No. 08-0833

In the Supreme Court of Texas

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

Petitioners,

v.

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

Respondents.

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

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BRIEF OF AMICUS CURIAE LINDA S. EADS, ASSOCIATE PROFESSOR OF LAW, DEDMAN SCHOOL OF LAW, SOUTHERN METHODIST UNIVERSITY

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STATEMENT OF INTEREST AND SOURCE OF FEE PAID FOR PREPARING BRIEF

Linda S. Eads is an Associate Professor of Law at the Dedman School of Law, Southern Methodist University. She has been actively engaged in the study and improvement of lawyer ethics for over twenty years. Professor Eads served as Chair of the State Bar Committee on the Texas Disciplinary Rules of Professional Conduct for three years. During this time the Committee reviewed all current Texas disciplinary rules for possible revision. The reports on proposed changes have been submitted to the Texas Supreme Court for evaluation. For this work, Professor Eads received the State Bar's President's Award. Professor Eads also is this year's recipient of the Lola Wright Foundation Award, which is presented each year by the Texas Bar Foundation to a Texas lawyer for outstanding public service in advancing and enhancing legal ethics in Texas.

Professor Eads is deeply concerned that the decision of the court of appeals creates unacceptable uncertainty about the attorney-client relationship. Indeed, the decision of the court of appeals allows lawyers to renegotiate employment agreements with clients without providing full disclosure to the clients and without having to bear the burden of ambiguity found in such renegotiated agreements. The decision of the court of appeals also ignores important principles of the fiduciary duty a lawyer owes to a client.

No fee was paid for the preparation of the *amicus curiae*'s brief.

ISSUES PRESENTED

1. Whether an attorney-client fee agreement negotiated after the inception of the attorney-client relationship is presumed unfair to the client.

2. Whether an attorney, as a fiduciary to a client, must communicate to the client when the circumstances of the representation materially change.

3. Whether rules of construction specifically applicable to attorney-client fee agreements require that true ambiguities in attorney-client fee agreements be construed against lawyers and in favor of clients.

STATEMENT OF FACTS

This is a fee dispute between an attorney and his former client. Before the transaction that led to the current dispute, Anglo-Dutch had been a client of the law firm Greenberg Peden P.C. for many years. 3 RR 77. Gerard Swonke, an attorney at Greenberg Peden, handled most of Anglo-Dutch's engagements with the firm, but had never represented Anglo-Dutch individually. *See* 3 RR 80-81; 6 RR 158; 7 RR 105-07; *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 267 S.W.3d 454, 459 (Tex.—App. Houston [14th Dist] 2008, pet. filed). Swonke had authority to enter into engagements for the firm, his office was located at the firm, correspondence from Swonke to Anglo-Dutch always arrived on firm letterhead or from Swonke's firm email account, and all invoices received by Anglo-Dutch came from Greenberg Peden, not Swonke individually. *See* 3 RR 80, 83-84, 114; 6 RR 158.

Greenburg Peden lawyers, including Swonke, represented Anglo-Dutch in an oil-and-gas deal in Kazakhstan; during the transaction, Anglo-Dutch discovered facts leading it to believe that two of its partners in the deal (Halliburton and Ramco Oil & Gas) had breached their confidentiality agreements with Anglo-Dutch. *Anglo-Dutch v. Greenberg*

Peden, 267 S.W.3d at 460. Anglo-Dutch wanted to pursue the lawsuit but lacked financial resources to pay an attorney on an hourly basis. *Id.*

Anglo-Dutch approached Greenberg Peden, asking the firm to take the lead in a suit against Halliburton and Ramco on a contingency-fee basis. Greenberg Peden refused, as Anglo-Dutch was behind in paying its legal bills to the firm. *Id.*; 3 RR 101-105. At Swonke's recommendation, Anglo-Dutch hired the firm McConn & Williams LLP under a contingency-fee agreement and, in May 2000, filed suit against Halliburton and Ramco. PX 3; 3 RR 101-05.

Given Swonke's involvement in the underlying transaction leading to that lawsuit, Anglo-Dutch asked Swonke to help familiarize McConn & Williams's trial lawyers with the facts of the case. PX 13; 3 RR 107-09. Swonke agreed, and at this point was providing legal services to Anglo-Dutch as a client. Swonke began spending considerable amounts of time on the matter and asked to receive a legal fee for the legal services he had begun providing. *Anglo-Dutch v. Greenberg Peden*, 267 S.W.3d at 460. Swonke negotiated the fee contract with Anglo-Dutch after he had begun work for Anglo-Dutch on the Halliburton-Ramco suit. *Id.* As a result of the negotiation, Anglo-Dutch agreed to pay a fee calculated as a derivative of McConn & Williams's time spent on the case and the recoveries it obtained in the suit. 3 RR 98-102. Anglo-Dutch was not represented by separate counsel during these fee discussions. *See* 6 RR 161-62.

