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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.

Legal Malpractice—Duty; Damages

Parsons v. Greenberg, No. 02-10-00131-CV, 2012 WL 310505 (Tex. App.—Fort Worth 2012, no pet. h.) (mem. op.)

In 1991, Parsons hired attorney Turley to handle the wrongful death and survival actions arising from his wife's death. In that suit, Parsons received a judgment for $4.75 million. The jury also returned a verdict for punitive damages, but the trial court entered judgment notwithstanding the verdict as to the punitive damages.

In 1996, Parsons hired attorney Greenberg to sue Turley for legal malpractice. At Greenberg's suggestion, Parsons also hired attorney Motsenbocker. The trial court granted summary judgment for Turley because he was not served before the statute of limitations ran. The court of appeals affirmed.

While appealing the Turley malpractice case, Parsons hired a new attorney and sued Greenberg and Motsenbocker for legal malpractice. The jury found that Greenberg had been negligent, Motsenbocker had not been negligent, and awarded Parsons zero damages.

On appeal, Parsons argued that the jury's finding that Motsenbocker was not negligent was against the great weight and preponderance of the evidence. Undisputedly, Motsenbocker and Parsons had an attorney-client relationship. The question was what duties were imposed on Motsenberger.

The court noted Parsons presented no evidence that when two or more lawyers undertake representation of a client, each is responsible for overseeing the other's work. It also noted that Parsons advanced no vicarious liability theory to hold Motsenbocker liable for Greenberg's actions.

The undisputed evidence was that Greenberg filed the petition and delayed service of citation and that Motsenbocker was never tasked with issuing or serving the citation. Greenberg testified that he was not very good at legal writing and research and brings in others to help draft petitions and other motions practice. Parson's expert testified that Motsenbocker did not use due diligence in having the citation issued and service achieved, and Motsenbocker's expert testified that Motsenbocker was not negligent in the role he had at the time the lawsuit was filed. The court determined that the jury was free to give each expert's

testimony the weight it felt was appropriate. Consequently, the court of appeals held the jury's determination was not against the great weight and preponderance of the evidence.

Parsons also argued that the jury's zero damage finding was against the great weight and preponderance of the evidence, attempting to recover attorney's fees paid in the underlying suit. Attorney's fees paid in the underlying suit are recoverable in a legal malpractice case to the extent they were proximately caused by the defendant attorney's negligence. In this case, although Parsons presented bills and checks, there was no testimony about which bills were incurred because of negligence and which he would have incurred anyway. No fees related to the appeal were recoverable because Parsons did not present evidence showing that had Turley been properly sued, there would have been no other appeal for which he would have had to pay fees. The court of appeals acknowledged that this was a difficult burden, but held Parsons to it. Because he presented no evidence of fees incurred due to negligence, the court held the jury's finding of zero damages was not against the great weight and preponderance of the evidence.

Legal Malpractice—Causation

Tommy Gio, Inc. v. Dunlop, 348 S.W.3d 503 (Tex. App.—Dallas 2011, pet. denied)

Baker sued Tommy Gio and related entities for employment discrimination. The entities hired attorney Stephens to represent them.

Baker served discovery on the entities through Stephens. Later, the entities hired attorney Dunlop to represent them instead. Dunlop requested the litigation file from Stephens, but Stephens never responded. Dunlop confirmed through Baker's attorney that discovery had been served, that no responses have been made, and the responses were past due. Being past due, the requests for admissions were deemed admitted. Baker's attorney would not agree to an extension of time to respond to discovery and stated he would oppose a motion to undeem admissions. Dunlop never filed a motion to undeem the admissions.

At trial, the entities were precluded from controverting the deemed admissions. The admissions included facts that established Baker was unlawfully terminated, and the trial court awarded her damages.

The entities then sued Dunlop for legal malpractice, contending that he should have filed a motion to undeem admissions.

