

William & Mary Environmental Law and Policy Review

Volume 26 (2001-2002)
Issue 2 Symposium: Toxic Torts: Issues of
Mass Litigation, Case Management, and Ethics

Article 3

December 2001

A Critique of Burrow v. Arce

Charles Silver

Follow this and additional works at: <https://scholarship.law.wm.edu/wmelpr>



Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Repository Citation

Charles Silver, *A Critique of Burrow v. Arce*, 26 Wm. & Mary Envtl L. & Pol'y Rev. 323 (2001),
<https://scholarship.law.wm.edu/wmelpr/vol26/iss2/3>

Copyright c 2001 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmelpr>

A CRITIQUE OF *BURROW V. ARCE*

CHARLES SILVER*

I. INTRODUCTION: POLITICS AND ETHICS

On March 28, 1996, Texas Attorney General Dan Morales announced the filing of a Medicaid recovery suit against the tobacco industry.¹ He also released the Outside Counsel Agreement ("OCA") between the State and the private attorneys who would represent it. The OCA provided that the attorneys would receive a 15% contingent fee.²

As the lawsuit raced toward an early trial setting, not a single public official questioned the reasonableness of the fee or any other part of the OCA. No one argued that Morales lacked authority to hire outside counsel. No one claimed that the State possessed sovereign immunity from fee obligations. No one contended that the legislature had to appropriate funds.³

* Co-Director, Center on Lawyers, Civil Justice, and the Media, and Cecil D. Redford Professor, University of Texas School of Law. I am grateful for comments from Steven Goode and for the permission of my colleague, Lynn Baker, to use ideas that we jointly developed.

The views expressed in this Article belong solely to the author. They cannot be attributed to the University of Texas, its Law School, or the Center for Lawyers, Civil Justice, and the Media, none of which has endorsed them.

The author advised the private attorneys who won Texas' tobacco lawsuit on professional responsibility and other subjects. The author also submitted a series of *amicus curiae* briefs in *Burrow v. Arce* arguing against the availability of fee recoupment in the absence of harm. All of the information discussed in this article is a matter of public record.

¹ Kathy Walt, *Texas Set to Sue Cigarette Makers; Morales to Announce Bid to Recover Medicaid Costs*, HOUS. CHRON., Mar. 28, 1996, at 33.

² Robert Elder, Jr. et al., *Morales' Team: Dream or Nightmare?*, TEX. LAW., Apr. 1, 1996, at 1.

³ For example, George W. Bush, then Governor of Texas, wished Morales "all the best" when commenting on the announcement of the lawsuit. Wayne Slater, *A.G. Says Tobacco Industry Could be in for a Fight*, DALLAS MORNING NEWS, Mar. 22, 1996, at 8A. TEX. GOV'T CODE § 323.006 (2002) empowered the Texas legislature to appoint a representative for the purpose of intervening in the lawsuit. The legislature did not exercise this option, even though it was in session during the lawsuit.

Then, in January 1998, when settlement negotiations ended the case on favorable terms for the state, "all hell broke loose."⁴ Governor George W. Bush, seven legislators, and John Cornyn, a Republican candidate to succeed Morales as Attorney General, intervened to attack the payment of fees.⁵ They lodged every conceivable charge of misconduct and error, specifically including those just mentioned.⁶ They also accused David G. Folsom, the presiding federal district court judge, of applying the wrong legal standard when reviewing the settlement and finding the fee reasonable.

In my opinion, the fee fracas had everything to do with politics and nothing to do with legal ethics. Morales was a Democrat, the private attorneys supported the Democratic Party, and the presiding federal judge was a Clinton appointee.⁷ Bush, Cornyn, and most of the legislators were Republicans. Bush was seeking the Presidency, and Cornyn was running for Attorney General. The legislators' intervention was sparked by, coordinated with, and apparently financed in part by persons associated with Texans for Reasonable Legal Fees ("TRLF"), a tort reform group with ties to tobacco interests and the Republican Party.

Today, the concrete effects of this partisan activity require a more serious assessment. What began as a partisan fistfight matured into a federal investigation of misconduct in public office and a legal precedent regarding fee forfeiture for breach of fiduciary duty.⁸ Before the fee dispute finally ends—and no end is in sight, even though it already has lasted far longer than the tobacco case did—it may also generate the

⁴ JOHN MILTON, *PARADISE LOST*, bk. IV., l. 918 (Christopher Ricks ed., English Poets 2000) (1667) ("Wherefore with thee / Came not all Hell broke loose?").

⁵ *Bush Files Suit Over Tobacco Case Fees*, CHARLESTON DAILY MAIL, Feb. 6, 1998, at P3A.

⁶ David E. Dahlquist, *Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles*, 50 DEPAUL L. REV. 743, 777 (2000).

⁷ Gregory Curtis, *Smoke Detectors*, TEX. MONTHLY, Mar. 1998, at 9.

⁸ The federal investigation occurred because of questionable dealings between Morales and a Houston attorney named Marc Murr. Murr neither signed the OCA nor had a relationship with the trial team. Yet, with Morales' support, Murr claimed to have provided valuable services and to have a separate contract with the state entitling him to hundreds of millions of dollars. This contract was neither released to the press before the case settled nor turned over to the defendants during discovery. It also was of questionable validity because it did not specify the payment Murr was due and appeared to have been doctored. Worse, members of the trial team refused to vouch for Murr's contribution because, to their knowledge, Murr did nothing of importance. Murr became known as the "stealth lawyer" because his work, said to have consisted of behind-the-scenes conversations with Morales, was undetectable.

largest fee forfeiture action in history. As this Article goes to press, now-Attorney General Cornyn is continuing to investigate allegations that the private attorneys breached their fiduciary duties to the state.

The precedent relating to fee forfeiture came about as a result of litigation in *Burrow v. Arce*, a legal malpractice case that was working its way through the Texas state courts when the fee dispute erupted in the federal tobacco case.⁹ *Burrow* grew out of a mass tort lawsuit in which 126 plaintiffs collectively recovered approximately \$190 million.¹⁰ Despite the enormity of the recovery, forty-nine of the claimants sued their former lawyers, accusing them of misconduct and disloyalty.¹¹ Eventually, the case reached the Texas Supreme Court on a legal issue: Can a former client recover from a disloyal attorney without proving harm?¹²

The justices ruled unanimously that fee recoupment is available in the absence of harm.¹³ One might have predicted a vote this lop-sided in a case squarely governed by precedent. Before *Burrow*, though, no Texas case recognized the right to recoup fees for breach of fiduciary duty in the absence of harm. The decision was an innovation.

The published opinion hides this. Writing for the court, Justice Nathan Hecht claims to follow the Restatement (Second) of Agency and prior Texas cases. The assertion is false. Anyone who compares the Justice Hecht's statements about these authorities to the originals will see numerous and obvious inaccuracies.

The only authority that supported the justices was the Restatement (Third) of the Law Governing Lawyers.¹⁴ Apparently, they found it too frail a reed to support their decision. This was a sensible conclusion. The authority supporting the Restatement (Third) was weak, none of it was Texas law, and the Restatement (Third) provided no analytical defense for the rule it endorsed.

This Article will critique the *Burrow* opinion. Part Two will focus on the Restatement (Second) of Agency and will show that the Texas Supreme Court ignored the carefully developed structure of general agency law while purporting to respect it. Part Three will show that the

⁹ *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

¹⁰ *Id.* at 232.

¹¹ *Id.*

¹² *Id.* at 237.

¹³ *Id.* at 247.

¹⁴ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996).

court grossly distorted Texas cases while purporting to respect them. Part Four will discuss the harm requirement itself. It will show that harm plays a crucial role in distinguishing permissible actions in conflict situations from impermissible ones, and that, by removing this requirement, the Texas Supreme Court put mass tort lawyers in an untenable position. Part Five will consider the merits of the Restatement (Third) of the Law Governing Lawyers. Part Six will draw a brief conclusion.

II. AGENCY LAW

Agency law treats two situations very differently. In the first, a principal discovers a disloyal act, fires the agent responsible for it, is sued by the agent for unpaid fees, and asserts disloyalty as a defense to the agent's claim. I will call this scenario "A v. P" because the agent is the plaintiff in the lawsuit seeking fees.

When A v. P arises, agency law entitles P to assert disloyalty as a defense to A's claim for payment.¹⁵ The agent may lose the right to a fee even if the principal cannot prove harm.¹⁶

In the second situation, a principal voluntarily pays an agent, subsequently discovers a disloyal act, and then sues the agent for a remedy. I will call this scenario "P v. A," the principal being the plaintiff in the suit for compensation.

Agency law does not recognize fee forfeiture (more accurately, fee recoupment) as a remedy in P v. A. It entitles P to a remedy if P incurred a loss. Otherwise, it sends P home empty-handed. To put the matter simply, agency law does not establish fee recoupment as a principal's remedy.

The Texas Supreme Court ignored the distinction between A v. P and P v. A. According to the court, *Burrow* asked "whether an attorney who breaches his fiduciary duty to his client may be required to forfeit all or part of his fee, irrespective of whether the breach caused the client actual damages."¹⁷ This statement is crucially ambiguous. The answer is "yes" in A v. P situations where disloyalty is a defense to an agent's claim for unpaid fees. But the answer is "no" in P v. A situations where a disgruntled principal seeks a remedy. *Burrow* was a P v. A situation.

