LAWYER CONDUCT ISSUES FOR THE FAMILY LAWYER

By

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I. Introduction.

Family law practice frequently requires practitioners to develop expertise in several distinct bodies of law. The practitioner must often be knowledgeable of marital property rights, litigation, business entity issues and taxation issues. However, even mastery of each of these areas of law will not mean that the practitioner will be free from malpractice claims or grievances. Instead, quite the contrary is true. Family law practitioners tend to have a higher frequency of malpractice claims than practitioners in all other areas of practice except personal injury lawyers. And, like personal injury lawyers, family lawyers must also weather a significant number of grievances that likely will be filed against them during the course of their career.

Does that mean that a family lawyer should just resign himself to the fact that he will have malpractice claims and grievances. The answer is a resounding No! Instead, avoiding a few types of conduct should assist the family law practitioner in preventing the worst claims and some of the more difficult grievances.

II. Tort Concerns for Family Lawyers.

Rather than focus on the specifics of malpractice and other tort claims asserted against family lawyers, it is more important to focus on a few important themes that continue to affect family lawyers.

A. <u>Conflicts of Interest</u>:

In the not-to-remote past, it was not unusual for a family lawyer to be requested to represent both spouses in an uncontested divorce. That practice still exists to some

extent in smaller counties. However, in larger counties, most lawyers seem to acknowledge that the practice is fraught with more perils than it is economically worth. In addition, it is not uncommon for a lawyer who undertakes to represent jointly the husband and wife in a divorce action to also forget that there can be no attorney-client privilege as between the two spouses. That is because in a joint representation, a lawyer may not refuse to disclose to one client the information given by the other client to him in the context of that representation. See Tex. Disc. Rule of Prof. Conduct Rule 1.06 (hereinafter the "Disciplinary Rules").

Even with the apparent demise of the practice of jointly representing the spouses, the existence of conflicts of interest have not gone away. Instead, the analysis has become far more sophisticated. Today a conflict is more likely to arise based upon a lawyer's representation of a spouse, and her, or someone within her firm's prior representation of another party in a matter that is substantially related to the prior representation. The first sign of a potential malpractice claim is often the filing of a motion to disqualify the lawyer with an alleged conflict of interest. We are still seeing a substantial number of disqualification motions that are being heard around the state. Dallas County can claim the dubious distinction of having generated more Texas Supreme Court decisions on disqualification issues than any other county in the state. Ultimately, the problem with disqualification motions is that if you fight the motion for disqualification and lose because of an alleged conflict, you will likely also draw a malpractice claim for the same conflict. Further, fighting the disqualification motion can be quite expensive. It is not uncommon for the motion to require two or more days

of evidentiary hearings and one or more rounds of substantial briefing and testimony by a small cadre of experts. And, as we now know, some and possibly all of the work product of the disqualified lawyer may not be available to the successor counsel. *In re George*, 28 S.W.3d 511 (Tex. 2000) (as to materials in public domain, those materials may presumptively be transferred to successor counsel unless opposing party moves to seal records or for protective order; as to counsel's work product, those materials are subject to a rebuttal presumption that the transfer will leak the former client's confidence. The party seeking access may, however, rebut presumption that materials are not likely to contain or reflect confidential material. Disqualified counsel will be required to produce inventory of the work product and describe type of work, subject matter of item, claims it relates to and any other factor court considered relevant.)

There are a couple of unique conflict issues that can arise for family lawyers. For instance, if we assume that the lawyer runs the name of the potential client and potential adverse parties through her conflicts database, it is still entirely possible to miss a conflict where the potential client or adverse party has changed their name. *See Howard v. Texas Department of Human Services*, 791 S.W.2d 313 (Tex. App. -- Corpus Christi 1990, no writ) (lawyer was retained to represent wife regarding conservatorship of her children. Subsequently, wife changed her name without lawyer's knowledge, and lawyer was appointed attorney *ad litem* for children. This lawyer was disqualified based on a conflict arising out of the two representations.)

The other somewhat unique type of conflict that can arise for family lawyers involves situations in which the lawyer represents a creditor of the community estate

and another party having a potentially adverse interest in the community estate, such as a receiver. *See e.g. Mallou v. Payne & Vindig*, 750 S.W.2d 251 (Tex. App. -- Dallas 1988, writ den'd).

From a risk management point of view, a family practitioner can try to minimize his or her malpractice exposure by maintaining an up-to-date conflicts database and making certain that the potential client has not previously changed their name. Limiting the representation to a single party in the case will also help minimize the risk of a conflict of interest arising.

B. <u>Sex, Lies and Sleeping with Clients and Others</u>:

One of the allegations that has occurred with greater frequency in the recent past against family lawyers has been an allegation by the client that the lawyer either made improper advances towards the client, or allegedly agreed to swap sex for fees.

An interesting twist on this scenario is alleged to have occurred in *Kahlig v. Boyd*, 980 S.W. 2d 685 (Tex App. -- San Antonio 1998, pet. den'd). In *Kahlig*, the client sued his former lawyer when he learned that the lawyer had an affair with the client's second wife while the lawyer was representing the husband in a child-custody dispute with the client's first wife. Although the client sued the lawyer on a variety of theories, the case was only tried on fraud and deceptive trade practices theories. The only fraud alleged was the concealment of the affair. In affirming a judgment not withstanding the verdict in favor of the lawyer, the court of appeals found that the lawyer's "private behavior" did not adversely affect his professional performance at trial. In part, it appears the lawyer was greatly assisted by the trial judge's testimony that the lawyer was a good

advocate for his client, the husband, in the custody matter. In passing, the Court of Appeals noted that the lawyer was disciplined for this conduct.

Although not specifically articulated, the result of *Kahlig*, had the case been tried on a breach of fiduciary duty theory, might have been different. It is difficult to conceive of how concealment of sleeping with the client's wife during a child-custody proceeding is not engaging in disloyal conduct. And, keep in mind that in a breach of fiduciary claim in which fee forfeiture is the requested remedy, proof of causation will not be required. *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

Another case in which sex with a client allegedly occurred was tried on fraud and intentional infliction of emotional distress theories. This case also failed to yield a recovery for the plaintiff. In *Gaspard v. Beadle*, 36 S.W.3d 229 (Tex.App.--Houston [1st Dist.] 2001, rev. denied), the attorney and client entered into a written hourly fee agreement for a real estate matter. Mid-way through the representation, the client and the lawyer began dating and having a sexual relationship. Before the representation concluded, they stopped dating and the lawyer told the client he could no longer work for free. In reversing a jury verdict finding that the lawyer had engaged in fraud, the Court of Appeals found that acting as if the lawyer loved the client and promises to take care of her were not actionable fraudulent statements. Similarly, the court found that a statement that the lawyer could no longer work for free was also not an actionable fraudulent statement. The client's intentional infliction claim faired no better. The court pointed out that the client did not consider the lawyers conduct to be extreme or outrageous until the lawyer ended the relationship and sent the client a bill for his legal

work. The court held that although the lawyer did not behave in a socially appropriate manner, his conduct as a matter of law was not extreme and outrageous.

Texas is not alone in spawning claims against lawyers for alleged sexual misconduct with their clients. *See Doe v. Roe*, 756 F. Supp. 353 (N. D. Ill. 1991)(Lawyer coerces client into having sex with him, but there was not a RICO claim established because of insufficient injury to property*); In re McDow*, 291 S.C. 468 (S.C. 1987)(lawyer receives public reprimand for engaging in adulterous affair with his client). Nor are lawyers the only professionals in Texas being sued for engaging in sexual relations with their clients. *See Sunsinger v. Perez*, 2000 Tex. App. Lexis 2352 (Tex. App. -- Beaumont, 2000)(malpractice claim against doctor who practiced in family medicine and had consensual sex with patient was dismissed because patient failed to put on an expert to controvert doctor's testimony that he acted within standard of care). See also An Introduction to Professional Responsibility, N. Crystal, Aspen Law & Business, pp. 75-76.

In some states there has been an effort made to specifically change the disciplinary rules to take into account the problem of sex with clients. California has adopted a disciplinary rule that provides that an attorney engages in misconduct if the attorney (1) expressly or impliedly conditions performance of legal services on the client's willingness to engage in sexual relations, (2) employs coercion or undue influence in entering into sexual relations, or (3) continues representation of the client if the sexual relationship would cause the lawyer to act incompetently or otherwise prejudice the client's case. Cal. St. Bar R., R. 3-120 (Deering Supp. 1998); Cal. Bus & Prof

Code §6106.0 (Deering 1993); Rules regulating the Florida Bar, R. 4-8.4 (West. Supp. 1998); Iowa Rules of Court Prof. Responsibility DR 5-101(b) (West 1998); Minn. Stat.Ann., V. 52, Rules of Prof. Conduct, R. 1.8(k) (West Supp. 1998); N.C. Gen. Stat., Rules of Prof. Conduct of the State Bar R.1.18 (1998); Wis. Suppt. Ct. R. 1.8(k) (West 1998).

In Texas, the Women in the Profession Committee of the State Bar proposed an amendment to the Texas Disciplinary Rules. The proposed rule stated that.

> "a lawyer may not engage in a sexual relationship with a client, unless the lawyer and client are married to each other or already had a consensual sexual relationship before the lawyer-client relationship commenced."

