IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NO. 2007-IA-00565-SCT

BARTHEL D. WAGGONER and JACQUELINE M. WAGGONER
(APPELLANTS)

versus

EDWARD A. WILLIAMSON, Individually; EDWARD A. WILLIAMSON, P.A.; and MICHAEL J. MILLER
(APPELLEES)

SECOND APPELLANTS' BRIEF

INTERLOCUTORY APPEAL – ADAMS COUNTY CIRCUIT COURT
No. 03-KV-0151-J

Oral Argument Requested

Respectfully submitted on the 29th day of January 2008 by:

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BARTHEL D. WAGGONER and JACQUELINE M. WAGGONER — **APPELLANTS**

versus — **NO. 2007-IA-00565-SCT**

EDWARD A. WILLIAMSON, Individually; EDWARD A. WILLIAMSON, P.A.; and MICHAEL J. MILLER, Individually — **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies the following persons have an interest in the outcome of this case. These representations are made in order for the Justices of the Supreme Court and Judges of the Court of Appeals to evaluate possible disqualification or recusal.

1. Barthel D. Waggoner and Jacqueline M. Waggoner, Natchez, Mississippi. Plaintiffs - Appellants.

2. Edward A. Williamson and Edward A. Williamson, P.A., Philadelphia, Mississippi, Defendants - Appellees.

3. Michael J. Miller, Alexandria, Virginia, Defendant - Appellee.

4. David Jefferson Dye, Esq., David Jefferson Dye, L.L.C., 1204 Napoleon Avenue, New Orleans, Louisiana 70115. Attorney of record for Barthel D. Waggoner and Jacqueline M. Waggoner, Plaintiffs - Appellants.

5. Gregg L. Spyridon, Esq. and Philip G. Smith, Esq., Spyridon, Palermo & Dornan, L.L.C., 3838 North Causeway Boulevard, Suite 3010, Metairie, Louisiana 70002. Attorneys of record for Barthel D. Waggoner and Jacqueline M. Waggoner, Plaintiffs - Appellants.

6. James P. Streetman, III, Esq. and Matthew A. Taylor, Esq., Scott, Sullivan, Streetman, & Fox, P.C., Post Office Box 13847, Jackson, Mississippi 39236. Attorneys of record for Edward A. Williamson and Edward A. Williamson, P.A., Defendants - Appellees.

7. Robert C. Latham, Esq. and Jeremy P. Diamond, Esq., Truly, Smith, & Latham, P.L.L.C., Post Office Box 1307, Natchez, Mississippi 39121. Attorneys of record for Michael J. Miller, Defendant - Appellee.

8. Any judge, lawyer, elected official, or other person or organization which in any capacity is or has been previously affiliated with Lawyers Involved for Mississippi's Betterment (L.I.M.B.), a State of Mississippi registered Political Action Committee related to the Mississippi Trial Lawyers Association.

9. Any current or former employee or client of Edward A. Williamson, Edward A. Williamson, PA, Miller & Associates, or Michael J. Miller in diet drug related litigation including but not limited to those individuals employed in connection with or claimants in the case styled *Annette Williams, et al. v. American Home Products Corporation, et al.*, No. 2000-207, Circuit Court of Holmes County, Mississippi.

10. Those unsecured creditors identified within *In Re: Michael J. Miller*, no. 07-02462, U.S. Bankruptcy Court for the Southern District of Mississippi.

11. The parties and witnesses, including Edward A. Williamson and Michael J. Miller, in the case styled *United States v. Oliver Diaz Jr. and Paul Minor*, no. 3:03-cr-00120-HTW-JCS, U.S. District Court - Southern District of Mississippi.

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AND JACQUELINE M. WAGGONER

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SECOND APPELLANTS' BRIEF

I. Issues and Questions Presented to the Court:

A. Did the trial court exceed its authority under Rule 56 of the Mississippi Rules of Civil Procedure by ruling on factual matters at summary judgment including particularly whether the Waggoners **knowingly agreed to particular but not all** line-items contained on a litigation settlement disbursement statement?

B. Does a client's signature on a litigation settlement disbursement statement and associated release documentation absolve the settling attorney from liability and damages resulting from the failure to disclose that the settlement was an aggregate settlement and related settlement information as required by the representation contract, settlement documents, common law, and Mississippi Rules of Professional Conduct 1.8 (g) and 1.2(a)?

C. Can a trial court on summary judgment eliminate the recognized remedy of attorney fee forfeiture or disgorgement when genuinely disputed issues of material fact were noted by the trial court in support of breach of fiduciary duty, breach of contract, negligent misrepresentations, and fraud causes of action?

II. Statement of the Case

A. Procedural History and Interlocutory Order.

This Second Appellants' Brief is filed in response to the Supreme Court of Mississippi's December 20, 2007 Order lifting the automatic stay granted to Appellee Michael J. Miller due to his bankruptcy filing.[1] The Court's December 20, 2007 Order reissued and set a briefing schedule pursuant to M.R.A.P. 31 with respect to Mr. Miller. This interlocutory appeal by the Plaintiffs, Barthel D. Waggoner and Jacqueline M. Waggoner, hereinafter the "Waggoners", seeks the reversal of the trial court's entry of a partial summary judgment favoring the defendants in *Barthel D. Waggoner and Jacqueline M. Waggoner v. Edward A. Williamson, Individually; Edward A.*

[1] *In Re: Michael J. Miller*, no. 07-02462, U.S. Bankruptcy Court for the Southern District of Mississippi.

Williamson, P.A.; and Michael J. Miller, Individually, No. 03-KV-0151-J.[2] The Waggoners also seek a remand to the Circuit Court for Adams County, State of Mississippi for a trial by jury on the merits.[3]

The Waggoners filed suit against Edward A. Williamson and Edward A. Williamson, P.A., hereinafter "Williamson", and Michael J. Miller, hereinafter "Miller", claiming four causes of action: breach of fiduciary duty; breach of contract; negligent misrepresentation; and fraud.[4] These four causes of action arose from Williamson's and Miller's representation of the Waggoners in the Phen-fen diet drug litigation *Annette Williams, et al. v. American Home Products Corporation, et al.*, No. 2000-207, Circuit Court of Holmes County, Mississippi, hereinafter referred to as the "*Annette Williams* litigation".[5]

Through extensive discovery, the Waggoners uncovered numerous breaches of fiduciary duties, breaches of contract, intentional misrepresentations, and acts of fraud committed by Williamson and Miller during the *Annette Williams* litigation.[6] With the assistance of Expert Donna Ingram, a Certified Public Accountant, Certified Forensic Accountant, and Certified Fraud Examiner, the Waggoners were able to document $1,165,228 in compensatory damages arising from Williamson's and Miller's wrongdoings.[7] In an effort to avoid the consequences of their actions, Williamson and

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[2] Interlocutory Order, R. vol. 12, p. 1581-1582 and Records Excerpts, tab 2.

[3] The Record before the Court has been divided in three sections with consecutive numbering for each: Record (volumes 1-12), Transcript, and Exhibits (volumes 1-7). The plaintiffs have designated their reference to each in the following manner: Record: R, Transcript: T, and Exhibits: E and have provided an electronic copy (PDF) copy of the record herewith.

[4] Original Complaint, R. vol. 1, p. 1-19 & Amended Complaint R. vol. 2, p. 168 - 182.

[5] Attorney Edward Blackmon, Jr. also provided representation in *Annette Williams, et al. v. American Home Products Corporation, et al.*, No. 2000-207, Circuit Court of Holmes County, Mississippi but is not a party to these proceedings.

[6] See *Plaintiffs' Memorandum in Opposition to Defendants' Motions for Summary Judgment* (R. vol. 11, p. 1496 - 1514).

[7] Ingram Affidavit, E. vol 4, p. 562.

Miller each filed *Motions for Summary Judgment* in August of 2005 immediately prior to Hurricane Katrina.[8] On March 17, 2006, the Waggoners opposed Williamson's and Miller's *Motions for Summary Judgment* by filing their *Plaintiffs' Memorandum in Opposition to Defendants' Motions for Summary Judgment* and attaching thereto multiple supporting affidavits and exhibits.[9 & 10] In the afternoon of March 27, 2006 at a lengthy and information packed hearing, Judge Forrest A. Johnson, Adams County Circuit Court Judge, heard Williamson's and Miller's *Motions for Summary Judgment* and multiple other motions filed by plaintiffs and defendants. Nearly one year later, on March 21, 2007, Judge Johnson issued the Interlocutory Order now appealed and attached to it the March 27, 2006 hearing transcript providing the court's reasons for the entry of the partial summary judgment in favor of Williamson and Miller.[11]

The March 21, 2007 Interlocutory Order absolves Williamson and Miller from liability and damages arising from their admitted failures to disclose material facts and their wrongdoings in connection with the aggregate settlement reached in the *Annette Williams* litigation.[12] The Interlocutory Order eliminates the remedy of attorney fee forfeiture or disgorgement which is a remedy previously recognized by this Court and other common-law courts in instances when a lawyer breaches a fiduciary duty he owes to his clients. Additionally, the Interlocutory Order stands for

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[8] Miller, R. vol. 7, p. 951-960, Williamson, R. vol. 6, p. 787–802.

[9] *Waggoner Opposition Memorandum*, R. vol. 11, p. 1496-1514.

[10] Please note that the Volume 11 of the Record provided by the Adams County Circuit Court contains two sequential pages each numbered 1496. The Waggoners' Opposition Memorandum to the Defendants' Motions for Summary Judgment starts on the second page numbered 1496 in Volume 11.

[11] Interlocutory Order, R. vol. 12, p. 1581-1582 and Record Excerpts, tabs 2 and 3.

[12] The settlement was an aggregate settlement. See Williamson Depo., E. vol. 2, p. 151, transcript pg. 112, lns. 7-12 and Miller Depo., E. vol. 2, p. 209, transcript pg. 76, lns. 5 -20. Williamson and Miller admitted their failure to disclose information to clients. See Williamson Depo., E. vol. 2, p. 152, transcript pg. 117, lns. 2-21 and Miller Depo., E. vol. 2, p. 213, transcript pg. 92, lns. 6-20, and E. vol. 2, p. 215, transcript pg. 98, lns. 1-12.

the proposition that a client's written acceptance of a settlement, which unbeknownst to the client was a part of an aggregate settlement governed by Rule 1.8 (g) of the Mississippi Rules of Professional Conduct, ratifies the representing attorneys' intentional withholding and non-disclosure of information necessary for the client's informed consent and agreement to the settlement as dictated by Rule 1.8(g). Furthermore, the Interlocutory Order absolves Williamson and Miller from liability and damages resulting from their wrongdoings including notably the breach of the duty of loyalty and failures to comply with the laws of the State of Mississippi and the Mississippi Rules of Professional Conduct, particularly Rules 1.8 (g) and 1.2 (a).

The Waggoners appeal the Interlocutory Order because the order contains legal and factual errors and represents an improper attempt by the trial court to resolve factual disputes on summary judgment. Discovery in this matter resulted in the production of more than 60,000 documents many hundreds of which the plaintiffs and defendants presented as pleadings and exhibits to the court in preparation for the March 27, 2006 hearing. Most importantly, the Waggoners presented numerous genuinely disputed issues of material fact in preparation for the March 27, 2006 hearing contained in *Plaintiffs' Itemization of Disputed Facts in Response to Defendant Michael Miller's Itemization of Undisputed Facts* and in *Plaintiffs' Itemization of Disputed Facts in Response to Defendant Edward A. Williamson, Individually, and Edward A. Williamson, P.A.'s Itemization of Facts Relied Upon and Not Genuinely Disputed.*[13] This Second Appellants' Brief again identifies the genuinely disputed issues of material fact between the Appellants and Appellees and demonstrates the trial court's error in ruling on these factual matters.

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[13] R. vol 11, pp. 1526 - 36 and R. vol 11, pp. 1537 - 58.

The Waggoners respectfully argue and pray that this Court reverse the partial summary judgment granted by the trial court in its March 21, 2007 Interlocutory Order and remand the case to the Circuit Court for Adams County for a trial by jury on the merits. Reversal and remand in this case is proper as dictated by the laws of the United States, the State of Mississippi, and the laws of other common law states, including particularly New York and Texas each of which have considered factual circumstances similar to those now presented to the Court.[14]

Furthermore, reversal and remand is necessary because the March 21, 2007 Interlocutory Order noted the existence of genuinely disputed issues of material fact relating to the elements of each of the Waggoners' four causes of action but nevertheless the trial court granted partial summary judgment. These genuinely disputed issues of material fact were clearly raised in the *Plaintiffs' Memorandum in Opposition to the Defendants' Motions for Summary Judgment* and the numerous affidavits and exhibits attached thereto as well as the previously referenced itemizations of disputed facts. The Waggoners respectfully pray that upon reversal of the partial summary judgment and remand to the Circuit Court of Adams County for further proceedings that all forms of remedy permitted by this Court be available to the Waggoners including specifically compensatory damages, attorney fee forfeiture or disgorgement, and punitive damages.

