St. Mary's Law Journal

Volume 40 | Number 4 Article 3

1-1-2009

Ten Years after Burrow v. Arce: The Current State of Attorney Fee Forfeiture.

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TEN YEARS AFTER *BURROW v. ARCE*: THE CURRENT STATE OF ATTORNEY FEE FORFEITURE

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** Blake is a third-year student at St. Mary's University School of Law. Blake would like to thank Professor Vincent R. Johnson for his guidance and suggestions, which were immeasurably valuable to the formation of this article, and also for his contributions in refining and advancing legal thought in the areas of torts and professional ethics. For select recent publications by Professor Johnson, see VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW (4th ed. 2009); Vincent R. Johnson, *Cybersecurity, Identity Theft, and the Limits of Tort Liability*, 57 S.C. L. REV. 255 (2005); and Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737 (2003). Blake would also like to thank Jeff Webb for the opportunity to work with him on this article.

I. INTRODUCTION

"Extreme [attorney] misconduct may warrant an extreme remedy."[1] Fee forfeiture, whether partial or complete, certainly

1. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 15:24, at 824 (2009 ed.).

constitutes an extreme remedy, at least compared to the ordinary remedy for violation of a legal duty—compensation for damages sustained because of the misconduct.[2] But neither the degree to which the remedy is extreme nor how extreme the misconduct must first be before forfeiture becomes appropriate is readily apparent in light of the Texas Supreme Court's 1999 decision in *Burrow v. Arce*.[3] Rather, issues emanating from the court's forfeiture analysis in *Burrow* have been the subject of consistent commentary.[4] Understanding the confusion that has arisen with regard to *Burrow*'s impact, however, depends in large measure on a thorough evaluation of (1) the basis for the court's determinations relating to forfeiture, (2) the sources from which this reasoning was derived, and (3) the careful manner in which the court set forth the applicable standards.

The issues that persist do not raise questions in all breach-of-fiduciary-duty claims against attorneys. *Burrow* primarily impacts cases where the client pursues fee forfeiture, as opposed to actual damages, as a remedy for an alleged breach of fiduciary duty.[5] Fee forfeiture is also relevant to attorneys' attempts to recover legal fees by initiating a lawsuit, to which the client defensively asserts justifiable avoidance of payment due to a breach of fiduciary duty.[6] The same fundamental issues are presented in both of these procedural settings, and there is no meaningful

2. *See id.* § 15:24, at 813–25 (discussing various jurisdictions' approaches to forfeiture and noting the potential harshness of the remedy in cases in which the party required to forfeit compensation acted in good faith).

3. Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999).

4. For examples of commentary on *Burrow*, see Errin Martin, Comment, *The Line Has Been Drawn on the Attorney-Client Relationship: The Implications of* Burrow v. Arce *on Texas Practitioners*, 32 TEX. TECH L. REV. 391, 394–95 (2001); Matthew Nielsen, Note, Burrow v. Arce*: Too Much Ado About Nothing?*, 52 BAYLOR L. REV. 487, 511 (2000); Linda Eads, *Negligence vs. Disloyalty: Limits on the Forfeiture of Attorneys' Fees*, TEX. LAW., Jan. 12, 2004, at 26; Christopher Fuller & Robyn Bigelow, *Forfeiting Attorneys' Fees After* Arce*: Consider the Consequences Before Suing Clients*, TEX. LAW., Aug. 5, 2002, at 32; Nathan Koppel, *Counsel May Lose Fees for Disloyalty: Absence of Damage to Client Won't Bar Fee Forfeitures*, TEX. LAW., July 12, 1999, at 1; and Tom Prehoditch, *Breach-of-Fiduciary-Duty Claims Against Lawyers on the Rise*, TEX. LAW., Feb. 13, 2006, at 27.

5. *See* Liberty Mut. Ins. Co. v. Gardere & Wynne, L.L.P., 82 F. App'x 116, 118 (5th Cir. 2003) (noting that *Burrow* does not apply in cases where the plaintiff is seeking actual damages).

6. *See* Christopher Fuller & Robyn Bigelow, *Forfeiting Attorneys' Fees After* Arce*: Consider the Consequences Before Suing Clients*, TEX. LAW., Aug. 5, 2002, at 32 (suggesting that the significance of the Texas forfeiture analysis resides in its necessitating pause for concern before an attorney sues a former client for payment of legal fees).

distinction for purposes of this article between the two contexts. As a practical matter, however, the availability of forfeiture impacts breach-of-fiduciary-duty cases in which actual damages are sought. As a result, an assessment of the current state of forfeiture law cannot be divorced from recognition of the myriad of legal duties that ensure attorneys act in a manner worthy of the unique status accorded the legal profession, and by extension, the members of the bar.[7] Thus, while forfeiture's direct implications apply to a somewhat limited realm of cases, this broader context provides the appropriate backdrop for assessing its current manner and significance.

Among the theories often pleaded by clients in cases brought against their former attorneys are: breach of contract; breach of fiduciary duty; fraud; breach of the duty of good faith and fair dealing; conversion; and false, misleading or deceptive acts under the Texas Deceptive Trade Practices Act (DTPA).[8] However, legal malpractice represents the most familiar theory relied upon in seeking redress for alleged attorney misconduct.[9] While malpractice actions frequently turn on whether it is possible for a plaintiff to prove causation of damages, *Burrow* provides fee forfeiture without such a showing in certain breach-of-fiduciary-duty cases.[10] Allowing this equitable remedy in the absence of

7. *See generally* Charles Schwartz, *A Survey of Recent Texas Law on the Duties of Attorneys*, *in* LEGAL MALPRACTICE: TECHNIQUES TO AVOID LIABILITY 1999, at 339, 339–55 (PLI Litig. & Admin. Practice, Course Handbook Series No. H0-003Q, 1999) (summarizing the legal theories on which clients may obtain a civil remedy against an attorney).

8. *See, e.g.*, James M. "Jamie" Parker, Jr., Thomas H. Watkins & Rachel L. Noffke, *A Rose Is a Rose Is a Rose—Or Is It? Fiduciary and DTPA Claims Against Attorneys*, 35 ST. MARY'S L.J. 823, 830–36 (2004) (setting forth a comprehensive overview of the vast array of causes of action that clients assert in lawsuits against their former attorneys).

9. *See* Aiken v. Hancock, 115 S.W.3d 26, 27–28 (Tex. App.—San Antonio 2003, pet. denied) (rejecting a client's assertions that an attorney breached a fiduciary duty and violated the DTPA); Bell v. Phillips, No. 14-00-01189-CV, 2002 WL 576036, at *3–4 (Tex. App.—Houston [14th Dist.] Apr. 18, 2002, no pet.) (not designated for publication) (addressing client's allegations of DTPA violations, legal malpractice, and breach of fiduciary duty); Whiteside v. Hartung, No. 14-97-00111-CV, 1999 Tex. App. LEXIS 5584, at *2–3 (Tex. App.—Houston [14th Dist.] July 29, 1999, pet. denied) (not designated for publication) (alleging, among other claims, violations of the Texas Debt Collection Act, and breach of express and implied contracts).

10. *E.g.*, Nathan Koppel, *Counsel May Lose Fees for Disloyalty: Absence of Damage to Client Won't Bar Fee Forfeiture*, TEX. LAW., July 12, 1999, at 1 ("A unanimous court held that lawyers can now be required to forfeit some or all of their fee for breaching their fiduciary duty of loyalty to clients, even when clients aren't damaged by the breach.").

causation and actual damages is not novel, yet *Burrow*'s ramifications have generated a decade of debate.[11] Forfeiture's availability has been a subject of particular interest in recent years because strict application of the trial-within-a-trial requirement for proving causation renders malpractice a less attractive cause of action.[12] Increasingly, clients have invoked *Burrow* and sought forfeiture in cases involving allegations traditionally understood as comprising a legal malpractice action.[13] This practice, which many believe to be the impetus driving a substantial increase in the volume of breach-of-fiduciary-duty cases against attorneys, forms the foundation of the position hypothesized by some commentators.[14] Those commentators contend that *Burrow* opened the

"To be entitled to forfeiture, the client need only prove the existence of a breach; proof of causation and/or damage is not necessary." Arce v. Burrow, 958 S.W.2d 239, 251 (Tex. App.—Houston [14th Dist.] 1997), *aff'd in part, rev'd in part*, 997 S.W.2d 229 (Tex. 1999). "[A] client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client." Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999).

11. *Compare* Matthew Nielsen, Note, Burrow v. Arce*: Too Much Ado About Nothing?*, 52 BAYLOR L. REV. 487, 511 (2000) ("Attorneys should be reassured, however, considering the limited utility given to the breach of fiduciary duty."), *with* Christopher Fuller & Robyn Bigelow, *Forfeiting Attorneys' Fees After* Arce*: Consider the Consequences Before Suing Clients*, TEX. LAW., Aug. 5, 2002, at 32 ("*Burrow v. Arce* represents a significant development in the area of lawyer liability.").

12. *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. b (2000) (explaining the process by which a malpractice plaintiff must demonstrate that but for the attorney's negligence, the client would have been awarded a specific amount of damages in the underlying lawsuit and that this amount of damages was the extent to which the plaintiff was damaged by the attorney's negligence).

13. *See* Tom Prehoditch, *Breach-of-Fiduciary-Duty Claims Against Lawyers on the Rise*, TEX. LAW., Feb. 13, 2006, at 27 (noting that Texas courts have found that certain factual scenarios implicate both a claim for legal malpractice and a breach of the attorney's fiduciary duties); *see also* Linda Eads, *Negligence vs. Disloyalty: Limits on the Forfeiture of Attorneys' Fees*, TEX. LAW., Jan. 12, 2004, at 26 (discussing the need for courts to draw a meaningful distinction between legal malpractice actions and instances in which *Burrow*'s forfeiture would warrant consideration, which is particularly important in light of the "tremendous advantage" a client obtains if allowed to prosecute a claim for breach of fiduciary duty).

14. *See* Errin Martin, Comment, *The Line Has Been Drawn on the Attorney-Client Relationship: The Implications of* Burrow v. Arce *on Texas Practitioners*, 32 TEX. TECH L. REV. 391, 394–95 (2001) ("[W]ith the Texas Supreme Court's decision on July 1, 1999, legal malpractice in Texas changed drastically.... Now, a client can sue his attorney for a breach of fiduciary duty, which falls under the umbrella of legal malpractice." (citation omitted)); *see also* Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 204–05 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (Brister, C.J., concurring and dissenting) (questioning Texas courts' handling of forfeiture claims in cases also involving legal malpractice).

litigation floodgates by not expressly foreclosing the possibility of awarding forfeiture in cases involving negligent conduct.[15] Other commentators, however, have dismissed the notion that a parade of horribles naturally flows from *Burrow*.[16] This latter position rests largely on the fact that forfeiture, while sought with increasing regularity in recent years, has not actually been awarded in the vast majority of those instances.[17] Rather, those who would assert that *Burrow* should not be regarded as an outlier in the overall framework relating to attorney-client litigation contend that the equitable nature of the remedy produced an analysis that necessarily leaves itself open to speculation of the kind it has received.[18] It does so, however, by design. That is, those who believe that *Burrow* has not fundamentally altered the liability landscape for attorneys point to other bodies of law, upon which *Burrow* is based, and the careful construction with which the Texas Supreme Court carved out the forfeiture remedy.[19] While bright-line standards are indeed absent from much of the analysis, it has been suggested that de facto realities have emerged through judicial interpretation of the forfeiture remedy.[20]

> Attorneys must exercise "the punctilio of an honor" towards clients. But even attorneys who do will sometimes have dissatisfied clients. . . . Adding a fee forfeiture claim to every legal malpractice or fee collection suit is the work of the moment. If the Court is correct that *Burrow* requires a jury trial over every scintilla of a punctilio, Texas judges and jurors will soon be occupied with little else.

Deutsch, 97 S.W.3d at 205 (citations omitted).

15. *See, e.g.*, Linda Eads, *Negligence vs. Disloyalty: Limits on the Forfeiture of Attorneys' Fees*, TEX. LAW., Jan. 12, 2004, at 26 ("Not surprisingly, we now see a breach-of-fiduciary-duty claim in almost every case in which a client alleges lawyer misconduct, including negligence cases.").

16. *E.g.*, Matthew Nielsen, Note, Burrow v. Arce*: Too Much Ado About Nothing?*, 52 BAYLOR L. REV. 487, 511–12 (2000) (acknowledging the legitimacy of concerns that have been raised relative to the possible ramifications of *Burrow*, but concluding that it is not a panacea for clients as suggested by others).

17. *See, e.g.*, *id.* at 512 ("Absent a conflict of interest, clients will have a viable traditional malpractice claim available, which should undercut their ability to pursue fee forfeiture. Therefore, fee forfeiture should not have a broad application in Texas.").

18. *E.g.*, *id.* at 488–89 (positing that while *Burrow* permits a broad interpretation that would substantially alter the liability landscape for attorneys, a careful analysis reveals that forfeiture can, and should, be read to fit within narrowly defined scenarios involving attorney misconduct).

19. *E.g.*, *id.* at 490–95 (evaluating the history of forfeiture in Texas and discussing the judicial precedent and other legal sources relied on by the *Burrow* court).

20. *E.g.*, *id.* at 504–08 (setting forth a number of clear rules which can be gleaned from a careful review of existing fee forfeiture precedent).

The emergent principles include notions that should serve to resolve many of the opponents' concerns. While the body of precedent applying *Burrow*'s forfeiture analysis reflects an equally diverse understanding of the prerequisites to obtaining, as well as the appropriate role of, equitable remedies, it is useful to acknowledge the consistencies that already exist, if only on a general level. Among the trends arising out of *Burrow*'s application are the following general propositions: (1) courts will likely rely, to one extent or another, on the Texas Disciplinary Rules of Professional Conduct (Texas Rules) in forfeiture cases; (2) the source of the duty at issue is of particular importance in assessing whether a violation warrants forfeiture; (3) forfeiture will not be awarded in cases in which the party seeking the remedy is not also the party who paid the fees sought; (4) if no legal fees were paid, forfeiture will not be awarded; (5) whether the alleged breach consists of negligence or more serious misconduct often bears a direct correlation to forfeiture's fit within the context of a particular case; and (6) the availability of an otherwise adequate remedy often shifts the balance of the equities against forfeiture.

While these general propositions appear to constitute an accurate reflection of *Burrow*'s net effect, a decade of perspective has yielded little clarity. Rather, the propositions suggested above potentially force inconsistencies with the plain letter of *Burrow*. This reality, however, is less a criticism of courts' construction and application capabilities than it is a function of factors that form a legitimate explanation. The fact-specific nature of the analysis and the theoretical underpinnings of the relevant legal doctrine have undeniably contributed to the present scattered jurisprudence on attorney fee forfeiture. Thus, what is necessary is a return to where the debate started—a revisiting of what *Burrow* does and does not say about forfeiture. Further, the sources from which the Texas approach was constructed cannot be disregarded as they encompass the larger concerns regarding attorney fee forfeiture of which courts must be conscious.

Part One of this article sets forth the facts and issues before the Texas Supreme Court in *Burrow* and provides an overview of the court's analysis in that case. Part Two considers the facially apparent issues raised by *Burrow*'s treatment of the forfeiture issue. Cases that have seemingly joined the *Burrow* analysis are the subject of Part Three. Part Four seeks to go beyond a

superficial, isolated understanding of the clear-and-serious-breach threshold applicable in forfeiture cases. A brief overview of the approach other jurisdictions have adopted regarding the questions currently left unresolved by Texas courts is addressed in Part Five. Finally, Part Six consists of a note in summation of current Texas state law pertaining to forfeiture as instructed by *Burrow* and its progeny.

II. *BURROW V. ARCE*

A. *The Facts*

On October 23, 1989, multiple explosions at a Phillips 66 chemical plant caused the death of twenty-three people and caused hundreds of other individuals to suffer injury.[21] Family members of the deceased, as well as some of the injured persons, retained Mr. Burrow along with several other attorneys to represent them in their respective suits against Phillips.[22] Mr. Burrow and the other attorneys entered into a contingent fee structure with these clients, which ultimately resulted in the attorneys receiving over $60 million in fees after reaching settlement with Phillips.[23]

The clients alleged that the attorneys improperly:

> [1] solicited business through a lay intermediary, [2] failed to fully investigate and assess individual claims, [3] failed to communicate offers received and demands made, [4] entered into an aggregate settlement agreement with Phillips of all plaintiffs' claims without plaintiffs' authority or approval, [5] agreed to limit their law practice by not representing others involved in the same incident, and [6] intimidated and coerced their clients into accepting the settlement.[24]

The specific breaches alleged warrant consideration, as some of them touch upon standards that evaluate attorney conduct relative to the reasonably prudent attorney in the same-or-similar-circumstances analysis, and others appear to embody more black and white principles of the expectations imposed on attorneys by

21. Burrow v. Arce, 997 S.W.2d 229, 232 (Tex. 1999).
22. *Id.*
23. *Id.*
24. *Id.* (footnotes omitted).

simple reason of being an attorney.[25] The clients relied on these allegations to assert the following causes of action: breach of fiduciary duty, fraud, violations of the DTPA, negligence, and breach of contract.[26]

The trial court granted summary judgment in favor of the attorneys without deciding whether a breach of fiduciary duty had occurred.[27] Rather, the court reasoned that even if such a breach occurred, the clients' claims failed as a matter of law because they could not prove that any actual damages were sustained due to the alleged misconduct.[28]

B. *The Issues and an Overview of the Court's Responses*

As the Texas Supreme Court viewed the case, four central issues required resolution: (1) whether actual damages must be established as a precondition to obtaining fee forfeiture; (2) whether fee forfeiture automatically and completely flows from all breaches of fiduciary duty; (3) assuming that the remedy is not to be applied either automatically or completely, whether the court or the jury should determine the appropriate amount of fee forfeiture; and (4) whether the clients alleged a theory or theories sufficient, if proven, to warrant either partial or total fee forfeiture.[29]

All of these questions, the *Burrow* court reasoned, had answers capable of derivation largely from the laws of agency and trusts.[30] While the initial inclination of the court toward the principles of trusts and agency proved instructive, the merger of the equitable doctrines existing in those bodies of law with the related notions as stated in the *Restatement of the Law Governing Lawyers* ultimately served as the basis for the court's holdings.[31]

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25. *Id.*

26. Arce v. Burrow, 958 S.W.2d 239, 243–44 (Tex. App.—Houston [14th Dist.] 1997), *aff'd in part, rev'd in part*, 997 S.W.2d 229 (Tex. 1999).

27. *Burrow*, 997 S.W.2d at 233.

28. *Id.*

29. *Id.* at 237.

30. *See id.* at 237–43 (analogizing, repeatedly, to the relevant standards and considerations existing in agency and trust law as a means of arriving at, and then legitimizing, the forfeiture analysis pertaining to attorney-client lawsuits).

31. *Id.* at 245.

C. *The Analysis*

1. Forfeiture Is Equitable—Neither Automatic, Compensatory, Nor Punitive

Both the Texas Supreme Court and the Fourteenth Court of Appeals found that the existing body of fiduciary law resolved the issue of whether actual damages should be a necessary condition to an aggrieved client's ability to access the fee forfeiture remedy.[32] In terms of the nature of the misconduct that must be present before fee forfeiture becomes an available remedy, the *Burrow* court embraced the view that "'[t]he remedy ... presupposes that a lawyer's clear and serious violation of a duty to a client destroys or severely impairs the client-lawyer relationship and thereby the justification of the lawyer's claim to compensation.'"[33] The attorneys unsuccessfully asserted that without actual damages, the court would not have an adequate metric for measuring whether forfeiture became excessive in each particular case.[34] But the remedy recognized by the *Burrow* court purports to serve another end as well—deterrence.[35] The court opined that, as a practical matter, this equitable remedy represented a well-placed disincentive to attorneys who might engage in acts of disloyalty (presumably for the attorneys' benefit) even if those acts could likely be performed without causing actual harm to the client.[36] In fact, the court emphatically embraced this notion, stating:

> It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation.... The main purpose of forfeiture is not to compensate an injured principal .... Rather, the central purpose of ... forfeiture is to protect relationships of trust by discouraging agents' disloyalty.[37]

The remedy at issue was classified as neither compensatory nor punitive, but merely an operation of equity.[38] Thus, the specifics

32. Burrow v. Arce, 997 S.W.2d 229, 233, 237 (Tex. 1999).

33. *Id.* at 238 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996)).

34. *Id.* at 240.

35. *Id.*

36. *Id.*

37. *Burrow*, 997 S.W.2d at 238.