To see that no right of fee recoupment in the absence of harm exists under the Restatement (Second) of Agency, one need only consult

¹⁵ RESTATEMENT (SECOND) OF AGENCY § 469 cmt. b (1958).

¹⁶ *Id.* § 469 cmt. a.

¹⁷ *Burrow*, 997 S.W.2d at 232.

section 399. Entitled "Remedies of Principal," section 399 exhaustively lists the remedies principals are legally entitled to seek from agents who commit wrongful acts.¹⁸ No right of fee recoupment appears in this section. The closest analogue is subparagraph (k), which identifies "refusal to pay compensation" as a remedy.¹⁹ There being an obvious difference between refusing to pay compensation and recovering compensation already paid, a plain language assessment of section 399 should have put the plaintiffs' claim for fee recoupment in *Burrow* to rest.

A textual analysis strengthens this conclusion. The comment to subparagraph (k) of section 399 states that "[t]he circumstances under which a principal is entitled to refuse to pay compensation to an agent who has been guilty of a violation of duty are stated in Section 456."²⁰ Section 456 reads as follows:

§ 456. REVOCATION FOR BREACH OF CONTRACT
OR RENUNCIATION IN BREACH OF CONTRACT

If a principal properly *discharges* an agent for breach of contract, or the agent wrongfully renounces the employment, the principal is subject to liability to pay to the agent, with a deduction for the loss caused the principal by the breach of contract:

(a) the agreed compensation for services properly rendered for which the compensation is apportioned in the contract, whether or not the agent's breach is wilful and deliberate; and

(b) the value, not exceeding the agreed ratable compensation, of services properly rendered for which the compensation is not apportioned if, but only if, the agent's breach is not wilful and deliberate.²¹

Section 456 had no application to *Burrow*. The plaintiffs did not discharge the lawyers, and the attorneys did not withdraw. The representations continued until the plaintiffs' claims were resolved. The allegations of misconduct all related to completed representations in which the lawyers were voluntarily paid.

¹⁸ RESTATEMENT (SECOND) OF AGENCY § 399 (1958).

¹⁹ *Id.* § 399 cmt. k.

²⁰ *Id.*

²¹ *Id.* § 456 (emphasis added).

When discussing the Restatement (Second) of Agency, the Texas Supreme Court considered neither section 399 nor section 456. This is a clear signal that something is amiss. Section 399 sets out a principal's remedies, and *Burrow* was a P v. A situation. Section 399 was therefore the right place to start. As stated, only subparagraph (k) of section 399 concerned fees. It mentioned refusal to pay, not fee recoupment, and it directed readers to section 456, which limits the right of refusal to situations in which the principal fires the agent or the agent withdraws.

The *Burrow* court latched onto section 469 of the Restatement (Second). It reads as follows:

An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.²²

Although the language of this section seems to support the conclusion reached in *Burrow*, it does not create a remedy that a principal may assert in a P v. A situation. The point of saying that an agent has no right to compensation for disloyal conduct is to establish disloyalty as a defense to an agent's claim for unpaid compensation in an A v. P situation.

Section 469 appears in chapter 14 of the Restatement, entitled "Duties and Liabilities of Principal to Agent." A chapter dedicated to a principal's responsibilities to an agent would be an odd place to locate a principal's right to recover damages from an agent. The point of chapter 14 is to identify rights agents may assert against principals in A v. P situations.

Section 469 also appears in title C of chapter 14. Title C bears the heading "Defenses." Along with disloyalty, the sections under title C address illegality, statutes of frauds, discharge, bankruptcy, statutes of limitations, and laches. Section 469A even bears the title "Other events terminating or diminishing agent's claim." Plainly, all sections in title C set out defenses that principals may assert against agents in A v. P situations.²³

Section 469 itself bears the following title: "Disloyalty or Insubordination as Defense." This makes it abundantly clear, as if further

²² *Id.* § 469.

²³ *Id.* §§ 467-69A.

clarification were needed, that the section identifies a defense, not a remedy. By using section 469 as a remedial provision, the Supreme Court of Texas fundamentally altered agency law.

I explained the straightforward structure of the Restatement (Second) in a series of amicus briefs.²⁴ The justices dismissed my analysis:

Amici argue that this rule [i.e., the one stated in § 469(b)] is limited by the caption of section 469, "Disloyalty or Insubordination *as Defense*." But the comments to section 469 do not limit application of the rule to the defense of an agent's claim for compensation. Comment *a* states in part: "An agent is entitled to no compensation for a service which constitutes a violation of his duties of obedience." Comment *e* adds that a "principal can maintain an action to recover the amount" of compensation paid to an agent to which the agent is not entitled. Amici argue that the scope of the rule should not be found in the comments, but we think there is more justification for looking to the comments than to two words in the title.²⁵

Obviously, this response ignores the larger structure of the Restatement (Second). It ignores the fact that section 399, which lists principals' remedies comprehensively, does not mention fee recoupment in the absence of harm. It ignores the fact that the sections immediately following section 399, which discuss particular remedies in detail, do not mention this remedy either. It ignores the discharge requirement that, per section 456, is a condition for refusing to pay compensation. It ignores the fact that section 469 appears in chapter 14, which concerns principals' responsibilities to agents, not their rights against agents. It ignores the fact that title C explicitly focuses on principals' *defenses* to agents' claims for unpaid fees. Finally, it assigns no weight to the title of section 469, as though the authors of the Restatement (Second) did not know the difference between a remedy and a defense.²⁶

²⁴ I also noted and rejected the possibility of reaching section 469 through section 401 of the Restatement. Because *Arce* does not mention section 401, I will say nothing more about this possibility here.

²⁵ *Burrow v. Arce*, 997 S.W.2d 229, 244 (Tex. 1999).

²⁶ The lead Reporter for the Restatement (Second) of Agency was Warren A. Seavey of Harvard Law School. Seavey wrote about remedies and defenses many times. See, e.g., WARREN A. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* §§ 28-31 (1964).

The only reason offered for ignoring the title of section 469 is that "the comments [to the section] do not limit application of the rule to the defense of an agent's claim for compensation."²⁷ Apparently, to convince the Texas Supreme Court that they were discussing defenses in section 469, the Reporters had to say so in every sentence. It was not enough to carefully separate remedies available in P v. A situations from defenses available in A v. P situations, locating the two in different titles and chapters and giving them appropriately descriptive names. Nor was it enough to supplement this structural separation with descriptive section headings that again distinguished remedies from defenses. Because the Reporters did not use the word "defense" in two comments that, in the hierarchy of the Restatement (Second), were subordinate to everything just mentioned, the justices concluded that the comments turned a shield into a sword. Why the Reporters hid a sword in an obscure location instead of placing it in section 399, a principal's armory, the court did not say.

In the Restatement (Second), the path to section 469 is clearly marked with signposts explaining that in this direction lie defenses for use in A v. P situations. The justices knew this, yet when they got to section 469, they unanimously claimed to have found a remedy for use in P v. A situations. The Emperor says he is fully clothed; therefore, he is.

As easily as they dealt with the signposts, the justices dispatched *Mechem on Agency*,²⁸ a leading turn-of-the-century treatise, even more simply. They ignored it. This is noteworthy because the court *followed Mechem* in *Kinzbach Tool Co. v. Corbett-Wallace Corp.*,²⁹ the case that, by the justices' own admission, was closest to *Burrow*.³⁰ *Mechem* agreed with the Restatement (Second). In a section headed "Principal's Right of Recoupment," the following passages appear:

[D]amages for the losses which the principal may have sustained by reason of the agent's inefficiency, negligence, misconduct, or failure to perform the express or implied covenants, agreements or conditions of his undertaking, and which would furnish the basis of an action by the principal against the agent, may be recouped by the

²⁷ *Burrow*, 997 S.W.2d at 244.

²⁸ FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY (2d ed. 1914).

²⁹ 160 S.W.2d 509, 514 (Tex. 1942).

³⁰ See *Burrow*, 997 S.W.2d at 238 (stating that, in *Kinzbach Tool*, the court held that an agent had to forfeit the secret commission from conflicting interests even though the principal was not harmed).

principal in the action brought by the agent [to recover unpaid compensation]

. . . .

The measure of [a principal's] damages is . . . substantially the same as though an independent action were brought [by the principal] to recover them. The limit of the recoupment must, therefore, be the actual damages which directly and proximately result from the negligence, default or misconduct of the agent.³¹

The message is clear. When A sues P for unpaid fees, P may counterclaim for losses resulting from A's misconduct.³² When P sues A for damages, losses also determine whether P recovers. Whether a principal initiates litigation or seeks relief by way of a counterclaim, harm is a prerequisite for recovering.

In *Burrow*, the justices neither cited *Mechem* nor argued that the treatise got the law wrong. *Mechem* was an unwanted reminder of the signposts in the Restatement (Second), so by consensus the *Burrow* court decided that *Mechem* did not exist.

III. TEXAS CASES

Texans for Reasonable Legal Fees, the interest group that coordinated the attack on fees in Texas' tobacco case, participated in *Burrow* as *amicus curiae*. TRLF argued that Texas cases recognized the remedy of fee recoupment in the absence of harm. In reply, I argued that "stunningly little authority" supported TRLF's position. To make good on this charge, I submitted a detailed examination of every Texas case on which TRLF relied. I paid particular attention to *Kinzbach Tool Co. v. Corbett-Wallace Corp.*,³³ the only Texas Supreme Court case cited in TRLF's brief. My conclusion was that *Kinzbach Tool* did not entitle an unharmed principal to recoup a fee from a disloyal agent.