On appeal, the court noted that a legal malpractice plaintiff has the burden of proving that but for his attorney's negligence, he would have prevailed in the underlying case. In this case, the first step was to determine whether a motion to undeem admissions would have been granted, making a different outcome possible. Under Texas Rule of Civil Procedure 198.3, a trial court has discretion in allowing a party to withdraw or amend admissions, but only on a showing of good cause and lack of undue prejudice to the other side. The court of appeals noted that an appellate court should set aside the trial court's ruling on a motion to undeem admissions only on an abuse of discretion. Proving causation in this case thus required evidence that conclusively established good cause such that the trial court in the earlier case would have abused its discretion in failing to set aside the deemed admissions had such a motion been filed.

The entities' expert testified that he did not believe a motion to undeem admissions would have been denied, but admitted it was a possibility. At trial there was evidence that Stephens was sick, which was circumstantial evidence of accident or mistake in failing to timely respond. However Dunlop stated that he was not aware of any accident or mistake despite trying to get that information from Stephens. He did not file the motion for that reason, and for the additional reason that the entities did not cooperate in providing the necessary information for the responses and the motion would be more likely to succeed if discovery responses were served.

Because the entities failed to prove that the trial court would be required to set aside the deemed admissions, they were unable to prove that the outcome would have been different, and therefore their malpractice claim failed.

> *Dove v. Graham,* 358 S.W.3d 681 (Tex. App.—San Antonio 2011, pet. denied)

In 2001, Kraft caused a car accident that involved Dove. Dove hired attorneys Graham and Ross to represent her in her suit against Kraft. They filed suit in May 2003.

As the suit progressed, the parties requested multiple continuances, which the trial court granted. On January 14, 2008, on the day of trial, Dove's counsel requested a continuance. When the trial court denied the request, Dove's counsel nonsuited her case without her approval.

Dove hired new counsel to pursue her legal malpractice claims against Graham, Ross, and their firm for their failure to prepare and try her case in a reasonably diligent manner, which had resulted in limitations barring her suit against Kraft. She also named Kraft as a defendant in the suit, but he had moved to California and she was unable to locate him.

Dove's former attorneys, the defendants, sought and obtained leave to designate Kraft as a responsible third party. They located him in California and served him with their cross-claim and Dove's petition. Kraft answered both, arguing limitations and that he was improperly joined as a responsible third party. He moved for traditional summary judgment on limitations. The trial court denied Kraft's motion because he was barred from raising the defense under Chapter 33 of the Texas Civil Practice & Remedies Code.

Dove's former attorneys moved for traditional summary judgment arguing that the revival of Dove's action against Kraft conclusively disproved the causation element of Dove's malpractice action against them. The trial court granted the attorney's motion and severed the claim making it a final judgment. Dove appealed, and the court of appeals reversed.

The court of appeals stated that the attorney's focus on the "cure" of the personal injury action appeared to be related to mitigation rather than causation. Dove's claims were by then over ten years old and she still had to overcome limitations and laches in order to prevail. She was not and could not be returned to the position she was in before the nonsuit. However, if successful, Dove's suit against Kraft may reduce or eliminate the damages attributable to the attorney's malpractice.

The causation element requires a malpractice plaintiff to prove that she would have prevailed in the underlying suit but for her attorney's malpractice. Because Kraft's designation as a responsible third party and subsequent joinder did not conclusively establish Dove would not have prevailed in

her original suit against him, the trial court erred in granting the summary judgment. The court of appeals remanded the severed cause.

Legal Malpractice—Limitations

Isaacs v. Schleier, 356 S.W.3d 548 (Tex. App.—Texarkana 2011, pet. denied)

The Isaacses sold a race track to Bishop in a transaction in which attorney Schleier prepared the documents for the sale and charged both parties a fee. Six months after the sale, the Isaacses visited the track and got involved in a fight with a track worker. Bishop also got involved in the fight in an attempt to break it up. After the fight, hard feelings developed between Mr. Issacs and Bishop, and Mr. Isaacs began looking into the track's operations.

Mr. Isaacs discovered that Bishop had failed to deliver full insurance policies that named the Isaacses as additional insureds, in violation of the terms of the security agreement. Schleier issued a notice of default on the Isaacses' behalf. Bishop objected to Schleier representing the Isaacses in this matter when he had represented both sides in the sale, and he demanded Schleier withdraw. Schleier denied he represented Bishop.