L. Fipps, Sex-With-Clients Ban on Resolutions Committee Agenda, Texas Lawyer, Vol. 16, p. 5 (June 19, 2000). The Texas proposal so far has failed to gain sufficient support for approval.

Given the increased awareness of sexual misconduct in the work place, we should not be surprised that there is a heightened awareness of this issue within the attorney-client relationship. The greatest problem with these claims will remain proof of whether the misconduct occurred. And, more likely than not, it will boil down to a swearing match.

C. <u>Suits for Fees</u>:

Rivers of ink and mountains of paper have been devoted to warning lawyers not to sue clients for fees. Nevertheless, it is not uncommon for unpaid or underpaid lawyers to sue their clients for fees. The result usually is a compulsory counterclaim for

malpractice against the lawyer by the disgruntled former client. *See, e.g., Hardy v. McCorkle*, 765 S.W.2d 910 (Tex. Civ. -- Houston [1st Dist.] 1989, no writ); *Gaspad v. Beadle*, 36 S.W.3d 229 (Tex.Civ.--Houston [1st Dist.] 2001, rev. denied) (after romantic relationship with client terminated, lawyer sued for his fee which drew claims for fraud and intentional infliction of emotional distress). Does this mean that clients who fail to pay or underpay their lawyer should be allowed to walk away? I think not. Instead, in today's environment it is probably time to take a page out of the criminal defense lawyer's playbook. Get your money up front. And, if you can't get the money -- get out. Very few lawyers believe that they are charitable institutions.

An interesting twist on trying to collect a fee from a client occurred in *Brown v. Fullenweider*, 52 S.W.3d 169 (Tex. 2001). In *Fullenweider*, the lawyer filed a motion under former Section 3.70(a) of the Family Code seeking to collect his fees from his client on the theory that the divorce decree allowed him to do so. One of the benefits of the 3.70 motion was that it removed the potential of trial by jury. In rejecting use of former §3.70 as a collection device, the Texas Supreme Court pointed out that the purpose of former §§3.70 -3.77 now §§9.001 - .014 was to provide an expeditious procedure for enforcing and clarifying property divisions in divorce decrees. These sections were not intended to be used to resolve issues that specifically related to the division of the marital estate. In holding that an attorney claim for fees was not a claim for division of the marital estates the court pointed out that it was "wholly implausible that the legislature intended to deny an attorney and client the right to trial by jury in a dispute

over fees" from a divorce proceeding. Thus, after *Fullenweider*, family lawyers do not have a replacement procedure for collecting fees.

Assuming that you do sue for fees, is your claim limited to the amount of unpaid fees in the case? The short answer is probably. In *Stewart v. Bailiss*, 964 S.W.2d 920 (Tex. 1998) (per curiam), a Houston law firm sued its former client for the fees incurred in the divorce representation, but also was awarded by the jury $500,000 in lost contingency fees that the firm contended it would have earned from other cases. The firm offered evidence that it paid its overhead and expenses out of collections from clients who were charged for legal services based on hourly rates. The firm also showed that it accepted some contingence fee matters. The firm contended at trial that as long as the firm was able to collect the hourly fees from clients, it can financially afford to take on contingent fee cases. The firm also took the position that the former client's failure to pay the hourly fees she owed resulted in the firm's inability to take on contingent fee matters. In a per curiam opinion, the Supreme Court of Texas concluded that as a matter of law, loss of contingency fees in unrelated matters was not foreseeable and not collectable. The Court noted it would be a rare case indeed in which an attorney or law firm could demonstrate that the failure of a client to pay its bills gave rise to a recovery of contingent fees that might have been earned from other clients. The Court stressed that the fee agreement between the firm and the client made no mention of this possibility and contained no agreement to pay damages for the loss of potential contingent fees from other client matters. Because such a loss was not reasonably foreseeable, the

$500,000 awarded for lost contingent fees was stricken by the Texas Supreme Court. *Stewart v. Bailiss*, 964 S.W.2d 920 (Tex. 1998) (per curiam).

Given that the Disciplinary Rules discourage contingent fee agreements in family law matters, it is an unusual case in which a contingency fee arrangement will be available for a family lawyer. One such unusual situation is where the existence of the marriage is in question. *See Ballesteros v. Jones*, 985 S.W.2d 485, 497 (Tex.App.-San Antonio 1999, pet. denied) (a one-third contingency fee agreement was enforceable where the marriage might not be established such as in a common law marriage allegation that is disputed).

D. <u>Failure to Adequately Represent</u>:

Family lawyers have also drawn malpractice claims that essentially assert the family lawyer failed to adequately represent the client. For instance, in *Bolton v. Foreman*, 263 S.W.2d 618 (Tex. Civ. App. – Galveston 1954, writ ref'd n.r.e.), a family lawyer was sued for failure to protect the client's property rights because he allowed a default judgment to be taken against his client. Similar arguments can be made concerning lawyers who fail to respond to request for admissions, answer interrogatories, designate experts, or otherwise fail to comply with deadlines that routinely occur in the litigation process. The risk management tool that the family lawyer needs to implement to avoid such a claim is a comprehensive calendaring system in which all deadlines are calendared and attended to.

Family lawyers have been sued for failure to adequately represent their client in taking into account the nature of marital property. For instance, in *Yaklin v. Glusing,*

Sharpe & Kruger, 875 S.W.2d 380, 385 (Tex.App.--Corpus Christi 1994) the lawyer was alleged to have failed to adequately describe whether the promissory notes in question were community property, in whole or in part. The claim against the lawyer nevertheless failed because the plaintiff failed to prove that the notes would have been separate property, or that the trial court's award to the other spouse was predicated on the separate or community nature of the notes.

Family lawyers have also been subjected to a claim for failure to adequately represent a client based on not obtaining sufficient factual information to advise the client. *Ballasteros v. Jones*, 985 S.W.2d 485 (Tex. App. – San Antonio 1998, pet. denied) (former client's expert testified that a reasonably prudent attorney would not have advised his client to accept a settlement in which the attorney had undertaken no discovery to obtain asset information about the community estate, had not obtained an inventory, took no depositions and hired no investigator to investigate the former spouse's assets). After *Ballasteros*, it is clear that it is dangerous to advise a client to accept a property settlement without having adequate information about the value of the community estate. What is adequate information will depend upon the facts and circumstances of the case, and may be subject to some after the fact second-guessing.

E. <u>Failure to Advise, and the Scope of the Representation</u>:

One of the more common types of malpractice cases arises out of the lawyer's failure to adequately define the scope of the representation. For example, in *Moore v. Yarborough, Jamison & Gray*, 993 S.W.2d 760 (Tex. App. – Amarillo 1999, no writ), the attorney was retained to represent a spouse in a divorce suit. In the context of the

divorce, the lawyer discussed a possible personal-injury claim with the spouse, advising her that personal injury law was not his specialty and aiding her in obtaining counsel to pursue the personal-injury claim. The divorce attorney contacted the personal-injury attorney in an effort to determine whether the personal injury claims would be pursued in the divorce or in a separate lawsuit. Ultimately, the personal-injury claims were pursued in a separate lawsuit, and the divorce suit reached judgment first. After the personal-injury claim was barred by *res judicata*, the spouse contended that the divorce lawyer had a duty to advise her of the potentially adverse effect of trying the two claims separately. The claimant's expert testified that the family attorney and the personal-injury attorney both should have advised the client as to the *res judicata* danger in trying the two matters separately. In reversing summary judgment granted in favor of the family lawyer, the Amarillo Court of Appeals pointed out that the family lawyer failed to present summary judgment evidence that the facts presented in the course of the divorce case were not related in time, space or general motivation to the personal injury claim. And, therefore, the family lawyer failed to prove as a matter of law that the personal injury claim was sufficiently dissimilar to the divorce so that *res judicata* would not apply. The family lawyer therefore failed to establish that consultation about the possibility of *res judicata* was not required.

F. Negligent Misrepresentation after *Appling Interest*:

Family lawyers, like most other practitioners, will have some exposure for negligent misrepresentation claims. The seminal case on lawyer negligent msirepresentation is *McCamish Martin Brown & Loeffler v. Appling Interests*, 991 S.W.2d 787 (Tex. 1999). In *Appling*, a borrower obtained a loan from a savings and loan that

failed to extend credit. The borrower brought a lender-liability lawsuit against the savings and loan, and that case was settled. Fearing that the settlement might not be enforceable if the savings and loan were taken over by the Federal Savings and Loan Insurance Corporation, the borrower agreed to sign the settlement agreement only if the attorney for the savings and loan affirmed that the requirements of 12 U.S.C. § 1823(e) had been met so the settlement agreement would be enforceable. The board of directors of the savings and loan approved the settlement, and the settlement was signed by the borrower. However, several weeks before the board approved the settlement, the board adopted a resolution placing the institution under voluntary supervision by the state banking commissioner. The commissioner did not ratify the settlement, the institution failed and the settlement was unenforceable under federal law. The borrower then sued the savings and loan's attorney for negligent misrepresentation and fraud. The Court of Appeals reversed the trial court's summary judgment that dismissed the claim against the lawyers. The Court of Appeals pointed out that Texas recognizes a cause of action for negligent misrepresentation as defined by the Restatement of Torts (Second) § 552 (1977). In so holding, the Court of Appeals pointed out that the negligent misrepresentation claim was not equivalent to a professional malpractice claim. Instead, the Court of Appeals pointed out that Restatement (Second) of Torts provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplied false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Accordingly, the Court of Appeals found that privity was not required in order for a negligent misrepresentation claim to exist. *Appling* at 408. The Court of Appeals

explained that the basis for a negligent misrepresentation claim is the relationship of trust created when a attorney makes representations to a third party in order to induce the third party's reliance. *Id*. at 408.