In *Kinzbach Tool*, the agent was a fellow named Turner who, while *Kinzbach Tool*'s employee (and therefore its fiduciary), negotiated for

³¹ *MECHEM*, *supra* note 28, §§ 1595, 1597.

³² In another section, *Mechem* also recognizes that disloyalty is a defense to an agent's suit for unpaid fees. *Id.* § 1588 (entitled "Disloyal agent cannot recover compensation").

³³ 160 S.W.2d at 509.

Kinzbach Tool the purchase of an item called a whipstock from Corbett. Unbeknownst to Kinzbach Tool, Turner was a double-agent who represented Corbett pursuant to a secret agreement. Corbett promised to pay Turner a commission if the sale went through. Turner neither told Kinzbach Tool that he represented Corbett, a principal with a conflicting interest in the transaction, nor revealed the size of the hidden commission, nor informed Kinzbach Tool that Corbett was willing to sell the whipstock for \$20,000. Throughout the transaction, Kinzbach Tool thought that Turner was its agent alone.³⁴

Ultimately, Kinzbach Tool bought the whipstock for \$25,000. This was \$5000 more than Corbett's reservation price, as Turner knew. Coincidentally, \$5000 also was the size of the secret commission that Corbett promised to pay Turner from the sale proceeds.³⁵

Kinzbach Tool subsequently discovered Turner's double-dealing and fired him on the spot. By this time, Corbett had paid Turner \$500 in commissions, leaving \$4500 unpaid. Kinzbach Tool then notified Corbett of its belief that it was entitled to a \$5000 credit against the sales price, the discount reflecting Turner's undisclosed commission. Corbett refused to apply the credit, and litigation among Kinzbach Tool, Corbett, and Turner ensued.³⁶

The Texas Supreme Court determined that Turner was Kinzbach Tool's fiduciary, that Turner was therefore obligated to meet "high equitable standards," and that Turner breached the duty of loyalty, which required him to tell Kinzbach Tool about the conflict, the hidden commission, and Corbett's reservation price.³⁷ The court then stated that "if the fiduciary takes any gift, gratuity, or benefit in violation of his duty, or acquires an interest adverse to his principal, without full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received."³⁸ Finally, the court found that Corbett was a joint tortfeasor with Turner, and awarded Kinzbach Tool relief.³⁹

³⁴ *Id.* at 510.

³⁵ *Id.* at 511.

³⁶ *Id.*

³⁷ *Id.* at 513-14.

³⁸ *Id.* at 514 (internal quotation marks omitted).

³⁹ The finding that Corbett was a joint tortfeasor was essential. See *MECHEM*, *supra* note 28, § 2137.

[T]he third person who has been guilty of no wrong is ordinarily not liable to the principal for losses caused to the latter by the misconduct or default of his own agent. But where the third person conspires with

From the facts alone it is abundantly clear that the *Kinzbach Tool* Court could not possibly have held that a principal, harmed or unharmed, was entitled to recoup fees from a disloyal agent. *Kinzbach Tool Company did not even attempt to recoup any monies that it paid to Turner as fees*. It demanded credit for the secret commission that Corbett agreed to pay Turner, most of which Turner never received and none of which came from Kinzbach Tool. Knowing only the facts, one can exclude the possibility that *Kinzbach Tool* recognized a remedy of fee recoupment.

Kinzbach Tool actually stands for the unremarkable proposition that an agent who receives a hidden benefit when effecting a transaction must convey the benefit to the principal. This has always been true. Section 388 of the Restatement (Second) of Agency states that, “[u]nless otherwise agreed, an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal.”⁴⁰ This requirement, which tracks the tort of usurpation of corporate opportunity, is no exception to the rule that a principal’s right to damages is limited to its loss. Turner’s secret commission was *Kinzbach Tool*’s loss—it was the appropriation by Turner of a discount that *Kinzbach Tool* could have received without reducing Corbett’s profit on the sale. The court’s decision to extinguish Turner’s commission and to award *Kinzbach Tool* the credit merely restored *Kinzbach Tool* to its rightful position, i.e., the position it would have been in if Turner had been loyal.

In *Burrow*, there was no allegation that the attorney-defendants received secret commissions in return for settling the plaintiffs’ personal injury claims. The *Burrow* plaintiffs sought to recover fees they paid the attorney-defendants themselves. *Kinzbach Tool* had nothing to say about this fee recoupment claim. *Kinzbach Tool Company* neither sought to recover a dime that it paid Turner in fees nor was awarded a fee recovery. Consequently, *Kinzbach Tool* could not have determined the outcome in *Burrow*.

Now consider what the *Burrow* court said about *Kinzbach Tool*. It began by observing that “[i]n the one case in which we have considered

the agent to perpetrate a fraud upon the principal, he is undoubtedly liable. So where the third person, by surreptitious dealing with the agent . . . has obtained the property of the principal . . . the defrauded principal . . . is entitled to recover his property . . . or . . . to have such other adequate relief as a court of equity may be able to render under the circumstances.

Id.

⁴⁰ RESTATEMENT (SECOND) OF AGENCY § 388 (1958).

the subject, *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, this court held that an agent was required to forfeit a secret commission received from a conflicting interest even though the principal was unharmed.”⁴¹ The opening clause is crucially vague. What was “the subject” that *Kinzbach Tool* addressed? It certainly was not fee recoupment, the subject of *Burrow*. The closing phrase is simply wrong. *Kinzbach Tool* did not hold that “the principal was unharmed.” When reviewing the facts, the court stated clearly that Turner’s disloyalty cost his employer \$5,000: “Turner, Kinzbach’s trusted employee, permitted his employer to consummate a contract whereby it bought for \$25,000 that which he, Turner, knew might be bought for \$20,000.”⁴²

After committing the preceding errors, the *Burrow* Court set out the facts of *Kinzbach Tool* and quoted the following excerpt:

It is beside the point for either Turner or Corbett to say that Kinzbach suffered no damages because it received full value for what it has paid and agreed to pay. A fiduciary cannot say to the one to whom he bears such relationship: You have sustained no loss by my misconduct in receiving a commission from a party opposite to you, and therefore you are without remedy. It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired. It is the law that in such instances if the fiduciary “takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.”⁴³

This is an accurate statement of agency law; indeed, I quoted it in one of my amicus briefs. An agent who receives a “secret gain or benefit” when carrying out an assignment, including a “gift, gratuity, or benefit” from an undisclosed principal with conflicting interests, must disgorge it to the principal whether or not the principal is harmed. Obviously, this

⁴¹ *Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex. 1999).

⁴² *Kinzbach Tool*, 160 S.W.2d at 513.

⁴³ *Burrow*, 997 S.W.2d at 239 (quoting *Kinzbach Tool*, 160 S.W.2d at 514).

has nothing to do with *Burrow*. As stated already, no one claimed that the attorney-defendants received secret payments.

The Texas Supreme Court never explained the relevance of the quoted passage to the facts of *Burrow*. Instead, after quoting the language, it continued as follows: "Texas courts of appeals, as well as courts in other jurisdictions and respected commentators, have also held that forfeiture is appropriate without regard to whether the breach of fiduciary duty resulted in damages."⁴⁴ This statement is overly general, and intentionally so. To see this, one need merely ask what is to be forfeited: A secret payment from a third party or a fee voluntarily paid by a client? The common law of agency distinguishes between the two, as the Restatement (Second) of Agency makes plain. It requires an agent to disgorge the former and allows an agent to keep the latter. The court repeatedly ignored this distinction without admitting that it was trampling the common law.

The court also bludgeoned the cases decided by the "Texas courts of appeals" that it cited above in support of its "reading" of *Kinzbach Tool*. I discussed three of these cases—*Bryant v. Lewis*,⁴⁵ *Anderson v. Griffith*,⁴⁶ and *Russell v. Truitt*⁴⁷—in my amicus briefs. None supports the remedy of fee recoupment in the absence of harm.

In *Bryant*, the plaintiff retained two attorneys, Lewis and Browning, to handle her claim against a deceased relative's estate.⁴⁸ Lewis subsequently agreed to represent another person, Blackwell, who had a competing claim against the same estate.⁴⁹ Bryant then discharged Lewis and Browning and hired new counsel to present her claims and to attack Blackwell's.⁵⁰ After being discharged without pay, Lewis and Browning sued Bryant in quantum meruit to collect a fee.⁵¹ In defense of the suit, Bryant claimed that Lewis' disloyalty extinguished her obligation to pay. The court of appeals agreed that Lewis was not entitled to compensation.⁵²

Bryant does not establish, and could not possibly establish, that a principal, harmed or unharmed, has any right to recoup fees previously

⁴⁴ *Id.* at 339-40 (citations omitted).

⁴⁵ 27 S.W.2d 604, 608 (Tex. Civ. App. 1930).

⁴⁶ 501 S.W.2d 695, 701 (Tex. Civ. App. 1973).

⁴⁷ 554 S.W.2d 948, 952 (Tex. Civ. App. 1977).

