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BURROW V. ARCE

LAWYER: I would like to start by proposing that the court adopt a rule. But I want to be blunt from the very beginning and confess that it is not perfect. and it's going to have drawbacks, and there will be hard cases. You will have no trouble coming up with hypos to say, In that fact pattern this rule seems harsh. But the rule is a harm requirement. It is an extension of Double Day, which I use as shorthand, the principle that we don't award punitive damages without actual damages. And I'm asking the court to extend Double Day to this realm of fee forfeiture, which is a realm...

HECHT: And make it different from the general rule in agency law?

LAWYER: Yes, in a sense. I would want to treat lawyers the same as other agents. And if there is a conflict working for both sides, the classic case of the secret commissions under the table from the other side of the deal, I would not call that a fee forfeiture case. I would call that a constructive trust case. A give it up case. So I would try to keep it congruent with the general rule, but I would view this remedy, which seems to me somewhat new as a punitive remedy in its essence and ask the court to adopt the Double Day approach for policy reasons.

Now that fits in theory if it's punitive. And it fits in practice because it serves the same function of filtering claims and devoting our resources to other cases. But as a theoretical matter, there is nothing awful about their rule, that fee forfeiture ought to be available in really bad cases when there's no harm. But you see the pragmatic approach and the distinction between what the TC did, what Judge Davidson thought, and what the CA thought. The CA wrote a very good opinion and it made a theoretical case more or less tracking the restatement that argued, Gosh there are going to be cases where we just want to say. I don't like that conduct, and I want to have the power to do something. Judge Davidson in the trenches focused on a different aspect of the problem, which was, What is this going to do to settlements? And what is going to happen to the finality of settled cases? And we're going to have no incentive to filter out strike suits later against the lawyers. That was the distinction.

HECHT: So I will understand your position. If the plaintiffs could prove that they could have gotten as much as 1% more, so they had some harm here, then the fee would be forfeited?

LAWYER: I think the answer is going to be yes, but it's going to depend on what exactly do you mean by they could have gotten 1% more. And there is a gradation of abstractness on what do we mean by harm?

HECHT: I'm talking about some meaningful actual damages but less than $60 million.

LAWYER: Well if it's meaningful actual damages, absolutely. If there's an offer on the

table that was not conveyed and it was higher, then I think absolutely. I think that's meaningful harm. But let me flip the hypo. Suppose there's an unconveyed offer for less and the lawyer wrongfully refuses to convey an offer to his client, then the case settles for that twice that offer later down the road. We would all agree the lawyer has done something wrong. The policy question is: Do we have fee forfeiture for that when we can see that the client ended up getting a better deal. Now that does not mean the wrong goes unpunished, or that it's not wrong. I do not defend wrongful conduct. But I would say, we have other remedies and the costs and the benefits have got to be weighed. You hear floodgates arguments up here all the time. And I'm not going to overdo the floodgates argument, but I do want to tell you they are open _____. I can cite, if the court wants, 80 cases against one law firm alone in Harris county. I defended Vinson & Elkins in the *Moran* litigation, and we had after the fact problems with this RC theory after the case was tried in *V E Moran* with no such theory.

I don't know if it was my law school's failings or my own ignorance of the law, but I had never heard of fee forfeiture until this case. You probably read David Beck's 1991, 120 page article on Legal Malpractice in Texas. There is no a word in there on fee forfeiture. That does not mean it's illegitimate. But it looks new, it feels new, and nobody has been pursuing it until the RC opinion came out. And it is going to lead to practical problems. Suppose you've got a Tilley defense counsel who gets his fees from AETNA, but he's defending the insured. I don't know what happens in a fee forfeiture claim. I don't know whether that is kind of like the Fleming Foods case, I don't know whether claim has got to from the insurance company or from the insured. I assume the insured has some sort of standing to pursue that because he sort of indirectly paid premiums to Aetna and that way subsidized the fees. But you get problems like the Peeler and Hughes & Luce case, where the court said, we're not going to have a legal malpractice claim. It just seems odd to me that now...