B. Factual Statement

In late 1999, Barthel D. Waggoner, a resident of Adams County, Mississippi, sustained severe and disabling injuries resulting from the ingestion of diet drugs

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[14] *New York Diet Drug Litigation v. Wyeth - Ayerst Laboratories*, 2007 WL 969426, *4 (N.Y. Sup. March 27, 2007) and *Burrow v. Acre*, 997 S.W.2d 229 (Tx. 1999).

manufactured by the American Home Products Corporation ("AHP").[15] Instead of joining a class-action suit against AHP, Mr. Waggoner opted-out and sought individualized representation from Attorney Edward A. Williamson ("Williamson").[16] Williamson undertook the representation of Barthel Waggoner and his wife Jacqueline Waggoner in the *Annette Williams* litigation filed on May 23, 2000.[17] Despite representations that the Waggoners would be and in fact were represented individually, Williamson represented more than thirty (30) named and unnamed plaintiffs from Mississippi in the *Annette Williams* litigation.[18]

Without disclosure to or approval from the Waggoners, Williamson associated with and entered into a fee sharing agreement with Michael J. Miller ("Miller") from Virginia and Edward Blackmon, Jr. from Holmes County.[19] At the time of his association, Miller represented at least fourteen (14) clients located in Washington, D.C. and Virginia in substantially similar litigation against AHP.[20] After his association with Williamson, Miller represented these fourteen (14) out-of-state clients against AHP via the *Annette Williams* litigation pending in Holmes County. Williamson has described his business relationship with Michael Miller in diet drug litigation as a "joint venture".[21]

On April 24, 2001, after less than one year of pursuing the *Annette Williams* litigation, Miller negotiated a $73,500,000 aggregate settlement ("Settlement Amount")

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[15] Original Complaint, R. vol. 1, p. 1-19 & Amended Complaint R. vol. 2, p. 168–182.
[16] Waggoner Affidavits, E. vol. 1, p. 51-54 and E. vol. 1, p. 55-58.
[17] *Annette Williams, et al. v. American Home Products Corp.*, et al., No. 2002-207, Circuit Court of Holmes County, Mississippi.
[18] Waggoner Affidavits, E. vol. 1, p. 51-54 and E. vol. 1, p. 55-58.
[19] Waggoner Affidavits, E. vol. 1, p. 51-54 and E. vol. 1, p. 55-58.
[20] Miller Depo.,E. vol. 3, p. 192, transcript p. 9, lns. 13-19 and E. vol. 3, p. 229, transcript p. 156 ln. 15 - p. 157, ln. 7.
[21] Williamson Depo., Exhibit vol. 1, p. 132.

with the AHP. The *Annette Williams* litigation settlement with AHP, effective April 24, 2001, included thirty-one (31) Mississippi claimants, including the Waggoners, and Miller's fourteen (14) claimants from Washington D.C. and the State of Virginia.[22] From the $73.5 million dollar settlement, the thirty-one (31) Mississippi claimants were allocated a total of $55 million dollars, and the remaining $18.5 million dollars were allocated to the fourteen (14) Washington D.C. and Virginia clients. The division between the Mississippi and the Washington - Virginia clients was performed at the direction of Williamson and Miller rather than the AHP.

Williamson and Miller themselves then further allocated the $55 million dollars among the thirty-one (31) Mississippi claimants rather than seeking the appointment of a special master or obtaining a court-approved disbursement plan.[23] In making this allocation of the $55 million dollars among the thirty-one (31) Mississippi claimants, Williamson and Miller, by their own admissions, failed to disclose the following information to the Waggoners and other Mississippi claimants participating in the aggregate settlement:[24]

1. The existence and amount of the aggregate settlement received from AHP and the resulting allocation of funds between the Mississippi, Washington, D.C., and Virginia claimants;

2. The existence and nature of all claims included within the aggregate settlement; and

3. The financial allocation to or participation of each claimant in the aggregate settlement reached with AHP, including but not limited

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[22] April 24, 2001, American Home Products Settlement Agreement, E. vol. 1, p. 25-48.

[23] Williamson Depo., E. vol. 1, p. 149, transcript p. 105 - p. 106.

[24] The settlement was an aggregate settlement. See Williamson Depo., E. vol. 2, p. 151, transcript pg. 112, lns. 7-12 and Miller Depo., E. vol. 2, p. 209, transcript pg. 76, lns. 5 -20. Williamson and Miller admitted their failure to disclose to clients. See Williamson Depo., E. vol. 2, p. 152, transcript pg. 117, lns. 2-21 and Miller Depo., E. vol. 2, p. 213, transcript pg. 92, lns. 6-20, and E. vol. 2, p. 215, transcript pg. 98, lns. 1-12.

to the basis for the related calculations, distributions of funds, and the required accounting for the aggregate settlement proceeds.

Despite Williamson's multiple representations that the Waggoners' case and resulting settlement would be and in fact were individually negotiated with AHP, the Waggoners learned through Discovery the settlement was in fact an aggregate settlement subject to the requirements of Rule 1.8 (g) of the Mississippi Rules of Professional Conduct. The Waggoners also relied upon this Court's August 12, 2004 opinion in *Williamson v. Edmonds*.[25] In *Williamson*, this Court noted, "[redacted]

[redacted]

[redacted] This Court further noted:

> "Under Mississippi Rule of Professional Conduct 1.8(g), Williamson obtained a lump sum aggregate settlement for all of his clients during settlement negotiations. In determining whether the proceeds of the aggregate settlement were improperly or fraudulently distributed among the various plaintiffs in the American Home suit, the information requested by the Edmondses is highly relevant to their claims of breach of contract and breach of the duties of care and loyalty. **The client is entitled to know the amount of the settlement, and the basis for the calculations, distributions and accounting of the proceeds of the settlement with American Home.**"[27]

Discovery also revealed that Williamson and Miller were obligated by the April 24, 2001 AHP Settlement Agreement to take whatever steps were necessary to comply with [redacted] of the Mississippi Rules of Professional Conduct.[28] However, the Disbursement Statement and other settlement documents presented to the Waggoners do not contain the disclosures necessary to fulfill the requirements of Rule 1.8(g). The Waggoners have testified that they would not have signed the

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[25] *Williamson v. Edmonds*, 880 So. 2d 310 (Miss. 2004).
[26] Id. at 314.
[27] Id. at 320.
[28] April 24, 2001, American Home Products Settlement Agreement, E. vol. 1, p. 25-48.

settlement related documents with AHP had Williamson and Miller fully disclosed to them the items required by the AHP Settlement Agreement and Rule 1.8 (g). The Waggoners assert that the [redacted] because of Williamson's and Miller's failure to disclose the information required by the AHP Settlement Agreement and Rule 1.8 (g) and the common law duty of loyalty.

Despite the fact the AHP settlement was negotiated and reached in April of 2001 and documented in the April 24, 2001 AHP Settlement Agreement, the Waggoners actually first learned of the settlement two months later on or about June 25, 2001 when they received a telephone call directing them to meet Williamson and his assistant, Glinda "Kookie" Bowles, at the Adams County Airport that day.[29] On June 25, 2001 at the Adams County Airport while his chartered aircraft waited on the tarmac and Kookie Bowles retrieved refreshments, Williamson, for the first time, presented the Waggoners with a distribution statement setting forth the following monetary allocations:

Client Name:	Barthel Waggoner
Attorney(s):	Edward Williamson
Settlement Amount:	$3,008,961.75
Attorney's Fee (45%):	$1,354,032.79
MDL fees 3%:	$90,268.85
MTLA Contribution:	$30,042.87
Expenses:	
Miller & Associates (case specific):	$ -0-
The Williamson Law Firm (case specific):	$15,041.64
Generic Expenses:	$47,475.10
Total Expenses:	$62,516.74
Net to Client:	$1,472,100.50

[29] Waggoner Affidavits, E. vol. 1, p. 51-54 and E. vol. 1, p. 55-58.

Williamson required the Waggoners' signatures on the distribution statement, or alternatively, the possible forfeiture of any right to the settlement which the Waggoners had just learned of.[30] The meeting at the airport lasted less than twenty minutes and did not afford the Waggoners an adequate opportunity to review and to question the distribution statement or the means by which the amounts on the statement had been determined.[31]

In the months following the signing of the Disbursement Statement, the Waggoners became aware of multiple, alleged wrongdoings by Williamson and engaged counsel in mid-2003 to request an accounting of the "**case specific**" and "**generic**" expenses deducted from the gross recovery allocated to the Waggoners. Rather than cooperate with the reasonable request for accounting information that had not been previously provided, [redacted] against Barthel Waggoner in the Hinds County Chancery Court seeking validation of Williamson's performance of the Representation Agreement executed with Barthel Waggoner. [redacted] the Waggoners filed and served the underlying action in the Adams County Circuit Court which gives rise to this interlocutory appeal. [redacted], Mr. Waggoner successfully challenged the Hinds County venue, and the matter was transferred to the Adams County Chancery Court where it remains idle. Only the action in the Adams County Circuit Court, now before this Court, has been pursued by the parties.

In the Adams County Circuit Court action, the Waggoners through extensive Discovery involving over 60,000 documents, depositions, and experts uncovered

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[30] B. Waggoner Depo., E. 3, p. 359, transcript pg. 151, lns. 18-20.
[31] Waggoner Affidavits, E. vol. 1, p. 51-54 and E. vol. 1, p. 55-58.

numerous knowing and willful omissions, misrepresentations, and acts of fraud in the information presented on the Disbursement Statement. **The over-arching disputed issue in this matter is whether or not the Waggoners could knowingly agree to any of the terms of the Disbursement Statement in light of Williamson's and Miller's knowing and willful omissions, representations, and acts of fraud.** The Waggoners in the following paragraphs detail Williamson's and Miller's wrongdoings in relation to each line-item on the Disbursement Statement. The trial court erred in attempting to resolve the numerous factual disputes described in these paragraphs that follow but nevertheless left the Waggoners' four causes of action against Williamson and Miller intact.

[redacted] indicates that only Barthel Waggoner was the client when the record establishes that Jacqueline Waggoner and many others were also named plaintiffs in the *Annette Williams* litigation. [redacted] executed with Barthel Waggoner and [redacted][32] The Representation Agreement was never dated and was never signed by Williamson nor does the Representation Agreement provide a scope of representation.[33] More importantly, Williamson failed to disclose to the Waggoners that unidentified parties were also represented and participated in the AHP settlement without being named as plaintiffs in the *Annette Williams* litigation. These unidentified parties participated in the aggregate settlement, the existence of which Williamson purposefully did not disclose, without the knowledge or consent of the Waggoners. For example, claimant

[32] Williamson Depo., E. vol. 1, p. 136.
[33] Williamson Depo., E. vol. 1, p. 134.

W17 received a gross settlement of $2,985,000 [redacted] in the *Annette Williams* litigation nor was she ever made an actual party to litigation against AHP, the maker of the Phen-fen diet drugs[34 & 35] The Waggoners disputed whether they could agree to participate in an aggregate settlement and to knowingly agree to the terms of the disbursement statement when the existence of all of the other claimants was not known.

Second, the line item marked "**Settlement Amount**" indicates Williamson allocated $3,008,961.75 as a gross settlement amount to Barthel Waggoner. The Waggoners had been told their settlement amount was individually presented to and negotiated with AHP.[36] However, the April 24, 2001 Settlement Agreement with AHP makes it exceedingly clear that the *Annette Williams* settlement was an aggregate settlement totaling $73,500,000 and that the settling attorneys were solely responsible for the allocation and distribution of the funds among the clients listed in the Exhibits to the Settlement Agreement, i.e. thirty-one (31) Mississippi based claimants and fourteen (14) Washington, D.C. and Virginia based claimants.[37] This Court [redacted] also found that the settlement negotiated with AHP was an aggregate settlement.[38] Nevertheless, Williamson and Miller continue to maintain the settlement was individually negotiated with AHP.

The Waggoners have never received an explanation of how the $3,008,961.75 allocated to them from the $73,500,000 settlement amount was determined or

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[34] For confidentiality purposes and in accordance with the Mississippi Supreme Court ruling in *Edward A. Williamson and Edward A. Williamson, P.A. v. Lisa Edmonds and Larry Edmonds*, 880 So. 2d 310, (Miss. 2004), Williamson's client records were redacted and individual clients were given letter and number identifiers that are used throughout this Brief.

[35] W17 Disbursement Statement, E. vol. 2, p. 945.

[36] Williamson Depo., E. vol. 1, p. 145.

[37] April 24, 2001 American Home Products Settlement Agreement, E. vol. 1, p. 27 Paragraph 5.

[38] *Williamson v. Edmonds*, 880 So. 2d 310, 320 (Miss. 2004).

calculated.[39] Additionally, Williamson did not evaluate the validity and value of the Waggoners' claims with the Waggoners or through consultation with a special master.[40] Most importantly, Williamson never obtained settlement authority nor did he obtain permission to settle the Waggoners' claims prior to the April 24, 2001 settlement with AHP. Williamson, for the first time, presented the Waggoners with the individualized "**Settlement Amount**" on June 25, 2001 at the Adams County Airport more than two months after Williamson and Miller agreed to the aggregate settlement.[41]

Williamson and Miller have admitted in their depositions that they alone determined the gross amounts allocated to individual clients and that they did not rely upon a special master or a court ordered distribution plan when making these allocations.[42] Williamson and Miller admitted in their depositions that the total settlement amount was not disclosed to the Waggoners and that the existence and nature of all the claims involved in the aggregate settlement with AHP were purposefully not disclosed to the Waggoners.[43] The participation of each claimant in the aggregate settlement and the basis for the calculations, distribution, and accounting for the aggregate settlement proceeds were also purposefully not disclosed to the Waggoners.[44]

When they signed the Disbursement Statement at the Adams County Airport, the Waggoners had no knowledge and no means of knowing that Williamson and Miller had committed numerous wrongful and fraudulent acts that directly reduced

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[39] Waggoner Affidavits, E. vol. 1, p. 51-58.
[40] Williamson Depo., E. vol. 1, p. 149, trans. p. 105 - p. 106 and Miller Depo., E. vol. 3, p. 244.
[41] Waggoner Affidavits, E. vol. 1, pp. 51-58.
[42] Williamson Depo., E. vol. 1, p. 149, trans. p. 105 - p. 106 and Miller Depo., E. vol. 3, p. 244.
[43] Williamson Depo., E. vol. 7, p. 150 & 152 and Miller Depo., E. vol. 3, pp. 213-214.
[44] Williamson Depo., E. vol. 2, p. 153.

the amount of settlement funds available for distribution to the Waggoners as their individualized "**Settlement Amount.**" In Discovery, the Waggoners uncovered multiple instances in which Williamson and Miller allocated settlement funds to the detriment of the Waggoners and other claimants in the Annette Williams litigation. Four examples of Williamson's and Miller's wrongful allocation of settlement funds relate to Clients W3, W17, W91, and W89 and involve wrongful allocations of more than $5,495,754.12 from the $55,000,000 allocated to the Mississippi claimants. These improper allocations, as explained in the following paragraphs, are clear examples of Williamson's and Miller's breach of the fiduciary duty of loyalty owed to the Waggoners and the other claimants who were injured by the ingestion of the diet drugs Phen-fen and Redux.

