

**Trial Demonstration: Direct and Cross of Legal  
Malpractice Expert**

**SUPPLEMENT**

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**CHAPTER 20 SUPPLEMENT**

## Direct & Cross-Examination of a Legal Malpractice Expert

### Breach of Fiduciary Duty

The Supreme Court's disciplinary rules are to be treated as statutes.<sup>1</sup> Disciplinary Rule 1.03 imposes a fiduciary duty on attorneys in their relationship with their client: an attorney must act with utmost fairness and in good faith,<sup>2</sup> with a duty to represent his client with undivided loyalty,<sup>3</sup> (which requires a full and fair disclosure of the terms of a proposed settlement<sup>4</sup>), to preserve a client's confidences,<sup>5</sup> and to disclose to the client any information that might prevent the fulfillment of these obligations.<sup>6</sup> All transactions growing out of the attorney/client relationship are subject to the closest scrutiny<sup>7</sup> as the relationship requires "[t]he most abundant good faith; absolute and perfect candor or openness and honesty; [and] the absence of any concealment or deception, however slight".<sup>8</sup>

The breach of fiduciary duty under Texas case law has included conflicts of interest, placing the attorney's personal interest over those of the client, failing to disclose important facts, and legal consequences to the client, improper use of client confidences,

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<sup>1</sup> *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397 (Tex. 1988).

<sup>2</sup> *Smith v. Dean*, 240 S.W.2d 789, 791 (Tex. Civ. App.—Waco, 1951, no writ).

<sup>3</sup> *See Employers Casualty Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973).

<sup>4</sup> *General Motors Corp. v. Bloyed*, 916 S.W. 2d 949, 959 (Tex. 1996) (discussed in context of class action attorney's fees).

<sup>5</sup> *See NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 39, 399 (Tex. 1989).

<sup>6</sup> *See Tilley*, 496 S.W.2d at 558 (conflict of interests).

<sup>7</sup> *See e.g. Archer v. Griffith*, 390 S.W.2d 735, 739, (Tex. 1964); *Avila v. Havana Painting Co.*, 761 S.W.2d 398, 400 (Tex.App.—Houston [14<sup>th</sup> Dist.] 1988, 24i5 denied); *O'Dowd v. Johnson*, 666 S.W.2d 619, 621 (Tex.App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.).

<sup>8</sup> *State v. Baker*, 539 S.W.2d 367, 374 (Tex.Civ.App.—Austin, 1976, writ ref'd n.r.e.).

and fraudulent concealment of relevant information.<sup>9</sup> Furthermore, the fiduciary duty may attach to even a prospective client.<sup>10</sup>

One must also consider that causes of action for attorney misconduct or malpractice have been held to involve breach of contract as well.<sup>11</sup> Therefore, the malpractice causes of action may often include breach of contract as well as tort actions for negligence and breach of fiduciary duty, which are not one and the same. Professors Anderson and Steele state that the distinction between the two torts is that negligence deals with the breach of a standard of care, whereas, “[A] breach of fiduciary duty ... involves a violation of a standard of conduct.”<sup>12</sup> Furthermore, the proof for the breach of a fiduciary duty “requires merely a showing of misconduct rather than a violation of a standard of care, proof of a breach of a fiduciary duty may be shown without resort to expert testimony.”<sup>13</sup>

### **Fee Forfeiture**

In 1997, the remedy of fee forfeiture for breach of a fiduciary duty, *even when the lawyer’s misconduct caused no actual damages*, was embraced by the Fourteenth Court of Appeals in *Arce v. Burrows*.<sup>14</sup> Yet even prior to *Arce*, the Supreme Court held that the commission of a material breach of contract with the client forfeited the attorney’s right

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<sup>9</sup> *Id.* at pg. 46-47.

<sup>10</sup> Beck, *Legal Malpractice in Texas*, 43 BAYLOR L. REV., (1991) at 45.

<sup>11</sup> *Royden v. Ardoin*, 331 S.W.2d 206 (Tex. 1960); *Latham v. Castillo*, 972 S.W.2d 914 (Tex. 1998).

<sup>12</sup> *Fiduciary Duty, Tort, and Contract: A Primer on the Legal Malpractice Puzzle*, 47 S.M.U.L. REV. 235, 249.