PHILLIPS: Didn't in fact in Hughes & Luce the majority leave open the possibility of a claim for recission - maybe not in that particular case under the pleadings, but said that was a potential remedy?

LAWYER: I think it can be read that way, that it's conceivable. I guess I feel bad for Ms. Peeler. I feel a little bit bad for the lawyer now who may have a fee forfeiture claim of his own against him because of his handling of that case.

One other _____, and I do not deny their benefits to the restatement approach of having no harm requirement, it seems to me that you're going to have some preverse results that the best lawyers who give their clients the direct blunt advice, that they're crazy to take the client to trial, and say: with all respect Mr. Client this is a great offer. I mean, a client could always come in in a situation like that, after the fact, and say, The lawyer had superior experience, leverage, force of personality, it was overwhelming to me, and he kept telling me no, that's an easy claim to make. And in a case like this our hands are tied on summary judgment, we cannot deny when people say that's what happened. We're going to face a jury trial on that. And it's preverse because the lawyer

who gets the biggest results is the biggest lightning rod. The more money the client gets and the lawyer gets, I think the more the likelihood is of a fee forfeiture claim.

The last _____ I would like to mention is a sort of redundancy - do we need it? This court has not been famed for creating redundant remedies. We look before we create a new remedy, or a new duty to see what is there already. I will give you three tiers of classification and just ask you to think of it in those terms. The worst conduct is criminal Our society says certain types of acts are absolutely out of bounds and if you do them you can go to jail and be executed. The next worst I would submit would be tortious: wrongful conduct that makes you liable in civil court. And then there is conduct which is non-criminal, non-tortious, but it may be unethical and violate the rules. If there is a criminal act, the lawyer goes to jail. If there's a tortious act, a civil wrong, the lawyer pays damages like everybody else. If there is a noncriminal, non-tortious act that didn't cause damages, but maybe it violated a rule or it's something we just don't like, there is a remedy for that through the grievance process.

HECHT: But is it significant enough? If you make $10 or $15 million dollars and you get a private reprimand, how do you waive these?

LAWYER: You're exactly right. If it's just a private reprimand, maybe not. There's a celebrated case going to trial on Pearl Harbor day. And I would bet that the lawyer who is the victim of that disciplinary proceeding would rather give up $10 or $5 million and keep his license. If the wrong is bad enough it won't be just a private reprimand.

PHILLIPS: Is Texas in the vanguard of this or is this happening in other states?

LAWYER: No it is happening in other states.

PHILLIPS: So have other courts wrestled with this in the last few years?

LAWYER: They have wrestled and wrestled. And I attached a law review article to one of the briefs that says: We need a uniform system. It is a complete patchwork quilt. There is no uniformity on whether harm rule is required. There is no uniformity on what the factors are that you consider. I like the restatement approach and theory. It is clearly law professors who thought about it, but I think it lacks some practical rigor...

HECHT: Which is what?

LAWYER: Which is some sort of real world sense of what's going to happen if we just open up the remedy. I say it's new. You can do some archeology and find a real estate broker case here and there. But for all practical purposes, I've grown up through my career seeing no signs of this remedy being out there. I think it's new and it's going to encourage suits that were not encouraged before. I don't think lawyers realize this was out there. I don't think clients ever thought

of pursuing it and we're going to have more of these claims.

PHILLIPS: The facts of this case, whatever standard we come up with can you address the record whether or not affidavits below were sufficient to justify the summary judgment the trial judge made?

LAWYER: We went forward with three affidavits below. Our witnesses were qualified. They practice in Texas. They are familiar with what you look at. And I think they were all able to say, there comes a point where we know enough money is enough. It is difficult to elaborate with a lot of words on a no causation argument.

PHILLIPS: Do you think it's a breach of duty to the client to be a below-average lawyer, where it's clear that another lawyer would have gotten more money in this case, whether it's in settlement threat or to a jury?

LAWYER: I think that would be an unworkable rule. We get into the problem of personalizing the outcome: this was a bad trial judge, or this was a jury pool that might have gone the other way, and you have to personalize the outcome. It's what would have been as opposed to what should have been. It's sort of an objective/subjective problem. I'm sorry, I have no solution on that.

