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ARTICLE

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Why Your Secretary Is Really Worth a Million Dollars: Exploring the Harsh Penalty for Not Proofreading Your Fee Agreements in *Anglo-Dutch Petroleum v. Greenberg Peden*

Abstract. This Article examines the Texas Supreme Court's decision in *Anglo-Dutch Petroleum International, Inc. v. Greenberg Peden, P.C.* Next, this Article discusses the decision in light of other cases dealing with attorney–client contract issues. Then, an explanation of why the court's decision is inconsistent with other opinions is provided. This Article next analyzes the long-term effects of the *Anglo-Dutch* decision and the lessons to be learned from the case about drafting contracts and lawyers' obligations to inform clients of material terms. Finally, this Article suggests that the court's decision decreases the legal protection extended to lawyers and holds them closer to a strict-scrutiny standard regarding candor, while encouraging predatory conduct by clients.

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I. INTRODUCTION

Contingent-fee contracts, long associated exclusively with personal-injury cases, are now often chosen by sophisticated parties as a preferable way of handling litigation in many different contexts.[1] A contingent-fee arrangement clearly offers "the potential of a greater fee than might be earned under an hourly billing method" to compensate the attorney for the risk of receiving "no fee whatsoever if the case is lost."[2] The failure to make the entire nature of the contingent-fee agreement *absolutely* clear to the client, however, can be fatal to even the most deserving of lawyers whose actions happen to result in gigantic windfalls for their clients.[3] The recent decision of *Anglo-Dutch Petroleum International, Inc. v. Greenberg Peden, P.C.*[4] allowed the Supreme Court of Texas to clear up several outstanding issues regarding attorney–client contracts but also appears to have created some unfortunate uncertainty regarding how Texas lawyers should deal with their clients.[5]

II. BACKGROUND

A. *The Facts of* Anglo-Dutch Petroleum International, Inc. v. Greenberg Peden, P.C.

The key facts in *Anglo-Dutch* were barely contested by the parties.[6]

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1. *See* Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 561 (Tex. 2006) (indicating that businesses and sophisticated parties have increased their use of contingent-fee contracts). A contingent-fee agreement's chief purpose is still "to allow plaintiffs who cannot afford an attorney to obtain legal services by compensating the attorney from the proceeds of any recovery." *Id.*; *see* Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997) (explaining the risks and rewards for a plaintiff and attorney who engage in a contingent-fee agreement).

2. *Arthur Andersen*, 945 S.W.2d at 818.

3. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5 (2002) (requiring the contingent-fee agreement to clearly explain the client's expense liability); Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 96 (Tex. 2001) (construing "any amount received" in the contingent-fee contract against the lawyer).

4. Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445 (Tex. 2011).

5. *Compare id.* at 452 (rejecting consideration of any extrinsic evidence showing that the agreement was with the attorney individually, rather than with the law firm, when the fee agreement was typed on business letterhead), *with* Lopez v. Muñoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 861 (Tex. 2000) (allowing extrinsic evidence to demonstrate the law firm had reserved a right to a higher fee in case of an appeal, even though the parties settled, because the opposing party perfected an appeal by paying a bond).

6. *See Anglo-Dutch*, 352 S.W.3d at 447 (revealing the consensus among the parties that the client initially approached by Greenberg Peden to represent Anglo-Dutch and was rejected before asking Swonke to assist in the litigation).

Gerard J. Swonke, an of-counsel attorney at the Greenberg Peden firm, was responsible for bringing Anglo-Dutch Petroleum International, Inc. to the firm as a client.[7] Swonke did a great deal of work for Anglo-Dutch at Greenberg Peden, including drafting a confidentiality agreement between Anglo-Dutch and two other parties, Halliburton Energy Services, Inc. and Ramco Oil & Gas, Ltd., regarding the development of a new oil and gas field.[8] Swonke also had a personal friendship with the president of Anglo-Dutch, Scott Van Dyke; thus, when the time came to file litigation regarding the confidentiality agreement, Van Dyke turned once again to Swonke and Greenberg Peden to provide the representation.[9] The problem, however, was that Anglo-Dutch was already far behind on payments to the firm, and Anglo-Dutch knew they would not be able to afford to pay hourly fees for the representation in the new suit.[10] Therefore, Anglo-Dutch proposed that Greenberg Peden represent Anglo-Dutch on a 20% contingent-fee interest.[11] Greenberg Peden *declined* representation on the case because Anglo-Dutch was behind in its obligations, and the firm felt that it did not have the resources necessary to properly handle the case on a contingent basis.[12] Therefore, Swonke referred Van Dyke to the firm of McConn & Williams, which agreed to take the case on the 20% contingency-fee basis.[13]

Suit was filed against Halliburton and Ramco (the underlying case), with Van Dyke and the attorneys at McConn & Williams frequently contacting Swonke for advice and assistance on issues that arose during the litigation.[14] Swonke provided unpaid help for a number of months before determining he would need to be paid for the time spent assisting with the litigation.[15] McConn & Williams declined to pay him and indicated that "its fee interest was not large enough" to encompass an additional cut to Swonke.[16] Even though Greenberg Peden had declined representation,

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7. *Id.* Swonke had a fee-sharing agreement with Greenberg Peden whereby the law firm would bill the clients, deduct administrative expenses from the collected fees, and pay the balance to Swonke. Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C., 267 S.W.3d 454, 459 (Tex. App.—Houston [14th Dist.] 2008), *rev'd on other grounds*, 352 S.W.3d 445.

8. *Anglo-Dutch*, 352 S.W.3d at 446–47.

9. *Id.* at 447.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C., 267 S.W.3d 454, 460 (Tex. App.—Houston [14th Dis.] 2008), *rev'd on other grounds*, 352 S.W.3d 445.

15. *Id.*

16. *Id.*

Van Dyke himself approached Swonke, asked him to assist McConn & Williams, and agreed to pay him for continuing to provide assistance.[17] Van Dyke suggested a contingent-fee agreement because Anglo-Dutch could not afford an hourly rate and eventually presented a formula that would pay Swonke based upon a ratio of hours Swonke spent on the case relative to those spent by McConn & Williams.[18]

Generally, when Swonke handled cases independently, he used personal stationary with the title "The Law Offices of Gerard J. Swonke Attorney at Law" and would sign the attorney–client fee agreement individually.[19] In this instance, however, the attorney–client contract was placed on Greenberg Peden letterhead and contained a Greenberg Peden signature block.[20] Despite this, the first sentence of the contract provided that "[t]his letter memorializes our agreement with respect to *me* assisting you and/or the companies which you control (Anglo-Dutch) and the law firm of McConn & Williams, LLP regarding the above-referenced matter."[21] Thereafter and throughout the contract, Swonke used personal pronouns such as "me," "my," and "I" in describing his fee arrangement and how the fees would be calculated.[22] The ultimate fee agreement allowed Swonke to charge a ratio of the hours he spent on the case relative to those spent by McConn & Williams.[23] Swonke signed the proposed fee agreement, and

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17. *Id.*

18. *See id.* (detailing the arrangement for compensation between Van Dyke and Swonke). Swonke's agreement as an of-counsel attorney with Greenberg Peden obligated him to offer the firm the right of first refusal over cases but allowed him to independently take cases that the firm declined. *Anglo-Dutch*, 352 S.W.3d at 447. Even when Swonke represented a client individually, Greenberg Peden handled the administrative duties on the case, including sending bills, for which the law firm kept 10% of any fee generated by Swonke. *Id.*

19. *Id.*

20. *Id.* at 447–48. The fact that the fee agreement was on Greenberg Peden letterhead rather than Swonke's own personal stationary was crucial to the Texas Supreme Court's determination that Swonke did not represent Anglo-Dutch independently but rather through Greenberg Peden. *See id.* at 452 (noting that the fee agreement was clearly with the Greenberg Peden law firm and not with Swonke individually).

21. *Id.* at 447 (emphasis added).

22. *Id.* Examples of personal pronoun use include: "I agree to assist . . . ."; "I will not be responsible for any expenses other than those I may personally incur"; "[T]he proportions under which my fees shall be calculated will be the ratio of the hours I have spent . . . ."; "[I]f . . . I spend [ninety] hours of my time towards the lawsuit, then . . . I would be entitled to receive from you . . . ."; "[Y]ou agree that I shall be entitled to the benefit of such amendment." *Id.* at 447–48.

23. *See* Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C., 267 S.W.3d 454, 460 (Tex. App.—Houston [14th Dis.] 2008), *rev'd on other grounds*, 352 S.W.3d 445 (detailing the arrangement for compensation between Van Dyke and Swonke). Swonke went further, even giving an example of how the fees would be calculated:

> For example, if McConn & Williams' attorneys spend 1,000 hours on the lawsuit after the date

it was delivered to Van Dyke.[24]

The next day, Van Dyke received the fee agreement, signed it, and returned it to Swonke with an attached letter.[25] The letter attached a copy of Anglo-Dutch's fee agreement with McConn & Williams and noted that "[t]his fee agreement with McConn & Williams, LLP provides the basis for the Agreement between Greenberg Peden P.C. and Anglo-Dutch."[26] Swonke agreed that he received the letter but later testified that he "did not read it and thus did not respond."[27]

The underlying litigation wore on, additional counsel was eventually hired, and new fee arrangements were made.[28] Meanwhile, "Swonke [continued to] work on the case, and . . . Greenberg Peden invoiced Anglo-Dutch for expenses" on Swonke's behalf.[29] A year later, the Greenberg Peden firm dissolved, and Swonke became an of-counsel lawyer at McConn & Williams, taking the Anglo-Dutch matter with him without any objection from Van Dyke.[30] Because of his separate agreement regarding the litigation, Swonke's arrangement with McConn & Williams as an of-counsel attorney did not allow him to share in any fees McConn & Williams obtained.[31]

The underlying case against Halliburton and Ramco eventually was tried before a jury that returned a plaintiff's verdict in excess of $70

> the lawsuit was filed and I spend 90 hours of my time toward[] the lawsuit, then by rounding up to the nearest whole number, I would be entitled to receive from you 2% (10% of 20%) of the gross revenues and other benefits recovered, if any, from this lawsuit.

Anglo-Dutch, 352 S.W.3d at 448. Initially, Swonke favored a simple percentage of the recovery, but ultimately agreed to Van Dyke's proposed complex fee structure with the addition of a rounding feature to avoid "decimals out there to a long degree." *Anglo-Dutch*, 267 S.W.3d at 478–79 (quoting Swonke's trial testimony) (internal quotation marks omitted).