Example No. 1 - Client W3 was allocated a "Settlement Amount" of $2,507,468.12 on her own Disbursement Statement.[45] Williamson and Miller allocated $2,507,468.12 to client W3 despite receiving medical evidence from their own medical expert, Dr. Rubin, that W3 had not been injured from taking the diet drug Phen-fen or Redux.[46] In fact, Williamson and Miller ordered assistant Glinda "Kookie" Bowles to destroy the medical evidence received and documenting the fact that W3 had no injury. Glinda "Kookie" Bowles referred to the destruction of Dr. Rubin's report as "**Operation Dr. Rubin Throw-Away.**"[47] The allocation of $2,507,468.12 to client W3 was fraudulent and reduced the amount of the aggregate settlement funds available to the Waggoners and others who experienced actual injuries from the ingestion of Phen-fen and Redux.

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[45] W3 Disbursement Statement, E. vol. 7, p. 941.
[46] Dr. Rubin's letter in relation to W3, E. vol. 3, pp. 249-250.
[47] E. vol. 3, p. 386 and Bowles Depo., vol. 4, p. 457.

Example No. 2 - Williamson and Miller, without disclosure to the Waggoners, withheld and initially did not distribute all of the $55,000,000 allocated to the Mississippi clients. Williamson and Miller, to the detriment of the Waggoners, used the amount withheld from the $55,000,000 to pay-off clients who for any reason were unhappy with the "**Settlement Amount**" allocated to them on their Disbursement Statement.[48] In response to client W17's threats to withdraw from and to in effect kill the AHP settlement, Williamson and Miller increased W17's "**Settlement Amount**" by $885,000 and paid this additional amount to W17 from the funds withheld and not distributed from the $55,000,000.[49] W17 was never a named plaintiff in the *Annette Williams* litigation or any other litigation against AHP. Nevertheless, Williamson and Miller allocated $2,100,000 to client W17 but, upon receiving her threats to derail the settlement, which required 100% participation, Williamson and Miller increased the "**Settlement Amount**" allocated to W17 to $2,985,000, an increase of $885,000 to W17 and a decrease of $885,000 available for distribution to other Mississippi claimants.

Example No. 3 - Client W91, to the detriment of the Waggoners and every other legitimately injured claimant, received a "**Settlement Amount**" of $1,000,000.[50] Initially, Williamson and Miller declined to represent client W91 and sent her correspondence indicating that there was no evidence suggesting client W91 had in fact ingested diet drugs manufactured by AHP.[51] Client W91's case was referred to another Mississippi law firm who also documented that client W91 had no evidence of injuries consistent with having taken the diet drugs manufactured by AHP.[52]

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[48] Miller depo., E. vol. 3, p. 223, transcript p. 131, ln. 17 - p. 134, ln. 2.
[49] Williamson Depo., E. vol. 2, p. 152 and Bowles Depo., E. vol. 4, p. 481.
[50] W91 Disbursement Statement, E. vol. 7, p. 944.
[51] Miller Depo., E. vol. 2, pp. 200-01; Exhibit 7 referenced therein, E. vol. 2, pp. 265-66.
[52] Miller Depo. Exhibit 8, E. vol. 2, p. 267.

Nevertheless, Williamson and Miller did in fact include client W91 in the AHP aggregate settlement thereby reducing the funds available for distribution to the Waggoners and other legitimately injured claimants by $1,000,000.[53] This wrongful allocation of $1,000,000 to client W91 is even more suspicious in light of the fact the attorney's fee deducted from her settlement was $450,000.[54]

Example No. 4 – Client W89 received a preferential "**Settlement Amount**" of $4,112,247.72 on her disbursement statement.[55] Williamson's and Miller's allocation to client W89 exceeded the allocation to the Waggoners by $1,103,286 even though Miller knew and has admitted that Barthel Waggoner's injuries (W77) were comparable and in fact more compensable than injuries sustained by client W89.[56] The fact client W89 received $1,103,286 more than the Waggoners despite comparable injuries is even more disturbing in light of the fact Miller's portion of the total attorney's fee for W89 was 30% compared to only 10% of the attorney's fee deducted from the Waggoners' "**Settlement Amount**."[57] This over-allocation of the aggregate settlement funds to W89 depleted the funds available for disbursement to the Waggoners.

Third, the line items "**Attorney(s)**" and "**Attorney's Fee (45%)**" on the Waggoners' Disbursement Statement indicate that only Williamson was the attorney of record and that he alone received the attorney's fee of $1,354,032.79 based upon a forty-five (45%) contingency fee. The Representation Agreement Barthel Waggoner signed contains a graduated fee schedule. Williamson did not ever explain to the Waggoners' the basis for his having charged a forty-five (45%) contingency fee. As

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[53] W91 Disbursement Statement, E. vol. 7, p. 944.
[54] *Id.*
[55] W89 Disbursement Statement, E. vol. 7, p. 943.
[56] Miller Depo., E. vol. 2, pp. 203-204; Exhibit 6 referenced therein, E. vol. 2, pp. 263-64.
[57] Miller Depo. Exhibit 6, E. vol. 2, pp. 261-64.

noted previously, Miller and Blackmon were also enrolled as counsel of record despite the lack of disclosure to the Waggoners and each received a portion of the attorney's fee of $1,354,032.79.[58] Again through discovery rather than through full disclosure from Defendant Williamson during the course of the *Annette Williams* litigation, the Waggoners uncovered the actual distribution of the $1,354,032.79 attorney fee deducted from the gross settlement amount: Miller received ten (10%) percent; Blackmon received twenty (20%) percent, and Williamson received seventy (70%) percent.[59]

The total fees paid to attorneys sharing in the AHP aggregate settlement exceeded $28 million with Williamson receiving over $11 million and Miller receiving over $13 million.[60] Through discovery, the Waggoners found that client W81 received the same settlement amount as the Waggoners but paid a $150,448.09 smaller attorney's fee.[61] Additionally, the attorney fees paid by the Mississippi versus the Washington, D.C. and Virginia clients were grossly disproportionate to one another.[62] Through the affidavit of Donna Ingram and their own affidavits, the Waggoners disputed the forty-five (45%) percent fee charged to them on the grounds the fee was excessive and split with other lawyers without their knowledge and consent.[63]

Fourth, the line item "**Multi-District Litigation Fees**" or "**MDL Fees 3%**" were deducted from the Waggoners' gross settlement allocation in accordance with Order 1203 issued by the United States District Court for the Eastern District of Pennsylvania which oversaw the mulit-district class litigation suits. Order 1203 was designed to

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[58] Williamson Depo., E. vol. 1, p. 138.
[59] Williamson Depo., E. vol. 1, pp. 49, 50, and 138-139.
[60] Ingram Affidavit, Summary of QSF Activity, E. vol. 4, p. 569, line 3 and p. 570.
[61] Ingram Affidavit, E. vol. 4, pp. 552-53.
[62] Ingram Affidavit, E. vol. 4, p. 552.
[63] Ingram Affidavit, E. vol. 4, p. 552 and Waggoner Affidavits, E. vol. 1, p. 54.

reimburse the class attorneys for their expenses in developing causation evidence. The Waggoners paid $90,268.85 in MDL Fees but were subsequently reimbursed approximately $30,000 as ordered by the U.S. District Court for the Eastern District of Pennsylvania. In Discovery, the Waggoners found that Williamson agreed to pay client W17's MDL fees totaling $89,550.00 rather than deducting that amount from the gross settlement allocated to client W17.[64] Client W17 objected to paying the $89,550.00 in MDL Fees because, as mentioned previously, client W17 was not a named plaintiff in the *Annette Williams* litigation. Williamson claimed to have paid the $89,550.00 MDL Fee from the attorney fees he was to receive from the *Annette Williams* litigation.[65] However, the Waggoners' expert fraud examiner Donna Ingram found that the $89,550 MDL Fee for client W17 was actually paid from a $164,000 contingency reserve fund Williamson and Miller created through the fraudulent inflation of client-specific expenses deducted from the gross allocations to the thirty-one (31) Mississippi claimants.[66] Williamson received his entire attorney's fee from the Qualified Settlement Fund administered by SunTrust Bank with no offset for W17's MDL fee.[67] Williamson's actions resulted in compensatory damages for the Waggoners.[68]

Fifth, the line item "**Mississippi Trial Lawyers' Association Contribution**" or "**MTLA Contribution**" deducted from the Waggoners' gross allocation was $30,042.87. The Waggoners did not knowingly agree to make this contribution and would not have agreed to this contribution had Williamson made a full disclosure to

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[64] Accounting for Funds in QSF, E. vol. 3, p. 379.
[65] Williamson Letter, E. vol. 7, pp. 945-50.
[66] Ingram Affidavit, E. vol. 4, p. 538, paragraph 2.
[67] Id. and Williamson correspondence to Sue Pittman, E. vol. 7, p. 717.
[68] Ingram Affidavit, E. vol. 4, p. 539, paragraph 5.

them.[69] The Waggoners through Discovery found that, in his solicitation for the contribution, Williamson failed to disclose his close connection with the Mississippi Trial Lawyers' Association including the fact he once served as the president of the MTLA and continued his involvement with the MTLA's past presidents' committee.[70] A fact more disturbing than this conflict of interest in Williamson's solicitation of the MTLA contribution is that the total contribution of approximately $300,000 deducted from the allocations to Mississippi clients did not go to the MTLA.[71] The $300,000 actually went to a Mississippi Political Action Committee known as Lawyers Involved for Mississippi's Betterment ("L.I.M.B.") rather than to the MTLA. Although deducted solely from the Mississippi clients and not Williamson, the L.I.M.B. contribution was made in Williamson's name personally rather than in the names of the individual clients.[72] However, the most disturbing aspect of the contribution to L.I.M.B. is that the $300,000 contribution was conveyed under questionable circumstances and was not reported to the Mississippi Secretary of State as required by Mississippi's laws and rules for Political Action Committees.[73] The disposition of this $300,000 contributed through L.I.M.B. remains a mystery.

Sixth, Williamson's and Miller's actions with respect to line items "**The Williamson Law Firm (case specific)**" and "**Generic Expenses**" on the Disbursement Statement were particularly egregious and survived summary judgment. Williamson did not provide the Waggoners with any accounting backup in support of the two expense deductions on the Disbursement Statement. When the Waggoners demanded

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[69] B. Waggoner Depo., E. vol. 3, pg. 359, transcript pg. 150, lns. 8-20 and J. Waggoner Depo., E. vol. 1, p. 12, transcript p. 18, lns. 4-21. Waggoner Affidavit, E. vol 1, pp. 54 & 58.
[70] Williamson Depo., E. vol. 1, p. 126, transcript pg. 13, lns. 12-18.
[71] Ingram Affidavit, E. vol. 4, p. 539, paragraph 4.
[72] Miller Depo. E. vol. 2, p. 240, transcript p. 200, ln. 25 - p. 202, ln. 11.
[73] Id. at E. vol 2, pp. 240 - 43. A representative of L.I.M.B. has also been deposed.

accounting backup, Williamson filed the previously referenced suit for declaratory judgment Barthel Waggoner in the Hinds County Chancery Court. The Waggoners did obtain accounting information via Discovery and their expert Donna Ingram extensively scrutinized the materials. As reported in her affidavit attached to the *Waggoners' Opposition to the Motion for Summary Judgment*, expert Donna Ingram discovered numerous accounting deficiencies, wrongful acts, and actual fraud related to the "**The Williamson Law Firm (case specific)**" expenses totaling $15,041.64 and the "**Generic Expenses**" totaling $47,475.10 both of which were deducted from the gross settlement Williamson and Miller allocated to the Waggoners. The March 21, 2007 Interlocutory Order the Waggoners appeal herein held that genuine issues of material disputed fact existed with respect to the deductions and appropriateness of both the "**The Williamson Law Firm (case specific)**" and "**Generic Expenses.**"[74] Accordingly, the Waggoners note herein only three of the numerous examples of Williamson's and Miller's accounting deficiencies, wrongful acts, and actual fraud.

