

**SEVEN DEADLY SINS
OF THE PERSONAL INJURY LAWYER**

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CHAPTER 12

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Matt's litigation experience encompasses several fields: legal malpractice, commercial, class actions, employment, tort, nonsubscriber, insurance defense, and criminal. He learned the art of trial advocacy while working as an Assistant District Attorney for the Dallas County District Attorney's Office for more than three and a half years, during which time he litigated more than 100 jury trials. He was the lead prosecutor in numerous felony trials that resulted in convictions for aggravated robbery, aggravated kidnapping, murder, and aggravated sexual assault. After leaving the Dallas County District Attorney's Office, Matt honed his civil litigation skills while working for the law firms DeHay & Elliston, LLP and McCathern Mooty, LLP. In the civil arena, Matt focused on personal injury defense, nonsubscriber, and commercial litigation where he successfully tried and defended numerous cases to defense verdicts in Dallas, Ft. Worth, El Paso, the Rio Grande Valley, and East Texas on behalf of Pilgrim's Pride Corporation, Texas Stadium Corporation and Dal-Tile Corporation. In addition to trying cases to juries, Matt played an integral part in the representation of plaintiffs and defendants in several commercial class action lawsuits, including the defense of a \$250 million dollar class action suit against the Dallas Cowboys under the Telephone Consumer Protection Act. Matt has received an "AV" rating by Martindale Hubble's peer review rating system – the highest rating available. The designation recognizes Matt for high ethical standards and "very high to preeminent legal abilities."

Matt was born in San Francisco, California in 1968. He earned a Bachelor of Science in Accounting, with Honors, from the University of Denver in 1990. After receiving his undergraduate degree, Matt worked for Arthur Andersen & Company auditing oil and gas, manufacturing and utility companies. He later earned a Juris Doctorate from Southern Methodist University in 1995, where he was a distinguished member of the Board of Advocates, as well as a member of the SMU National ABA Mock Trial Team. Matt was licensed to practice in the State of Texas in November, 1995. He is admitted to practice law in all state courts in Texas, the federal district courts for the Northern, Eastern, Western and Southern Districts of Texas, as well as the federal district courts for the Eastern and Western Districts of Arkansas. In addition to the State Bar of Texas, Matt is a current member of the Dallas Bar Association. While being an attorney drives Matt, his true love is his wife Robin, sons Austin and Gabe, and daughter Remi.

Areas of Practice

- Insurance Defense
- Commercial
- Employment
- Tort
- Nonsubscriber
- Criminal

Bar Admissions

- Texas, 1995
- U.S. District Court Eastern District of Texas
- U.S. District Court Northern District of Texas
- U.S. District Court Western District of Texas
- U.S. District Court Southern District of Texas
- U.S. District Court Eastern District of Arkansas
- U.S. District Court Western District of Arkansas

Education

- **Southern Methodist University School of Law, Dallas, Texas**
 - Juris Doctorate - 1995
 - Honors: Member, Board of Advocates
 - Honors: Member, SMU National ABA Mock Trial Team
- **University of Denver**
 - Bachelor of Science - 1990
 - Honors: With Honors
 - Major: Accounting

Honors and Awards

- "AV" Rating by Martindale Hubble's Peer Review Rating

Professional Associations and Memberships

- State Bar of Texas
- Dallas Bar Association, Member

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SEVEN DEADLY SINS OF THE PERSONAL INJURY LAWYER

In 590 AD, Pope Gregory revised what we now know as the “Seven Deadly Sins.” The seven deadly sins are: 1) greed, 2) gluttony, 3) sloth, 4) wrath, 5) lust, 6) envy and 7) pride, and their impact on the soul’s journey toward God were depicted in the epic poem *The Divine Comedy* by Dante Alighieri. While this list of sins attempts to classify mankind’s struggle with righteousness from a Christian point of view, these same sins are often manifested in the practice of law. Although no lawyer is perfect, we as lawyers should strive for perfection in the manner in which we represent our clients, always bearing in mind we are fiduciaries held to a duty of the utmost fidelity, honesty and loyalty. Recognizing our weaknesses and areas of likely sin (or mistakes) in the practice of law will enable us to avoid many of the stumbling blocks in representing our clients and, with no small dose of humility and prayer, to avoid a legal malpractice lawsuit.

“The Bible and several other self help or enlightenment books cite the Seven Deadly Sins. They are: pride, greed, lust, envy, wrath, sloth, and gluttony. That pretty much covers everything that we do, that is sinful ... or fun for that matter.”

- Dave Mustaine, Lead Vocals for Megadeth

All kidding aside, each of these Seven Deadly Sins carries with it the potential harm to lawyer and client alike, and serves to undermine public respect for, and confidence in, our profession. It is our hope that the practical suggestions below will help you to avoid the sting of a malpractice lawsuit, or perhaps provide you with a good defense.

DEADLY SIN #1 – GREED. THE PUBLIC’S PERCEPTION OF LAWYERS

“...[G]reed, for lack of a better word, is good. Greed is right, greed works. Greed clarifies, cuts through, and captures the essence of the evolutionary spirit. Greed, in all of its forms; greed for life, greed for money, for love, for knowledge has marked the upward surge of mankind.”

Gordon Gekko, real estate tycoon from *Wall Street* (1987)

Although Gordon Gekko described greed as an essential motivating factor in life, it is one of the Seven Deadly Sins for lawyers. As Thomas Aquinas observed about greed: “It is a sin directly against one’s neighbor, since one man cannot over-abound in external riches, without another man lacking them...it is a sin against God, just as all mortal sins, inasmuch as man condemns things eternal for the sake of the temporal things.” One of the cardinal sins identified by Pope Gregory, greed can certainly cause many problems for the personal injury lawyer. President Harry S. Truman correctly stated, “Selfishness and greed, individual and national, cause most of our troubles.” While there is no doubt some truth to Gekko’s “greed is good” philosophy serves as a motivator in our society, adhering to Truman’s warning will serve the personal injury lawyer well. Indeed, money as a motivation for hard work is not sinful, and can even be noble depending on the uses of one’s earnings. The love of money, however, and indeed the love of more and more money, should never be our motivation as lawyers, and we should attempt to remove this sin from our work. In fact, the personal injury lawyer would be wise to work hard to minimize and ultimately eliminate this evil from the practice of law altogether; especially,

considering its impact on the public's perception of lawyers. In the context of a legal malpractice case, indicia of greed can be devastating to an otherwise valid defense. Once a defendant attorney is tainted by evidence of greed, even otherwise innocuous conduct can be damaging in light of the greed presumption. Thus, even perception of greed should be avoided in all phases of representation, beginning with the lawyer's initial consultation, throughout the course of the case, and upon conclusion of the matter and termination of the attorney-client relationship.

Avoid the perception of greed during the initial consultation, and in forming the attorney-client relationship. Clear communication with the prospective client, followed by a written fee agreement memorializing those communications and explaining the type of fee and how it will be calculated, can prevent an initial perception of greed. By way of example, in evaluating legal malpractice claims against family lawyers, it is surprising to learn the number of times the law firm's first inquiry is directed at the prospective client's net worth, and the question is often posed by a receptionist or other non-lawyer staff member. Regardless of the potential relevance of such information, the obvious perception created by such an introduction is that the lawyer is far more interested in lining her pockets than representing the client's interests. In addition to avoiding this ugly perception, the prudent lawyer will avoid these issues that may cause, or exacerbate, a legal malpractice claim arising from her representation.

First, the personal injury lawyer needs to avoid entering into an agreement requiring, or actually charging or collecting, an illegal or unconscionable fee. Pursuant to Rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct, a fee is "unconscionable" only if a "competent lawyer cannot form the reasonable belief that the fee is reasonable." Although the factors in Rule 1.04 apply specifically for disciplinary purposes, Texas courts often cite such factors in evaluating the reasonableness of a fee. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997) (holding that the fact finder should consider the factors set forth in Rule 1.04 in determining attorneys' fees under the DTPA and that a contingent fee agreement alone cannot support an award of attorneys' fees); *Heritage Resources, Inc. v. Hill*, 104 S.W.3d 612, 620 (Tex. App.—El Paso 2003, no pet.) (holding the factors contained within the Texas Disciplinary Rules of Professional Conduct should be considered in determining whether fees were reasonable and necessary).

In light of this reasonableness standard, what is an acceptable contingency fee today in the context of personal injury law? We know that any contingent fee above 50% will be carefully scrutinized by the courts. In fact, Texas courts have held that contingent fees requiring payment of 70% to 100% of a client's recovery are unconscionable. *Curtis v. Comm'n for Lawyer Discipline*, 20 S.W.3d 227, 233 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (the evidence was sufficient to support a finding that a contingent fee equaling 70 to 100% of the client's recovery was unconscionable). The safer alternative when practicing law in the personal injury arena is to evaluate the amount of work, time and expertise that will be needed in order to zealously represent the client. Texas courts have upheld contingency fee arrangements of 40% of a personal injury recovery, as well as 45% if the case is appealed to a higher court, as long as these percentages are communicated to the client in writing and explained in detail. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857 (Tex. 2000) (approving a law firm's contingent fee contract that allowed for 40% of any recovery, and 45% of any recovery if the case was

appealed to a higher court). The best practice in this regard is to suggest and agree to a fee structure that does not push the boundaries of reasonableness, and then explain how that fee will be calculated. Agreeing to a lower percentage in cases of more clear liability or more significant damages may also prove valuable in defending higher contingency fees in more complex and uncertain cases.