24. *Anglo-Dutch*, 352 S.W.3d at 448.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 449.

29. *Id.* at 448.

30. *Id.* at 448–49. Swonke's letter to Van Dyke informing him of Swonke's change of firms continued using personal pronouns and announced his plan to continue working on the legal matter for Anglo-Dutch. *Id.* at 449 n.3.

31. *See id.* at 456 (Lehrmann, J., dissenting) (agreeing that Swonke and McConn & Williams would not share the firm's fees). Swonke informed Van Dyke of his departure from Greenberg Peden and the new of-counsel position with McConn & Williams. *Id.* However, it was not communicated to Van Dyke or Anglo-Dutch that Swonke planned to continue working on the case in an individual capacity rather than as an attorney of the McConn & Williams firm after his move. *See id.* (recognizing that "McConn & Williams and Swonke agreed that he would not share in the firm's fees from the Halliburton lawsuit, but did not relay that agreement to Anglo-Dutch").

million, and a post-verdict settlement of $51 million was reached.[32] By that point, Anglo-Dutch's attorney's fees and expenses had reached $20 million.[33] Just before the settlement was funded, Swonke informed Van Dyke that he expected to be paid not only for the 277 hours he worked while at Greenberg Peden, but also for the 1,022 hours he worked at McConn & Williams.[34] Van Dyke thereafter instructed that Swonke's name be removed from the wiring instructions when the settlement was funded and demanded that Swonke obtain a release from Greenberg Peden regarding any claim of fees for the case.[35] Swonke obtained and provided the release, which showed that Greenberg Peden had assigned any interest it had in the fee agreement to Swonke.[36] Ultimately, Van Dyke met with Swonke and offered him $293,338.85 for his work while at Greenberg Peden, but he refused to pay Swonke for his work while at McConn & Williams because he believed it was covered by the separate fee agreement with that firm.[37]

Later, on the very day of the meeting between Swonke and Van Dyke, Anglo-Dutch sued Swonke for breach of fiduciary duty and filed a declaratory-judgment action seeking a finding that the fee agreement was with Greenberg Peden and not with Swonke individually.[38] Swonke responded by alleging breach of contract and fraud, claiming he was

32. *Id.* at 449 (majority opinion); *see id.* at 457 (Lehrmann, J., dissenting) (detailing the results of the Halliburton and Ramco legal dispute).

33. *Id.* at 449 (majority opinion).

34. *See id.* (noting that Swonke contributed 277 hours of work as an of-counsel attorney with Greenberg Peden and 1,022 hours while employed at McConn & Williams, respectively).

35. *See id.* at 457 (Lehrmann, J., dissenting) (describing the events leading up to the disbursement of attorney fees to the law firms and counsel who provided representation).

36. *See id.* (pointing to the cooperation between the dissolved firm of Greenberg Peden and Swonke whereby the firm agreed to the assignment, provided the firm receive a limited percentage, thus complying with the original agreement). Other lawyers involved in the case even sent letters to Van Dyke indicating that Swonke's help had been "invaluable" in the successful prosecution of the case and that his submitted hours were reasonable. Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C., 267 S.W.3d 454, 462 (Tex. App.—Houston [14th Dist.] 2008), *rev'd on other grounds*, 352 S.W.3d 445. Moreover, Swonke offered to have an audit of his hours if Van Dyke felt it was necessary, but the audit was never requested. *Id.*

37. *See Anglo-Dutch*, 352 S.W.3d at 449 (showing the interactions between Swonke and Van Dyke regarding payment and the difficulty caused by the initial lack of communication when Swonke joined McConn & Williams as an of-counsel attorney, yet continued working on the Anglo-Dutch case in an individual capacity).

38. *See id.* (noting the timing and description of events that led to the dispute now before the court). Van Dyke also met with separate counsel concerning Swonke's fee agreement prior to his meeting with Swonke to discuss the compensation agreement. *See Anglo-Dutch*, 267 S.W.3d at 463 (detailing Van Dyke's meetings concerning payment to Swonke for his legal assistance to Anglo-Dutch under their fee arrangement).

personally a party to the fee agreement and was defrauded by Van Dyke.[39]

When the contract matter came to trial, Swonke testified that the use of the firm letterhead and signature block was a mistake.[40] Concluding the agreement to be ambiguous, the court admitted extrinsic evidence regarding the parties' relationship and the intended nature of the agreement.[41] After a two-week trial, the jury found Van Dyke had not defrauded Swonke.[42] However, the jury specifically found the fee agreement had been with Swonke individually, Swonke had met his fiduciary duties, and Swonke was entitled to $1 million in damages.[43]

The Fourteenth Court of Appeals[44] unanimously affirmed the trial court, concluding that the fee agreement was ambiguous, that the trial court had correctly submitted the issue to the jury, and that legally and factually sufficient evidence supported the jury's verdict in favor of Swonke.[45] Anglo-Dutch appealed that ruling to the Supreme Court of Texas, which reversed and remanded judgment in favor of Anglo-Dutch.[46]

B. *The Texas Supreme Court's Holdings*

The majority of the court[47] noted that the issue of "[w]hether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered."[48] The court believed a key factor was that this particular contract arose out of the attorney–client context

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39. *See Anglo-Dutch*, 352 S.W.3d at 449 (relating to the issue of disputed payment for services rendered between Van Dyke and Swonke).

40. *See id.* (summarizing Swonke's testimony relating to the fee-agreement contract).

41. *See id.* (concluding that the contract was ambiguous and allowing a jury to hear the parties' disputed claims).

42. Upon receiving the verdict from the jury, the trial court accepted it, as did the subsequent reviewing court. *Id.*

43. *Id.* The jury's verdict essentially meant that Swonke would have been paid $1,058 per hour for his 277 hours of work while at Greenberg Peden and "only" $978.47 for his 1,022 hours of work at McConn & Williams. *Id.*

44. Justices Fowler and Boyce and Senior Justice Hudson unanimously affirmed the trial court's judgment with Justice Boyce writing the opinion. Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C., 267 S.W.3d 454 (Tex. App.—Houston [14th Dist.] 2008), *rev'd*, 352 S.W.3d 445.

45. *See id.* at 485 (affirming the trial court's decision).

46. Justice Wainwright wrote a separate opinion, concurring in part and dissenting in part; Justice Lehrmann wrote the dissenting opinion, joined by Justices Medina and Green. *Anglo-Dutch*, 352 S.W.3d at 453.

47. Justice Hecht wrote the court's majority opinion, with Chief Justice Jefferson and Justices Johnson, Willett, and Guzman joining. *Id.* at 446.

48. *Id.* at 449–50 & n.6 (quoting David J. Sacks, P.C. v. Haden, 266 S.W.3d 447, 451 (Tex. 2008) (per curiam)) (internal quotation marks omitted).

because "a lawyer's fiduciary duty to a client covers contract negotiations between them," thus requiring such contracts to be "closely scrutinized."[49] The court indicated that part of the lawyer's duty in such instances is to clearly communicate to the client "all material facts" relating to the fee agreement.[50] The court stressed that this duty was only one of "reasonable clarity . . . not perfection" and concluded that "not every dispute over the contract's meaning must be resolved against the lawyer."[51] However,

> the object is that the client be informed, and thus whether the lawyer has been reasonably clear must be determined from the client's perspective. Accordingly, we agree with the [Restatement (Third) of the Law Governing Lawyers] that "[a] tribunal should construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it."[52]

In turning to the facts, the court reiterated the limits to the use of surrounding circumstances to interpret the meaning of a contract because parol evidence cannot be used to create an ambiguity when the contract itself is unambiguous.[53] Here, the fee agreement was "plainly one with Greenberg Peden, not Swonke personally."[54] The court determined that the firm's letterhead and signature block "are not contradicted by the personal pronouns in the text" and did not suggest that Swonke would be working individually on the case at the exclusion of other attorneys within the firm.[55] In fact, according to the court, the use of the

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49. *Id.* at 450. The court cites to past Texas Supreme Court cases, noting that contracts drawn during an already existing attorney–client relationship must be closely examined, especially contracts that attempt to negotiate fee compensation. *Id.* at 450 n.8 (citing Keck, Martin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 20 S.W.3d 692, 699 (Tex. 2000); Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 cmt. e (2000)). An attorney is not prevented from contracting with a client during the existence of the attorney–client relationship as long as such agreement is "executed freely, voluntarily, and with full understanding by the client," but the courts will "scrutinize with jealousy" all such contracts because of the relationship between the parties. *Id.* (quoting *Archer*, 390 S.W.2d at 739). Note this attention is highlighted due to the ethical implications of such a particular negotiation. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18, cmt. e (acknowledging that special scrutiny is needed for fee contracts entered into after representation has begun).

50. *Anglo-Dutch*, 352 S.W.3d at 450.

51. *Id.* at 451.

52. *Id.* (last alteration in original) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18(2)).

53. *Id.* (quoting David J. Sacks, P.C. v. Haden, 266 S.W.3d 447, 450–51 (Tex. 2008) (per curiam)).

54. *Id.* at 452.

55. *Id.*

first-person-singular pronouns "indicate only inexact drafting," not that the contract was with Swonke individually.[56] The trial court had only allowed extrinsic evidence because it concluded that the contract was ambiguous.[57] However, the Supreme Court of Texas held that even the admitted evidence did not suggest that the parties "intended" something other than what was in the contract, and therefore, the contract was actually only between Anglo-Dutch and Greenberg Peden.[58]

In its conclusion, the court noted:

> Construing client[–]lawyer agreements from the perspective of a reasonable client in the circumstances imposes a responsibility of clarity on the lawyer that should preclude a determination that an agreement is ambiguous in most instances. Lawyers appreciate the importance of words and "are more able than most clients to detect and repair omissions in client[–]lawyer contracts." A client's best interests, which its lawyer is obliged to pursue, do not include having a jury construe their agreements.[59]

Therefore, the court remanded the case to the trial court.[60] The court's holding, while understandable as an ad hoc assessment of the reasonable fee amount any one lawyer [should receive] on a case, was arguably incorrect on a number of levels and provides a chance for mischief against

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56. *Id.* The court cited to differences in the meaning of the word "you" as sometimes referring to Van Dyke individually, sometimes only to Anglo-Dutch, and sometimes to both, depending on the context. *Id.*

57. *See id.* (asserting that extrinsic evidence is of little relevance because the Texas Supreme Court found the contract unambiguous, unlike the trial court).