Example No. 1 – Williamson and Miller fraudulently inflated the "**case specific**" expenses charged to Mississippi clients to create a $164,000 contingency reserve fund.[75] The existence of the $164,000 contingency reserve fund earmarked within the Qualified Settlement Fund ("QSF") is evidenced by a letter from Williamson to Sue Pittman with SunTrust Bank, QSF administrator.[76] Expert Donna Ingram testified the contingency reserve was created by the artificial inflation of the "**case-specific**" expenses deducted from twenty-eight Mississippi clients and is

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[74] T. & Records Excerpts, volume, p. 75, lns. 14-18 and 4-13 and p. 83, ln. 27 to p. 84, ln. 4.
[75] Ingram Affidavit, E. vol 4, pp. 547-50.
[76] Ingram Affidavit Exhibit, E. vol. 4, pp. 535-70 and vol. 5, p. 717 (Bates W089-02456) and through calculations prepared by Williamson's accountant Linda Holley, Ingram Affidavit Exhibit, E. vol. 4, p. 712 (Bates W089-02478).

consistent with the discrepancy between the $15,041.64 in "case-specific" expenses deducted from the Waggoners' gross settlement allocation and the approximate $2,900 in actual "**case-specific**" receipts Williamson produced during Discovery.[77] The record indicates Williamson and Miller sought to deceive the Waggoners by overstating the "**case-specific**" expenses and by using the funds for purposes contrary to the best interests of the Waggoners.[78] Specifically, Williamson and Miller used the $164,000 contingency reserve fund to pay client W17's $89,550 MDL fee discussed previously and to pay $29,058 necessary to resolve an attorney fee dispute with Attorney David Holley who was co-counsel with Williamson and Miller on the behalf of Mississippi client W1.[79]

Example No. 2 - The second example of accounting related wrong doing by Williamson and Miller is that the total "**generic expenses**" of approximately $866,733 incurred during the *Annette Williams* litigation was paid exclusively by the thirty-one (31) Mississippi clients.[80] The fourteen (14) Washington D.C. and Virginia clients Miller represented and included in the *Annette Williams* litigation did not pay one dime of the $866,733 in total "**generic expenses**" which are also referred to in the record as "**common-benefit expenses**."[81] The Waggoners raised the genuinely disputed issue of material fact that Williamson and Miller acted prejudicially to the Waggoners and other Mississippi clients by not assessing the "**generic expenses**" on a pro-rata basis and the trial court correctly denied summary judgment on this factual dispute.

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[77] Ingram Affidavit, E. vol 4, pp. 547-50.
[78] *Id.*
[79] Ingram Affidavit, E. vol. 4, pp. 535-70, particularly p. 551 and Ingram Affidavit Exhibit, E. vol. 5, pp. 656-658.
[80] Ingram Affidavit Exhibit, Williamson correspondence, E. vol. 5, p. 707 & 710.
[81] Ingram Affidavit Exhibit, DC Client Settlement Chart, E. vol. 5, p. 705.

Example No. 3 - Miller, unbeknownst to the Waggoners, received double reimbursement for $54,504.08 in claimed, "**generic expenses**."[82] Specifically, Miller requested reimbursement from Williamson for claimed "**generic**" or "**common-benefit**" expenses. After reconciliation of the amount requested with amounts previously paid, Williamson issued Miller a payment of $54,504.08 which Miller subsequently failed to deduct from his request for reimbursement for "**generic**" or "**common-benefit**" expenses from the QSF.[83] Miller's failure to properly account for "generic" or "common-benefit" expenses resulted in his receiving and the Mississippi clients paying $54,504.08 dollars more in "generic" or "common-benefit" expenses than was proper.[84] This factual issue also survived summary judgment.

III. Summary of Argument

In the original and amended complaints, the Waggoners asserted four causes of action against Williamson and Miller: breach of fiduciary duty; breach of contract; negligent misrepresentation and fraud. The Interlocutory Order appealed herein and granting defendants Williamson and Miller a partial summary judgment actually left intact each of the Waggoners' four causes of action despite the fact Williamson's August 12, 2005 *Motion for Summary Judgment* asserted that no genuine issue of material fact existed as to at least one essential element of each of the Waggoners' four causes of action.[85]

Instead of entering a partial summary judgment with respect to any one of the Waggoners' four causes of action against Williamson and Miller, the trial court drastically narrowed the factual issues upon which those four causes of action could

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[82] Ingram Affidavit, E. vol. 4, pp. 539-541.
[83] *Id.*
[84] *Id.*
[85] Williamson, R. vol. 6, p. 787-802.

focus. The narrowed focus now dictated by the Interlocutory Order restricts the Waggoners' four, viable causes of action exclusively to the "**case-specific**" and "**generic**" expenses set forth on the Disbursement Statement and briefly discussed herein as the Sixth item in the Fact Statement. The Interlocutory Order improperly eliminates the following issues from the trial by jury in this matter:

1) The attorney - client relationship between the Waggoners and defendants Williamson and Miller;
2) The withholding of information and wrongdoing related to the April 24, 2001 aggregate settlement reached with AHP;
3) The undisclosed association and fee-sharing with other attorneys and grossly disproportionate fees paid by the different clients;
4) The improprieties associated with the payment of Multi-District Litigation Fees on the behalf of W17; and
5) The conflict of interest and fraudulent conduct related to the contribution solicited for the Mississippi Trial Lawyers' Association.

Furthermore, the Interlocutory Order improperly eliminates the remedy of attorney fee forfeiture or disgorgement, which is recognized by this Court as remedy for attorney breaches of fiduciary duties owed to his client(s). The elimination of the attorney fee forfeiture or disgorgement is particularly harmful to the Waggoners' case as their breach of fiduciary duty cause of action was left fully intact by the trial court.

The Waggoners have herein raised the genuinely disputed material issues of fact just as they did before the trial court with their *Memorandum in Opposition to Defendants' Motions for Summary Judgment* and the multiple supporting affidavits and exhibits attached thereto; their *Itemization of Disputed Facts in Response to Defendant Michael Miller's Itemization of Undisputed Facts*; and their *Itemization of Disputed Facts in*

Response to Defendant Edward A. Williamson, Individually, and Edward A. Williamson, P.A.'s Itemization of Facts Relied Upon and Not Genuinely Disputed.[86]

The Waggoners could not knowingly agree to participate in the aggregate settlement reached with AHP because Williamson and Miller, as they have admitted, never disclosed to the Waggoners that there was an aggregate settlement. Despite the obvious lack of informed consent to the terms of the Disbursement Statement, the trial court actually found the Waggoners **knowingly agreed as a matter of law** to the gross settlement allocated to them by Williamson and Miller, the contingency fee amount of forty-five (45) percent, MDL fees, and MTLA contribution. In reaching this conclusion, the trial court improperly determined factual rather than legal matters and held that, once the Waggoners signed the Disbursement Statement, they were prevented as matter of law from contesting material matters Williamson and Miller intentionally failed to disclose in derogation of the Representation Agreement, the April 24, 2001 AHP settlement agreement, the common law of Mississippi, and the Mississippi Rules of Professional Conduct 1.8(g) and 1.2(a).

The trial court failed to consider that the Waggoners signed the Disbursement Statement under the false belief Williamson was acting in the Waggoners' best interest as their fiduciary. The trial court instead contemplated the June 25, 2001 events at the Adams County Airport in the context of an arms-length transaction between equals. Even when considered in the context of an arms-length transaction between equals, the Waggoners could not have knowingly agreed as a matter of law to the Disbursement Statement because Williamson and Miller intentionally and fraudulently withheld information they were obligated to disclose to the Waggoners.

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[86] R. vol. 11, pp. 1496-1514 and 1526 – 58.

Williamson and Miller clearly profited by failing to disclose material information to the Waggoners including particularly their fraudulent allocation of settlement proceeds to W3, W17, W89, and W91. Williamson and Miller also profited from their accounting improprieties, unauthorized fee-sharing, conflicts of interest between clients created by self-distributing the aggregate settlement, and wide discrepancies in attorney fee arrangements. By ignoring Williamson's and Miller's ethical and legal obligations to disclose detailed material information to the Waggoners, the trial court's Interlocutory Order absolves Williamson and Miller from liability and damages resulting from their breaches of fiduciary duties, breaches of contract, negligent misrepresentations, and acts of fraud. **No reasoning in law supports the proposition that a fiduciary can reap the benefit of defrauding his beneficiaries by manipulating the beneficiaries into signing the very instruments by which the fraud is perfected.**

Additionally, no amount of recovery or effort expended justifies an attorney's breach of the fiduciary duties owed to a client, including particularly the duty of loyalty. There can be no greater importance in the administration of justice than to assure that those charged with the responsibility of servicing the legal system conduct themselves in a manner which conforms to the highest legal standards set by law. A lawyer is not only an advocate for his client but also an officer of the court and legal system. As this Court has recognized, "a breach of loyalty injuries both the client's interests and the legal profession's integrity."[87] Any decision that allows an attorney to "side-step" their legal duties, obligations and responsibilities should be closely scrutinized because the damage that results is not limited to their clients but

[87] *Tyson v. Moore*, 613 So.2d 817, 823 (Miss. 1992), *citing*, Mallen & Smith, *Legal Malpractice* § 11.3 (3d ed. 1989).

reaches and impacts the future conduct of the entire legal profession. Accordingly, this Court should reverse the Interlocutory Order now before it as it permits Williamson and Miller to circumvent their legal duties, obligations and responsibilities and damages the integrity of the legal profession.

Equally important, the Interlocutory Order should be reversed because the Waggoners presented genuinely disputed issues of material fact to the trial court in opposition to Williamson's and Miller's respective Motions for Summary Judgment. As detailed in the Fact Statement herein, these genuinely disputed issues raised with the trial court relate specifically to the gross allocation, contingency fee amount of forty-five (45) percent, MDL fees, and purported MTLA contribution. These genuinely disputed issues of material fact bear directly on the elements of the Waggoners' causes of action for breach of fiduciary duty, breach of contract, negligent misrepresentation and fraud. **Furthermore, the trial court erred in finding the Waggoners undisputedly and knowingly agreed to selected terms in the Disbursement Statement but not to other terms. Determining whether the Waggoners knowingly agreed to some terms of the Disbursement Statement but not to other terms could not occurred without the trial court's resolution of factual disputes before the court on summary judgment.** The Interlocutory Order should be reversed and the Waggoners permitted to present each and every issues and element comprising their four causes of action against Williamson and Miller.

[redacted] This prayer was made only by Miller in his *Motion for Summary Judgment* filed on August 25, 2007.[89]

[88] Williamson, R. vol. 6, pp. 787-802.
[89] Miller, R. vol. 7, pp. 951-960.

Regardless, the trial court improperly granted summary judgment thereby eliminating the Waggoners' remedy of attorney fee forfeiture or disgorgement for Williamson's and Miller's respective breaches of fiduciary duty. Furthermore, the trial court eliminated the remedy of fee forfeiture or disgorgement from the entirety of the Waggoners' claims and not only for those factual circumstances in which the trial court did not find genuinely disputed issues of material fact, i.e. gross settlement, contingency fee amount of forty-five (45) percent, MDL fees or MTLA contributions. **The trial court even eliminated the remedy of fee forfeiture or disgorgement in those instances in which the trial court did in fact note the existence of genuinely disputed issues of material fact.** Mississippi case law specifically recognizes disgorgement and *quantum meruit* as a remedy for the Waggoners' causes of action. Summary judgment is a legal mechanism appropriate only for the determination of whether a genuine issue of material fact exists as to each element of each cause of action asserted by the plaintiffs. The availability of the remedy of disgorgement of attorney's fee is not properly decided by and through summary judgment, and therefore, the trial court's grant of summary judgment on remedy of attorney fee forfeiture was in error and should be reversed.

IV. Standard of Review

When the issues presented on an interlocutory appeal are questions of law, the Mississippi Supreme Court reviews those issues de novo.[90] The existence of a duty is an issue of law and, as such, is subject to de novo review.[91] Additionally, The Mississippi Supreme Court reviews a trial court's disposition of a summary judgment

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[90] *Gant v. Maness*, 786 So.2d 401, 403 (Miss. 2001).

[91] *Donald v. Amoco Production Co.*, 735 So.2d 161, 174 (Miss. 1999).

motion de novo.[92] "All evidence is to be viewed in light most favorable to the non-moving party."[93] "Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite."[94] "In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the nonmoving would be given the benefit of the doubt."[95] Furthermore, this Court has stated, "All motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side of denying the motion."[96] "When doubt exists whether there is a fact issue, the non-moving party gets its benefit. Indeed, the party against whom the summary judgment is sought should be given the benefit of every reasonable doubt."[97]

V. Argument

In response to Williamson's and Miller's respective *Motions for Summary Judgment,* [redacted] The trial court's partial summary judgment did not in any way eliminate the Waggoners' four causes of action against Williamson and Miller for their breaches of fiduciary duties, breaches of contract, negligent misrepresentations, and acts of fraud. In fact, the trial court found

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[92] *Laurel Yamaha, Inc. v. Freeman*, 956 So.2d 897, 902 (Miss. 2007).
[93] *Byrd v. Bowie*, 933 So.2d 899, 902 (Miss., 2006) (citing, *Brooks v. Roberts*, 882 So.2d 229, 231-32 (Miss. 2004)).
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.* (citing, *Mink v. Andrew Jackson Casualty Ins. Co.*, 537 So.2d 431, 433 (Miss. 1988).

the Waggoners may proceed on all four causes of action. In a peculiar response to Williamson's and Miller's *Motions for Summary Judgment,* the trial court ruled on factual rather than legal matters in its holding the Waggoners knowingly agreed to the gross settlement amount, the attorney contingency fee percentage, the assessment of Multi-District Litigation fees, and to the purported contribution solicited for the Mississippi Trial Lawyers' Association. Williamson and Miller have never disputed that these deductions were presented on the Disbursement Statement for the first time and provided to the Waggoners for the first time at the twenty-minute meeting at the Adams County Airport on June 25, 2001 while Williamson's chartered airplane waited on the tarmac.