When agreeing to represent a client in a matter involving personal or real property rather than money, be sure to note at the outset what property will, and will not, be subject to the fee. In order to avoid the impression of greed or a breach of a lawyer's fiduciary obligations, the written agreement should detail the valuation of non-cash assets and allow the client some reasonable determination of whether and how to liquidate, or pay the fee based upon the fair market value of the non-cash assets recovered. "Because the lawyer is better able than the client to predict and provide for fee arrangements based on recoveries diverging from the traditional payment actually received, the burden should fall on the lawyer to express in a contract with the client whether the contingency fee will be calculated on non-cash benefits, as well as money damages." *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 95 (Tex. 2001). Therefore, if the contingent fee arrangement between the client and lawyer allows for recovery of non-cash assets or benefits, it is best to describe in detail what those benefits are and how they will be allocated and paid. Likewise, these arrangements may create potential conflicts that should be fully disclosed, and waived if appropriate, either in the fee agreement or as soon practical upon discovery of the issue. If the conflict is one that cannot legitimately be resolved or waived, the lawyers should refuse the representation or withdraw. Again, avoiding even the perception of greed is important.

In Texas, it is not enough for an attorney to defend his fee agreement with the quip, "a contract is a contract." *Hoover Slovacek, LLP v. Walton*, 206 S.W.3d 557, 560-61 (Tex. 2006). The personal injury lawyer's fee agreement is going to be scrutinized through the lens of a fiduciary, and judged against what a reasonable person in the client's position would expect. *Id.* at 560-61; *Anglo-Dutch Petro. Intl., Inc. v. Greenberg Peden, P.C.*, 267 S.W.3d 454, 471-72 (Tex. App.—Houston [14th Dist.] 2008, pet. filed) (contracts between clients and lawyers are to be construed from the standpoint of a reasonable person in the client's position, and a lawyer bears the burden of insuring that the contract states any terms diverging from that reasonable expectation standpoint). Thus, to avoid the perception of greed and to minimize the opportunities for clients to second guess the fee structure, a wise lawyer will have a written contingency fee agreement that includes the following: 1) the method of determining the fee, 2) stating the difference in recovery percentages, if applicable, in the event of settlement, trial, or appeal, and 3) identification of the expenses that are to be deducted from the recovery, whether such deductions will be made before or after the contingency fee is calculated. *See* TEX. DISC. R. PROF. COND. 1.04(d). These critical elements of the contingent fee agreement cannot be ignored without tempting trouble from a disgruntled client or worse, a legal malpractice attorney.

An example of a contingent fee agreement for use in a personal injury case is attached at Appendix A. As seen by this example, a prudent attorney will incorporate several important concepts into a fee agreement, including:

- 1) the parties to the agreement;
- 2) the scope of the representation;
- 3) the potential conflicts of interest, if any;
- 4) the calculation of the attorney's fee;
- 5) the reimbursement of expenses, and whether this occurs before or after the attorney's fee is calculated;
- 6) the calculation of the client's total recovery;
- 7) the potential for and impact of a lien to be filed against the client's recovery if the attorney is terminated without cause;
- 8) the initial expectation for costs and expenses to be incurred during the case;
- 9) the applicable statute of limitation and the issues posed by same, if any;
- 10) the client's acknowledgement that there is no guarantee with regard to the outcome of the representation;
- 11) the necessity of the client's cooperation;
- 12) the ability of the lawyer to withdraw if not impractical;
- 13) the ability to associate additional counsel or refer the case to lead counsel, if applicable;
- 14) the client's acknowledgement of reading and understanding the terms of the contract;
- 15) the mandatory State Bar of Texas information concerning how to file a complaint; and
- 16) reference to a copy of The Texas Lawyer's Creed accompanying the contract.

If you are associating another co-counsel with your case, remember to include in the fee agreement that lawyer's share, that lawyer's responsibilities, and most importantly, the client's consent in writing to such association. *See* TEX. DISC. R. PROF. COND. 1.04(f). While addressing each of these areas may increase the length of a contingency fee contract, doing so will decrease the likelihood of the attorney and client winding up on different pages of the hymnal during the course of the representation, and will reduce the likelihood of a legal malpractice lawsuit once the representation is over.

Avoid midstream changes to the terms of representation, with a presumption of unfairness.

Contracts between attorneys and their clients negotiated during the existence of the attorney-client relationship are closely scrutinized because of the relationship's fiduciary nature. *Keck, Mahin & Cate v. National Union Fire Ins. Co.*, 20 S.W.3d 692, 699 (Tex. 2000). Therefore, if the terms of the contract change during the representation, it is incumbent upon the attorney to ensure the client is aware of the changes and how those changes impact the relationship. Further, the lawyer should suggest that the client seek independent counsel to review such changes and provide advice on whether they are reasonable or advisable under the circumstances. By failing to take these precautions, a personal injury lawyer runs a significant risk of being perceived as greedy and, worse, setting herself up for a malpractice lawsuit.

Never betray the client's trust, particularly when it comes to the client's funds. A lawyer's greed, if unchecked, will come back to haunt her. Again, to avoid even the implication of greed, a lawyer is better served by specifically designating where the client's funds will be deposited and how the client's funds will be utilized. Although personal injury lawyers do not typically require their clients to advance expenses, there are occasions in which the personal injury lawyer may enter into a hybrid contract requiring the client to pay the expenses. If the client is providing funds for the advancement of costs and expenses, the lawyer is not required to keep those funds in a separate account designated as a "trust" or "escrow" account, maintained in the state where the lawyer's office is situated, or else with the consent of the client or other third party, as required by Rule 1.14(a) of the Texas Disciplinary Rules of Professional Conduct. *See* TEX. ETHICS OP. 391. Although the attorney may deposit advances for costs and expenses in her general operating account, the safer practice would be to place all client funds into a trust account when the costs and expenses are merely estimated, and to make the necessary disbursements from that account as needed. *Id.*

Retainers should be fully explained and kept in a separate trust account. TEX. DISC. R. PROF. COND. 1.14. Otherwise, the lawyer runs the risk of poor accounting practices becoming a real problem. If bold enough to include a non-refundable retainer within an agreement with a client, the lawyer should be cognizant, and should explain, that such non-refundable retainer is not a payment for her services, but is rather a payment to secure her lawyer's services and to compensate her for the loss of opportunity for other employment. *See* TEX. ETHICS OP. 611; *Cluck v. Commission for Lawyer Discipline*, 214 S.W.3d 736, 738 (Tex. App. —Austin 2007, no pet.). However, a lawyer is not prevented from entering into an agreement with a client for payment that is denominated a "non-refundable retainer" but also includes payment for the provision of future legal services rather than solely for the availability of future services. *Id.* If that occasion arises, the lawyer should be sure not to deposit such funds into the lawyer's operating account, but rather into a separate trust or escrow account as required by Rule 1.14(a) of the Texas Disciplinary Rules of Professional Conduct.

Even when the case, or the client, does not live up to expectations, the lawyer must. Few cases turn out the way lawyers anticipate during the initial consultation. Some increase in value and some decrease, or lose all value along the way. When a settlement (or judgment) is obtained and funded, lawyers must resist the temptation to alter the agreement or even the calculation of the fee in a way that is more beneficial to the lawyer, even if the fee agreement is ambiguous, unintentionally or otherwise. In making a distribution of proceeds to the client, lawyers should provide a written breakdown of the settlement (or judgment) recovery, reflecting the gross recovery, expenses and costs reimbursed, calculation and payment of the fee, and the net client recovery. Issues related to confidentiality and non-disparagement, if any, as well as potential Medicare liens, and federal income tax liability should be discussed as well, at least to the point of advising the client to seek another legal opinion regarding these matters. Obtaining the client's signature on this written explanation establishes not only the client's agreement and consent to the settlement, but likewise serves to insulate the lawyer from claims by the client concerning any number of ancillary matters that may arise after funding.

The personal injury lawyer should always err on the side of generosity toward her client – taking care not to appear greedy in any respect, and always abiding by her ethical duties. The ethical

implications of the fiduciary relationship between lawyer and client overlay (and overcome) the contractual relationship. In Texas, "...[W]e hold attorneys to the highest standards of ethical conduct in their dealings with their clients. The duty is highest when the attorney contracts with his or her client or otherwise takes a position adverse to his or her client's interest. As Justice Cardozo observed, '[A fiduciary] is held to something stricter than the morals of the marketplace. Not honesty alone but the punctilio of an honor the most sensitive, is then the standard of behavior.' Accordingly, a lawyer must conduct his or her business with inveterate honesty and loyalty, always keeping the client's best interest in mind..." *Hoover Slovacek, LLP v. Walton*, 206 S.W.3d 557, 560-61 (Tex. 2006). These ethical duties go hand in hand with the Texas Disciplinary Rules of Professional Conduct and its Preamble, which states, "A consequent obligation of lawyers is to maintain the highest standards of ethical conduct." In order to avoid the sin of greed, and even the perception of that sinful motive, the personal injury lawyer must closely guard her conduct from inception of the representation to its conclusion. With a nod to Mr. Gekko, it is in every lawyer's best interest to do so.

DEADLY SIN #2 – GLUTTONY. "If you chase two rabbits, you will not catch either one."
Russian proverb

The deadly sin of gluttony, derived from the Latin word *gluttire*, means to gulp down or swallow, or the over-indulgence or over-consumption of anything to the point of waste. As Socrates wisely noted, "He who is not contented with what he has, would not be contented with what he would like to have." One of the more overlooked deadly sins, gluttony should be avoided by the lawyer in her daily practice. This is true most often when a lawyer overreaches into a practice area in which she has no experience or expertise, but nonetheless agrees to the representation. Pursuant to Rule 1.01(a) of the Texas Disciplinary Rules of Professional Conduct, a lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless: 1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or, 2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary under the circumstances. Too often, lawyers overindulge themselves, dipping into practice areas where they have no experience or expertise, and end up committing malpractice. The practice of law is difficult enough within single practice areas, with looming deadlines, statutory mandates, as well as the ever changing case law. As soon as a lawyer decides to jump into another discipline of the law where she has no expertise, she has in some sense doubled the likelihood of a mistake that will lead to a malpractice claim. The outlook continues to deteriorate as more and more practice areas are added to the website for the lawyer who appears to be a "jack of all trades" but is, in reality, a master of none.