The law firm was dissatisfied with the decision by the Court of Appeals and sought review by the Supreme Court of Texas. In a somewhat unusual fashion, the Supreme Court first denied writ, and then granted writ, heard oral argument and issued an opinion.

The question presented to the Supreme Court of Texas was whether the absence of an attorney-client relationship precluded a third party from suing an attorney for negligent misrepresentation under Section 552 of the Restatement (Second) of Torts. Notably, the Court refused to address in any way the potential liability of the law firm involved in the appeal. Instead, the Court only addressed whether a negligent misrepresentation claim could in fact be brought against an attorney. In holding that a negligent misrepresentation claim could be asserted, the court noted that it had already adopted the tort of negligent misrepresentation as described by Section 552 of the Restatement. The Court pointed out that eight lower court decisions had recognized a Section 552 claim against other professionals including, accountants[2], auditors[3], a physician[4], a real-estate broker[5], a securities placement agent[6], a surveyor[7] and a title

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2 *Shatterproof Glass Corp. v. James*, 466 S.W. 2d 873, 880 (Tex. Civ. App. – Fort Worth 1971, writ ref'd n.r.e.); *Blue Bell v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408, 411-12(Tex. App --- Dallas 1986, writ ref'd n.r.e.)

3 734 F.Supp. 269, 279-80 (N.D. Tex. 1990)

4 *Smith v. Sneed*, 938 S.W.2d 181, 185 (Tex. App. – Austin 1997, no writ).

5 *Hagans v. Woodruff*, 830 S.W.2d 732, 736 (Tex. App. – Houston [14th Dist.] 1992, no writ).

insurer.[8] The Court could perceive no reason why a section 552 claim should not apply to attorneys.

The Court found nothing in the language of Section 552 that warranted an exception for attorneys. The court said that allowing a negligent misrepresentation claim by a non-client did not implicate the policy concerns behind the Court's strict adherence to the privity rule in legal-malpractice cases. The Court looked to the Restatement (Third) of the Law Governing Lawyers Section 73, which sets forth certain circumstance under which an attorney may owe a duty of care to a non-client as support for the application of Section 552 to an attorney when the attorney invites a non-client's reliance.

The court noted that the typical negligent misrepresentation case involves one party to a transaction receiving and relying on an evaluation, such as an opinion letter, prepared by another party's attorney. The court stated that Disciplinary Rule 2.02 provided safeguards against a lawyer's exposure to conflicting duties, and ensures that the client make the ultimate decision of whether to provide such an evaluation to another party.

The Court further pointed out that Section 552 did not threaten lawyers with unlimited liability because Section 552 requires justifiable reliance on the alleged

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6 *Lutheran Bhd. v. Kidder Peabody & Co.*, 829 S.W. 2d 300, 309 (Tex. App. – Texarkana 1992, writ granted w.r.m.).

7 *Cook Consultants, Inc. v. Larson*, 700 S.W.2d 231, 234 (Tex. App. – Dallas, 1985, writ ref'd n.r.e.).

8 *Great Am. Mortgage Investors v. Louisville Title Ins. Co.*, 597 S.W.2d 425, 429-430 (Tex. Civ. App. – Fort Worth 1980, writ ref'd n.r.e.).

negligent misrepresentation. And, the Court found that liability is limited to the loss suffered by the person or a limited group of persons for whose benefit and guidance one intends to supply the information or knows that the recipient intends to supply it. Thus, there is only liability if the information is transferred by an attorney to a known party for a known purpose. The Court explained a lawyer may minimize the risk of liability to a non-client by setting forth the limitations on the persons the opinion is directed to, the scope and accuracy of the information or assumptions, or the scope of the representation itself.

The Court also carved out from potential liability attorney statements communicating a client's negotiation position. Such negotiation statements, the Court concluded, were not statements of material fact.

The Court stressed that the justifiable reliance element of such a claim will not always be present. The nature of the relationship the between the attorney, client, and non-client must be considered. The Court pointed out that reliance is not justified when the representation takes place in an adversarial context. The Court acknowledged that the adversarial concept is not limited to litigation. Instead, the same policy considerations present in litigation may apply to business and commercial transactions. The adversarial concept reflects that an attorney hired by a client for the benefit and protection of the clients' interest must pursue those interests with undivided loyalty within the confines of the Disciplinary Rules of Professional Conduct and the law. Whether a situation is "adversarial " or "non-adversarial" is a determination that

should be guided at least in part by the "extent to which the interest of the client and the third party are consistent with each other."

Notwithstanding the Court's attempts in *Appling* to limit negligent misrepresentation claims, there will still be in the future a substantial number of cases in which a negligent misrepresentation claim will be at issue. And, there still remain many unanswered questions. For instance, whether an adversarial relationship will be a fact question left to the jury or be a question for the court is an open question. What factors will be considered in determining whether the relationship is adversarial or not. Will one factor be controlling, or will the determination be based on the weight of all or some of these factors. Similarly, will the determination of whether a statement is a negotiating position or a statement of fact be a question for the court or the jury. What factors will the fact finder consider in determining whether a particular statement is a negotiating position? These and many more issues remain unanswered by the Court, and we will have to wait and see how these issues will affect all of our practices.

G. Breach of Fiduciary Duty and Fee Forfeiture After *Burrow*:

The remedy of fee forfeiture also will haunt many family law practitioners. In *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999), the Supreme Court of Texas held that an attorney's fee may be forfeited, even in the absence of proof of actual damages, based on a breach of a fiduciary duty owed to the client. The Court further held that whether such a forfeiture was appropriate was a question for the court.

In *Burrow*, the plaintiffs were former clients of five attorneys from the law firm of Umphrey, Burrow, Reaud, Williams & Bailey. The attorneys negotiated a $190 million settlement of the plaintiffs' personal injury and wrongful death claims, and their

resulting contingency fee exceeded $60 million. After the settlement, the plaintiffs filed suit against their former attorneys alleging that they had violated various rules of professional conduct in negotiating and executing their settlements. The plaintiffs asserted causes of action for breach of fiduciary duty, fraud, violations of the Deceptive Trade Practices-Consumer Protection Act, negligence and breach of contract.

Each of the plaintiffs' claims were disposed of, at the district court level, on the ground that the settlement was fair and reasonable and, consequently, no actual damages were incurred. The Fourteenth Court of Appeals affirmed, but not as to the plaintiffs' breach of fiduciary duty claims. *See Arce v. Burrow*, 958 S.W.2d 239, 251 (Tex. App.–Hous. [14th Dist.] 1997), *aff'd as modified*, 997 S.W.2d 229 (Tex. 1999). In regard to a breach of fiduciary duty by an attorney, the court of appeals held that actual damages need not be proven to justify a fee forfeiture. The court of appeals held further, however, that this equitable remedy was neither automatic nor total for every breach of fiduciary duty. Instead, the court held that the propriety of a fee forfeiture would vary from case to case and that the determination was for the court, not the jury.

In affirming the appellate court's decision regarding fee forfeiture, the Supreme Court noted that even though fee forfeiture is both compensatory and punitive in nature, compensation and punishment are not its main focus. Instead, the "central purpose" of a fee forfeiture is to "protect relationships of trust from an agent's disloyalty or other misconduct." *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999). The court therefore concluded that, to deter violations of these relationships of trust, actual damages should not be a prerequisite to a fee forfeiture. The court also agreed that a full fee forfeiture should not automatically apply to every breach of fiduciary duty by an attorney. The court set forth a list of nonexclusive factors that should be considered to determine the appropriateness and extent of the remedy. Those factors, taken from Section 49 of the Restatement (Third) of the Law Governing Lawyers, include "'the

gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.'" *Id.* at 243 (citing Restatement (Third) of the Law Governing Lawyers § 49 (Proposed Final Draft No. 1, 1996) [hereinafter RESTATEMENT]). Finally, the court added to that list "the public interest in maintaining the integrity of attorney-client relationships" and noted that this public policy goal was "at the heart of the fee forfeiture remedy." *Id.* at 244.

Section 49 to the RESTATEMENT provides as follows:

> A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. In determining whether and to what extent forfeiture is appropriate, relevant considerations include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.

RESTATEMENT § 49. The comments to Section 49 elaborate on the factors to be considered by a court in determining the appropriateness and extent of fee forfeiture. The comments provide ample support for the conservative application of fee forfeiture.