38. *Id.* at 240.

of the remedy must largely be a dictate of the facts and circumstances of each case in which it is considered.[39] Nevertheless, the court was unequivocal in recognizing that forfeiture may well be appropriate without proof of causation and actual damages.[40]

The clients asserted that where a serious breach of fiduciary duty occurs, the lawyer must automatically forfeit all fees paid.[41] In support of this position, the clients relied on *Kinzbach Tool Co. v. Corbett-Wallace Corp.*,[42] decided in 1942 by the Texas Supreme Court. The *Burrow* court recognized the legitimacy of *Kinzbach*, but stated that the holding of that case failed to reach and, a priori, define the parameters of the fee forfeiture remedy.[43] Hence, the *Burrow* court readily arrived at the proposition that precedent did not mandate complete and automatic forfeiture of attorneys' fees without regard to the particular nature of the misconduct in question.[44] The court felt that the ends of the fee forfeiture remedy could be served by less restrictive means.[45] In fact, to bind the remedy to a requirement that it be automatic, complete, or both would strip it of its equitable character in the court's view.[46] As such, the remedy's availability must be a direct result of a contextual fit within the circumstances presented.[47] As with constructive trusts, the court reasoned that to hold otherwise would be overly broad and would allow the possibility that attorneys who inadvertently engage in misconduct could be forced to forfeit all compensation.[48]

The Fourteenth Court of Appeals formulated an approach unique to the attorney-client context in resolving the fee forfeiture issue in *Burrow*.[49] But the Texas Supreme Court disagreed and

39. *Id.* at 245.

40. *Id.* at 240 ("We therefore conclude that a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client.").

41. *Id.*

42. Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509 (1942).

43. Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999).

44. *Id.*

45. *Id.* at 241.

46. *Id.*

47. *Id.*

48. *Burrow*, 997 S.W.2d at 241.

49. Arce v. Burrow, 958 S.W.2d 239, 250 (Tex. App.—Houston [14th Dist.] 1997),

refused to divorce the forfeiture analysis governing attorney-client cases from that applicable to other cases arising out of an agent's disloyalty to a principal.[50] Therefore, the *Burrow* court concluded that, consistent with the proposed *Restatement of the Law Governing Lawyers*, rigidity must be dispensed with in favor of a more pragmatic analytical framework for assessing whether the facts of a particular case justify fee forfeiture or profit disgorgement.[51] Thus, the court concurred in the *Restatement*'s consideration of certain factors in resolving whether and to what extent forfeiture is justified.[52]

2. The *Restatement* Factors and the Equity of the Particular Circumstances

A nonexclusive list of relevant factors embodied in the proposed *Restatement* and adopted by the *Burrow* court includes: "'the gravity and timing of the violation, its wil[l]fulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.'"[53] Notably, willfulness does not equate to intentional conduct, but rather refers to attorneys' culpability generally.[54] Thus, the *Burrow* court made clear that forfeiture was not to be limited to

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aff'd in part, rev'd in part, 997 S.W.2d 229 (Tex. 1999). The appellate court in *Burrow* applied a set of factors in passing on the fee forfeiture issue which the court described as follows:

> (1) [t]he nature of the wrong committed by the attorney or law firm; (2) the character of the attorney's or firm's conduct; (3) the degree of the attorney's or firm's culpability, that is, whether the attorney committed the breach intentionally, willfully, recklessly, maliciously, or with gross negligence; (4) the situation and sensibilities of all the parties, including any threatened or actual harm to the client; (5) the extent to which the attorney's or firm's conduct offends [the] public [notion] of justice and propriety; and (6) the adequacy of other available remedies.

Id. Notably, these factors bear a striking resemblance to those appropriately relied upon in assessing whether punitive damages should be awarded. *Id.*

50. *Burrow*, 997 S.W.2d at 242–43 (citing *Arce*, 958 S.W.2d at 249). "The rule is not dependent on the nature of the attorney-client relationship, as the court of appeals thought, but applies generally in agency relationships." *Id.*

51. Burrow v. Arce, 997 S.W.2d 229, 241–43 (Tex. 1999).

52. *Id.* at 243.

53. *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmts. a–b (Proposed Final Draft No. 1, 1996)); *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000) (providing that fee forfeiture is a remedy where an agent willfully and deliberately breaches his duty to his principal).

54. *Burrow*, 997 S.W.2d at 243.

situations involving intentional misconduct on the part of attorneys.[55] In addition, the consideration of the adequacy of other remedies seems, to some extent, inconsistent with the stated reason for the doctrine of fee forfeiture in the first instance.[56] Indeed, *Burrow* has taken criticism from members of the bar who assert that the absence of an actual damages requirement is of little to no effect because of the presence of the "adequacy of other remedies" factor.[57] Nevertheless, the court explained that the availability of other sufficient avenues for client remedies must be considered by trial courts, and it may or may not play a substantial role in any particular case.[58]

Establishing that an attorney clearly and seriously breached a duty does not automatically result in fee forfeiture, and where forfeiture is awarded, it need not be the entire amount of legal fees accepted by an attorney.[59] The above-referenced factors provide the framework, or at least a portion of the framework, for determining whether fee forfeiture is appropriate in the first instance, and if it is, whether the attorney should be required to forfeit all compensation or a lesser sum.[60] Similar to constructive trusts, the nature of the analysis elevates the "equity of the particular circumstances" above all else in determining the specific amount, if any, an attorney should be forced to forfeit.[61] Thus, the *Burrow* framework dictates a case-specific inquiry and result.

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55. *Id.*

56. *See id.* at 244 (noting that the remedy of fee forfeiture is centered on "concern for the integrity of the attorney-client relationship").

57. *See* Nathan Koppel, *Counsel May Lose Fees for Disloyalty: Absence of Damage to Client Won't Bar Fee Forfeitures*, TEX. LAW., July 12, 1999, at 1 (noting contentions by some attorneys who have expertise in legal malpractice claims that *Burrow*'s lack of an actual damages requirement is of little practical significance). One attorney who practices in the area of malpractice defense believes that *Burrow* did not accomplish a "'doggoned thing'" in that "'[it] takes away the requirement of damages to bring a forfeiture claim but then it puts it right back in by saying it is a factor to be considered on how much to forfeit.'" *Id.* (quoting Mr. Jim Cowles of Dallas's Cowles & Thompson).

58. *Burrow*, 997 S.W.2d at 243–44.

59. *See id.* at 243 (concluding that while fee forfeiture may be appropriate if certain factors are present, the law does not "mandate automatic forfeiture or preclude consideration of factors other than" those that the court outlined in determining that fee forfeiture was an appropriate remedy).

60. *Id.* at 245–46 ("In a forfeiture case the value of the legal services rendered does not . . . dictate either the availability of the remedy or amount of the forfeiture. Both decisions are inherently equitable and must thus be made by the court.").

61. *Id.* at 241–45.

3. The Public Interest in Fostering Attorney-Client Relationships

The court's reluctance to create a governing standard unique to the attorney-client context makes sense because the analysis set forth in the proposed *Restatement of the Law Governing Lawyers* and adopted in *Burrow* seems consistent with existing agency and trust law.[62] However, the attorney-client relationship is a particularly important one in terms of the general public's confidence and trust in attorneys and the legal system.[63] Accordingly, the *Burrow* court noted that the public's interest in fostering attorney-client relationships must be observed by courts when imposing fee forfeitures.[64] The *Burrow* court recognized, however, that a standard agency or trusts law analysis would require ignoring the obvious distinction emanating from the relationship upon which the common law system of jurisprudence has rested many of its most central assumptions and principles.[65] Grounding this consideration in practicality, the Texas Supreme Court noted that the predominant consideration trial courts must rely on to inform their discretion is "whether forfeiture is necessary to satisfy the public's interest in protecting the attorney-client relationship."[66] Thus, the attorney-client context does not demand a standard specific to that relationship; yet the attorney-client arena remains capable of causing the totality of the analysis to yield a result that could not otherwise be reached.[67] In any event, the *Burrow* court felt strongly about promoting positive public sentiment regarding the nature of attorney-client relationships but opted not to go so far as to carve out a forfeiture

62. *See id.* (analyzing and endorsing the approaches to fee forfeiture outlined in the *Restatement (Third) of the Law Governing Lawyers*, the *Restatement (Second) of Trusts*, and the *Restatement (Second) of Agency*). *See generally* RESTATEMENT (SECOND) OF TRUSTS § 243 (1959) (allowing for a court's discretion in determining whether all or only a portion of a trustee's compensation should be forfeited for breach of trust); RESTATEMENT (SECOND) OF AGENCY § 469 (1958) (permitting partial forfeiture of compensation if some of the services were properly performed); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996) (rejecting a rigid approach to attorney fee forfeiture).

63. Burrow v. Arce, 997 S.W.2d 229, 244 (Tex. 1999).

64. *Id.*

65. *Id.* at 238.

66. *Id.* at 246.

67. *Id.* at 243–46.

analysis distinct from that applicable in other contexts.[68]

4. The Role of the Judge and Jury

Burrow also set forth a careful construction regarding the roles of the trial judge and the jury insofar as it recognizes that many underlying factual issues must be resolved by a jury; whereas, the far-reaching implications stemming from the process of weighing the stated factors present "legal policy issues well beyond the jury's province."[69] Particularly, the public interest in strengthening the attorney-client relationship and the adequacy of other remedies are classified by the *Burrow* court as being among the factors inextricably intertwined with the analysis that dictates whether the trial court must make the determination as to the amount of fees, if any, subject to forfeiture in a particular case.[70] In this regard, *Burrow* reserves these equitable issues for judicial discretion.[71] Underlying factual disputes, however, must be resolved by a trier of fact before such legal pronouncements can be made.[72]

The rule set forth by the court is based on the following ideas: (1) fee forfeiture is never a mandatory remedy; (2) fee forfeiture can never be appropriate in the absence of a clear and serious violation of the attorney's obligations;[73] and (3) even where forfeiture is properly applied, complete forfeiture is not necessarily required.[74]

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68. *Burrow*, 997 S.W.2d at 242–43 ("The rule is not dependent on the nature of the attorney-client relationship, as the court of appeals thought, but applies generally in agency relationships.").

69. *Id.* at 245.

70. *Id.* at 245–46.

71. *Id.*

72. Burrow v. Arce, 997 S.W.2d 229, 246 (Tex. 1999). The court suggested that the following issues would frequently need to be determined by the trier of fact: (1) whether, and if so, to what extent, a client was injured by the breach of duty; (2) whether, and if so, when, the wrongful conduct happened; and (3) whether the attorney acted negligently, recklessly or intentionally in breaching the duty. *Id.*

73. *Id.* at 240–45. The factors articulated in *Burrow* bearing on whether the prerequisite clear and serious breach of fiduciary duty has occurred are: "'[1] the gravity and timing of the violation, [2] its wil[l]fulness, [3] its effect on the value of the lawyer's work for the client, [4] any other threatened or actual harm to the client, and [5] the adequacy of other remedies.'" *Id.* at 243 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996)).

74. *See Burrow*, 997 S.W.2d at 241 ("Nor is automatic and complete forfeiture necessary for the remedy to serve its purpose.").

III. *BURROW*'S IMMEDIATE IMPLICATIONS

A. *Causation and Actual Damages Need Not Be Proven*

The notion that a fiduciary must forfeit his compensation when that compensation is earned in violation of obligations owed to a principal is certainly not groundbreaking.[75] Nevertheless, the *Burrow* decision created as many questions as it provided answers, or at least it has been perceived as having done so.[76] One reading of *Burrow* certainly lends itself to the conclusion that the court believed it would be intolerable to allow attorneys to escape liability in cases involving breaches of a certain character.[77] The *Burrow* court also apparently believed that, absent the possibility of forfeiture, attorneys might engage in a balancing process—weighing the advantages of engaging in disloyal conduct against the probability that provable damages would result.[78] If attorneys applied such a formula, presumably, the question of whether to move ahead with the disloyal conduct would be resolved by this analysis; if the odds that the conduct would cause provable damages were reasonably low, attorneys would take comfort in knowing that no real civil remedy would exist for clients, even if those clients learned of the conduct.[79] Of course, reasonable minds could certainly differ as to whether, and if so to what extent, members of the bar would engage such a process at a greater clip than would otherwise be the case. One could indeed question if *Burrow*'s forfeiture bears any direct relationship to instances of attorney-misconduct of the variety that *Burrow* purports to guard against. Such a position likely rests, at least in part, on the existence of other forums for policing attorney-misconduct. The

75. *See id.* at 242–43 (citing the *Restatements of Agency* and *Trusts* in explaining that the remedy of forfeiture is well established where relationships of trust are breached).

76. *See* Matthew Nielsen, Note, Burrow v. Arce*: Too Much Ado About Nothing?*, 52 BAYLOR L. REV. 487, 488–92 (2000) (stating that *Burrow* is perceived as having created a multitude of questions pertaining to the availability of forfeiture and the extent of attorney liability more generally).

77. *See Burrow*, 997 S.W.2d at 243–44 (stating that limiting forfeiture to a compensation mechanism would be to depart from the very reason for the remedy).

78. *Id.* at 238–39.

79. *See id.* at 238 ("[T]he possibility of forfeiture of compensation discourages an agent from taking personal advantage of his position of trust in every situation no matter the circumstances . . . ." (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. b (Proposed Final Draft No. 1, 1996))).

argument then necessarily begs the question of how reasonable it is to presume that the forfeiture deterrent will serve to limit attorney-misconduct that is not already restricted by other enforcement mechanisms.

The Texas Supreme Court articulated the cornerstone of the forfeiture analysis as follows: "'A fiduciary cannot say to the one to whom he bears such relationship: You have sustained no loss by my misconduct . . . and therefore you are without remedy.'"[80] In adamantly rejecting such an approach, the Texas Supreme Court opined that allowing a fiduciary to avoid responsibility for the underlying breach of duty simply because no actual damages resulted would indeed be a "dangerous precedent."[81] Thus, the forfeiture remedy does not require causation and actual damages—perhaps the two most frequent evidentiary impediments to recovery under other legal theories.

As noted, the general concept of allowing fee forfeiture in the absence of causation and actual damages rests in the laws of agency and trusts. "[A] person who agrees to perform compensable services in a relationship of trust" and who then fails to observe the nature of that relationship may forfeit the right to compensation.[82] "The person is not entitled to be paid when he has not provided the loyalty bargained for and promised."[83] Stated differently, in both the agency and trust contexts, forfeiture stems conceptually from the idea that when obligated parties deviate from certain norms, the underlying relationship of trust itself is necessarily and irreparably harmed.[84] Indeed, the *Restatement (Second) of Trusts*, which the *Burrow* court relied

80. *Id.* at 239 (quoting Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 573, 160 S.W.2d 509, 514 (1942)).

81. *Id.* at 239–40 (citing *Kinzbach Tool*, 138 Tex. at 573, 160 S.W.2d at 514).

82. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000); RESTATEMENT (SECOND) OF TRUSTS § 243 (1959); RESTATEMENT (SECOND) OF AGENCY § 469 (1958); *see* Matthew Nielsen, Note, Burrow v. Arce*: Too Much Ado About Nothing?*, 52 BAYLOR L. REV. 487, 493–94 (2000) (noting that Texas courts have frequently relied on the law of agency and trusts as reflected in the *Restatement of the Law Governing Lawyers* when evaluating a fee forfeiture case).

83. Burrow v. Arce, 997 S.W.2d 229, 237–38 (Tex. 1999).

84. *E.g.*, *id.* at 238 (noting that forfeiture is a function of equity in that it applies where the right to compensation is removed by actions that impair the relationship itself); Terry Jennings, *Fiduciary Litigation in Texas*, 69 TEX. B.J. 844, 848 (2006) (observing that the basis of fee forfeiture is simply that the right to compensation disappears where the agent's disloyalty impairs the relationship with the principal).

upon, states that "[i]f the trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him a reduced compensation or allow him full compensation."[85] The reasoning behind rules of this nature is readily transferable to the attorney-client context in that the aim is to deter disloyalty.[86] As a result, actual injury is not the focus of the inquiry.[87] Rather, conduct that fundamentally weakens relationships of agency and trust, standing alone, necessitates imposing the equitable remedy of fee forfeiture.[88]

These principles—and indeed much of the analysis flowing from them—formed the basis of the forfeiture approach embodied in both the *Restatement (Third) of the Law Governing Lawyers* and *Burrow*. To be clear, an aggrieved client must still prove causation in order to recover damages because *Burrow* dictates the proper analysis only where a claim of forfeiture—and not damages—is advanced by the client.[89] Equally clear is the proposition that actual damages need not be pleaded or proven in order to maintain a forfeiture action based on an attorney's violation of fiduciary obligations.

B. *The Threshold Level of Misconduct Is Undefined*

The first issue requiring further discussion arises with reference to *Burrow*'s open-ended approach to defining the minimal culpability that must be present as a prerequisite to substantive consideration of forfeiture in each particular case. *Burrow* and the sources on which it relied uniformly recognize that fee forfeiture

85. RESTATEMENT (SECOND) OF TRUSTS § 243 (1959).

86. *See* Errin Martin, Comment, *The Line Has Been Drawn on the Attorney-Client Relationship: The Implications of* Burrow v. Arce *on Texas Practitioners*, 32 TEX. TECH L. REV. 391, 404–05 (2001) (discussing agent disloyalty in the agency and trusts contexts and the policy behind permitting fee forfeiture when the loyalty of the attorney-client relationship is jeopardized).

87. *Burrow*, 997 S.W.2d at 238.

88. *Cf. id.* at 240 (rejecting the attorneys' argument on grounds that it was premised on the ill-conceived notion that compensation was the center of the analysis).

89. *Id.* at 239–40; *see also* Liberty Mut. Ins. Co. v. Gardere & Wynne, L.L.P., 82 F. App'x 116, 118 (5th Cir. 2003) (noting that *Burrow*'s forfeiture analysis applied to only those situations where a client did not seek actual damages); *In re* Segerstrom, 247 F.3d 218, 225 n.5 (5th Cir. 2001) ("Injury and causation are still required when a plaintiff seeks to recover damages for a breach of fiduciary duty."); Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 905–06 (Tex. App.—Dallas 2001) (recognizing that a claim for damages necessarily requires proof of causation as a prerequisite to recovery), *rev'd*, 145 S.W.3d 150 (Tex. 2004).

should normally be restricted to situations involving attorneys who act with consciousness of their misconduct.[90]

For instance, the *Restatement (Third) of the Law Governing Lawyers* contemplates such a limitation by noting that all violations of legal duties do not require forfeiture and opines as follows: "Some violations are inadvertent or do not significantly harm the client."[91] Relative consensus has emerged among commentators that forfeiture will ordinarily not be appropriate where the underlying conduct consists of an inadvertent mistake.[92] But the *Burrow* court did not go so far as to expressly reserve the remedy for situations involving greater culpability than mere negligence.[93] Indeed, in its commentary, the *Restatement (Third) of the Law Governing Lawyers* provides that "[a] tribunal will . . . consider misconduct more broadly, as evidence of the lawyer's lack of competence and loyalty, and hence of the value of the lawyer's services."[94]

IV. CASES APPLYING *BURROW*: A SERIES OF FACT-SPECIFIC HOLDINGS

Many of the cases from which *Burrow*'s breadth must be

90. *See Burrow*, 997 S.W.2d at 241 (explaining that fee forfeiture is not appropriate in all circumstances, such as when the misconduct was inadvertent or when the client suffered no significant harm); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000) (naming as a factor in determining forfeiture the willfulness of the conduct).

91. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 cmt. b (2000).

92. *E.g.*, *id.* § 37 cmt. d ("Forfeiture is generally inappropriate when the lawyer has not done anything willfully blameworthy . . . ."); Matthew Nielsen, Note, Burrow v. Arce*: Too Much Ado About Nothing?*, 52 BAYLOR L. REV. 487, 504 (2000) (contending that with regard to the minimum level of culpability with which an attorney must have acted before forfeiture is appropriate, knowing misconduct, which surpasses the standard of proof in traditional malpractice actions, represents the appropriate threshold); Linda Eads, *Negligence vs. Disloyalty: Limits on the Forfeiture of Attorneys' Fees*, TEX. LAW., Jan. 12, 2004, at 26 ("The reasoning in *Burrow* does not support fee forfeiture when the client is claiming only failure to exercise reasonable care or when the client is not alleging facts that show disloyalty."); Christopher Fuller & Robyn Bigelow, *Forfeiting Attorneys' Fees After* Arce*: Consider the Consequences Before Suing Clients*, TEX. LAW., Aug. 5, 2002, at 32 (surmising that although the issue has not been definitively resolved, one can infer that the conduct required for forfeiture is in the nature of intentional wrongdoing).

93. *See* Burrow v. Arce, 997 S.W.2d 229, 241–44 (Tex. 1999) (explaining that the willfulness factor is not limited to instances of intentional breaches and in any event, the presence or absence of any one factor will not necessarily be controlling if the facts of a particular case implicate the purposes of forfeiture).

94. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 cmt. a (2000).

deduced do not actually address the issue of forfeiture directly. Because many breach-of-fiduciary-duty claims are resolved as a matter of law on the question of breach, only a handful of cases actually apply *Burrow*.[95] Among these, several anomalies exist.[96] Peculiar factual contexts in these cases have frequently prevented courts from sewing together a coherent and consistent forfeiture standard.[97] Nevertheless, a review of the recent precedent may provide the most instructive data on whether *Burrow*'s aims, as articulated by the Texas Supreme Court, can be adhered to.