The trial court's Interlocutory Order creates new legal precedence for the State of Mississippi and the legal profession. The Interlocutory Order stands literally for the proposition that an attorney is absolved from his obligations to disclose to his clients material information related to the existence and management of an aggregate settlement if the attorney can obtain the client's signature on a Disbursement Statement. The Interlocutory Order further absolves Williamson and Miller from liability and damages incurred by the Waggoners and resulting directly from Williamson's and Miller's admitted failures to fulfill the obligations owed to the Waggoners in accordance with the law of the State of Mississippi and Rules 1.8 (g) and 1.2 (a) of the Mississippi Rules of Professional Conduct. The Interlocutory Order prevents the Waggoners, and if upheld, similarly situated plaintiffs from contesting fraudulent and disloyal activity by their former lawyers if the conduct is not discovered until after the signing of settlement documentation. The Interlocutory Order is contrary to the very bedrock of the legal profession, and more specifically in

this case, ratifies conduct directly in violation of the April 24, 2001 AHP Settlement Agreement, the Representation Agreement, the common law, and the Mississippi Professional Rules of Conduct.

A. The trial court erred by resolving factual disputes on summary judgment.

This Court has continuously recognized the limitations of trial courts to determine only whether a genuine issue of material fact exists through summary judgment. Trial courts are not vested with the authority to decide or to resolve genuinely disputed issues of material fact. This Court has provided: "If facts are in dispute, it is not the province of the trial court to grant summary judgment thereby supplanting a full trial with its ruling. 'Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried.'"[98] "A fact is material if it 'tends to resolve any of the issues properly raised by the parties.'"[99] The trial court has done exactly what this Court has determined is prohibited. Specifically, the trial court has decided and resolved genuinely disputed issues of material fact regarding whether the Waggoners **knowingly and with the requisite informed consent** agreed to the gross settlement amount, attorney fee sharing and percentage, MDL fee improprieties, and purported contribution to the MTLA as presented on the Disbursement Statement. The trial court stated, "[p]resented with this disbursement sheet if the plaintiffs had any problem with the amount of this settlement amount or with the amount of the attorney's fees or the trial lawyer contribution, they could have clearly stated so. They agreed to this and signed

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[98] *Daniels v. GNB, Inc.* 629 So.2d 595, 599-600 (Miss., 1993) (quoting, *Brown v. Credit Center, Inc.*, 444 So.2d 358, 362 (Miss.1983) (citing, The Advisory Committee Comment to M.R.C.P. 56)).
[99] *Byrd v. Bowie*, 933 So.2d 899, 902 (Miss. 2006) (quoting, *Palmer v. Anderson Infirmity Benevolent Ass'n*, 656 So.2d 790, 794 (Miss. 1995)).

signifying that and did so."[100] Later in the March 27, 2006 hearing, in an effort to remove any ambiguity from the trial court holding, Judge Johnson stated:

> Later on in June there was a disbursement sheet which set out all the amounts, the total settlement that they agreed to, that they signed a release of what the attorney's fees would be, and all the matters like that. They very clearly signed these papers, and the Court is saying that when someone does that, that's it. They have accepted that and agreed to that.[101]

The Waggoners have consistently maintained that they could not have knowingly agreed to the terms of the disbursement statement because Williamson and Miller intentionally withheld vital information necessary, and in fact required, in order for the Waggoners to make an informed settlement decision.[102] The information withheld included even the existence of the aggregate settlement and certainly the disclosures required under Rule 1.8 (g) of the Mississippi Rules of Professional Conduct. Informed consent to the Disbursement Statement was an impossibility given the lack of disclosure by Miller and Williamson. Despite being provided with this information, the trial court nevertheless disregarded the Waggoners' pleadings and genuinely disputed issues of material fact and held that once the Waggoners signed the Disbursement Statement, *caveat emptor*.

Peculiarly, the trial court held inconsistently that the Waggoners could pursue their four causes of action against Williamson and Miller with respect to the "case-specific" and "generic" or "common-benefit" expenses deducted on the Disbursement Statement. The court held as a matter of law that the Waggoners by signing knowingly agreed to some, but not all, line items and facts contained in the Disbursement Statement. The Court could not reach such an inconsistent ruling

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[100] Transcript, Record Excerpts, tab 3, pg. 75, lns. 14-18.
[101] Records Ex. and Transcript volume, page 83, line 27 to page 84, line 4.
[102] (Affidavit of Barthel D. Waggoner, E. vol. 1, p. 51-54 and Affidavit of Jacqueline M. Waggoner, E. vol. 1, p. 55-58).

without weighing and attempting to resolve the factual disputes between the Waggoners and the Defendants over the line items on the Disbursement Statement. Wrongdoing by Williamson and Miller, including conflicts of interest from which Williamson and Miller profited as well as actual fraud, vitiated the Waggoners' consent to the entirety of the Disbursement Statement and not merely the factual items the trial court evaluated on summary judgment.

In clear contradiction to its earlier reasoning, the trial court held the Waggoners could present these factual circumstances related to expenses to the jury because the Waggoners had no way of knowing whether these expenses were proper at the time they signed the settlement Disbursement Statement. The trial court stated:

> "There is evidence that there is a genuine issue of material fact as to the deduction of expenses. In particular, the case specific expenses to Williamson Law firm, there is a genuine issue of material fact as to whether or not these expenses deducted are set out on here are legitimate proper expenses. Also, as to generic expenses, there has been genuine issue of material fact as to whether or not these expenses were proper."[103]

[redacted] The Waggoners had no basis to know Williamson and Miller had engaged in wrongdoing and intentionally withheld vital information required in order for the Waggoners to make an informed consent to the AHP settlement.[104] The two facts most contrary to the trial court's

[103] T., p. 75, lns. 4 - 10, Records Excerpts, Tab 3, p. 75, lns. 4-10.

[104] (Affidavit of Barthel D. Waggoner, E. vol. 1, p. 51-54 and Affidavit of Jacqueline M. Waggoner, E. vol. 1, p. 55-58).

reasoning is first that the AHP Settlement was actually reached on April 24, 2001 two months prior to Williamson's June 25, 2001 communication to the Waggoners concerning the actual resolution of their claims. Second, [redacted]

Although the trial court did not cite a legal theory in attempting to explain or to support its holding dismissing the Waggoners' issues related to the gross settlement amount, attorney fee sharing and percentage, MDL improprieties, and the purported MTLA contribution, the trial court appears to have employed either a waiver or accord and satisfaction justification for its holding. However, neither waiver nor accord and satisfaction support the partial summary judgment given the circumstances of this case, including particularly the aggregate settlement reached with AHP.

In *Channel v. Loyacono*, this Court addressed a similar appeal also involving alleged fraudulent conduct by attorneys in the settlement of a case against AHP.[106] In *Channel*, the defendants pursued, on behalf of their former clients, litigation for injuries also resulting from the ingestion of Phen-fen and other diet drug products manufactured by AHP.[107] This Court reversed the trial court's entry of a partial

Already decided in 880 So.2d 310

[105] [redacted] See Williamson Depo., E. vol. 2, p. 151, transcript pg. 112, lns. 7-12 and Miller Depo., E. vol. 2, p. 209, transcript pg. 76, lns. 5 -20. Williamson and Miller admitted their failure to disclose information to clients. See Williamson Depo., E. vol. 2, p. 152, transcript pg. 117, lns. 2-21 and Miller Depo., E. vol. 2, p. 213, transcript pg. 92, lns. 6-20, and E. vol. 2, p. 215, transcript pg. 98, lns. 1-12.

[106] *Channel v. Loyacono*, 954 So.2d 415 (Miss., 2007).

[107] As indicated in *Channel*, American Home Products is now doing business as Wyeth Pharmaceuticals. *Channel v. Loyacono*, 954 So.2d 415 (Miss., 2007).

summary judgment against the plaintiffs based on waiver and accord and satisfaction.[108] Addressing the defense of waiver, this Court stated:

> Nor does this Court accept the proposition that, simply because the plaintiffs accepted the settlement funds, that they waived any right to sue for malpractice. As discussed earlier, the discovery rule applies to legal malpractice claims and a layman may not discover the wrongful conduct of an attorney until after a case has been settled or otherwise concluded. Therefore, clients maintain their right to sue for malpractice even after accepting settlement funds.

This Court also reversed summary judgment in *Channel* rendered upon the defense of accord and satisfaction:

> Under Mississippi law, there are four elements of accord and satisfaction: "(1) something of value offered in full satisfaction of a demand; (2) accompanied by acts and declarations as amount to a condition that if the thing is accepted, it is accepted in satisfaction; (3) the party offered the thing of value is bound to understand that if he takes it, he takes subject to such conditions; and (4) the party actually does accept the item."[109]

This Court reversed the trial court on accord and satisfaction, finding the plaintiffs in *Channel* had not demanded anything from the attorneys "except reasonable care in legal service."[110] More importantly, this Court held accord and satisfaction accrued to AHP rather than to the attorneys in the aggregate settlement reached for the *Channel* plaintiffs.[111] Likewise, this Court should reverse the Adams County Circuit Court's entry of the partial summary judgment against the Waggoners because the trial court appears to have relied upon the theories of waiver and accord and satisfaction, both of

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[108] *Id.* at 426.

[109] *Id.* at 426. (quoting, *Medlin v. Hazlehurst-Emergency Physicians*, 889 So.2d 496, 498 (Miss.2004) (citing, *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748, 754 (Miss.2003)); *Wallace v. United Miss. Bank*, 726 So.2d 578, 589 (Miss.1998); *Alexander v. Tri-County Co-op.*, 609 So.2d 401, 404-05 (Miss.1992)).

[110] Id. See also *Young v. Southern Farm Bureau Life Ins., Co.*, 592 So.2d 103, 106-07 (Miss. 1991).

[111] Id. at 427.

which this Court has clearly pronounced are improper grounds for the entry of summary judgment in the context now before the Court.

This Court has also reversed summary judgments in other cases involving alleged breaches of fiduciary duties.[112 & 113] In *Owen v. Pringle*, this Court reserved the trial court's grant of summary judgment in favor of Defendant Pringle by relying upon *Singleton* and holding that the plaintiff in *Owen* validly asserted a cause of action for breach of fiduciary duty by alleging "'*[t]his action is essentially brought before this Honorable Court as a result of Defendant's breach of duty to Plaintiff to maintain confidentiality and to inform Plaintiff of any conflict of interests.*"[114] (emphasis added) This Court in *Owen* and in *Singleton* and the other indicated cases did not permit the trial court to decide or to resolve genuinely disputed issues of material fact in response to motions for summary judgment.

In the instant case, the trial court clearly erred in deciding and in attempting to resolve genuinely disputed issues of material fact with respect to the gross amount allocated to the Waggoners; the lack of disclosure of the aggregate settlement and required information about all other claimants; improprieties related to MDL fee assessment and payment; and the improper solicitation of the MTLA contribution and fraudulent donation of the total contribution to L.I.M.B. Factual elements germane to

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[112] 621 So.2d 668 (Miss. 1993).

[113] *Owen v. Pringle*, 621 So.2d 668, 671 (Miss., 1993) (citing *Singleton v. Stegall*, 580 So.2d 1242, 1244-45 (Miss., 1991).

[114] *Id.* at 671. See also *Great Southern Nat. Bank v. McCullough Environmental Services, Inc.*, 595 So.2d 1282, 1289 (Miss.,1992) ("This Court has also alluded to the notion that cases which involve issues of contractual ambiguity and interpretation as well as allegations of fraud or misrepresentation generally are inappropriate for disposition at the summary-judgment stage.") and *Perkins Energy Corp. v. Perkins*, 558 So.2d 349, 354 (Miss. 1990) ("In summary judgment cases in which a contract or deed was deemed ambiguous . . . this Court . . . has held that disposition . . . generally involve triable issues of fact and, thus, disposition is inappropriate at summary judgment stage.").

the Waggoners' four causes of action against Williamson and Miller are the province of a jury not a judge on summary judgment. Accordingly, this Court should reverse the Adams County Circuit Court's entry of the partial summary judgment against the Waggoners and permit the Waggoners to proceed before a jury with the entirety of the factual circumstances supporting their breach of fiduciary duty, breach of contract, negligent misrepresentation, and fraud causes of action.

B. Williamson's failure to disclose to the Waggoners the existence and distribution of the aggregate settlement in the *Annette Williams* diet drug litigation violated the terms of the Representation Agreement, common law, Rules 1.8 (g) and 1.2 (a) of Mississippi Rules of Professional Conduct, and the April 24, 2001 AHP Settlement Agreement and can not be alleviated by the trial court's grant of partial summary judgment.

VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT

This Court promulgated the Mississippi Rules of Professional Conduct to more clearly define the duty lawyers owe to their clients. Pursuant to Mississippi Rule of Professional Conduct 1.8(g):

> **[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims . . . involved and of participation of each person in the settlement.** (emphasis added).