Bishop sued the Isaacses, Schleier, and other parties, asserting numerous claims. Among them was a legal malpractice claim against Schleier and fraud claims against the Isaacses for falsely representing that Schleier would represent both parties to the transaction.

Although he had previously denied representing Bishop, Schleier admitted on the stand at trial that he represented both parties. The jury found an attorney-client relationship between Schleier and Bishop and found Schleier negligent. The jury also found that the Isaacses committed fraud.

The Isaacses then sued Schleier. Schleier argued that the Isaacses' various claims were really a malpractice claim, and was barred by limitations. The court of appeals agreed with Schleier. It further held that the Isaacses should have discovered their legal injury with reasonable diligence when Bishop first claimed Schleier represented both parties in the transaction, therefore the discovery rule did not preserve the Isaacses' malpractice claim.

The final issue was whether the *Hughes* doctrine tolled limitations. The Isaacses relied on *Gulf Coast Investment Corp. v. Brown*, 821 S.W.2d 159 (Tex. 1991) (per curiam), in which application of the *Hughes* doctrine tolled limitations on Gulf Coast's legal malpractice suit against Brown until the conclusion of other litigation. In *Brown*, the viability of the malpractice action for failing to foreclose properly depended on the outcome of the wrongful foreclosure action brought by a third party. The court of appeals distinguished *Brown* from this case on that basis. The Isaacses' liability to Bishop did not depend on whether Schleier had an attorney-client relationship with Bishop; it depended on a finding that the Isaacses knew Schleier's denial of dual representation was false. Even after Schleier admitted dual representation, the Isaacses has a viable defense to Bishop's claim.

Because the court of appeals held that the *Hughes* doctrine did not apply, the statute of limitations was not tolled, and the Isaacses' claims were therefore barred.

Imputed Disqualification

In re Guar. Ins. Srvcs., 343 S.W.3d 130 (Tex. 2011) (orig. proceeding) (per curiam)

Trans-Global Solutions sued Guaranty Insurance Services, an insurance agent, for failing to obtain appropriate insurance. Guaranty prevailed, and in a separate action it sued Trans-Global for indemnity for its defense costs. Trans-Global was represented by attorneys at Godwin Pappas Langley Ronquillo, and remained with the same attorneys when the attorneys moved to Kane Russell Coleman & Logan. Strasburger & Price represented Guaranty.

Williams, a paralegal, began work at Godwin Pappas in 2005. While there, he billed 6.8 hours to the Trans-Global case for time he spent identifying persons with knowledge of relevant facts, drafting an initial response to Guaranty's requests for disclosures, assisting in document production, and communicating with opposing counsel. He left Godwin Pappas in 2006.

Williams applied for a paralegal position with Strasburger in 2008. In the hiring process, he identified Godwin Pappas as a prior employer. Strasburger ran a conflicts check, which came back clear. At Strasburger's request, Willaims identified potential conflicts based on his prior work on matters in which Strasburger represented another party. Williams identified two other cases but did not identify the Trans-Global case as a conflict because he did not remember billing to it. At Strasburger, Williams billed about 27 hours to the case for time spent affixing bates labels to documents and attaching redacting tape to passages highlighted by an attorney.

Strasburger learned of the conflict when one of Trans-Global's attorneys, now at Kane Russell, recognized Williams as a former Godwin Pappas employee after email communications between the parties' counsel made reference to Williams as a Strasburger legal assistant. Strasburger immediately instructed Williams to stop working on the matter.

Trans-Global moved to disqualify Strasburger. Although Trans-Global conceded no confidences were actually shared, the trial court granted its motion. The court of appeals stated Strasburger's screening procedures were exemplary but nevertheless declined to provide mandamus relief because the screening procedures were ultimately ineffective. The Supreme Court of Texas reversed, holding that Strasburger took reasonable steps that achieved the practical effects of screening.