Swonke wrote the fee agreement, which is dated October 16, 2000. It is printed on Greenberg Peden letterhead, is addressed to Mr. Scott Van Dyke of Anglo-Dutch, and purports to "memorialize[] our agreement with respect to me assisting you and/or the

companies which you control (Anglo-Dutch) and the law firm of McConn & Williams, LLP regarding the above-referenced matter." PX 1. The letter incorporates the McConn & Williams fee agreement by reference, explaining that "I agree to assist Anglo-Dutch and that firm in this lawsuit" and setting out the fee calculation. *Id.* The letter indicates that, after calculating the fee from a formula based on McConn & Williams's time spent and the recoveries obtained for the suit, "I would be entitled to receive from you" an amount "rounded to the next whole percentage." PX 1. The letter is signed:

> Very truly yours.
>
> GREENBERG PEDEN P.C.
> /s/ Gerard J. Swonke
> Gerard J. Swonke

PX 1. Swonke claimed, years after the fact, that his secretary mistakenly put the letter on firm letterhead and inserted the firm's name in the signature block. 6 RR 163-73; *Anglo-Dutch v. Greenberg Peden*, 267 S.W.3d at 461. But it is undisputed that Swonke saw the letter before signing it and that he signed his name underneath the firm's name, which was in all capital letters in the signature block. *See* PX 1; 3 RR 64-66.

The next day Van Dyke signed the contingency-fee agreement and responded with a separate letter addressed to "Mr. Gerard J. Swonke, Greenberg Peden P.C.," attaching a copy of the executed fee agreement with McConn & Williams. The letter's final paragraph reads: "This fee agreement with McConn & Williams, LLP provides the basis for the Agreement *between Greenberg Peden P.C. and Anglo-Dutch.*" PX 2; 3 RR 67-68 (emphasis added). That letter bears Greenberg Peden's stamp, showing it was received on October 17, 2000. PX 2. Swonke claims he never reviewed the letter and never

responded to it. 6 RR 176-83. Indeed, until the fee dispute arose in 2004, Swonke never revealed to Anglo-Dutch his subjective belief that he represented the company individually rather than as an attorney of Greenberg Peden.[1]

In October 2001, Swonke left Greenberg Peden and began working "of counsel" for McConn & Williams, which already had its own, preexisting contingency-fee agreement with Anglo-Dutch. PX 10; 8 RR 13, 16, 24-25; *Anglo-Dutch v. Greenberg Peden*, 267 S.W.3d at 461. Swonke informed Anglo-Dutch of his change in employment, indicating that the work he had previously done for Anglo-Dutch had been "*through my association with Greenberg Peden, P.C.*" PX 10 (emphasis added). Although Swonke indicated he would continue to work on the Halliburton–Ramco matter at McConn & Williams, he did not disclose to Anglo-Dutch that he expected to be paid individually under the agreement signed while at Greenberg Peden. 3 RR 142-45. Nor did Swonke advise Anglo-Dutch that his new firm would not be paying him for time spent on the matter under McConn & Williams's contingency-fee agreement. *Id.* While at McConn & Williams, Swonke used an office at McConn & Williams' offices, used firm letterhead and email accounts, and billed using the firm's billing software. PX 10; 3 RR 140; 6 RR 261-62. And Swonke also did other work for Anglo-Dutch while at McConn & Williams that was not related to the Halliburton litigation, and that work was always invoiced by

[1] From June 2000 until October 2001, when Swonke left Greenberg Peden, he recorded time spent on the Halliburton–Ramco matter using Greenberg Peden's time-tracking system. PX 27. The law firm's expenses were billed to Anglo-Dutch on a Greenberg Peden invoice. PX 55. Further, in June 2001, Anglo-Dutch signed a promissory note in favor of Greenberg Peden for Anglo-Dutch's unpaid invoices and interest on that amount, much of it for work Swonke had performed. Swonke handled the arrangement on the firm's behalf. PX 17.

McConn & Williams, not by Swonke individually. Anglo-Dutch paid McConn & Williams directly for that work. PX 11; 3 RR 149-50.