On the affidavits how else can you say they weren't hurt. How else can you say, whatever these wrongful acts were it didn't cause anybody to get short-changed. Phillips was giving away money.

ABBOTT: Were other alternatives causes of action not pursued here because of the causation issue?

LAWYER: Those were pursued. It was the standard commercial pleading where you see the usual allegations. And what this case has been and was briefed as in the CA, and as I understand it now today, is a fight over under-compensation, and over what you could call mistreatment claims. The under-compensation did not occur, and there is evidence in the record of what happened to other plaintiffs who refused very good offers and end up going to the jury. The mistreatment claims, if they are true, and I think we take the plaintiff's allegations at face value and take their evidence as true for this proceeding, I ask you to apply the Double Dday rule that you would apply if it were just a malpractice case for tort claims and say, There is a grievance proceeding and if these people were that bad, they can be grieved, disciplined, lose their license.

I would like to close with a reference to the court's decision in *Milhouse*, the causation, appellate malpractice case, where the court held that it is a question of law for the court whether appellate malpractice resulted in damages. In other words, what would have been the outcome of the appeal within the case? Justice Mauzy and Justice Ray's dissent in that case as a

theoretical matter, I respectfully suggest, are superior to the analysis in the majority opinion, but I think the majority got it right for pragmatic reasons. It is the difference between theory and practice. We ended up treating appellate lawyers differently for causation purposes in *Milhouse*, but there is very sensible reasons for it, and that's where I think the restatement gets part way but doesn't recognize what's going to happen in the real world if this remedy is opened up.

I would ask that the TC's judgment be affirmed in its entirety.

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RESPONDENT

LAWYER: I am privileged to be here today on what I consider a very serious issue. An amicus curiae brief has been submitted in this case, which attaches a law review article by the author of the amicus brief. Contained in that article is this sentence, which is attacking the rule on aggregate of which condemns aggregate settlements: *Much of the blame rest with judges who allow concerns about professionalism and public opinion to guide their treatment of economic issues.*

The argument that you have just heard is an attempt to essentially to dumb down the profession of the lawyer and to put all attorney/client fee contracts into simple disputes over breach of contract. I am really shocked to hear opposing counsel say that this is all so new. Four of the leading fee forfeiture cases in Texas involve attorneys, the most recent of which being the *Lopez* decision out of the San Antonio CA, and which is presently pending on petition to this court.

There is nothing new and nothing that the clients in this case are asking this court to do steps out of the norm of standard legal principles that this court has applied. I would like to in view of the argument that we have just heard, try to give some structure to where I think the court needs to think. Question No. 1: Is there a remedy of fee forfeiture for an attorney's breach of fiduciary duty? Question No. 2: Is the remedy total fee forfeiture, and if not total forfeiture, how is the amount determined?

Basically what we are dealing here is with standard contract principles and agency principles. The first one of which is that a party who breaches a contract does not recover on that contract. In some context, such as the construction cases, a breaching party may recover in quantum meruit. It is unclear in Texas, there is one decision that says, that an attorney discharged by a client may recover in quantum meruit. It is unclear and this court has never held that an attorney who breaches the contract himself or herself is entitled to recover in a quantum meruit. And if you will think with me in those simple terms about a breaching party recovering on a contract, all of this makes perfect sense.

ABBOTT: Isn't it true that in those situations that the party who breaches the contract up to some point in time probably receives partial payment to which they will be entitled to keep?

LAWYER: I think that's true, but I think that the situation is different.

ABBOTT: So you don't want us to think in terms of breach of contract then, you want us to think in terms of breach of contract plus?

LAWYER: I want you think in terms of breach of contract by a fiduciary who breaches it through breach of fiduciary duty.

PHILLIPS: Why isn't the lawyer who gets a $1.5 to $2 million settlement, why isn't that more akin to a contractor who builds a house? And we look at the final product you've got there as a house, and then see if there is a problem. If there's problems with that then he gives to a real estate broker who messes up the deal.

