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Legal Malpractice in Texas: Examining Selected Cases and Forecasting Future Trrends Third Annual Symposium on Legal Malpractice & Professional Responsibility: Symposium Presentations.

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SYMPOSIUM PRESENTATIONS

LEGAL MALPRACTICE IN TEXAS: EXAMINING SELECTED CASES AND FORECASTING FUTURE TRENDS*

JUSTICE WALLACE B. JEFFERSON**

I attended the investiture for Scott Brister this morning, who is our newest justice on the Supreme Court of Texas. Of course, the proceeding was ceremonial only. He was sworn in last October and has since been contributing greatly to our court. But, tradition demands that we mark the occasion of his addition to the court. And such ceremonies, like those we have for new lawyers, like weddings, and like funerals, provide a time for introspection. We are reminded that there are ideals in the law, or in marriage, or in life and death, that help guide our conduct and often reinforce the responsibilities we have to others. Justice Brister's investiture was no exception. I took notes of a few of his comments during his investiture that I think are appropriate here. Justice Brister remarked that wisdom, knowledge, and understanding should guide his role as a justice on the supreme court. But he said that we should not have blind fidelity to the way things were done in the past, but must also look toward the future, and examine ourselves

* Originally presented as a speech at *The Third Annual Symposium on Legal Malpractice & Professional Responsibility*, sponsored by the *St. Mary's Law Journal*, February 27, 2004, San Antonio, Texas. Citations to sources specifically mentioned by name in the speech have been added by the editorial staff for the convenience of readers, though more complete citation of information in the text has been omitted.

** Justice, Supreme Court of Texas. Justice Jefferson earned his J.D. in 1988 from the University of Texas School of Law. He has served on the Supreme Court of Texas Advisory Committee and the Texas State Commission on Judicial Conduct, and received national recognition from the American Bar Association for his 2001 speech celebrating Law Day.

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continuously to improve our system of justice in Texas. And he said, I think quite appropriately, that we cannot always expect perfect justice. I've raised these points because I think they are relevant to some of the issues that you're studying today in legal ethics. We are challenged every day to take a new approach and to look at the way we enforce our ethical rules in a new world, a world that is changing every day. The rules of ethics undergirding our profession are not simple rules. They are written, of course, to promote compliance from those most likely to depart from good conduct, but also to establish standards for the relationships that exist in our increasingly complex world. You have to balance in your professional practice the obligations to the client, to other parties, and to the overall system of justice. And there is a right way and an expedient way. The lawyer's duty is to take the expedient way only when it is also the right way.

Although ethics is taught in law school and we are tested in ethics as a precondition to admission to the bar, learning to do right requires daily discipline, from the most experienced lawyers to those brand new to the practice. I would like to take this occasion to congratulate St. Mary's University School of Law on this Third Annual Symposium on Legal Malpractice and Professional Responsibility. When you teach ethics, as this course does impressively, you encourage discipline, and St. Mary's has been a leading force in professional responsibility for years. In preparation for this talk I have had a chance to review the proceedings of the previous two symposiums. I wanted to share with you the impact that these conferences have had in their brief time.

Recently, the court discussed a proposal regarding referral fees in state courts. Has anyone here heard of proposed Rule 8a? In the extensive commentary the court received on this proposed rule, concerned parties cited a number of scholarly discussions on the subject, but there was only one in-depth article on the state of referral fees in Texas. It should come as no surprise that the only paper on that specific subject, a student note, was published as part of the first symposium.[1]

Participants in this symposium have often blazed the trail. Tom Watkins, who is a presenter today, serves as the head of our court's

1. Samuel V. Houston III, *In the Interest of the Client: Why Reform of Texas's Rules Regarding Referral Fees is Necessary*, 33 ST. MARY'S L.J. 875 (2002).

Jefferson: Legal Malpractice in Texas: Examining Selected Cases and Forecast

task force to integrate the American Bar Association's Ethics 2000 reform with the State Bar's proposed changes to the disciplinary rules to create a single cohesive model. His committee includes some of the brightest lawyers in the area of professional responsibility, including Luther H. Soules III,[2] who's an expert on the writing and analysis of procedural rules here in Texas, and Professor Susan Saab Fortney,[3] both of whom are former presenters at this symposium. I think it is fair to say that in the last two years, most of the scholarship on professional responsibility in Texas has come from these gatherings. Unlike lawyers in a pitched battle or courts who have only the immediate controversy before them, you who write about and those who study larger questions of professional responsibility, exploring trends and exposing contradictions, can help chart a path toward a sensible approach to the ethical dilemmas that all of us face daily. So, thank you to St. Mary's for letting us pause periodically to consider the state of ethics in our legal profession.