58. *Id.* The Texas Supreme Court explained that, at all times, Swonke treated the case as though the original contract was between Anglo-Dutch and Greenberg Peden, rather than with Swonke individually. *Id.* at 452–53.

59. *Id.* at 453 (footnote omitted) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 cmt. h (2000)).

60. *Id.* at 453. Justice Wainwright filed a concurring opinion in which he urged that although attorneys have fiduciary duties to their clients and ambiguities should be construed against a lawyer as the drafter, such a rule does not mean that "an ambiguous contract should be designated clear and then enforced to a result that neither signer intended at the time he signed it." *Id.* at 455 (Wainwright, J., concurring and dissenting). Although he agreed with Justice Lehrmann's dissent on the issues, he felt the matter should be remanded to the trial court for an examination of the agreement in light of the fiduciary duties owed by the attorney. *Id.* Justice Lehrmann filed a dissenting opinion, joined by Justices Medina and Green. *Id.* at 455 (Lehrmann, J., dissenting). Justice Lehrmann agreed that when a contract is subject to multiple, reasonable interpretations, "a court should review an attorney[–]client contract from the perspective of a reasonable person in the client's circumstances." *Id.* However, Justice Lehrmann urged that the mere fact that a firm's letterhead and signature line is on the contract does not make the contract unambiguous. *Id.* Rather, the contract should be viewed in light of the undisputed evidence about the client's understanding of the firm's involvement. *Id.*

otherwise careful lawyers.[61] Although practitioners can now make some firm conclusions about how to draft any attorney–client contract in the future, the court's decision can be criticized in a number of ways.[62] First, the criticism.

III. THE RESULT OF THE *ANGLO-DUTCH* DECISION

A. *The* Anglo-Dutch *Decision Does Not Appear Consistent with Previous Opinions*

In *Lopez v. Munoz, Hockema & Reed*,[63] the plaintiffs brought suit against their attorneys for breach of fiduciary duties relating to a billing dispute arising out of the attorney–client contract.[64] The attorneys had essentially included a contractual provision allowing them an additional 5% contingent-fee recovery if the matter was "appealed to a higher court."[65] A disagreement arose when the defendant in the underlying case did no more than file an appeal bond during settlement negotiations to preserve the right to appeal in the event that settlement negotiations failed.[66] The underlying case was settled with no further appellate activity and the full amount of fees, including the additional 5% appeal fee, was paid to the representing attorneys.[67] The clients eventually sought repayment of the additional 5%, claiming that charging the additional fee

61. *Cf. id.* at 459 (reasoning that the attorney's fiduciary duties in examining a contract must also be weighed along with a "reasonable, not predatory, client's perspective").

62. Clarity and detail benefit both the lawyer and the client in drafting documents. *See id.* at 450 (majority opinion) (proposing benefits to the lawyer and client). By stating exactly what is agreed upon between the parties in the contract itself, the client is able to identify the person or entity to contact in the case of a dispute, whether that is the firm or the lawyer in a separate capacity. *See id.* (quoting Brief for Linda S. Eads, Southern Methodist University as Amicus Curiae Supporting Petitioner, *Anglo-Dutch*, 352 S.W.3d 445 (No. 08-0833)) (explaining the purpose of including details about representation in the agreement for the client). Further, the attorney will be certain as to whom the fees would be paid and whether the firm's malpractice insurance will cover any resulting lawsuit. *See id.* (acknowledging the importance to lawyers of having clarity in the terms of the contract).

63. Lopez v. Muñoz, Hockema & Reed, L.L.P., 22 S.W.3d 857 (Tex. 2000).

64. *See id.* at 859–60 (providing the background of the lawsuit).

65. *See id.* at 859 n.1 (relating the relevant part of the plaintiff's contingent-fee contract including a specified 45% contingent fee "if the case is appealed to a higher court"). The matter was not purely academic as the 5% interest equated to $750,000 because of the $15 million settlement in the case. *Id.* at 860.

66. *See id.* at 859 (explaining the defendant's filing of a cash deposit for the appeal in an effort to preserve the right to appeal in the event that the ongoing settlement negotiations fell through before the appeal deadline passed).

67. *See id.* at 860 (relating the settlement signing and lack of appellate action taken by Westinghouse).

was a breach of fiduciary duty, among other torts.[68] After the trial court granted summary judgment in favor of the lawyers, the court of appeals reversed, holding that the term "appealed to a higher court" meant something more than simply initiating the appellate process and that by charging the additional fee, the attorneys had breached their fiduciary duty.[69] In addressing the contractual issues, however, the Supreme Court of Texas noted that an "[a]mbiguity does not arise simply because the parties advanced conflicting interpretations of the contract; rather, for an ambiguity to exist, both interpretations must be reasonable."[70] After examining the contract's language, the court held that it was actually unambiguous because it was "not reasonably susceptible to more than one meaning."[71] Because an appeal was legally filed, the lawyers did not breach the contract by charging the additional amount; therefore, they could not have breached their fiduciary duty to their clients.[72]

In *Anglo-Dutch*, the Texas Supreme Court only cited to *Lopez* in a footnote, which simply referred to Justice Gonzalez's separate concurring and dissenting opinion.[73] The lack of reference to *Lopez* is particularly interesting considering the notable similarities between the two cases. In *Lopez*, as in *Anglo-Dutch*, the parties advanced conflicting interpretations of the contingent-fee agreement's terms.[74] The clients in both cases sought an interpretation of the contractual terms and claimed a breach of fiduciary duty by the lawyer attempting to protect a fee that he believed had been earned.[75] In *Lopez*, the court specifically stated that a matter was

68. *See id.* ("[T]hree years later, [the law firm] received a letter requesting that the firm refund the additional [5%] fee to the Lopez family.").

69. *See id.* (restating the appellate court's ruling on the appropriateness of the fee and the appropriate remedy). Both parties sought relief at the Supreme Court of Texas—the law firm on the breach of contract and breach of fiduciary duty findings, and the plaintiffs on the ground that the court of appeals should have gone further and forfeited the firm's entire fee in the matter because the breach of fiduciary duty was so egregious. *Id.*

70. *Id.* at 861 (citing Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd., 940 S.W.2d 587, 589 (Tex. 1996); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc., 907 S.W.2d 517, 520 (Tex. 1995)).

71. *Id.*

72. *See id.* (explaining that the plaintiffs' only stated grounds for breach of fiduciary duty was the breach of contract by charging the additional fee and because the court held there was no breach of contract, no stated grounds exist for plaintiffs to proceed on a breach of fiduciary duty claim).

73. *See* Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445, 450 n.7 (Tex. 2011) (reducing any reference to *Lopez* to a footnote and, even then, only citing to *Lopez* through another case that quoted language from *Lopez*).

74. *See id.* at 446 ("The parties dispute whether an attorney fee agreement is ambiguous."); *Lopez*, 22 S.W.3d at 859 (referring to "the contingent[-]fee contract that underlies this dispute").

75. *See Anglo-Dutch*, 352 S.W.3d at 449 (suing for a declaration that the plaintiff's interpretation was correct and for breach of fiduciary duty); *Lopez*, 22 S.W.3d at 860 (seeking a

ambiguous if "both interpretations are reasonable."[76] In *Anglo-Dutch*, the jury, the trial court, three appellate justices, and four Texas Supreme Court justices all decided, presumably reasonably, that Swonke's interpretation of the contract was reasonable.[77] Even standing alone, does that fact not show that some ambiguity existed that needed to be decided by the jury?

B. *The* Anglo-Dutch *Decision Does Not Make Sense When Applying the Facts to the Apparent Standards Announced*

Any reasonable person would agree that Swonke made a mistake in drafting the contract. While the actual terms of the contract were *exactly* what had been negotiated between the parties, Swonke failed to properly proofread the agreement before it left his desk.[78] As an attorney, he was responsible for the mistake and, in a perfect world, the court could easily conclude that Swonke made his own bed and should be expected to lay in it. On the other hand, while not precisely stated by the majority, the undoubted purpose of the "clarity rule" is to "protect clients from unscrupulous attorneys, reduce disputes, and create a predictable rule that is in the best interest of the legal system, individual clients, lawyers, and law firms."[79]

Unfortunately, the application of the new reasonable-clarity rule to the facts in *Anglo-Dutch* serves none of these purposes. This is not a situation where the client was misled by the terms of the contract, the amount or nature of the fee, how the fee would be calculated, or any of the other terms that would normally serve as the basis for a misunderstanding between an attorney and client. In fact, while one would anticipate the primary dispute between attorney and client to center around how a fee is to be calculated,[80] in *Anglo-Dutch*, the client's own "formula" was chosen to calculate the fee.[81] While patently unfair to the lawyer, if predictability

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refund for the contingent fee and suing for breach of fiduciary duty).

76. *Lopez*, 22 S.W.3d at 861.

77. *See Anglo-Dutch*, 352 S.W.3d at 449, 453 (noting the opinions of the courts and justices).

78. *See id.* at 452 (recognizing Swonke's use of firm letterhead as well as use of specific pronouns in drafting the agreement as evidence of an agreement between the client and the firm, not with Swonke individually).

79. *See id.* at 458 (Lehrmann, J., dissenting) (emphasizing the purpose for imposing a requirement of clarity on attorneys drafting fee agreements).

80. *See Lopez*, 22 S.W.3d at 860 (involving a client who contested the attorneys taking an additional 5% fee for appellate action when no action was taken beyond merely filing a cash deposit to preserve the right to appeal if settlement negotiations failed).

81. *See Anglo-Dutch*, 352 S.W.3d at 447 (noting that it was the client, Anglo-Dutch, that suggested the 20% contingent fee because it could not afford the hourly rates charged by the law firm).

is actually the goal, a general rule that "the lawyer loses" on any ambiguity would appear to be preferable. A bright-line rule would enforce the exact policies the court stressed in *Anglo-Dutch*.[82]

As it stands, however, there will be unending disputes over whether the lawyer did what was reasonably "clear enough" to meet a standard that can only be described as nebulous.[83] The court asserted that the determination of clarity is to be viewed from the perspective of a reasonable client[84] but then went on to effectively ignore the jury verdict that presumably reflected that very perspective.[85] Putting aside what appears to be an error in the court's holding, the question is: What can be learned from the opinion?