In particular, the comments note that conduct that constitutes malpractice may also support a breach of fiduciary duty claim, not every act of malpractice will support a fee forfeiture. "A lawyer's negligent legal research, for example, might constitute malpractice, but will not necessarily lead to fee forfeiture." *Id.* cmt. a. The comments likewise note that fee forfeiture will not be justified for every breach of duty by a lawyer. To determine whether the remedy applies, actual harm may be considered by a court, even though it is not required to impose the remedy. Further, a court should consider whether other causes of action, such as breach of contract and malpractice,

may adequately remedy the breach, rendering a forfeiture unnecessary. It is also relevant "[w]hether the breach involved [a] knowing violation or conscious disloyalty to a client." *Id.* cmt. d. The comments also cite to the Section 469 of the RESTATEMENT (SECOND) OF AGENCY, which allows for a full forfeiture only when the breach was both "willful and deliberate." *Id.* In that regard, "[f]orfeiture is generally inappropriate when the lawyer has not done anything willfully blameworthy." *Id.* And even when a forfeiture is allowed, a lawyer may be able to recover for services rendered before the misconduct at issue occurred. In any event, the "[f]orfeiture should be proportionate to the seriousness of the offense." *Id.* at 190.

The decisions from other jurisdictions applying fee forfeitures are generally consistent with Section 49 of the proposed Restatement Governing Lawyers and its accompanying comments. For the most part, it appears that courts are reluctant to apply the remedy when another will suffice, or when the effect of forfeiture would be unjustifiably punitive. For instance, in *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller*, 629 So. 2d 947, 951 (Fla. Dist. Ct. App. 1993), one Florida court of appeals noted that, in most instances, other remedies will adequately redress the breach of duty at issue and that courts of law should not be substituted for the disciplinary rules and procedures applied to attorneys. The court recognized that "[t]he unadorned legal conclusion that attorneys' fee agreements are greatly affected by public policy considerations, lacking in most other contractual arrangements, does not mean ipso facto that the ordinary legal remedies are insufficient to protect clients from breaching lawyers. Public policy concerns should supplant legal remedies only if such remedies

are inadequate to their purpose and insufficient to protect the client's unfettered right to end the services of a breaching lawyer." *Id.* The court declined to "confuse [its] role on this appeal with that of the lawyer disciplinary process, which belongs in another forum." *Id.* at 953.

Similarly, other courts have focused on the punitive nature of fee forfeiture and have limited its application. In *Gilchrist v. Perl*, 387 N.W.2d 412, 416 (Minn. 1986), the Minnesota Supreme Court noted that a fee forfeiture is both "reparational and admonitory" in nature. It reasoned that the punitive nature of the remedy was maximized when a total forfeiture was granted and that such an award "emphasizes the importance of strict fidelity to one's client and to the Rules of Professional Conduct." *Id.* at 416-17. However, the court also recognized that the law of punitive damages, at least in Minnesota, does not allow such an award to exceed what is appropriate to "punish and deter." *Id.* at 417 (internal quotations omitted). Therefore, to determine what award was appropriate, the court looked to the factors used when imposing punitive damages under the law of that state. The court concluded that only cases of "actual fraud or bad faith" should justify an automatic and complete forfeiture. In all other instances, the amount of the forfeiture should be determined with reference to punitive damages law. Likewise, the Supreme Court of Illinois, in *In re Marriage of Pagano*, 607 N.E.2d 1242, 1250 (Ill. 1992), has recognized the punitive nature of a complete fee forfeiture and has limited its application to "egregious" breaches of duty that "require the forfeiture of compensation by the fiduciary as a matter of public policy."

Still, other courts have implicitly recognized the punitive nature of the remedy and have accordingly required some element of willfulness to justify a fee forfeiture. In *International Materials Corp. v. Sun Corp.*, 824 S.W.2d 890, 894 (Mo. 1991), the Missouri Supreme Court noted that "forfeiture is generally inappropriate when the lawyer has done nothing willfully blameworthy, for example, where a conflict of interest arises after the lawyer accepts the client's case and the conflict could not have been discovered at the time the attorney accepted the case." *Id.* at 895. Likewise, the Supreme Court of Alaska has noted that a court should consider, before applying a complete forfeiture, both whether the attorney's conduct was intentional and whether it resulted in any prejudice to the client. *See In re Estate of Brandon*, 902 P.2d 1299, 1317 (Alaska 1995). Other courts likewise have limited the remedy to "actual, flagrant acts of fraud." *Littell v. Morton*, 369 F. Supp. 411, 425 (D. Md. 1974) (citing *In re Skoll*, 78 Minn. 408, 81 N.W. 210 (1899); *In re Conrad*, 340 Mo. 582, 105 S.W.2d 1 (1937); *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 98 S.W. 178 (1906)). And more often than not, even decisions allowing fee forfeitures permit the offending attorney or fiduciary to recover, under theories of quantum meruit or unjust enrichment, for services properly rendered and for which their fees may be apportioned. *See, e.g., Musico v. Champion Credit Corp.*, 764 F. Supp. 102, 113 (2d Cir. 1985) (and cases cited therein); *Fairfax Savings, F.S.B. v. Weinberg & Green*, 685 A.2d 1189, 1209 (Md. Ct. Spec. App. 1996); *International Materials*, 824 S.W.2d at 895; *Life Ins. Trust Agreement of Julius F. Seeman v. Gumbiner*, 841 P.2d 403, 405 (Colo. Ct. App. 1992); *Lurz v. Panek*, 527 N.E.2d 663, 671 (Ill. App. Ct. 1988).

The duties at issue in *Burrow* arose from the Texas Disciplinary Rules of Professional Conduct. In allowing ethical violations to support a fee forfeiture, even in the absence of actual damages, the Supreme Court has given the judiciary a tool to further regulate the integrity of the legal profession outside of a disciplinary context.[9] However, even if this tool will successfully deter breaches of fiduciary duties by attorneys, it appears that both attorneys and other fiduciaries are left vulnerable to sanctions with a potentially punitive effect, especially if the forfeiture granted is not proportionate to the gravity of the underlying offense.

One of the larger fee forfeiture cases is *Piro v. Sarofim*, 2002 WL 538741 (Tex.App.--Houston [1st Dist.] 2002). In *Piro*, the Court of Appeals affirmed the forfeiture of a $3,000,000.00 fee. During the trial, the trial court prepared a three page list of questions to ask the jury about disputed facts that the court felt had a bearing on the breach of fiduciary duty question. After reviewing the list, the defendant lawyers agreed to a global breach of fiduciary duty question. After the jury found against the defendant lawyers the lawyers asked the court for specific findings of fact on the breach of fidicuary duty. The trial court found, among others, that the fee agreement was unfair and was inadequately described by the lawyers. The trial court also made a detailed set of findings that the lawyers had over-billed the client. The trial court also noted that one of the lawyer defendants had not "maintained a professional relationship with the client" and had a romantic relationship with the client, although it was disputed

[9] *Compare Scheller*, 629 So.2d at 953 (court declined to confuse [its] rule on this appeal with that of the lawyer disciplinary process, which belongs in another forum.").

whether the relationship was sexual or not. The relationship was such that it could have affected the ability of one of the lawyers to be an effective advocate if the case had not settled. The court of appeals affirmed the forfeiture of the $3,000,000.00 fee.

Another recent case that could have interesting consequences on the fee forfeiture issue is *Haase v. Herberger*, 44 S.W.3d 267 (Tex.App.--Houston [1st Dist.] 2001). In *Haase*, the law firm was representing husband and wife in a construction lawsuit. While the construction lawsuit was pending, husband and wife filed for divorce using separate counsel. During the divorce proceeding, a settlement offer was made in the construction lawsuit that the wife wanted to accept, but the husband did not. The wife through her separate divorce counsel filed a motion in the divorce proceeding to allow her to accept the settlement on her signature alone. The motion was granted and the construction lawsuit was settled on her signature. The husband sued the construction lawyers for breach of a fiduciary duty and breach of contract and sought to require the forfeiture of fees by the law firm handling the construction lawsuit. In rejecting the availability of fee forfeiture the court of appeals held that because the family court had ordered the law firm to give complete effect to the wife's acceptance of the settlement, the law firm should not be subject to fee forfeiture. The court of appeals found that it would have been inequitable for the law firm to forfeit its fees by following the family court order. This would, the court of appeals pointed out, be inconsistent with their obligations as officers of the court.

An example of a partial fee forfeiture case can be seen in *Jackson Law Office v. Chappell*, 37 S.W.3d 15 (Tex.App.--Tyler 2000). In *Jackson*, the law firm agreed orally to

an hourly fee representation for a divorce. When the alleged $60,000.00 fee went unpaid, the law firm sued for its fee, and to set aside certain fraudulent transfers by the client. The client counterclaimed for malpractice, breach of fiduciary duty and alleged DTPA violations, among other things. In affirming forfeiture of 12% of the fee, the court of appeals noted that there was ample evidence that the lawyers had breached their fiduciary duty to the client. The lawyers had failed to maintain billing records, failed to provide billing statements to the client when requested, inflated their hours, charged fees associated with their defense of a grievance filed by the client's husband and required the client to sign an assignment without making appropriate disclosures of the effect of the assignment. Once the jury found the lawyers had breached their fiduciary duties to the client, it was within the trial court's discretion to determine the amount of the fee forfeiture. The court of appeals affirmed the trial court's use of its discretion to require a partial forfeiture of the fee.