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> *Arce v. Burrow*, 958 S.W.2d 239 (Tex.Civ.App.—Houston [14<sup>th</sup> Dist.] 1997, *reh’g overruled, writ granted, judgment aff’d in part, reversed in part, Burrow v. Arce*, 997 S.W.2ds 229 (Tex. 1999).

to compensation.<sup>15</sup> However, the remedy of fee forfeiture has been an available in fiduciary relationships for a long time. The equation of [CONFLICT = ] BREACH OF FIDUCIARY DUTY = NEGLIGENCE = FEE FORFEITURE, PROFIT FORFEITURE AND/OR ACTUAL DAMAGES has existed since at least 1991.<sup>16</sup>

The Appellate Court in *Arce v. Burrow* stated that an “[A]n attorney need not necessarily forfeit his or her entire fee because of breach of fiduciary duty, and factors to be considered in determining amount of forfeiture include: “(1) the nature of the wrong committed by the attorney or law firm; (2) the character of the attorney's or firm's conduct; (3) the degree of the attorney's or firm's culpability, that is, whether the attorney committed the breach intentionally, willfully, recklessly, maliciously, or with gross negligence; (4) the situation and sensibilities of all parties, including any threatened or actual harm to the client; (5) the extent to which the attorney's or firm's conduct offends a public sense of justice and propriety; and (6) the adequacy of other available remedies.”<sup>17</sup>

The Texas Supreme Court in *Burrow v Arce* stated it is up to the discretion of the court whether or not the breaching attorney shall receive full compensation or whether his compensation shall be reduced or denied; and in exercising the court's discretion the following factors are considered: “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

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<sup>15</sup> *Royden v. Ardoin*, 3331 S.W.2d 266 (Tex. 1960) (emphasis added).

<sup>16</sup> *Ifielder v. Adams*, 446 N.W.2d 39 (Minn. Ct. App. 1991).

<sup>17</sup> *Arce v. Burrow*, 958 S.W.2d 239, 250 (Tex.Civ.App.—Houston [14<sup>th</sup> Dist.] 1997, *reh'g overruled, writ granted, judgment aff'd in part, reversed in part, Burrow v. Arce*, 997 S.W.2ds 229 (Tex. 1999).

harm to the client, and the adequacy of other remedies, with great weight given to the public interest in maintaining the integrity of attorney-client relationships.”<sup>18</sup>

### ***Mental Anguish Damages for Legal Malpractice***

Not only must the attorney be aware of exposure for general damages and the possibility of fee forfeiture, the legal malpractice claim is also subject to mental anguish damages.

The Texas Supreme Court in *Douglas v. Delp*<sup>19</sup> found that there was sufficient evidence of the plaintiff’s mental anguish to raise a fact issue as to whether or not it was the result of “egregious and extraordinary circumstances” and ruled the lower court had improperly granted the directed verdict as to the plaintiff’s mental anguish claims. Testimony had been heard that the alleged mistakes of her legal counsel in a contract matter had caused the plaintiff to experience physical ailments and depression that required anti-depressant medication.

Yet the *Delp* ruling has several shortcomings. The Court in *Delp* did not apply the standards set out in *Parkway Co. v. Woodruff*<sup>20</sup>, nor *Saenz v. Fidelity & Guar. Ins. Underwriters Inc.*<sup>21</sup> Additionally, the Court in *Delp* made no reference to its ruling in

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<sup>18</sup> *Burrow v. Arce*, 997 S.W.2d 229, 243 (Tex. 1999).

<sup>19</sup> 987 S.W.2d 879, 873-886 (Tex.1999).

<sup>20</sup> 901 S.W.2d 434, 443-444 (Tex. 1995) (plaintiff must prove the “nature, extent and severity of plaintiff’s anguish, thus establishing a substantial disruption of the plaintiff’s daily routine,” without which proof of “other evidence of a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment or anger” are required for recovery of mental anguish damages).

<sup>21</sup> 925 S.W.2d 607, 614 (Tex. 1996) (requiring proof of compensable mental anguish and “some evidence to justify the amount awarded.”).

*City of Tyler v. Likes*<sup>22</sup>. A final consideration in analyzing the holding in *Delp* is that the holding is dicta because the court upheld the directed verdict as to all claims on other grounds.

Meanwhile, mental anguish damages are available under at DTPA legal malpractice claim, even if the plaintiff sustained no other damages.<sup>23</sup>

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<sup>22</sup> 962 S.W.2d 489, 496 (Tex. 1997) (holding that mental anguish damages can be recovered if there is evident of intent or malice, when there is severe bodily injury or when there is a special relationship; limiting recoverable mental anguish damages to injuries of a “shocking or disturbing nature; but added element stating such injuries must be “highly foreseeable.”

<sup>23</sup> *Latham v. Castillo*, 972 S.W.2d 66, 69 (Tex. 1998)(applying the principles set out in *Parkway* and *Saenz*, but not *Likes*).