Know when to say "when" - good advice for lawyers at the bar and at the office. The term gluttony is most often linked with eating and drinking too much. While those choices can certainly be harmful to lawyers, here the focus is on the lawyer's decision to decline that next client or case. The concept may be as foreign to some lawyers as sobriety, but the issue is real. As with tolerance for one more drink, every lawyer has a different capacity for work, and no two are the same. Pursuant to Rule 1.01(b) of the Texas Disciplinary Rules of Professional Conduct,

a lawyer shall not: 1) neglect a legal matter entrusted to the lawyer; or 2) frequently fail to carry out or complete the obligations that the lawyer owes to a client or clients. Overworked lawyers are not effective lawyers. This issue should be of great concern for the personal injury lawyer who has an excessive caseload. Unless adequate staff and associate lawyers are hired to assist, attorneys with hundreds of active cases are, unfortunately, the usual suspects for missed deadlines and poor preparation that leads to decreased return for client and lawyer alike, and an increased likelihood of a malpractice suit as a result. In order to maximize effectiveness and recovery, and minimize the likelihood of mistakes and potential liability, personal injury lawyers should take regular stock of their caseload in order to ensure an appropriate balance of capacity and quality of work is maintained. Clearly, it would be better for any lawyer to achieve a great result by representing one client accurately and thoroughly than to achieve little or no success by representing two or more clients inadequately and exposing herself to liability for malpractice. This advice applies most poignantly to lawyers representing victims of catastrophic events.

Tread carefully when signing up multiple clients in catastrophic injury cases. Take, for example, the recent fertilizer plant explosion in West, Texas that claimed several lives and caused millions of dollars of property damage. Shortly thereafter, several lawyers began representing more than one client, even after it became known that West Fertilizer Co. had only a \$1 million liability policy. *See* Miriam Rozen, *Lawyers in West Explosion Strategize After Insurance News*, TEX. LAWYER, May 13, 2013 at 1. As soon as a personal injury lawyer is retained to represent more than one client concerning the same accident, a potential conflict of interest arises. These lawyers must to be cognizant of these potential conflicts of interest and the possibility of having to withdraw from one or more of the representations. Any time there may be a limited pool of funds from which multiple clients seek to recover, an inherent conflict is present. *See* TEX. DISC. R. PROF. COND. 1.06 and comment 2; *see also* TEX. ETHICS OP. 500. In fact, this very scenario is analyzed in Opinion 500, in which the Committee conceded it would be a violation of Rule 1.06 to represent two or more in a single accident caused by a third person, when it becomes clear that the third person has a limited amount of funds to pay a possible judgment or settlement (*e.g.*, insurance policy limits substantially less than likely verdict range). *Id.* The unwary personal injury lawyer's over-indulgence in signing up multiple clients may ultimately cost her clients an opportunity to maximize their recoveries, which can, in turn, cost the lawyer in terms of a professional liability claim.

Pursuant to Rule 1.06(b), a lawyer shall not represent a person if the representation of that person: 1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or 2) reasonably appears to be or become adversely limited by the lawyer's or the law firm's responsibilities to another client or to a third person or by a lawyer's or law firm's own interests. In addition to the potential conflict that a limited recovery option may present, multiple clients may actually have conflicting, or adverse, claims. For example, by representing two individuals who died in the West explosion in survival and wrongful death causes of action, a lawyer may well have one client whose claims are adverse to the other; this would be especially true if one of the clients was an employee of the plant and one was merely a passerby. A lawyer engaging multiple clients should notify the clients, in writing, of any potential conflicts of interest and the clients' immutable right to independent counsel on these and other issues that may arise, including a full disclosure of the existence, nature, implications, and possible adverse

consequences of the common representation and the advantages involved, if any. *See* TEX. DISC. R. PROF. COND. 1.06(c). An alternative for a lawyer representing two individuals hurt or injured as a result of the same accident is for that lawyer to limit her scope of representation initially to include maximizing a recovery into one lump sum, but have the clients agree between themselves the potential split. If the clients agree to the split up front without the lawyer's influence, or if there is some alternative dispute resolution in place to deal with the clients' disagreements later, then the lawyer could possibly represent the clients. Again, this scenario is a possibility more so at the outset of a case when it is uncertain who are the responsible parties (*i.e.*, the fertilizer company, the supplier of the fertilizer, or other third parties) rather than when it becomes clear there is only one responsible party with limited funds.

Unfortunately, even informed consent and a written waiver of the conflicts does not provide the blessed assurance of no liability. The question of whether or not the conflict is one that could not be effectively waived, or could not be waived as a matter of law or public policy may still be presented. Therefore, if the lawyer overreaches and tries to sign up too many clients and the representation is later found to be in violation of Rule 1.06, the lawyer may have to withdraw from the representation of all the clients pursuant to Rule 1.06(e) of the Texas Disciplinary Rules of Professional Conduct. In this circumstance, the lawyer will likely have forfeited her fee as well. As the old saying goes, "Pigs get fat and hogs get slaughtered." A smart personal injury lawyer will avoid the sin of gluttony and overreaching by declining new clients or cases requiring more resources than she has available, by refusing to venture into practice areas outside of her own, and by exercising extreme caution in pursuing multiple clients in catastrophic injury cases.

DEADLY SIN #3 – SLOTH. A CUTE AND CUDDLY ANIMAL, BUT NO WAY TO PRACTICE LAW

"Sluggishness of the mind which neglects to begin good... [it] is evil in its effect, if it so oppresses man as to draw him away entirely from good deeds."

- Thomas Aquinas

In Christian parlance, sloth is defined as spiritual or emotional apathy, neglecting what God has spoken, and being physically and emotionally inactive. Sloth can also indicate a wasting due to lack of use, concerning a person, skill, or intangible ideal that would require maintenance, refinement, or support to continue to exist. Certainly, the practice of law is a profession that requires maintenance, refinement, and support. As explained in the parable of the ten minas, we are expected to use our God-given gifts and abilities, including our talents as lawyers, to benefit those who have put their trust in us. Luke 19:11-26; *see also* Matthew 25:14-28. In fact, The Texas Lawyer's Creed states, "A lawyer owes to a client allegiance, learning, skill, and industry." Even when the first three are present, the absence of industry (*i.e.* hard work) should be unacceptable to personal injury lawyers, because it is certainly unacceptable to their clients.

In 2013, the ABA reported that personal injury lawyers representing plaintiffs were targeted in more than 18% of all malpractice claims. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAWYERS' PROF. LIABILITY, *Number of Claims by Area of Law by Year: 2004 – 2011 Study*, in Profile of Legal Malpractice Claims 7, Table 1B.

Within those claims, the top five problem activities associated with the attorney were:

- 1) Preparation, Filing and Transmittal of Documents, or Failure to Do So (28% of claims)
- 2) Advice (20% of claims)
- 3) Commencement of Action / Proceeding (17% of claims)
- 4) Pretrial, Prehearing Errors (9% of claims)
- 5) Settlement / Negotiation (7% of claims)

Id. at 9, Table 3.

Idle hands, and poorly kept calendars, are the devil's playground. These statistics make clear that the failure to act, or act timely, is one of the greatest lawyer sins from a quantitative standpoint. Rule 1.01(b) of the Texas Disciplinary Rules of Professional Conduct states that a lawyer shall not “neglect a legal matter entrusted to the lawyer or frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.” For all of the nuance that can be associated with the practice of law, this rule is pretty straightforward – do your job. Of course, in the practice of law, the devil is truly in the details.

Perhaps the most important function of any law office staff is the calendaring, with reasonable reminders, of upcoming deadlines, derived either from a scheduling order or Texas Rule of Civil Procedure 190. The volume of cases handled by any one lawyer has increased dramatically since computers and word processing became main stream over the last 25 years. This increase in productivity, however, has resulted in a corresponding increase in the opportunities for administrative and clerical mistakes, including calendaring of deadlines. Thus, while the lawyer bears ultimate responsibility for case deadlines, effective training and management of office staff has become even more critical.

Once deadlines are calendared, a safety net or system of “checks and balances” involving two or more members of the law firm is ideal to ensure that deadlines are not overlooked. Once observed, the responsibility for ensuring work is performed timely (and correctly) falls squarely on the lawyer's shoulders. Start early and do not procrastinate, hire help when necessary, and treat your employees as members of your team. Becoming proficient in these areas will help to ensure deadlines are met, hearings are attended, and cases are not dismissed prematurely. By doing so, the prudent lawyer will have avoided the most common basis for a legal malpractice claim.

Do not allow ‘paralysis by analysis’ to creep in. At times, the issues facing lawyers can seem overwhelming. It is during these times when the words of General George S. Patton should come to mind:

“A good plan, violently executed now, is better than a perfect plan next week.”

A failure to act or advise that results in damages to a client will always appear worse than having acted in good faith on behalf of the client – even when that action yields an unsuccessful or unwanted result. While many lawyers are perfectionists, they are not perfect. Fortunately, perfection is not the standard by which a lawyer's conduct is judged in a legal malpractice claim.

Rather, the question will be posed whether the lawyer acted as a reasonably prudent lawyer would have acted under similar circumstances. *Alexander v. Turtur & Assocs.*, 146 S.W.3d 113, 119 (Tex. 2004).

No lawyer can predict every twist and turn that may arise during the course of representation, especially when factual evidence continues to be developed throughout the case. Lawyers can, however, keep their clients informed regarding significant developments, and should maintain an adequate paper trail to document these periodic updates. As reflected above, post-settlement disputes over authority to settle are another common source of complaints against lawyers in personal injury cases. Obviously, the best defense to these claims is written communication with the client asking for and confirming settlement authority. If negotiations are protracted, it is recommended to repeat and confirm authority as the negotiation progresses or as additional facts and circumstances come to light.

