

No. 08-0833

In the
Supreme Court of Texas

ANGLO-DUTCH PETROLEUM INTERNATIONAL, INC. AND
ANGLO-DUTCH (TENGE) L.L.C.,
Petitioners,

v.

GREENBERG PEDEN, P.C. AND GERARD J. SWONKE,
Respondents.

On Petition for Review from the
Fourteenth Court of Appeals at Houston, Texas

**BRIEF OF AMICI CURIAE ABRAMS SCOTT & BICKLEY, L.L.P.,
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MICHAEL H. TROTTER, PROFIT AND THE PRACTICE OF LAW:
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**STATEMENT OF INTEREST AND SOURCE OF FEE PAID
FOR PREPARING BRIEF**

Abrams Scott & Bickley, L.L.P., Arnold & Itkin LLP, Caddell & Chapman, Cornell, Smith & Mierl, LLP, Dawson, Sodd, Ellis & Hodge LLP, Law Office of James M. McCormack, and Quilling, Selander, Cummiskey & Lownds, P.C. are law firms with offices within the State of Texas. Some of the *amici curiae* are larger firms with multiple offices and dozens of attorneys practicing before the Texas bar; others are small firms with just a few attorneys. Some represent primarily defendants, some represent primarily plaintiffs, and some represent plaintiffs and defendants on a regular basis. The *amici curiae* are thus in a balanced position to address the interpretation of fee agreements between lawyers and their clients.

The *amici curiae* are deeply concerned that the decision of the court of appeals creates unacceptable uncertainty about the attorney-client relationship. Indeed, the decision of the court of appeals prompts clients and attorneys alike to wonder whether the firm has a client and whether clients can depend on the firm they thought they hired to represent their interests. Further, the *amici* have a vested interest in upholding and promoting the rules of professional conduct and the attorney's role as a fiduciary, which the court of appeals improperly disregarded when interpreting the fee agreement.

No fee was paid for the preparation of the brief of the *amici curiae*.

ISSUES PRESENTED

1. Whether an attorney-client fee agreement is ambiguous as to the identify of the contracting law firm or attorney when the fee agreement is printed on firm letterhead and contains the firm's name in the signature block, but uses personal

pronouns inconsistently and does not contain the firm's name in the body of the engagement letter.

2. Whether rules of contract construction specifically applicable to attorney-client fee agreements require that a fee agreement be viewed from the perspective of a reasonable client, construing true ambiguities in fee agreements against the attorney and in favor of the client.
3. Whether, in conducting an ambiguity analysis, courts should consider the Texas Rules of Professional Conduct to decide whether a proposed interpretation of an attorney-client fee agreement is reasonable.

STATEMENT OF FACTS

The *amici curiae* adopt the statement of facts in the Brief of Amicus Curiae Linda S. Eads, Associate Professor of Law, Dedman School of Law, Southern Methodist University.

SUMMARY OF THE ARGUMENT

We ask the Court to restore interpretive standards that, in addition to being clear and predictable, also reflect the fundamental fiduciary and ethical duties we as lawyers owe our clients. Law firms exist to serve the needs of their clients in a professional manner. It is therefore troubling that the respondents—a law firm and one of its former lawyers—base their claim to a larger lawyer's fee on "confusion" of their own creation. Even more troubling, the court of appeals upheld the lawyer's claim without pausing to consider its ramifications for lawyers, law firms, clients, and the legal profession in general. The undisputed facts are that the lawyer drafted the fee agreement; that the agreement was on firm letterhead and contained the firm's name in the signature block; that a contemporaneous letter from the client (which the lawyer neglected to read) made clear the client's reasonable understanding that the agreement was with the firm; and that

the firm later assigned its rights in the fee agreement to the lawyer through a document that reports that the initial fee agreement was executed “on behalf of” the firm. The respondents’ position—advocating ambiguity under such circumstances—is inconsistent with the role law firms should play in our system of justice.