In addition to the clear pronouncements of Mississippi Rule of Professional Conduct 1.8(g), Mississippi Rule of Professional Conduct 1.2(a) is also implicated in aggregate settlement contexts as demonstrated by the comment to the American Bar Association's Model of Rule of Professional 1.8(g), which provides:

> Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement. . . . The rule stated in this paragraph [Rule 1.8(g)] is a corollary of both these Rules and provides that, before any settlement offer . . . is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of

the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. [115]

As indicated in the above comment and Mississippi Rule of Professional Conduct 1.2(a), *"A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."*[116] In addition to these rules, the definition of informed consent as defined in the Mississippi Rules of Professional Conduct provides that informed consent *"denotes voluntary acceptance and agreement by a person of a proposed course of conduct* ***after adequate information has been imparted to the person*** *that allows the person to arrive at a decision."*[117] (emphasis added).

In this particular case, Williamson's failure to fully inform the Waggoners of the aggregate settlement reached on April 24, 2001 with AHP constitutes a clear violation of both Rules 1.8 (g) and 1.2 (a). Although the Waggoners were presented with a Disbursement Statement, Williamson intentionally withheld information vital to the Waggoners ability to make an informed decision regarding the gross settlement amount, contingency fee amount of forty-five (45) percent, MDL fees and MTLA contributions, i.e. four factual rather than legal issues.[118] The Waggoners' dispute of the gross settlement amount on the Disbursement Statement provides the clearest example of the many ways in which Williamson and Miller breached their fiduciary duties owed to the Waggoners, breached the Representation Agreement, made negligent misrepresentations, and committed acts of fraud. The Disbursement Statement provided to the Waggoners on June 25, 2001 indicated Williamson and

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[115] See also Rule 1.0(e) (definition of informed consent).

[116] Mississippi Rule of Professional Conduct 1.2(a).

[117] *Id.*

[118] Affidavit of Barthel D. Waggoner, E. vol. 1, p. 51-54 and Affidavit of Jacqueline M. Waggoner, E. vol. 1, p. 55-58.

Williamson alone had reached an individual settlement on the behalf of the Waggoners in the amount of $3,008,961.75.[119]

However, the April 24, 2001 AHP settlement agreement specifies an aggregate settlement in the amount of $73,500,000 on the behalf of the Mississippi, Washington D.C. and Virginia plaintiffs in the *Annette Williams* litigation. In order to prevent a lawyer from compromising the duty of loyalty he owes on an undivided basis to his clients, Rule 1.8(g) and the April 24, 2001 AHP settlement agreement required Williamson and Miller to disclose to the Waggoners "*the existence and nature of all the claims . . . involved and of participation of each person in the settlement*" so that the Waggoners could make an informed decision as to whether to participate in the settlement.[120] Specifically and completely unbeknownst to the Waggoners, Williamson and Miller:[121]

A. allocated $2,507,468.12 to plaintiff W3 even though W3 was found to have no injury;[122]

B. increased the settlement of W17 from $2,100,000 to $2,985,000 based only on the threats by W17 to withdraw from, and therefore kill, the settlement;[123]

C. allocated $1,000,000 to W91 even though W91 had not taken Phen-Fen and did not have any related injuries;[124]

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[119] Disbursement Statement, E. vol. 3, p. 366

[120] Rule 1.8 (g) of the Mississippi Rules of Professional Conduct.

[121] These assertions are explained in detail in the Factual Statement provided herein and are supported by, among the many documents, the Affidavit of Barthel D. Waggoner, E. vol. 1, p. 51-54; the Affidavit of Jacqueline M. Waggoner, E. vol. 1, p. 55-58; and the Affidavit of Donna Ingram, E. v. 4, pp. 535-570.

[122] "Operation Dr. Ruben Throw-Away," E. vol. 3, pgs. 382-386; K. Bowles Depo., E. vol. 4, pg. 456, transcript pg. 124, lns. 4 - 17.; W3 Disbursement Statement, E. vol. 7, pg. 941.

[123] W17 Disbursement Statement, E. vol. 7, pg. 945 and Williamson - Tucker letter, E. vol. 7, pgs. 949, paragraph 4.

[124] W91 - Lack of injury correspondence, E. vol. 2, pgs. 265-267; W91 Disbursement Statement, E. vol. 7, pg. 944.

D. allocated $1,103,286 more to W89 than to the Waggoners even though Respondent Miller knew and has admitted that Barthel Waggoner's injuries were as or more severe than W89's injuries, a proposition made more disturbing because, under the fee sharing agreement with Williamson, Respondent Miller received a larger percentage of attorney fees (30%) from W89 than from the Waggoners (10%).[125]

The Waggoners have testified that they would not have signed the Disbursement Statement had they known Williamson failed to properly evaluate the validity and value of Waggoners' claims; to disclose to the Waggoners the very existence of the aggregate settlement; to disclose the existence and nature of all claims involved in the aggregate settlement; and to disclose the participation of each person in the aggregate settlement including the basis for the calculations, distribution and accounting of settlement proceeds.[126] [redacted] Simply put, the Waggoners [redacted]d not in any capacity consent to participating in an aggregate settlement of which they were never informed.

Although this Court has not yet done so, in *Quintero v. Jim Walter Homes, Inc.*, the Texas Appellate Court addressed a violation of Texas' corresponding rule of professional conduct in circumstances also involving the failure to disclose the existence of the aggregate settlement.[127] The Texas Court of Appeals for Corpus Christi found that a release and settlement agreement executed in violation of

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[125] Comparison between W77 (Barthel Waggoner) and W89: Miller Depo., E. vol. 2, pg. 204, transcript pg. 55, ln. 4 - pg. 56, ln. 10. W89 Disbursement Statement, E. vol. 7, pg. 943.

[126] Affidavit of Barthel D. Waggoner, E. vol. 1, p. 51-54; the Affidavit of Jacqueline M. Waggoner, E. vol. 1, p. 55-58.

[127] *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, (Tex. App. Court for the Corpus Christi Dist. 1986).

Disciplinary Rule 5-106 of the Texas Code of Professional Responsibility was unenforceable because "*as a matter of public policy, the ethics of attorneys and their clients must exist on a very high plane.*" [128] & [129] In *Quintero*, the plaintiffs were previously represented by their attorney in a class action lawsuit against the defendant home manufacturer, Jim Walters.[130] In holding that the release and settlement executed by the Quinteros could not be upheld, the Texas appellate court stated, "*The Quinteros were not informed of the nature and settlement amounts of all the claims involved in the aggregate settlement, nor were they given a list showing the names and amounts to be received by the other settling plaintiffs.*"[131] The Texas appellate court further stated, "*The policy expressed in Disciplinary Rule 5-106 is clearly to ensure that people such as the Quinteros do not give up their rights except with full knowledge of the other settlements involved.*"[132] (emphasis added). Based on their attorney's failure to meet the disclosure requirements of Disciplinary Rule 5-106, which is substantial similar to MRPC 1.8(g) the Texas appellate court refused to uphold the release and settlement agreement signed by the Quinteros.[133] On rehearing, the court stated:

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[128] According to *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 230 (Tex. App. Corpus Christi Dist. 1986), Disciplinary Rule 5-106 of the Texas Code of Professional Responsibility provides "(a) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement." Rule 5-106 is substantially similar to Mississippi Rule of Professional Responsibility 1.8(g).

[129] *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 230 (Tex. App. Corpus Christi Dist. 1986). See also *New York Diet Drug Litigation v. Wyeth - Ayerst Laboratories*, 2007 WL 969426, *4 (N.Y. Sup. March 27, 2007), citing, *Amchem Products v. Windsor*, 521 U.S. 591 (1997).

[130] Id. at 227.

[131] Id. at 227.

[132] Id. and Id. at 229.

[133] Id.

> [Plaintiffs' counsel] failed to comply with DR 5-106, a rule designated to protect clients by allowing them to make an intelligent, informed decision whether or not to participate in a joint settlement. [Plaintiffs' counsel] denied the Quinteros that right. To impute his misconduct to the Quinteros in order to uphold the settlement would totally thwart the express public policy behind the Code of Professional Responsibility, which is to protect clients.[134]

Likewise, [redacted]

[redacted] The New York County Supreme Court interpreted *Amchem* in *New York Diet Drug Litigation v. Wyeth - Ayerst Laboratories*, to provide "that mass tort cases should be governed by the aggregate settlement rule (which requires complete transparency) because the collective nature of these settlements create[s] lawyer-client and client-client conflicts of interest."[136] The plaintiffs in *New York Diet Drug Litigation* made multiple allegations of wrong doing, misrepresentations, and manipulation of the AHP aggregate settlement on the part of their former counsel.[137] Most importantly, the New York County Supreme Court ruled that the plaintiffs' allegations of misrepresentations and of the manipulation of the settlement including the allocation of settlement amounts, expenses, and legal fees in *New York Diet Drug Litigation* were to be determined at trial.[138]

This Court would totally thwart the purposes and standards of legal ethics and professionalism in the State of Mississippi legal profession by upholding the trial

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[134] Id. at 232.

[135] *New York Diet Drug Litigation v. Wyeth - Ayerst Laboratories*, 2007 WL 969426, *4 (N.Y. Sup. March 27, 2007), citing, *Amchem Products v. Windsor*, 521 U.S. 591 (1997). Wyeth - Ayerst Laboratories is the predecessor to American Home Products Corporation.

[136] Id.

[137] Id. at 9-10.

[138] Id. at 11.

court's partial summary judgment entry in favor of Williamson and Miller. Williamson and Miller willfully withheld vital information they were obligated to provide to the Waggoners and thereby prevented the Waggoners' informed consent to the aggregate settlement reached in the *Annette Williams* litigation. In the recent case of *Bradfield v. Schartz*, this Court noted the appropriateness of relying upon the Mississippi Rules of Professional Conduct in determining an award of punitive damages for an attorney's breach of fiduciary duty owed to his client.[139] In *Schwartz*, the plaintiff made claims against Richard Schwartz and Schwartz and Associates, P.A. for breach of contract, breach of covenant of good faith and fair dealing, intentional acts and conspiracy to defraud based upon the improper deduction of expenses from the plaintiff's settlement proceeds.[140] The jury returned a verdict awarding compensatory damages in favor of the plaintiff against Schwartz and Associates, P.A., and when discussing the standard by which punitive damages should be determined and awarded this Court provided:

> Notably, a punitive damages phase would permit both the judges and the jury to evaluate the conduct of Schwartz and Associates in light of the **standards of ethics and professionalism** that control a firm, and the lawyers within the firm, in the practice of law in this State.[141]

Based upon *Quniteros*, *Schwartz*, and *New York Diet Drug Litigation*, this Court should reverse the partial summary judgment granted to Williamson and Miller and permit the Waggoners to present the full-scope facts and wrongdoing to a jury so that compensatory and punitive damages can be evaluated for Williamson's and Miller's breaches of fiduciary duties, breaches of contract, negligent misrepresentations, and acts of fraud.

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[139] *Bradfield v. Schwartz*, 936 So.2d 931 (Miss. 2006).
[140] Id. at 935.
[141] Miss. Code Ann. § 73-3-35 (Rev. 2004) and *See also* Miss. Code Ann. §73-3-35 (Rev. 2004).

VIOLATION OF THE COMMON LAW DUTY OF LOYALITY

The fiduciary duty owed to a client is often referred to as a duty of loyalty, or sometimes, fidelity. It includes duties to the client of honesty, fairness, confidentiality, candor and, most of all, disclosure.[142] The fiduciary duty a lawyer owes to his client requires that "an attorney must deal with the client in a manner of 'utmost honesty, good faith, fairness, integrity and fidelity.'"[143] In simple terms, a lawyer must fulfill the duty to "*inform [a] client of all matters of reasonable importance related to the representation or arising therefrom.*"[144] A breach of duty occurs when an attorney either obtains an unfair personal advantage or when an attorney has interests that are adverse to the clients.[145] The breach of the lawyer's duty to his clients is termed a "constructive fraud" because proof of intent is irrelevant.[146] "Any transaction in which an attorney may have taken undue advantage of the client is voidable" and "presumptively fraudulent."[147] This Court further provided in *Owen* that:

> Each lawyer owes each client a second duty, not wholly separable from the duty of care but sufficiently distinct that we afford it its own label, viz. the duty of loyalty, or, sometimes, fidelity. We speak here of the fiduciary nature of the lawyer's duties to his client, of confidentiality and of candor and disclosure. That an action may lie for the lawyer's breach of these duties is settled.[148]

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[142] See *Lowrey v. Will of Smith*, 543 So.2d 1155, 1161-62 (Miss. 1989); *Gold v. LaBarre*, 455 So.2d 748 (Miss. 1984); *Mississippi State Bar v. Attorney D*, 579 So.2d 559 (Miss. 1991); *See also Singleton v. Steigal*, 580 So.2d 1242 (Miss. 1991).

[143] *Tyson v. Moore*, 613 So.2d 817, 823 (Miss. 1992) quoting, 7A C.J.S. Attorney & Client § 234 (1980).

[144] Id. at 827 (citing ALI, *Restatement (Third) of the Law Governing Lawyers* § 31 (T.D. No. 5 (1992)).

[145] Id.

[146] Id. (citing *Gwin v. Fountain*, 126 So. 18, 22 (Miss. 1930)).

[147] Id.

[148] *Owen v. Pringle*, 621 So.2d 668, 671 (Miss., 1993) (citing *Singleton v. Stegall*, 580 So.2d 1242, 1244-45 (Miss.1991) (citations omitted) (emphasis in original)).