I chose the topic "Ethics As Viewed from the Bench." Judges either love or hate any speech that talks about "the view from the bench." Construed as an invitation for a judge to speak his mind freely, it threatens impartiality. If considered an excuse for preaching, it could turn this podium into a pulpit. So, I will try to avoid both and review some of the numbers and anecdotes that paint a picture of the state of ethics today in Texas.

Most of what we know of legal malpractice is anecdotal. We read published accounts of legal malpractice, but have little hard data on the number of claims and their outcomes in Texas. So, let's look at some of the numbers that, at best, suggest the scope of the problem. In the last six months, the *Texas Lawyer* newspaper shows twenty published articles and case summaries that describe ongoing malpractice actions. That works out to about one story of alleged wrongdoing per issue. Since 2000, Texas's intermediate appellate courts have issued fifty written opinions on legal malpractice—or about one opinion a month—and a majority of those cases

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2. Luther H. Soules III, *Proposed Conflict of Interest and Confidentiality Rules*, 33 ST. MARY'S L.J. 753 (2002).

3. Susan Saab Fortney & Jett Hanna, *Fortifying a Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest*, 33 ST. MARY'S L.J. 669 (2002).

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St. Mary's Law Journal, Vol. 35 [2003], No. 4, Art. 4

were heard before we abolished the no-publication rule under which court of appeals opinions were not designated for publication and therefore did not establish precedent.

The American Bar Association (ABA) publishes a report entitled, *A Profile of Legal Malpractice Claims*. The last one was in 2001 and studied malpractice cases from 1999. The report does not collect statistics in all states, but does provide a snapshot of legal malpractice issues across the country. Some of the statistics are worth noting. For instance, we know from the study that the largest percentage of the 36,844 claims studied in 1999, or about 25%, arose out of the plaintiff's personal injury area of law. The next two most common areas of claims arose in the areas of real estate and family law. All three of those areas also represented the largest number of claims filed in 1995. When I read this report, I was somewhat surprised at those numbers because I served on a grievance committee here, the District 10B Grievance Committee for the State of Texas, and a large number of the claims that we saw concerning allegations of disciplinary violations had to do with criminal law. But then it came to me that perhaps those litigants were not the most likely to file suit in state court and present those claims to a verdict or judgment. The 1999 study of the American Bar Association showed that claims relating to malfeasance of corporate lawyers or those working on a corporation's behalf accounted for about 9% of the claims, and claims related to securities work (which drove ethical changes like Sarbanes-Oxley) accounted for 1.5% of all claims. A majority of the claims, 73%, were reported against firms with one to five lawyers practicing. This is not really all that surprising because 63% of all law firms in the United States are comprised of between one and five lawyers. Large law firms of forty or more lawyers accounted for about 20% of the claims made.

Back to the anecdotal part of the story. Remember, I told you that there are fifty Texas cases from 2000 forward. Well, a quick look at the case styles indicates that at least 10% of those reported cases involved firms that would have been among the top 100 largest in the state. The activity that most often gave rise to a claim of legal malpractice involved the preparation, filing, and transmittal of documents, accounting for about a quarter of all claims. Fifteen percent of those were based on the failure to properly commence an action—the dreaded statute of limitations problem. It is inter-

Jefferson: Legal Malpractice in Texas: Examining Selected Cases and Forecast

esting to note that this category experienced a significant drop, almost 50% from the previous reporting period, which the ABA suggests might be attributable to something as simple as the implementation of a computerized docket and calendar checklist.