By concluding a fee agreement is ambiguous based on legally insufficient facts, and by ignoring important canons of construction specifically relevant to attorney-client fee agreements, the appellate court’s decision harms the interests of clients, individual attorneys, and law firms. The decision injects uncertainty into potentially thousands of fee agreements. That uncertainty invites fee disputes both between lawyers and clients and also between individual lawyers and law firms, undermining faith in the legal profession. Clients need to know that they have a lawyer—and need to know with certainty whether they have retained a law firm or just a single lawyer to represent them. Likewise, lawyers and law firms need to know when they have a client. Those simple propositions—which are so fundamental to every attorney engagement that they should be straightforward and easy to ascertain—are muddled by the appellate court’s decision.

Like other businesses, law firms value predictability and recognize the real-world importance of having clear rules for interpreting contracts, which makes the court of appeals’s loose standard for determining ambiguity disturbing. What is even more surprising, however, is that the court of appeals would apply that lenient ambiguity standard, which is not even appropriate for commercial contracts, to an attorney-client fee agreement. The *amici* and all lawyers practicing in Texas are held to a higher standard when negotiating and renegotiating attorney-client fee agreements. Swonke’s claim

should have failed under general rules of contract interpretation, and it goes without saying that his claims also should have failed under the standards specifically applicable to attorney-client fee agreements. Multiple interpretive canons specifically applicable to fee agreements independently defeat Swonke’s claim for additional fees.

ARGUMENT

I. THE PRINCIPAL OBJECTIVES OF LAW FIRMS MUST ALWAYS BE TO SERVE CLIENTS AND TO FOSTER PROFESSIONAL EXCELLENCE, NOT TO ACT AS COVER FOR ATTORNEY MISTAKES OR TO CONFUSE CLIENTS.

Without doubt, the legal profession has evolved over time. Indeed, the last century has seen explosive change in the practice of law, including a sharp rise in the number, size, and geographic reach of law firms.¹ “In 1900 a ‘large firm’—so large that contemporaries called it a ‘law factory’—was eleven lawyers.”² And as late as 1960, only 38 American firms had more than 50 lawyers.³ By 2005, in contrast, at least 17 firms had more than 1000 lawyers, 30 firms had over 800 lawyers, 70 had over 500, and 405 had over 100.⁴ The ratio of associates to partners has steadily increased, there is greater associate attrition, billable-hour requirements for both associates and partners are

¹ Robert W. Gordon, *The American Legal Profession, 1870–2000*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 73, 115 (Christopher Tomlins & Michael Grossberg eds., 2008).

² *Id.*

³ *Id.*

⁴ *Id.* This dramatic shift in the practice of law in the last 50 years is the result of many interrelated factors, including globalization, increased regulation and the attendant demand for greater specialization; the continued rise of American economic power; the introduction of the billable hour in the 1940s; client demands for firms to provide full service and multiple offices; intense competition among firms for lucrative work (a phenomenon that took off in the 1980s); a new legal press reporting profits per partner and encouraging lawyers openly to “flaunt purely commercial criteria of success”; and the increased importance of developing and protecting intellectual property. *See id.* at 123-24; GEOFFREY C. HAZARD, JR. & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY 37-39 (2004).

higher, and fees have gone up.⁵ And whereas most lawyers a generation ago were generalists, doing everything from drafting wills to organizing companies, today's law-firm lawyer tends to specialize in (or at least emphasize) one area of practice.

Many in the legal community lament that "law has become a business." Yet despite calls for a return to a halcyon past, the changes experienced by law firms have enabled firms to continue offering excellent service to their clients and to promote excellence, even as clients' needs and demands have evolved. Many transactional and litigation matters require a specialist's insight or are otherwise suited to a small, agile firm; others are better suited to a large or full-service firm. Given the size, speed, complexity, and range of transactions in today's world, firms of all sizes are needed to keep the wheels of commerce and justice rolling. Moreover, in the best firms, lawyers build strong professional and personal bonds with each other, help each other navigate the complex ethical and moral issues that inevitably arise in the practice of law, and support and facilitate each other's involvement in the community. The desire to serve clients ably, foster professional development, and earn an honest living remain the main reasons for lawyers to associate into law firms.

But the act of associating with a law firm does not give an attorney license to leave his or her fiduciary and professional obligations at the door. Indeed, rather than reducing a lawyer's ethical obligations, the act of associating with a firm actually increases those obligations. *See, e.g.*, TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b), 5.01, 5.02, 7.01.