As noted, the Texas Supreme Court entrusted a great deal of discretion over the forfeiture issue to the trial courts.[98] For instance, in *Ellis v. City of Dallas*,[99] the attorney faced a request for fee forfeiture.[100] The underlying allegations in that case amounted to conversion, which the plaintiff believed constituted a clear and serious breach of the attorney's obligations.[101] The procedural posture in which the Eastland Court of Appeals evaluated the forfeiture analysis proved particularly important, although it also contributed to a lack of clarity in applying the *Burrow* analysis.[102] The trial court in *Ellis* ruled that forfeiture was not appropriate, and the appellate court affirmed this result.[103] Notably, the *Ellis* court acknowledged that the attorney's conduct could constitute conversion, but the attorney

95. *See* 48 ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 2.14, at 229–34 (2008–2009 ed.) (examining the five cases that have reached the merits on breach-of-fiduciary-duty claims against attorneys).

96. *Cf.* Christopher Fuller & Robyn Bigelow, *Forfeiting Attorneys' Fees After* Arce*: Consider the Consequences Before Suing Clients*, TEX. LAW., Aug. 5, 2002, at 32 (discussing the limited number of published cases and peculiar factual contexts in which *Burrow* has been applied as contributing to the confusion regarding its proper interpretation).

97. *Id.* "Yet a look at several post-*Arce* opinions reveals that the exact substantive parameters of [fee forfeiture's availability] remain uncertain. This may be because more than half of the post-*Arce* opinions are unpublished, and many of the published opinions do not take significant steps in developing the cause of action." *Id.*

98. *See Burrow*, 997 S.W.2d at 241–42 (endorsing substantial discretion accorded to trial courts as appropriately permeating the forfeiture inquiry in numerous contexts).

99. Ellis v. City of Dallas, 111 S.W.3d 161 (Tex. App.—Eastland 2003, no pet.).

100. *Id.* at 166–67.

101. *Id.* at 165–67.

102. *See id.* at 163–67 (outlining the *Burrow* factors and determining, summarily, that despite the circumstances potentially calling for forfeiture of fees, the trial court was within its discretion in not finding forfeiture).

103. *Id.* at 167.

acted in good faith.[104] The total sum of these circumstances in the court's view was simply that forfeiture—either partial or total—was not appropriate.[105] Refusal of forfeiture, however, was the result of the trial court's justifiably reasoned exercise of its discretion under *Burrow*.[106] *Ellis* is illustrative of the practical reality that stems from the relative role of the trial court in passing on the forfeiture question under *Burrow*'s framework.

Another case that implicated the role of the trial court in the forfeiture inquiry was *Miller v. Kennedy & Minshew, P.C.*,[107] which required assessing whether the jury's finding stood for the proposition that a breach of fiduciary duty barred the attorneys from recovering their fees.[108] The Fort Worth Court of Appeals ultimately concluded that, even if the jury's finding could be so read, the trial court properly disregarded it.[109] Rather, because the question of forfeiture is a legal one, Texas law dictates that the jury's response to a special issue on the point is immaterial, and the trial court is to proceed, as it did in *Miller*, as though no such finding existed.[110] This case demonstrates the distinct roles of the judge and jury in applying *Burrow*. While forfeiture doubtlessly is a legal question, the posture in which the issue is raised has the ability to create confusion.

The 2002 case of *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*,[111] did not directly examine the application of forfeiture, but rather the appellate court took issue with the notion that the trial court's directed verdict as to breach should also be read to include a separate conclusion that forfeiture was legally barred.[112] In rejecting the concurring and dissenting opinion's thesis, the

104. *Ellis*, 111 S.W.3d at 165–67.

105. *Id.* at 167.

106. *Id.*

107. Miller v. Kennedy & Minshew, P.C., 142 S.W.3d 325 (Tex. App.—Fort Worth 2003, pet. denied).

108. *Id.* at 339–40.

109. *Id.* at 341.

110. *Id.* at 340–41.

111. Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

112. *See id.* at 193 ("[T]he jury must determine the factual issues *before* the trial court can determine whether the breach of fiduciary duty, if any, was . . . clear and serious. . . . Because there were fact issues regarding breach of fiduciary duty and scienter, . . . we conclude the trial court erred in granting a directed verdict [on the] claim for fee forfeiture based on the [l]aw [f]irm's alleged breaches of fiduciary duty regarding the conflicts of interest.").

Deutsch court readily dispensed with the notion that lack of actual damages coupled with unintentional breaches precluded forfeiture, stating: "As a matter of law, damages and an intentional breach are not required for a clear-and-serious breach to exist."[113] In *Deutsch*, the forfeiture issue was not reached and could not have been resolved as a matter of law because there was sufficient evidence to raise a genuine issue of material fact on the question of breach.[114] Depending upon the jury's findings, the trial court might be within its discretion in assessing the forfeiture claim, according to the majority.[115] However, the trial court was not authorized under *Burrow* to exercise discretion in resolving whether forfeiture was justified based on the clarity and severity of the breach without first allowing the jury to decide underlying fact questions on the existence or absence of the breach itself.[116] Thus, the trial court's directed verdict was reversed and the case remanded.[117] Chief Justice Brister's concurring and dissenting opinion, however, addressed the forfeiture issue directly.[118] Due to the procedural posture of the case, the concurring and dissenting opinion believed the majority's emphasis on the trial court's failure to expressly rule on forfeiture was exaggerated, if not wholly misplaced.[119] Chief Justice Brister argued that forfeiture had to be assessed as though the trial judge had exercised discretion and declined to make an award, as opposed to treating the issue as beyond the scope of the trial court's actions (as the majority expressly and repeatedly did).[120] Rather, in his view, not only did the trial court's order include a ruling denying forfeiture, that result should be affirmed.[121] Thus, while opposition certainly exists, forfeiture seems capable of ensuring factual issues must be resolved by a jury in a realm of cases that

113. *Id.* at 196.

114. *Id.* at 197–98.

115. *Deutsch*, 97 S.W.3d at 197–98.

116. *Id.* at 193–94.

117. *Id.* at 200.

118. *Id.* at 200–04 (Brister, C.J., concurring and dissenting).

119. *See id.* at 205 ("But there is a presumption that applies here: when a trial judge signs a judgment after a conventional trial on the merits, we must presume that he 'intended to, and did, dispose of . . . all issues made by the pleadings between the parties.'" (quoting N. E. Indep. Sch. Dist. v. Aldridge, 400 S.W.2d 893, 897–98 (Tex. 1966))).

120. Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 204–05 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (Brister, C.J., concurring and dissenting).

121. *Id.* at 200–01, 205.

would otherwise be resolved as a matter of law. In other words, because culpability is one factor to consider in assessing the seriousness of a particular violation of duty and actual damages are not required, conventional methods of pursuing summary judgment in breach-of-fiduciary-duty cases may prove unavailing in light of *Burrow*.

As noted, *Burrow* clearly left the determination of whether forfeiture—where appropriate in the first instance—is to be total or partial as a matter within the discretion of the trial court.[122] In *Lopez v. Muoz, Hockema & Reed, L.L.P.*,[123] the San Antonio Court of Appeals appeared to provide some insight into the practical application of this component of the forfeiture framework.[124] In *Lopez*, the court determined that, because of an absence of intentional deceit on the part of the attorney, the proper remedy for the client's overpayment was simply a disgorgement of that portion of fees that represented the extent to which the attorney had been overcompensated.[125] But the court did so without an in-depth explanation of the paramount issue pertaining to forfeiture's availability in general: What constitutes a clear and serious violation of duty sufficient to consider forfeiture or disgorgement and order total application of it? Nevertheless, *Lopez* does prove useful insofar as it demonstrates that the underlying justifications that gave rise to the *Burrow* rule are not merely matters of theory. Rather, the San Antonio Court of Appeals' analysis is steeped in the significance of the contract-based justification for forfeiture. Further, because the Texas Supreme Court clearly stated that the remedy is not to be thought of as a punitive measure, an approach similar to *Lopez* seems reasonable.

Unfortunately, this trend—not directly articulating what conduct does and does not support a forfeiture analysis under *Burrow*—has not been unique to the *Lopez* decision. In *Haase v. Herberger*,[126] the Fourteenth Court of Appeals interpreted

122. Burrow v. Arce, 997 S.W.2d 229, 240–41 (Tex. 1999).

123. Lopez v. Muoz, Hockema & Reed, L.L.P., 980 S.W.2d 738 (Tex. App.—San Antonio 1998), *aff'd in part, rev'd in part sub nom.* Lopez v. Muñoz, Hockema & Reed, L.L.P., 22 S.W.3d 857 (Tex. 2000). Please note that "Muoz" is the correct spelling of the party's name, as indicated by the court of appeals.

124. *Id.* at 741–44.

125. *Id.* at 743–44.

126. Haase v. Herberger, 44 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

Burrow and reasoned that forfeiture should be denied.[127] The factual circumstances giving rise to *Haase*, however, seemingly foreclose the possibility of deriving broader instruction from the court's analysis of the forfeiture issue.[128] The plaintiff's claim in *Haase* arose out of the attorney's representation of both the plaintiff and his wife.[129] The two sought a divorce, however, while the underlying matter was still pending.[130] With the advice of independent counsel, the plaintiff's wife sought and obtained a court order authorizing her to settle the underlying claim notwithstanding the husband's objection.[131] Consequently, the attorney in *Haase*, in reliance on the court order, carried out the settlement of the initial lawsuit.[132] The attorney's fees were then paid from the settlement amount to the attorney.[133] The Fourteenth Court of Appeals agreed with the trial court's grant of summary judgment in the attorney's favor.[134] While assuming, without deciding, that the allegations advanced against the attorney amounted to a breach of fiduciary duty, the fact that the attorney simply acted in a manner consistent with a court order was dispositive on the question of forfeiture.[135] Thus, the *Haase* court determined that the circumstances of the case dictated that only one "equitable and just" result existed: the forfeiture claim had to be denied.[136] Although it did not state as much, *Haase* could be read as perfectly consistent with the Texas Supreme Court's decision not to limit the considerations to the factors it set forth. The *Burrow* court noted that the *Restatement*'s list was not exhaustive, and *Haase* may well be a practical example of the prudence of the Texas Supreme Court's precision in this regard. Clearly, the conduct that is of concern in leaving forfeiture on the

127. *Id.* at 270.

128. *See id.* ("Here, appellees would have had to forfeit a fee that they ultimately earned by following a court order. This would be inconsistent with their obligations as officers of the court.").

129. *Id.* at 269.

130. *Id.* at 268.

131. *Haase*, 44 S.W.3d at 268–69.

132. *Id.* at 268.

133. *Id.* at 269.

134. *Id.* at 270–71.

135. *Id.* at 270 ("Fee forfeiture is not required in every case where an attorney breaches a fiduciary duty." (citing Burrow v. Arce, 997 S.W.2d 229, 241 (Tex. 1999))).

136. Haase v. Herberger, 44 S.W.3d 267, 270 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

table in a wide range of cases does not include attorney-compliance with court instruction. To that degree, *Haase* appears to be uncontroversial in its holding; however, it is also necessarily limited to its facts, which counseled against applying a standard *Burrow* analysis.

In *Ray v. T.D.*,[137] the Austin Court of Appeals considered whether profit disgorgement was appropriate where the attorney represented multiple plaintiffs in obtaining a settlement.[138] In determining that the attorney was not entitled to fees for his services, the court relied on a breach of the ethical rule relating to conflicts of interest as one of several bases for its decision.[139] The *Ray* court, after finding that the evidence presented established that a conflict of interest existed among the plaintiffs, pointed out that the attorney had not produced evidence that he fully disclosed the underlying conflict to the court or his clients.[140] The court reasoned that the attorney was not entitled to attorneys' fees because no enforceable fee agreement existed.[141] As a result, the appellate court did not consider the *Burrow* argument in its denial of attorneys' fees.[142] Other equitable theories, however, were addressed, and the court determined that the attorney had not shown a right to recovery in quantum meruit.[143] While this case does not shed a great deal of light upon the workings of *Burrow*, it does demonstrate one instance in which denial of attorneys' fees is considered appropriate based on a violation of ethical rules. The result of the breach, however, gave rise to the court's position that

137. Ray v. T.D., No. 03-06-00242-CV, 2008 WL 341490 (Tex. App.—Austin Feb. 7, 2008, no pet.) (mem. op.).

138. *Id.* at *5–8.

139. *Id.* at *7–8.

140. *Id.* at *5–8.

141. *Id.* at *8.

142. *See Ray*, 2008 WL 341490, at *2–3 (acknowledging the appellee's forfeiture argument based on *Burrow*).

143. *Id.* at *8. The elements of a quantum meruit claim are as follows:

> To recover under quantum meruit, a claimant must prove that: (1) valuable services were rendered; (2) for the person sought to be charged; (3) the services were accepted, used, and enjoyed by the person sought to be charged; and (4) the acceptance, use, and enjoyment was under such circumstances as reasonably notified the person sought to be charged that the claimant, in performing such services, was expecting to be paid by the person sought to be charged.

Id. The court was particularly critical of the attorney's failure to present evidence of the true value of the legal services for which he was allegedly entitled to compensation. *Id.*

the basis for fee denial was the absence of a contractual right.[144] Further, holding that an agreement for an unreasonable fee is unenforceable and, as such, an attorney is not entitled to compensation, could be read as doing away with the necessity of *Burrow*. A Fourteenth Court of Appeals decision from 2001, however, suggests otherwise. *Lee v. Lee*[145] involved a sibling dispute over the benefits of their mother's trust.[146] The appellants argued that the *Burrow* analysis was limited to cases in which the fiduciary duty at issue was the prohibition on taking an excessive fee.[147] This contention was rejected, and the court noted that the Texas Supreme Court did not impose such a limitation.[148] Rather, as the court reasoned, *Burrow* extends to all cases in which (1) any breach of fiduciary duty is alleged, and (2) the equitable remedy of fee forfeiture is properly pleaded.[149] While the appellee in *Lee* ultimately failed to obtain forfeiture due to the absence of a request for the equitable remedy in the pleadings, the court's pronouncement concerning the availability of forfeiture under *Burrow* is instructive.[150] Thus, while *Lee* does little else to expound upon *Burrow*'s application (largely because of the procedural posture of the case), it is clear that forfeiture remains a possible remedy for violations of fiduciary obligations, from whatever source and in whatever manner those may be interpreted by a given court. For this reason alone, *Lee* shows that *Burrow* is not understood, at least by the Fourteenth Court of Appeals, as providing a remedy within a narrow range of circumstances.

A review of the judicial precedent developed under *Burrow* seems to confirm the contention of some that no meaningful forfeiture standard capable of consistent application has emerged.[151] But also true is that such a reality is due, in large measure, not to the level of jurisprudential reasoning in these cases, but rather to the specific factual circumstances and procedural posture in which appellate courts have been required

144. *Id.*

145. Lee v. Lee, 47 S.W.3d 767 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

146. *Id.* at 773–75.

147. *Id.* at 780.

148. *Id.*

149. *Id.*

150. *Lee*, 47 S.W.3d at 780–81.

151. Christopher Fuller & Robyn Bigelow, *Forfeiting Attorneys' Fees After* Arce*: Consider the Consequences Before Suing Clients*, TEX. LAW., Aug. 5, 2002, at 32.

to rule on some variation of forfeiture.[152] Perhaps the primary reason for this reality is simply the few number of cases that have actually applied *Burrow*.[153] In any event, forfeiture precedent does not provide the clear pattern of understanding that some would prefer, and it is advisable to approach the analysis in the same fashion that the courts in these rare cases have and return to the fundamentals of *Burrow*'s holding. That is, to crystallize the role forfeiture plays in the broader framework of attorney-client litigation, it becomes necessary to evaluate the nature of the clear and serious breach standard, as well as the boundaries of trial court discretion, by (1) identifying and attempting to utilize the sources relevant to the "clear" prong, and (2) practically engaging the process of balancing factors relevant to the "serious" analysis.

V. ATTRIBUTES OF A CLEAR AND SERIOUS BREACH

A. *The "Clear Breach" Requirement: Sources Courts Rely on to Define Attorneys' Fiduciary Duties*

As to the clarity of the underlying breach, courts must assess whether "a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful."[154] Some courts approach this prong of the analysis by simply assuming the truth of the client's allegations and then inquiring whether the conduct presents a substantial question as to whether a breach of duty has occurred.[155] Courts adopting this approach reason that if the alleged misconduct (if true) would not raise a question as to whether a violation of an attorney obligation has occurred, the breach is sufficiently clear to satisfy that particular part of the forfeiture analysis.[156] In this regard, the clarity of the breach is inextricably bound to the clarity of the duty itself. In other words, a clear breach could presumably never be found where the misconduct did not amount to a

152. *Id.*

153. *Id.*

154. Burrow v. Arce, 997 S.W.2d 229, 241 (Tex. 1999) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. d (Proposed Final Draft No. 1, 1996)).

155. Sealed Party v. Sealed Party, No. Civ-A-H-04-2229, 2006 WL 1207732, at *16–18 (S.D. Tex. May 4, 2006).

156. *Id.*

violation of a well-established standard of attorney obligations. As such, it is useful to evaluate the sources that courts will likely consult in defining the duty at issue, and then assess whether the alleged violation is sufficiently clear to satisfy the initial prong of the clear and serious standard. Central to this assessment is the level of generality with which courts discuss fiduciary obligations.

1. Conventional Understanding of Attorneys' Fiduciary Obligations: Dictates of the Common Law

Attorneys are bound to observe fiduciary obligations in favor of their clients as a matter of law.[157] While this principle is unequivocal, the contours of specific fiduciary obligations binding on attorneys are not as easily treated. Justice Benjamin Cardozo famously described the nature of the obligations under which a fiduciary must labor by stating that such persons were held to "something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[158] In general, courts and commentators characterize the attorney-client relationship as "highly fiduciary" and *uberrima fides*—meaning that the relationship requires utmost abundant good faith.[159] While these characterizations are illustrative, the application of fiduciary law in attorney-client forfeiture suits poses a host of significant issues that require further evaluation. Substantive precision in setting forth the dictates of fiduciary obligations becomes of paramount importance in this context because of the influx of cases arising out of a wide array of conduct, but which find commonality in that the remedy pursued is increasingly (though often not exclusively) fee forfeiture.[160]

The Texas Supreme Court recognized the importance of

157. Terry Jennings, *Fiduciary Litigation in Texas*, 69 TEX. B.J. 844, 846 (2006).

158. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, C.J.).

159. *Sealed Party*, 2006 WL 1207732, at *6; Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied) (quoting Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1965)); Hefner v. State, 735 S.W.2d 608, 624 (Tex. App.—Dallas 1987, pet. ref'd).

160. *See generally* Linda Eads, *Negligence vs. Disloyalty: Limits on the Forfeiture of Attorneys' Fees*, TEX. LAW., Jan. 12, 2004, at 26 ("[W]e now see a breach-of-fiduciary-duty claim in almost every case in which a client alleges lawyer misconduct, including negligence cases."); Tom Prehoditch, *Breach-of-Fiduciary-Duty Claims Against Lawyers on the Rise*, TEX. LAW., Feb. 13, 2006, at 27 (indicating that the number of appellate court decisions involving alleged breach of fiduciary duty by an attorney is on the rise).

fiduciary obligations by stating: "One occupying a fiduciary relationship to another must measure his conduct by high equitable standards, and not by the standards required in dealings between ordinary parties."[161] The implication arises that the general principles of negligence-based duties likely define the level of conduct required in ordinary situations.[162] In contrast, fiduciary duties are purposefully tailored to provide security for legitimate expectations regarding the foundation of the attorney-client relationship—that bundle of assumptions and principles which form the very essence of representation itself.[163]

"The essence of a breach of fiduciary duty involves the 'integrity and fidelity' of an attorney."[164] "A breach of fiduciary duty occurs when an attorney benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interests to his own, retaining the client's funds, using the client's confidences improperly, taking advantage of the client's

161. Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 574, 160 S.W.2d 509, 514 (1942).

162. *See* Goffney v. Rabson, 56 S.W.3d 186, 190 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (rejecting any attempt to reframe an action alleging an attorney's conduct fell below an objectively reasonable standard as anything other than a legal malpractice claim).