With regard to file retention, files relating to the distribution of funds held on behalf of the client must be held for no less than five years. TEX. DISC. R. PROF. COND. 1.14(a). A five year retention policy for all client files is a wise idea. *See Ex Parte Scott*, 190 S.W.3d 672, 674 (Tex. Crim. App. 2006) (Cochran, J. concurring) (noting that the applicable statutes of limitations for legal malpractice and grievances are two and four years, respectively, and thus, a lawyer should retain his file for at least four years, unless the lawyer is made aware of circumstances necessitating a longer retention). A lawyer who does not properly maintain a closed file could be the subject of a request for a spoliation instruction. *See Trevino v. Ortega*, 969 S.W.2d 950, 955 (Tex. 1998). If the lawyer is terminated from representation and the claim is continued by another lawyer, retaining the file until five years after the case has been resolved should be considered. Remember, when a client asks for a copy of her file, it is her file, and should be turned over. (*Resolution Trust Corp. v. H—P.C.*, 128 F.R.D. 647, 650 (N.D. Tex. 1989); TEX. ETHICS OP. 570 (2006) (holding that the client's file includes attorneys' notes and legal memorandum prepared on behalf of client during course of the firm's representation). Upon the client's request for return of her file, however, the lawyer is entitled to a reasonable opportunity to have the file. An attorney should not use the client's file as leverage for payment or settlement of a dispute with the client under any circumstances, as this may be viewed as putting the lawyer's interests ahead of the client's interests – a breach of fiduciary duty.

Seek professional help, if necessary. Whether sloth takes the shape of true laziness and neglect, or merely inaction or “paralysis by analysis,” the effects can be extremely damaging to a lawyer and her clients. The former may also be signs of depression that should be treated. All lawyers face stress in their practice. If a lawyer is struggling to deal with the stress, or feeling depressed or overwhelmed by the practice of law, she is not alone. Most lawyers experience this sensation at some point in their careers, and many lawyers find that their practice moves through cycling stages and varying degrees of motivation, energy, and satisfaction while riding on top of the wave, to apathy, laziness, and depression when the wave crashes down. If a lawyer is battling depression or chemical dependency of any kind, assistance is available from the State Bar of Texas at 1-800-343-8527 any time day or night. Additional information is available at www.texasbar.com.

DEADLY SIN #4 – WRATH. NOT GOOD IN YOU, YOUR OPPOSING COUNSEL, OR YOUR CLIENTS.

Wrath, or anger, is one of the tougher sins to deal with, in that some forms of this emotion are quite natural, healthy and even considered holy. Thomas Aquinas felt that if anger was justified, it was not a sin:

“He that is angry without cause, shall be in danger; but he that is angry with cause, shall not be in danger: for without anger, teaching will be useless, judgments unstable, crimes unchecked. Therefore to be angry is not always an evil.”

Indeed, God’s righteous anger at the sight of evil is spoken of often in scriptures. Jesus himself displayed such righteous anger, turning over the tables of the money changers in the temple. (John 2:13-20). But wrath, which is also known as rage, is typically described as inordinate and uncontrolled feelings of hatred and anger. So where do we draw the line as lawyers? When does passion for our case and zealous representation of our clients become too personal, too prideful, often leading to ugliness and incivility between opposing lawyers? Lawyers would be wise to temper their feelings of anger when it comes to dealing with opposing counsel, opposing parties, and even their own clients. Incivility is not only unbecoming of the legal profession, it can lead to unpleasant and costly results in your cases.

Be agreeable when possible, and get the agreement in writing. Maintaining a good relationship with opposing counsel is not always easy, but it is worth the effort. Courtesy, candor and cooperation is required between lawyers under The Texas Lawyer’s Creed, as is scrupulous observance of all agreements. Practicing “gotcha” tactics may prove successful in the short term, but eventually this monster will bite the hand that feeds it. When that happens, do not expect a gracious response from your adversary. Remember, “a gentle answer turns away wrath, but a harsh word stirs up anger.” (Proverbs 15:1). Treat your opposing counsel with respect – just as you want to be treated. Lawyers are people, and “life” happens to lawyers too. Give extensions freely, provided that these favors are not abused, and expect the courtesy to be returned. At the same time, do not take such courtesies for granted, and protect yourself by memorializing such agreements with opposing counsel in writings that will be enforced according to Texas Rule of Civil Procedure 11.

Texas Rule of Civil Procedure 11 states, “Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.” TEX. R. CIV. P. 11. A settlement agreement must comply with Rule 11 to be enforceable. *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex.1995) (citing *Kennedy v. Hyde*, 682 S.W.2d 525, 528 (Tex.1984)); *see also London Mkt. Cos. v. Schattman*, 811 S.W.2d 550, 552 (Tex.1991) (once the existence of an agreement concerning a pending suit becomes disputed, the alleged agreement is unenforceable unless it comports with Rule 11 requirements). In determining whether the “in writing” provision of Rule 11 has been satisfied, Texas courts will apply the same contract principles used to determine whether a writing satisfies the statute of frauds. *Padilla*, 907 S.W.2d at 460. Thus, a Rule 11 settlement agreement is not enforceable

unless there is a “written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writings without resort to oral testimony.” *Id.*; see also *Knapp Med. Ctr. v. De La Garza*, 238 S.W.3d 767, 769 (Tex.2007) (Rule 11 is “essentially a ‘statute of frauds’ for settlement agreements”). The written memorandum need not be contained in one document. *Padilla*, 907 S.W.2d at 460. In other words, a series of emails is sufficient as long as the essential elements of the agreement are present. *Id.* Whether a settlement agreement fails for lack of an essential term is a question of law. *Cantu v. Moore*, 90 S.W.3d 821, 825 (Tex. App.—San Antonio 2002, pet. denied).

Since many agreements are reached through email, it is important to note that emails are enforceable under Rule 11. *Cunningham v. Zurich American Ins. Co.*, 352 S.W.3d 519, 525 (Tex. App.—Fort Worth 2011, pet. denied; pet. for rehearing filed). Even though Rule 11 requires a signed writing, the fact that the email is an electronic document does not prevent it from being enforceable under Rule 11 because, under the Uniform Electronic Transactions Act, a contract may be enforceable despite the use of an electronic record in its formation, and “[i]f a law requires a signature, an electronic signature satisfies the law.” *Id.* at 529. Similarly, filing a Rule 11 agreement with the court is not required for the agreement to exist, but the agreement must be filed with the court before any effort to enforce it is made. *Padilla v. LaFrance*, 907, S.W.2d 454, 461 (Tex. 1995).

Finally, remember that Rule 11 does not apply to pre-suit agreements, as those agreements are not “touching any suit pending.” TEX. R. CIV. P. 11. As such, pre-suit oral agreements (including settlement agreements) can be binding because Rule 11 does not apply and no writing will be required for enforcement. *Carter v. Allstate Ins. Co.*, 962 S.W.2d 268, 271 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). Still, the best policy, next to honesty, is putting it in writing. This is recommended even if only confirming an agreement in an email and requesting a simple response with a question, “Did I understand this correctly?” or “Do we have an agreement on this?” Even when lawyers from more “laid back” towns ask to just trust them, or imply such writings are silly, the best practice is to avoid possible misunderstandings by reducing agreements to writing. Those small steps taken now may avoid many more steps, and painful ones, later on when memories and cooperation fade.

Be a straight shooter, always. As with other aspects of life, a lawyer’s best defense against disputes over agreements is to be true to her word – to be honest. “My word is my bond” is the very first tenet of the Texas Lawyer’s Creed. Remember, in the event of a malpractice claim by a former client, your opposing counsel can be your biggest advocate or your worst enemy. In fact, the first call from a malpractice attorney investigating a potential claim is often to the opposing counsel in the underlying case. Understandably, that conversation can either fan the flames of a lawsuit, or go a long way toward putting the fire out. As Vice President John C. Calhoun noted, “Beware the wrath of a patient adversary.” If an opposing counsel’s description is less than a “straight shooter,” trouble may be awaiting.

Maintain independence and personal ethics at all costs. At some point in their careers, most lawyers will be tempted, if not outright requested, to do something they know to be wrong. A lawyer should not let a client’s request, a supervising attorney’s request, or the desire to win the

case lead down a slippery slope of that includes the compromising of personal ethics. Aiding and abetting the breach of fiduciary duty is a growing and real threat to lawyers providing advice to corporate clients, especially when the litigation involves shareholder disputes. *E.g.*, *Querner v. Rindfuss*, 966 S.W.2d 661, 670 (Tex. App.—San Antonio 1998, pet. denied). Obtain the appropriate conflict waivers or decline the representation if the conflict presents an impediment to independent and honest advice. *See Beck v. Law Offices of Edwin J. (Ted) Terry Jr., PC*, 284 S.W.3d 416, 437 (Tex. App.—Austin 2009, no pet.). Do not ever participate or condone the destruction of documents or computer files, or the creation or submission of documents known to have been fabricated after the fact. Not only will such actions subject the lawyer to discipline under the rules, they will expose the lawyer to the wrath of the trial judge, and the opposing counsel, neither of which may be quick to forgive and forget.

In addition to developing a reputation as an honorable adversary by shooting straight with opposing counsel, it is equally important to shoot straight with clients. Reporting bad news is never easy or enjoyable but, unlike wine, bad news does not get better with time. In fact, potential malpractice claims can often be headed off at the pass with an honest admission, and remedial actions. Even when the damage is irreparable, clients are far less likely to feel the need for vindication if they feel their lawyer has been honest with them about the error and its impact. Further, the value of a malpractice case increases dramatically when taken out of the context of simple negligence, and claims of fraud, DTPA violations and breach of fiduciary duty are added based upon the lawyer's failure to fully, and timely, disclose the error and honestly report to the client regarding its impact. Lawyers tend to make fairly unsympathetic defendants, and adding the element of dishonesty and deceit is a recipe for disaster.