Now, a majority of all the reported claims, or 53%, were resolved by either a take-nothing judgment or nonsuit. In about 20% of the cases, a settlement was paid before suit was commenced. In 14% of the cases, a settlement was paid after the suit was filed. The study calculates the total amount of dollars paid to resolve a claim including expenses, defense costs, and the payment of any indemnity or settlement. Almost 60% of claims filed were closed at no recorded cost; about 32% required $50,000 or less; and 1% had a price tag of $500,000 or more to defend and settle. Of course, settlements, even at the lower end of the scale, can be very costly to defend. One case could easily consume the majority of the firm's litigation budget and occupy the minds of the partners and associates tremendously.

Now, these statistics give us a rough insight into the state of legal malpractice today. First, legal malpractice claims look a lot like most other claims in our system. A majority of the malpractice lawsuits are never tried. What do we make of the statistics that 53% of claims are ultimately abandoned and 60% of the claims incur no expenses outside regular claim handling costs? Does the fact that half of all claims are abandoned mean that it is too easy to file a malpractice action? Does the fact that 60% of all claims incur "no expenses" indicate that the cost of abandoned claims are so slight that any proposed reform of the practice is counterproductive? I don't know if the statistics bear out either of those propositions nationwide, and I expect that there is serious disagreement about whether those assertions are true in Texas.

I am intrigued with the statistics relating to the substantial decline in claims based on missing statute of limitations periods and failing to docket and calendar correctly, but I suspect the ABA may be right. The incorporation of new technology and calendar systems and conflicts analysis not only guard against missed statutes of limitations, but alert the lawyer that a prospective client could be adverse to a current client, or that undertaking the representation raises an appearance of impropriety or a clash of legal positions taken by the lawyer for different clients within the firm. Use of this kind of technology could well decrease the number or

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St. Mary's Law Journal, Vol. 35 [2003], No. 4, Art. 4

severity of legal malpractice claims which could otherwise devastate a lawyer's practice.

Now, applying nationwide trends on the state level is not easy. As I suggested, we have little hard data, and what data exists is not necessarily to be trusted. A year ago, Chief Justice Alma Lopez of the Fourth District Court of Appeals here in San Antonio talked about lawyers behaving badly in her court. I am sad to report that the issues she raised about lawyers practicing poorly in Texas appellate courts, ranging from failure to follow simple court rules and orders violating typeface requirements, for example, to more substantial failures of candor with a tribunal, are far too recurrent in our court. So, what course do we pursue? I recommend initially to listen closely to the comments of Chief Justice Lopez and other judges whose jobs are made easier when their recommendations are adopted.

In thinking about legal malpractice in Texas with an aim of providing more competent legal representation to clients and creating fewer malpractice claims, we have at least two goals. Both of them are shared tasks between the bench and the bar. The first is to work diligently to educate the profession through the development of caselaw defining the contours of Texas legal malpractice standards. I cannot emphasize enough that this responsibility is shared by the bench and the bar. The better the advocacy, the better the rule of law pronounced in the case. And the second factor is to address proactively emerging ethical issues before they become malpractice concerns.

Turning first to the development of caselaw—two years ago, Steve McConnico and Robyn Bigelow cautioned at this conference that "attorneys must perform their duties with the utmost caution, as their obligation to zealously represent their clients becomes tempered by a new range of duties that they now owe to the world beyond."[4] The framework for these obligations is derived in large part from the pleadings of legal malpractice plaintiffs and defendants and the decisions of the courts. And the bench and the bar have hammered out a large number of these issues over the last several years. The decisions on the availability of the remedy of fee forfeiture, the reason for expanding or contracting legal liabil-

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4. Steve McConnico & Robyn Bigelow, *Summary of Recent Developments in Texas Legal Malpractice Law*, 33 ST. MARY'S L.J. 607, 668 (2002).

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ity to nonclients, and the time for commencing a malpractice action or for tolling it have all been fought and at least partially resolved by effective advocacy and, one hopes, by well written opinions from the appellate bench.

In the fifty cases Texas courts have handled over the last several years comprising a wide variety of issues, both the bench and the bar have seemed to perform their roles well. Issues such as whether arbitration of legal malpractice claims may be compelled by an agreement of the parties or is, instead, in the nature of a personal injury claim that is excluded under the Texas Arbitration Act, have been well-briefed and argued. And the decisions of the courts of appeals have raised a number of interesting issues and sometimes conflicting opinions, and it is at that point that the supreme court is most likely to step in and attempt to resolve that conflict.