IV. THE EFFECTS OF THE *ANGLO-DUTCH* DECISION

A. *Attorney–Client Contracts Will Continue to Be Closely Scrutinized*

Despite what might otherwise be expected from the headlong race to protect clients from their own attorneys, there is no absolute prohibition on transactions between attorneys and clients during the existence of the attorney–client relationship. In fact, both Texas case law[86] and the disciplinary rules[87] specifically allow for such transactions. The trade-off for allowing contracts negotiated during an ongoing relationship is that they are "closely scrutinized" and are presumed to be invalid and unfair to the client.[88] For purposes of analyzing any such agreement, it will be

82. *See id.* at 451 (focusing on clarity from the client's perspective). Bright-line tests have historically been seen as important in attorney–client issues. *See, e.g.*, Barcelo v. Elliott, 923 S.W.2d 575, 578–79 (Tex. 1996) (adopting a bright-line test for privity, resulting in an attorney having no duty to beneficiaries of a will if the attorney's client is the testator).

83. *See Anglo-Dutch*, 352 S.W.3d at 451 (employing the inherently subjective standard of a reasonable client's perspective).

84. *See id.* (citing RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 18(2) (2000)).

85. *See id.* at 453 ("A client's best interests, which its lawyer is obliged to pursue, do not include having a jury construe [the client's] agreements.").

86. *See* Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964) (confirming that an attorney is not proscribed from contracting with clients during the attorney–client relationship).

87. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (Tex. State Bar R. art. X, § 9) (permitting an attorney to transact with a current client, providing certain specific criteria are met). The rule essentially provides that an attorney may not enter into a transaction with a client unless (1) the transaction is "fair and reasonable to the client"; (2) the transaction and terms "are fully disclosed in a manner which can be reasonably understood by the client"; (3) "the client is given a reasonable opportunity to seek the advice of independent counsel"; and (4) "the client consents in writing." *Id.* R. 1.08(a).

88. *See* Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 20 S.W.3d 692, 699 (Tex. 2000) ("Contracts between attorneys and their clients negotiated during the existence of the attorney[–]client relationship are closely scrutinized."); Wright v. Sydow, 173 S.W.3d 534, 548

considered unfair if the attorney "significantly benefits" at the expense of the client.[89] In other words, the agreement must be "perfectly fair, adequate[,] and equitable" so the client cannot claim the attorney "took advantage of the client's confidence to create an unfair agreement."[90] Of course, these strictures only apply when the transaction occurs during the course of the attorney–client relationship.[91] Agreements reached either before or after the attorney–client relationship are generally considered "arm's-length" transactions.[92]

(Tex. App.—Houston [14th Dist.] 2004, pet. denied) (pointing to the fiduciary nature of the attorney–client relationship as the reason for presuming contracts formed during the relationship are invalid or unfair).

89. *See* Judwin Props., Inc. v. Griggs & Harrison, 911 S.W.2d 498, 506 (Tex. App.—Houston [1st Dist.] 1995, no pet.) (noting that the test for when an attorney–client transaction is unfair is when the attorney benefits significantly at the expense of the client).

90. Lee v. Daniels & Daniels, 264 S.W.3d 273, 279 (Tex. App.—San Antonio 2008, pet. denied) (quoting Robinson v. Garcia, 804 S.W.2d 238, 251 (Tex. App.—Corpus Christi 1991) (Nye, J., concurring), *writ denied*, 817 S.W.2d 59 (Tex. 1991) (per curiam)) (placing the burden on the attorney to show he did not take unfair advantage in contracting with a client); Jacobs v. Middaugh, 369 S.W.2d 695, 698 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.) (placing the burden on the attorney "to show that the transaction was open and above board and that no advantage was taken of the client by reason of the transaction"); Barnes v. McCarthy, 132 S.W. 85, 87 (Tex. Civ. App.—Dallas 1910, no writ) (requiring an attorney to show a lack of undue influence and "that the transaction was as beneficial to the client as it would have been had the client dealt with a stranger"). Thus, for example, a transaction between an art collector and an attorney in which the art collector paid the attorney $175,000 to assist in marketing an art collection was held to be unfair and inequitable where the attorney did not have experience marketing art, the agreement was not specific regarding the services the attorney would provide, and the agreement entitled the attorney to his fee regardless of the number of hours worked or the resulted achieved. *See* Kormanik v. Seghers, No. 14-09-00815-CV, 2011 WL 2322369, at *9 (Tex. App.—Houston [14th Dist] June 14, 2011, no pet.) (concluding that the "$175,000 flat fee . . . was not dependent upon the amount of hours worked or the success of the efforts").

91. *See, e.g.*, *Wright*, 173 S.W.3d at 548 ("If the attorney[–]client relationship has been severed before the parties enter into an agreement, the presumption [that the agreement is invalid] does not apply.").

92. *See id.* (considering the agreement made after the termination of the attorney–client relationship as a valid arm's-length agreement); Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 255 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (acknowledging that the representation was conditioned upon the client's acceptance of the fee agreement, and because there was not acceptance of the fee agreement, there was no representation); Baldinger v. Schoettmer, No. 05-98-00239-CV, 2001 WL 185554, at *5 (Tex. App.—Dallas Feb. 27, 2001, no pet.) (not designated for publication) (affirming the trial court's ruling that there was no attorney–client relationship with respect to the transaction that formed the basis of the complaint); Biesel v. Furrh, No. 05-94-01429-CV, 1995 WL 447532, at *2–3 (Tex. App.—Dallas July 28, 1995, no writ) (not designated for publication) (expounding that the attorney–client relationship ended when the client died, and there was no extension of fiduciary duty to the deceased client's estate or to the executor of the estate). *But see* Nolan v. Foreman, 665 F.2d 738, 739 n.3 (5th Cir. 1982) (attaching fiduciary duties during preliminary consultations where the attorney had "a view toward undertaking representation").

In *Anglo-Dutch,* the Supreme Court of Texas reaffirmed that attorney–client contracts formed during the course of an attorney–client relationship will be subject to special scrutiny.[93] Having spouted that maxim, however, the court gave no further indication as to why it should apply to Swonke under the circumstances, much less how the deal Swonke struck with his client was anything other than fair and reasonable.[94]

First, the court seems to gloss over whether the necessary attorney–client relationship existed at the time the contract was executed so as to justify applying special scrutiny.[95] Although Swonke had represented Anglo-Dutch "on various matters for years" and had been involved in drafting the confidentiality agreement—which became the basis of the lawsuit—he was still simply its former counsel and possibly a material witness relating to the key documents.[96] Greenberg Peden stopped working on Anglo-Dutch matters due to the large outstanding balance, and nothing in the opinion indicates that Swonke did anything other than cease work at the same time, which was well before the contract in this case was negotiated.[97] As the court's opinion makes clear, Swonke was responsible for bringing Anglo-Dutch to Greenberg Peden and for doing "much of its work."[98] It necessarily follows that "much" of the more than $200,000 in unpaid fees reflected work that Swonke performed and for which he had received no compensation whatsoever.[99] While not

93. *See* Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445, 450 (Tex. 2011) ("Because a lawyer's fiduciary duty to a client covers contract negotiations between them, such contracts are closely scrutinized." (citing *Keck*, 20 S.W.3d at 699; Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 cmt. e (2000))).

94. *See id.* at 449–52 (concluding that because attorney–client agreements are examined with special scrutiny, a court should simply proceed to examine the fee agreement for clarity of the terms, but providing no further explanation of why the special scrutiny standard is relevant to the facts of the underlying agreement in this case).

95. *See id.* (stating that the court "[began] by considering what standards to apply in construing lawyer[–]client contracts" and then proceeding to apply those standards to the agreement in dispute with no further explanation as to why that standard should apply).

96. *See id.* at 446–47 (summarizing the history of the professional relationship between Anglo-Dutch and Swonke as counsel for Greenberg Peden).

97. *See id.* at 447 (recognizing that "Anglo-Dutch had fallen behind in its obligations to [Greenberg Peden], that the firm had decided not to accept further business from the company until it became current," and that after Greenberg Peden declined further representation, Swonke referred Anglo-Dutch to another firm, which took the case).

98. *See id.* ("Swonke had been responsible for Anglo-Dutch's initial engagement as a firm client and had done much of its work.").

99. *See id.* at 454 (Wainwright, J., concurring and dissenting) (providing that "Anglo-Dutch was over $200,000 behind in paying Greenberg Peden"). Anglo-Dutch recognized in its brief on the merits to the court that Swonke handled the majority of Anglo-Dutch's matters while he was counsel

suggesting that an attorney–client relationship only exists when the attorney is being paid, some recognition should be made to the fact that (1) the parties involved in this case were extremely sophisticated businesspersons[100] and (2) while clients would undoubtedly prefer their lawyers to work for free, it is neither reasonable nor practical. Even assuming that Swonke continued to have an attorney–client relationship with Anglo-Dutch (despite ceasing all work on their matters), at what point is it appropriate to question whether Anglo-Dutch should be able to continue to claim the benefits of the attorney–client relationship without the quid pro quo of actually paying for them?

Moreover, when the time came for Anglo-Dutch to find a lawyer to represent it in the Tenge Field case, which involved the dispute against Halliburton and Ramco, Greenberg Peden undisputedly turned them down flat.[101] Anglo-Dutch president, Van Dyke, plainly admitted at trial that he was aware Greenberg Peden would not represent Anglo-Dutch until the outstanding debt was paid.[102] At that time Van Dyke was also aware that Swonke was not representing Anglo-Dutch in any capacity, as evidenced by Swonke referring Van Dyke to another firm, which took the case.[103] Justice Wainwright pointed out in his separate opinion that Van

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for Greenberg Peden. Brief of Petitioner at 5–6, *Anglo-Dutch*, 352 S.W.3d 445, (No. 08–0833). Considering the payment scheme whereby Swonke was paid for his services only after Greenberg Peden was paid, Swonke likely worked many uncompensated hours on matters before the Anglo-Dutch versus Halliburton-Amoco dispute arose. *See id.* at 6 (explaining the payment process between Swonke and Greenberg Peden).