⁵ MICHAEL H. TROTTER, PROFIT AND THE PRACTICE OF LAW: WHAT'S HAPPENED TO THE LEGAL PROFESSION 61-92 (1997).

Nor should a firm be used as a cover for an attorney's shortcomings. Too often, attorneys cite the fact that they practice at a firm in an attempt to pass blame onto fellow attorneys and support staff, who are sometimes used as convenient scapegoats, when an attorney explains a mistake or a disappointing outcome to a judge or client.

This case—a suit between lawyer and client about fees—demonstrates how a lawyer's association with a firm can be turned against the client improperly. The case therefore provides the Court an opportunity to ensure that the evolution in the practice of law does not become an excuse for the erosion of the special attorney-client relationship.

The undisputed facts reveal that:

- Swonke drafted the attorney-client fee agreement;⁶
- the fee agreement is printed on Greenberg Peden letterhead and contains the firm's name in capital letters as the first line of the signature block;⁷
- attempting to excuse those obstacles to his case, Swonke claimed, years after the fact, that his secretary mistakenly put the letter on firm letterhead and also mistakenly inserted the firm's name in the signature block (and that he apparently did not notice those problems when he signed the fee agreement);⁸
- on the same day that Anglo-Dutch mailed the fee agreement, its president also mailed a separate letter to "Mr. Gerard J. Swonke, Greenberg Peden P.C.," explaining that the McConn & Williams fee agreement would "provide[] the basis for the Agreement *between Greenberg Peden P.C. and Anglo-Dutch*";⁹
- although Greenberg Peden received that letter, Swonke claims he did not review his client's correspondence and never responded to it;¹⁰

⁶ 3 RR 64-66.

⁷ *Id.*

⁸ 6 RR 163-73.

⁹ 3 RR 67-68 (emphasis added).

¹⁰ 3 RR 67-68; 6 RR 176-83.

- until the fee dispute arose in 2004, Swonke never explained to Anglo-Dutch the effect that his moving to McConn & Williams would have on the fee agreement; and
- apparently concerned about his legal position, Swonke secured Greenberg Peden’s cooperation, receiving an assignment of virtually all of the firm’s rights under the fee agreement—yet the assignment frankly stipulates that Swonke had executed the fee agreement with Anglo-Dutch “*on behalf of (and while affiliated with) Greenberg Peden as an Of Counsel.*”¹¹

Notably, Swonke has not pointed to a single statement, not a single piece of evidence, in which he clearly told Anglo-Dutch that the fee agreement would be with him directly rather than through Greenberg Peden, the party whose name is on the letterhead and whose name is on the signature block of the fee agreement.¹² And although Swonke argues that Anglo-Dutch knew that he was “of counsel,”¹³ there is no evidence that Swonke ever explained what that title meant or whether it had any effect on Swonke’s authority to sign up cases for the firm.¹⁴

Given those facts, it is troubling that Swonke pursued the claim for additional attorneys’ fees, aided by Greenberg Peden and, at least to this point, sustained by the judiciary. As explained previously, law firms exist to serve the interests of clients and to promote professional excellence; their purpose is not to serve as a cover for attorney mistakes or as a means of confusing or taking advantage of the client. Yet that is exactly

¹¹ 3 RR 179-80 (emphasis added).

¹² Nor did he alert Anglo-Dutch to the fact that McConn & Williams had no plans to compensate him for work done in the Halliburton litigation.

¹³ Swonke Br. 2.

¹⁴ Indeed, Greenberg Peden’s managing partner repeatedly testified that Swonke and the firm’s other “of counsel” attorneys were authorized to enter into agreements on behalf of the firm. 8 RR 206; *see also* 7 RR 104-08, 111-12; 8 RR 186-87.

what happened in this case. The use of Greenberg Peden’s letterhead and signature block clearly confused Anglo-Dutch, whose contemporaneous letter confirmed its belief that the “Agreement [was] between Greenberg Peden P.C. and Anglo-Dutch.”¹⁵ And while Swonke does not dispute that he actually signed the fee agreement, he blames the support staff of his former firm for putting the agreement on firm letterhead, for inserting the firm as the party on the signature block,¹⁶ and presumably for not ensuring that he kept up with client correspondence,¹⁷ which, if he had read, would have alerted him to a misunderstanding about the identity of the parties to the fee agreement.