In pursuing this goal, courts can only answer the questions in front of them and nothing more. But when faced with an appropriate opportunity to give guidance to the profession or to clarify the contours of the practice, lawyers should ask the court to take advantage and clarify the law. Likewise, while a lawyer is appropriately focused on his or her own case and their client, they should realize the benefits of assisting the court in recognizing that all judges have a view to the larger impact of the case, both on the rule of law at issue and on the legal profession as a whole.

With that, I would like to turn to the second course of action, which is to address emerging issues proactively before they become malpractice issues. For some reason, the court today has written only rarely on professional responsibility issues. But Justice Hecht has offered the following observation on the problems decision-makers sometimes face when presenting suggestions for change. He said, "I hope the participants of this conference will take this as an encouragement and not a criticism, but a difficulty with the rule making process can be the nonresponsiveness of the bar that is resistant to change and its inherent nearsightedness in the attitude that if I can just get through tomorrow, what happens next week I will worry about then." He noted that while the dynamics of our legal profession might focus a majority of our attention only on the next time sheet or slip opinion, regulation of a profession requires "statesmanship that will look past those things and see that ultimately the changes are going to be good for most people, and sec-

ond to be able to articulate and convince people of the legitimacy of the view."

A year ago, David Beck spoke here on "The Legal Profession at the Crossroads." His paper noted that Sarbanes-Oxley marked the first time the federal government has given executive branch agencies the authority to regulate lawyers' professional conduct, to criminalize it, and to create new federal liability. That Act represented the change from the traditional paradigm—standards of conduct written by lawyers and bar associations and adopted by the court—in a word, self-governance. David Beck accurately predicted the outcome to lawyers. He said, "[S]o long as a public perceives the profession's disciplinary rules as lax, such as to allow attorneys representing public companies to ignore or even knowingly assist in corporate misfeasance, the legal profession stands to lose its ability to remain a self-regulated industry."[5]

I look forward to reading Dean Johnson's thoughts about how Sarbanes-Oxley changes the duties of attorneys. For my part, I think a common complaint about the federal government's intrusion into attorney self-regulation has to be read against the background of these changes. For a number of years there was a substantial debate over whether an attorney should be required to disclose client confidences to prevent the client from perpetrating a fraud or to rectify a substantial loss resulting from that client's crime or fraud. When most states, including ours, debated the topic over ten years ago, these issues were front and center. Not surprisingly, the prospect of exposing the client to civil or criminal penalties is not attractive to the lawyer, and the frank discussion with the client of these options probably doesn't help with client development issues. So, the debate fizzled, and the problems that would manifest themselves in such examples as WorldCom or Enron were fully discussed, and with almost eerie precision, several commentators suggested that under the rules, events similar to those that occurred would, in fact, occur. The result of the debate was, in a large number of states, that the status quo prevailed. And I suppose that should be expected. Any attempt to invade the protections of the attorney-client privilege would be discouraged by

5. David J. Beck, *The Legal Profession at the Crossroads: Who Will Write the Future Rules Governing the Conduct of Lawyers Representing Public Corporations?*, 34 ST. MARY'S L.J. 873, 914 (2003).

lawyers who regard the duty to their clients as sacrosanct. But my brief experience on the court suggests that when the public is dissatisfied, they turn to other bodies such as the legislature, whose interests are not always aligned with those of the legal profession, either the lawyers or the judges. So, if the attorneys drafting the disciplinary rules knew ten years ago that the public may perceive the rules as lax or would assist attorneys representing their clients to ignore or knowingly assist in the client's malfeasance, they may have worked harder to evade the kind of scrutiny realized when *60 Minutes, Dateline*, or *20/20* pitch their tents in the lawyers' offices and create an atmosphere in which self-regulation yields to legislative intrusion. It can be argued that Sarbanes-Oxley was not a case of Monday morning quarterbacking, but rather a reminder to the bar that the legislature is a brooding presence and can change time-honored rules on little more than a majority vote. The lessons of Sarbanes-Oxley and the responsiveness to it, or lack thereof, has not been lost on the Texas Legislature.