163. *See* Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied) (defining the nature of a breach-of-fiduciary-duty claim and providing a distinct categorization of causes of action brought against attorneys arising out of the attorney-client relationship). Causes of action pertaining to the very core of the obligations that a client can legitimately expect an attorney to satisfy should be prosecuted as a claim for breach of fiduciary duty. *See id.* ("The essence of a breach of fiduciary duty involves the 'integrity and fidelity' of an attorney." (quoting *Goffney*, 56 S.W.3d at 193)). "A breach of fiduciary duty occurs when an attorney benefits improperly from the attorney-client relationship by . . . using the client's confidences improperly, [or] taking advantage of the client's trust." *Id.* In contrast, a legal malpractice action involves "an attorney's alleged failure to exercise ordinary care," and is a derivative of the law of negligence. *Id.*

164. *Id.* (quoting *Goffney*, 56 S.W.3d at 193). The *Restatement of the Law Governing Lawyers* articulates four duties that a lawyer is bound to comply with in the course of representation:

> (1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation; (2) act with reasonable competence and diligence; (3) comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and (4) fulfill valid contractual obligations to the client.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 28 (Proposed Final Draft No. 1, 1996).

trust, engaging in self-dealing, or making misrepresentations."[165] The duties imposed on an attorney also include the duty of confidentiality and the duty of candor—in some cases absolute and perfect candor.[166] At times, courts have described the duty of candor as one that exists independently from the distinct, but often concurrent, duty to take reasonable preventive measures to safeguard confidential information, which is a derivative of the law of negligence.[167]

This distinction is critical to understanding whether forfeiture claims are grounded in a legally sound basis—breach of fiduciary duty—as opposed to a foundation that should be classified as some other cause of action. Forfeiture's attractiveness to clients will likely continue to cause courts to delve into the intricacies and nuances involved in grounding traditional notions of fiduciary obligations in new and case-specific contexts. Simply stated, clients seeking to benefit from forfeiture will pursue whatever avenues are seemingly left open by courts in terms of the phrasing of attorneys' fiduciary obligations. It is advisable, therefore, to first refine and then consistently apply precise standards commensurate with attorneys' fiduciary obligations.

2. The Texas Disciplinary Rules of Professional Conduct: The Temptation to Convert an Appropriate Reference into a Threshold Standard

A "clear and serious breach of duty," *Burrow* plainly stated, is a prerequisite to a trial court's ability to exercise discretion as to whether and to what extent forfeiture should be awarded.[168] Reliance on sources other than the common law to define fiduciary duties, however, poses an interesting issue.[169] The *Burrow* analysis consists largely of an adoption of the approach

165. *Kimleco Petroleum*, 91 S.W.3d at 923 (citations omitted).

166. *See* Vincent R. Johnson, *Cybersecurity, Identity Theft, and the Limits of Tort Liability*, 57 S.C. L. REV. 255, 295 (2005) (opining that the fiduciary duty of candor requires an obligation that may be viewed as absolute and perfect in some situations).

167. *See id.* at 280 ("The duties imposed on a fiduciary . . . are sometimes coextensive with those that the law of negligence embraces. However . . . fiduciary obligations may extend considerably further . . . ." (citation omitted)).

168. Burrow v. Arce, 997 S.W.2d 229, 246 (Tex. 1999).

169. *Cf.* Tom Prehoditch, *Breach-of-Fiduciary-Duty Claims Against Lawyers on the Rise*, TEX. LAW., Feb. 13, 2006, at 27 (noting that the interplay between ethical obligations to which attorneys are bound and "the law governing the fiduciary conduct of lawyers in Texas" creates a "rapidly evolving jurisprudence").

suggested by the then-proposed *Restatement of the Law Governing Lawyers*.[170] The final version of the *Restatement* provision actually spoke to the possible origins of the duties that, if violated, could support an award of forfeiture; however, these commentaries were added after *Burrow* was decided.[171] As modified after *Burrow*, the *Restatement of the Law Governing Lawyers* provides that "[t]he source of the duty can be civil or criminal law, including, for example, the requirements of an applicable lawyer code or the law of malpractice."[172] While this language was not included in the *Restatement* version endorsed in *Burrow*, subsequent case law suggests that courts have articulated fiduciary duties in forfeiture cases as though it was.

As evidenced by the *Burrow* court, as well as many others addressing issues of this nature, the Texas Rules provide guidance in terms of determining the particulars of the legal duties imposed on attorneys.[173] But the extent to which a relationship exists between a violation of the Texas Rules and a cause of action for breach of fiduciary duty seeking fee forfeiture remains less than clear.[174] In *McGuire, Craddock, Strother & Hale, P.C. v. Transcontinental Realty Investors, Inc.*,[175] the Dallas Court of Appeals revealed this ambiguity.[176] The court in *McGuire* plainly stated: "A private cause of action does not exist for violation of the

170. *Burrow*, 997 S.W.2d at 241.

171. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 cmt. d (2000).

172. *Id.* § 37 cmt. c. *But cf.* McGuire, Craddock, Strother & Hale, P.C. v. Transcon. Realty Investors, Inc., 251 S.W.3d 890, 895–96 (Tex. App.—Dallas 2008, pet. denied) (dismissing the appellee's contention that a breach of statutory duty can serve as the basis for fee forfeiture).

173. *Burrow*, 997 S.W.2d at 245–46; *see, e.g.*, Sealed Party v. Sealed Party, No. Civ-A-H-04-2229, 2006 WL 1207732, at *11 n.30 (S.D. Tex. May 4, 2006) (resorting to the disciplinary rules to address the appropriate standard in assessing a breach-of-fiduciary-duty claim).

174. *Compare McGuire*, 251 S.W.3d at 896 (rejecting the notion that a private cause of action exists for violation of a rule of professional responsibility), *with Sealed Party*, 2006 WL 1207732, at *11 n.30 (noting that a lack of precedent on the contours of a particular fiduciary duty can justify consultation of, and perhaps reliance on, ethical rules).

175. McGuire, Craddock, Strother & Hale, P.C. v. Transcon. Realty Investors, Inc., 251 S.W.3d 890 (Tex. App.—Dallas 2008, pet. denied).

176. *Id.* at 896 (rejecting the Texas Rules as the appropriate standard for assessing whether an attorney's conduct amounted to a breach of fiduciary duty but noting that conflicting evidence as to whether the attorney actually met the standard set forth in the relevant Texas Rule precluded the trial court from granting judgment notwithstanding the verdict against the attorney).

disciplinary rules."[177] This statement is certainly accurate per the plain letter of the Texas Rules; nevertheless, it seems somewhat inconsistent with the body of precedent, which relies, without caveat, on the Texas Rules to inform the fee forfeiture analysis in breach-of-fiduciary-duty cases.[178] The *McGuire* court, however, cited the preamble to the Texas Rules and noted that a disciplinary proceeding is the sole proper forum in which to resolve "[a] claim that a lawyer has violated a rule of professional conduct."[179]

Interestingly, *Burrow* touched on whether a violation of the Texas Rules can support the award of forfeiture.[180] The court summed up the essence of the clients' claims as assertions that their attorneys "reached an aggregate settlement in violation of Rule 1.08(f) of the Texas Disciplinary Rules of Professional Conduct."[181] The attorneys contended that this type of misconduct (assuming it actually occurred) could not support forfeiture, and that even if a violation of an ethical rule could be sufficient as the underlying duty, this particular rule was overly vague.[182] Resolution of this contention, however, was ultimately not necessary in *Burrow*.[183] Rather, the *Burrow* court noted that these issues had not been fully developed in the trial court, and answering the questions raised in this setting would also mandate determination of whether other alleged violations of the ethical

177. *Id.* (citing Jones v. Blume, 196 S.W.3d 440, 449 (Tex. App.—Dallas 2006, pet. denied)).

178. *Compare id.* (rejecting a litigant's invocation of the commentary to a particular Texas Rule as the basis for assessing whether an attorney breached a fiduciary duty), *and* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 15, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9) ("Violation 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."), *with Sealed Party*, 2006 WL 1207732, at *11 n.30 (outlining the contours of the duty attorneys owe their clients by reference to the text and commentaries included in the rules of professional responsibility).

179. *McGuire*, 251 S.W.3d at 896 (noting that the Texas Rules are the appropriate standard "solely for the purpose of discipline within the profession" (citing 1 J. HADLEY EDGAR, JR. & JAMES B. SALES, TEXAS TORTS AND REMEDIES § 12.02[1][a][ii][A] (2000))). The *McGuire* court disposed of the fee forfeiture issue by noting that *Burrow* rendered the clients' claim based on violations of the Texas Rules "without merit." *Id.* at 897–98 (citing Burrow v. Arce, 997 S.W.2d 229, 234 (Tex. 1999)).

180. *Burrow*, 997 S.W.2d at 246.

181. *Id.*

182. *Id.*

183. *Id.* ("The lower courts did not find it necessary to address this argument, and given the difficult considerations involved, we believe it to be imprudent for us to decide the matter in the first instance without a full airing below.").

rules were sufficient to support an award of forfeiture.[184]

The Fourteenth Court of Appeals in *Burrow* also addressed the need for separation between the forfeiture remedy and the role of disciplinary proceedings in policing attorneys' conduct.[185] The appellate court recognized the significance of maintaining the distinction, which separates the role of the court hearing a particular case and that of a disciplinary committee charged with "oversee[ing] violations of disciplinary rules in this state."[186] An appreciation for the divergence in the role the courts and the state bar play in this regard, however, did not seem to logically lead to the appellate court's conclusion on the issue.[187] Rather, the Fourteenth Court of Appeals cited the reality that even a disciplinary proceeding in which an attorney is reprimanded does not provide a complete remedy in that no tangible relief inures to the benefit of the aggrieved client.[188] In reasoning that forfeiture is a viable remedy for courts to turn to in breach-of-fiduciary-duty cases against attorneys, the appellate court defined the role of the judiciary as "compensating the client for the injury created by the client's justifiable perception that he or she may have received less than the honest advice and zealous performance to which a client is entitled."[189] Thus, the Fourteenth Court of Appeals suggested that conduct that would result in professional discipline for violations of specific ethical rules could bear on whether there is a sufficient basis for courts to consider forfeiture for purposes of providing a means of redress to the aggrieved client.[190]

Similarly, the United States District Court for the Southern District of Texas, in a case released as *Sealed Party v. Sealed Party*,[191] considered the application of *Burrow* in the context of the ethical duty of confidentiality owed a former client.[192] The issue came before the court in terms of disclosure of certain

184. *Id.*

185. Arce v. Burrow, 958 S.W.2d 239, 246 (Tex. App.—Houston [14th Dist.] 1997), *aff'd in part, rev'd in part*, 997 S.W.2d 229 (Tex. 1999).

186. *Id.* at 251.

187. *See id.* (noting the separate roles and duties of the disciplinary committee and the courts).

188. *Id.*

189. *Id.* (citing Gilchrist v. Perl, 387 N.W.2d 412, 415 (Minn. 1986)).

190. *Arce*, 958 S.W.2d at 251.

191. Sealed Party v. Sealed Party, No. Civ-A-H-04-2229, 2006 WL 1207732 (S.D. Tex. May 4, 2006).

192. *Id.* at *5.

information, which was agreed to be maintained as confidential per the parties' underlying settlement agreement.[193] The attorney's conduct under review involved public dissemination via a press release concerning the client's matter, which the attorney knew was the subject of—but was not aware of the particulars included in—"some [set of] confidentiality requirement[s]."[194] The court ultimately articulated the relevant duty as "a fiduciary obligation to not reveal to third parties confidential information received from a client, or obtained by reason of the representation of that client, . . . [which] survives termination of the attorney-client relationship in the absence of permission from the former client to make the disclosure."[195] In defining the parameters of this duty, the *Sealed Party* court took refuge in the Texas Rule on point and did not address whether the fiduciary duty owed a former client is actually broader than that which is articulated in the ethical rules.[196]

Because the specifics that accompany the moniker of fiduciary relationship do not immediately become obvious through categorization alone, the advancement of the law depends in large measure on working from a set of standards that can at least loosely be agreed upon. But the *Sealed Party* court did not stop at a mere reference.[197] As one might expect from the nature of this analysis, the reason why it did not do so is likely as instructive as the singular fact that it did not. The court noted that "no reported Texas judicial decision[] or rule[] address[ed] [one of the] threshold issue[s] in th[at] case: whether, for fiduciary duty purposes, client-related information that originally was 'confidential information' under Texas Rule 1.05 may be revealed at the attorney's option once the information has been included in court pleadings."[198] As a result, resort to the Texas Rules and the

193. *Id.* at *2–4.

194. *Id.* at *4.

195. *Id.* at *7.

196. *See Sealed Party*, 2006 WL 1207732, at *8 n.25 (noting that the parties agreed at all relevant times that the issue turned on the interpretation of the Texas Rule and no other standard).

197. *Id.*

198. *Id.* at *11 (exhausting all potential sources of precedent in search of guidance on the issue, and concluding that the only authority touching on the question existed in the form of a seventeen-year-old opinion issued by the State Bar of Texas Committee on Professional Ethics). The *Sealed Party* court demonstrated the extent to which certain circumstances necessitate evaluating the Texas Rules as though they stand on equal

history of their creation, as well as the ABA's Model Rules of Professional Conduct,[199] became instrumental in constructing the parameters of the fiduciary obligation and, a priori, its exceptions.[200]

The Texas Disciplinary Rules of Professional Conduct provide guidance in terms of the contemplated implications of a violation in that the preamble explicitly states that a "[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."[201] Notwithstanding this apparent separation between civil liability and ethical violations for purposes of professional sanctions, Texas courts—like their counterparts in sister states—have consistently and unapologetically resorted to this body of rules as an appropriate source for informing or refining the standards of permissible attorney conduct in the context of tort cases.[202] Thus, the general role of the Texas Rules in most jurisdictions can be summarized in two principles: (1) the ethical rules do not create an independent civil cause of action, so they cannot embody attorney obligations in the same manner that the true source (i.e., the law of negligence, fiduciary law, the DTPA or some other statute) of causes of action do; and (2) the ethical rules are valuable and may properly be considered as an evidentiary tool for establishing or defeating alleged breaches of duty.

Referencing applicable standards of professional discipline promotes a measure of consistency and makes practical as well as

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footing with a legislative enactment. *Id.* at *11 n.32. Specifically, a hierarchical structure was carved out in terms of the text of the Rules relative to drafting materials and other products of the process, which culminated in codification. *Id.* The issue of expert testimony as to interpretation required comment, insofar as the court clarified that where the text of a particular rule would contravene the testimony of an expert who was proffered by an interested party, the former controls and indeed also renders the latter "wholly unpersuasive." *See* Sealed Party v. Sealed Party, No. Civ-A-H-04-2229, 2006 WL 1207732, at *11 n.32 (S.D. Tex. May 4, 2006) ("It is not persuasive that one or both of the witnesses may have been involved in the drafting of the Texas Rules [because of the complexity of the drafting process].").

199. MODEL RULES OF PROF'L CONDUCT (2008).

200. *Sealed Party*, 2006 WL 1207732, at *13 (supporting its analysis by reference to the Texas Rules, the majority view among jurisdictions in adopting the rules of professional discipline, and the ABA Model Rules).

201. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 15, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9).

202. Hendry v. Pelland, 73 F.3d 397, 401 (D.C. Cir. 1996); *Sealed Party*, 2006 WL 1207732, at *8.

doctrinal sense, if the proper limitations are recognized. The contours of the specific fiduciary duties recognized by courts could be paramount when considered relative to the standard for determining whether a given breach satisfies forfeiture's clear and serious requirement.[203] Because the clarity of the duty at issue has a correlative relationship with the potential for a clear breach, both the common-law articulations of fiduciary obligations and applicable ethical rules are vital to assessing *Burrow*'s likely trajectory. What remains free from doubt is that, whatever the particular source relied upon, forfeiture hinges in part on the presence of a duty that is sufficiently clear to support a finding that "a lawyer . . . could . . . have been expected to know that conduct was forbidden."[204]

B. *Seriousness of the Breach: The Texas Non-Fracturing Doctrine and Knowing Violations of the Texas Disciplinary Rules of Professional Conduct*

While the violation must be serious, in addition to being clear, before fee forfeiture is appropriate, the seriousness determination does not turn on a singular definitional standard similar to the clarity inquiry. Rather, the cumulative result, derived from evaluating multiple factors, measures the severity of the breach for *Burrow*'s purposes.[205] The relevant considerations include the willfulness of the breach, which provides substantial practical difficulties in forfeiture claims based on negligent breaches of fiduciary duty.[206] While the weight of scholarly opinion, *Burrow*, and the *Restatement (Third) of the Law Governing Lawyers* suggest that forfeiture should ordinarily not be entertained in such

203. *See Sealed Party*, 2006 WL 1207732, at *16–18 (reasoning that the duty must be sufficiently clear in terms of how it is defined in order for a breach to warrant forfeiture).

204. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 cmt. d (2000).

205. *See* Burrow v. Arce, 997 S.W.2d 229, 243 (Tex. 1999) (adopting the *Restatement*'s view that a nonexclusive list of factors to be weighed include: "'the gravity and timing of the violation, its wil[l]fulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies'" (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996))); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000) (providing the same list of factors to be considered in forfeiture of compensation that the *Burrow* court used from the proposed *Restatement* section 49).

206. *Burrow*, 997 S.W.2d at 243; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000).

cases, no one factor is controlling.[207] Analysis on this point has become increasingly common, because even in cases involving allegations of negligence, clients often assert that alleged breaches are: sobering in their gravity; severe in their timing; devastating in their failure to give rise to an adequate alternative remedy; and unmistakable in their likely impact on the integrity of the attorney-client relationship. Likewise, these same clients are almost sure to contend that the relevant duties are sufficiently clear under the standard adopted in *Burrow*.

The willfulness factor has clearly and predictably emerged as one that seems to have risen to a level of relative superiority compared to the others, notwithstanding *Burrow*'s pronouncement that no singular consideration is to be interpreted as outcome-determinative in assessing whether the breach is sufficiently severe.[208] Another factor that has received similar treatment by courts is the adequacy of other remedies consideration.[209] It seems courts have taken a view that almost relegates forfeiture to an alternative to actual damages. That is, where actual damages are present, the likelihood of forfeiture also being granted appears to be low. Such a reality stems from the notion that any other

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207. *Burrow*, 997 S.W.2d at 243–44 (noting that even though forfeiture is not intended to compensate the client, but rather is intended to deter breaches of duty, there are cases where no other remedy is appropriate for making the client whole); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 cmt. b (2000) (giving the rationale that forfeiture is not always appropriate when the violation is "inadvertent"). *See generally* Matthew Nielsen, Note, Burrow v. Arce*: Too Much Ado About Nothing?*, 52 BAYLOR L. REV. 487 (2000) (positing that a cause of action for breach of duty should be confined to willful and knowing conduct); Linda Eads, *Negligence vs. Disloyalty: Limits on the Forfeiture of Attorneys' Fees*, TEX. LAW., Jan. 12, 2004, at 26 (arguing that there should be safeguards against clients who suffered no damages but are seeking a windfall because of an attorney's negligence); Christopher Fuller & Robyn Bigelow, *Forfeiting Attorneys' Fees After* Arce*: Consider the Consequences Before Suing Clients*, TEX. LAW., Aug. 5, 2002, at 32 (concluding that a lack of case law interpreting the factors gives attorneys little guidance as to what constitutes a breach for *Arce* purposes).

208. *See* Matthew Nielsen, Note, Burrow v. Arce*: Too Much Ado About Nothing?*, 52 BAYLOR L. REV. 487, 504 (2000) (concluding that the *Burrow* court determined, as a practical matter, forfeiture requires proof of knowing breach of duty).

209. *See* Piro v. Sarofim, No. 01-00-00398-CV, 2002 WL 538741, at *6–7 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002, pet. dism'd by agr.) (not designated for publication) (holding that the trial court was allowed, within its discretion, to award both breach-of-fiduciary-duty and fee-forfeiture awards, but that *Arce* factors permitted the court to award equitable fee forfeiture only if it wished, as one of the factors allows consideration of existing alternatives to fee forfeiture); *cf.* McGuire v. Kelley, 41 S.W.3d 679, 682–83 (Tex. App.—Texarkana 2001, no pet.) (holding that a plaintiff's election for breach-of-duty damages only precluded any appellate-level discussion on the jury's finding of fraud).

outcome results in a windfall to the client.[210]

Thus, these two factors have proven to be of utmost importance as an interpretative matter in forfeiture cases, although not by way of express recognition. Indeed, that at least one of the two must weigh in favor of forfeiture has reached a status approaching a de facto prerequisite to forfeiture. Nevertheless, the possibility of obtaining forfeiture on a negligent breach-of-fiduciary-duty claim has led to a fundamental challenge in terms of distinguishing legal malpractice actions from cases that present a viable and justifiable potential for a forfeiture award.