H. <u>Family Lawyers and the DTPA</u>:

In the last few years there has been a trend in many legal malpractice cases for the plaintiff to add a claim under the Deceptive Trade Practices Act. From the plaintiff's prospective, one of the benefits of a DTPA claim is that it allows the plaintiff to potentially recover attorney's fees and additional damages. In 1995, the legislature added certain amendments to the DTPA including the professional service exemption. The apparent purpose of the exemption was to make it clear that simple negligence by a lawyer was not sufficient to give rise to a DTPA claim. Many of the DTPA claims that have been filed since the 1995 amendments have included the allegation that the

lawyers' conduct involved an unconscionable course of action. Under the DTPA an unconscionable course of action means "an acts or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." Tex. Bus. & Comm. Code Ann. §17.45(5) (Vernon 2002). Proof of unconscionability requires a showing that the resulting unfairness was glaring, noticeable, flagrant, complete, and unmitigated." *Ballasderos v. Jones*, 985 S.W.2d 485, 496 (Tex.App.--San Antonio 1998, pet. denied) (quoting *Chastine v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985).

The distinction between conduct that is just negligent and conduct that constitutes deception conduct for the DTPA has received some attention by the courts. In *Goffney v. Rabson*, 56 S.W.3d 186 (Tex.App.--Houston [1st Dist.] 2001, pet. denied) the plaintiff alleged that a lawyer had engaged in an unconscionable course of action in violation of the DTPA by, among other things, misleading the plaintiff into believing that the lawyers had prepared the case for trial in a good workmanship manner and by failing to properly, timely, and adequately prepare for trial and misrepresenting the fact that they were prepared and qualified to try the case. The court found these allegations merely restated the plaintiff's legal malpractice claim and disallowed the DTPA claim.

In contrast in *Latham v. Castillo*, 972 S.W.2d 66 (Tex. 1998) the Texas Supreme Court found that an affirmative misrepresentation that a case had been filed when it in fact had not been filed was the difference between negligent conduct and deceptive conduct.

Claims of unconscionable conduct by family lawyers are not unusual. For instance, in *Ballasderos v. Jones*, 985 S.W.2d 485 (Tex.App.--San Antonio 1998, pet. denied) the client alleged the lawyer violated the DTPA because the lawyer's conduct coerced her to settle her cause of action without determining the size of the estate and by charging her an allegedly unconscionable attorney's fee. In affirming the judgment that the client take nothing on her DTPA claim, the court pointed out that the legislature intended the DTPA to protect consumers against false misleading deceptive business practice and unconscionable actions. The court found that the thrust of the client's claim for unconscionable conduct was that the fee agreement was excessive and unconscionable. The court noted that even though contingent fee matters in divorce actions were rarely justified, they were appropriate in this situation where the marriage had not been established, and if the marriage was not established the plaintiff would have recovered nothing in the divorce action. The court found that a one-third contingent fee between the client and the lawyer was valid and enforceable and was not excessive. The remaining allegations of the client in this case were such that the court characterized them as negligence and were insufficient to support a DTPA claim.

III. An Overview of the Lawyer Disciplinary System.

According to the State Bar, the total number of inquiries filed in Texas has hovered around 9,500 each year for the last several years. Approximately, 3,500 inquiries each year are classified as grievances and an investigatory hearing is held. The total number of lawyers in Texas is approximately 75,000. Given the number of inquiries, one might assume that a lawyer under ordinary circumstances would have

about a one-in-seven chance of having an inquiry filed against him during any given year. Experience suggests to the contrary. Part of the explanation is that some lawyers have virtually no exposure. Lawyers who are not actually practicing, but may earn their living from being in business are one such example. Similarly, in-house counsel to corporations or to government agencies have very little exposure to grievances. Nobody really knows the number of lawyers that fall into these two categories in Texas because the State Bar does not disclose this data, assuming it is maintained in the first place. In fact, the data maintained by the State Bar and the statistical analysis of that data is for the most part not terribly helpful. As it stands today, analysis of the disciplinary system based on age, race, gender, or geographic location is impossible. Whether representation by counsel in the disciplinary system makes a difference cannot be determined from the available data. Nor can we tell whether there is a bias within the disciplinary system towards solo practitioners or those who practice in small firms.

To make matters worse, the Texas Disciplinary System is complicated and expensive. When compared with the costs of other similar state disciplinary systems, Texas holds the dubious honor of having one of the most costly systems. (The Florida system which handles approximately the same number of inquiries costs about half as much as Texas!)

The few insurance companies that will pay defense costs for defending a grievance, for the most part, are only willing to pay between $5,000 and $10,000 to defend grievances per policy period. In substance, the insurers seem to be saying that they will defend you through the investigatory hearing, but after that you are on your

own. Or alternatively, if you have more than one or two grievances within your firm within a given year, you will run out of grievance coverage even if the grievances are dismissed at the investigatory stage. Clearly, the message should be to avoid grievances, if at all possible. Otherwise in all likelihood you will be putting your single most valuable asset at risk. Unfortunately, one fatal misstep after years of successful practice can lead to a complete loss of your liberty interest -- your license.

A. <u>Disciplinary Risk Factors</u>:

Even though the data and analysis from the State Bar of Texas concerning grievances is often insufficient to support meaningful analysis, there are some patterns that emerge from a careful review of the last twenty years of reported disciplinary actions. Based on my review of the reported sanctions and my experience in defending lawyers in the disciplinary system, I have identified nine risk factors that make certain lawyers more likely targets of grievances. These risk factors are as follows:

1. high volume practices
2. representation of individuals vs. corporations
3. contingency vs. non-contingency fee arrangements
4. clients with highly charged emotional issues
5. clients with unrealistic expectations
6. clients with more than money at stake
7. law office deficiencies or failures
8. excessive economic pressures
9. diverse vs. focused practice

These risk factors are not necessarily in order of importance. Nor does the presence of one or more of these risk factors automatically mean that a lawyer will have grievance problems. But, as with many problems, the more risk factors you have, the more likely grievances are to arise in your practice. And, we should never forget that

even a single risk factor that occurs in only an isolated instance can effect the frequency and the severity of a grievance.

Applying these factors to a family law practice suggests that some of these factors will be present in virtually all family law practices. Thus, all family law practices will be susceptible to the risk factor associated with representing individuals. Similarly, all family lawyers will have at least some clients with highly charged emotional issues. Many clients, regardless of what their family lawyers discuss with them will have unrealistic expectations. In many family law cases there will be more than money at stake. Child custody issues often predominate divorce cases. And, frequently money issues may impact the quality of life and family viability. Because contingency fee arrangements are disfavored within family law matters the contingency fee risk factor is often not present. However, when it is present it can have an important impact on the likelihood of discipline. Hopefully, law office deficiencies or excessive economic pressure risk factors will not be present. And, assuming the practice is not adding new employees the focused aspect of most family law practices should help avoid risk that general practice law firms have.

Thus, most family lawyers will have at least some risk factors present in their practice. It is therefore important to try to minimize the risk factors that are present. It is equally important to avoid the risk factors that are ordinary to the practice and are frequently avoidable (e.g. law office deficiencies and excessive economic pressures).

B. Disciplinary Sanctions:[10]

The sanctioning of lawyers today should be viewed within the context of the changes to the disciplinary system that occurred eight years ago. In 1992, the Texas Supreme Court revamped the procedures under which lawyer discipline would be meted out in Texas. The laudable goal was twofold: (1) to establish uniformity, consistency, and, accordingly, a measure of predictability in the grievance system; and, as a result, (2) to increase public confidence that Texas lawyers can "police" their own.

My independent anecdotal experiences in defending lawyers prompted me to ask: Is either one or both of these goals realized in the current disciplinary system in Texas?

My conclusion is "No!" My conclusion is echoed by others familiar with the system. For example, the postpresident of the State Bar of Texas, like many others familiar with the system has concluded that the Texas lawyer disciplinary system is broken.[11]

Lawyers who practice criminal law in Texas typically have the greatest number of complaints, totaling approximately 1,100 a year. Personal injury lawyers have slightly fewer complaints, followed by family lawyers who average about 775 a year.

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[10] The author gratefully acknowledges permission from the Florida Coastal Law Journal to allow portions of a paper first published by the Florida Coastal Law Journal to be reprinted here. See *Lady or the Tiger? Opening the Door to Lawyer Discipline Standards*, FLA. COASTAL L.J. Spring/Summer pp. 231-264 (1999).

[11] J. Elliott, *Backlash*, *Texas Lawyer*, Vol. 15 p. 14 (June 7, 1999).

The State Bar does not maintain records of the total number of licensed lawyers who practice in any particular area of practice.[12]

In 1999, a part of this paper was published by the *Florida Coastal Law Journal*. In it a snapshot of the discipline imposed on Texas lawyers during 1998 was taken. The results were somewhat surprising, but were consistent with my antidotal observations. The snapshot was flawed in part because the data maintained by the State Bar was not maintained in a consistent manner, making it difficult to compile. More sophisticated analyses also were impossible.

This snapshot of Texas disciplinary sanctions was by no means scientific, statistically significant, or reliable for any purpose other than for the conclusion: There appears to be no consistency in the discipline imposed in Texas for particular misconduct, even when the procedural rules themselves impose a particular discipline for a particular transgression. The sample set out in Attachment "1" included below, represents 13% of the sanctions assessed during 1998. The resulting image of disciplinary sanctions is out of focus and presents only a partial picture of the Texas disciplinary system. It is the best that can be done with the available information. Based on the comments made by lawyers who are familiar with the system, the conclusion that the disciplinary system fails to satisfy either of the Supreme Court's goals is shared by many Texas lawyers.[13] The 1992 procedural rule changes have not

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[12] Because of the way these statistics are kept, it is impossible to determine, for example, if the number of grievances filed against criminal lawyers represents a higher frequency of grievances for criminal lawyers than for lawyers engaged in other areas of practice. This inability to correlate frequency with specific areas of practice holds true for all practice areas.