One can read several changes in the State Bar's Sunset Bill from last session as an indication that the legal community missed an opportunity to seize the agenda before it was defined in small rooms under the capitol dome. The Sunset Bill required the State Bar to substantially revamp its methods for handling disciplinary cases, which was a subject of criticism for many years, and imposed a $65 fee on lawyers to pay for both civil and criminal indigent legal services, which in a bad budget year might be viewed as an attempt to generate additional fees, or which may be, in fact, an expression of dissatisfaction with the way the legal community has addressed access to justice issues. I take some exception to that because in recent years, and particularly since I have been on the court, the response of the bar to the invitation to donate money for legal services has increased substantially, and I think the bar has done a tremendous job in that area.

The court today is in the midst of two big projects. We've talked about Tom Watkins, who was featured this week in *Texas Lawyer*,[6] and his committee to integrate the ABA Model Rules changes with changes to the Texas rules. His committee has worked diligently and is now approaching what he calls the "hot potato" issues—the

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6. Mary Alice Robbins, *Task Force to Begin Tackling Hot Potato Disciplinary Issues*, TEX. LAW., Feb. 23, 2004, at 4.

St. Mary's Law Journal, Vol. 35 [2003], No. 4, Art. 4

messy stuff. The stuff we wish would go away, issues like conflicts of interest and duties to disclose in a legal profession that services highly mobile clients. These are tough questions. And it is clear, as Mr. Beck noted, that in writing the future rules governing attorney conduct, "the role of civil suits must be considered."[7] So, we look forward to the committee's work on that project.

The second task that we are conducting today is a review of the Rules of Judicial Conduct. Anyone who has watched a confirmation hearing or judicial campaign ads in the last five years should know that while we may expect a certain detachment of judges on areas of political concern, those who are elected have a much expanded opportunity today to discuss issues and controversies that are likely to find their way to their courts. We had the case in the U.S. Supreme Court of *Republican Party of Minnesota v. White*[8] that said judges have First Amendment rights to discuss issues that might come before the court, a practice that was prohibited prior to the U.S. Supreme Court's decision in that case. Our code of judicial conduct did not anticipate that change, but our rules must now conform to that reality. We are working hard to do so now in a way that may change forever the ethical standards governing judicial speech and relationships among lawyers and judges, with the far-reaching consequences to how you practice law and how judges react to, for example, calls for recusal. And we're seeing this at the highest court in the land. There have been many calls for Justice Scalia to recuse himself from the case involving the Vice President,[9] and he voluntarily recused himself in the Pledge of Allegiance case because of remarks he made in public about the Ninth Circuit's decision.[10] So, no less than the bar, judges are juggling hot potatoes and hoping that the process of reviewing our rules will

7. David J. Beck, *The Legal Profession at the Crossroads: Who Will Write the Future Rules Governing the Conduct of Lawyers Representing Public Corporations?*, 34 St. Mary's L.J. 873, 912 (2003).

8. 536 U.S. 765 (2002).

9. *See* Robert S. Greenberger, *Scalia Walks Into Line of Fire: Critics Say Jurist's Hunting Trips Create Appearance of Conflict*, Wall St. J., Mar. 2, 2004, at A12 (noting the concerns raised over Justice Scalia's potential for partiality in the case). *But see* Cheney v. U.S. Dist. Court, No. 03-475, 2004 U.S. LEXIS 2008 (U.S. Mar. 18, 2004) (mem.) (denying the motion to recuse filed by respondent, the Sierra Club).

10. Elk Grove Unified Sch. Dist. v. Newdow, No. 02-1264, 2003 U.S. LEXIS 7434, at *1 (U.S. Oct. 14, 2003) (mem.) (indicating that Justice Scalia did not participate in the decisions regarding the case).

have a cooling effect. In dealing with these issues, both committees, the court that must receive the reports, and ultimately, the bar must appreciate that just because a process has never been needed or has always been done another way, resistance to change alone is no longer a good enough reason to continue on a set course. Which reminds me of the comments that Scott Brister made this morning—all of us are required to peer into the future and worry about the practice not just this year, but in the next generation. If we, the bench and the bar, are able to continue to work diligently to educate the profession through the development of caselaw as to the contours of Texas legal malpractice standards, and if we step up to the plate and proactively address emerging ethical issues before they become malpractice issues, perhaps five years from now, we can report a reduction in the number of malpractice claims and a more nuanced appreciation for addressing concerns that in the end enhance the greatest legal system in the world. Thank you very much.