The client's interests must come first, but not at the sacrifice of the lawyer's integrity. In addition to the obligations of the Texas Lawyer's Creed, the Texas Rules of Disciplinary Conduct govern a lawyer's obligations to her client. While the Disciplinary Rules focus on more substantive matters, the Texas Lawyer's Creed is also instructive, and colors in some of the more practical areas between the legal theory and policy behind the Disciplinary Rules. For example, Rule 1.03(a) requires a lawyer to keep her client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information. Rule 1.03(b) requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Without written communications, it is difficult to imagine how an attorney accused of violating these rules would defend such allegations. Nonetheless, the Texas Lawyer's Creed also tips the question of tactics in favor of the lawyer, noting some protections of the lawyer's objectivity and independence even while remaining loyal and committed to the client's goals. The Creed also notes that a client has no right to demand his lawyer abuse an opposing party, pursue claims with no merit, or refuse to grant opposing counsel reasonable accommodations. TEX. LAWYERS' CREED § II(10).

Communicate as much as necessary to keep your client abreast of critical events, decisions and advice in writing. As noted earlier, it is best to convey bad news in writing as well. Doing so will help to avoid allegations of concealment or sugar-coating, and can even support a limitations defense and destroy the application of the discovery rule, which does apply in legal malpractice claims. *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988).

When mistakes happen, correct them immediately, if possible. This really should go without saying. However, due in part to the deadly sin of Pride, lawyers are often experts at finding fault and novices at accepting it. A personal injury lawyer should never try to rationalize or cover up her mistakes. Instead, she should learn from those mistakes, teach associates and staff from them, and move ahead with a plan to correct or minimize the damage. If the mistake is a rather obvious one, she should consider apologizing for the result while attempting to mitigate the damage. (Consult your professional liability carrier before making any admission of liability in order to avoid prejudice to any defenses that may exist). A skillful lawyer can honestly accept responsibility for the outcome without necessarily admitting fault, and may even avoid a claim by doing so. If the mistake was made by an associate or partner, do not turn a blind eye and assume the associate or partner will resolve the problem. Such willful ignorance can actually create personal liability for partners and supervising attorneys. *See Cook v. Brundidge, Fountain, Elliott, & Churchill*, 533 S.W.2d 751, 758 (Tex. 1976). Lawyers can be held personally responsible for doing nothing, when they should have done something – this should sound familiar by now.

The prudent lawyer writes letters and emails as though she expects to see them again. She is mindful of the primary audience of her letters, e-mails, blogs, text messages, or other social media postings. At the same time, she is mindful of the potential secondary audiences, such as a judge or jury. Everyone is a potential witness in a legal malpractice case and every communication is a potential exhibit. If that thought causes concern – it should.

Exercise care in the negotiation and execution of settlements. Almost seven percent of all claims against lawyers involve the settlement process. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAWYERS' PROF. LIABILITY, *Number of Claims by Area of Law by Year: 2004 – 2011 Study*, in Profile of Legal Malpractice Claims 7, Table 1B. When engaging in settlement negotiations, be mindful of the information revealed to opposing counsel, and do not assume the case will settle. Although the settlement communication is protected under Texas Rule of Evidence 408, the information conveyed may not be, especially if opposing counsel can obtain or prove it from another source. If issues arise that are outside of the area of the lawyer's expertise, such as the tax treatment of the settlement, ask for assistance from another lawyer with that expertise, and advise the client in writing.

Once a settlement is reached, secure the settlement with a valid Rule 11 agreement, which may contemplate the drafting and execution of a more formal settlement document. Explain the material settlement terms to the client before the final agreement has been reached and signed. Once the agreement has been finalized and funded, explain in writing the recoveries received, fees paid to the law firm, costs paid from the settlement proceeds, if any, and the final disbursement to the client. In addition to the financial components, remind the client again of the non-monetary terms included in the settlement, such as confidentiality, indemnification, and the impact of any potential liens or taxes. Obtaining the client's signature acknowledging the settlement disbursement, the calculation of fee, and the non-monetary terms is advisable.

DEADLY SIN #5 – LUST. WHEN PASSION OVERWHELMS COMMON SENSE.

“Don’t fall in love; if you do you may find that she don’t love you.”
- Fee Waybill.

While lust is often associated with unbridled sexual desire, the true meaning of lust is an intense craving for an object or experience, *i.e.* a lust for life. Lust often causes the otherwise sensible person to act foolishly. Everyone knows at least one seemingly happily married person who threw away his or her family, friends, and career to pursue a fleeting romantic encounter. Once the lust subsides, even the wayward actor struggles to explain her behavior – perhaps suggesting that she allowed the thrill of the moment to override her common sense. For the personal injury practitioner, the most common form of lust – at least relevant to this G-rated article – is falling in love with a bad case.

Learn to recognize and avoid bad cases. A significant portion of the personal injury attorney’s time is dedicated to case intake and evaluation. The process of determining which cases to accept and which cases to decline may be the most important factor in determining an attorney’s success or failure. Generally, the only information presented to the lawyer by the (potential) client in this initial stage is the client’s version of events. From this one-sided presentation of the facts, the prudent lawyer must discern fact from fiction, evidence from imagination, and determine whether the case is likely to be successful. It has been said that, “your client’s story never gets better than the first time you hear it.” Repeat that statement daily if necessary.

Before jumping headlong into a complicated case, ask the following questions:

- Does the client’s story make sense?
- Do I believe the client?
- Can the important events be independently verified?
- Is the client likeable?
- Are the client’s expectations realistic?

If the answer to any of the above question is “no,” the wise personal injury lawyer will think twice before taking the case. Two or more negative answers should be a serious red flag, at a minimum, if not an automatic rule out. In handling malpractice claims, one of the most common statements from the defendant lawyer is, “I knew he was going to be trouble the first time I met him.” Why did the attorney take a case for a client that she knew would cause her trouble? Several of the “deadlies” may apply here, but lust ultimately prevails, leading the lawyer to allow her passion to overwhelm her common sense. Attorneys are natural problem solvers. In many instances, especially in cases that have the potential to generate a substantial fee, the lawyer convinces herself that she can overcome any challenge that the case may present. This paper does not advocate shying away from a “tough” case, but simply warns the personal injury lawyer against allowing her common sense to be overwhelmed by lust and convinced to take a case she should avoid.

A well-drafted representation agreement is an effective tool for avoiding a bad decision. Texas Disciplinary Rule of Professional Conduct 1.04(d) requires a written agreement between the client and the attorney in every matter in which the lawyer's fee is contingent on the outcome of the case. However, it is in the lawyer's best interest to have a written agreement in every case. For one thing, a standard form written agreement can provide an "out" for a lawyer who signed up a case in the heat of the moment, then later determined that the case lacked the potential initially perceived or, worse, lacked the facts as represented by the client. As set forth above, a well-written fee agreement should:

- Identify the parties to the Agreement
- Define scope of services
- Outline the fee arrangement
- Require adequate client cooperation
- Delineate the circumstances in which the attorney may withdraw
- Perfect an assignment and/or lien against the case if the lawyer is terminated

While the identity of the client and the scope of the services to be provided may seem to be obvious at the outset of the litigation, they are often the source of dispute once the representation is concluded (or near conclusion). For example, an elderly wrongful death plaintiff comes to the office to discuss her husband's death case. During the course of the initial meeting, she expresses a desire that the funds she recovers go to her niece after her passing. Being sympathetic to the client, the lawyer signs up the case. Without knowing it, the client may leave with the expectation that, in addition to handling the death case, the lawyer will also be drafting her will. A clear, written contract will avoid this confusion and any disagreement that may arise concerning the scope of services being offered. Identifying who the lawyer represents is just as important, especially in situations where multiple parties may have claims to a limited pool of insurance funds, or may have different claims or defenses from one another.

What if the lawyer ignored the advice above and, in a moment of lustful blindness, accepted a case with a very difficult client and unwinnable facts? Such a case can become an albatross around a lawyer's neck. With the Court's permission, a lawyer may withdraw from a case if doing so does not adversely impact the client. TEX. DISC. R. PROF. COND. 1.15(b)(1); TEX. R. CIV. P. 10. The Disciplinary Rules also allow "for cause" withdrawal when:

- (a) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (b) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (c) "other good cause for withdrawal exists."

TEX. DISC. R. PROF. COND. 1.15(b)(1). The best evidence to support a request to withdraw is a written contract that clearly outlines the requirements of the client and provides fair notice of the

circumstances under which the parties have agreed in advance that the lawyer may withdraw. An effective motion to withdraw will show that the withdrawal circumstances outlined in the fee agreement have occurred, and that the client has been given an ample opportunity to rectify her conduct and obtain substitute counsel. It may also be important to show that the circumstances giving rise to such request to withdraw did not exist at the onset of the litigation. One of the more frequent bases to allow an attorney to withdraw is a lack of cooperation from the client. Including a client cooperation provision in the fee agreement that specifically describes the actions that must be taken by the client to fully cooperate with her counsel is helpful. Providing a detailed account of the client's failures to communicate and cooperate with the attorney provides the Court with an appropriate basis to grant the withdrawal motion.

Finally, a written contract that clearly outlines a fee may be necessary to protect a lien interest in the outcome of a case. "When a client, without good cause, discharges an attorney before he has completed his work, the attorney may recover on the contract for the amount of his compensation." *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969).

Even in the bad cases, the lawyer owes the client a fiduciary obligation until the withdrawal is complete. *Ellis v. United States*, 356 U.S. 674, 675 (1958). A lawyer should not allow resentment in accepting a bad case to prevent her from zealously representing her client in the matter, even while her motion to withdraw is on file and soon to be considered. By following these suggestions, a lawyer can become better at avoiding the acceptance of bad cases, and will have a better chance to withdraw from that case accepted in a moment of lustful weakness.