[13] *Backlash*, p. 14-15.

promoted uniformity, consistency or predictability. Instead, with the imposition of the new rules, the sanctions meted out climbed dramatically for the first few years and then began to decline during the 1994-1995 period. I doubt that public confidence in the system has improved.

For those of you who are interested, there are criteria that are theoretically applied by grievance committees and district courts in sanctioning lawyers, both in Texas[14] and nationally[15]. By applying the applicable criteria, lawyers who engage in the

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[14] Texas Rules of Disciplinary Procedure, Rule 3.10 provides the following criteria:

A. The nature and degree of the Professional Misconduct for which the Respondent is being sanctioned;
B. The seriousness of and circumstances surrounding the Professional Misconduct;
C. The loss or damage to client;
D. The damage to the profession;
E. The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found;
F. The profit to the attorney;
G. The avoidance of repetition;
H. The deterrent effect on others;
I. The maintenance of respect for the legal profession;
J. The conduct of the Respondent during the course of the Committee action;
K. The trial of the case; and
L. Other relevant evidence concerning the Respondent's personal and professional background.

In addition, the respondent's disciplinary record, including any private reprimands, is admissible for determining the appropriate sanction to be imposed. TEX. R. DISC. P. 3.10.

Aggravating and mitigating factors may be considered in deciding an appropriate sanction for lawyer misconduct.

A. Aggravating factors include:

1. prior discipline;
2. dishonest or selfish motive;
3. multiple offenses;
4. obstruction of disciplinary process;
5. failure to acknowledge wrongfulness of conduct;
6. vulnerability of victim;
7. substantial experience in the practice of law;
8. indifference to making restitution; and
9. illegal conduct.

B. Mitigating factors include:

1. absence of prior discipline;

same or substantially similar conduct should receive the same or substantially similar sanction. Attachment "1" includes a necessarily truncated summary of the sampling of published sanctions reported by the State Bar of Texas in the *Texas Bar Journal* for 1998.

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2. absence of dishonest or selfish motive;
3. personal or emotional problems;
4. timely effort to make restitution;
5. cooperation with disciplinary proceedings;
6. inexperience in practice of law;
7. good reputation;
8. physical or mental disability;
9. delay in disciplinary proceedings;
10. imposition of other penalties;
11. remorse; and
12. remoteness of prior offenses.

[15] The ABA Standards for Imposing Lawyer Sanctions, provides that a court should consider the following factors in determining a sanction to impose for lawyer misconduct:

A. **the duty violated** -- to the client, the public, the administration of justice, or the profession;
B. **the lawyer's mental state** -- intentional, knowing, or negligent;
C. **the extent of actual or potential injury**; and
D. **aggravating or mitigating circumstances**.

These standards are designed to promote thorough, rational consideration of all factors relevant to imposing a sanction in an individual case. The standards attempt to ensure that the factors are given appropriate weight in light of the stated goals of lawyer discipline, and that only relevant aggravating and mitigating circumstances are considered at the appropriate time. Finally, the standards are intended to help achieve the degree of consistency in the imposition of lawyer discipline necessary for fairness to the public and to the bar.

Absence of harm or loss to clients in selected situations may also be considered in mitigation. *See, e.g., Office of Disciplinary Counsel v. Kagawa*, 63 Ha. 150, 622 P.2d 115 (1981) (not "serious unethical conduct"); *In re Fling*, 316 N.W.2d 556 (Minn. 1982) (no loss in commingling).

Whether or not a particular factor will be deemed to be aggravating or mitigating in a specific case will depend on the jurisdiction, the nature of the ethics rule violated, and the facts of the case. ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, MISCONDUCT AND DISCIPLINE, DISCIPLINARY PROCESS § 101:2101, *Procedure*, Practice Guide (1999).

Further, these factors should be considered in light of the purpose of lawyer disciplinary proceedings, which is not to punish the attorney, "but rather to protect the courts, the public and the legal profession, as well as to guard the administration of justice." *In re Madsen*, 426 N.W.2d 434, 435 (Minn. 1988); *see also In re Kersey*, 520 A.2d 321 (D.C. 1987); *In re Gallo*, 568 A.2d 522 (N.J. 1989); ABA Standard 1.1.

Finally, ABA Standard 9.4 specifies six factors that should not be considered either in aggravation or in mitigation:

A. forced or compelled restitution;
B. agreeing to the client's demand for certain improper behavior or result;
C. withdrawal of the complaint against the lawyer;
D. resignation prior to completion of disciplinary proceedings;
E. complainant's recommendation as to sanction; and

The analysis of the available data suggests that the criteria are not being uniformly applied or at least that there is much room for improvement.

C. Overall Observations of Sanction Application and the Need for a "Point System":

In analyzing the sanctions meted out in 1998, the application of discipline was at best uneven. In the worst situations the same or essentially the same conduct yielded widely disparate treatment for the sanctioned lawyers. Four types of conduct highlight the disparate treatment problem: (1) missed deadlines; (2) failure to safeguard property; (3) neglect of a client matter; and (4) termination of the attorney-client relationship. The results of the analysis are discussed below.

1. Missed Deadlines

During 1998, there were a number of lawyers who were disciplined for missing a deadline such as a statute of limitations. The discipline that was meted out to these lawyers ran the gamut from public reprimand all the way up to disbarment or resignation. Slightly more of these lawyers were suspended with partial probation of their suspensions. Qualitatively, there did not appear to be any guiding principal that would explain such disparate treatment. It was surprising to see some of these cases yield professional discipline. Unlike professional malpractice, discipline is usually only appropriate for intentional conduct, not negligence. It is hard to conceive of any lawyer that would intentionally miss a statute of limitations or other deadline.[16]

F. failure of injured client to complain.

[16] Of course, lawyers that regularly miss the statute of limitations for their clients are susceptible to discipline, but that does not appear to be a factor that was present in these cases.

2. Failure to Safeguard Property

Similarly, lawyers who failed to safeguard the property of third parties also received widely disparate sanctions. See Attachment 1. A larger number of these lawyers was disbarred or resigned. Others received partially or fully probated suspensions. A few received only a public reprimand. Predicting the likely sanction based upon the facts reported in the *Texas Bar Journal* was impossible.

3. Neglect of a Client's Matter

Neglect of a client's matter also yielded disparate levels of discipline. See Attachment 1. Several of the lawyers who neglected their client's matter were disbarred. Some were suspended. The largest number received a public reprimand. Frequently, neglect of the client's matter also carried with it other disciplinary rule violations. These circumstances tended to yield a more severe sanction although this was not always the case.

4. Termination of the Attorney-Client Relationship

Finally, misconduct arising in the termination of the attorney-client relationship highlighted a different kind of uneven application problem. See Attachment 1. More particularly, five of the lawyers described below in Attachment 1 failed to return their client's file as requested by the client. In at least one instance, the lawyer apparently was just slow in returning the file. In another instance, the lawyer's delay in returning the client's file caused the client to miss the statute of limitations. And, in a third instance, the client made a timely request for the file but never received it because the

lawyer shredded it. Although these fact patterns suggest different levels of intent by the lawyers involved, the sanction meted out was the same – public reprimand.

5. Private Reprimands

The Texas Rules of Disciplinary Conduct prohibit the imposition of private reprimands for particular conduct, specifically any conduct involving a trust account violation or misapplication of clients funds, as well as conduct involving deceit, fraud, dishonesty, or misrepresentation. Private reprimands, as the term implies, and referrals for rehabilitation are not reported by name of attorney. However, the Texas Bar Journal does report private reprimands and referrals by specific rule violation.

During 1998 there were 137 private reprimands. More than 30%, or 37 of the private reprimands were for neglect of a client file. There were 16 lawyers who received a private reprimand for failing to protect property and 12 lawyers who were admonished for mishandling the termination of the attorney-client relationship.

Similarly, there were 34 lawyers who received referrals for rehabilitation during the period. Neglect of a client matter generated 12 referrals while failure to protect property generated 2 referrals. There were five lawyers who received referrals for rehabilitation relating to the termination of the attorney-client relationship.

Sixteen lawyers received private reprimands and referrals for rehabilitation for violations of rules for which no private reprimand is theoretically available.

The solution to disparate sanctioning requires implantation of a plan to address these inconsistencies:

1. Initiation of uniform statistical reporting periods;

2. Assimilation of relevant demographic data for all licensed lawyers;

3. Assimilation of relevant statistical data for all inquiries filed, inquiries classified as complaints, and sanctions imposed;

4. Generation of reports of the statistics accumulated; and

5. Centralized oversight of any trends indicated by significant features of the statistical information and publication of those oversight records.

Conclusion

Practicing in the area of family law is a bigger challenge today than ever before. Hopefully, by keeping your practice focused and by avoiding some of the risks identified in this paper, you should avoid most grievances and professional liability claims.