In the instant case, the common law duty of loyalty a lawyer owes to his clients is imperiled by the trial court's partial summary judgment in the same manner the partial summary judgment negates the importance of the Mississippi Rules of Professional Conduct. Williamson's and Miller's secretive allocation of aggregate settlement funds themselves among the thirty-one (31) Mississippi clients and the fourteen (14) Washington, D.C. and Virginia clients and the inherent conflicts of interest associated therewith is the clearest example of the breach of the common law duty of loyalty presented by the instant case. More importantly, the trial court's reasoning in support of the partial summary judgment will, unless reversed by this Court, prevent the Waggoners from presenting evidence to the jury regarding the distribution of the $73,500,000 aggregate settlement and how Williamson and Miller could not possibly uphold the common law duty of loyalty owed to the Waggoners.

Even more egregious injustice will result if the Waggoners are unable to present evidence to the jury how Williamson and Miller ordered the destruction of medical records showing client W3 was not injured and was not entitled to the $2,507,468.12 awarded to her. Further injustice will result if the Waggoners are prevented by the partial summary judgment from presenting evidence to the jury concerning W91's receipt of $1,000,000 even though Williamson and Miller knew and in fact had written W91 that she had not ingested the diet drugs and possessed evidence indicating W91 had not been injured from taking diet drugs manufactured by AHP. Perhaps the final injustice would result from preventing the Waggoners from presenting evidence that W17 was not even a party to the *Annette Williams* litigation and yet received $2,985,000 from the aggregate settlement to that litigation, including most particularly an additional $885,000 to prevent her from "tanking" the settlement.

Williamson and Miller made these allocations to W3, W91, and W17 knowing very well they too stood to profit from these allocations and would profit to the detriment of the Waggoners and others litigants who did in fact ingest the diet drugs resulting in damages to their cardiac systems. But for the improperly granted partial motion for summary judgment, the Waggoners are prepared to make a proper showing of constructive fraud by Williamson and Miller sufficient to shift the burden of proof to the defendants:

> Upon proper showing, the court may relieve the client of its burden and may grant an equitable remedy. To overcome the presumption, the attorney must prove three things: (1) the transaction's fairness, (2) the client's voluntary entry into the transaction, and (3) the client's full, independent understanding of the nature of the transactions and his or her rights. And, of course, an informed and competent client, acting voluntarily, may ratify any such contract or release any such rights.[149]

Only through Discovery did the Waggoners learn Williamson and Miller misrepresented the nature of the AHP settlement and engaged in blatant violations of the common law duty of loyalty owed to the Waggoners, particularly the self-distribution of the aggregate settlement including distributions to individuals who were neither factually nor legally entitled to receive settlement funds and did so the detriment of the Waggoners. **This Court has stated, "[w]ithout a doubt, a lawyer has a duty to inform his client of all matters of reasonable importance related to the representation or arising therefore."[150] "This includes advice regarding matters the client may reasonably see as presenting conflict of interests."[151]** As the record indicates, the Waggoners lacked the degree of knowledge and independence necessary

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[149] *Tyson*, 613 So.2d at 823 - 24 (internal citations omitted).
[150] Id. at 827 (citing American Law Institute, Restatement (Third) of the Law Governing Lawyers § 31 (T.D. No. 5 (1992)).
[151] Id.

to evaluate the appropriateness of the gross settlement amount, contingency fee of forty-five (45) percent, MDL fees, and MTLA contributions. Accordingly, in no way could the Waggoners ratify Williamson's and Miller's breach of the common law duty of loyalty by signing the Disbursement Statement as appears to be the position adopted by the trial court through its entry of the partial motion for summary judgment.

C. The trial court committed reversible error by eliminating the recognized remedy of attorney fee forfeiture or disgorgement on summary judgment when genuinely disputed issues of material fact remain for trial for breach of fiduciary duty, breach of contract, negligent misrepresentations, and fraud.

In addition to ruling the Waggoners can not pursue matters arising out of the gross settlement amount, contingency fee of forty-five (45) percent, MDL fees, and the MTLA contribution, the trial court ruled fee forfeiture or disgorgement was not a remedy available to the Waggoners under any of their four causes of action against Williamson and Miller. [redacted] The trial court stated:

> If you're suggesting that if an attorney in handling a case breaches some duty owed to a client in some kind of way in that case and if they do that, they forfeit their entire fee, then I'm not going down that same road with you, because if there is a breach of duty - this is a suit at law. . . . What you're doing is representing your client seeking a claim for damages before this Court of Law. And you're doing that in the same way we do in negligence action or anything else. You show a breach of duty and you show damages resulting from that.[152]

At trial, the Waggoners will attempt to prove $1,165,228 in compensatory damages arising from Williamson's and Miller's breach of fiduciary duties and other wrongdoings.[153] Attorney fee forfeiture is an additional remedy that should be

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[152] (T. p. 88, lns. 5-14, Record Excerpts, p. 88, lns. 5-14).

[153] Ingram Affidavit, E. vol 4, p. 562.

available to the Waggoners and its elimination by the trial court is outside the scope and purposes of summary judgment.

In *Duggins*, this Court found that the disgorgement of attorney's fees and the award of fees on the basis of *quantum meruit* was an appropriate remedy for the misappropriation of client funds.[154] In *Duggins*, one defense attorney, Duggins, was found to be vicariously liable in tort and breach of contract for the misappropriation of guardianship funds committed by his associated counsel, Barfield.[155] As a remedy for the misappropriation, this Court affirmed the disgorgement of Barfield's entire fee "denying Barfield any attorney's fees as a result of his representation of the guardianship."[156] As to Duggins, the Court disgorged his attorney's fee but suggested compensation on a *quantum meruit* basis as set forth in *Tyson*.[157 & 158]

Although this Court does not appear to have addressed fee forfeiture in the context of withholding information pertaining to an aggregate settlement, the Texas Supreme Court in *Burrow v. Acre* held the forfeiture of attorney's fees was an appropriate remedy in the context of an aggregate settlement when an attorney breached a fiduciary duty owed to a client regardless of whether actual damages were suffered by the plaintiffs.[159] In *Burrow*, one hundred and twenty-six (126) plaintiffs

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[154] *Duggins v. Guardianship of Washington Through Huntley*, 632 So.2d 420 (Miss., 1993)

[155] Id. at 425.

[156] Id. at 430.

[157] In *Tyson v. Moore*, 613 So.2d 817 (Miss. 1992), this Court found disgorgement of fees and an award *quantum meruit* appropriate remedy against attorney who asserted excessive fees and failed to inform client of conflicting self interest).

[158] *Id. See also Mardirossian & Associates, Inc. v. Ersoff*, 153 Cal. App. 4th 257, 278 (June 18, 2007)(recognizing an egregious violation of the rules of professional conduct may justify an entire fee forfeiture); *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 2007 WL 2142299, 9 (N.Y.Sup., 2007)("It is well settled that '[o]ne who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary.'")(internal citation omitted).

[159] *Burrow v. Acre*, 997 S.W.2d 229 (Tx. 1999). See also *New York Diet Drug Litigation v. Wyeth - Ayerst Laboratories*, 2007 WL 969426, *4 (N.Y. Sup. March 27, 2007)(citing *Amchem Products v.*

joined in a class action suit for personal injury and wrongful death damages arising from an explosion of a Phillips 66 chemical plant in 1989.[160] The attorneys for the class action settled the claims of the group for $190,000,000, of which $60,000,000 amounted to attorneys' fees.[161] Subsequently, forty-nine (49) of the settling plaintiffs filed suit claiming, inter alia, breach of fiduciary duty, breach of contract and entering into an aggregate settlement without plaintiffs' authority or approval in violation on Texas Disciplinary Rule of Professional Conduct 1.08(f).[162]

Much like this case, the trial court in *Burrow* granted summary judgment to the Defendant attorneys without considering the fiduciary duties the attorneys owed to their clients. The *Burrow* trial court found "the settlement of the plaintiffs' claims in the Phillips accident suit was fair and reasonable, plaintiffs had therefore suffered no actual damages as a result of misconduct by the attorneys, and absent actual damages plaintiffs were not entitled to a forfeiture of any the attorneys' fees."[163] On review, the Texas Supreme Court remanded the case to the trial court finding that actual damages are not a prerequisite to a forfeiture of attorney's fees for breach of fiduciary duty.[164]

> To limit forfeiture of compensation to instances in which the principal sustains actual damages would conflict with both justifications for the rule. **It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation.** An agent's compensation is not only for specific results but also for loyalty. Removing the disincentive of forfeiture except when harm results would prompt an agent to attempt to calculate whether particular conduct, though disloyal to the principal, might nevertheless be harmless to the principal

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Windsor, 521 U.S. 591 (1997) in which "the United States Supreme Court set a zero tolerance standard for conflicts in aggregate settlements.").

[160] Id. at 232.

[161] Id.

[162] Tex. Disciplinary R. Prof'l Conduct 1.08(f) is identical to Mississippi Rule of Professional Conduct 1.8(g).

[163] *Burrow v. Acre*, 997 S.W.2d 229 (Tx. 1999).

[164] *Id.*

> and profitable to the agent. **The main purpose of forfeiture is not to compensate an injured principal, even though it may have that effect. Rather, the central purpose of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty.**[165]
>
> 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 breach of confidence, and he must account to his principal for all he has received."**[166] (emphasis added)

In both *Tyson* and *Duggins,* this Court held that attorney fee forfeiture or disgorgement is a remedy recognized in the State of Mississippi.[167] Despite the *Tyson* and *Duggins,* the trial court chose to eliminate the remedy of fee forfeiture or disgorgement from the Waggoners because the trial court considered the Waggoners' remedy limited to their actual damages.[168] This Court has provided that summary judgment is legal mechanism which *"tests the legal sufficiency of the plaintiff's claim to under gird his insistence that further proceedings be had."*[169] *"The purpose of Rule 56 is to expedite the determination of actions on their* ***merits and eliminate unmeritorious claims or defenses*** *without the necessity of a full trial."*[170] (emphasis added). The elimination of an otherwise recognized remedy is not included within the purposes of summary judgment proceedings according to these comments.

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[165] *Id.* at 238.

[166] *Id.* at 239 (quoting *United States v. Carter*, 217 U.S. 286, 514 (1910)).

[167] See *Tyson v. Moore*, 613 So.2d 817 (Miss. 1992) (This Court found disgorgement of fee and an award *quantum meruit* an appropriate remedy against an attorney who asserted excessive fees and failed to inform his client of conflicting interests); *Duggins v. Guardianship of Washington Through Huntley*, 632 So.2d 420 (Miss. 1993) (This Court found disgorgement of fee and an award *quantum meruit* an appropriate remedy for an attorney who was vicariously liable for misappropriation of client funds).

[168] T. p. 88, lns. 5-14.

[169] *Gray v. Baker*, 485 So.2d 306, 307 (Miss., 1988).

[170] Comment to Rule 56 of the Mississippi Rules of Civil Procedure.

If this Court is going to adhere to the logic of the *Burrow* opinion and uphold its prior rulings in *Tyson* and *Duggins*, then this Court must reverse the trial court's partial summary judgment eliminating the remedy of attorney fee forfeiture or disgorgement. Reversal of the trial court on this point will permit the Waggoners to pursue the forfeiture of the $1,354,032.79 in attorneys' fees deducted on the Waggoners' Disbursement Statement as the remedy for the breaches of fiduciary duties committed by Williamson and Miller.

VI. Conclusion and Prayer

NOW WHEREFORE, Appellants - Plaintiffs Barthel D. Waggoner and Jacqueline M. Waggoner do respectfully pray that after Oral Argument and due consideration of the facts, law, and arguments made herein that this Court enter an Order reversing the Interlocutory Order issued by the Circuit Court for Adams County and remanding this matter to the Circuit Court for Adams County for further proceedings including a trial by jury in accordance with the ruling of the Court.

Respectfully submitted on the 29th day of January 2008 by:

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Second Appellants' Brief* and *Records Excerpt* filed by Barthel D. Waggoner and Jacqueline M. Waggoner has been served this 29th day of January, 2008 on the Circuit Court of Adams County and on opposing counsel of record via the United States Postal Service, postage prepaid and properly addressed to the following:

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Center *for* Professional Responsibility

Model Rules of Professional Conduct

Client-Lawyer Relationship
Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on

behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

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Center *for* Professional Responsibility

Model Rules of Professional Conduct

Client-Lawyer Relationship
Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules - Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the

transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates

for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the

risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule

1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

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M.R.C.P. 56

WEST'S MISSISSIPPI RULES OF COURT
MISSISSIPPI RULES OF CIVIL PROCEDURE
CHAPTER VII. JUDGMENT

Current with amendments received through June 1, 2007

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.
(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.
(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.
(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.
(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.
(h) Costs to Prevailing Party When Summary Judgment Denied. If summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award

attorneys' fees.