The *amici* are not suggesting that lawyers and law firms should always lose a fee dispute. Many disputes can arise from a client’s unjust refusal to pay or from a reasonable misunderstanding, one in which the lawyer and law firm have taken sensible precautions to prevent confusion. But this case does not involve that kind of dispute. The misunderstanding here arose from a fee agreement drafted by Swonke, alleged “mistakes” by Swonke and his firm in printing the agreement on firm letterhead and placing the firm’s name in the signature block, Swonke’s and the law firm’s failure to read and respond to client correspondence, and failures by Swonke and the law firms involved to advise Anglo-Dutch on the effect that Swonke’s change in law firms would have on the fee. That change in fee was substantial: an increase of over \$1.2 million,

¹⁵ 3 RR 67-68.

¹⁶ 6 RR 163-73.

¹⁷ 6 RR 176-83.

from \$293,339 to \$1,530,000.¹⁸ Thus, Swonke's claim for fees comports with some of the worst cultural stereotypes about lawyers and law firms: that they are greedy to the point of putting their own economic self-interest above concern for their clients, that they are willing to make any argument no matter how meritless (like Swonke's argument that he was not Greenberg Peden's agent¹⁹), and that they consciously fail to clarify billing issues, especially when there is something to hide.

When lawyers and law firms single-mindedly pursue profit at the expense of their professional obligations to their clients and to society, there is a tremendous ripple effect. It reaches deep into the ways we practice law and the way the public perceives our profession. The consequences are not merely cosmetic, but instead profoundly affect who is able to afford to hire a lawyer, the maintenance of professional standards, and the way that we see ourselves as lawyers. While wholesale loss of faith in the legal system does not occur in a single case, there can be no question that public confidence and professional pride erode when a lawyer successfully uses his association with a law firm to confuse the client and to justify what he claims is an ambiguity in a fee agreement of his own creation. Judicial acceptance of such behavior sends a message to the public and the bar that the legal profession has, indeed, become a just another business governed by the same rules that apply to any other business—and that it is acceptable for lawyers and

¹⁸ 7 RR 44-45.

¹⁹ See Swonke Br. 35-42. His argument ignores (1) testimony from Greenberg Peden's managing partner that Swonke had authority to enter contracts on the firm's behalf, (2) the assignment of Greenberg Peden's rights in the fee agreement, (3) that Swonke never raised this issue in the trial court and has therefore waived it on appeal, and (4) that Swonke failed to file a verified denial of agency as he was required to do in order to dispute Anglo-Dutch's pleading that Swonke's signature had bound the firm.

law firms to place their economic self-interest before their ethical and fiduciary obligations. The *amici* therefore ask the Court to scrutinize this case carefully and to apply clear guidance for interpreting attorney-client fee agreements, adopting standards that are consistent with the professional and client-centered roles that law firms and their lawyers play in our system of justice.

II. THE DECISION OF THE COURT OF APPEALS IS HARMFUL TO LAW FIRMS, HARMFUL TO INDIVIDUAL ATTORNEYS, AND, OF PRIMARY CONCERN, HARMFUL TO CLIENTS.

The decision of the court of appeals wrongly allowed Swonke to use his associations with two law firms to confuse the client, a result that is both inconsistent with the proper roles of law firms and also sends the wrong message to the public and the bar. The decision also employs a faulty textual analysis and disregards interpretive rules specific to attorney-client agreements. But in addition to addressing those issues, the *amici* wish to echo Professor Linda Eads’s concerns about the real-world effects that the decision of the court of appeals will have on law firms and their clients.²⁰

“[B]y readily reading ambiguity into a seemingly straightforward engagement letter, the court’s decision will increasingly raise questions among clients, law firms, lawyers, insurance carriers, and others,” including:

- Who owes fiduciary duties to the client, the law firm or merely the lawyer who signs the engagement letter?
- Can law firms count on receiving the benefit of the fee agreements memorialized on their letterhead?