⁴⁸ *Bryant*, 27 S.W.2d at 605.

⁴⁹ *Id.* at 606.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 608.

paid to an agent. Bryant discharged Lewis without paying him and did not seek any money from him. The case supports the proposition that a principal who fires an agent can assert disloyalty as a defense in a suit by an agent for unpaid fees. *Bryant* is thus completely consistent with section 469 of the Restatement (Second) of Agency.

The *Burrow* court did not deny this. But it did characterize *Bryant* misleadingly. According to the court, *Bryant* held "that [an] attorney who represented clients with conflicting interests was not entitled to any compensation for legal services rendered without addressing whether actual damages were sustained."⁵³ This description elides the distinction between the remedy of fee recoupment and the defense of disloyalty to a discharged agent's claim for payment. It fails to mention that *Bryant* was an A v. P case, not a P v. A case like *Burrow*.

In *Anderson v. Griffith*, Anderson had acted as a real estate agent for the Griffiths, who sold about 50 acres of land for \$250,000.⁵⁴ The buyer was Anderson himself, acting as trustee.⁵⁵ The Griffiths knew this. What they did not know was that before the sale took place, Anderson had arranged to resell the property to a group of buyers that included himself.⁵⁶ That group later sold the land to yet another purchaser for twice the Griffiths' original sale price.⁵⁷

Before the final sale took place, the Griffiths sued Anderson for breach of fiduciary duty.⁵⁸ At the time the suit was filed, Anderson still owned a one-third interest in the land. The Griffiths sought to impose a constructive trust on this interest. After the sale, the Griffiths disclaimed any interest in the land and agreed to look to Anderson's share of the sale proceeds for satisfaction of their claims.⁵⁹

The court of appeals found that Anderson breached his duty of loyalty to the Griffiths by failing to tell them that he expected to make a profit from the sale of their land in addition to the commission he received from them as their agent.⁶⁰ The court then found that Anderson's breach

⁵³ *Burrow v. Arce*, 997 S.W.2d 229, 239 n.35 (Tex. 1999).

⁵⁴ 501 S.W.2d 695, 697-98 (Tex. Civ. App. 1973).

⁵⁵ *Id.* at 698.

⁵⁶ *Id.* at 698-99.

⁵⁷ *Id.*

⁵⁸ *Id.* at 699.

⁵⁹ *Id.*

⁶⁰ "[A]n agent may not deal with the subject matter of the agency in such a manner as to injure the principal, or act in connection with the subject matter so as to secure for himself secret or unauthorized benefits." *Anderson*, 501 S.W.2d at 700.

harmd the Griffiths substantially by depriving them of fair market value for their land.⁶¹

Anderson is not a case in which an unharmed principal recouped fees from a disloyal agent. It is a case in which the principals lost an opportunity to enjoy a significant economic gain. Because of *Anderson*'s secrecy, the Griffiths sold their land for far less, perhaps as much as \$250,000 less, than *Anderson* knew it to be worth. *Anderson* is also a case in which the agent received a hidden profit.

The *Burrow* court distorted *Anderson*, offering it for the proposition that "even though the principal was not injured, '[t]he self-interest of the agent is considered a vice which renders the transaction voidable at the election of the principal without looking into the matter further than to ascertain that the interest of the agent exists.'"⁶² Obviously, the lead-in is a gross mischaracterization. The court of appeals emphasized that *Anderson*'s disloyalty harmed the Griffiths by depriving them of the fair market value of their land.

Finally, consider *Russell v. Truitt*. There, the principals, a group of joint venturers on a construction project, recouped \$8,000 in fees from a disloyal agent, and the language of the opinion suggests that the court did not care whether the principals were injured or not.⁶³ In fact, though, the *Russell* principals were harmed severely. As a result of their agent's misconduct, "the [construction] project's long-term financing was withdrawn, and the First National Bank of Fort Worth foreclosed on the project."⁶⁴ The financial toll appears to have been about \$370,000, although it is impossible to be sure.⁶⁵ The amount the court awarded the principals—\$8,000 in fees and \$55,000 in exemplary damages—was far less than this.

Again, the *Burrow* court's characterization is misleading. It describes *Russell* as "holding that plaintiffs were entitled to recovery of agency fees as a matter of law if the breach of fiduciary duty was proved without regard as to whether the breach caused any harm."⁶⁶ Given the significant financial loss in *Russell*, any statement regarding fee recovery in the absence of harm can only have been dictum, not holding.

⁶¹ *Id.*

⁶² *Burrow v. Arce*, 997 S.W.2d 229, 239 n.35 (Tex. 1999) (quoting *Anderson*, 501 S.W.2d at 701).

⁶³ *Russell v. Truitt*, 554 S.W.2d 948, 950 (Tex. Civ. App. 1977).

⁶⁴ *Id.* at 951.

⁶⁵ *Id.*

⁶⁶ *Burrow*, 997 S.W.2d at 239 n.35.

The *Burrow* court also referred to two other cases: *Watson v. Limited Partners of WCKT, Ltd.*⁶⁷ and *Judwin Properties, Inc. v. Griggs & Harrison, P.C.*⁶⁸ Neither case offers much support for *Burrow*.

The court's parenthetical description of *Judwin Properties* shows this. According to the court, *Judwin Properties* states "in dicta that '[w]hen an attorney has stolen or used the interest to the detriment of his client, the plaintiff need not prove causation for breach of fiduciary duty.'" ⁶⁹ Given the combination of dictum and harm to the client, *Judwin Properties* hardly stands as precedent for the remedy of fee recoupment in the absence of harm.

If the court is to be believed, *Watson* should carry much more weight. It describes *Watson* as "holding that limited partners may recover against [a] general partner without a showing of actual damages."⁷⁰ Because partners are fiduciaries for each other, this description makes the case seem relevant.

Once again, however, the court's description is willfully and wildly inaccurate. In *Watson*, "a jury found . . . that the general partner's conduct was a proximate cause of damages to the limited partners."⁷¹ On appeal, the court "overrule[d]" the general partner's contention that "there [was] no evidence, or insufficient evidence, of any damages proximately caused by the general partner's conduct in managing affairs of the partnership."⁷² *Watson's* "holding" cannot possibly be that limited partners can recover damages without showing harm, whatever the justices may think.⁷³

I began this section by renewing my claim that "stunningly little authority" supported TRLF's assertion that Texas cases recognized the remedy of fee recoupment in the absence of harm. I have now canvassed every Texas case that the supreme court relied upon in *Burrow* and shown this to be true. The justices got the result they wanted by distorting Texas law.

⁶⁷ 570 S.W.2d 179 (Tex. Civ. App. 1978).

⁶⁸ 911 S.W.2d 498 (Tex. App. 1995).

⁶⁹ *Burrow*, 997 S.W.2d at 239 n.35 (quoting *Judwin Properties, Inc.*, 911 S.W.2d at 507).

⁷⁰ *Id.*

⁷¹ *Watson*, 570 S.W.2d at 180.

⁷² *Id.*

⁷³ When one reads a page or so further into *Watson*, one sees that the limited partners lost \$15,900 apiece. *Id.* at 182. This was money they invested in the project and placed under the general partner's control. Its recovery was held by the appellate court to be justified on restitutionary grounds. Its recovery also would be appropriate under section 399 of the Restatement (Second) of Agency.

IV. TRUSTEES VERSUS AGENTS

To this point, I have examined portions of the *Burrow* opinion that dealt with the Restatement (Second) of Agency and Texas common law. In this section, I will turn to passages that analogized from the law of trusts. My conclusion will be that when reasoning from this body of law, the justices were vague and superficial.

According to *Burrow*:

The rule [of fee recoupment for disloyalty] is not dependent on the nature of the attorney-client relationship . . . but applies generally in agency relationships. Thus, as we have already seen, section 243 of the Restatement (Second) of Trusts sets out a similar rule for forfeiture of a trustee's compensation: "If the trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him a reduced compensation or allow him full compensation."⁷⁴

This passage is interesting for several reasons. First, the opening sentence is false. Before *Burrow*, agents in general were not subject to the rule of fee recoupment. Second, nothing in section 243 of the Restatement (Second) of Trusts discusses fee recoupment. The section and its comments address only the possibility of reducing or withholding fees that a trustee has not received.

Third, and more fundamentally, the suggestion the same rule should apply to all fiduciaries ignores crucial differences between trustees and litigating attorneys. An attorney with multiple clients may not subordinate the interests of one client to those of another. An attorney may act only in ways that are expected to make all clients better off.⁷⁵ By contrast, a trustee may prefer one beneficiary to another, and many

⁷⁴ *Burrow*, 997 S.W.2d at 242-43 (quoting RESTATEMENT (SECOND) OF TRUSTS § 243 (1959)).

⁷⁵ I have discussed this "no subordination" rule many times. See, e.g., Ellen Smith Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part II—Contested Coverage Cases*, 15 GEO. J. LEGAL ETHICS 29, 34 (2001); Charles Silver & Kent D. Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 337 (1995).

trustees make inter-beneficiary tradeoffs routinely. A trustee need only act impartially.⁷⁶

A trustee also can gain protection from a breach of fiduciary duty charge more easily than an attorney. When the permissibility of a proposed use of assets is unclear, a trustee can gain complete protection from a misconduct charge by seeking prior judicial review.⁷⁷ A trustee can even bill the cost of a declaratory judgment action as an administrative expense. No such option exists for a litigating attorney.