1. The Role of the Non-Fracturing Doctrine: Explaining the Increase in Fiduciary Duty Claims Against Attorneys

The rule against fracturing stands for the proposition that it is impermissible for a client to divide or fracture a legal malpractice action, which consists of allegations that an attorney's conduct in rendering legal services departed from that which a reasonably prudent attorney would have engaged in, into proceeding against the attorney on four or five independent causes of action.[211] The Texas rule against fracturing claims certainly does not preclude a client from asserting claims other than malpractice against an attorney.[212] Rather, this rule only prohibits a client from asserting a claim other than malpractice against an attorney when the underlying allegations constitute a legal malpractice claim, which has been labeled as something other than an action for malpractice.[213] The troubling reality, however, persists in that

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210. *E.g.*, *Piro*, 2002 WL 538741, at *7 (recounting the trial court's ruling that the plaintiff only recovers for breach of fiduciary duty over fee forfeiture as a proper application of *Arce*); *Kelley*, 41 S.W.3d at 682–83 (stating the rule that recovery may not be had multiple times for the same injury, but addressing the issue no further since the plaintiff had elected damages under one cause of action).

211. *See, e.g.*, Trousdale v. Henry, 261 S.W.3d 221, 227 (Tex. App.—Houston [14th Dist.] 2008, pet. filed) ("The rule against dividing or fracturing a negligence claim prevents legal malpractice plaintiffs from opportunistically transforming a claim that sounds only in negligence into other claims."). Nevertheless, Texas courts have rejected attorneys' contentions that breach-of-fiduciary-duty claims cannot arise out of the rendition of professional services. Affiliated Computer Servs., Inc. v. Kasmir & Krage, L.L.P., No. 05-98-00227-CV, 2000 WL 1702635, at *4 (Tex. App.—Dallas Nov. 15, 2000, no pet.) (not designated for publication).

212. Newton v. Meade, 143 S.W.3d 571, 574 (Tex. App.—Dallas 2004, no pet.).

213. *See Trousdale*, 261 S.W.3d at 227 (stating that the rule against fracturing prevents a claim based only in negligence from being transformed into multiple recoveries (citing Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 189 (Tex. App.—

clients have increasingly adopted the practice of alleging negligent conduct and still invoked *Burrow* in an attempt to obtain forfeiture.[214]

The impact of *Burrow* in context of the rule prohibiting fracturing legal malpractice claims has been hypothesized as follows: "Not surprisingly, we now see a breach-of-fiduciary-duty

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Houston [14th Dist.] 2002, no pet.))); Jacobs v. Tapscott, No. 3:04-CV-1968-D, 2006 WL 2728827, at *4 (N.D. Tex. Sept. 25, 2006) (stating that the rule against fracturing prevents a client from opportunistically pursuing multiple remedies for negligence in legal malpractice), *aff'd*, 277 F. App'x 483 (5th Cir. 2008). There is still room for argument as to what constitutes a separate claim and what is not to be considered a fractured claim. For example, the Fifth Circuit Court of Appeals articulated the distinction between claims for breach of fiduciary duty in the fee forfeiture context and malpractice suits as follows:

> Texas courts distinguish between legal malpractice claims and breach of fiduciary duty claims; this distinction depends on the source and kind of duty that the lawyer allegedly breached. If a claim, regardless of what it is called, involves a lawyer's performance in representing a client, then it is a legal malpractice claim. If a claim involves a lawyer's 'integrity and fidelity,' then it is a breach of fiduciary duty claim.

Liberty Mut. Ins. Co. v. Gardere & Wynne, L.L.P., 82 F. App'x 116, 118 n.3 (5th Cir. 2003) (citing Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied)). The Fourteenth Court of Appeals recently described the circumstances that must be present for the client to proceed on a claim other than legal malpractice as follows:

> This [c]ourt subscribes to the rule that a separate cause of action for breach of fiduciary duty exists if the allegations in the petition allege self-dealing, deception, or misrepresentations in the attorney's legal representation of the client. We have never held that self-dealing, deception, *and* misrepresentation must all be present in order for a breach of fiduciary duty claim to stand; rather, we stated that the allegations in support of a breach of fiduciary duty claim must simply go beyond the mere negligence allegations in a malpractice action.

Trousdale, 261 S.W.3d at 228 (citations omitted); *see also* O'Donnell v. Smith, 234 S.W.3d 135, 146 (Tex. App.—Dallas 2007, pet. granted) (asserting that even though the client alleged that the firm failed to "exercise the highest degree of care, good faith, and honest dealing," this was insufficient to make an independent claim for breach of fiduciary duty without presenting some additional evidence); Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (considering the client's allegations against the attorney and concluding that her breach of duty claim was basically a claim of legal malpractice); Judwin Props., Inc. v. Griggs & Harrison, 911 S.W.2d 498, 507 (Tex. App.—Houston [1st Dist.] 1995, no writ) (determining that an unauthorized disclosure of privileged information was properly remedied by the client through the vehicle of a malpractice claim—not breach of fiduciary duty, as a breach of duty claim is considered a "means to an end to assert legal malpractice").

214. Linda Eads, *Negligence vs. Disloyalty: Limits on the Forfeiture of Attorneys' Fees*, TEX. LAW., Jan. 12, 2004, at 26 (noting that the increase in fiduciary duty claims will likely continue to be the trend and perhaps become the norm if courts do not reject clients' attempts to characterize malpractice actions as claims justifying forfeiture simply because of the advantageous aspects of a case brought in such a manner).

claim in almost every case in which a client alleges lawyer misconduct, including negligence cases."[215] Another commentator states that post-*Burrow* trends include, inter alia, the "demise of the extreme interpretation of the non-fracturing doctrine," which has led to confusion in terms of when unreasonable conduct provides the basis for a legal malpractice action, a claim for breach of fiduciary duty, or both, and confusion with regard to "[t]he allocation of the burden [of proof] on remedy," which potentially varies depending upon whether a breach-of-fiduciary-duty plaintiff pursues actual damages or fee forfeiture.[216] Again, these difficulties will likely persist, given the present state of the law, which precedent suggests invites clients to seek forfeiture through a multitude of theories.[217] Consideration of the non-fracturing doctrine relative to forfeiture is thus warranted in light of *Burrow*.[218]

In *Two Thirty Nine Joint Venture v. Joe*,[219] the Dallas Court of Appeals stated the underlying problem as precisely and clearly as any court or commentator.[220] The *Joe* court summarized the nature of the quandary as follows:

> Because avoiding conflicts of interest and thereby observing the fiduciary duty of loyalty is an action that a reasonably prudent lawyer would observe in relation to the client, a lawyer can be civilly

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215. *Id.*

216. Tom Prehoditch, *Breach-of-Fiduciary-Duty Claims Against Lawyers on the Rise*, TEX. LAW., Feb. 13, 2006, at 27.

217. Christopher Fuller & Robyn Bigelow, *Forfeiting Attorneys' Fees After* Arce*: Consider the Consequences Before Suing Clients*, TEX. LAW., Aug. 5, 2002, at 32. After outlining the *Restatement* factors adopted in *Burrow*, one assessment suggests that the reality as it relates to the application of these factors as well as the judicial decisions pertaining to the forfeiture remedy itself "has [not] provided the much-needed practical guidance on what types of violations are sufficiently grave, willful, harmful or against the public interest." *Id.*

218. Tom Prehoditch, *Breach-of-Fiduciary-Duty Claims Against Lawyers on the Rise*, TEX. LAW., Feb. 13, 2006, at 27 (noting the prudence of monitoring the developments in the non-fracturing doctrine, as it is likely to be a fluid area in light of *Burrow*).

219. Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896 (Tex. App.—Dallas 2001), *rev'd*, 145 S.W.3d 150 (Tex. 2004).

220. *Id.* at 904–06 (outlining the breach of fiduciary duty and loyalty claims and the elements of civil malpractice); *see* James M. "Jamie" Parker, Jr., Thomas H. Watkins & Rachel L. Noffke, *A Rose Is a Rose Is a Rose—Or Is It? Fiduciary and DTPA Claims Against Attorneys*, 35 ST. MARY'S L.J. 823, 837 (2004) (discussing the difficulty courts have had with classifying claims brought by clients against their former attorneys in light of the evolution of liability under the DTPA and the recent precedent pertaining to breach of fiduciary duty).

liable to a client if the lawyer breaches a fiduciary duty to a client by not avoiding impermissible conflicts of interest, and the breach is a legal cause of injury.[221]

In addition, *Burrow* necessarily requires further consideration of whether the same conduct referenced by the *Joe* court could justify fee forfeiture where the client either does not sustain, or fails to sufficiently establish, causation and damages.

In *Murphy v. Gruber*,[222] the Dallas Court of Appeals acknowledged the inconsistencies in the current state of the law regarding whether allegations of conflict of interest support either a malpractice claim, other causes of action, or both.[223] To the extent that generalizations could be made from recent precedent, the court deduced that where the asserted basis is that the attorney's impermissible conflict resulted in an inability of the attorney to provide adequate representation, some courts will only allow a malpractice claim to be advanced.[224] The court also stated, by way of summation, that a malpractice claim is not the sole theory available where the contentions involve an attorney's obtaining an improper benefit from representing the client or an attorney's failure to disclose a personal conflict of interest.[225] The court then offered a possible explanation for the incompatibility existing among recent cases in stating that "the standard of care in negligence claims is often defined by the characteristics of that inherent fiduciary relationship.... [C]ourts have most often applied those standards to conclude that the claims are really negligence, not breach-of-fiduciary-duty claims."[226]

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221. *Joe*, 60 S.W.3d at 905–06 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 16(3), 49 (2000)); Arce v. Burrow, 958 S.W.2d 239, 245–46 (Tex. App.—Houston [14th Dist.] 1997), *aff'd in part, rev'd in part*, 997 S.W.2d 229 (Tex. 1999); *see* James M. "Jamie" Parker, Jr., Thomas H. Watkins & Rachel L. Noffke, *A Rose Is a Rose Is a Rose—Or Is It? Fiduciary and DTPA Claims Against Attorneys*, 35 ST. MARY'S L.J. 823, 837 (2004) (setting forth a chart to categorize the theories that courts have deemed applicable to similar factual allegations).

222. Murphy v. Gruber, 241 S.W.3d 689 (Tex. App.—Dallas 2007, pet. denied).

223. *Id.* at 695.

224. *Id.* at 696.

225. *Id.* at 696–97.

226. *Id.* at 696. The court in *Murphy* then proposed an approach to determining whether a claim was one of professional negligence, breach of fiduciary duty or fraud. *Murphy*, 241 S.W.3d at 696–97. The court noted that because the superficial labels placed on claims cannot operate to transform traditional negligence-based actions into other causes of action that yield advantages to clients in terms of standards of proof, statutes of limitations, or available remedies, the substance of the underlying allegations must be

As the First Court of Appeals stated in *Judwin Properties, Inc. v. Griggs & Harrison*,[227] "breach of fiduciary duty ... refers to unfairness in the contract."[228] Conversely, a legal malpractice claim is rooted in the law of negligence, and its practical operation requires nothing more than the party seeking relief to establish a particular permutation of that familiar theory. Nevertheless, the *Judwin Properties* court held that an attorney's public disclosure of confidential information could not be remedied through a client's breach-of-fiduciary-duty claim.[229] Rather, the First Court of Appeals stated that the action advanced by the client was more akin to a standard tort action, and the pleading of the case as an action for breach of fiduciary duty was simply "a means to [the] end [of] assert[ing] legal malpractice."[230] Nevertheless, the court recognized that fees paid to an attorney might, in some instances, be recoverable in cases in which the legal services provided are rendered of no value due to the attorney's negligence.[231]

While it is unclear whether certain unreasonable courses of action or instances of conduct give rise to a breach-of-fiduciary-duty claim and which of those may then provide a sufficiently clear and serious violation of duty to justify fee forfeiture in the absence of causation and damages, some violations have consistently been held to be within the realm of breach of fiduciary duty.[232] For

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scrutinized in order to properly classify the allegations in each particular case. *Id.* at 697. The court then rejected the notion that precedent revealed a rule that conflicts of interest amount to breach-of-fiduciary-duty causes of action, and defined the parameters of the case relied on by the client as merely that "'an attorney's duty of care includes disclosure of any conflict of interest that may affect the attorney's representation of that client's interest.'" *Id.* (quoting Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 900 (Tex. App.—Dallas 2001), *rev'd*, 145 S.W.3d 150 (Tex. 2004)). Thus, the client's claims called only the quality of the representation into question. *Id.* The client in this case contended, among other things, that the attorneys engaged in self-dealing and knowingly engaged in multiple failures to disclose the terms of settlement proposals and conflicts of interest. *Id.* at 695–98.

227. Judwin Props., Inc. v. Griggs & Harrison, 911 S.W.2d 498 (Tex. App.—Houston [1st Dist.] 1995, no writ).

228. *Id.* at 506.

229. *Id.* at 507.

230. *Id.* at 506.

231. *Id.* at 507.

232. *See* Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("Breach of fiduciary duty by an attorney most often involves the attorney's failure to disclose conflicts of interest, failure to deliver funds belonging to the client, placing personal interests over the client's interests, improper use of client confidences, taking advantage of the client's trust, engaging in self-dealing, and making

instance, the San Antonio Court of Appeals in *Acevedo v. Stiles*[233] held that where an attorney transfers a client's property in a manner inconsistent with the client's directions or consent, the claim is one for breach of fiduciary duty.[234] The court reached this result without providing an analysis or other insight into its reasoning. As a result, no guidance was provided in terms of whether the actions taken in violation of the client's directions or

misrepresentations."). Much of the debate about the breadth of *Burrow* in this context appears attributable to the clear conviction with which the Texas Supreme Court addressed this subject in the 1960 case of *Royden v. Ardoin*, 160 Tex. 338, 331 S.W.2d 206 (1960). The *Royden* court declined refuge for an attorney on the fact that the reason for his breach of the employment agreement stemmed directly from the suspension of his right to practice law. *Id.* at 341–42, 331 S.W.2d at 209 (noting that the attorney had been suspended by the Houston Grievance Committee of the State Bar of Texas for violations of the Canon of Ethics). Abandoning a client at trial, in the court's view, was among the most serious breaches of duty that an attorney could commit. *See id.* at 341, 331 S.W.2d at 209 ("If an attorney, without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination, or if such attorney commits a material breach of his contract of employment, he thereby forfeits all right to compensation." (quoting Beaumont v. J.H. Hamlen & Son, 81 S.W.2d 24, 25 (Ark. 1935))). To hold otherwise, in the court's view, would be an anomaly insofar as a suspension or disbarment would then be treated as different from an attorney's voluntary abandonment of his client. *Id.* Rather, the two must be legal equivalents as it relates to their mutual resultant effect of "render[ing] it impossible to complete the work that [the attorney] engaged to perform." *Id.* (citation omitted). Perhaps the case that provides the most intriguing contrast with the apparent clarity of the *Burrow* analysis is the 2001 case of *Goffney v. Rabson*, 56 S.W.3d 186 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). In that case, the client asserted various theories including breach of fiduciary duty and DTPA violations. *Id.* at 188. The allegations regarding the breach-of-fiduciary-duty claim consisted of abandonment of the client at trial as well as failure to prepare the client's case. *Id.* at 193. The appellate court reversed the jury findings based on the rule against fracturing and determined that the client was not entitled to the recovery awarded by the jury because the only permissible basis on which that result could stand was a legal malpractice action, which had been abandoned by the client. *Id.* at 190. The justification provided by the *Goffney* court was that the allegations failed to rise to the level of (1) self-dealing; (2) deception; or (3) misrepresentations; and thus could not be viewed as anything other than malpractice. *Id.* at 194. Another case involving the abandonment of a client at trial is *Lewis v. Nolan*, No. 01-04-00865-CV, 2006 WL 2864647 (Tex. App.—Houston [1st Dist.] Oct. 5, 2006, no pet.) (mem. op., not designated for publication). In that case, the court rejected the notion that a failure to file an answer and appear on the part of an attorney somehow amounted to a claim of abandonment at trial. *Id.* at *4–6. As a result, malpractice constituted the sole theory on which he could rely in seeking redress for the attorney's alleged misconduct. *Id.*

233. Acevedo v. Stiles, No. 02-04-0077-CV, 2003 WL 21010604 (Tex. App.—San Antonio May 7, 2003, pet. denied) (mem. op., not designated for publication).

234. *Id.* at *1–2; *see* Avila v. Havana Plumbing Co., 761 S.W.2d 398, 400 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (concluding that an attorney's failure to deliver property to the client subjected the attorney to liability for breach of fiduciary duty).

without the client's consent must have also been engaged in with a state of culpability greater than mere unreasonableness.

Further, in *Duerr v. Brown*,[235] the court analyzed the operation of the rule against fracturing and reasoned that, whatever the specific parameters of the possible causes of action a former client may bring against an attorney may be, breach of fiduciary duty certainly includes conduct amounting to any of the following: "failure to disclose conflicts of interest; a failure to deliver funds belonging to the client; placing personal interests ahead of a client's interests; misuse of client confidences; taking advantage of the client's trust; engaging in self-dealing; and making material misrepresentations."[236] Further, the court conceded that the underlying allegations centered on an unfulfilled promise.[237] Additionally, the theories of breach of fiduciary duty included an assertion of failure to disclose a conflict of interest.[238] The *Duerr* court then characterized the claims as legal malpractice "as a matter of law," notwithstanding the client's attempt to classify the underlying conduct as breaches of fiduciary duty.[239] In doing so, the court squarely rejected the notion that seeking fee forfeiture, rather than actual damages, justifies treating what should be nothing more than a legal malpractice action as though it presented a question of fiduciary conduct.[240] Again, whether these particular conclusions are accurate is perhaps less important than the fact that they can certainly be reached without deviating from reasonable application of existing law. The *Duerr* decision is merely one instance that is illustrative of the larger confusion over whether a negligence-based set of allegations against an attorney can be reframed as a claim for breach of fiduciary duty, which could then presumably allow the client to at least raise a question of fact with respect to the issues of breach and scienter.

One such instance in which the client was able to avoid the non-fracturing hurdle can be found in *Trousdale v. Henry*.[241] In that

235. Duerr v. Brown, 262 S.W.3d 63 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

236. *Id.* at 71; *accord* Aiken v. Hancock, 115 S.W.3d 26, 28 (Tex. App.—San Antonio 2003, pet. denied) (identifying the types of conduct involved in breaches of fiduciary duty).

237. *Duerr*, 262 S.W.3d at 71.

238. *Id.*

239. *Id.* at 74.

240. *See id.* ("Duerr's invocation of fee forfeiture does not change the analysis.").

241. Trousdale v. Henry, 261 S.W.3d 221 (Tex. App.—Houston [14th Dist.] 2008, pet. filed).

case, the Fourteenth Court of Appeals held that the rule against fracturing did not so limit a client's claim arising out of the duty to "render a full and fair disclosure of facts material to the client's representation."[242] The nature of the allegations in this case relating to the above-referenced duty allowed the client the possibility, as a matter of the legal doctrines themselves, of proceeding on both the breach-of-fiduciary-duty claim as well as the legal malpractice cause of action.[243] The *Trousdale* court apparently considered both causes of action because the client's allegations involved intentional misconduct.[244] Moreover, this distinction was crystallized when the court stated the rule against fracturing would have led to a different result had the client only alleged that the attorney negligently abandoned the case.[245]

Thus, the possibility of packaging conduct frequently understood as malpractice as an action for fee forfeiture under the rubric of breach of fiduciary duty produces a multitude of issues in light of *Burrow*.[246] Courts have struggled in categorizing cases that seem almost identical in terms of the specific duty allegedly violated, as well as the culpability with which the attorney acted.[247] Even the facially straightforward cases may require closer scrutiny in light of the co-existing strands of judicial precedent, one of which has seemingly adopted a rather broad view of the non-fracturing doctrine. These areas of apparent confusion would likely not be very significant in and of themselves. But the increase in fiduciary duty claims seeking forfeiture of attorneys' fees speaks to the need for addressing these issues.

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242. *Id.* at 229.

243. *Id.* at 232–33. The client's legal malpractice action was actually time barred, but the court indicated that if it were otherwise, the client would be free to maintain both causes of action. *Id.* at 233.

244. *Id.* at 232.

245. *Trousdale*, 261 S.W.3d at 232.

246. Tom Prehoditch, *Breach-of-Fiduciary-Duty Claims Against Lawyers on the Rise*, TEX. LAW., Feb. 13, 2006, at 27. Trends emerging from *Burrow* include "demise of the extreme interpretation of the non-fracturing doctrine," which has led to confusion in terms of when unreasonable conduct provides the basis for a legal malpractice action, a claim for breach of fiduciary duty, or both. *Id.*

247. *See* Christopher Fuller & Robyn Bigelow, *Forfeiting Attorneys' Fees After* Arce*: Consider the Consequences Before Suing Clients*, TEX. LAW., Aug. 5, 2002, at 32 ("In addition, few published appellate opinions post-*Arce* provide any significant insight into its substantive requirements. It remains unclear what type of misbehavior rises to the level of a 'clear and serious violation' and what circumstances might justify the forfeiture of only part of a fee versus a complete disgorgement.").