100. *See Anglo-Dutch*, 352 S.W.3d at 452 ("Van Dyke was not an unsophisticated client; indeed, it was he, not Swonke, who proposed the terms of the Fee Agreement."). Although the majority believed Van Dyke was a sophisticated party, the justices disagreed about the parties' levels of experience as referenced by the amicus brief filed on behalf of Anglo-Dutch's position. *See* Brief for Linda S. Eads, Southern Methodist University as Amicus Curiae Supporting Petitioner at 11, *Anglo-Dutch*, 352 S.W.3d 445 (No. 08-0833) ("Although the Respondents have painted the facts in this case to portray Anglo-Dutch as being sophisticated and thus beyond any overreaching by Swonke, the facts indicate a different conclusion."). The amicus curiae for Anglo-Dutch reasoned that Anglo-Dutch's inability to pay its legal bills and its requests for legal advice from Swonke indicates a "greater financial vulnerability and greater dependence on Swonke than portrayed by" Greenberg Peden and Swonke. *Id.* Despite the assertion that Anglo-Dutch was an inexperienced negotiator, the fact was admitted at trial that Van Dyke did have extensive experience negotiating as a significant part of his job as president of Anglo-Dutch. *Anglo-Dutch*, 352 S.W.3d at 461 (Lehrmann, J., dissenting) (detailing Van Dyke's sophistication in negotiations and rejecting the majority's opinion that the interpretation of contract terms presented by Anglo-Dutch was the only reasonable one).

101. *Anglo-Dutch*, 352 S.W.3d at 454 (Wainwright, J., concurring and dissenting).

102. *Id.*

103. *Id.* at 447 (majority opinion). In addition to the fact that Van Dyke was aware Greenberg Peden would not represent Anglo-Dutch, the fact that Swonke referred Van Dyke to McConn & Williams and that Van Dyke's later requested Swonke assist McConn & Williams demonstrates that

Dyke's testimony unequivocally demonstrated that he was aware, well before the fee agreement was formed, that Greenberg Peden would not be representing his company until the outstanding debt was paid.[104] Furthermore, Van Dyke's awareness of Swonke not representing Anglo-Dutch prior to the formation of the contingent-fee agreement is evidenced by Van Dyke's solicitation of Swonke's services sometime after the case was accepted by McConn & Williams.[105] Therefore, while Greenberg Peden and Swonke might have owed some lingering duties to Anglo-Dutch, any *fiduciary* duties derived from the attorney–client relationship would necessarily have ceased with the termination of the attorney–client relationship by the firm.[106]

As the Tenge lawsuit progressed, Van Dyke requested that Swonke "advise" or "assist" McConn & Williams because of Swonke's extensive experience with Anglo-Dutch.[107] Although not stated in the opinion, this unpaid assistance (provided at the request of his former client, who had already received $200,000 worth of unpaid legal advice) necessarily provides the basis for the court's conclusion that an attorney–client relationship existed at the time the contract was executed, thereby requiring close scrutiny of the contract.[108] Thus, one lesson to be learned

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Van Dyke was aware of the termination of the attorney–client relationship between both Greenberg Peden and Swonke as related to Anglo-Dutch. *See id.* (outlining the events leading up to the formation of the contingent-fee agreement for Swonke's assistance with the case).

104. *Id.* at 454 (Wainwright, J., concurring and dissenting).

105. *See id.* at 456 (Lehrmann, J., dissenting) (pointing out the passage of time between Swonke's referral to McConn & Williams and Van Dyke's request for Swonke's assistance).

106. *See* Stephenson v. LeBoeuf, 16 S.W.3d 829, 836 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) ("In the absence of an agreement to the contrary, an attorney–client relationship generally terminates upon the completion of the purpose of the employment." (citing Simpson v. James, 903 F.2d 372, 376 (5th Cir. 1990); Dillard v. Broyles, 633 S.W.2d 636, 643 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.))). *But see* Burnett v. Sharp, 328 S.W.3d 594, 602 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that a lawyer still has a duty to return unearned client retainer after termination); Reppert v. Hooks, No. 07-97-0302-CV, 1998 WL 548784, at *9 (Tex. App.—Amarillo Aug. 28, 1998, pet. denied) (not designated for publication) (extending the duty to maintain client confidentiality beyond termination of an attorney–client relationship).

107. *See Anglo-Dutch*, 352 S.W.3d at 456 (Lehrmann, J., dissenting) ("As the Halliburton lawsuit progressed, Van Dyke asked Swonke to serve as an advisor to McConn & Williams because of his familiarity with the underlying contracts. After initially consulting for free, Swonke requested compensation as his involvement in the case became more substantial.").

108. *See id.* at 449–50 (majority opinion) (assuming an attorney–client relationship existed and, therefore, closely scrutinizing the contract). Although the court did not articulate the reasons for assuming an attorney–client relationship existed between Swonke and Anglo-Dutch, the Restatement of Law Governing Lawyers indicates that where an attorney manifests consent to offer services to a person who is seeking those services, an attorney–client relationship exists. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000) (defining how an attorney–client relationship may be formed). Additionally, in situations such as here, where the

from *Anglo-Dutch* is that "no good deed goes unpunished." This means that an attorney asked to informally assist the client's new counsel should operate under the presumption that an attorney–client relationship exists unless active steps are taken to ensure the client cannot claim that such aid formed a new attorney–client relationship, through which renewed fiduciary duties can arise.[109]

Assuming the court was correct in finding a renewed set of fiduciary duties, the court provided little indication as to how close scrutiny of the contract led to the conclusion that it was not perfectly fair, adequate, or equitable under the circumstances.[110] Van Dyke was experienced in negotiating fees with attorneys, and he knew that McConn & Williams refused to compensate Swonke for any time spent on the case because it was Van Dyke himself who initiated the negotiations with Swonke after he realized Swonke would no longer be assisting McConn & Williams.[111] Swonke requested a flat percentage fee, and it was Van Dyke who suggested the ratio of number of hours worked to the ultimate percentage fee.[112] The total fee was specifically tied to the number of hours actually worked on the case; thus, even if the contingent fee materialized—which was quite uncertain from the difficult nature of the underlying litigation—

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attorney has previously represented the client and there is essentially an ongoing relationship even after the conclusion of a particular matter, there may be a continued fiduciary duty owed to the client beyond conclusion of the specific matter for which the attorney was retained. *See id.* § 33 cmt. h (specifying that an attorney's duties generally terminate when the representation ends; however, a continuing duty may be owed if the attorney maintains a continuing relationship with the client).

109. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33 cmt. h (2000) (laying out factors for consideration in determining whether there is a continuing duty to a client beyond the conclusion of the representation on a specific matter).

110. *See Anglo-Dutch*, 352 S.W.3d at 453 (reversing the appellate court's affirmation of the jury award in favor of the attorney). The detailed dissenting opinion filed by Justice Lehrmann, like the majority, analyzed the agreement as an attorney–client agreement and considered the alleged ambiguity of the terms of the contract "from the perspective of a reasonable person in the client's circumstances." *Id.* at 458 (Lehrmann, J., dissenting). Justice Lehrmann further explained that she doubted the majority's claim that it did not simply construe the ambiguities against the attorney and suggested the application of the standard laid out in the Restatement (Third) of the Law Governing Lawyers by considering the surrounding circumstances. *Id.* at 458–59. Although Justice Lehrmann would affirm the lower court's ruling in Swonke's favor, she also makes the same inferential leap made by the majority that there was a fiduciary duty owed to Anglo-Dutch even after termination of the official attorney–client relationship. *See id.* at 456 (citing the circumstances whereby Greenberg Peden declined representation and Swonke, instead of continuing representation as of-counsel like he did in the past, referred Anglo-Dutch to McConn & Williams).

111. *See id.* at 461 ("Van Dyke proposed [the agreement] to ensure that he would continue to receive the benefit of Swonke's experience when McConn & Williams refused to compensate Swonke for his services.").

112. *See id.* (summarizing the terms of the agreement and clarifying that Van Dyke suggested the terms, not Swonke, demonstrating Van Dyke's sophistication).

it could not be said that the fee was somehow unbridled or that Swonke was somehow taking advantage of his client.[113] The fee agreement was clearly not a lawyer attempting to renegotiate the compensation rate to his own advantage during the middle of representation,[114] nor was it a situation where the initial agreement was somehow too one-sided in its terms.[115] Likewise, this was not a circumstance where the evidence at trial showed the fee ultimately charged was unconscionable, even if the hourly rate was substantial.[116] Rather, two other attorneys in the case, including Mr. McConn himself, sent letters to Van Dyke supporting Swonke, asserting that the amounts sought by Swonke were fair and reasonable considering the invaluable assistance he provided to ensure recovery for Anglo-Dutch.[117]

Although the need for protection is understandable in cases where, for example, an attorney engages in a contract with a client for sale or purchase of property, or where the lawyer attempts to renegotiate a fee in the middle of ongoing representation, it is reasonable to question how close scrutiny of the contract in *Anglo-Dutch* somehow compels the final result.

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113. *See id.* at 447–48 (majority opinion) (including the text of the drafted fee agreement in the opinion where Swonke clarifies that the fees will be calculated by the number of hours spent on the case).

114. Even if the negotiation from "nothing" to "maybe something if we win" can be construed as advantageous to the attorney, it was Van Dyke and not Swonke who initiated these negotiations in the first place. *Id.* at 447. In fact, the ultimate contingent fee by which Swonke's recovery was to be determined was actually *reduced* during the course of the representation when McConn & Williams agreed to drop its fee to 16 2/3% because additional counsel was retained to assist in the litigation. *See id.* at 449 (paraphrasing the fee changes when Anglo-Dutch and McConn & Williams decided to bring on John M. O'Quinn & Associates to assist in the litigation, which resulted in McConn & Williams's fee being reduced to 16 2/3% to compensate for the 20% contingent fee Anglo-Dutch agreed to pay John M. O'Quinn & Associates). Because Swonke's fee was determined by the contingent fee received by McConn & Williams, the reduced fee necessarily resulted in a reduction of fees to Swonke. *See id.* at 447 (specifying that Swonke's fee was proportionately based on the percentage to be received by McConn & Williams).

115. *See, e.g.*, Hoover Slovacek, LLP v. Walton, 206 S.W.3d 557, 562–63 (Tex. 2006) (holding that an attorney's termination provisions requiring immediate payment of the contingent fee upon discharge, even when suit was not yet successful, "violates public policy and is unconscionable as a matter of law").

116. *See* Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 95 (Tex. 2001) (refusing to construe contingent-fee contracts as entitling attorneys to compensation exceeding the client's net recovery); Curtis v. Comm'n for Lawyer Discipline, 20 S.W.3d 227, 233 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding that the evidence was sufficient to support the trial court's ruling that a contingent fee totaling 70%–100% of the client's recovery was unconscionable).