When a lawyer or a non-lawyer works on a matter, they are deemed to have obtained confidential information. Lawyers are also deemed to share confidences with others at a new firm. However, unlike lawyers, non-lawyers are only presumed to share confidences with others at a new firm. The presumption becomes conclusive if: (1) confidential information is actually disclosed; (2) screening would be ineffective or the non-attorney would necessarily have to work on the other side of a matter they previously worked on at a prior firm; or (3) the non-lawyer actually performed work, including clerical work, on the matter at a lawyer's directive if the lawyer should have reasonably known of the conflict. Otherwise, the presumption may be rebutted by: (1) instructing the non-lawyer not to work on any matter he worked on during prior employment or in which he has information relating to the former employer's information; and (2) taking other reasonable steps to ensure he does not work

in connection with matters on which he worked in previous employment. The other reasonable steps must include at a minimum institutionalized, formal screening measures. Strasburger had such screening measures, but they failed to screen Williams from this case.

The ultimate failure to prevent a non-lawyer from working on a matter on which he had worked in previous employment may not require disqualification; perfection in screening is not required. Disqualification is not required where the practical effect of formal screening has been achieved. Whether the practical effect has been achieved is evaluated by balancing six factors: (1) the substantiality of the relationship between the matters; (2) the time elapsed between the matters; (3) the size of the firm; (4) the number of individuals presumed to have confidential information; (5) the nature of involvement in the former matter; and (6) the timing and features of any measures taken to reduce the dangers of disclosure.

In this case, the relationship between the matters was substantial, but mitigated somewhat by the fact that summary judgment had limited the scope of the matter to the amount of attorney's fees and whether they were recoverable. The supreme court said the other factors indicated effective screening.

The court had previously addressed a situation in which a paralegal similarly worked both sides of a case in *In re Columbia Valley Healthcare System., L.P.*, 320 S.W.3d 819 (Tex. 2010). In *Columbia*, the paralegal worked on clerical tasks for the case at her new firm, and the court held disqualification was required. The court distinguished this case from *Columbia* on two points. First, in *Columbia*, the paralegal's new firm did not have any formal screening measures. Second, in *Columbia*, the firm did not immediately remove the paralegal's access to the case. The supervising attorney in *Columbia* even asked the paralegal to work on the case after the conflict came to light. Here, the court stated that Strasburger's immediate instruction to Williams to stop working on the case once it learned of the conflict paralleled and reinforced its thorough attempts to preempt the conflict in the first place.

Legal Ethics—Safeguarding Clients' Confidential Information

Tex. Comm. on Prof'l Ethics, Op. 609, 74 Tex. B.J. 856 (2011)

The Professional Ethics Committte for the State Bar of Texas evaluated whether an attorney employed by an insurance company may office with an insurance adjuster employed by the same company. In the scenario considered, the adjuster would evaluate whether and to what extent the company-issued policy provides coverage on some of the same matters in which the attorney would represent the insured.

The committee began by noting that the attorney owes his client, the insured, unqualified loyalty. It also noted that no disciplinary rule of professional conduct specifically prohibits an attorney from sharing office space with a non-attorney.

The committee concluded that it is permissible for an attorney to office with a non-attorney, provided the attorney takes appropriate steps to protect the client's confidential information. Such steps may include restricting access to client files and office equipment. Staff should also be trained to protect client confidences.

Legal Ethics—Fee Arrangements

Tex. Comm. on Prof'l Ethics, Op. 611,
74 Tex. B.J. 944 (2011)

The ethics committee considered a scenario in which an attorney proposed to deposit into his operating account an amount denominated a "non-refundable retainer," which covers all services the lawyer will provide in the matter up to trial.

Texas Disciplinary Rule of Professional Conduct 104(a) prohibits attorneys from entering into arrangements for an unconscionable fee. For a non-refundable retainer, the factor in evaluating the reasonableness of the fee is the likelihood that the acceptance of the employment will preclude other employment by the lawyer.

A non-refundable retainer is not a payment for services, but is an advance fee to secure a lawyer's services and compensate him for the loss of opportunity to accept other employment. A non-refundable retainer is deemed earned when received, and may be placed in the lawyer's operating account. If the client discharges the attorney before any opportunities have been lost, or the attorney withdraws voluntarily, the attorney should refund an equitable portion of the retainer. The fact that a portion may later be refunded does not negate that such amount has been earned or that it may immediately be deposited into the attorney's operating account.