²⁰ See generally Br. of Amicus Curiae Linda S. Eads, Associate Professor of Law, Dedman School of Law, Southern Methodist University, at 18-21.

- Who is obligated to clients in the event of malpractice?
- Will insurance companies begin to use “ambiguity” in engagement agreements to refuse malpractice coverage?²¹

There must be clear and predictable answers to those questions, each of which is of great practical importance to the profession and practice of law.²² “Law firms, attorneys, and clients need to know with a high degree of certainty whether a fee agreement is with a firm or whether it is with individual attorneys.”²³ Law firms must be able to anticipate whether they are entitled to recover fees for their cases, as such information is essential in budgeting, developing organizational strategies, deciding the scope and amount of malpractice insurance to purchase, analyzing potential conflicts of interest, and making staffing decisions to ensure their clients’ interests are protected. Individual attorneys will want the assurance that their law firm stands behind them and that their firm’s malpractice carrier will defend them if a malpractice claim is asserted. Likewise, clients need fee agreements to be certain, allowing them to know whether they can rely on the firm they thought they hired to represent their interests. “When there is uncertainty about a firm’s or attorney’s responsibility for a matter, there is a real risk that loyalty to that client will become watery.”²⁴ Also troubling, a loose ambiguity standard for interpreting fee agreements will increase the likelihood of litigation not only between lawyers and clients but also among lawyers. The predictable consequences are an

²¹ See generally *id.* at 19.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

increase in the number of malpractice claims brought against lawyers, an increase in the number of times clients are dragged into fee disputes between lawyers and law firms, and accelerated erosion in the public's faith in our profession.²⁵

III. THE COURT SHOULD REAFFIRM THE PROPER TEST FOR ANALYZING AMBIGUITY AND ARTICULATE CLEAR STANDARDS FOR INTERPRETING ATTORNEY-CLIENT FEE AGREEMENTS, RECOGNIZING THE FIDUCIARY AND PROFESSIONAL OBLIGATIONS THAT LAWYERS OWE TO CLIENTS.

A. The Ambiguity Analysis Adopted by the Court of Appeals Misconstrues the Standards for Interpreting Even Ordinary Commercial Contracts.

Swonke's breach-of-contract claim should never have gone to the jury. Under general rules of contract interpretation, the fee agreement in this case was not ambiguous. A textual analysis of the fee agreement—the proper starting point for determining ambiguity—confirms that the agreement was between Anglo-Dutch and the law firm. *See Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 311-12 (Tex. 2005) (holding that courts “must ascertain and give effect to the parties’ intentions *as expressed in the document*” (emphasis added)). The interpretation of an unambiguous agreement is a matter of law for the court, and a contract is ambiguous only if it is “susceptible to more than one reasonable interpretation.” *Id.* at 312.

Here, the text of the fee agreement clearly supports the reasonableness of Anglo-Dutch's interpretation that the company was contracting with Greenberg Peden P.C., not Swonke individually. The contingency-fee letter agreement dated October 16, 2000 is printed on Greenberg Peden letterhead, lists the firm's contact information, and contains

²⁵ *See id.* at 18-21.

a signature block stating, “Very truly yours, GREENBERG PEDEN P.C.,” followed by Swonke’s signature and printed name.²⁶ The existence of Greenberg Peden’s name and contact details on the letterhead and its capitalized name in the signature block have commercial significance and should not have been discounted. *See Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983) (“Courts must favor an interpretation that affords some consequence to each part of the instrument so that none of the provisions will be rendered meaningless.”)²⁷.

Moreover, the decision of the court of appeals improperly ignores the significance of Anglo-Dutch’s October 17, 2000 letter to Greenberg Peden. Anglo-Dutch signed and returned that letter the same day it returned the contingency-fee agreement and expressly stated its understanding in the letter that the “Agreement [was] *between Greenberg Peden P.C. and Anglo-Dutch.*”²⁸ Anglo-Dutch’s contemporaneous letter, which refers to the contingency agreement and is absolutely clear on the identity of the parties, dictates the proper interpretation of the fee agreement. *See Becker v. Lindsley*, 154 S.W.2d 892, 895 (Tex. Civ. App.—Dallas 1941, writ ref’d w.o.m.) (explaining that written instruments executed ten days apart but dealing with the same subject matter were contemporaneous transactions that should be construed together); *DeWitt County Elec. Co-op, Inc. v. Parks*, 1 S.W.3d 96, 102 (Tex. 1999) (holding that writings pertaining to the same transaction

²⁶ 3 RR 64-66.