LAWYER: And if it's someone who is presently in the midst of remodeling a house, I can assure you that the relationship that I have with my contractor is not exactly that that I have with my lawyer. And you suggest precisely the dilemma that I proposed earlier, and that what we are dealing with here is a dumbing down of the attorney/client relationship.

In Texas, *Bryant v. Lewi,* the nature of the relationship requires a different rule. The courts of Texas have split as to the basis upon which the legal rights and obligations are analyzed. In one instance they say, that the breach of fiduciary duty goes to the essence of the contract and essentially renders that contract voidable at the option of the client. Another case says, that a breach of fiduciary duty by the attorney is a constructive fraud upon the relationship, which renders the attorney or the agent unable to collect upon the contract itself, and also to disgorge anything which is done, and which is received under the contract.

But basically what all of the cases are saying is that the nature of the duty and the calling of the profession is such that there has to be a policing function and that there has to be a harsh remedy for one who breaches a contract.

PHILLIPS: If the attorneys had consulted with all the clients, laid out options, etc. and reached a non-aggregate settlement, would you be complaining based on these amounts alone?

LAWYER: If they had consulted with the clients, and if the clients had agreed to accept the sums based upon an individual assessment of their own loss, we would not be complaining. I must caution, however, though, that this record is replete with much more than just the reaching of an aggregate settlement. It is the reaching of an aggregate settlement and the coercion of that settlement. But aggregate settlements are not themselves to be banned as long as there is client participation. Aggregate settlements are nothing more than a species of conflict of interests. And if there is one thing that Texas courts, including this court, has been very strict about in terms of being able to keep benefits of the contract, it is that you cannot do so when you are representing conflicting interests. And candidly, it is simply a policy decision that says, that your obligations are

so high that the breach of fiduciary duties must also reap a very high penalty.

ABBOTT: I can foresee situations involving perhaps cases like this where if the lawyers followed the conduct that perhaps they should, you would maybe have a situation where the client would not want to settle. They would say, well Joe Jamail got more money, so I either want more money or nothing else, and I want to go to trial. And they wind up going to trial and they lose, they lose everything. And as a result, the client is going to be worse off than they would have been had they had let's say a ____ settlement forced upon them.

LAWYER: That easily could happen. But whose life is it? It's my life and it's my harm as the client, and if I can make that determination based upon unfiltered advice from my attorney, then the client ought to be bound by those obligations. But it seems to me ____ to say that forcing an aggregate settlement upon someone can be in their best interest. It seems to me like what we are saying now again in this dumbing down process that this whole thing is now a contest between lawyer and client to say, It's not your life. It's my right to make a fee. And the difficulty I have with your hypothetical is, the very vice of the aggregate settlement. Here looking at the potential of losing a $65 million fee if one person backs out, what kind advice do I give that person as to their chances of recovery? Well I tell you what kind of advice they got in this case, you don't know what you're talking about, shaking their finger in your face and cursing you and telling you you're dumb and stupid and where did you go to law school, I have agreed not to try your case. If this law firm does try your case, it's going to be tried by a junior who's going to lose it. There is going to be salacious information come out about you during the trial. I mean, was that unbiased advice dangling the $65 million fee in front of them? I just vote to say, no. And if all of that conduct - breach of fiduciary duties, I have no sympathy for the lawyer who says, well I want a fee because I determine whose best interest is at stake here.

HECHT: Opposing counsel begins by saying that it's easy to think of problems both side, and that may be true in this case as much as any of them I remember. I think of problems with both sides. But one of the problems he suggests, is that this allowing some recovery here even under a restatement approach would result in a tremendous increase in litigation. What's your view of that?

LAWYER: We have had fee forfeiture in this case since the decision in *Kelley v. Murphy*, which I believe goes back to the 1920s. And I haven't seen the floodgates. I'm not really too worried about the floodgates argument if we are talking about the standards of adherence to the profession. That may be what we have to suffer. But again, I don't understand why if it is viewed that this is such a cataclysmic and C change in the law this court has said in *Broden v.* _____, where an attorney signed a fee contract and then lost his license, that we will treat this as a total abandonment by the client, and he's entitled to recover absolutely nothing on the contract. These principles are in place because of the high calling of the profession. And if we have to suffer a floodgate of litigation, we have to suffer that because it's the profession's integrity at stake. There has got to be a message sent in the rules that apply that you cannot breach fiduciary duties to the client and then say, job partially well-done. And then let's engage in a fight between ourselves with all of the resources that

we have to fight our clients even though we've taken them as contingent fee clients on the notion that they don't even have the ability to participate _____.