117. *See* Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C., 267 S.W.3d 454, 462 (Tex. App.—Houston [14th Dist.] 2008), *rev'd on other grounds*, 352 S.W.3d 445 (laying out relevant facts and noting the agreement among other attorneys that Swonke's fee was reasonable).

B. *A Lawyer's Duty to Provide the Client with "All Material Facts" May Not Equate to an "Absolute and Perfect Candor" Standard*

One of the underlying factors cited by the court in *Anglo-Dutch* was that because fiduciary duties exist, a lawyer has a duty to inform the client of "all material facts."[118] The underlying reasons for this statement, however, are not as clearly supportive of the court's opinion as might be expected.

It has been clearly established that once an attorney–client relationship is created, a fiduciary duty is imposed on the lawyer as a matter of law.[119] The formation of a fiduciary duty creates a number of affirmative duties on the part of the lawyer, including candor, loyalty, and confidentiality.[120] Neither loyalty nor confidentiality was at issue in *Anglo-Dutch*, so the only inquiry concerns Swonke's candor with his client.[121]

The general dictionary definition of "candor" is the "quality of being frank, open, and sincere in speech or expression."[122] With regard to attorneys and their relationships with the client, however, that definition has generally increased in scope to include what has been called the "absolute and perfect candor" standard.[123] The most common formulation is the one mentioned by Justice Gonzalez in his separate

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118. *See Anglo-Dutch*, 352 S.W.3d at 450 (including a duty to disclose all material facts to a client within the fiduciary duty).

119. *See* Meyer v. Cathey, 167 S.W.3d 327, 331 (Tex. 2005) (per curiam) (identifying an attorney–client relationship as one imposed with a fiduciary duty "as a matter of law"); Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied) (describing the attorney–client relationship as highly fiduciary); *see also* Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) (noting that a client "must feel free to rely on his attorney's advice").

120. *See* Charles E. Rounds, Jr., *Lawyer Codes Are Just About Licensure, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles That Regulate the Lawyer–Client Fiduciary Relationship*, 60 BAYLOR L. REV. 771, 791 (2008) (noting that the general duty of loyalty encompasses the "duty of full disclosure" as well as the "duty of confidentiality"). In *Perez v. Kirk & Carrigan*, the court emphasized that the nature of the fiduciary relationship requires "absolute and perfect candor, openness and honesty, and the absence of any concealment or deception." *Perez*, 822 S.W.2d at 265.

121. *See generally Anglo-Dutch*, 352 S.W.3d 445, 449–51 (indicating that the court's analysis hinged on whether the lawyer's duty to "inform the client of all material facts" was present in this case). Based on the duty to inform the client of all material facts, the court warned that "the lawyer must be clear" or the duty would simply become a "meaningless formality." *Id.* at 450 (excluding confidentiality and loyalty from the analysis).

122. *Candor*, DICTIONARY.COM, http://dictionary.reference.com/browse/candor (last visited May 24, 2012).

123. *See* Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 738–39 (2003) (explaining how the legal implications of candor are different than the general dictionary definition). Not only does the duty of candor require that an attorney respond honestly to inquiries, but it also is more demanding in the sense that an attorney must "disclose information without request." *Id.*

opinion in *Lopez v. Munoz, Hockema & Reed, L.L.P.*:

> "[A] [fiduciary] is 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." Accordingly, a lawyer must conduct his or her business with inveterate honesty and loyalty, always keeping the client's best interest in mind.[124]

Derived from a quote from Justice Cardozo, this standard has been circulating in a number of states, including Texas.[125] Used in discussions by a number of courts of appeals,[126] Texas Supreme Court Justice Hecht also advocates for the standard in *Vickery v. Vickery*.[127] Such makes the court's failure to use the same language in *Anglo-Dutch* quite puzzling. It would seem quite easy for the court, had it wished, to simply cite to the presumed duty of perfect candor, note that the contract at issue clearly failed to meet that standard by not clearly stating with whom the contract

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124. Lopez v. Muñoz, Hockema & Reed, L.L.P, 22 S.W.3d 857, 866–67 (Tex. 2000) (second alteration in original) (citation omitted) (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)).

125. The first mention of this standard in Texas appeared in *State v. Baker*, 539 S.W.2d 367, 374 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (per curiam), *overruled by* Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989). *Baker* was a disbarment proceeding for an attorney charged with multiple ethics violations. *Id.* at 369. Acting in his capacity as an attorney and trustee for an estate, the attorney took charge of his client's property for his own benefit and later claimed adverse possession. *Id.* The court noted that the attorney–client relationship is governed by the *uberrima fides* standard, which is described as "[t]he most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight." *Id.* at 374 (quoting BLACK'S LAW DICTIONARY 1690 (4th ed. 1968)) (internal quotation marks omitted). This standard was subsequently referred to in *Perez* to emphasize the highly fiduciary nature of the relationship between an attorney and client. *Perez*, 822 S.W.2d at 265.

126. *See, e.g.*, Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 253 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (clarifying that the fiduciary relationship between an attorney and client exists as a matter of law). The court noted that "[t]he term fiduciary 'refers to integrity and fidelity,'" and concluded that "the attorney[–]client relationship is one of 'most abundant good faith,' requiring absolute perfect candor, openness and honesty, and the absence of any concealment or deception." *Id.* (quoting Arce v. Burrow, 958 S.W.2d 239, 246 (Tex. App.—Houston [14th Dist.] 1997), *aff'd as modified*, 997 S.W.2d 229 (Tex. 1999); Perez, 822 S.W.2d at 285); *accord* Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 196 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (reiterating the level of fiduciary duty owed to clients by attorneys); Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (reemphasizing that an attorney owes the "most abundant good faith" to the client).

127. Vickery v. Vickery, 999 S.W.2d 342, 376 (Tex. 1999) (Hecht, J., dissenting from denial of petition for review) (acknowledging that the fiduciary relationship between attorney and client requires "absolute and perfect candor, openness and honesty, and the absence of any concealment or deception"). Some commentators argue that "it would be improper to read [Justice Hecht's dissent] as a considered expression of views about the disclosure obligations of attorneys" since his primary argument focused on mental distress and exemplary damages. Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 761–62 (2003).

was being entered (obviously a "material fact"), and end the analysis there.

Notably, in determining why the court did not cite to the standard, several commentators have discussed the precarious nature of the absolute and perfect candor standard, explaining that:

> If the phrase "absolute and perfect candor" is read literally and without qualification, it cannot possibly be an accurate statement of an attorney's obligations under all circumstances. To begin with, such a standard would be impractical. A duty of candor that is "absolute and perfect" would require a lawyer to convey to a client every piece of data coming into the lawyer's possession, no matter how duplicative, arcane, unreliable, or insignificant. Little would be gained by imposing such an exacting obligation, and much would be lost in terms of efficiency and expense.[128]

Therefore, the court unsurprisingly held that lawyers only need to use "reasonable clarity" in explaining the terms of the attorney–client contract.[129] Logically, if lawyers have the duty to use absolute and *perfect* candor in all of the other dealings with the client, there is no reason to restrict that same standard in the formation of the relationship in the first place—unless, of course, the court is tacitly recognizing the fundamental problem with the absolute and perfect standard in the first place.[130]

This view might be subtly supported by the court's citation to the Restatement (Third) of the Law Governing Lawyers, which indicates that the main objective is to ensure the client is informed; whether the lawyer was reasonably clear must be determined from the client's perspective.[131]

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128. *Id.* at 738–39 (citing STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 74–75 (5th ed. 1998)).

129. *See* Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445, 451 (Tex. 2011) ("Only reasonable clarity is required, not perfection; not every dispute over the contract's meaning must be resolved against the lawyer.").

130. *See* Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 738–39 (2003) (listing some situations when it would seem absurd to adhere to the utmost absolute and perfect candor standard). For example, does a lawyer have a duty to inform the client of the following: (1) the attorney is enduring marital problems that may somehow affect the quality of representation; (2) the attorney had a learning disability in law school and was granted special accommodations; (3) the attorney did not pass the bar examination on the first attempt; or (4) the attorney is aware of confidential, yet nonessential, gossip about the friend of a client? *Id.* at 739–40. Thus, as Professor Vincent Johnson concludes, and as the Texas Supreme Court in *Anglo-Dutch* seems to agree, the absolute and perfect candor standard is actually not *absolute* and *perfect*—instead it seems to hinge on reasonableness. *See id.* (acknowledging that the standard "must inevitably mean something less than total disclosure of everything a lawyer knows that might be of interest or use to a client").

131. *See Anglo-Dutch*, 352 S.W.3d at 451 (explaining that a contract between a client and lawyer must be evaluated "as a reasonable person in the circumstances of the client would have construed it" (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18(2) (2000))).

This effectively echoes the Restatement's differences in the absolute and perfect candor standard, which requires only that the lawyer keep the client reasonably informed.[132] Thus, although the court does reaffirm that a lawyer must provide the client with "all material facts," the duty appears to also be viewed with a lens of reasonableness in assessing the lawyer's actions.[133] A retreat from the absolute and perfect candor standard would be a benefit because it turns something that seems to sound in strict liability to something more akin to a negligence standard.

The problem with that analysis, of course, is that the court's way of deciding the case makes it appear that the absolute and perfect standard applied despite the professed reasonableness standard.[134] Specifically, it was undisputed that Anglo-Dutch was made aware that: (1) it owed Greenberg Peden a very large amount of money; and (2) Greenberg Peden had, in no uncertain terms, indicated it was no longer interested in representing Anglo-Dutch, especially on a new matter where it would have to go even further into the hole.[135] Once again, Van Dyke was the one to approach Swonke, and he even suggested the basis of the contract that was eventually signed.[136] One might ask what more was Swonke reasonably

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132. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 (2000). A lawyer "must keep a client *reasonably informed* about the matter and must consult with the client to a *reasonable extent* concerning decisions to be made by the lawyer[;] . . . must promptly comply with a client's *reasonable requests* for information[;] . . . and must explain a matter to the extent *reasonably necessary* to permit the client to make informed decisions regarding the representation." *Id.* (emphasis added).