Thus, the rule against fracturing injects even less predictability into the analysis, and a substantial portion of the short history on *Burrow* consists of the collision of the rule against fracturing legal malpractice actions and the fact that the Texas Supreme Court did not expressly foreclose the possibility of negligence as an adequate basis for imposing forfeiture. Perhaps this scattered landscape is understandable. Regardless, the forfeiture waters will grow murkier unless lines are drawn.

2. Knowing Violations of the Texas Disciplinary Rules of Professional Conduct and Interpretation of the "Clear and Serious at the Same Time" Requirement

As noted, after laboring at length to merely classify the fiduciary obligation binding on the attorney, the *Sealed Party* court turned to the issue of whether the attorney knowingly breached a duty.[248] For purposes of determining whether the disclosure of confidential information constituted knowing conduct, the court likened the standard to the Texas Supreme Court's interpretation of a knowledge requirement attendant to a civil standard of liability.[249] The court concluded that "[t]he [a]ttorney's knowledge of the [former client's confidential information] and its sources suffice[d] to make his conduct knowing for purposes of Texas Rule 1.05(b) and the [c]lient's breach of fiduciary duty claim."[250] The court seemed to revisit and expand upon its somewhat cumbersome treatment of the definition of the conduct in question in rejecting the attorney's contention that a knowing violation does not exist where the details of the confidentiality provisions in the underlying settlement agreement could not possibly have been within the

248. Sealed Party v. Sealed Party, No. Civ-A-H-04-2229, 2006 WL 1207732, at *16 (S.D. Tex. May 4, 2006) (asserting that an attorney's knowledge of the details and sources of the disclosed information is sufficient to categorize the disclosure as being done "knowingly").

249. *Compare id.* (finding the requirement that the wrongful conduct be engaged in knowingly is satisfied where, although unaware prospectively of the legal conclusion to eventually be reached by a court, the attorney had knowledge of the substance and source of the information itself), *with* Osterberg v. Peca, 12 S.W.3d 31, 39 (Tex. 2000) (interpreting a statute which established civil liability where one knowingly accepts unlawful campaign contributions as burdening the plaintiff with establishing that the acceptance of the unlawful contribution was an act knowingly engaged in by the defendant, but not that the defendant had knowledge of the unlawfulness).

250. *Sealed Party*, 2006 WL 1207732, at *16.

realm of information known to that attorney.[251] In reaching an ultimate conclusion that the recklessness of the attorney unquestionably amounted to a knowing act, the *Sealed Party* court stated:

> The issue is whether the [a]ttorney breached his fiduciary duty not to reveal to others a former client's confidential information; the issue is *not* whether he personally breached the [c]onfidentiality [p]rovision, knowingly or otherwise. Even if the [a]ttorney's knowledge of the confidentiality requirements in the [s]ettlement [a]greement were the focus, which it is not, the [a]ttorney knew the settlement contained some confidentiality requirement . . . [and] . . . nevertheless elected not to obtain (or even seek) clarification about the scope of the . . . confidentiality obligation.[252]

The *Sealed Party* court then concluded that the client was not entitled to actual damages.[253] This was due, in part, to the client's failure to prove economic damages coupled with the failure to supplement discovery as required by applicable procedural rules.[254] The court offered suggestions regarding how future litigants in a position similar to that of the client might obtain a more favorable result on the issue of actual damages by commenting that such a claim could be viable where the damages sought are predicated on an amount corresponding to that which "the [a]ttorney received [in terms of] some identifiable financial benefit from the [breach of fiduciary duty]."[255]

Proceeding on to the forfeiture matrix, the court examined whether the attorney's conduct constituted a clear breach of fiduciary duty.[256] This inquiry turned on the clarity of the attorney's obligation to refrain from divulging information about a former client.[257] A portion of the disclosed information, the court

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251. *See id.* at *16 n.52 (reiterating that the issue is not whether the attorney breached the confidentiality provision in the settlement agreement, but whether he breached his fiduciary duty not to disclose a former client's confidential information to another).

252. *Id.*

253. *Id.* at *18.

254. *Id.* at *17.

255. *Sealed Party*, 2006 WL 1207732, at *18.

256. *Id.* (asserting that some of the violations were clear but not serious, and other violations were serious but not clear; thus, the disclosures could not be classified as both clear and serious).

257. *Id.* (commenting that the press release was a clear breach of fiduciary duty in some respects, but not in others).

reasoned, was not clearly included in the definition of the confidences that an attorney must safeguard, and hence, as to those portions, the violation failed to reach the clear standard.[258]

The analysis as to the seriousness of the violation of duty, however, was not dispensed with in such straightforward terms.[259] The *Sealed Party* court began its inquiry by noting the equitable nature of fee forfeiture, and then it outlined an analysis steeped in references to various permutations of that same notion.[260] Three of the *Burrow* factors—(1) the extent to which harm, threatened or actual, became manifest; (2) the willfulness of the conduct; and (3) the public policy interest in terms of the attorney-client relationship—were mentioned in various contexts by the court.[261] Interestingly, the court concluded by noting that those portions of the breach that were clear also represented the portions that were not sufficiently serious, and necessarily, the court held that the inverse was also true.[262] Thus, the "'remedy of forfeiture [did not] fit the circumstances presented.'"[263] While portions of the breach constituted either (1) a clear violation of duty; or (2) a serious violation of duty, no single portion of the breach fell within both categories.[264]

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258. Sealed Party v. Sealed Party, No. Civ-A-H-04-2229, 2006 WL 1207732, at *18 (S.D. Tex. May 4, 2006) (holding that the disclosure of information contained in the press release that was "a matter of public record" was not a clear violation of the attorney's fiduciary duty).

259. *See id.* at *19 ("Because the [c]ourt's conclusions differ on whether the violation was 'clear' as to specific components of the [p]ress [r]elease, the [c]ourt must address the seriousness of each component separately.").

260. *Id.* (acknowledging that forfeiture is grounded on the principles that a breach of fiduciary duty is a breach of contract and fee forfeiture acts as a deterrent to fiduciaries "being disloyal to their principals").

261. *Id.* at *19–20 (listing several nonexclusive factors that the Texas Supreme Court has considered when determining whether fee forfeiture is necessary and, if so, in what amount).

262. *Id.* at *19–21 (asserting that some of the violations were clear but not serious, and other violations were serious but not clear; thus, the disclosures could not be classified as both clear and serious).

263. *Sealed Party*, 2006 WL 1207732, at *20 (quoting Burrow v. Arce, 997 S.W.2d 229, 241 (Tex. 1999)).

264. *See id.* at *21 ("The [c]lient . . . has not proven he suffered actual damages, if he even preserved the right to claim the damages he now seeks in this case. Nor has the [c]lient proven that the [a]ttorney benefited financially or otherwise from the breach . . . . The [c]ourt also concludes no fee forfeiture is warranted because the [c]ourt cannot conclude as to any single component of the [p]ress [r]elease that the . . . breach . . . was both clear and serious.").

Additionally, *Capps v. State*[265] raised many of these underlying issues in the context of a criminal prosecution where the defendant attorney was on trial for mishandling fiduciary property.[266] In that case, the attorney contended that disbarment, sanctions and forfeiture of fees constituted punishment for double jeopardy purposes.[267] Even though the district court that sanctioned the attorney in the prior civil proceeding never mentioned the term fee forfeiture or cited *Burrow*, the First Court of Appeals stated that because the attorney's conduct would have justified the remedy, a reasonable inference arose that the court's earlier actions constituted an application of *Burrow*.[268] Most significantly, the court stated that "there is no general requirement of scienter in the . . . [Texas] [R]ules."[269] In that same vein, the *Capps* court stated that no absolute requirement of scienter with respect to the wrongful conduct is necessary to justify disbarment or restitution.[270] Therefore, to the extent the Texas Rules are relied upon by courts to inform the contours of fiduciary obligations, no general culpability requirement precludes fee forfeiture from the perspective of finding a clear and serious breach of an ethical obligation.[271]

3. *Burrow*'s Apparent Bright-Line Limitation: Seeking Forfeiture of Fees Paid by Someone Else or Not Paid at All

The Fifth Circuit Court of Appeals provided some guidance in terms of *Burrow*'s parameters in an unpublished decision in the

265. Capps v. State, 265 S.W.3d 44 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd).

266. *Id.* at 52 (recognizing that the sole issue is whether state prosecution "for misapplication of fiduciary property" violates the double jeopardy clauses of the United States and Texas constitutions where the attorney has been punished in civil court for the same conduct, and ultimately determining that it does not violate the constitutions).

267. *Id.*

268. *Id.* (stating that the civil court could have reasonably found that the attorney-client relationship was destroyed when the attorney breached his fiduciary duty and, thus, he was "not entitled to any fee").

269. *Id.*; *see also* TEX. PENAL CODE ANN. § 32.45(b) (Vernon Supp. 2007) (providing that the crime of misapplication of fiduciary property occurs where one "intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary . . . in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held").

270. *Capps*, 265 S.W.3d at 52.

271. *Id.* ("While it may be true that appellant's culpable mental state was considered by the court in rendering its final judgment of disbarment, nothing in the rules provides for disbarment or restitution for only specific violations that involve an element of scienter.").

case of *Liberty Mutual Insurance Co. v. Gardere & Wynne, L.L.P.*[272] The court noted that *Burrow* unequivocally stands for the proposition that causation and actual damages need not be proven as prerequisites to obtaining forfeiture for an attorney's breach of fiduciary duty.[273] But the source from which the legal fees were paid was controlling in the court's view.[274] Because Liberty Mutual sought recovery of fees paid by a third party, forfeiture could not be applied.[275] The *Liberty Mutual* court provided particularly useful insight into the manner in which *Burrow* should be applied. The "two ideas" of *Burrow* were advanced in opposition of one another, and the court evaluated each in turn.[276] Initially, the notion that forfeiture exists as a means of equitably remedying a situation in which the client cannot be said to have received the benefit of his bargain due to the attorney's conduct simply could not be sustained based on the facts of the case.[277] Rather, because the fees earned by the defendants were not paid by the plaintiffs, the court found that this "contract-based" justification for forfeiture was not present.[278]

Liberty Mutual, however, also presented a compelling deterrence-based rationale for imposing forfeiture.[279] While recognizing the legitimacy of this argument, it proved unpersuasive under the circumstances.[280] The court's preference between the two competing principles did not flow from its rejection of either argument per se, but rather from the breadth of the plaintiff's

272. Liberty Mut. Ins. Co. v. Gardere & Wynne, L.L.P., 82 F. App'x 116 (5th Cir. 2003).

273. *Id.* at 118, 121.

274. *Id.* at 121 ("Because Liberty is not asking for forfeiture of the fees it paid to Gardere, Gardere correctly argues that forfeiting the fees earned from [another client] makes no sense under the first, contract-based justification for forfeiture.").

275. *Id.* ("We therefore, hold that the district court did not err in refusing to allow forfeiture of fees paid by other clients, particularly when the client could have chosen to seek forfeiture of the fees that it paid.").

276. *Id.*

277. *Liberty Mut.*, 82 F. App'x at 121 (noting that Liberty Mutual's emphasis on the contract-based argument in support of forfeiture, although a valid consideration, is not supported by the facts of the case in light of a careful consideration of *Burrow*).

278. *Id.*

279. *Id.*

280. *Id.* (indicating that Liberty Mutual's argument was based upon an idea proffered in *Burrow*, but holding that the application of Liberty Mutual's argument to this set of facts "ignores the careful creation of the forfeiture remedy in *Burrow*").

argument.[281] That is, the court believed that "Liberty's argument ignore[d] the careful creation of the forfeiture remedy in *Burrow*."[282] The court arrived at this conclusion after analyzing the precedent upon which Liberty Mutual relied.[283] As the court noted, the majority of cases offered in support of Liberty Mutual's position involved fiduciary duties in contexts outside the attorney-client setting.[284] Thus, also not transferable was the underlying principle espoused in those cases—"that a fiduciary must account for all gains obtained in violations of fiduciary duties, even when those gains come from third parties."[285] The *Liberty Mutual* court, therefore, potentially articulated one of the chief limitations of fee forfeiture: forfeiture may never be available where the attorney's fees sought were paid by someone other than the former client.[286]

Recently, in *Swank v. Cunningham*,[287] the Eastland Court of Appeals denied forfeiture in a case involving a complex fee arrangement.[288] The court rejected the forfeiture claim on grounds that the clients seeking the equitable remedy had not themselves paid any of the legal fees.[289] In fact, the attorney whose actions were the subject of the forfeiture claim received compensation in the underlying matter from a third party investor.[290] An additional portion of the fees was to be handled through a contingency agreement.[291] Thus, the *Swank* court found summary judgment was proper on the issue of forfeiture.[292] The court's reasoning, however, provides nuanced insight into what appears to be the current understanding of the source or fact-of-payment limitations on forfeiture in attorney-client cases.[293]

281. *See id.* ("We conclude that Liberty's expansion of the *Burrow* rule is not one that Texas courts would adopt.").

282. Liberty Mut. Ins. Co. v. Gardere & Wynne, L.L.P., 82 F. App'x 116, 121 (5th Cir. 2003).

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. Swank v. Cunningham, 258 S.W.3d 647 (Tex. App.—Eastland 2008, pet. denied).

288. *Id.* at 673–74.

289. *Id.* at 673 (stating that allowing the collection of fees would result in inequity).

290. *Id.* at 673–74 n.11.

291. *Id.* at 673.

292. *Swank*, 258 S.W.3d at 673–74.

293. *See id.* at 672–74 ("[D]enying an attorney all compensation would be an excessive sanction because it would give a windfall to the client.").

Nevertheless, a broad principle governing these issues was not forthcoming, as the court distinguished not only the *Liberty Mutual* case, but also two other unpublished Texas cases.[294]

One of the cases distinguished by the court was *Bell v. Phillips*,[295] wherein the court denied forfeiture on the simple grounds that the attorney had not been paid any legal fees.[296] Rather, the attorney did not receive any compensation while representing the client, although the two did have a contingency fee arrangement.[297] Similarly, in *Universal Fleet Leasing, Inc. v. Pope*,[298] the other Texas case distinguished in *Swank*, a forfeiture claim was denied on grounds that "[the client had] produced no evidence to show [that he was] entitled to a disgorgement of fees paid in connection with [the relevant] matter."[299] The client in *Pope*, however, had an ongoing engagement with his attorney and had paid on numerous occasions throughout the representation.[300] The *Swank* court distinguished these cases, as well as *Liberty Mutual,* on grounds that none of the other cases involved the payment of fees in connection with the representation of the plaintiff-client.[301] In contrast, the attorneys in *Swank* unquestionably received payment in connection with the representation of the forfeiture plaintiffs, but the payment was simply from a source other than those same plaintiffs.[302]

In *Bellows v. San Miguel*,[303] the appellants contended that the

294. *See id.* at 673–74 n.11 (discussing Bell v. Phillips, No. 14-00-01189-CV, 2002 WL 576036 (Tex. App.—Houston [14th Dist.] Apr. 18, 2002, no pet.) (not designated for publication), and Universal Fleet Leasing, Inc. v. Pope, No. 01-99-01235-CV, 2000 WL 1708515 (Tex. App.—Houston [1st Dist.] Nov. 16, 2000, pet. denied) (not designated for publication)).

295. Bell v. Phillips, No. 14-00-01189-CV, 2002 WL 576036 (Tex. App.—Houston [14th Dist.] Apr. 18, 2002, no pet.) (not designated for publication).

296. *See id.* at *8 n.3 (noting that the attorney was "never paid at any time for his nine-year representation" of his client).

297. *Id.*

298. Universal Fleet Leasing, Inc. v. Pope, No. 01-99-01235-CV, 2000 WL 1708515 (Tex. App.—Houston [1st Dist.] Nov. 16, 2000, pet. denied) (not designated for publication).

299. *Id.* at *3.

300. *Id.* (noting that more than $25,000 was paid in attorneys' fees).

301. Swank v. Cunningham, 258 S.W.3d 647, 673–74 n.11 (Tex. App.—Eastland 2008, pet. denied).

302. *Id.* at 673.

303. Bellows v. San Miguel, No. 14-00-00071-CV, 2002 WL 835667 (Tex. App.—Houston [14th Dist.] May 2, 2002, pet. denied) (not designated for publication).

trial court's violation of the "one satisfaction rule" required reversal.[304] This argument arose out of the trial court's award of actual damages as well as forfeiture in favor of a client.[305] The Fourteenth Court of Appeals did not reach this precise issue because it first reversed that portion of the trial court's judgment that awarded forfeiture.[306] Payment of the legal fees in question by a source other than the client who sought forfeiture resulted in a finding of error.[307] Based on this finding, the court did not resolve the question of whether the trial court ran afoul of the "one satisfaction rule" in awarding both actual damages and forfeiture.[308] Presumably, such a position flies in the face of the *Burrow* court's reasoning, which expressly stated that the forfeiture remedy is neither punitive nor compensatory and clarified that while compensation may well be a practical by-product of forfeiture, the reason for the equitable rule exists independently of such a function.[309] But *Bellows* sheds little light on whether application of *Burrow* has become divorced from these principles; rather, *Bellows* serves as further evidence of the impact the particular source of payment of legal fees can have on the forfeiture analysis. In fact, the *Bellows* court adopted, without equivocation, a per se rule barring forfeiture in cases in which the fees were not paid by the client.[310]

In terms of practical application, at least one point of clarity now exists. As obvious as such a rule may seem, it bears note that the case law in fact reflects that payment of the fees involved in a forfeiture claim by a source other than the client is dispositive. Stated another way, if the litigant seeking forfeiture or profit disgorgement did not actually pay the fees in question, courts resolve the forfeiture inquiry as a matter of law in favor of the attorney who received or stands to receive those fees.

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304. *Id.* at *16.

305. *See id.* (discussing the prohibition against "obtaining more than one recovery for the same injury").

306. *Id.*

307. *See id.* at *15 (disagreeing with the client that he paid attorneys' fees because the fees were paid from another source).

308. *Bellows*, 2002 WL 835667, at *15–16.

309. *See* Burrow v. Arce, 997 S.W.2d 229, 238–43 (Tex. 1999) (noting that the equitable rule exists in large part to protect relationships of trust).

310. *See Bellows*, 2002 WL 835667, at *15 (holding that in the absence of evidence that the client paid attorneys' fees, there should be no order of forfeiture).

4. Another Adequate Remedy May Be Controlling: Forfeiture As an Alternative to Actual Damages

As noted with regard to *Bellows*, a substantial question exists in terms of whether courts consider the award of actual damages and forfeiture in the same case to be a double recovery.[311] *Burrow* clearly established the legitimacy of rejecting the windfall argument, an argument consistently advanced by attorneys attempting to avoid forfeiture.[312] *Burrow* did so by its classification of, or refusal to classify, the remedy in terms of compensatory or punitive theories of entitlement to recovery.[313] The case law, however, suggests that in the rare instance in which forfeiture and actual damages are both awarded in the trial court, the appropriate course is to set the remedies as alternative—and not complementary—measures. Further, to the extent that such a reality exists in forfeiture cases, the factor-based framework adopted by the Texas Supreme Court would seem to be called into question in that one of the purported considerations (actual damages) would then be controlling without regard to the balance of the other factors.

In *Whiteside v. Hartung*,[314] for instance, the Fourteenth Court of Appeals was faced with an issue that called the reach of *Burrow* into question.[315] In that case, the jury awarded a specified amount to compensate a former client for an attorney's breach of fiduciary duty.[316] This amount, awarded as actual damages, equaled the precise amount that the client had paid in legal

311. *See id.* at *16 ("Because we have found that San Miguel paid Bellows no attorney fees and have reversed the portion of the judgment awarding her a forfeiture . . . we need not address the [argument that allowing forfeiture and economic damages violated the one satisfaction rule].").

312. *See Burrow*, 997 S.W.2d at 240 (rejecting the attorney's argument "that forfeiture of an attorney's fee without a showing of actual damages encourages breach-of-fiduciary claims by clients to extort a renegotiation of legal fees after representation has been concluded, allowing them to obtain a windfall").

313. *Id.* ("[F]orfeiture of an agent's compensation is not mainly compensatory, as we have already noted, nor is it mainly punitive. Forfeiture may, of course, have a punitive effect, but that is not the focus of the remedy.").

314. Whiteside v. Hartung, No. 14-97-00111-CV, 1999 Tex. App. LEXIS 5584 (Tex. App.—Houston [14th Dist.] July 29, 1999, pet. denied) (not designated for publication).

315. *Id.* at *8 (noting that actual damages were pleaded in this case, and not fee forfeiture specifically).