In *Burrow*, the plaintiffs accused the lawyers of subordinating the interests of some clients to those of others when allocating a settlement fund. Had the lawyers been trustees, this charge would have faced a defense of reasonableness. The lawyers also would have been able to avoid the charge in advance by requesting a declaratory judgment from a court.

Given these differences, the case for fee recoupment as a remedy for disloyalty must be argued separately for lawyers and trustees. When it comes to allocation decisions,⁷⁸ lawyers who act without consent will always be liable, but trustees will be liable only when they abuse their discretion and fail to obtain judicial review before acting. Because trustees enjoy more options and greater protection than attorneys, a draconian rule on fees is easier to defend with respect to them.

In multiple-client lawsuits, a rule of strict liability for inter-client tradeoffs is especially dangerous. Attorneys cannot handle these lawsuits without making tradeoffs constantly. Consider the decisions that must be made when developing clients' claims. A plaintiffs' firm with thousands of clients with claims against manufacturers of asbestos producers will not have enough personnel to develop all cases concurrently. The largest such firm, Baron & Budd of Dallas, Texas, has about 500 lawyers and non-lawyer employees. Consequently, while some clients are served, others wait in the queue. The decision to serve some clients now and others later involves an inter-client tradeoff. In a world where a dollar earned today is

⁷⁶ RESTATEMENT (SECOND) OF TRUSTS § 183 (1959) ("When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.").

⁷⁷ *Id.* § 259 ("The trustee is entitled to apply to the court for instructions as to the administration of the trust if there is reasonable doubt as to his duties or powers as trustee.").

⁷⁸ It may be important to distinguish allocation decisions from other disloyal acts such as self-dealing. It is entirely possible that agents and trustees should be treated the same when they act disloyally by putting their own interests ahead of their charges' but treated differently when their offenses relate to allocations.

worth more than a dollar earned tomorrow, all clients would rationally want to be served first.

Client queuing is an example of what Saul Levmore calls a competition among principals for an agent's services.⁷⁹ These competitions occur across the entire range of resources that agents devote to matters within their control. A mass tort lawyer with \$10,000 to spend may hire an expert witness to testify on causation or a different expert to testify on damages. Clients may disagree about the choice. In an explosion case, victims whose homes were located near the center of a blast may benefit more from better proof of harm than from better proof of causation. Victims whose houses were near the periphery may more greatly need to establish that the force of the blast actually reached their homes. In an asbestos case, mesothelioma victims may want the damages expert and pleural disease victims may prefer the expert on causation.

Lawyers handling mass tort cases do not obtain consents when making strategic decisions like these. They act unilaterally using their best professional judgment. Nor could they practicably do otherwise. A requirement of obtaining consent before queuing clients would, by itself, bring mass tort cases to a halt. Imagine trying to obtain the consent of 1000 clients, or even 100 clients, before deciding which file to work on next.

Obviously, it is a practical necessity to draw a line between inter-client tradeoffs that lawyers can make unilaterally, perhaps subject to a reasonableness requirement, and tradeoffs that require client consent. Trustees have such a line. They can act without beneficiaries' consent when they have a reasonable basis for deciding, and they can consult the courts in advance when their control is challenged.⁸⁰

Before *Burrow*, lawyers had a line too. Demonstrable harm to the client divided tradeoffs that lawyers could make unilaterally from those that required consent. In effect, the harm requirement reduced the practical importance of an ambiguity that inheres in all conflict of interest rules. For example, Rule 1.7(b) of the Model Rules of Professional Conduct ("Model Rules") reads as follows: "A lawyer shall not represent a client if the representation of that client may be *materially limited* by the lawyer's responsibilities to another client."⁸¹ As the italicized language plainly shows, Rule 1.7(b) does not prohibit all interest conflicts. It distinguishes important conflicts—those that are "materially limit[ing]"—

⁷⁹ Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J. LEGAL STUD. 259 (1999).

⁸⁰ RESTATEMENT (SECOND) OF TRUSTS § 259 (1959).

⁸¹ MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (1992).

from unimportant conflicts—those that are not “materially limit[ing]”—and prohibits only the former. Unfortunately, neither Rule 1.7(b) nor anything else in the Model Rules explains how, in practice, lawyers can tell these conflicts apart. Sorting conflicts is inescapably a matter of judgment because no rigorous analytical distinction can be drawn between the two.

The conflict rules in the Restatement (Third) of the Law Governing Lawyers contain the same ambiguity. The basic rule, set out in section 201, states that “[a] conflict of interest is involved if there is a substantial risk that the lawyer’s representation of the client would be *materially* and adversely *affected* . . . by the lawyer’s duties to another current client.”⁸² The rule specific to litigation conflicts, stated in section 209, contains the same language.

To the Reporters’ credit, the Restatement (Third) attempts to clarify the materiality requirement. Comment c(ii) to section 201 states that “[m]ateriality of a possible conflict is determined by reference to obligations necessarily assumed by the lawyer (see section 28).”⁸³ In turn, section 28 states that a lawyer must:

proceed in a manner reasonably calculated to advance a client’s lawful objectives . . . ;

- (1) act with reasonable competence and diligence;
- (2) comply with obligations concerning the client’s confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and
- (3) fulfill valid contractual obligations to the client.⁸⁴

Obviously, although the Reporters tried to disambiguate the materiality requirement, they did not succeed. First, the reference to “impermissible conflicting interests” in subparagraph (2) makes entirely circular Comment c(ii)’s effort to use section 28 to define material limitations. Second, subparagraphs (1) and (2) of section 28 both require judgment calls. Whether a particular use of litigation resources was

⁸² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 201 (P.F.D. No. 1, 1996) (emphasis added).

⁸³ *Id.* cmt. c(ii).

⁸⁴ *Id.* § 28.

“reasonably calculated” to help a client and demonstrated “reasonable competence and diligence” on the lawyer’s part is precisely what the former client bringing the breach of fiduciary duty action will deny. The former client will assert that the lawyer acted unreasonably by making decisions that put other clients’ interests first.

Before *Burrow*, such an assertion made by a client who could not prove harm was a non-starter. Now, it automatically entitles a former client to a trial. Because conflicts inhere in all multiple-client representations, there usually will be some evidence to show that an attorney could have served a client better, and there always will be some expert witness willing to testify that an attorney was disloyal. Every such claim therefore raises a serious possibility of a partial or complete fee reduction, and every such claim therefore has settlement value.⁸⁵

This is an unsatisfactory state of affairs for claimants and lawyers. Many claims increase in value when they are joined with others and litigated in a coordinated manner. An individual pleural disease case is worthless, yet lawyers have settled large blocks of pleural cases for millions of dollars.⁸⁶ If claimants are to enjoy the advantages of group lawsuits and if lawyers are to conduct these lawsuits efficiently, it must be possible for lawyers to make many inter-client tradeoffs without risking disloyalty charges.

Because most cases settle, it must in particular be possible for lawyers to propose settlement amounts in mass actions. Many clients have little idea what their claims are worth. They rely on lawyers to evaluate their cases and pay them for this service. Yet, when claims are settled in blocks, as mass tort claims routinely are, a plaintiff’s attorney may have the power to obtain a larger settlement for one client by recommending a smaller amount for another. Under *Burrow*, even recommending settlement amounts when representing multiple clients can conceivably cost a lawyer a fee.

⁸⁵ To escape this predicament, a defendant-attorney may urge a court to distinguish an action that harms a client from an omission that merely leaves a client where he or she stood. Although there are many situations in which the law regards the failure to help as being both different from and normatively better than the infliction of harm, the difference is considerably less sharp when the actor is a fiduciary. For example, a trustee has an affirmative duty to protect the trust corpus and, usually, to enhance its value. A trustee who fails to invest assets will be held liable for failing “to use reasonable care and skill to make the trust property productive.” RESTATEMENT (THIRD) OF TRUSTS, PRUDENT INVESTOR RULE § 181 (1990).

⁸⁶ See Richard Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295 (1996).

A trustee who makes inter-beneficiary tradeoffs can easily avoid liability.⁸⁷ A lawyer who makes inter-principal tradeoffs cannot. Yet, in multiple-client representations, lawyers must make many tradeoffs unilaterally. Consequently, from a remedial perspective it makes no sense to subject lawyers and trustees to the same fee forfeiture rule. The harm requirement protected lawyers by reducing the importance of the uncertainty surrounding the materiality requirement in the conflict rules. This layer of insulation helped clients by giving lawyers discretion to make decisions that could efficiently be left to them.

Burrow unwrapped this insulation. Now, any lawyer who makes a decision that involves an inter-client tradeoff is exposed to a fee forfeiture claim—even if the decision was a good one from the perspective of all clients taken as a group and a reasonable one from the perspective of any given client. The high-sounding rhetoric of the opinion suggests a desire to protect clients from interest conflicts absolutely, but this is an unrealistic goal. In the real world, it is impossible for mass tort lawyers to represent tens, hundreds, or thousands of clients without making inter-client tradeoffs daily. A policy of zero-tolerance for interest conflicts would deprive clients of the advantages of group litigation while offering no benefits in their place.