GONZALEZ: There's an argument that if we were to rule in your favor, that not only would it be unfair to the lawyer but the client would be getting a windfall in essence getting a windfall and free legal services?

LAWYER: If an attorney who just simply breaches a contract is not allowed to recover on it as this court has held many times, I don't understand where the windfall is. When somebody has undertaken to represent me in the highest calling profession that we know, and engages in conduct that people call a constructive fraud upon the relationship, something that voids the relationship, I don't understand where the windfall is. It seems to me Justice Gonzalez, that what you have to do is you have to retract the 1942 decision by this court that said, It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have acquired. You have to overrule it. You have to overrule many, many other cases which have said that this relationship is one that is sacred and that is deserving of _____.

ABBOTT: In that regard in applying your test, let's assume we have a, b, c company that's being sued in a multi-million maybe in a multi-billion dollar lawsuit. And what they do they go out and hire x, y, z law firm, which is the largest law firm in the state, and this large law firm bills on an hourly basis, and charges a, b, c company $5 million in attorneys fees over the course of the litigation and prevails - they exonerate a, b, c company. And a, b, c company doesn't have to pay anything in the lawsuit. And then a week after the big victory, they learn that x, y, z law firm didn't do a conflict check and find that they had a conflict of interest. And so a, b, c decides well not only did I win, but now I get my $5 million back because I'm going to charge that they breached their fiduciary duty because there was a conflict of interest. Who cares if I won. I'm going to get free victory now. And that conflict of interest had absolutely no impact on the outcome of the case.

LAWYER: I say that there can be total fee forfeiture in that instance.

PHILLIPS: So your second question is it's total, and the answer is yes?

LAWYER: The answer is yes.

PHILLIPS: But you don't have to reach the third one?

LAWYER: I don't, but we're happy to because that is the position adopted by the CA. And it is a position that has been adopted by many states around the nation. And it is partially embraced and I think by the restatement third...

PHILLIPS: There's a claim that $80 billion a year changes hands in the American legal

system, which the fees one would assume are somewhere between $15 - 30 billion of that. This is a big business.

LAWYER: Yes, it is. Although I continue to wonder why we are so concerned about protecting the rights of lawyers who breach fiduciary duties to the clients. But let me say that of those cases who adopt what I call the sliding scale approach to fee forfeiture, most of them do not involve breach of fiduciary duty cases. One or two of them do.

GONZALEZ: Assuming for the sake of our discussion here, that if we were to affirm the CA as to the propriety of this fee forfeiture cause of action, and if we were to reverse the CA as to who gets the call, the TC or a jury, assuming it's a jury, what would the charge look like?

LAWYER: We have taken the position that the elements in the restatement, which you can almost pick right out of *Alamo National Bank v. Kraus*, are appropriate. We have agreed that those would be appropriate standards. They are largely adopted in the new restatement third of the law governing lawyers. They are in the footnote in the first opinion of the CA and they are actually promulgated in the second opinion of the CA as factors for the court to utilize.

GONZALEZ: They didn't say court. They said the trier of fact.

LAWYER: In the first opinion they said the jury, and in the second opinion they said and they really mean the court. Those are really the *Kraus* factors, the nature of the wrong that sensibility of the parties that sends a public outrage and things of that nature.

GONZALEZ: And then the jury gets to pick a number?

LAWYER: That's correct. Quite candidly, I am very uncomfortable with that.

OWEN: So you think total forfeiture is more equitable than some sort of middle ground?