A fee relating to future services is a non-refundable retainer at the time received only if the fee is entirely a reasonable fee to secure the availability of a lawyer's future services and compensate the lawyer for the preclusion of other employment. Any payment for services not yet completed does not meet the strict requirements for a non-refundable retainer.

The disciplinary rules do not prohibit a lawyer from entering into an agreement with a client that requires the payment of a fixed fee at the beginning of representation. But it is a violation of the disciplinary rules to agree with a client that a fee is non-refundable upon receipt, regardless of designation, if that fee is not in its entirety a reasonable fee solely for the lawyer's agreement to accept employment in the matter.

When a client provides one check that represents both a non-refundable retainer and a refundable advance payment, the entire check should be placed in a trust account and the portion representing the non-refundable retainer may be moved into the attorney's operating account.

Legal Ethics—Communication with Opposing Parties

Tex. Comm. on Prof'l Ethics, Op. 613,
75 Tex. B.J. 70 (2012)

The ethics committee considered a scenario in which an attorney retained by an insurance company as defense counsel proposes to provide notice directly to the opposing party of a settlement payment issued to that party's attorney.

Under Texas Disciplinary Rule of Professional Conduct 4.02(a), a lawyer is prohibited from communicating about the subject of litigation with a person the lawyer knows is represented by another lawyer, unless the lawyer consents or the communication is authorized by law. In this scenario the party's attorney does not consent to direct communication.

The Texas Department of Insurance (TDI), strongly encourages notification of a settlement—but does not require it. The committee concluded that TDI's

encouragement does not make notification 'authorized by law' for purposes of the disciplinary rules.

The committee also noted that insurance companies are not subject to the disciplinary rules. While an attorney may not cause another party to carry out communication the attorney could not make, the attorney is not required to affirmatively discourage an insurance company from communication in which the attorney is not involved.

Officer & Director Liability—Fiduciary Duty

Lindley v. McKnight, 349 S.W.3d 113 (Tex. App.—Fort Worth 2011, no pet. h.)

McKnight was president and a shareholder of two bank holding companies. Daws was also a shareholder of the two companies. In 1996, in connection with a Subchapter S (flow-through tax treatment) election, the companies issued shareholder agreements with restrictions designed to prevent transfers that would disqualify the entities from Subchapter S status. Daws and all other shareholders agreed to the election and shareholders agreement.

In 2000, Daws died. Her will left almost all of her stock in the two companies to her niece, Lindley. The transfer to Lindley constituted an involuntary transfer under each shareholder agreement. Although the number of shareholders was less than the maximum the bylaws permitted, the directors found it undesirable to increase the number of shareholders. At the meetings of the respective companies, the boards voted that the shares should be redeemed through a payment of the book value of the stock. As independent executor of the Daws estate, Lindley sued McKnight and others, including a breach of fiduciary duty claim against McKnight for causing Daws to sign the shareholder agreements.

Generally, a director's fiduciary duties run to the corporation, not to individual shareholders. The law does not recognize a fiduciary relationship lightly. However, a contract or confidential relationship gives rise to an exception. In this case:

- McKnight was Daws's distant relative, perhaps third or fourth cousin, by marriage.
- McKnight gave advice to Daws on oil and gas matters unrelated to the corporations at issue in this case. However, this assistance was not special to Daws, as McKnight assisted other women as well.
- McKnight once asked Daws for an investment. However, arms-length transactions for the parties' mutual benefit are not a basis for imposing a fiduciary relationship.
- McKnight lived close to Daws as a child and once worked for Daws's husband.
- McKnight served as a pall bearer at Daws' funeral at the request of a funeral director, and attended her burial service.

The court of appeals considered these facts to be "common to ordinary friendly and neighborly relationships." It held these facts did not amount to any material evidence that would justify imposition of a fiduciary duty. Therefore the trial court did not err when it granted summary judgment in favor of McKnight on the breach of fiduciary duty claim.