

ETHICS IN REAL ESTATE PRACTICE
MORTGAGE LENDING AND SERVICING INSTITUTE

CONTINUING LEGAL EDUCATION PROGRAM
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ETHICAL ISSUES FOR REAL ESTATE LAWYERS

Legal malpractice claims are on the rise. As several studies have shown, since 1960, there has been a significant increase in legal malpractice claims. Mallen and Smith, Legal Malpractice, Vol. 1 p. 22 Ed., Thompson West (2005 Ed.).

As an attorney who defends lawyers in legal malpractice cases, I can attest that, in Texas since 1988, there has been a significant increase in the number and severity of legal malpractice claims. It is my belief that one reason for this increase is that, due to tort reform legislation, it is much harder to sue doctors. This has led many plaintiffs' attorneys, who used to sue doctors, to look to sue other professional targets such as lawyers, accountants and architects.

It is also my belief that the advent of the internet has led to an increase in the number of legal malpractice claims. If you do a Google search of Dallas legal malpractice lawyers, you will find approximately 10 web sites put up by attorneys who are obviously looking for plaintiff legal malpractice cases. The same is true if you do a similar search for Houston.

In many of these web sites, the soliciting lawyer provides an expansive description of the fiduciary duty a lawyer owes his client. In many of these web sites, a soliciting lawyer asks whether the reader has been injured by his lawyer. Many of these web sites contain links by which the reader can send the soliciting lawyer an email describing the potential claim.

In this article I plan to address certain issues that I have seen repeatedly arise in defending lawyers. These are legal malpractice issues, fiduciary duty issues and attorney fee issues.

I. Fiduciary Duty

As an attorney, you owe your client a fiduciary duty. This fiduciary duty is one of the highest duties found in the law. The relationship between attorney and client has been held to be highly fiduciary. *See, e.g., Archer v. Griffith*, 390 S.W.2d at 739 (Tex. 1964) ("The relation between an attorney and his client is highly fiduciary in nature, and their dealings with each other are subject to the same scrutiny, intendments and imputations as a transaction between an ordinary trustee and his cestui que trust. The burden of establishing its perfect fairness, adequacy, and equity is thrown upon the attorney....")

If a client sues an attorney for breach of fiduciary duty, and the case actually goes to trial, the jury instruction that will likely be submitted to the jury on breach of fiduciary duty will be close to the following which comes directly from the Texas Pattern Jury Form:

JURY QUESTION

Did the defendant lawyer comply with his fiduciary duty to the client?

As the client's attorney, the attorney owed a fiduciary duty to the client. To prove the attorney complied with his duty, the attorney must show:

- 1) the transaction in question was fair and equitable to the client;
- 2) the attorney made reasonable use of the confidence that the client placed in the attorney;
- 3) the attorney acted in the utmost good faith and exercised the most scrupulous honesty toward the client;
- 4) the attorney placed the interest of the client before the attorney's own interest, did not use the advantage of the attorney's position to gain any benefit for himself at the expense of the client, and did not place himself in any position where his self-interest might conflict with his obligations as a fiduciary; and
- 5) the attorney fully and fairly disclosed all important information to the client concerning the transaction (emphasis added).

Answer: _____

The foregoing jury instruction comes straight out of the Texas Pattern Jury Charge.

A. Damages/Fee Forfeiture

If a client sues a lawyer for breach of fiduciary duty:

- 1) that client can seek all damages proximately caused by the lawyer's breach of fiduciary duty; or
- 2) that client can seek a forfeiture of some or all of the attorneys' fees paid to the lawyer.

See Burrow v. Arce, 997 S.W.2d 229 (Tex. 1998).

In *Arce*, a Phillips 66 chemical plant explosion killed 23 people. Subsequently, five attorneys represented 126 plaintiffs on a contingent attorney fee basis against Phillips 66. The case was settled for \$190 million. Out of this \$190 million, the attorneys received \$60 million.

Later, 49 of these plaintiffs sued the five attorneys contending the attorneys had breached their fiduciary duty to the clients by:

- 1) making an aggregate settlement of all the clients' claims without the clients' consent; and

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