ATTACHMENT 1

Sanctions Grouped by Severity:

A. Disbarment/Resignation

1. Lawyer failed to prepare and record deed conveying real property to his client's children. Failed to notify client of his suspension, and continued to practice law. Result: disbarred. Vol. 61 TX. BAR J. 171.

2. After agreeing to represent complaint and son in a personal injury matter, the lawyer assigned the matter to an associate. When the associate left the firm, the lawyer took over the matter, but failed to prosecute the matter or settle the claims, communicate with the complainant, respond to the complainant's request for information, return the complainant's file, or respond to the grievance committee subpoena. Result: disbarred. Vol. 60 TX. BAR J. 1175.

3. Lawyer failed to timely file and serve answers or objections to admissions. Result: Disbarred. Vol. 61 TX. BAR J. 593.

4. Lawyer represented complainant in a DTPA lawsuit and settled the case, but failed to retain the funds in a trust account or pay the funds to his client. Result: Resignation. Vol. 60 TX. BAR J. 1175.

5. Personal injury lawyer failed to respond to his client's inquiries, to disburse settlement proceeds to a medical provider, or respond to notice of the complaint and a subpoena from the grievance committee. Result: Disbarred. Vol. 61 TX. BAR J. 593.

6. Lawyer issued letters of protection to two medical providers, but failed to pay the providers on receiving settlement funds for his clients, and converted $200,000 for his personal use. Result: resignation. Vol. 61 TX. BAR J. 591.

7. Lawyer repeatedly failed to attend court hearings and, after being admonished that no future failures to appear would be tolerated, he failed to appear at his next scheduled court hearing. Result: Disbarred. Vol. 61 TX. BAR J. 788.

8. Lawyer filed a motion to appear pro hac vice in a California court stating he was an attorney licensed in Texas was in good standing. Lawyer had previously been suspended from the active rolls of the State Bar of Texas for non-payment of dues. Result: Disbarred. Vol. 61 TX. BAR J. 963.

9. Lawyer plead guilty to attempted forgery, a Class A misdemeanor. Result: Disbarred. Vol. 60 TX. BAR J. 1175.

10. Lawyer pleaded guilty to 3 counts of making a false statement in an income tax return. 26 USC 7206. Result: Disbarred. Vol. 61 TX. BAR J. 787.

11. Lawyer pleaded nolo contendere to one count of insurance fraud, money laundering, and conspiracy to commit insurance fraud. Result: Disbarred. Vol. 61 TX. BAR J. 787.

12. Lawyer convicted for making false oaths and claims. 18 USC 152(2). Result: Disbarred. Vol. 61 TX. BAR J. 787.

13. Lawyer convicted of bankruptcy fraud. Although the conviction has been appealed he will be disbarred if the conviction becomes final. Vol. 61 TX. BAR J. 499.

14. Lawyer plead nolo contendere to indecency with a child. If the lawyer's 10-year probation is revoked he will be disbarred. Vol. 61 TX. BAR J. 499.

15. Lawyer plead nolo contendere to theft by check. After he violated his probation he was disbarred. Vol 61 TX. BAR J. 499.

B. Active Suspension

1. Patent lawyer failed to respond to numerous requests for information regarding the application, attend several scheduled meetings with her client, or timely respond to notice of the complaint from the grievance committee. Result: 6-month suspension. Vol. 61 TX. BAR J. 963.

2. Lawyer retained to represent complainant and son in a divorce and custody action. Lawyer neglected matter and failed to refund the complainant's money after termination, among other things. Result: 29-month suspension. Vol. 61 TX. BAR J. 173.

3. Lawyer received settlement funds on behalf of his client and withheld a portion to pay medical providers. Lawyer failed to disburse the funds to the medical provider or return the funds to his client. Lawyer also failed to obtain a written contingent fee agreement for the representation. Result: 14-month suspension. Vol. 61 Tx. Bar J. 282.

4. Lawyer failed to hold funds of clients or third persons in a trust or escrow account. Result: 6-month suspension. Vol 61 TX. BAR J. 282.

C. Partial Probation/Action Suspension

1. Lawyer neglected legal matters entrusted to him, failed to keep his clients reasonably informed of the status of pending matters and failed to take steps reasonably practicable to protect his clients' interest on termination of employment. Result: 66-month suspension partially probated. Vol. 60 TX. BAR J. 1176.

2. Lawyer retained to represent complainant in a paternity action failed to secure DNA testing as requested by the complainant and failed to respond to subpoenas from the grievance committee. Result: 18-month suspension, 6 months actively served, 12 months probated. Vol. 61 TX. BAR J. 82.

3. Personal injury lawyer allowed statute of limitations to expire on his client's claim. Result: 3-month suspension, 1 month active 2 months probated. Vol. 61 TX. BAR J. 282.

4. Personal injury lawyer allowed statute of limitations to expire. Result: 3-year suspension with third year probated. Vol. 61 TX. BAR J. 283.

5. Court-appointed criminal defense lawyer failed to respond to letters from complainant regarding the status of the case and failed to file an appeal brief. Result: 24-month fully probated suspension. Vol 61 Tx. Bar J. 171.

6. Lawyer sold an oil and gas interest to the complainant for more than $11,000. When a dispute arose over whether a payment was for attorney's fees for another matter or the oil and gas interest, the complainant requested a refund and the lawyer sued the complainant. Result: 12-month suspension, 6 months of which were to be actively served. Vol. 61 TX. BAR J. 368.

7. Lawyer in a meeting with a client regarding revocation of the claimant's probation requested, and the client performed, a "sexual massage" for which the client would be compensated. Lawyer paid the client for a portion of the massage and told her the rest would be applied to attorney's fees. Result: 60-month partially probated suspension the first 30 months actively served. Vol. 61 TX. BAR J. 368.

8. Lawyer and client entered a business transaction that was not fair or reasonable to the client. The client did not consent in writing to the transaction and was not given a reasonable opportunity to seek the advice of independent counsel regarding the transaction. Result: 24-month suspension, 1 month active suspension, 23 months probated. Vol. 61 TX. BAR J. 788.

9. Lawyer received a settlement check on behalf of a client and endorsed the check on behalf of an interested third party without the party's knowledge or consent. Lawyer deposited the proceeds into his IOLTA account but did not keep segregated disputed proceeds until there was an accounting and determination of all parties' interest or promptly remit to the third party his agreed-upon interest in the proceeds. Result: 27-month suspension 3 months actively served. 61 Vol. TX. BAR J. 1072.

10. Lawyer violated rules regarding candor toward the tribunal and failure to report another lawyer's misconduct. Result: 39-month suspension with 3 months actively served and 36 months probated. Vol. 61 TX. BAR J. 283.

11. A company hired a person who was a lawyer as a regional manager. The lawyer violated the company's policy when he opened a checking account without the company's knowledge or consent under the name of the lawyer, doing business under the company's name. The lawyer deposited more than $10,000 belonging to the company into the checking account and used those funds for himself. When the company became aware of the account, the lawyer resigned his job as regional manager of the company and replaced the funds he had used. Result: 12-month suspension fully probated. Vol. 61 TX. BAR J. 714.

12. Lawyer pledged complainant's funds as security for a loan to the lawyer. Lawyer defaulted, and the bank offset against the pledged property. Five years later, the complainant discovered the offset at which time the lawyer gave the complainant a check for $50,000 which bounced. Lawyer eventually paid the $50,000 and gave a promissory note for $30,000 for the remaining balance. Lawyer filed bankruptcy and cannot pay the promissory note. Result: 7-year fully probated suspension. Vol. 61 TX. BAR J. 963.

13. Lawyer had failed to pay his bar dues and meet his MCLE requirements and was suspended. While suspended he faxed a letter to four individuals indicating he was a licensed attorney. Result: 24-month suspension six months actively served. Vol. 61 TX. BAR J. 1072.

14. Lawyer was hired to represent a client on two misdemeanor criminal cases. Lawyer charged an illegal and unconscionable fee. Result: 24-month suspension, 1-month active suspension, 23 months probated. Vol. 61 Tx. Bar J. 788.

15. Lawyer who had been suspended failed to remove or properly cover the words "attorney at law" following his name on a building sign. Result: 18-month partially probated suspension with the first 6 months actively served. Vol. 61 TX. BAR J. 714.

D. Fully Probated Suspension

1. Lawyer retained to represent complainant in a probate matter that lawyer should have known was beyond her competence, yet she failed to withdraw from the representation. Result: 3-month suspension fully probated. Vol. 61 TX. BAR J. 172.

2. Lawyer failed to timely answer requests for admission and interrogatories in a child support case and complainant had to dismiss the case to avoid possible liability and court sanctions. Result: 20-month suspension fully probated. Vol. 61 TX. BAR J. 172.

3. Tax lawyer failed to adequately consult with the complainant to determine the complainant's wishes concerning the representation. The complainant therefore did not consent to the limited scope, objectives, and general methods of representation provided by the lawyer. Result: 6-month suspension fully probated. Vol. 61 TX. BAR J. 790.

4. Lawyer settled the complainant's case without the complainant's knowledge or approval, failed to keep the complainant informed of the status of the case, and received settlement funds but failed to notify or deliver the funds to the complainant. Result: 5-year suspension fully probated. Vol. 61 TX. BAR J. 282.