133. *See Anglo-Dutch*, 352 S.W.3d at 450 (acknowledging that a lawyer has a duty to "inform the client of all material facts"). The court further warns that this duty should not be viewed as a meaningless formality. *Id.* In order to ensure that the client truly understands and is aware of the material facts, the court underscores the important role that clarity plays in attorney–client relationships. *See id.* at 450–51 (summarizing how both lawyers and clients benefit when clarity is used in fee agreements). However, the court steers away from any language indicating "absolute and perfect candor" and instead uses reasonableness as the crux of the clarity standard. *See id.* at 451 (rejecting any absolute language by noting that "only reasonable clarity is required, not perfection").

134. *See id.* at 459 (Lehrmann, J., dissenting) (rejecting the court's mechanical approach to the facts). Although the court claimed to rely on the Restatement's position of reasonableness, the holding seemed to ignore crucial facts that are required for such reasonableness. *See id.* at 461 (listing facts that point to multiple interpretations of the document and concluding that the lower courts were correct in submitting the agreement to the jury). In doing so, the majority opinion falsely asserts a claim of reasonableness while its decision adheres to a mechanical absolute candor standard.

135. *See id.* at 456 (emphasizing the undisputed facts that Greenberg Peden explicitly refused to represent Anglo-Dutch in future matters due to "unpaid bills and a history of difficulty in collecting fees from Anglo-Dutch").

136. *See id.* (outlining the timeline of events and noting that "Van Dyke called Swonke directly and offered to pay him for the work"). The majority opinion also acknowledged that Van Dyke was the one to ask Swonke for assistance and proposed a contingent fee. *Id.* at 447 (majority opinion).

required to do, given the client's clear awareness of the material facts regarding the representation.

C. *Construction of the Contract Against the Lawyer Is Not Mandated*

At each stage of the case, Anglo-Dutch argued that the doctrine of *contra proferentem* required a strict construction of the fee agreement against Swonke as its drafter.[137] It also urged that the Texas Supreme Court's recent cases were all moving towards a blanket rule that ambiguities in fee agreements should always be construed against the attorney.[138] The court of appeals disagreed, as did the Supreme Court of

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137. *See* Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C., 267 S.W.3d 454, 469–72 (Tex. App.—Houston [14th Dist.] 2008), *rev'd on other grounds*, 352 S.W.3d 445 ("Under this doctrine, an ambiguous contract will be interpreted against its drafter." (citing Evergreen Nat'l Indem. Co. v. Tan It All, Inc., 111 S.W.3d 669, 677 (Tex. App.—Austin 2003, no pet.))). In *Evergreen*, the Third Court of Appeals clarified that "[t]he doctrine of *contra proferentem* is a device of last resort employed by courts when construing ambiguous contractual provisions." *Evergreen*, 111 S.W.3d at 676. It is a "tie-breaking device" employed to eliminate arbitrary decisions when every other interpretation method has failed. *Id.* at 677.

138. *See Anglo-Dutch*, 267 S.W.3d at 471–72 (noting that Anglo-Dutch points to three Supreme Court of Texas cases that appear to strictly construe ambiguities in favor of the client and against the attorney in fee contract disagreements). *Hoover Slovacek, LLP v. Walton*, 206 S.W.3d 557 (Tex. 2006), is the first case that Anglo-Dutch used in urging the court to adopt the *contra proferentem* doctrine. *Id.* at 469. However, the court noted that the fact pattern is inapplicable because the *Hoover* decision analyzed the public-policy implications of a termination provision in a fee agreement and did not decide whether the *contra proferentem* doctrine should be used in resolving ambiguous fee agreements. *Id.* at 471 (citing *Hoover*, 206 S.W.3d at 559). The second case advanced by Anglo-Dutch was *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857 (Tex. 2000). In that case, a law firm was sued for breach of fiduciary duty and breach of contract based on its collection of an additional 5% contingent fee. *Lopez*, 22 S.W.3d at 859. Specifically, the contractual language noted that the additional fee would be owed if the personal injury suit was "appealed to a higher court." *Id.* The defendant filed a cash deposit to preserve its right to appeal, and the law firm argued this entitled it to the additional 5% fee. *Id.* In *Lopez*, The Supreme Court of Texas held that filing of a cash deposit constituted an appeal and, as a result, the unambiguous contract should be enforced so that the law firm receives the additional 5%. *Id.* at 862. On appeal, Anglo-Dutch relied on Justice Gonzalez's dissent because he argued that the language "appealed to a higher court" is ambiguous and, thus, should be construed against the attorneys. *Anglo-Dutch*, 267 S.W.3d at 470. Again, the court of appeals rejected Anglo-Dutch's attempted parallel by observing that "[n]o subsequent Texas Supreme Court case has acted on the *Lopez* dissent's urging to adopt a broad *contra proferentum* rule for attorney[–]client fee contracts." *Id.* at 471. Finally, the third case the court analyzed when responding to Anglo-Dutch's contention that the *contra proferentum* doctrine should be used was *Levine v. Bayn, Snell & Krause, Ltd.*, 40 S.W.3d 92 (Tex. 2001). *Id.* at 471–72. In that case, the agreement contained language obligating the Levines to pay their attorneys "one-third of any amount received by settlement or recovery from their lawsuit." *Levine*, 40 S.W.3d at 93. The Levines received an award, but the total amount was later offset after a successful counterclaim. *Id.* Their attorneys argued that they should receive one-third of the entire contingent fee before the offset, but the court sided with the Levines. *Id.* at 95 (explaining that attorneys have the burden to clearly express the terms of fee agreements due to their experience and sophistication with such matters). Yet the *Anglo-Dutch* appellate court did not find this case convincing as it noted:

Texas.[139] As noted by the court, "not every dispute over the contract's meaning must be resolved against the lawyer."[140] The dissent pointed out, however, despite the lip service to that general ideal, that is essentially what the court ended up doing in its analysis.[141]

Adopting the Restatement's view of interpretating of fee agreements, the Supreme Court of Texas noted that a court should "construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it."[142] The court, however, appears to have ignored the very section of the Restatement it used as support. Restatement comment h notes:

> Many tribunals have expressed the principle as a rule that ambiguities in client[–]lawyer contracts should be resolved against lawyers. That formulation can be taken to mean that the principle comes into play only when other means of interpreting the contract have been unsuccessful. Under this Section, the principle that the contract is construed as a reasonable client would understand it governs the construction of the contract in the first instance. However, this Section does not preclude reliance on the usual resources of contractual interpretation such as the language of the contract, the circumstances in which it was made, and the client's sophistication and experience in retaining and compensating lawyers or lack thereof. The contract is to be construed in light of the circumstances in which it was made, the parties' past practice and contracts, and whether it was truly negotiated. When the reasons supporting the principle are inapplicable—for example, because the client had the help of its own inside legal counsel or another lawyer in drafting the contract—the principle should be correspondingly relaxed.[143]

If that section truly governs the court's use of the Restatement, it remains very difficult to determine how the court could have concluded that the circumstances somehow favored Anglo-Dutch's position. This

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"That decision did not address an ambiguity concerning the identity of parties to a fee agreement, as it did not adopt a *contra proferentem* rule for all ambiguities in all attorney[–]client fee agreements." *Anglo-Dutch*, 267 S.W.3d at 471.

139. *Anglo-Dutch*, 267 S.W.3d at 472 (refusing to extend recent Supreme Court of Texas cases advanced by Anglo-Dutch because they "do not establish that Texas law requires an ambiguity concerning the identity of parties to a fee agreement to be resolved against the attorney").

140. *Anglo-Dutch*, 352 S.W.3d at 451.

141. *See id.* at 458 (Lehrmann, J., dissenting). As noted by Justice Lehrmann: "The [c]ourt claims not to construe the agreement against the attorney. However, in concluding that the circumstances surrounding the agreement do nothing to negate the letterhead on which the agreement was printed, the [c]ourt does just that." *See id.* (citation omitted).

142. *Id.* at 451 (majority opinion) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18(2) (2000)) (internal quotation marks omitted).

143. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 cmt. h (2000).

was not a standard form contract of adhesion or a "take it or leave it" offer presented by an attorney to a new client. Rather, an extremely experienced and sophisticated client presented the proposed terms to the lawyer and forcefully negotiated the agreement away from the lawyer's initial position, after specifically being informed that the lawyer's firm would not be representing the client.[144] The fee negotiation was clearly a collaborative process with all of Van Dyke's proposed terms ultimately included in the contract.[145]

The question remains: how could a client in Anglo-Dutch's position *reasonably believe* that Greenberg Peden was representing it, after the client was clearly told it would not be, when all of the negotiations were with Swonke and with all of the personal pronouns contained in the body of the agreement? Because any ambiguity will hereafter be viewed from the perspective of what a reasonable client would have expected under the same or similar circumstances, given the result here, it is difficult to imagine a situation where the contract language will not *effectively* be construed against the lawyer as long as the client can come up with even the most tenuous interpretation.[146] If directly telling the client something is not enough, it is difficult to fathom what is.

D. *Lawyers Generally Remain in the Best Position to Avoid These Problems*

No one would argue against the assertion that an attorney is usually in the best position to prevent disputes in the area of fee contracts.[147] Even

144. *See Anglo-Dutch*, 352 S.W.3d at 460–61 (Lehrmann, J., dissenting) (listing circumstances surrounding the agreement that indicate Van Dyke clearly understood the terms of the contract). Not only did Van Dyke testify that negotiating was a "significant portion of his job," but there is also "undisputed evidence that Van Dyke, not Swonke, suggested the unusual compensation ratio that Swonke initially resisted, requesting a flat percentage fee instead." *Id.* Furthermore, the majority opinion readily concedes that "Van Dyke was not an unsophisticated client." *Id.* at 452 (majority opinion). Not surprisingly, "it was [Van Dyke], not Swonke, who proposed the terms of the Fee Agreement." *Id.*

145. *See id.* at 460–61 (Lehrmann, J., dissenting) ("[I]t is undisputed that the contract in this case arose in the context of genuine negotiations between Swonke and the client, both of whom had previous experience negotiating such agreements.").