²⁷ *See also Sw. Bank v. Info. Support Concepts, Inc.*, 149 S.W.3d 104, 109 (Tex. 2004) (emphasizing the importance of honoring rules designed to “promot[e] certainty and predictability in commercial transactions” (quoting *Putnam Rolling Ladder Co. v. Mfrs. Hanover Trust Co.*, 546 N.E.2d 904, 908 (N.Y. 1989))).

²⁸ 3 RR 67-68 (emphasis added).

“will be considered together, even if they were executed at different times and do not expressly refer to one another”).

In contrast, the only textual bases for the appellate court’s decision is Swonke’s repeated use of the singular pronoun “I” and the fact that, despite appearing on the letterhead and signature block, Greenberg Peden’s name does not appear in the body of the letter. *See Anglo-Dutch Petroleum Int’l, Inc. v. Greenberg Peden, P.C.*, 267 S.W.3d 454, 461 (Tex. App.—Houston [14th Dist.] 2008, pet. filed). But the appellate court’s reliance on pronouns is inconsistent and unreasonable. The court’s opinion makes no effort to reconcile the fact that, in addition to using the singular pronoun “I,” the agreement also employs the singular pronoun “you” in instances seeming to refer to Van Dyke individually. *See, e.g.*, 3 RR 64-66 (“This letter memorializes our agreement with respect to me assisting *you* and/or the companies which *you* control.” (emphasis added)). Applied uniformly, “you” would apply to statements that “*you* [Van Dyke] have executed a Fee Agreement” and that the fees would be “receive[d] from *you* [Van Dyke].” 3 RR 64-66 (emphasis added); *see also* 6 RR 173-76 (Swonke’s concession that “you” refers to Anglo-Dutch, not Scott Van Dyke).

Unless we are to believe that Van Dyke was personally responsible for paying the legal fees (and that, in suing Anglo-Dutch, Swonke sued the wrong person), the only reasonable interpretation of the fee agreement is that, as is common with business people acting for their principals, Swonke’s use of personal pronouns was meant to personalize

the letter, not to cut Greenberg Peden and Anglo-Dutch out of the transaction.²⁹ The factors relied on by the court of appeals (the use of personal pronouns and the absence of the firm's name in the body of the letter) do not support the result the court reached. Instead, reliance on those factors produces an improbable conclusion that no one is advocating: that the rights and duties regarding payment were exchanged personally between Swonke and Van Dyke.³⁰ The court of appeals should not have disregarded the textual and commercial significance of the letterhead, the textual and commercial significance of the signature block, and Anglo-Dutch's October 17, 2000 letter.

B. The Court Should Announce Appropriate Standards Specifically Relevant to Interpreting Attorney-Client Fee Agreements, Including the Reasonable-Client Interpretive Canon and an Avoidance Canon for Proposed Constructions That Would Implicate Ethical Violations.

In analyzing the decisions of the trial court and court of appeals, the *amici* “regret to find that the law was powerless to enforce the most elementary elements of commercial morality.” *Reddaway v. Banham*, [1896] A.C. 199, 209 (H.L.) (Herschell, L.). Equally disturbing, however, is that in addition to ignoring the commercially reasonable interpretation of the fee agreement, their rulings also fail to apply the relevant canons for construing attorney-client fee agreements, each of which would have independently defeated Swonke's contract claim. In the context of attorney-client fee agreements, special rules of interpretation apply to safeguard the highly fiduciary nature

²⁹ See *Frost Nat'l Bank*, 165 S.W.3d at 312 (holding that courts must “consider the entire writing and attempt to harmonize and give effect to all the provisions of the contract” and analyze “the provisions with reference to the whole agreement”); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) (same).