5. Lawyer represented complainant on claim for lost money. Lawyer recovered funds for the complainant, but failed to notify the complainant of the existence of two checks representing interest on the claim. Lawyer cashed the two checks and kept the funds for herself without fully obtaining the complainant's authorization. Result: 24-month suspension fully probated. Vol 61 TX. BAR J. 171.

6. Lawyer obtained a $70,000 no-answer default judgment for his client, but failed to submit it to the court for execution. The case was dismissed for want of prosecution. The lawyer failed to respond to requests for information from the complainant, to explain the dismissal, or to respond to a notice of the complaint and subpoena from the grievance committee. Result: 6-month suspension fully probated. Vol. 61 TX. BAR J. 593.

7. Lawyer revealed and used confidential information previously received from the complainant to the complainant's disadvantage. Lawyer also accepted employment by a former client without obtaining consent from all parties to a dispute. Result: 12-month suspension fully probated. Vol. 61 TX. BAR. J. 80.

8. Lawyer who settled two personal injury cases failed to safeguard or timely disburse the settlement funds to medical providers. He also failed to respond to

client inquiries about payment of their medical bills. Result: 24-month suspension, fully probated. Vol. 61 TX. BAR J. 593.

9. Real estate lawyer handled closing and withheld funds from the closing to satisfy outstanding taxes and a lien. Lawyer failed to timely pay the taxes or lien and converted funds held in trust for his own use. Result: 12-month suspension, fully probated. Vol. 61 TX. BAR J. 788.

10. After neglecting matters entrusted to him, lawyer failed to take steps reasonably practicable to protect his clients' interest on termination of employment. Result: 24-month fully probated suspension; attend additional hours of continuing legal education. Vol. 61 TX. BAR J. 1174.

11. Lawyer failed to keep funds belonging to third persons separate from his and knowingly disobeyed a ruling by a tribunal. Result: 24-month suspension fully probated. Lawyer was also ordered to pay $5,000 in restitution and $4,160 in attorneys' fees. Vol. 61 TX. BAR J. 715.

12. Personal injury lawyer handling large number of cases operated without a trust account and had several non-lawyer employees over whom the lawyer had direct supervisory control who were involved in, and later convicted of insurance fraud. Lawyer failed to ensure that the employees' conduct was compatible with his professional obligations and ordered, encouraged, or permitted their conduct. Result: 12-month suspension fully probated. Vol. 61 TX. BAR J. 595.

13. Lawyer ordered two non-lawyer employees to contact the families of deceased children by phone and in person for the purpose of soliciting employment in a medical negligence suit. The non-lawyer employees told the families their children died as a result of negligence by doctors and a hospital when, in fact, there were no facts to support the statements. The families were also told the reason for contacting them was to identify witnesses when the sole purpose was to solicit employment for the lawyer. Result: 24-month suspension fully probated. Vol. 60 Tx. Bar J. 1176.

14. Lawyer filed medical malpractice suits on behalf of the families of several deceased children without the consent of some of his clients. He filed 8 suits after little or no investigation and without substantiation of the alleged facts. He continued employment in these cases even after learning many of the cases were obtained through improper solicitation. Result: 24-month fully probated suspension, plus $20,000 in attorney fees and $4,000 in litigation costs. Vol. 60 TX. BAR. J. 1176.

15. Lawyer approached an employee of a grocery store, handed her his business card, suggested she could receive financial benefits by having an on-the-job injury, and offered to represent her in that claim. Result: 12-month suspension fully probated. Vol. 61 TX. BAR J. 368.

E. Public Reprimand

1. Lawyer failed to perform any meaningful legal services on a family law matter for about a year. He failed: (1) to notify the complainant of the date of a hearing, (2) to appear at the hearing, (3) to return the complainant's telephone calls, (4) to accept certified mail from the complainant, and (5) to timely respond to notice of the complaint from the grievance committee. Result: Public reprimand. Vol. 61 TX. BAR J. 283.

2. Lawyer handling a DTPA case that went to trial failed to: (1) prepare trial testimony, (2) properly designate witnesses, (3) develop his client's case or inform his client about the importance of hiring an expert witness. Result: Public reprimand. Vol. 61 TX. BAR J. 596.

3. Lawyer hired to oversee the management of complainant's father's estate and replace the executor because of suspected mismanagement. Lawyer failed: (1) to investigate the status of the estate property; (2) to hire an accountant to review the estate's financial condition; (3) or attempt to remove the executor. Result: Public reprimand. Vol. 61 TX. BAR J. 965.

4. Lawyer during a year period failed to respond to his client's telephone calls concerning the status of the case and failed to keep several office appointments with his client. Result: Public reprimand. Vol. 60 TX. BAR J. 1176.

5. Lawyer hired to represent complainant in three employment discrimination cases. Lawyer failed to return phone calls, respond to accept correspondence from complainants, attend planned meetings, reasonably explain the representation, or keep the complainant informed of the status of his cases. Result: Public reprimand. Vol. 61 TX. BAR J. 965.

6. Lawyer improperly revealed a confidential communication of his client. Result: Public reprimand. Vol. 61 TX. BAR J. 1176.

7. Lawyer represented a client with interest adverse to those of a former client and in a matter substantially related to the former client's case. Result: Public reprimand. Vol. 61 TX. BAR J. 1073.

8. Lawyer accepted personal loans from a client on seven occasions during 1993 without advising the client to seek independent counsel regarding the propriety of the transactions. Result: Public reprimand and must reimburse client $11,800. Vol. 61 TX. BAR J. 964.

9. Lawyer failed on two occasions to promptly deliver settlement funds to medical providers. Result: Public reprimand. Vol. 61 TX. BAR J. 283.

10. Lawyer contacted a client and told him he is closing his office and would no longer provide representation. Lawyer gave client a phone number to call to request the return of the client's file, but stated the client's file would be shredded if it was not retrieved by a certain date. Lawyer failed to return file despite client's attempts by phone and in writing to get the file. Result: Public reprimand and order to pay $100 in attorney's fees and litigation expenses.

11. Vol. 60 Tx. Bar J. 1176.

12. Lawyer failed to return a client's file within a reasonable amount of time. Result: Public reprimand. Vol. 61 Tx. Bar J. 596.

13. Lawyer neglected family law and bankruptcy matters and failed to adequately communicate with the complainant. Lawyer also failed to timely return the complainant's file on termination of the representation. Result: Public reprimand. Vol. 61 TX. BAR J. 596.

14. Lawyer handling a matter on a contingent fee basis refused to release the file to complainant's new lawyer. File could not be found and limitations expired. Result: Public reprimand. Vol. 61 TX. BAR J. 1073.

15. Lawyer filed suit on behalf of numerous plaintiffs who were exposed to fumes of a chemical spill. When one of the complainants terminated the representation and requested his file, the lawyer failed to return the file. Result: Public reprimand and $200 in attorneys fees and court costs, plus the lawyer was required to attend six additional hours of legal ethics training. Vol. 61 TX. BAR J. 596.

16. Lawyer filed a frivolous lawsuit against a hospital and a physician. Result: Public reprimand and $300 in attorneys' fees. Vol. 61 TX. BAR J. 964.

17. Bankruptcy lawyer, while representing his clients in a chapter 11 proceeding, filed a statement with the court indicating the clients had not paid him legal fees, nor did they owe him legal fees. After filing this statement the lawyer accepted compensation from the clients, but failed to disclose this to the court. Lawyer

also improperly signed his client's name to a bankruptcy petition and made a false statement to the bankruptcy judge regarding his experience in handling bankruptcy cases. Result: Public reprimand. Vol. 62 TX. BAR J. 284.

18. Lawyer employed a private investigator on a fee-sharing basis. Result: Public reprimand. Vol. 61 TX. BAR J. 715.

19. Lawyer failed to pay student loans and attorney occupation tax. Lawyer filed lawsuit on behalf of a client in district court during his resulting administrative suspension. He later failed to timely respond to notice of the complaint from the grievance committee or respond to the subpoena. Result: Public reprimand. Vol. 61 TX. BAR J. 1073.

20. Lawyer had a business agreement with a non-lawyer assistant. The non-lawyer undertook a social security case in the lawyer's name, working on it without the lawyer's knowledge and charging attorneys' fees to the client, none of which went to the lawyer. The nonlawyer also cashed checks in the lawyers' name. Result: Public reprimand. Vol. 61 TX. BAR J. 790.

21. Lawyer failed to obtain approval of a public advertisement or include pertinent information required by advertising rules. Result: Public reprimand. Vol. 61 TX. BAR J. 174.

22. Lawyer failed to respond to lawful demands for information from a disciplinary authority. Result: Public reprimand and $1,000 attorneys' fees and court costs. Vol. 61 Tx. Bar J. 284.

23. Lawyer repeatedly failed to attend professional enhancement sessions ordered by grievance committee and failed to prepare a written report required by the committee. Result: Public reprimand. Vol. 61 TX. BAR J. 370.

24. Lawyer failed to timely respond to notice of a complaint from the grievance committee. Result: Public reprimand. Vol. 62 TX. BAR J. 715.

25. Lawyer was hired to incorporate and apply for tax exempt status for an organization. Lawyer incorporated the organization, but failed to apply for the tax-exempt status. Lawyer failed to return complainant's phone calls. Lawyer was administratively suspended for failure to pay his attorney occupation tax. He continued to represent the complainant while suspended. Result: Public reprimand. Vol. 61 TX. BAR J. 964.