V. POLICY ANALYSIS

To this point, I have shown that the Texas Supreme Court distorted the Restatement (Second) of Agency and Texas agency cases and that the court's analogy between trustees and agents was superficial and unpersuasive. Yet, one could respond to all of this by asking why one should treat P v. A situations different from A v. P situations. Why not free principals from liability for fees whenever agents act disloyally?

There is an obvious policy justification for the common law requirements that *Burrow* swept away, having to do with the need for evidence that a disloyal act seriously mattered to a client. By now, it should be clear: (1) that interest conflicts necessarily arise when agents represent multiple principals concurrently; (2) that acts of imperfect loyalty are the concrete manifestations of these conflicts; and (3) that principals knowingly tolerate many such acts, not because deviations from perfect loyalty are desirable, but because the cost of avoiding them by

⁸⁷ See RESTATEMENT (SECOND) OF TRUSTS § 259 (1959).

hiring a sole agent is too great for principals to bear.⁸⁸ Clients accept being queued. They accept that lawyers may work harder for some clients than others. They accept that lawyers allocate scarce financial resources among multiple matters. They accept that a lawyer may tell one client confidences communicated by another when explaining how matters are being handled or why particular matters are being handled first. They accept that lawyers have important reputational interests that cause them to be less aggressive or more aggressive than clients desire when dealing with defendants. They understand that lawyers' fees reflect lawyers' ability to avoid risks and lower costs by developing portfolios of matters.

Because conflicts are both unavoidable and frequently tolerable, the common law has to sort conflicts into those that are important for legal purposes and those that are not. In other words, it has to do what the Model Rule and the Restatement (Third) of the Law Governing Lawyers seek to accomplish by establishing "material affect" requirements. The common law has, however, drawn the lines more starkly and functionally. It has used the requirement of discharge to distinguish among conflicts for one purpose—that of determining whether a *principal* owes an *agent* anything—and it has used demonstrable harm for another—that of determining whether an *agent* owes a *principal* anything.

These are intelligent choices. Consider discharge. Obviously, discharge is a discrete action that gives one a bright-line rule.⁸⁹ But there is more to it than this. A principal who terminates an agent without pay while a project is ongoing often incurs significant costs and risks. First, the principal bears the expense of supervising the agent with sufficient care to discover the wrongdoing. Second, the principal loses the opportunity to gain a return on the sunk cost of finding, hiring, and training the agent. Third, the value of the agent's detailed knowledge of the project acquired through on-the-job experience is lost as well. Fourth, the project may have to be delayed until a new agent is located, engaged, and trained. Fifth, the firing may lead other candidates to believe that the principal is a high-risk employer and make them refuse offers of employment or demand higher wages. Sixth, the firing may send negative signals to other relevant audiences, such as investors or other creditors,

⁸⁸ Even hiring a sole agent would not eliminate conflicts. The interests of principals and agents never align perfectly. Consequently, the arguments made in the text concerning agents for multiple principals apply, *mutatis mutandis*, to agents with single principals as well.

⁸⁹ Except for laches, the other defenses recognized by the Restatement (Second) of Agency (illegality, statutes of frauds, discharge, bankruptcy, and statutes of limitations) also establish bright-line rules.

and make them skittish. Seventh, the replacement hire may turn out to be worse than the old agent. Eighth, the former agent may disagree about the reasonableness of the discharge and sue for unpaid compensation, saddling the principal with litigation costs.

Because it is costly to terminate an agent, the decision to discharge for disloyalty is clear evidence that, in the principal's opinion, the violation matters. A principal's willingness to monitor an agent closely enough to discover a violation is itself a strong signal of a principal's interest in the conduct at issue. Discharge also establishes a bright-line rule. Consequently, discharge is an appropriate basis for distinguishing conflicts that terminate an agent's right to compensation from conflicts that do not.

Now consider provable harm. Although a harm requirement may establish a duller line than discharge, the line is fairly clear in many situations and the common law has broad experience with it. In cases like *Kinzbach Tool* where an agent receives a hidden commission, the commission is the principal's loss and its size usually can be determined straightforwardly. The same is true when, as occurred in *Anderson*, an agent makes a secret profit by failing to disclose information relating to a self-dealing transaction. The difference between the price the agent paid and the price the agent received is easy to calculate. In *Watson*, the court used the sums the limited partners put under the general partners' control as the measure of their losses. This too is easy to determine.

The hardest kind of case to adjudicate is one like *Russell*, where an agent's misconduct causes a principal to incur substantial consequential damages.⁹⁰ Here, the line is no brighter than in any other lawsuit where consequential damages may be recovered. But it is no duller either. Common law courts have great experience awarding compensation for losses incurred. Although they have not made an exact science of this inexact matter, they have developed serviceable procedures for proving up losses.

Burrow eliminated the common law criteria of discharge and provable harm. In place of them, the court imposed the general fee forfeiture provision set out in section 49 of the Restatement (Third) of the Law Governing Lawyers: "A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the

⁹⁰ See *Russell v. Truitt*, 554 S.W.2d 948 (Tex. Civ. App. 1977).

lawyer's compensation for the matter."⁹¹ The court also adopted the list of factors on which the magnitude of the forfeiture depends.⁹²

As previously explained, the decision to follow the Restatement (Third) makes it even harder to understand why the justices butchered both the Restatement (Second) and prior Texas cases. Why distort legal authorities when one has an independently sufficient basis for striking out in a new direction? One reason may be that nothing in section 49 indicates an intention to deviate from the Restatement (Second). To the contrary, in comments to section 49, the Reporters purport to *follow* the Restatement (Second). Thus, Comment b to section 49 cites section 456(b) of the Restatement (Second) as authority, and Comment d cites section 469. One might therefore conclude that, although the text of section 49 ignores the distinction between remedies and defenses that the Restatement (Second) sets out with such care, a major rewrite of the common law was not intended.⁹³

A second reason is that from start to finish the Restatement (Third) of the Law Governing Lawyers was mired in controversy. Many scholars thought it poorly conceived and discouraged the American Law Institute from undertaking it.⁹⁴ While the project was ongoing, many criticized the Reporters' readings of cases and their tendency to take aggressive positions on the basis of slim authority,⁹⁵ a tendency the Lead Reporter admitted.⁹⁶ When the document was nearly completed, charges of error,

⁹¹ *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999).

⁹² *See id.*

⁹³ A WESTLAW search of the REST-LGOVL database turned up no discussion of the Restatement (Second) in any Reporter's Memorandum relating to the fee forfeiture provision. There is, however, some evidence that the Reporters for the Restatement (Third) thought they were merely following established common law. *See* Reporter's Memorandum to the Members of the Institute, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Tentative Draft No. 4, Apr. 10, 1991) ("The Section [i.e., § 49] states a primarily common-law rule delimiting when a tribunal may order forfeiture of a lawyer's fees.").

⁹⁴ *See, e.g.,* Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?* 46 OKLA. L. REV. 25, 25 (1993) (describing the project as "a notable departure from ALI traditions").

⁹⁵ *See, e.g.,* Stephen Gillers, *Caveat Client: How the Proposed Final Draft of the Restatement of the Law Governing Lawyers Fails to Protect Unsophisticated Consumers in Fee Agreements with Lawyers*, 10 GEO. J. LEGAL ETHICS 581 (1997); Charles Silver & Michael Sean Quinn, *Are Liability Carriers Second-Class Clients? No, But They May Be Soon—A Call to Arms against the Restatement of the Law Governing Lawyers*, 6 COVERAGE 21 (Jan./Feb. 1996).

⁹⁶ *See* Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements*, 26 HOFSTRA L. REV. 817, 818-819 (1998) ("[T]he view—which we have striven to follow in

ideological bias, improper influence and interest conflicts filled the air.⁹⁷ Many years and much careful scrutiny will be needed to identify the sections of the Restatement (Third) that actually express the soundest view of the law.

Section 49 requires especially close study. As the Reporter's Note observes, "[s]ome courts have refused to hold fees forfeited when the client was not harmed."⁹⁸ Citations to five cases from five different jurisdictions follow this admission. Although the manner in which the Reporter's Note is written makes it impossible to be sure, cited cases that reject the doctrine of fee recoupment in the absence of harm appear to outnumber those that endorse it.

The imbalance of authority seems even more lop-sided when one considers that several of the cases cited in section 49 rely on prior versions of section 49 as authority.⁹⁹ Talk about lifting oneself up by the bootstraps! In an early draft, the Reporters endorsed a controversial remedy that had little case support. Then, a court cited the early draft as authority for the fee forfeiture remedy, perhaps reaching a conclusion that it would have rejected had it thought the matter through for itself instead of allowing the prestige of the American Law Institute to dictate its decision. Then, the Reporters completed the circle by citing the new case as authority for their view. Obviously, it is dangerous for the common law to develop this way. Reporters make mistakes, and their mistakes should not automatically or, indeed, ever become the law.

Three of the cases that TRLF relied upon in its amicus briefs cited early drafts of section 49 as authority. This includes *Hendry v. Pelland*,¹⁰⁰ the case upon which TRLF placed the greatest weight.¹⁰¹ After finding "no District of Columbia cases precisely on point," the *Hendry* Court cited

the Restatement of the Law Governing Lawyers—[is] that a substantive proposition in a Restatement is warranted as 'restating' the law if it can be rested on the support of at least one decision in an American jurisdiction.").