146. *See id.* at 462 (concluding that the majority decision "effectively construes the agreement against the lawyer"). Justice Lehrmann points out a major flaw in the court's analysis. Instead of focusing on the contractual terms in light of what the parties meant *at the time of negotiations*, the court mistakenly gives weight to arguments subsequently construed as a result of changed circumstances. *Id.* at 459. Essentially, skilled lawyers can construe creative legal arguments, such as deceptive letterheads in this case, but such tenuous connections should not result in the court's acceptance of such propositions when the circumstances at the time of the contract refute them. Justice Lehrmann warned: "While giving due weight to a lawyer's fiduciary obligations, we should do so from a reasonable, not predatory, client's perspective." *Id.*

147. This has long been the indisputable rule in Texas. *See* Hoover Slovacek LLP v. Walton,

those ruling in Swonke's favor did not feel that he did everything possible to avoid the situation, but does his "punishment" fit his "crime"? Surely not.

The simple answer is that the client took advantage of the drafting error to, yet again, get out of paying a legal bill that was owed for legal work.[148] While the court engrafted a new requirement that the attorney must be clear in making the client aware of facts material to the representation, such requirement does not change the court's arguably mistaken analysis because there continues to be no doubt that Van Dyke was clear about Greenberg Peden not representing him when the contract was negotiated.[149] If the new duty is only one of "reasonable clarity . . . , not

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206 S.W.3d 557, 563 (Tex. 2006) (explaining why attorneys have the burden of fair dealing in regard to fee contracts with clients); Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 95 (Tex. 2001) ("Lawyers almost always possess the more sophisticated understanding of fee arrangements. It is therefore appropriate to place the balance of the burden of fair dealing and the allotment of risk in the hands of the lawyer in regard to fee arrangements with clients." (citing *In re* Myers, 663 N.E.2d 771, 774–75 (Ind. 1996))). Even the separate opinions in the Supreme Court of Texas stressed that it is incumbent on the lawyer to make sure they are clear with their clients by fully and fairly disclosing all important information. *See Anglo-Dutch*, 352 S.W.3d at 454 (Wainwright, J., concurring and dissenting) (agreeing with the majority opinion that attorneys have a fiduciary duty to ensure that "engagement letters are clear to the clients"); *id.* at 458 (Lehrmann, J., dissenting) (emphasizing the critical importance of clarity).

148. Essentially, this translates to Anglo-Dutch getting away with not paying the initial $200,000 it owed Greenberg Peden. *See Anglo-Dutch*, 352 S.W.3d at 456 (Lehrmann, J., dissenting) (discussing the mounting unpaid debt as a reason that Greenberg Peden refused to continue representing Anglo-Dutch). Furthermore, Anglo-Dutch also did not pay Swonke anything for his subsequent 1,022 hours of work, which was instrumental in obtaining the $51 million settlement. *See id.* at 456–57 (establishing that Van Dyke desired Swonke's assistance due to his "familiarity with the underlying contracts," while also noting that Swonke would not be compensated for at least 1,022 hours of work).

149. Both the trial court and a jury ruled that the contract was ambiguous, but the Supreme Court of Texas rejected this conclusion and instead held that the agreement was not ambiguous. *See id.* at 452 (majority opinion). In reaching this conclusion, the court explained that "[e]xtrinsic evidence cannot be used to show that the parties probably meant, or could have meant, something other than what their agreement stated." *Id.* at 451. Yet in analyzing the contract, the court seemed to contradict itself by creating alternate meanings for what the language *could have meant*, or what the parties *probably meant to imply*. At the very least, the court's analysis here shows that the contract was ambiguous. For example, the court acknowledged that the contract has many personal pronouns indicating that Swonke himself would be "working on the matter, which Anglo-Dutch certainly intended." *Id.* at 452. This leads to the court's flawed, hypothesis-laden analysis. It hypothesizes that nothing in the contract "suggests that other attorneys and staff at Greenberg Peden would be excluded from the case." *Id.* The hypothesizing does not stop there, but instead transforms into further presumptions: "Since the fee was contingent on recovery and therefore not based on any attorney's hourly rate, it would *presumably* make no difference to Anglo-Dutch who besides Swonke worked on the case as long as the fee was computed on his hours." *Id.* (emphasis added). In all its ambiguous glory, the court could have presumed on the opposite spectrum and noted that the abundance of personal pronouns would *presumably* indicate that Swonke was solely taking on the

perfection," then one might be forgiven for concluding from the *result* of the opinion (rather than its language) that *reasonable clarity* actually means something closer to strict liability if the client can find even the slightest mistake in the documentation of the parties' agreement.[150] Although lawyers likely "appreciate the importance of words and 'are more able than most clients to detect and repair omissions in the client[–]lawyer contracts,'"[151] the court's failure to similarly protect the rights of the other litigant before the court is not excused.

In *Hoover Slovacek LLP v. Waldon*,[152] the court recognized "the valid competing interests of an attorney who, like any other professional, expects timely compensation for work performed and results obtained. Thus, attorneys are entitled to protection from clients who would abuse the contingent-fee arrangement and avoid duties owed under contract."[153]

Anglo-Dutch got away with not paying its lawyers well over $1 million in fees that the lawyers undoubtedly deserved in obtaining the recovery on Anglo-Dutch's behalf.[154] Rather than encouraging better drafting by attorneys, it seems far more likely that the court's decision will encourage the type of predatory client that the dissent warned of—one who will look for the slightest mistake upon which to make a claim for breach of fiduciary duty or other claim.[155] Courts have historically rejected

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endeavor. Furthermore, the court agreed that "[Van Dyke] also knew that the firm had refused to be lead counsel in the case," but again, more presuming plagues the court's analysis: "[B]ut the firm certainly had sufficient resources for a consulting role." *Id.* Because Greenberg Peden was resourceful and business-savvy, the court disregarded the explicit facts and implicitly presumed that Greenberg Peden should take on a consulting role for Anglo-Dutch.

150. *Id.* at 451. The court attempted to justify its conclusion by asserting: "Nothing about the parties' relationship preceding the [f]ee [a]greement required Van Dyke to recognize that though the agreement purported to be with Greenberg Peden, it was really with Swonke." *Id.* at 452–53. The facts say otherwise. The parties' relationship preceding this agreement was burdened with a $200,000 unpaid debt looming over them. *Id.* at 454 (Wainwright, J., concurring and dissenting). Van Dyke's undisputed testimony explicitly indicated that the parties' relationship had changed, and he knew that "no Greenberg lawyers would work on his files from that time forward." *Id.* But in a counterintuitive twist of facts and logic, the court relies on firm letterhead and ignores sworn testimony that Van Dyke admitted to knowing Greenberg Peden was no longer interested in representing Anglo-Dutch. *Id.* at 452 (majority opinion) (stating that the fee agreement was on Greenberg Peden stationary).

151. *Id.* at 453 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 cmt. h (2000)).

152. Hoover Slovacek LLP v. Walton, 206 S.W.3d 557 (Tex. 2006).

153. *See id.* at 563.

154. *See Anglo-Dutch*, 352 S.W.3d at 457 (Lehrmann, J., dissenting) (calculating the loss that Swonke would suffer as a result of Van Dyke's ploy and emphasizing that Swonke's compensation would be reduced by over a million dollars).

155. *See id.* at 459 ("While giving due weight to a lawyer's fiduciary obligations, we should do

attempts to increase liability to the extent that a lawyer would have to practice so defensively that the relationship with the client would be impaired;[156] yet, the court allowed a client that abused the arrangement by never paying for services to prevail after the jury, which heard all the testimony and saw the demeanor of the witnesses, actually found in the lawyer's favor.[157]

E. *The Client's Interests Remain Paramount, Plus Some*

Perhaps the most troubling statement in the entire opinion is the last one. The court simply noted that "[a] client's best interests, which its lawyer is obliged to pursue, do not include having a jury construe their agreements."[158] If this is mere dicta or judicial fluff, it might be excusable. The problem, of course, is that a number of situations in the same vein are also not in the client's best interests.[159] For example, most clients, like Anglo-Dutch, would prefer to not pay their bill. It is certainly in the client's best (monetary) interest not to do so, just as it might not be in its best interest to litigate an issue over which reasonable minds might (and this case, did) differ.

V. CONCLUSION

What are attorneys to take away as the teaching points of *Anglo-Dutch*? Apparently it is that, even if your client is *actually* fully informed, the

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so from a reasonable, not predatory, client's perspective.").

156. *See* Barcelo v. Elliott, 923 S.W.2d 575, 578–79 (Tex. 1996) (preserving a bright-line test for privity that "denies a cause of action to all beneficiaries whom the attorney did not represent" so attorneys can zealously represent clients without looming threats of third-party suits); Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 317–18 (Tex. App.—San Antonio 1994, writ ref'd) (declining to adopt assignments of claims against attorneys to third parties because this would impair the attorney–client relationship, and this would transform litigation into a "mere game and not a search for truth"); Bradt v. West, 892 S.W.2d 56, 71–72 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (refusing to hold attorneys liable to opponents for actions taken in litigation because "such a policy would favor *tentative* representation, not the *zealous* representation that our profession rightly regards as an ideal and that the public has a right to expect").

157. *See Anglo-Dutch*, 352 S.W.3d at 454 (Wainwright, J., concurring and dissenting) (reiterating that the jury listened to disputes from Swonke, Van Dyke, Greenberg Peden, and McConn & Williams and then concluded that Swonke—not Greenberg Peden—represented Anglo-Dutch).

158. *Id.* at 453 (majority opinion).

159. *See* Mary Flood, *Lawyers Fire Clients Who Don't Pay, Raise a Stink, or Just Stink*, CHRON.COM (Aug. 20, 2007), http://www.chron.com/business/article/Lawyers-fire-clients-who-don-t-pay-raise-a-1811643.php (discussing clients who have refused to do things that they deemed not to be in their best interest). Some examples of these include: not paying bills, not being truthful, not cooperating, choosing to remain unrealistic about what the outcome of the lawsuit will be, and showing up to court under the influence of drugs. *Id.*

attorney still runs the risk of being wholly responsible for any confusion whatsoever in the formation of the attorney–client contract.[160] More dangerously, if the court meant it as anything other than a throwaway comment, what constitutes a client's best interests certainly becomes a much more fluid concept.

160. *See Anglo-Dutch*, 352 S.W.3d at 458–62 (Lehrmann, J., dissenting) (disagreeing with the majority opinion's over-emphasis on a letterhead). Justice Lehrmann acknowledged that the letterhead certainly contributed to the ambiguity in the agreement, yet strongly disagreed with how the court transformed the letterhead into a deciding factor against Swonke. *Id.* at 459. In rejecting such "unnecessary, harsh results," Lehrmann warned: "[A] lawyer who made a mistake in choosing stationery—or even used the only stationery available—would lose." *Id.*