³⁰ After all, it would have been acceptable for Van Dyke, a nonclient, to pay the legal fees of the client, Anglo-Dutch. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §134.

of the relationship and to minimize attorney-client disputes, which undermine faith in the legal system. *See, e.g., Hoover Slovacek, LLP v. Walton*, 206 S.W.3d 557, 565 (Tex. 2006); *Wampold v. E. Eric Guirard & Assocs.*, 442 F.3d 269, 273 (5th Cir. 2006). Those canons include interpreting fee agreements from the perspective of a reasonable client and looking to the rules of professional responsibility to determine whether a proposed construction of a fee agreement is reasonable.

The perspective of the reasonable *client* is the touchstone for interpreting fee agreements. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §18(2) (“A tribunal should construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it.”)³¹ Adopting the view of a reasonable client means that true ambiguities about fees should generally be resolved against lawyers and in favor of clients. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §8.9, at 8-24 (3d ed. 2000 & Supp. 2003); *see also* Anglo-Dutch Br. 35-36 & n.3 (collecting cases).³² “Unfortunately, the court of appeals analyzed the doctrine of *contra preferentem* as a device of last resort and acknowledged no need to consider this doctrine in a different light when the contract is between an attorney and client.”³³

³¹ *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §18 cmt. h (explaining that, given prospective from which fee contracts are judged, “the lawyer bears the burden of ensuring that contract states any terms diverging from a reasonable client’s expectations”), §38 cmt. d (prescribing that fee contracts are to be “construed as a reasonable client would have construed it, considering the contract in the circumstances in which it was made”).

³² Clearly, a rule of reason still applies, and reasonable clients should expect to pay a reasonable fee and not receive a windfall of free legal services. 1 HAZARD & HODES, *supra*, §8.9, at 8-24.

³³ Eads Br. 16.

What the appeals court misunderstood and never confronted head-on, however, is that the reasonable-client canon does not construe ambiguous agreements against a lawyer because he or she is the *drafter* (that is, *contra preferentem*). Rather, fee agreements with true ambiguities are construed against the lawyer because the lawyer is a *fiduciary*. The opinion of the court of appeals fails to recognize that distinction, overlooking this Court's precedents. As the Court has repeatedly held, ambiguities in attorney-client contracts are construed against the lawyer and in favor of the client because, unlike in a typical commercial contract in which the parties negotiate at arms' length, a lawyer contracting with a client (whether individually or on behalf of a firm) owes strict fiduciary duties to protect the client's interests. *See Hoover Slovacek*, 206 S.W.3d at 559; *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 93 (Tex. 2001); *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 859 (Tex. 2000).

Viewed from a reasonable client's perspective, Anglo-Dutch did not have fair warning that the agreement was with Swonke personally rather than with the firm:

- the letterhead and signature block indicated the firm was the party to the fee agreement (3 RR 64-66);
- Swonke had previously told Anglo-Dutch that one should use personal stationary, not corporate stationary, when conducting personal business (3 RR 62-64, 87-88);
- Anglo-Dutch had a lengthy preexisting relationship with Greenberg Peden and had always been billed by the firm rather than by Swonke, even when Swonke did all the work (3 RR 80; 6 RR 158);
- the expenses for the Halliburton–Ramco litigation were invoiced by Greenberg Peden and not by Swonke (PX 55; 4 RR 25-26);
- all of Swonke's work for Anglo-Dutch while at Greenberg Peden had been performed through and on behalf of Greenberg Peden (3 RR 80-81; 7 RR 105-07); and

- Swonke did nothing to contradict Anglo-Dutch’s October 17, 2000 letter, which contained a clear statement of the identity of the parties to the fee agreement (3 RR 128-29; 6 RR 179-82).