⁹⁷ Entire symposia have been dedicated to the subject. See, e.g., Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 HOFSTRA L. REV. 641 (1998). See also Charles Silver, *The Lost World: Of Politics and Getting the Law Right*, 26 HOFSTRA L. REV. 773 (1998).

⁹⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49, Reporter's Note, cmt. d (Proposed Final Draft No. 1, 1996).

⁹⁹ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49, COURT CITATIONS TO RESTATEMENT, THIRD (Tentative Drafts) (1998).

¹⁰⁰ 73 F.3d 397 (D.C. Cir. 1996).

¹⁰¹ TRLF cited *Hendry* six times, more than any other case. The other tainted cases are *Int'l Materials Corp. v. Sun Corp.*, 824 S.W.2d 890 (Mo. 1992) and *Searcy, Denney, Scarola, Barnhart & Shipley, PA v. Scheller*, 629 So. 2d 947 (Fla. Dist. Ct. App. 1993).

section 49 of Tentative Draft No. 4 of the Restatement (Third), published in 1991, and eliminated the harm requirement.¹⁰² To complete the circle, in the final draft of section 49 the Reporters cited *Hendry* in support of their view that a showing of harm is optional.¹⁰³

When considering the merit of section 49, one must think for oneself instead of being led in circles by authorities that refer to each other. The common law carefully separated principals' remedies against agents from principals' defenses to agents' claims for unpaid fees, establishing harm as a condition for the former, and establishing discharge as a condition for the latter. In the Restatement (Third), the Reporters laid waste to this structure, apparently by accident and certainly without providing a careful legal or policy analysis. Instead, they cited cases many of which relied on prior drafts of section 49.

When one does think for oneself, one quickly sees that the Restatement (Third)'s "clear and serious violation of a duty to a client" standard¹⁰⁴ is less serviceable than the discharge and provable harm requirements of the common law. According to the Restatement (Third), "[a] violation is clear if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful."¹⁰⁵ Obviously, this is a matter that can only be established through expert testimony and that will require a jury determination in every case where the experts disagree—which is to say, in every case, period. What the Restatement (Third) says about seriousness is even more indeterminate.¹⁰⁶ Unlike the common law, the "clear and serious" standard contains no criteria that establish bright-line rules for distinguishing important conflicts from trivial ones.

The loss has serious implications. It is inexpensive for a former client to sue a lawyer after a lawsuit settles. In *Burrow*, the plaintiffs put up about \$2,000 each and their lawyer worked on contingency. A malpractice plaintiff must also contribute time, but for most tort claimants this is a minor issue. Having already been paid, a former client also avoids the direct costs that usually flow from the decision to fire an attorney. The indirect costs are minimal too because tort plaintiffs rarely have reputational interests to consider.

¹⁰² *Hendry*, 73 F.3d at 401. The court also confused the *defense* of fee forfeiture with the *remedy* of fee recoupment. See *id.* at 401-02.

¹⁰³ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. d (Tentative Drafts) (1998).

¹⁰⁴ *Id.* § 49.

¹⁰⁵ See *id.* § 49 cmt. d.

¹⁰⁶ See *id.*

Two other considerations also matter. First, given the nature of mass tort cases, some evidence of imperfect conduct can always be found. Evidence of disloyalty will exist because some inter-client tradeoffs cannot be avoided. Why did the lawyer work on Client A's case before Client B's? Did "the squeaky wheel get the grease" even though B's needs were just as great? Why didn't the lawyer obtain B's consent before putting his case on the back burner? Evidence also will exist because attorneys are negotiators and advisors. Why didn't the lawyer recommend a larger payment for B when bargaining toward settlement? Was it because the lawyer wanted to keep more money available for A? Why didn't the lawyer advise A to settle for less so that more money would be available for B? Why did the lawyer pressure B to settle? Was the lawyer motivated by a sincere desire to protect B's interests, or did lust for fees cause the lawyer to twist B's arm excessively?

Second, concerns about disloyalty are easy to feign or exaggerate. Anyone can say, "I would have fired my lawyer had I known what was happening." A former client may even believe it. Yet, it is one thing to talk about changing horses in midstream and an entirely different matter to accomplish the feat. From a client's perspective, there is little downside potential attached to the decision to sue a lawyer post-settlement. Consequently, the act of filing a fee recoupment lawsuit in the absence of demonstrable harm is not a reliable signal that disloyalty mattered to a client.

The real question is whether the market will supply attorneys who are willing to take fee recoupment cases against mass tort lawyers on a contingent payment basis. Although contingent fee lawyers reject most requests for representation, there are several reasons for believing that the "need" will be met. First, because conflicts inhere in all multiple-client representations, there usually will be some evidence of disloyalty. Consequently, most fee recoupment cases are likely to have enough merit to survive pre-trial motions. Second, because mass tort cases involve millions of dollars in fees, the potential payoff will be high, and the larger the recovery, the higher the fee to be recouped.

VI. CONCLUSION

I have argued against a zero-tolerance standard for interest conflicts in multiple client representations. This may be an odd position for a professor of legal ethics to take, but the zero-tolerance standard is completely unrealistic. Serviceable arrangements are the best claimants can hope for in a conflict-ridden world. To eliminate inter-client conflicts,

one would have to forbid lawyers from representing multiple clients. This would make clients worse off by denying them the benefits of aggregation.

Interest groups that oppose mass tort lawsuits understand this. They seek to hold mass tort lawyers to ethical standards that are impossibly high because they oppose claim aggregation. If they succeed, every mass tort settlement will become a bona fide fee recoupment opportunity and attorneys' enthusiasm for mass tort cases will diminish. Claimants will lose while seeming to win. In theory, they will be entitled to "gold plated" representation. In practice, lawyers will turn down their cases.

In *Burrow*, the Supreme Court of Texas responded to pressure from one such interest group and created a new remedy calculated to destabilize the practices of mass tort lawyers. It also disguised what it was up to by distorting the Restatement (Second) of Agency and prior Texas cases. An important function of academic commentary is to discourage conduct like this.

ADDENDUM

THE SILENCE OF THE COMMENTATORS REVISITED

I am increasingly interested in partisan debates about the legal profession and in the uses participants in these debates make of ethics rules and principles. In 1999, this interest led me to write of a bias that certain politically conservative commentators seemed to exercise when targeting attorneys for public condemnation. The commentators castigated plaintiffs' attorneys for attempting to manufacture evidence while saying nothing about a lawyer defending a product manufacturer who engaged in similar misconduct.

The plaintiffs' attorneys were lawyers at Baron & Budd who represented asbestos claimants. The defense lawyer was William J. Skepnek, an attorney for Raymark Industries, an asbestos manufacturer. The Baron & Budd incident involved a witness preparation memorandum that, the commentators asserted, asked clients to lie. The Skepnek incident involved an affidavit signed by a Raymark executive that, according to two courts, was both false and known to be false when filed.¹ Although both incidents involved charges of evidence fabrication, the pundits treated them quite differently. They attacked Baron & Budd mercilessly as soon as the witness preparation memorandum became public. Yet, they gave Skepnek a pass even after his misconduct was adjudicated and even though James F. Cobb, the former president of Raymark who signed the false affidavit, was sanctioned severely.²

Professor Lester Brickman, a participant in this symposium, was one of the commentators I identified. He published a column in *The Wall Street Journal* condemning Baron & Budd. He also has repeatedly lodged accusations of misconduct against personal injury lawyers, mass tort lawyers, and private attorneys who handled the states' tobacco cases.

Professor Brickman has not publicly criticized Mr. Skepnek, however. At the conference that preceded the publication of this Symposium, I asked him why. The question was natural for another reason: Skepnek was a lawyer for the *plaintiffs* in *Arce v. Burrow*, the fee recoupment case whose merits Brickman and I debated. By questioning Brickman, I hoped to explore the possibility that *Arce* was a strategic

¹ See *Skepnek v. Mynatt*, 8 S.W.3d 377 (Tex. App. 1999); *In re Skepnek*, No. 03-98-00388-CV, 1998 WL 717202 (Tex. App. 1998).

² *In re James F. Cobb*, 1999 WL 689621 (Tex. App. 1999) (affirming sanctions).

attack on mass tort lawyers orchestrated by an asbestos manufacturer and an attorney in its employ.

In response to my prodding, Professor Brickman eliminated ignorance as a possible explanation for his failure to condemn Mr. Skepnek. He stated that he was quite familiar with the charges against Skepnek. He also asserted that my statements regarding those charges were false, even libelous, and further reported that he knew Skepnek to be an honorable member of the legal profession. At this point, I interrupted him, read the audience the citations for the reported cases I relied upon, and asked Brickman whether he knew any facts suggesting that my sources were wrong. He responded only by asserting that the sanctions decisions against Skepnek were still on appeal. I pointed out that this was only partly true. A WESTLAW search conducted shortly before the conference showed that one decision against Skepnek was final. I subsequently learned that the second proceeding was final as well. The "fact" Brickman purported to know was not one.

In my opinion, Professor Brickman's explanation for his silence makes his favoritism clear. He gave Skepnek the benefit of the doubt while withholding it from lawyers at Baron & Budd. He did not wait for a trial court to find that they acted improperly. Nor did he withhold judgment pending a final decision by a court of appeals. He publicly accused the Baron & Budd attorneys of suborning false testimony before any court decided anything.