DEADLY SIN #6 – ENVY. WANTING WHAT YOU DO NOT HAVE AND IGNORING WHAT YOU DO.

"The envious man thinks that if his neighbor breaks a leg, he will be able to walk better himself."

- Helmut Schoeck.

Do not envy the opponent's case. Litigation is, by definition, adversarial; oftentimes, it is contentious as well. However, every lawyer owes a duty to her fellow attorneys to be "courteous, civil, and prompt in oral and written communication." TEX. LAWYERS' CREED § III(1). In some cases, attorneys may feel so strongly that their clients are in the right – and the opposition so clearly in the wrong – that she is tempted to win at any cost. In the case where she truly feels that her client is in the right, a lawyer may become envious of the funds held by a recalcitrant insurance company – and protected by their obfuscating lawyers. These envious feelings can tempt a lawyer to adopt an "ends justify the means" approach to litigation. Acting on these thoughts, however, can be counter-productive. Worse, such conduct can lead to a grievance and a disciplinary hearing, and even a malpractice action.

The Texas Disciplinary Rules of Professional Conduct provide the rules by which a Texas lawyer must act. While a violation of these rules is not negligence *per se*, the existence of a violation can be introduced as evidence in connection with a legal malpractice action. *Two Thirty Nine Joint Venture v. Joe*, 60 S.W.3d 896, 905 (Tex. App.—Dallas 2001), rev'd on other grounds, 145 S.W.3d 150 (Tex. 2004). The Preamble to the Texas Disciplinary Rules of

Professional Conduct provides: “(v)iolation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached.” PREAMBLE ¶ 15, TEX. DISC. R. PROF. COND., *reprinted in* TEX. GOV'T CODE ANN., title 2, subtitle G app. A. This statement has led some malpractice attorneys to assert that evidence of a violation of the Disciplinary Rules may not be introduced to show malpractice. Courts considering this question, however, have held that, while the Disciplinary Rules are not dispositive, they may be introduced as evidence and should be considered as part of the analysis of the scope of fiduciary duty owed by an attorney to his client. *Burrow v. Arce*, 997 S.W.2d 229, 246 (Tex.1999) (remanding case to the Court of Appeals for determination whether attorneys’ violations of the Disciplinary Rules justified fee forfeiture). In fact, courts have routinely referred to the Disciplinary Rules to help define standards of attorney conduct. *See, e.g., State v. Baker*, 539 S.W.2d 367, 372 (Tex. 1976), overruled on other grounds, *Cosgrove v. Grimes*, 774 S.W.2d 662 (Tex. 1989) (“[a]lthough the canons of ethics and their ethical considerations set out in the Rules are not binding upon this Court, those canons are highly persuasive and are due our utmost consideration”); *Two Thirty Nine Joint Venture v. Joe*, 60 S.W.3d 896, 905 (Tex. App.—Dallas 2001), rev'd on other grounds, 145 S.W.3d 150 (Tex. 2004) (noting that the Disciplinary Rules can be considered by the trier of fact as evidence of a violation of an existing duty of care to support claims of legal malpractice or breach of fiduciary duty); *Nolan v. Foreman*, 665 F.2d 738, 740–43 (5th Cir.1982) (holding that an alleged violation of Texas ethical rules regarding reasonableness of fees, attorney withdrawal, and rule prohibiting an attorney from attempting to exonerate himself from malpractice in advance, stated “a cause of action for legal malpractice in the nature of a tort”). For example, claims for breach of fiduciary duty and theft of trust funds are actionable under well-established Texas law. Thus a legal malpractice plaintiff may not rely on the Disciplinary Rules to create a cause of action, but may introduce the Disciplinary Rules to explain the duties owed by the defendant to her client. Using the Disciplinary Rules in this manner is permitted and contemplated by well-settled Texas law. *Id.*

As a fiduciary, the lawyer owes her client a duty of absolute candor. A fiduciary duty exists between attorneys and client as a matter of law. *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988). One often misunderstood duty is the duty of absolute candor. As the Tyler Court of Appeals noted in *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15 (Tex. App.—Tyler 2000, pet. denied), the attorney-client relationship is “highly fiduciary” and requires proof of “perfect fairness” on the part of the attorney. *See Id.* at 22 (*citing Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964)). Counsel must fully disclose all relevant facts and circumstances to the client. *Id.* “A fiduciary has much more than the traditional obligation not to make any material misrepresentations; he has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes.” *Id.* (*citing Montgomery v. Kennedy*, 669 S.W.2d 309, 312–14 (Tex.1984) (emphasis added)). If an attorney fails to fully disclose the facts it is tantamount to fraudulent concealment. *Id.* (*citing Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex.1988)). In short, a lawyer must be 100% honest with her client, even about her own mistakes.

Do not envy other lawyers’ cases. Barratry, otherwise known as ambulance chasing, is formally defined as the “vexatious incitement to litigation, especially by soliciting potential legal clients.” Black’s Law Dictionary (2009). Barratry must be avoided for a host of reasons. First

and foremost, barratry is illegal - a third-degree felony. (TEX. PENAL CODE § 38.12. Second, barratry is grounds for disbarment. (TEX. DISC. R. PROF. COND. 8.04(a)(9); TEX. GOV'T CODE § 82.062). Finally, newly enacted civil statutes provide the victims of barratry a cause of action against the lawyer who committed the offense, even when no damages are incurred. (TEX. GOV'T CODE § 82.0651). A lawyer may face two to ten years in prison, a criminal penalty of up to \$10,000, loss of his license, and a civil damages award of \$10,000 plus attorneys' fees. Simply put, barratry is not worth the risk.

Legitimate advertising is not barratry. An attorney has a Constitutionally-protected free speech right to advertise her services. *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977). Attorney advertising, however, is subject to several rules that may function as traps for the unwary personal injury lawyer.

All advertisements (including websites) must be submitted to the Advertising Review Committee before being distributed, published, or "going live." TEX. DISC. R. PROF. COND. 7.07(e). However, an advertisement that contains only the following elements is exempt from the pre-approval process:

- the name of the lawyer or firm and lawyers associated with the firm, with office addresses, electronic addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as "attorney," "lawyer," "law office," or "firm";
- the particular areas of law in which the lawyer or firm specializes or possesses special competence or particular areas of law in which the lawyer or firm practices or concentrates or to which it limits its practice, including relevant Board Certification(s);
- the technical and professional licenses granted by this state and other recognized licensing authorities and the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;
- foreign language ability and the acceptance or nonacceptance of credit cards;
- any fee for initial consultation and fee schedule;
- other publicly available information concerning legal issues, not prepared or paid for by the firm or any of its lawyers, such as news articles, legal articles, editorial opinions, or other legal developments or events, such as proposed or enacted rules, regulations, or legislation; and
- that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement.

A copy or recording of each advertisement in the public media, the approval of same, and a record of when and where the advertisement was used, shall be kept by the lawyer or firm for four years after its last dissemination. *Id. at 7.04(f)*.

If an advertisement refers to the fact that the lawyer accepts cases on a contingency basis, the advertisement must state:

- whether the client will be obligated to pay all or any portion of the court costs;
- if a client may be liable for other expenses; and
- in the event that a specific fee or range of fees is disclosed, the advertisement must state whether the percentage is computed before or after expenses are deducted from the recovery. *Id.* at 1.04(h).

An advertisement must disclose the city or town of the lawyer's principal office and may not advertise the existence of any office other than the principal office unless that office is staffed by a lawyer at least three days a week; or the advertisement states the days and times during which a lawyer will be present at that office, or that meetings with lawyers at that office will be by appointment only. *Id.* at 1.04(j).

A complete list of the rules governing attorney advertising (specifically Rules 1.04, 7.02, 7.04, and 7.07) should be consulted before beginning any advertising program. The staff of the Advertising Review Committee of the State Bar of Texas can be a tremendous assistance in determining whether a particular ad needs prior approval. They can be reached at (800) 566-4616 or by email at adreview@texasbar.com. Attorney advertising does not have to overwhelm even the solo practitioner. A successful advertising program can ethically generate cases, while avoiding the liabilities of barratry.

As a group, lawyers are fortunate. We have the skills and ability to make significant sums of money while helping our clients solve real life problems along the way. The temptation to be envious of our peers can be a powerful force for negative actions. Lawyers must act as the standard bearers of ethical conduct, and avoid the temptation to "sin" by taking liberties with the ethical requirements of our practice. Lawyers should do so both because it is the right thing to do, and because doing so will avoid the serious ramifications of covetous conduct.

DEADLY SIN #7 – PRIDE. A RARE COMMODITY AMONG TRIAL LAWYERS.

"Pride goeth before destruction, and an haughty spirit before a fall."
- Proverbs 16:18.

The deadly sin of pride is the opposite of humility – a virtue too often lacking in personal injury trial lawyers. While a healthy sense of one's own ability to persuade and "carry the day" is a must for successful trial lawyers, the path that leads to an unhealthy sense of pride is a slippery slope. Because most trial lawyers are both highly intelligent and highly educated, there is an inherent tendency for a lawyer to think that "she knows best." While this may often be the case, the Disciplinary Rules require that a lawyer's own opinion yield to that of others in certain circumstances. A lawyer must always remember that they are hired to serve their client, and that the client is always the ultimate decision maker. Pride will lead the lawyer to ignore client requests and goals, and thus the prudent lawyer must remember that she is merely the facilitator of the client's claim, not the master of it.

Specifically, Rule 1.02 requires a lawyer to “abide by the client’s decision.” For the personal injury lawyer, this situation may present itself in the context of whether to accept a settlement offer. When a defendant offers what the lawyer considers to be an unacceptably low settlement offer, the lawyer may recommend declining the settlement. However, the client – perhaps in a bind for money – might express a desire to accept the offer. The converse can also occur when a lawyer has fought hard to obtain what she considers a fair and reasonable settlement offer, but the plaintiff insists on continuing the fight. While these situations are a mainstay in the personal injury lawyer’s profession, a few steps can be taken at the outset of the case to ameliorate the potential problems they create.