316. *Id.*

fees.[317] The client also contended that fee forfeiture was an available remedy based on the facts of the case.[318] In rejecting the recovery of both actual damages and fee forfeiture, the appellate court based its holding on the notion that where the amount paid for legal services is sought as actual damages resulting from a breach of fiduciary duty, the client is bound to that theory in attempting to recover those fees.[319] That is, if pleaded as actual damages, the client cannot be awarded the equitable remedy of fee forfeiture to compensate for the attorney's breach of loyalty.[320] This suggests that what should be a factor in the analysis—the adequacy of other available remedies—may well be given controlling effect in certain cases.[321]

In *Piro v. Sarofim*,[322] the First Court of Appeals determined that the trial court acted within the bounds of its discretion under the *Burrow* standard in awarding fee forfeiture only as an alternative to recovering damages under a malpractice theory.[323] The *Piro* court stated that "[a]lthough we agree the trial court could have rendered judgment against the lawyers on both awards without creating a double recovery, the trial court did not err when it declined to render such a judgment."[324] Thus, the adequacy of other remedies factor and the public interest in maintaining the integrity of attorney-client relationships factor operated jointly to justify the trial court's decision to make the equitable recovery an alternative—and not an addition—to the malpractice recovery.[325]

Courts seem to agree that the equitable remedy of fee forfeiture will never apply unless the party seeking to benefit specifically pleads the theory.[326] Further, where a party seeks actual damages

317. *Id.* at *5 n.1 ("Th[e] award reflected the exact amount of attorneys' fees Hartung paid the [f]irm.").

318. *Id.* at *10 n.3.

319. *See Whiteside*, 1999 Tex. App. LEXIS 5584, at *9–10 (noting that the plaintiff specifically pleaded actual damages, and not forfeiture, as the relief requested).

320. *Id.* at *10 n.3.

321. *See id.* at *12 ("Recovery of fees paid to an attorney may be appropriate when [acts of] negligence rendered the services of no value." (citing Judwin Props., Inc. v. Griggs & Harrison, 911 S.W.2d 498, 507 (Tex. App.—Houston [1st Dist.] 1995, no writ))).

322. Piro v. Sarofim, No. 01-00-00398-CV, 2002 WL 538741 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002, no pet.) (not designated for publication).

323. *Id.* at *5–7.

324. *Id.* at *7.

325. *Id.*

326. Alavi v. MCI Worldcom Network Servs., Inc., No. 09-05-364-CV, 2007 WL 274565, at *3 (Tex. App.—Beaumont Feb. 1, 2007, pet. denied) (mem. op.); Lee v. Lee, 47

as a remedy, forfeiture likely becomes unavailable notwithstanding the apparent possibility of pleading in the alternative.[327]

This notion was seemingly carried forward in *McGuire v. Kelley*,[328] one of the few cases actually applying *Burrow*.[329] In that case, the Texarkana Court of Appeals affirmed an actual damages award of $47,000—the amount that the attorney received from the aggrieved client in legal fees.[330] The court also noted that requiring an attorney to forfeit compensation would provide an appropriate measure of redress for breach of fiduciary duty.[331] But it is unclear whether the *Kelley* court intended to imply that forfeiture is available only where the compensation paid cannot be recovered through proving that the amount represents actual damages sustained by the client, as opposed to an amount of fees that should be forfeited.[332] Obviously, if that is indeed the case, *Kelley*'s reasoning flies in the face of *Burrow*. Nevertheless, the body of precedent on this specific point evinces what appears to be a persistent reality, stated or not—that the application of the relevant legal doctrines, when considered in the context of specific cases, frequently operates to restrict fee forfeiture to an alternative to actual damages.

VI. OVERVIEW OF OTHER JURISDICTIONS

While almost all jurisdictions recognize many of the underpinnings of the Texas fee forfeiture analytical construct, commentators suggest that "the case law reflects jurisdictional variation" in terms of the circumstances under which the remedy of forfeiture or fee disgorgement will be upheld.[333] Specifically,

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S.W.3d 767, 780–81 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); Longaker v. Evans, 32 S.W.3d 725, 733 n.2 (Tex. App.—San Antonio 2000, pet. withdrawn).

327. *See Alavi*, 2007 WL 274565, at *3 (reasoning that where actual and punitive damages, but not forfeiture, are pursued as the relief sought, the equitable remedy of forfeiture will not be available (citing Home Loan Corp. v. Tex. Am. Title Co., 191 S.W.3d 728, 735 n.22 (Tex. App.—Houston [14th Dist.] 2006, pet. denied))).

328. McGuire v. Kelley, 41 S.W.3d 679 (Tex. App.—Texarkana 2001, no pet.).

329. *See id.* at 682 n.4 (stating *Burrow* allows for fee forfeiture when an attorney breaches his fiduciary duty).

330. *Id.*

331. *Id.*

332. *See id.* (reiterating the amount awarded as damages, then stating that fee forfeiture is a proper remedy for breach of fiduciary duty).

333. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 15:24, at 816 (2009 ed.).

courts vary in terms of the nature of the breach at issue as well as whether actual damages must be sustained by the client as a prerequisite to seeking the remedy.[334]

As one might expect, there is also variation among jurisdictions with regard to the proper role of ethical rules.[335] As set forth above, the Texas Rules often appear informative, and perhaps instructive, in determining whether fee forfeiture is appropriate.[336] Other jurisdictions employ a similar approach.[337] As scholars in the area of attorney liability have insisted—and as was espoused above—"[fee forfeiture] arises because of a breach of a common-law fiduciary duty, not as a penalty for violating a disciplinary rule."[338]

For instance, a Washington appellate court deemed complete disgorgement of fees appropriate.[339] In doing so, the court looked to the ethical rules regarding unreasonable fees and business transactions with clients.[340] Conversely, in *Behrens v. Wedmore*,[341] the Supreme Court of South Dakota made clear that a violation of the ethical rules does not necessarily amount to a breach of fiduciary duty.[342] Specifically, the court held that while an attorney may have charged an unreasonable fee, as well as failed to maintain adequate communication with a client, no breach-of-fiduciary-duty claim could be sustained where the breach could not be shown to have involved actions in contravention of either the duty of loyalty or the duty of

334. *Id.*

335. *Id.*

336. *Cf. id.* § 15:24, at 822–23 (describing the Texas Supreme Court's decision on fee forfeiture in *Burrow*, which held that lawyers should not be compensated following a breach of the duty of loyalty, regardless of whether an injury occurred, since the purpose of fee forfeiture is not to compensate the client).

337. *See, e.g.*, Hendry v. Pelland, 73 F.3d 397, 401 (D.C. Cir. 1996) (focusing favorably on the client's argument that violation of the disciplinary rule necessarily entails violation of the attorney's fiduciary duty).

338. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 15:24, at 822 (2009 ed.) (citing Portland Gen. Elec. Co. v. Duncan, Weinberg, Miller & Pembroke, P.C., 986 P.2d 35, 42 (Or. Ct. App. 1999)).

339. Cotton v. Kronenberg, 44 P.3d 878, 887 (Wash. Ct. App. 2002) (stating that the trial court was well within its discretion in ordering disgorgement of all fees paid to the attorney in the underlying matter).

340. *Id.* at 884.

341. Behrens v. Wedmore, 2005 SD 79, 698 N.W.2d 555.

342. *Id.* ¶ 51, 698 N.W.2d at 575.

confidentiality.[343] While, as is the case with Texas courts, the practice of consulting the ethical rules only makes good sense, it nevertheless results in ambiguity in terms of the proper role of those rules as the basis upon which courts rely in applying the remedy of fee forfeiture.[344]

To the extent one is discernible, the majority approach among jurisdictions seems to be generally in favor of an analysis centered on a careful balance of numerous factors with regard to the clear and serious breach standard.[345] But a minority approach also has gained some traction, and it relies on punitive principles as the engine driving the availability and extent of fee forfeiture and profit disgorgement.[346] The D.C. Circuit applied this minority approach in a 1996 case.[347] In *Hendry v. Pelland*,[348] the D.C. Circuit Court of Appeals considered the fee forfeiture issue based on an attorney's alleged breach of duty in failing to communicate a possible conflict of interest to his clients.[349] While avoiding

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343. *See id.* ¶ 52, 698 N.W.2d at 576 (noting that the fiduciary duty arising in the attorney-client relationship is one involving two obligations: (1) confidentiality; and (2) undivided loyalty).

344. *See id.* (noting that not all violations of ethical rules amount to breaches of fiduciary duty, but drawing a distinction in this regard with respect to certain rules of professional conduct).

> "[U]nlike the disciplinary rules regarding negligent conduct, the ethics rules concerning the fiduciary obligations commonly are cited by the courts in civil damage actions regarding the propriety of the attorney's conduct. One reason for this difference in usage is that the disciplinary rules concerning the fiduciary obligations often are reasonably accurate statements of the common law . . . ."

Id. ¶ 51, 698 N.W.2d at 576 (quoting 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14:5, at 551 (5th ed. 2000)).

345. *See* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 17:19, at 1036 (2009 ed.) ("The prevailing view balances considerations, which include the significance, seriousness and timing of the ethical impropriety, the competence of counsel and the value of the services rendered. Under this approach the lawyer can be compensated for those services rendered before the breach.").

346. *Id.* § 17:19, at 1037 ("A minority view is punitive, resulting in a complete forfeiture of the attorney's entitlement to legal fees, whatever the attorney's motives.").

347. Hendry v. Pelland, 73 F.3d 397, 400 (D.C. Cir. 1996) ("Whether clients sue their attorney for professional negligence or breach of fiduciary duty, District of Columbia law allows punitive damages only if the attorney acted with 'fraud, ill will, recklessness, wantonness, oppressiveness, [or] willful disregard of the [clients'] rights.'" (citations omitted)); *see* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 17:19, at 1037 (2009 ed.) (classifying the approach adopted by the *Hendry* court as within the minority view on the subject).

348. Hendry v. Pelland, 73 F.3d 397 (D.C. Cir. 1996).

349. *See id.* at 400–03 (stating that Pelland represented all five owners of the

whether circumstances exist that would justify the imposition of automatic or total forfeiture, the D.C. Circuit's decision appears consistent with *Burrow*.[350] In noting that the remedy was other than compensatory in its fundamental character, the D.C. Circuit stated, "[F]orfeiture reflects not the harms clients suffer from tainted representation, but the decreased value of the representation itself."[351] As set forth above, the Texas Supreme Court stated that the equitable remedy of fee forfeiture owes its existence neither to compensatory nor punitive theory.[352] But the *Hendry* court, applying much of the same reasoning that the *Burrow* court relied upon, provided an analysis that commentators have considered different from that applied in Texas.[353] Notably, the *Hendry* court also addressed the relationship of disciplinary rules and claims for breach of fiduciary duty in the fee forfeiture context.[354] Concluding that the violation of a disciplinary rule amounted to a breach of fiduciary duty, the court noted that D.C. law acknowledged that "'a violation of the Code of Professional Responsibility or of the Rules of Professional Conduct *can* constitute a breach of the attorney's common law fiduciary duty to

property, which would amount to a violation of the disciplinary rules unless he obtained consent to the representation by all five owners after full disclosure).

350. *See id.* at 402–03 (declining to reach the issue of whether forfeiture should be automatically and completely awarded in favor of a client who establishes a breach of loyalty). The *Hendry* court noted that three potential approaches to these issues exist among jurisdictions. *Id.* at 403. First, some courts adopt the position that all compensation an attorney receives in the "tainted representation of a client" must be forfeited. *Id.* (citing Silbiger v. Prudence Bonds Corp., 180 F.2d 917, 920–21 (2d Cir. 1950) (dictum)). Conversely, some courts follow an approach that results in forfeiture of all compensation earned after the underlying breach occurred. *Hendry*, 73 F.3d at 403 (citing Fin. Gen. Bankshares, Inc. v. Metzger, 523 F. Supp. 744, 773 (D.D.C. 1981), *vacated on other grounds*, 680 F.2d 768 (D.C. Cir. 1982)). Finally, some courts determine the appropriate extent of forfeiture on a case-by-case basis. *Id.* (citing Gilchrist v. Perl, 387 N.W.2d 412, 416–17 (Minn. 1986); Kidney Ass'n of Or., Inc. v. Ferguson, 843 P.2d 442, 446–47 (Or. 1992); Perez v. Pappas, 659 P.2d 475, 480 (Wash. 1983)).

351. *Hendry*, 73 F.3d at 402.

352. *See* Burrow v. Arce, 997 S.W.2d 229, 239 (Tex. 1999) (reasoning that actual damages are not a prerequisite to obtaining fee forfeiture for certain classes of attorney-misconduct).

353. *See* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 17:19, at 1037 (2009 ed.) (classifying the approach adopted by the *Hendry* court as within the minority view on the subject).

354. *See Hendry*, 73 F.3d at 401 (stating that an attorney would be in violation of District of Columbia Disciplinary Rule 5-105 if he represented different interests without informing each client of the circumstances by making full disclosure).

the client.'"[355] In the court's view, the practice of treating violations of ethical rules as equivalent to breaches of fiduciary duty was well established in numerous jurisdictions.[356] With respect to the rules of professional responsibility requiring attorneys to act zealously and competently in representing clients, however, the *Hendry* court did not resolve whether a violation amounts to a breach of common law fiduciary duties.[357]

A Florida court has denied recovery of legal fees to attorneys who received compensation for providing services in violation of the ethical rules prohibiting the unauthorized practice of law by out-of-state attorneys.[358]

In another case, a Michigan appellate court looked to the public policy interests of that state in denying recovery of a referral fee because of an impermissible conflict of interest pertaining to the referring law firm.[359] The court clarified its holding in relation to the ethical rules by stating that the violation of such rules did not give rise to a cause of action, yet the courts should and do embrace an oversight function by refusing to enforce certain agreements that are inconsistent with the strictures of the ethical rules.[360] In the Michigan appellate court's view, the public policy of the state, not just the violation of the ethics rules, justified fee forfeiture.[361]

Similarly, the Louisiana Supreme Court, a year before *Burrow*, affirmed a court of appeals decision which reasoned that a reduction in attorneys' fees was warranted due to a lawyer's

355. *Id.* (quoting Griva v. Davison, 637 A.2d 830, 846–47 (D.C. 1994)).

356. Hendry v. Pelland, 73 F.3d 397, 401 (D.C. Cir. 1996) (citing Am.-Can. Oil & Drilling Corp. v. Aldridge & Stroud, Inc., 373 S.W.2d 148, 150–51 (Ark. 1963)). The *Hendry* court observed that the duty of undivided loyalty, which is widely recognized as among the basic fiduciary obligations attorneys must adhere to, is necessarily breached where an attorney's clients have conflicting interests. *Id.* (citing 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 11.1, at 633 (3d ed. 1989)). Further, the same logic dictated, in the court's view, that clients be allowed to raise alleged breaches of this nature as an affirmative defense to actions initiated by attorneys seeking payment of legal fees. *Id.* at 403 (citing *Griva*, 637 A.2d at 847; 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 11.24, at 698–99 (3d ed. 1989)).

357. *Id.* (remanding to the district court for a ruling on whether the attorney violated a common law fiduciary duty).

358. *See, e.g.*, Vista Designs, Inc. v. Silverman, 774 So. 2d 884, 887–88 (Fla. Dist. Ct. App. 2001) (noting that regulations "make it a criminal offense to practice law without a license").

359. Evans & Luptak, PLC v. Lizza, 650 N.W.2d 364, 369–71 (Mich. Ct. App. 2002).

360. *Id.*

361. *Id.* at 370.

breach of duty to a client.[362] The case involved the attorney's continued representation of both a husband and wife in an action, during which the two filed for a divorce.[363] While the theories of recovery asserted in the underlying matter precluded the representation of both from being a per se impermissible conflict of interest, the court based its fee reduction on the attorney's refusal to adhere to the directions and wishes of the husband concerning continued representation in the litigation.[364] The approach adopted by California courts is consistent, to some degree, with the *Burrow* holding as well.[365] Specifically, in *Jeffry v. Pounds*,[366] the court addressed the lower court's determination that an attorney could have committed an ethical violation but not be subject to the remedy of fee forfeiture in favor of the client.[367] Notwithstanding similarities with regard to the California and Texas approaches, a series of 2006 California decisions indicate a foundational divergence as between the two states.[368] Those California cases seemingly articulated a fixed requirement for litigants pursuing the remedy of disgorgement or fee forfeiture from an attorney: the client must prove actual damages were suffered as a prerequisite to accessing the equitable remedy.[369]

362. Osborne v. Vulcan Foundry, Inc., 699 So. 2d 492, 496–97 (La. Ct. App. 1997), *aff'd*, 709 So. 2d 723 (La. 1998).

363. *Id.* at 493–94.

364. *Id.* at 494–97.

365. *Compare* Burrow v. Arce, 997 S.W.2d 229, 241–42 (Tex. 1999) (adopting the approach articulated in the *Restatement (Third) of the Law Governing Lawyers* and noting that in certain instances, complete forfeiture constitutes an impermissible windfall), *with* Jeffry v. Pounds, 136 Cal. Rptr. 373, 377 (Cal. Ct. App. 1977) (noting that the basis of forfeiture is the client's loss of confidence, and reasoning that partial forfeiture may well be appropriate so as to allow an attorney to retain payment for legal services performed before the breach).

366. Jeffry v. Pounds, 136 Cal. Rptr. 373 (Cal. Ct. App. 1977).

367. *Id.* at 375–76.

368. *See, e.g.*, Frye v. Tenderloin Hous. Clinic, Inc., 129 P.3d 408, 424 (Cal. 2006) (refusing to provide disgorgement of attorneys' fees where the client did not suffer actual damages due to a "'prohibited' contingent fee provision"); Slovensky v. Friedman, 49 Cal. Rptr. 3d 60, 73 (Cal. Ct. App. 2006) ("Where an attorney's misrepresentation or concealment has caused the client no damage, disgorgement of fees is not warranted." (citation omitted)); Olson v. Cohen, 131 Cal. Rptr. 2d 620, 624 (Cal. Ct. App. 2003) (refusing to permit fee forfeiture where the client failed to show "a reasonable basis for restitutionary relief").

369. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 15:24, at 823 (2009 ed.) ("Several 2006 California decisions said that a fee forfeiture or disgorgement requires a showing of damages.").

A West Virginia court also adopted the *Restatement* approach to determining whether attorney fee forfeiture is appropriate in *Lawyer Disciplinary Board v. Ball*.[370] The court applied this test and arrived at the conclusion that total restitution (paid by the attorney to the client) was the only appropriate quantum of relief based on the facts of that case.[371] The attorney's conduct in that case was held to be intentional, causing "actual and potential harm to his clients."[372] The *Ball* court, in keeping with *Burrow*, described its adoption and application of the *Restatement* approach relative to underlying policy concerns.[373] As *Burrow* suggests, the *Ball* decision is largely confined to its facts in that the conduct was particularly egregious, and the client sustained actual damages.[374] As a result, the West Virginia court authorized forfeiture against a uniquely well-suited backdrop: the facts of the case directly implicated the two factors that seem likely to be outcome-determinative of the forfeiture issue—either the client suffered actual harm, or the breach resulted from the attorney's intentional misconduct.[375]

Thus, a string of decisions supporting a very strict interpretation of *Burrow*'s forfeiture analysis can be located if courts are inclined to inquire into that particular issue. The reality emerging from these cases, however, parts with the false instruction that might otherwise be taken from a superficial review of these opinions. A closer reading of the cases reveals that the conduct in question in all instances satisfied the two de facto factors of greatest weight—(1) intentional attorney misconduct, and (2) actual or potential damages suffered by the client. As a result, little can actually be drawn from these cases in terms of resolving similar issues when they arise on different facts. Namely, cases where one or both of the above-referenced factors do not weigh in favor of forfeiture or

370. Lawyer Disciplinary Bd. v. Ball, 633 S.E.2d 241 (W. Va. 2006).

371. *Id.* at 254.

372. *Id.*

373. *Compare id.* at 253 ("'As a matter of policy, a lawyer should be regarded as "earning" his fee only when he provides legal services to his client in a manner consistent with his professional duties[.]'" (quoting Kourouvacilis v. Am. Fed'n of State, County & Mun. Employees, 841 N.E.2d 1273, 1284 n.22 (Mass. App. Ct. 2006))), *with* Burrow v. Arce, 997 S.W.2d 229, 237–38 (Tex. 1999) ("The person is not entitled to be paid when he has not provided the loyalty bargained for and promised.").

374. *Ball*, 633 S.E.2d at 254.

375. *Id.*

disgorgement remain as perplexing to resolve as they were the day after *Burrow* was handed down.

Interestingly, a New Jersey court has seen fit to apply a permutation of forfeiture as an alternative to requiring withdrawal due to conflict of interests.[376] The court held that even though the facts otherwise required withdrawal, the firm that would ordinarily be forced to take such action was instead restricted in terms of compensation to payment for the legal services it provided up to the date the court's opinion was issued.[377] Services beyond that point would not entitle the firm to additional payment, regardless of whether their client ultimately obtained a favorable disposition in the matter.[378] The central rationale for this holding relates directly back to the Texas Supreme Court's analysis in *Burrow*.[379] The New Jersey court, like the *Burrow* court, based its forfeiture standard on the necessity to promote public confidence in the judicial system and its agents—an end the New Jersey court believed better served by this result rather than simply disqualifying the firm.[380]

In *Gilchrist v. Perl*,[381] the Minnesota Supreme Court imposed fee forfeiture as a remedy for an attorney's fraudulent conduct.[382] While a superficial reading of *Gilchrist* suggests consistency in its detail with *Burrow*, an important distinction exists regarding the boundaries within which fee forfeiture will become an automatic remedy.[383] That is, the Minnesota Supreme Court carved out a

376. Dewey v. R.J. Reynolds Tobacco Co., 536 A.2d 243, 250–53 (N.J. 1988).

377. *Id.* at 252.