Comment

The purpose of Rule 56 is to expedite the determination of actions on their merits and eliminate unmeritorious claims or defenses without the necessity of a full trial.
Rule 56 permits any party to a civil action to move for a summary judgment on a claim, counterclaim, or cross-claim when he believes that there is no genuine issue of material fact and that he is entitled to prevail as a matter of law. The motion may be directed toward all or part of a claim or defense and it may be made on the basis of the pleadings or other portions of the record, or it may be supported by affidavits and other outside material. Thus, the motion for a summary judgment challenges the very existence or legal sufficiency of the claim or defense to which it is addressed; in effect, the moving party takes the position that he is entitled to prevail as a matter of law because his opponent has no valid claim for relief or defense to the action, as the case may be.
Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried. The rule should operate to prevent the system of extremely simple pleadings from shielding claimants without real claims or defendants without real defenses; in addition to providing an effective means of summary action in clear cases, it serves as an instrument of discovery in calling forth quickly the disclosure on the merits of either a claim or defense on pain of loss of the case for failure to do so. In this connection the rule may be utilized to separate formal from substantial issues, eliminate improper assertions, determine what, if any, issues of fact are present for the jury to determine, and make it possible for the court to render a judgment on the law when no disputed facts are found to exist.
A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. Similarly, although the summary judgment procedure is well adapted to expose sham claims and defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues.
Rule 56 is not a dilatory or technical procedure; it affects the substantive rights of litigants. A summary judgment motion goes to the merits of the case and, because it does not simply raise a matter in abatement, a granted motion operates to merge or bar the cause of action for purposes of res judicata. A litigant cannot amend as a matter of right under Rule 15(a) after a summary judgment has been rendered against him.
It is important to distinguish the motion for summary judgment under Rule 56 from the motion to dismiss under Rule 12(b), the motion for a judgment on the pleadings under Rule 12(c), or motion for a directed verdict permitted by Rule 50.
A motion under Rule 12(b) usually raises a matter of abatement and a dismissal for any of the reasons listed in that rule will not prevent the claim from being reasserted once the defect is remedied. Thus a motion to dismiss for lack of subject matter or personal jurisdiction, improper venue, insufficiency of process or service of process, or failure to join a party under Rule 19, only contemplates dismissal of that proceeding and is not a judgment on the merits for either party. Similarly, although a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted is addressed to the claim itself, the movant merely is asserting that the pleading to which the motion is directed does not sufficiently state a claim for relief; unless the motion is converted into one for summary judgment as permitted by the last sentence of Rule 12(b), it does not challenge the actual existence of a meritorious claim.
A motion for judgment on the pleadings, Rule 12(c), is an assertion that the moving party is entitled to a judgment on the face of all the pleadings; consideration of the motion only entails an examination of the sufficiency of the pleadings.
In contrast, a summary judgment motion is based on the pleadings and any affidavits, depositions, and other forms of evidence relative to the merits of the challenged claim or defense that are available at the time the motion is made. The movant under Rule 56 is asserting that on the basis of the record as it then exists, there is no genuine issue as to any material fact and that he is entitled to a judgment on the merits as a matter of law. The directed verdict motion, which rests on the same

theory as a Rule 56 motion, is made either after plaintiff has presented his evidence at trial or after both parties have completed their evidence; it claims that there is no question of fact worthy of being sent to the jury and that the moving party is entitled, as a matter of law, to have a judgment on the merits entered in his favor.
A Rule 12(c) motion can be made only after the pleadings are closed, whereas a Rule 56 motion always may be made by defendant before answering and under certain circumstances may be made by plaintiff before the responsive pleading is interposed. Second, a motion for judgment on the pleadings is restricted to the content of the pleading, so that simply by denying one or more of the factual allegations in the complaint or interposing an affirmative defense, defendant may prevent a judgment from being entered under Rule 12(c), since a genuine issue will appear to exist and the case cannot be resolved as a matter of law on the pleadings.
Subsections (g) and (h) are intended to deter abuses of the summary judgment practice. Thus, the trial court may impose sanctions for improper use of summary judgment and shall, in all cases, award expenses to the party who successfully defends against a motion for summary judgment.
For detailed discussions of Federal Rule 56, after which MRCP 56 is patterned, *see* 10 Wright & Miller, *Federal Practice and Procedure*, Civil §§ 2711-2742 (1973); 6 *Moore's Federal Practice* ¶¶ 56.01-.26 (1970); C. Wright, *Federal Courts* § 99 (3d ed. 1976); *see also* Comment, *Procedural Reform in Mississippi: A Current Analysis*, 47 Miss.L.J. 33, 63 (1976).

Rules Civ. Proc., Rule 56
MS R RCP Rule 56
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Rules of Prof.Conduct, Terminology

WEST'S MISSISSIPPI RULES OF COURT
MISSISSIPPI RULES OF PROFESSIONAL CONDUCT

Current with amendments received through June 1, 2007

TERMINOLOGY

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
"Confirmed in writing," when used in reference to the informed consent of a person denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
"Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.
"Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, professional association, professional limited liability company, sole proprietorship, governmental agency, or other association whose members are authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.
"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.
"Informed consent" denotes voluntary acceptance and agreement by a person of a proposed course of conduct after adequate information has been imparted to the person that allows the person to arrive at a decision.
"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
"Partner" denotes the member of a partnership , a shareholder in a law firm organized as a professional corporation, professional association, or a member of a professional limited liability company or an entity whose members are authorized to practice law.
"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.
"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.
"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

[Amended effective November 3, 2005 to add definitions for "confirmed in writing," "informed consent," "knowingly, known, or knows," "screened," and "writing or written." At that time the definitions for "firm or law firm" and "partner" were modified.]

Rules of Prof. Conduct, Terminology

MS R RPC Terminology
END OF DOCUMENT

WEST'S MISSISSIPPI RULES OF COURT
MISSISSIPPI RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

Current with amendments received through June 1, 2007

RULE 1.2 SCOPE OF REPRESENTATION

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, a lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
(c) A lawyer may limit the objectives of the representation if the client gives informed consent.
(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that a lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

[Amended effective November 3, 2005]

Comment

Scope of Representation. Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.
In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.
Independence From Client's Views or Activities. Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.
Services Limited in Objectives or Means. The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon

which representation is undertaken may exclude specific objectives or means that the lawyer regards as imprudent.
An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.
Criminal, Fraudulent and Prohibited Transactions. A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.
Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.
Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Code Comparison

Rule 1.2(a) has no counterpart in the Disciplinary Rules of the Code. EC 7-7 states that "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client ...." EC 7-8 states that "In the final analysis, however, the ... decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client .... In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgement and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." DR 7-101(A)(1) provides that "A lawyer shall not intentionally ... fail to seek the lawful objectives of his client through reasonable available means permitted by law .... A lawyer does not violate this Disciplinary Rule, however, by ... avoiding offensive tactics ...."
Rule 1.2(b) has no counterpart in the Code.
Rule 1.2(c) has no counterpart in the Code.
With regard to paragraph (d), DR 7-102(A)(7) provides that a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(6) provides that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-106 provides that "A lawyer shall not ... advise his client to disregard a standing rule of a tribunal ... but he may take appropriate steps in good faith to test the validity of such rule or ruling." EC 7-5 states that "A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."
With regard to Rule 1.2(e), DR 2-110(C)(1)(c) provides that a lawyer may withdraw from representation if a client "insists" that the lawyer engage in "conduct that is illegal or that is prohibited under the Disciplinary Rules." DR 9-101(C) provides that "a lawyer shall not state or imply that he is able to influence improperly ... any tribunal, legislative body or public official."
See also MSB Ethics Opinion No. 92.

Rules of Prof. Conduct, Rule 1.2
MS R RPC Rule 1.2
END OF DOCUMENT

WEST'S MISSISSIPPI RULES OF COURT
MISSISSIPPI RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

Current with amendments received through June 1, 2007

RULE 1.8 CONFLICT OF INTERESTS: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or pecuniary interest adverse to a client unless:
(1) the transaction and terms on which the lawyer acquires the interests are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
(3) the client consents in writing thereto.
(b) A lawyer shall not use information relating to representation of a client
(1) to the disadvantage of the client, or
(2) to the advantage of himself or a third person, unless the client consents after consultation.
(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
(d) Prior to the conclusion or representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, or administrative proceedings, except that:
1. A lawyer may advance court costs and expenses of litigation, including but not limited to reasonable medical expenses necessary to the preparation of the litigation for hearing or trial, the repayment of which may be contingent on the outcome of the matter; and
2. A lawyer representing a client may, in addition to the above, advance the following costs and expenses on behalf of the client, which shall be repaid upon successful conclusion of the matter.
a. Reasonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation or administrative proceeding for which the client seeks legal representation; and
b. Reasonable and necessary living expenses incurred.
The expenses enumerated in paragraph 2 above can only be advanced to a client under dire and necessitous circumstances, and shall be limited to minimal living expenses of minor sums such as those necessary to prevent foreclosure or repossession or for necessary medical treatment. There can be no payment of expenses under paragraph 2 until the expiration of 60 days after the client has signed a contract of employment with counsel. Such payments under paragraph 2 cannot include a promise of future payments, and counsel cannot promise any such payments in any type of communication to the public, and such funds may only be advanced after due diligence and inquiry into the circumstances of the client.
Payments under paragraph 2 shall be limited to $1,500 to any one party by any lawyer or group or succession of lawyers during the continuation of any litigation unless, upon ex parte application, such further payment has been approved by the Standing Committee on Ethics of the Mississippi Bar. An attorney contemplating such payment must exercise due diligence to determine whether such party has received any such payments from another attorney during the continuation of the same litigation, and, if so, the total of such payments, without approval of the Standing Committee on Ethics shall not in the aggregate exceed $1,500. Upon denial of such application, the decision thereon shall be subject to review by the Mississippi Supreme Court on petition of the attorney seeking leave to make further payments. Payments under paragraph 2 aggregating $1,500 or less shall be reported by the lawyer making the payment to the Standing Committee on Ethics within seven (7) days following the making

of each such payment. Applications for approval by the Standing Committee on Ethics as required hereunder and notices to the Standing Committee on Ethics of payments aggregating $1,500 or less, shall be confidential.
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client consents after consultation;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.
(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.
(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.

[Amended October 21, 1999.]

Comment

Transactions Between Client and Lawyer. As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.
A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.
Literary Rights. An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).
Person Paying for Lawyer's Services. Rule 1.8(f) requires disclosure of the fact that the lawyer's

services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.
Family Relationships Between Lawyers. Rule 1.8(i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers are associated.
Acquisition of Interest in Litigation. Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e). This Rule is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

Code Comparison

This Rule deals with certain transactions that per se involve conflict of interest.
With regard to Rule 1.8(a), DR 5-104(A) provides that "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." EC 5-3 states that "A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested."
With regard to Rule 1.8(b), DR 4-101(B)(3) provides that a lawyer shall not "use a confidence or secret of his client for the advantage of himself, or of a third person, unless the client consents after full disclosure."
There is no counterpart to Rule 1.8(c) in the Disciplinary Rules of the Code. EC 5-5 states that "A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."
Rule 1.8(d) is substantially similar to DR 5-104(B), but refers to "literary or media" rights, a more generally inclusive term than "publication" rights.
Rule 1.8(e)(1) is similar to DR 5-103(B), but eliminates the requirement that "the client remain ultimately liable for such expenses."
Rule 1.8(e)(2) has no counterpart in the Code.
Rule 1.8(f) is substantially identical to DR 5-107(A)(1).
Rule 1.8(g) is substantially identical to DR 5-106.
The first clause of Rule 1.8(h) deals with the same subject as DR 6- 102(A). There is no counterpart in the Code to the second clause of Rule 1.8(h).
Rule 1.8(i) has no counterpart in the Code.
See MSB Ethics Opinion No. 102.

Rules of Prof. Conduct, Rule 1.8
MS R RPC Rule 1.8
END OF DOCUMENT

Texas Disciplinary Rules of Professional Conduct
(Tex. Disciplinary R. Prof. Conduct, (1989) reprinted in Tex. Govt Code Ann., tit. 2, subtit. G, app. (Vernon Supp. 1995)(State Bar Rules art X [[section]]9))

I CLIENT-LAWYER RELATIONSHIP

1.08 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(c) Prior to the conclusion of all aspects of the matter giving rise to the lawyers employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents;

(2) there is no interference with the lawyers independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.05.

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

(g) A lawyer shall not make an agreement prospectively limiting the lawyers liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyers fee or expenses; and

(2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

(i) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyers firm may engage in that conduct.

(j) As used in this Rule, business transactions does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.

Comment:

Transactions between Client and Lawyer

1. This rule deals with certain transactions that per se involve unacceptable conflicts of interests.

2. As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, such as banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing, with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

3. A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will

or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (b) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

4. An agreement by which a lawyer acquires literary or media rights concerning the conduct of representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (c) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyers fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.04 and to paragraph (h) of this Rule.

Person Paying for Lawyers Services

5. Paragraph (e) requires disclosure to the client of the fact that the lawyers services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.05 concerning confidentiality and Rule 1.06 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure. Where an insurance company pays the lawyers fee for representing an insured, normally the insured has consented to the arrangement by the terms of the insurance contract.

Prospectively Limiting Liability

6. Paragraph (g) is not intended to apply to customary qualification and limitations in legal opinions and memoranda .

Acquisition of Interest in Litigation

7. This Rule embodies the traditional general precept that lawyers are prohibited from acquiring a proprietary interest in the subject matter of litigation. This general precept, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for contingent fees set forth in Rule 1.04 and the exception for certain advances of the costs of litigation set forth in paragraph (d). A special instance arises when a lawyer proposes to incur litigation or other expenses with an entity in which the lawyer has a pecuniary interest. A lawyer should not incur such expenses unless the client has entered into a written agreement complying with paragraph (a) that contains a full disclosure of the nature and amount of the possible expenses and the relationship between the lawyer and the other entity involved.

Imputed Disqualifications

8. The prohibitions imposed on an individual lawyer by this Rule are imposed by paragraph (i) upon all other lawyers while practicing with that lawyers firm.

DR 5-106 Settling Similar Claims of Clients.

A. A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.