Indeed, the Court need not make a guess about how a reasonable client would have interpreted the agreement. Anglo-Dutch’s October 17, 2000 letter gives the answer: “the Agreement [is] between Greenberg Peden P.C. and Anglo-Dutch.” PX 2; 3 RR 67-68. Unless the Court is willing to hold that Anglo-Dutch’s interpretation was unreasonable or atypical of how most clients would have interpreted the situation, Anglo-Dutch’s actual conduct (occurring years before the dispute arose) reveals the appropriate way to construe the contract. In reaching that conclusion, it is also important to note that Swonke made no effort to explain that this fee agreement, unlike any he had ever asked Anglo-Dutch to execute, would be with him personally.³⁴

Independently, it is appropriate to consider the Texas Disciplinary Rules of Professional Conduct to decide whether Swonke’s interpretation of the agreement is reasonable. Although the disciplinary rules do not define standards for civil liability or give rise to private claims, they are “rules of reason”³⁵ to be used to analyze whether an attorney-client fee agreement is ambiguous. *Wampold*, 442 F.3d at 273. In *Wampold*, the Fifth Circuit ruled the fee agreement was unambiguous, applying Louisiana’s analogue to Texas’s rule 1.04(d) in rejecting the lawyer’s interpretation of the fee agreement:

³⁴ See, e.g., *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 95-96 & n.10 (Tex. 2001) (holding that lawyers must take care to clarify contract terms that might diverge from a reasonable client’s expectations, particularly any term the lawyer might invoke to the client’s detriment).

³⁵ TEX. DISCIPLINARY R. PROF’L CONDUCT preamble cmt. 10.

[The] Rules of Professional Conduct impose strict requirements on contingency-fee agreements. Rule 1.5(c) provides: “A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined.” Rule 1.5(c) is, in effect, a heightened specificity standard for contingency-fee agreements, necessitated by the sound public policy attempting to minimize attorney-client fee disputes. Again, *these concerns counsel against [the lawyer’s] interpretation.*

Wampold, 442 F.3d at 273 (emphasis added).³⁶

Here, Swonke’s interpretation of the agreement would implicate ethics violations. Like the lawyer in *Wampold*, Swonke failed to satisfy rule 1.04(d)’s heightened specificity requirements for contingency-fee agreements, having neglected to clarify the method for determining the fee—namely, whether Anglo-Dutch would be obligated to pay Swonke individually under the October 2000 agreement for hours worked at a firm with a separate fee agreement already in place. *See* TEX. DISCIPLINARY R. PROF’L CONDUCT 1.04(d). Further, Swonke did not explain to Anglo-Dutch the effect his decision to join a new firm with a preexisting contingency-fee agreement for the same litigation would have on the fee calculation, breaching his duty under rule 1.03 to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” TEX. DISCIPLINARY R. PROF’L CONDUCT 1.03(b); *see also Hoover Slovacek*, 206 S.W.3d at 565. And, critically, Swonke’s interpretation of the October 16, 2000 contingency-fee letter agreement likely constitutes a violation of rule 7.01’s prohibition against using a firm’s name and letterhead in a

³⁶ Further, the disciplinary rules are an expression of public policy, such that a contract violating them may be held unenforceable as against public policy. *See Bond v. Crill*, 906 S.W.2d 103, 106 (Tex. App.—Dallas 1995, no writ); *Polland & Cook v. Lehmann*, 832 S.W.2d 729, 736 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

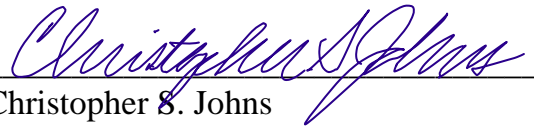
misleading way. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 7.01. Because Swonke's view of the contracting parties' identities arguably involves ethical violations, his interpretation is "a construction which is unreasonable, inequitable, and oppressive" and must be rejected. *See Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987).

When a lawyer has breached ethics or fiduciary obligations in the formation of the attorney-client fee agreement, or when a judge refuses to apply the proper standards for interpreting such agreements, it is no excuse that a jury in a particular case has found in favor of the lawyer. The bench and bar have the ultimate duty to ensure that their members uphold their professional obligations. When we cease to perform that duty, we become just another business governed by marketplace morality and cease to be a profession. The *amici* hope the Court will resist that movement and instead reaffirm the special rules of construction that apply to fee agreements between attorneys and clients.

PRAYER

For these reasons, the *amici curiae* ask the Court to grant Anglo-Dutch's petition for review and to provide clear standards for interpreting attorney-client fee agreements.

Respectfully submitted,



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