LAWYER: I personally do. There are a number of good policy reasons it seems to me of total fee forfeiture. Number 1, it is a sure remedy. The problem that you have in these cases is when someone has breached fiduciary duties, represented conflicting interests, coerced their clients into doing something they would not otherwise have done. It's like trying to put tooth paste back in the tube. It is very difficult for the client to reconstruct what would have happened had I been fairly represented. And so total fee forfeiture represents a sure remedy.

OWEN: Why are we applying it seems to me a much harsher standard in these situations than you're advocating we do than we do in punitive damage situations?

LAWYER: I think in punitive damages situations of course we've already established

liability. In other words we've afforded their relief.

GONZALEZ: There must be some damage.

LAWYER: That's true in those instances. In this case there are two answers to the damage. First of all, we did have proof that we were under-compensated, but this is a summary judgment case, and they did not inclusively disprove that we were under-compensated. But the damage is to the relationship.

OWEN: But disproportionality it seems to me of punitive damages, that there is some effort made to weigh the punitive damages against the egregiousness of the wrong. And if you take an all or nothing approach it seems to me that's very far from even punitive damages.

LAWYER: Again, that's a policy decision I think that this court has to come to. But I think I've got to take the position that once we get into balancing value verses breach, we are essentially bringing these disputes back into the _____ commercial marketplace.

PHILLIPS: The disciplinary rules are reasonably long and have a lot of meat on them. A lot of vague words. Do you believe it's possible for an attorney to represent a client in an extended difficult multi-party litigation and not raise an allegation of some breach of those rules in some way through the course of the representations?

LAWYER: Let's hope that it is possible to do that. If the court is concerned about the possibility of total fee forfeiture in a long extended relationship, my position about that is, and I think it's borne out by the restatement, that the forfeiture is in relation to the breach. So the example that's given in opposing counsel's brief is supposedly represented somebody in a probate matter for 10 years, and then we took on a car wreck case for them and breached fiduciary duties in that context, do we get the probate fees back for 10 years? Of course not. It has to be a breach in regard to the services with which we're hired.

ABBOTT: Other than what you're advocating are you aware of any other legal theory that exist where a party is able to recover money damages without having to prove either injury or causation?

LAWYER: It depends I guess upon your definition of money damages. I think that all of the...

ABBOTT: I'm comparing it as to say an injunction.

LAWYER: And that was where I was coming. I think that nevertheless in that realm probably all of the money counts, money had and received, money paid under a mistaken fact. In other words all of those things would seem to me to involve exactly the same situation. Yes, I don't

find this to be unusual. And again, I don't want to be put in to the position of saying that there is no harm, because I think the cases are quite clear that what's happened is that the underlying relationship has been damaged. And if we take the position that attorney damaged the relationship, and then nevertheless recover in quantum meruit, I think that what's happening we are allowing concerns about professionalism and public opinion to guide their treatment of economic issues, and I think that's where we are.

We would implore the court to uphold the integrity of the bar as well as the rights of people represented by lawyers.

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REBUTTAL

LAWYER: I would like to speak to *Kinsback*, a 1942 decision. If you read that, twice the court makes the point that the treacherous employee received a month salary in addition to secret commissions from the other side. And what was forfeited was not the salary, but the secret commissions from the other side. It was not total forfeiture of all of his fees. He got to keep his salary.

The case, as I see it, is not about what's right and wrong. I agree with the other side about what's right and wrong. But what this case is about is about remedies and what will we do about it. Will we cure it by litigation or should litigation come to and end here? And you notice, you didn't hear what's going to happen to Phillips and the settlements that have been attacked as void because of an alleged aggregate settlement and their pursuit of reopening those cases of setting aside the underlying judgment. I say this case wouldn't have happened if there were clear law extending Double Day saying, We're not going to do that, we're not going to have to worry about reopening and then we don't have this kind of litigation.

HECHT: Is it true that this case wouldn't have happened if there not been such generous settlements paid to some people?

LAWYER: I think that's probably true. Not all the clients came back.

HECHT: Does that cut against your floodgates argument?

LAWYER: Perhaps so.

HECHT: How many times are we going to fuss over nothing?

LAWYER: I think that's right. And the floodgates, I don't know whether we are going to see or not. I envision this as a new remedy that is going to open them. up. I know of two appeals where _____ have been raised for the first time on appeal. You will see this coming to

your doorstep.