First, have an open and frank discussion about the client’s (and perhaps even the lawyer’s) expectations prior to accepting a case. In the lawyer’s natural rush to sign up new cases, this important step may be overlooked. This omission, however, simply sows the seeds of later disagreements concerning a settlement offer. A lawyer should understand her client’s motivation as it relates to the litigation. Is the client in a hurry for a quick settlement, or is she prepared for a long and arduous battle in order to obtain a larger award? Likewise, are the client’s expectations for recovery realistic? Importantly, do both of these answers indicate the lawyer and client are the same page concerning the goals for the representation? If not, more discussion, evaluation and even documentation concerning the scope and goals of the representation may be necessary.

Every client has heard about the famous McDonald’s case in which the plaintiff received “millions” after spilling hot coffee on her own lap. Some clients may think, “if that case was worth one million, my case is worth at least ten.” Most clients do not realize, however, that the McDonald’s case was reversed on appeal, like so many others that garner media attention. Two of the most foreign concepts for clients, particularly in personal injury cases, is the function of appellate courts and the role of insurance. Explaining the carrier’s cost–benefit analysis, where the carrier’s worst day in court is paying its policy limits, and that the client is unlikely to recover policy limits without success at both the trial and appellate court levels, may help to put the client in a more reasonable frame of mind. Likewise, a lawyer should explain potential dispositive issues in the case. While more and more insurance defense counsel are filing motions for summary judgment before making a substantive settlement offer, many cases still settle with dispositive issues unresolved. A prospective client needs to understand how these potential unresolved issues can impact settlement value. Weighed against the risk of a dispositive issue being resolved in the defendant’s favor, a current settlement offer may also appear more desirable.

The responsibility to keep a client reasonably well informed of the realistic range of settlement does not end as soon as the case is signed up. A prudent attorney continues to keep her client informed with periodic updates as the case progresses. This is especially important in circumstances where the client receives correspondence directed to opposing counsel. Prior to sending a letter or position statement to the defendant that contains argument and a significant demand for settlement, lawyers should discuss the letter with the client, explaining its purpose is intended to persuade the opposition to settle, and does not represent an unqualified statement of the facts or even the lawyer’s valuation of the case. Too often, an unexplained letter to opposing counsel can form the basis for a client’s unrealistic expectations. An experienced personal injury

lawyer should have a good feel for the client's expectations at every step of the litigation process, and this understanding can be important in preventing lawyer-client disputes from arising in the future.

What if the lawyer truly committed an error? As stated previously, an attorney owes a fiduciary duty to report all information concerning the case to the client, even information that may harm the attorney. *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied); TEX. DISC. R. PROF. COND. 1.03. However, legal malpractice cases and grievances are typically filed because anger has developed between the client and the attorney, often in the absence of common courtesy and respect. Therefore, in addition to disclosing errors solely out of obligation, common sense and common courtesy dictate this disclosure as well. Often a kind word and a sincere apology can alleviate a grievance. It may also be prudent to notify one's malpractice carrier of the potential for a claim. Likewise, be sure to disclose all potential claims on any subsequent policy applications. Failure to do so may provide a basis for the carrier to deny coverage of such claims when they are made in the future.

Settling with the client. After making an error regarding a client's file, the first thought of some attorneys may be, can I settle this quickly? However, the Disciplinary Rules provide that, "A lawyer shall not . . . settle a claim for . . . liability [for malpractice] with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith." TEX. DISC. R. PROF. COND. 1.08(g). This scenario was squarely presented to the Professional Ethics Committee of the Supreme Court of Texas and was addressed in Texas Ethics Opinion 593 (2010). The Committee's conclusion was that an attorney may settle with a client, if he meets these requirements:

- (1) the lawyer discloses the malpractice in detail;
- (2) the lawyer clearly and unambiguously notifies the client that the lawyer client relationship has been terminated;
- (3) the lawyer advises the now former client in writing that independent representation is appropriate with respect to the client's consideration of the lawyer's offer to settle the malpractice claim;
- (4) the lawyer provides sufficient time for the client to consider obtaining independent representation for the settlement of the malpractice claim; and
- (5) the lawyer does not engage in conduct involving dishonesty, fraud, deceit or misrepresentation in connection with the negotiation and settlement of the malpractice claim.

See TEX. ETHICS OP. 593. It should be noted, however, that the opinions of the Texas Ethics Committee are not binding on any Court or on the Grievance Committee. *In re: Meador*, 968 S.W.2d 346, 349 (Tex. 1998); *Sidley, Austin, Brown, & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 866 (Tex. App.—Dallas 2010, no pet.) (citing TEX. ETHICS OP. 586). Nevertheless, settlement of a malpractice complaint that complies with these requirements will stand a fighting chance at being upheld if challenged by a client who has changed her mind about settlement.

Throughout history, pride has caused the downfall of many powerful institutions and extraordinary people. One need only remember the poem Casey at Bat, in which Casey vainly ignores strikes one and two, confident in his ability to hit the third pitch out of the ballpark. (*Casey at Bat*, E. THAYLER 1888). But, as we all know, Mighty Casey struck out.

The practice of law is a profession, and must be treated as such. Abiding by the ethical rules and principles set forth in the Texas Lawyer's Creed, the Texas Disciplinary Rules of Professional Conduct and the opinions of the Texas Ethics Committee is certainly advised. Abiding by simple common sense and personal integrity may be enough for some lawyers to avoid a malpractice claim. Hopefully, the Seven Deadly Sins discussed in this paper will simply serve as reminders to those already on the path of righteousness and professionalism in their practice.

APPENDIX A

ATTORNEY-CLIENT CONTINGENT FEE CONTRACT

This Attorney-Client Contingent Fee Contract (referred to herein as the “Contract”) is made between _____ (referred to herein as “Clients”), on the one hand, and _____ and _____ (collectively referred to herein as “Attorneys”), on the other hand. Clients and Attorneys are sometimes collectively referred to herein as the “Parties.” In consideration of the mutual promises and agreements stated in this Contract, the Parties agree as follows:

I. THE REPRESENTATION

1.1 By signing this Contract, Clients retain Attorneys to represent Clients in investigating, evaluating and asserting Clients’ potential claims and causes of action against _____ (referred to herein as “_____”) arising from or based upon damages sustained by Clients as a result of _____, _____ and _____ (referred to herein as the “Claims”). Attorneys agree to assume joint responsibility for the representation of Clients. _____ will assume the role of lead counsel in the representation and _____ will monitor the Claims, assist in communicating with the Clients about the Claims and the progress of the Claims, and assist in the representation as requested by _____.

1.2 Clients agree that pursuant to this Contract, Attorneys represent only the person and entity listed above as “Clients.” Clients further agree that Attorneys’ obligations are limited to representing Clients in connection with the specific matters described in paragraph 1.1, above, as the “Claims.” Clients also agree that Attorneys’ representation of Clients under this Contract is limited to representation through one trial and any post-trial and/or post-judgment motion practice in the trial court following that one trial, and does not include representation in connection with any appeal by either or both Clients or by _____, of a judgment rendered by the trial court or any retrial or other proceedings that might be ordered or might occur following an appeal. If Clients would like for Attorneys to represent them in connection with any appeal or retrial following an appeal, then the Parties would need to negotiate a new fee contract for that representation. Clients understand and agree that Attorneys’ are not tax experts and that Attorneys will not provide any type of tax advice, including, but not limited to, whether any funds or other things of value that Clients might recover pursuant to the Claims are taxable.

1.3 Pursuant to the Texas Disciplinary Rules of Professional Conduct, a lawyer generally may not represent multiple clients in a matter if there is a conflict of interests or potential conflict of interests among the clients, unless (i) the lawyer reasonably believes that the representation of each client will not be materially affected, (ii) each client consents to the representation after the lawyer has made a full disclosure of the existence, nature, implications, and the potential adverse consequences and the advantages of the joint representation. You have indicated that you are the sole owner of _____, and thus it appears that no conflict is likely or foreseeable. In any event, if any conflict of interest were to develop, be aware that could require Attorneys to withdraw from representation of one or both Clients.

1.4 To the extent feasible, Attorneys will communicate with each of the Clients regarding developments in the Claims and will keep Clients reasonably informed. Because a lawyer has both an obligation of confidentiality to each of the lawyer's clients and an obligation to keep each of the lawyer's clients reasonably informed of significant developments in the case, Attorneys request that Clients agree that whatever one of the jointly represented clients tells Attorneys, Attorneys will be free to share with the other jointly represented client(s). By signing this Contract, Clients so agree.

II. ATTORNEYS' FEES

2.1 This Contract is a contingency fee contract. If Attorneys are successful in recovering for either or both Clients money and/or other things of value as described in paragraph 2.2, below, whether by settlement, judgment or otherwise, Attorneys shall receive as attorneys' fees the dollar amount equal to:

(a) 34% of any amount remaining after deducting court costs and other case expenses incurred or advanced by Attorneys pursuant to paragraph 3.1, below, from Clients' "Total Recovery" (as that term is defined in paragraph 2.2, below) if a recovery is made at a time when Attorneys have not associated additional counsel in accordance with paragraph 6.4, below; or

(b) 40% of any amount remaining after deducting court costs and other case expenses incurred or advanced by Attorneys pursuant to paragraph 3.1, below, from Clients' "Total Recovery" (as that term is defined in paragraph 2.2, below) if a recovery is made after Attorneys have associated additional counsel in accordance with paragraph 6.4, below.

If Attorneys do not obtain a recovery of money or other things of value for Clients, then Clients will not owe Attorneys any attorneys' fees or costs or expenses.