378. *Id.* at 252–53.

379. *Compare id.* at 252 ("We believe, however, that an order disqualifying counsel on the eve of trial would do more to erode the confidence of the public in the legal profession and the judicial process than would an order allowing the firm to continue its representation of the plaintiff."), *with Burrow*, 997 S.W.2d at 244 ("[C]oncern for the integrity of attorney-client relationships is at the heart of the fee forfeiture remedy.").

380. *Dewey*, 536 A.2d at 253.

381. Gilchrist v. Perl, 387 N.W.2d 412 (Minn. 1986).

382. *See id.* at 416–17 (discussing whether fee forfeiture could be scaled when dealing with a breach of fiduciary duty constituting fraud).

383. *Compare id.* at 417 n.3 (noting that while the policy considerations supporting forfeiture are the same, the court disagrees with those jurisdictions that do not adopt an absolute rule imposing the remedy where actual fraud or bad faith is involved), *with Burrow*, 997 S.W.2d at 242–45 (setting forth policy considerations similar to those articulated by the Minnesota Supreme Court but disagreeing with that jurisdiction's approach to creating an absolutist rule in certain instances and its reliance on statutory factors that ordinarily govern punitive damage calculations).

bright-line standard in terms of the low watermark under which an attorney cannot escape fee forfeiture.[384] The court, focusing on deterrence, stated that fee forfeiture is automatic and total when an attorney is guilty of actual fraud or bad faith.[385] Cases where bad faith or actual fraud is not present, however, must be analyzed as to the amount of forfeiture in light of the punitive damages statute.[386] But the level of culpability was not the sole justification for the court's decision to create a two-pronged approach to forfeiture cases. Rather, the *Gilchrist* court noted that the absence of actual damages and the potential for multiple plaintiffs to raise the same basis for a forfeiture claim contributed heavily to this result.[387] Thus, in certain instances, the *Gilchrist* court relied heavily on the Minnesota punitive damages statute as a guidepost for determining the appropriate amount of fee forfeiture in each particular case.[388] So too did the Texas Fourteenth Court of Appeals.[389] As made clear by the Texas Supreme Court's rejection of informing the analysis with the punitive damages consideration, the law in Texas, while substantially similar, is not equivalent to the Minnesota approach.[390]

In *Perl v. St. Paul Fire & Marine Insurance Co.*,[391] the Minnesota Supreme Court held that because of the public

384. *See Gilchrist*, 387 N.W.2d at 414–15 ("An attorney guilty of actual fraud forfeits his entire fee.").

385. *See id.* at 417 ("The parties all agree—and we reaffirm—that cases of actual fraud or bad faith result in total fee forfeiture.").

386. *Id.* "But when no actual fraud or bad faith is involved, when no actual harm to the client is sustained, and particularly when there are multiple potential plaintiffs, we think the better approach is to determine the amount of the fee forfeiture by a consideration of the relevant factors set out in [the Minnesota punitive damages statute]." *Id.*

387. *Id.* (citing MINN. STAT. § 549.20(3) (1984)).

388. *See Gilchrist*, 387 N.W.2d at 417–18 (stating that the application of several factors codified in the Minnesota punitive damages statute was necessary in determining the appropriate amount of fee forfeiture).

389. Arce v. Burrow, 958 S.W.2d 239, 246 (Tex. App.—Houston [14th Dist.] 1997), *aff'd in part, rev'd in part*, 997 S.W.2d 229 (Tex. 1999).

390. *Compare* Burrow v. Arce, 997 S.W.2d 229, 239–41 (Tex. 1999) (opting not to directly adopt the appellate court's articulation of factors, which was largely derived from consideration of the punitive damages statute, and setting forth the appropriate considerations by reference only to the *Restatement (Third) of the Law Governing Lawyers* and the general public policy of the state of Texas), *with Gilchrist*, 387 N.W.2d at 417 (defining the circumstances in which it is appropriate for courts to inform the forfeiture analysis by reliance on the punitive damages factors).

391. Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209 (Minn. 1984).

concerns implicated in cases of breach of fiduciary duty where attorneys are found to have failed to disclose "matters material to the client's interests and trust," allowing fee forfeiture to be covered by an attorney's insurance policy would be "contrary to public policy and of no validity."[392] This particular issue is one that the Texas Supreme Court did not reach directly in *Burrow*; however, the emphasis placed on deterrence as a justification for fee forfeiture in the Texas Supreme Court's analysis cannot be overstated.[393]

The issue of whether forfeiture merely provides an alternative remedy to a client who can establish entitlement to actual damages is yet another area of confusion that is not unique to Texas. In *Distefano v. Greenstone*,[394] a New Jersey appellate court found more clarity under the laws of that state on the issue than has been the case in many other jurisdictions, including Texas.[395] In *Distefano*, the New Jersey court held that an aggrieved client was entitled to recover the entire amount of a malpractice settlement—without accounting for a percentage otherwise payable to the attorney under a contingency arrangement.[396] Further, an additional amount was awarded to the client to compensate her attorneys who had represented her in the malpractice action itself.[397] The court acknowledged that the specter of a duplicative recovery in favor of the client might fairly be raised, but that such a result was provided for under precedent set forth by the New Jersey Supreme Court.[398] While this case involved a malpractice action, the underlying conduct warrants consideration relative to the court's application of the fee forfeiture principle coupled with actual damages in the same amount that was forfeited.[399] The

392. *See id.* at 215 ("[I]f forfeiture of attorney fees is to punish and deter, that purpose is defeated when the attorney's insurance carrier pays.").

393. *See Burrow*, 997 S.W.2d at 238 (noting that the integrity of the relationship between attorney and client must be strengthened and that forfeiture may be the appropriate mechanism for achieving this goal).

394. Distefano v. Greenstone, 815 A.2d 496 (N.J. Super. Ct. App. Div. 2003).

395. *Id.* at 501.

396. *Id.* (asserting that the plaintiff rejected both contingency arrangements herself).

397. *Id.* at 499 (noting that the plaintiff was awarded $30,000 in counsel fees in addition to other monies awarded).

398. *Id.* at 499–500 (noting that sometimes a client receives a windfall benefit for the cost of enduring two lawsuits (citing Saffer v. Willoughby, 670 A.2d 527, 533 (N.J. 1996))).

399. *See Distefano*, 815 A.2d at 501 (following the three general rules laid out in *Saffer*).

client's negligence action arose out of the attorney's failure to file her claim within the statute of limitations.[400] Such conduct frequently gives rise to legal malpractice actions; however, it seems the New Jersey court felt as though the fee forfeiture principle could properly be applied within the malpractice rubric based on the facts of that particular case.[401] Arguably, the possibility of a similar holding emanates from *Burrow*.

In *Chen v. Chen Qualified Settlement Fund*,[402] the Second Circuit Court of Appeals affirmed a trial court's ruling denying an attorney's fee application in a case that squarely addressed the precise issues of concern under *Burrow* and its progeny.[403] In *Chen*, an attorney contended that his error in calculating the maximum amount of fees allowable under a statutory formula resulted in his attempting to obtain an unreasonable sum.[404] The trial court considered whether the attorney could recover a lesser amount—one commensurate with the governing statutory formula.[405] In denying the attorney all compensation for the legal services rendered, the trial court acted within its sound discretion in the opinion of the Second Circuit.[406] The nature of the underlying conduct is particularly relevant in light of the window seemingly left open by *Burrow*.[407] The allegations arose out of a medical malpractice case, which concluded in a large settlement.[408] Specifically, the malpractice plaintiffs asserted that

400. *Id.* at 497 (discussing the basis for the plaintiff's lawsuit as being that the defendants failed to timely pursue the plaintiff's claim which resulted in the statute of limitations barring the plaintiff's personal injury cause of action).

401. *See id.* at 497–98 (noting the amounts that the plaintiff is entitled to recover based on the general rules determined by the New Jersey Supreme Court in *Saffer*).

402. Chen v. Chen Qualified Settlement Fund, 552 F.3d 218 (2d Cir. 2009) (per curiam).

403. *See id.* at 226 (acknowledging that absent evidence that the district court applied other factors into the denial of his fee application, the district court's decision will be affirmed).

404. *Id.* at 224 (noting that the attorney informed the court that the fee request was a result of a typographical error).

405. *Id.* at 225–26 (illustrating that the initial fee request exceeded the statutory amount by $20,000).

406. *Id.* at 226 ("[T]he record demonstrate[d] that the fee discrepancy and [the attorney's] inability to explain it were a sound basis for the district court's determination.").

407. *See Chen*, 552 F.3d at 226 (explaining the underlying facts and the difference between attorneys who earn their fees and attorneys that do not).

408. *Id.* at 220 (explaining the facts of the case and how the mother executed a medical malpractice retainer with the attorney as a result of her medical malpractice claim

their attorney neglected to investigate the future needs of the disabled child and charged an unreasonable fee.[409] The relevant statutory formula pertaining to fee calculation set forth a sliding scale method for determining an appropriate amount.[410] The attorney seeking payment consistent with a proper application of the statutory framework argued that his initial miscalculation was simply the result of a mathematical error.[411] The Second Circuit noted that this "explanation was plausible."[412] But the court also believed that the trial court's findings should not be disturbed simply because of the explanation.[413] In doing so, the Second Circuit rested its conclusion on the notion that the trial court properly exercised its discretion in accepting an alternative explanation for the overcharge: the trial court believed that the attorney had acted deliberately in attempting to obtain an amount in excess of that allowable under the statute, a holding which the Second Circuit found to be supportable by the record on appeal.[414]

Arnold E. DiJoseph, who represented the attorney on appeal, perhaps summed up what he believed to be a troubling precedent created by the Second Circuit's affirmance:

> "I find it very disturbing that an attorney who obtained damages of $2.4 million versus Martin Clearwater & Bell, one of the top malpractice defense firms in the state of New York, right after examinations before trial, isn't getting a penny.... Nobody is even arguing that the result [his client obtained for the malpractice plaintiffs] wasn't satisfactory. He isn't getting any fees because he made a mistake and that somehow got *transformed* into how he was trying to steal $20,000 from a brain-damaged baby."[415]

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where she was awarded $2.4 million).

409. *Id.* at 221–22 (noting that the attorney failed to obtain a life care plan detailing the future treatment plans for the disabled child and made an error in the charging of his fees for the medical malpractice case).

410. *Id.* at 221 n.2 (discussing how the attorney, under section 474a of the New York Judiciary Law, calculated two separate fees, one at 30% of the recovery for the cause of action on behalf of the mother and 30% of the recovery on behalf of the child).

411. *Id.* at 224 (stating that the attorney told the district court that his initial fee request was the result of a typographical error in his retainer agreement with the mother).

412. Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 225 (2d Cir. 2009) (per curiam) (noting that the attorney's initial fee request exceeded the amount allowed by $20,000, which was the same amount requested in expenses, therefore making his mistake plausible).

413. *Id.* at 226.

414. *Id.* at 225–26.

415. Mark Hamblett, *2nd Circuit Upholds Denial of Fees to Ex-Lawyer in*

The Second Circuit noted that the facts presented a "close call," which was implicitly suggested by the court's statements that the crux of the issue was a matter of the trial court's discretion.[416] Nevertheless, in its per curiam opinion, the court also stated that the case was "instructive with respect to the nature of the conduct that may merit the denial of fees."[417]

Interestingly, the attorney resigned from the bar amidst an unrelated investigation, which was based on allegations pertaining to the attorney's conduct after the matter at issue in the fee application.[418] The attorney contended that the trial court improperly considered the fact of his resignation from the bar in determining that all fees should be denied.[419] The Second Circuit responded by noting that "nothing in the district court's orders . . . suggests that it considered th[e] resignation—or the circumstances surrounding it—in deciding to deny [the attorney's] fee application."[420] One of the attorneys who advocated for an affirmance of the trial court's ruling, however, cited an alleged ethical violation as a reason for the Second Circuit's holding.[421]

To be clear, courts in some jurisdictions have suggested and indeed held that good faith alone will not ensure observance and enforcement of the attorney's right to compensation.[422] As a general matter, however, courts have found that attorneys are entitled to receive payment for legal services rendered before the breach.[423] Texas is not alone in terms of its recognition of the forfeiture remedy or in the doctrinal inconsistencies pertaining to the source of duties that may support fee forfeiture or the purpose

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Malpractice Suit, LAW.COM, Jan. 7, 2009, http://www.law.com/jsp/article.jsp?id=1202427257704 (quoting Arnold E. DiJoseph).

416. *Chen*, 552 F.3d at 226 (stating that a choice between one of two plausible explanations will not be held to be an abuse of discretion on the part of the court).

417. *Id.* at 220 (explaining the detailed factual background of the case).

418. *Id.* at 224 n.4 (acknowledging that the record reflected the resignation from the bar by the attorney).

419. *Id.*

420. *Id.* at 226.

421. *See Chen*, 552 F.3d at 223 (noting that interests in the case are in conflict).

422. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 15:24, at 824–25 (2009 ed.) ("Even an attorney who acted in good faith may lose the right to recover fees if a fiduciary breach occurred, such as representing irreconcilable conflicting interests . . . .").

423. *Id.* § 15:24, at 825.

of the remedy.[424] While some jurisdictions categorize forfeiture as a punitive measure, the remedy also performs something of a compensatory function under other jurisdictions' laws.[425] Disagreement surrounding the proper role of ethical rules, as well as the issue of whether forfeiture must be automatic and complete, persists in numerous jurisdictions.[426]

VII. CONCLUSION

While forfeiture is a well-defined remedy for certain acts of disloyalty, its application to the attorney-client context has been anything but seamless. Rather, the nature of a clear and serious breach of duty has become the subject of any number of theories, none of which appear to finally resolve the issue. But the nature of the requisite breach becomes the issue in many cases only because of the realities of attorney-client litigation external to *Burrow*'s forfeiture analysis.

The substantial number of breach-of-fiduciary-duty claims raised in factual scenarios that facially appear to present nothing more than a cause of action for legal malpractice provides the general framework in which forfeiture's fluidity has been and will likely continue to be amplified. The attractiveness of avoiding the potentially dispositive issues of the trial-within-a-trial requirement and actual damages attendant to a legal malpractice action provides the impetus for seeking forfeiture in all cases in which the facts provide an arguable basis for doing so.[427] Further, if this

424. *Id.* § 15:24, at 813–25 (discussing the different approaches as well as the correct understanding of the role ethical rules should play in assessing the source of the obligation at issue in a breach-of-fiduciary-duty claim).

425. *Id.* § 17:19, at 1037.

426. *Compare* Cotton v. Kronenberg, 44 P.3d 878, 887 (Wash. Ct. App. 2002) ("'The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized.'" (quoting Eriks v. Denver, 824 P.2d 1207, 1213 (Wash. 1992))), *with* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 15:24, at 822 (2009 ed.) ("The relevancy of an ethics rule is subject to jurisdictional variation.").

427. *See* 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 2:15, at 182 (2009 ed.) (citing a study which revealed that clients rank legal fees as number one on the list of criticisms relating to the attorney-client relationship). *See generally* Linda Eads, *Negligence vs. Disloyalty: Limits on the Forfeiture of Attorneys' Fees*, TEX. LAW., Jan. 12, 2004, at 26 ("Not surprisingly, we now see a breach-of-fiduciary-duty claim in almost every case in which a client alleges lawyer misconduct, including negligence cases."); Nathan Koppel, *Counsel May Lose Fees for Disloyalty: Absence of Damage to Client Won't Bar Fee Forfeitures*, TEX. LAW., July 12, 1999, at 1 (predicting the increase in breach-of-fiduciary-duty claims following the *Burrow* opinion).

general landscape was not sufficiently perplexing, the dilemma is compounded in that courts have been unable to draw clear lines in terms of the types of conduct that absolutely cannot be said to constitute breach of fiduciary duty. As some predicted in its immediate aftermath, *Burrow*'s ramifications seem to include the notion of a marked departure from the previously well-established, rigid application of the Texas non-fracturing doctrine.[428]

While *Burrow*'s forfeiture requires a clear breach of duty, the precise duties and the appropriate sources thereof pose areas of unavoidable ambiguity. Ethical rules clearly have a role in this regard, but the extent to which courts will indulge those seeking to rely on professional conduct requirements in doing so remains to be decided. Jurisdictional variation exists on this point, and the same may be true with respect to the internal jurisprudence of Texas courts. Forfeiture requires the party seeking to benefit in equity to define the duty, which then must be shown to have been violated in a clear fashion. To that end, former clients will likely seek to convert ethical rules into liability standards if not prevented from doing so. When measured in its totality, the confluence of the lack of a clear realm of duties sufficient to entertain a forfeiture analysis in the event of their breach, the tempting quality of the Texas Rules as a source for articulating the relevant duties, and room for argument where there previously was none under the non-fracturing doctrine will likely persist in creating a point of confusion for the bench and the bar alike.

Similarly, measuring whether a particular violation of duty is severe by considering the factors set forth in *Burrow* has produced varying results. The variance is of import because it appears to go not to the outcome of the balancing of the *Burrow* factors as applied to the facts of each particular case, but rather to the relative significance of certain factors in general. While clearly the willfulness and adequacy of other remedies factors are contemplated as being of relative prominence, the *Burrow* court did not create hard and fast rules relating to these considerations. Nevertheless, courts have seen fit to treat an adequate alternative remedy as controlling on the question of forfeiture. Assuming such a rule has emerged as a de facto matter, its existence does not

428. Linda Eads, *Negligence vs. Disloyalty: Limits on the Forfeiture of Attorneys' Fees*, TEX. LAW., Jan. 12, 2004, at 26; Tom Prehoditch, *Breach-of-Fiduciary-Duty Claims Against Lawyers on the Rise*, TEX. LAW., Feb. 13, 2006, at 27.

pose a problem in itself. Rather, as is the case with the seemingly dispositive nature of the willfulness factor in many instances, the existence of the rule without its clear articulation as a rule presents the substantive difficulty. For the variance between the practical reality of *Burrow*'s factors as applied to specific facts on the one hand and the theoretical parody of those factors on the other provides the opening through which forfeiture has and will likely continue to be sought in cases that do not actually present a realistic possibility of recovery.

Texas courts' difficulty in sewing a cohesive forfeiture fabric in the attorney-client setting is not theirs alone. Other jurisdictions experience similar challenges, and responses have been equally sporadic. Courts in some states have moved toward recognizing bright-line rules, while others have tied the remedy to punitive theory as a means of attempting to clarify the theoretical basis of attorney fee forfeiture. It is not clear that either approach would cure what presently ails the Texas analysis.

Perhaps the lack of clarity in this area of the law is to be expected and, indeed, it may be unavoidable. Considerations of equity necessarily produce case-specific results that can be framed against other permutations of the same general principles to form what appears to be a complete absence of consistency. If this notion is becoming more prevalent with regard to Texas's attorney fee forfeiture jurisprudence, it should not gain traction. Rather, the analysis seems to be amorphous because of the nature of the remedy itself. The "[g]eneral propositions"[429] upon which forfeiture is based "do not decide concrete cases,"[430] which introduce the variables of culpability, circumstance, and external possibilities for redress. The conscientious practitioner, however, can benefit from an understanding of the current state of forfeiture law. Arguments that depart from rigid insistence on adopting bright-line rules might be one particularly useful practice point to be gleaned from the lessons of the last ten years. The tendency has long been to advocate for the propositions that *Burrow* precludes. For instance, the notion that the absence of actual damages prevents a court from awarding or affirming forfeiture is simply outside the permissible interpretations of *Burrow*. So too is

429. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).
430. *Id.*

a contention that the remedy must be complete and automatic because of the egregious nature of the misconduct. But these general propositions are very much a part of the body of arguments that have proved successful. It is the reframing of these arguments, while maintaining their general thrust, that appears to be the key to effective advocacy on either side of the forfeiture analysis.

Notwithstanding the apparent absence of a clear solution, discussion of these issues is no less deserved or imperative. Indeed, attorneys must endeavor to develop the law, particularly as it pertains to their liability to former clients, which implicitly speaks to the larger issue regarding the lens through which the public views the attorney-client relationship. True enough is the proposition that *Burrow* and its ramifications have been treated extensively in scholarly comment, but continued discussion should be engaged going forward, and perhaps, most importantly, attorneys must understand where the law currently stands. Whether that knowledge may unfortunately become a necessity for some in the bar, all must take note of the present reality. Indeed, one may not perceive its necessity until the window within which its value might be realized has already closed.