did not involve the American Rule that prevails in Texas. "NDR does not seek to recover attorney's fees for prosecuting its malpractice suit against Akin Gump. It seeks damages measured by the economic harm it suffered from Akin Gump's breach of its duty of care in prosecuting the Panda suit." Further, the court held there was "little difference" between damages measured by the amount the malpractice plaintiff would have recovered and collected in an underlying suit and damages measured by attorney's fees it paid for representation in the underlying suit so long as it was the defendant attorney's negligence that proximately caused the fees. "In both instances, the attorney's negligence caused identifiable economic harm to the malpractice plaintiff."

Legal Ethics – Disclosure of Confidential Information

Opinion No. 603, Professional Ethics Committee for the State Bar of Texas (November 2010)

The commission considered a scenario where a lawyer represents a corporation that a single individual, the "corporate representative," owns and runs. The corporate representative is breaching his fiduciary duty to the corporation, but is not breaking the law. Because the corporation is insolvent, it will not be harmed by the corporate representative's breach of fiduciary duty, but its creditors are likely to be substantially harmed. The lawyer advises the corporate representative his acts are a breach of fiduciary duty to the corporation and should be stopped. The corporate representative continues and specifically instructs the lawyer not to inform the corporation's creditors. The question is whether the rules require, permit, or prohibit the lawyer from revealing to the corporation's creditors his advice to his client.

The commission first noted that preserving a client's confidential information is one of the fundamental obligations of a lawyer. The lawyer's conclusions about the conduct of the corporate representative and the resulting advice to the corporation meet the definition of confidential information.

One exception to the general prohibition against sharing a client's confidential information permits a lawyer to reveal confidential information where the lawyer has reason to believe it is necessary to prevent the client from committing a criminal act or fraud. The facts provided specified the corporate representative's conduct was not criminal and conduct that breaches a fiduciary duty is not necessarily fraudulent. If the conduct is not fraudulent, nothing allows the lawyer to reveal confidential information.

If the corporate representative's conduct is fraudulent, the lawyer is required to attempt to dissuade the conduct under rules 1.02(d) and 1.12(c). Where, as in the facts considered, the client continues in wrongdoing, the lawyer is permitted to disclose confidential information under rule 1.05(c)(7) to the extent necessary to prevent the fraud. This means that if disclosing confidential information will not prevent the fraud, the lawyer may not disclose confidential information. It also means the lawyer must minimize any disclosure and its adverse affect on the client.

Finally, the commission noted the lawyer may be able to withdraw regardless of whether he is permitted to disclose confidential information.

Legal Ethics – Assignment of Life Insurance as Compensation

Opinion No. 596, Professional Ethics Committee for the State Bar of Texas (November 2010)

The commission considered a situation in which the client pays the lawyer by assigning a specific dollar amount of life insurance proceeds to the lawyer. The question is whether the rules permit such an arrangement.

The commission ultimately outlined four possible analyses dependent on additional facts. First, if the assignment is made after the lawyer has completed his representation of the client, the fact payment is made by assignment of insurance rather than money is not significant under the rules; the only consideration is the generally applicable requirements concerning legal fees in rule 1.04. If the assignment is made before the lawyer has completed his representation of the client, the next question is whether the insurance policy is the subject of litigation.

If the insurance policy is not the subject of litigation, assignment is permissible as long as it and any related payment is held and accounted for separately until representation is complete, as required by rule 1.14. If the insurance policy is the subject of litigation, rule 108(h) prohibits the assignment unless the assignment falls under the contingent-fee exception.

Legal Ethics – Settlement of Malpractice Suit

Opinion No. 593, Professional Ethics Committee for the State Bar of Texas (November 2010)

The commission considered a scenario in which a lawyer committed malpractice by missing the deadline to file a lawsuit, recognized the malpractice, and offered the client a settlement agreement for the malpractice claim. The client accepted the agreement without representation by independent counsel. The question was whether the rules permit the lawyer to enter such an agreement with a client.

The commission began its analysis by noting that where malpractice cannot be significantly mitigated through continued representation, rule 1.06 requires the attorney-client relationship end as to the matter in which the malpractice arose. Rule 2.01's requirement a lawyer renders candid advice; rule 1.15(d)'s requirement that upon termination of representation a lawyer take steps to protect the client's interests; and rule 8.04(a)(3)'s requirement that a lawyer not engage in dishonest, fraudulent, deceitful, or misrepresentative conduct collectively mean that the lawyer must promptly terminate the attorney-client relationship, so inform the client, and inform the client malpractice has occurred.

Once the lawyer has disclosed the malpractice and termination of the attorney-client relationship, if the attorney wants to attempt to settle the malpractice claim, rule 1.08(g) requires the lawyer must first advise the now-former client in writing that independent representation is appropriate regarding settlement of the malpractice claim.