2.2 The "Total Recovery" for purposes of calculating attorneys' fees pursuant to paragraphs 2.1 (a) or (b), above, includes, except as stated in this paragraph, all money and anything else of value (expressed in present dollars) recovered, received or obtained by Clients as a result of any settlement of, or recovery pursuant to the Claims. Such things of value other than money may include, but are not limited to, non-cash assets (such as real property or personal property) or the value of any business deal or transaction entered into by Clients with _____ as a part of a settlement of the Claims. If Attorneys and Clients cannot agree on the value, expressed in present dollars, of any item, right or thing included in the Total Recovery, Clients and Attorneys agree to retain the services of a mutually agreed upon accounting firm to make an appraised present cash value of such item, right or thing, which appraised value shall be assigned to such item, right or thing for purposes of determining the present cash value of the Total Recovery.

2.3 Clients understand that Attorneys will divide any attorneys' fees payable pursuant to this Contract based on Attorneys assuming joint responsibility for the representation. Attorneys will receive the following percentages of any attorneys' fees payable:

- a. _____ 85%; and
- b. _____ 15%.

The foregoing division of fees will not increase the total attorneys' fees that Clients will owe if there is a recovery. By signing this Contract, Clients consent to Attorneys' participation in the representation and to the Attorneys dividing attorneys' fees payable under this Contract based on their assumption of joint responsibility for the representation and in the percentages stated above.

2.4 Clients recognize and agree that Attorneys have the right to assert a common law lien against any and all proceeds of any recovery that come into Attorneys' possession. All sums that become due and payable as attorneys' fees pursuant to this Contract are payable at the offices of _____ in _____ County, Texas.

III. COSTS AND EXPENSES

3.1. Attorneys will advance certain court costs and other case expenses on Clients' behalf. These costs and other case expenses may include, but are not limited to, the following: filing and service fees; costs for records; costs for investigative services; expert witness and consultant fees; mediator's fees; travel expenses (including air fare, ground transportation, vehicle mileage, lodging and meals); deposition expenses and court reporter fees; transcripts of court proceedings, including the cost of obtaining a transcript of proceedings in the trial of the underlying case; charges for computer assisted legal research (e.g., Westlaw); interest costs incurred in accordance with paragraph 3.2, below; preparation of exhibits and graphics; miscellaneous copying (billed at Attorneys' usual rate or the costs of any outside copy service Attorneys use), postage, long-distance telephone charges, facsimile charges at Attorneys' usual rate, shipping expenses, and courier expenses. Clients agree to reimburse Attorneys for all such costs and expenses from the Total Recovery before the deduction of attorneys' fees. Upon Attorneys' receipt of the proceeds of any settlement, order, award or judgment, Attorneys shall (1) deduct from the Total Recovery any court costs and other case expenses that Attorneys have advanced or incurred on Clients' behalf, (2) retain as attorneys' fees the amount determined in accordance with paragraph 2.1(a or b), above, and (3) disburse to Clients the remainder, if any, of the Total Recovery. Any payment or reimbursement of costs and expenses that Attorneys receive from _____, as a result of a court ruling or otherwise, will be credited against the amount Clients would otherwise owe, or will be paid to Clients if Clients would not otherwise owe any such expenses. If Attorneys do not obtain a recovery of money or other things of value for Clients, then Clients will not be required to reimburse Attorneys for any court costs or case expenses that Attorneys advance or incur pursuant to this paragraph.

3.2 Clients agree that Attorneys may borrow money from a lending institution to pay for court costs and other case expenses that Attorneys advance in connection with the Claims and, in the event of a recovery, charge to Clients as a part of the other case expenses to be deducted from the Total Recovery the actual, out-of-pocket interest charges of the lending institution. If

Attorneys do not obtain a recovery of money or other things of value for Clients, then Clients will not be required to reimburse Attorneys for any interest costs.

IV. STATUTE OF LIMITATIONS ISSUE

4.1 Clients are aware that, based on the facts currently available, Attorneys have not determined the date(s) on which the statute(s) of limitations that applies to Clients' potential causes of action against _____ (including, but not limited to causes of action based on negligence, the Texas Deceptive Trade Practices Act or breach of fiduciary duty) accrued and whether the applicable statute(s) of limitations now bars any of the Claims that Clients might otherwise have. Clients recognize that significant risks exist that one or more claims will be, or already are, barred by the statute of limitations.

V. SETTLEMENT

5.1 Attorneys will not settle all or any part of the Claims without Clients' prior consent. Clients agree to consider any settlement offer made by or on behalf of _____ that Attorneys recommend before making a decision to accept or reject such offer.

5.2 Clients grant Attorneys a power of attorney so that they may have full authority to prepare, sign and file all legal instruments, pleadings, drafts, authorizations and papers as shall be reasonably necessary to conclude this representation including settlement and/or reducing to possession any and all monies or other things of value due to the Clients pursuant to the Claims as fully as Clients could so do in person.

VI. MISCELLANEOUS

6.1 No Guarantee. Clients understand and acknowledge that Attorneys cannot and do not warrant or guarantee the outcome of the Claims and that Attorneys have not represented to Clients that Clients will recover any funds or other things of value pursuant to the Claims.

6.2 Clients' Cooperation. Clients agree to cooperate with Attorneys and to comply with Attorneys' reasonable requests to permit Clients' Claims to be investigated and developed; to disclose to Attorneys all facts relevant to the Claims; and to be reasonably available to attend any necessary meetings, depositions, preparation sessions, hearings, and trial. Clients agree to notify Attorneys in writing of each change in Clients' respective mailing addresses, telephone numbers and/or email addresses during this representation within ten (10) days of each such change. When the Claims have been concluded, Attorneys will give Clients the opportunity to retrieve documents and other tangible items that Clients provided to Attorneys. If Clients have not retrieved those documents and other tangible items within thirty (30) days after Attorneys give Clients written notice that Clients' documents and other tangible items are available to be picked up, Clients agree that Attorneys may dispose of those documents and other tangible items.

6.3 Attorneys' Withdrawal. Clients understand that Attorneys will be investigating and evaluating the law and the facts applicable to the Claims on an ongoing basis. Clients agree

that if Attorneys conclude at any time (including, but not limited to, before filing suit against _____) that, in Attorneys' opinion, it is impractical or unduly burdensome for Attorneys to proceed with the handling of the Claims or that the Claims lack sufficient merit or are not supported by adequate evidence, then Clients agree that Attorneys may withdraw from further representation of Clients, subject to complying with applicable rules. In addition, Attorneys may withdraw, subject to applicable rules, from representing Clients if Clients fail to comply with any term of this Contract. If Attorneys voluntarily withdraw from representation, Clients shall not owe Attorneys any fee or reimbursement of costs or expenses, unless Clients and Attorneys agree otherwise.

6.4 Association of Additional Counsel. Clients agree that Attorneys may associate additional lawyers or law firms to assist them in representing Clients and prosecuting the Claims. Before associating any additional lawyers, Attorneys will request that Clients consent in writing to the terms of the proposed association after advising Clients of (1) the identity of the lawyer(s) or law firm(s) involved, (2) whether Attorneys and the additional lawyers will divide fees based on the proportion of services rendered or by the lawyers agreeing to assume joint responsibility for the representation, and (3) the share of the fee that each lawyer or law firm will receive, or if the division is based on the proportion of services performed, the basis on which the division will be made.

6.5 Texas Law to Apply. This Contract shall be construed and enforced under and in accordance with the laws of the State of Texas. Any suit between Clients and Attorneys regarding Attorneys' representation of Clients or regarding any matter covered by this Contract will be filed in a Court of competent jurisdiction in _____ County, Texas.

6.6 Parties Bound. This Contract shall be binding upon and inure to the benefit of the Parties and, to the extent permitted by applicable law, their respective heirs, executors, administrators, legal representatives, successors and assigns.

6.7 Legal Construction. In case any of the provisions contained of this Contract for any reason shall be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions and this Contract shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

6.8 Prior Agreements Superseded. This Contract constitutes the only agreement between Clients and Attorneys and supersedes any prior understandings between Clients and Attorneys concerning the subject matter of this Contract. Clients and Attorneys agree that to be enforceable, any amendment or change to this Contract must be made in writing and signed by both Clients and Attorneys, and that any alleged oral amendment or change to this Contract will be void and unenforceable.

6.9 Clients' Acknowledgments. _____, individually and as authorized representative for _____, acknowledge and confirm that (a) he has read and has had an opportunity to ask questions about this Contract; (b) he is fully aware of and understands the terms and conditions of this Contract; and (c) that he has voluntarily entered into this Contract.

6.10 Effective Date. This Contract will not be effective unless it is signed by both Clients and by Attorneys. This Contract will be effective as of the latest date that it is signed by one of the Clients or by Attorneys.

VII. NOTICE TO CLIENTS

7.1. The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar Office of General Counsel will provide you with information about how to file a complaint. For more information, please call 1-800-932-1900. This is a toll-free phone call.

7.2 In accordance with joint orders of the Texas Supreme Court and the Texas Court of Criminal Appeals, please take notice that those Courts have adopted the Texas Lawyers' Creed -- A Mandate for Professionalism and the Standards for Appellate Conduct. Copies of the Lawyers' Creed and the Standards are being provided with this Contract for your information. The Creed and the Standards contain standards applicable to lawyers in their conduct towards the legal system generally, to clients, to other lawyers, and to judges. A principal goal of the Creed and the Standards is to reduce abusive tactics in litigation. In accordance with the orders of those courts, we attempt to comply with the Creed and the Standards for Appellate Conduct, and we encourage you to familiarize yourself with the Creed and the Standards and to ask us any questions you might have about either and how they apply to the litigation process.

AGREED:

By: _____

Date: _____

Its: _____

Date: _____

AGREED:

By: _____

Date: _____

Date: _____