In Texas' tobacco case, Professor Brickman also denied plaintiffs' attorneys the benefit of the doubt. There, he joined forces with politicians, including then-Governor George W. Bush, who intervened for the purpose of attacking the private attorneys' fees. In support of their political cause, he submitted a report accusing the private attorneys of disloyalty and of charging an excessive fee. He lodged these allegations even though the settlement garnered what was then the largest civil recovery in history and even though the presiding federal district court judge had already issued a lengthy opinion approving the fee. Again in contrast to his treatment of Skepnek, he passed judgment before any court entered a finding of wrongdoing; indeed, he did so in the teeth of a decision that the fee was proper. At last report, Brickman was working with President Bush's administration on a plan to subject fees earned in tobacco cases to an excess profits tax.

After the conference ended, it occurred to me that Professor Brickman may have known more about Mr. Skepnek than he was able to recall when I put him on the spot by asking him for details. Because I wanted to know the truth and because Brickman's libel charge rankled me,

I wrote him and asked for a complete account of his knowledge on the subject and for copies of or citations to any relevant documents he possessed.³ In response to my request, Brickman provided no new information.⁴

In one respect, I found this comforting. Because Professor Brickman knew nothing that cast doubt on the accuracy of my account of the charges against Skepnek, my confidence was restored. In another respect, Brickman's response disturbed me greatly. A libel charge is a serious allegation to make against a university-level researcher at an academic conference.⁵ Were I a scientist, the equivalent indictment might have been that my findings were worthless because I negligently, intentionally, or recklessly relied upon faulty data. It is now clear that the charge was baseless and that Brickman acted rashly in making it. The sanctions decisions against Skepnek are final, and Brickman possesses no information that casts doubt on the accuracy of my statements.

Professor Brickman's response also surprised me for another reason. I sought information and documents from him because he claimed to know things that bore on the accuracy of my public statements. As an academic, this seemed to me to be the proper course. Yet, Brickman requested nothing from me in return, even though he knew that I possessed materials bearing on the accuracy of his rejoinder. When I wrote him, I expected him to respond by asking for a copy of my file so that he could test the reasonableness of his defense of Mr. Skepnek and evaluate the soundness of the libel charge. To me, his failure to seek access to my materials signals a troubling lack of interest in the facts.

Although Professor Brickman gave me no new information,⁶ he did offer to put me in touch with Mr. Skepnek. When preparing my 1999 article, I did not interview Skepnek. The omission was intentional. First, I thought Skepnek would refuse to talk to me. I knew that, in May of 1998, he invoked the Fifth Amendment and refused to answer questions from a state court judge. I also knew that sanctions litigation against him

³ E-mail from Charles Silver, to Lester Brickman (Mar. 27,2001) (on file with author).

⁴ E-mail from Lester Brickman, to Charles Silver (Mar. 30,2001) (on file with author) ("Based upon conversations I have had with William Skepnek, I believe at least some of the statements you made at the conference were in error and others were misleading [M]y knowledge about the subject matter is incomplete and I am not in any position to offer a more detailed explanation of the facts.").

⁵ See RESTATEMENT (SECOND) OF TORTS § 558 (1976) (stating the elements of the tort of defamation).

⁶ Professor Brickman declined my request, routed through the editors of this journal, to review a draft of the article he contributed to this issue. I am therefore unable here to incorporate or respond to anything he may have written that bears on my assertions.

was still proceeding. I therefore concluded that Skepnek would decline to be interviewed.

Second, I was interested in the way certain commentators on the legal profession reacted to media reports about Skepnek, not in the truth of the reports or in Skepnek personally. The commentators seemed to me to use reports about plaintiffs' attorneys as occasions for issuing harsh denunciations while saying nothing when similar reports appeared concerning corporate defendants or their lawyers. In keeping with this interest, I focused on public reports about Skepnek. Neither his opinions on the accuracy of the reports nor his views on the merits of the sanctions decisions was relevant to my project.⁷

Professor Brickman's offer knocked out the first of these props, so I asked him to contact Mr. Skepnek for me. He did so, and the letter from Skepnek that followed began an exchange of correspondence that was extremely unpleasant, at least for me. Before it ended, though, I learned some things that are relevant to this article and that require me to clarify or qualify what I published in 1999.

First, in the earlier piece I wrote that Mr. Skepnek was "convicted of knowingly filing false affidavits on behalf of Raymark Industries in lawsuits throughout the State of Texas." Skepnek objects to the word "convicted," arguing that it applies only to the outcome of a criminal proceeding. Because I specialize in professional responsibility, I know that sanctions proceedings are "quasi-criminal" and it sounds natural to me to describe a sanctioned lawyer as having been "convicted," "punished," or "found guilty." I am certain that I have used these phrases and close synonyms in public presentations many times. Yet, others may associate convictions solely with felonies or other crimes, as Skepnek claims to. Because it would be easy to substitute a word like "adjudged" for

⁷ For the record, I note that the commentators I criticized in 1999 made little effort to investigate the charges against Baron & Budd before castigating the firm. For example, Walter Olson, an associate of Professor Brickman's at the Manhattan Institute and the proprietor of Overlawyered.com, reported that "two University of Texas legal-ethics professors" gave Fred Baron opinions on the propriety of the witness preparation memorandum. He did not name the professors or, apparently, ask them for copies of their opinions. He certainly did not contact me, and I am one of the professors Mr. Baron consulted. Olson also misidentified James McCormack, the former General Counsel for the State Bar of Texas as "Steven McCormick." See WALTER OLSON, CREATIVE DEPOSITION (Manhattan Inst. for Pol'y Res., Civil Justice Memo No. 34, May 1998), at http://www.manhattan-institute.org/html/cjm_34.htm (last visited Dec. 1, 2001). On the general tendency of partisan commentators on the civil justice system to accept factual assertions without investigating their accuracy, see Marc Galanter, *News From Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993).

"convicted," I would gladly make the replacement if I were writing the sentence today.

Mr. Skepnek also complains that the quoted sentence is inaccurate. Although the affidavit and the sanctions motions relating to it were filed in courts throughout Texas, only in Austin and El Paso were sanctions actually imposed. The rest of the proceedings appear to have lapsed. I agree that I framed the sentence poorly, and I apologize for its imprecision. Although Skepnek filed the identical affidavit in many courts, only two courts actually ruled on the propriety of his conduct and these rulings apply only to conduct in the jurisdictions where the courts sat. I also note for the record Skepnek's belief that he should not have been sanctioned at all. He claims to have believed that the affidavit was true when written, he regards the respects in which it was false as unimportant and immaterial, and he sees himself as a victim of a campaign that Fred Baron undertook to distract attention from Baron & Budd's misconduct. By noting his views, I do not mean to endorse them.

Second, I also wrote in the 1999 article that Mr. Skepnek invoked the Fifth Amendment and refused to answer questions "[w]hen Senior Judge Leonard E. Hoffman ordered [him] to appear and testify about an affidavit filed in his court." Skepnek admits that he did so, but he feels slighted by my failure to mention certain additional facts. At the hearing, he claims to have asked Judge Hoffman to transfer the matter to a grand jury because he believed that Hoffman had prejudged him and because he objected to the private prosecution of a contempt action by lawyers at Baron & Budd. After the judge granted this request, Skepnek reports that he cooperated fully with the prosecutor and was not indicted. He also states that he waived his Fifth Amendment rights in connection with a grand jury proceeding in El Paso and was not indicted there.

I did not report these facts because I did not know them. I agree that they reflect positively on Mr. Skepnek, and I am happy to air them now. Unfortunately, they do not satisfy my curiosity about the silence of the conservative commentators in the face of publicly available media and case reports, which did not contain this information. Nor, apparently, did conservative commentators obtain this information privately. Professor Brickman did not mention Skepnek's waiver of his Fifth Amendment rights when attempting to explain his failure to criticize Skepnek's misconduct.

When Mr. Skepnek first wrote me, he expressed the belief that I intentionally presented a partial account of the facts because my object was to smear him. The charge is false. When researching the 1999 article, I consulted publicly available sources and also obtained

unpublished deposition transcripts and court orders from Baron & Budd. The latter contained information about Skepnek that I did not use, precisely because the sources were not publicly reported. My subject was neither Skepnek himself nor the truth of the charges against him. It was a bias I thought certain conservative commentators displayed when criticizing lawyers whose conduct is discussed in media reports. Because I could not use unpublished sources to hang a charge of bias on them, I omitted the information. Had my object been to smear Skepnek, I would have had no reason to leave any gun holstered.

Turning to matters of more relevance to *Arce*, in his letters Mr. Skepnek explained that he came to represent Raymark Industries *after* the *Arce* plaintiffs hired him. This foreclosed the possibility, which I seriously entertained, that Raymark inspired and financed the *Arce* suit. Skepnek also denied having connections with and receiving financial support from tort reform groups. He did not explain how Texans for Reasonable Legal Fees so quickly came to possess a copy of my initial amicus curiae brief or why that organization chose to file papers of its own. These are continuing mysteries. Skepnek also disagreed vehemently with my analysis of the fee forfeiture issue. In his opinion, I give insufficient weight to the damage that was done to the relationships between the *Arce* plaintiffs and their attorneys. Naturally, I do not share this assessment. If Skepnek wishes to see this criticism developed fully, he will have to publish his own essay.