HECHT: We have a case pending, you are probably familiar with out of the San Antonio Court, a divided court, but there the allegation is a breach of contract by the attorney. If there was a breach of contract, the damages were $750,000 and the fee was $6.25 million under your view, if there is a breach in that case, the whole $6 million fee would be forfeited?

LAWYER: If there is a breach of fiduciary duty and damages, then the fee forfeiture remedy is available. Now if we have a dispute over whether it's the whole pie or whether it's got to be scaled, and I just say on that scaling question analyze this through the prism of the classic cases on constructive trusts, unjust enrichment that arise out of the equity courts where the lawyer or the agent is envisioned as a trustee, and in the equity courts that trustee was sort of answerable to the judge. You see that still today in bankruptcy cases where the bankruptcy trustee whose fee can be scaled down. And I think a discretionary approach fits with the constructive trust roots, that solves not only the judge/jury problem, it channels the deciding person's discretion, but it openly admits that we're going to have to do apportionment.

PHILLIPS: Is that the remedy you're asking for in this case, is a remand to the TC for that type of proceeding?

LAWYER: Yes.

PHILLIPS: I didn't know that was what you were asking for. Right then it sounds to me that's the best you can - if you believe that's an appropriate cause of action, that's the best you can get on the state of this record?

LAWYER: Right. If there are no damages, the CA sent us back to have the judge figure out what the facts are and maybe have the jury make fact findings like you would in an injunction trial, and then decree an appropriate remedy.

GONZALEZ: So your primary position as a matter of law, the plaintiffs get nothing and have no case?

LAWYER: That is my primary position.

PHILLIPS: I thought you weren't contesting on the record at this time, that there were breaches of this relationship, breaches of fiduciary duty, violations of the disciplinary rules. What you were saying was, there were no damages in that the money they got was as good as they would have gotten in a _____?

LAWYER: That is correct, that there are no damages and this case ought to stop. As Judge Davidson said, Let's stop it because it's going to happen in the future.

PHILLIPS: So no matter how egregious the breach if there is no impairment of the money, you would say it ends right there?

LAWYER: Yes.

PHILLIPS: Only if you can show that the breach led to $1 or more of recovery?

LAWYER: That's correct.

PHILLIPS: Is the recovery limited by the dollar loss? In other words, the lawyer just does terrible things, but it only cost $100?

LAWYER: Probably. And it's sort of the *Schleter v. Schleter* problem of fraud on the community and is it limited by the size of the...

PHILLIPS: And now you're getting into another _____.

LAWYER: There are firms that have alternative billing arrangements, a captive defense firm for an insurance company or there's a good firm in Houston that defends Wal Mart on almost all of its cases. I don't know what their billing rates are, but if they misbehave towards their patron, what does total forfeiture mean? It seems to me that there's an intrinsic need to decide how big is the transaction, and we're going to be scaling it.

Let me end with a point about *Alamo Kraus* and charging the jury on the prospectus. The CA added an extra factor. The number 6 factor was considered the adequacy of other legal remedies. I don't know how we effectively litigate that in front of a jury and have experts and _____ introduced to talk about are these other legal remedies adequate as a constructive trust, and is an injunction enough? is restitution enough? can you get unjust enrichment or did they have unclean hands? That seems from the *Milhouse* reasons like it ought to go to the court.

PHILLIPS: Do you agree with the amici that the prohibition against aggregate settlements in _____ *Sibley* no longer practical in light of modern litigation? They cannot mean what they seem to say?

LAWYER: I agree with some of their argument. I wouldn't go as far. I would not commodotize the business quite as much and turn into quite as much a free market approach. I think aggregate settlements have a problem. They can cause under-compensation. But I will say, that it is not always clear what aggregate settlement is and in this case it's a classic example You have correspondence going back and forth between lawyers on both sides of the table saying, we're not doing an aggregate settlement but our carrier wants to know the bottom line. And now that's held to create a fact issue over an aggregate settlement. So I think the amicus brief is correct, but it's not always clear what one is.