Ultimately, in 2004, Anglo-Dutch was about to accept a $55-million settlement from Halliburton. For the first time, shortly before settlement, Swonke claimed that Anglo-Dutch was obligated to pay him individually not only for his work at Greenberg Peden but also for the time he spent on the case while at McConn & Williams. PX 22; 3 RR 168-71. Applying the terms of the Greenberg Peden fee agreement, this increased Swonke's fee claim from approximately $293,339 (277 hours billed at Greenberg Peden) to $1,530,000 (277 hours billed at Greenberg Peden plus 1022 hours at McConn & Williams), an increase of over $1.2 million.[2] 7 RR 44-45.

This litigation—between lawyer and former client—ensued in short order with each side arguing about the meaning of the October 2000 fee agreement. Over Anglo-Dutch's objections, the trial court determined that the October 2000 fee agreement was ambiguous on its face, relying on the existence of personal pronouns such as "I" and "me," discounting the importance of the signature block listing "GREENBERG PEDEN P.C." and the fact that the fee agreement was printed on firm letterhead. *Anglo-Dutch v. Greenberg Peden*, 267 S.W.3d at 461. In construing the fee agreement, the trial court also ignored the client's obvious belief (recorded in a contemporaneous writing sent to

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[2] Swonke secured an assignment from Greenberg Peden of all its rights under the October 2000 fee agreement with Anglo-Dutch. Swonke's own initial drafts of the assignment stated that "Gerard J. Swonke executed such Letter Agreement *on behalf of Greenberg Peden, P.C.*," PX 6 at GP 000004-5 (emphasis added), and the final assignment stipulated that Swonke had originally executed the fee agreement with Anglo-Dutch "*on behalf of (and while affiliated with) Greenberg Peden* as an Of Counsel." 3 RR 179-80 (emphasis added).

Swonke) that the fee agreement was between "Greenberg Peden P.C. and Anglo-Dutch." PX 2; 3 RR 67-68. The trial court sent Swonke's fee claim to the jury, which awarded him $1 million plus interest for Anglo-Dutch's purported breach of the fee agreement. *Anglo-Dutch v. Greenberg Peden*, 267 S.W.3d at 463. The jury rejected Swonke's fraud claim against Anglo-Dutch. *Id.* The court of appeals likewise concluded that the fee agreement was ambiguous on its face, discounting the "reasonable-client" perspective and the rules of professional responsibility in construing the agreement. *Id.* at 466-72.

The fee agreement at the center of this dispute was entered into after the attorney-client relationship had been formed. *See id.* at 460. The trial court rejected Anglo-Dutch's requested jury instruction that fee contracts negotiated after the inception of the attorney-client relationship are presumed unfair to the client. 4 CR 670-71; 5 CR 851-52. The court of appeals refused to see as critical the denial of this requested jury instruction. Further, the trial court decided *not* to send to the jury the issue of whether Swonke violated his fiduciary duty when he failed to inform Anglo-Dutch about the compensation effect his move to McConn & Williams would have on how much Anglo-Dutch would owe him for his work on the Halliburton-Ramco suit. *See* 1 CR 634; 10 RR 137-38; Supp. CR. Once again, the court of appeals did not consider this to be a critical issue in evaluating the actions taken by the lower court.

The trial court's instructions to the jury also failed to inform the jury that ambiguities in attorney-client fee agreements are resolved against lawyers and in favor of clients, even though such an instruction was requested. 1 CR 627-30. The court of appeals held that, in Texas, this *contra proferentem* interpretation doctrine does not apply

to all ambiguities in attorney-fee agreements and, specifically, did not apply in this case. *Anglo-Dutch v. Greenberg Peden*, 267 S.W.3d at 469-72.

SUMMARY OF THE ARGUMENT

The standards for interpreting attorney-client fee agreements must be clear and predictable. In order to achieve these goals, this Court should grant the petition for review so as to reaffirm two bedrock principles to be applied in construing contracts between lawyers and contracts. First, fee contracts negotiated after the formation of an attorney-client relationship will be presumed unfair to the client. Second, attorneys have a fiduciary duty to explain material changes in the representation to the client and failure to do so will be a breach of fiduciary duty. This Court also should announce that in Texas, as in many other jurisdictions, any ambiguity founded in a fee agreement will be construed against the lawyer-drafter of the agreement. By taking this action, the Court will protect clients and lawyers from facing fee disputes as are likely to occur in greater numbers if the court of appeal's decision is permitted to stand. Having predictable rules of construction that reduce disputes about fee agreements is in the best interests of clients, lawyers, law firms, and the legal system as a whole. For these reasons, the Court should grant the petition for review and provide clarification and guidance on these issues.

ARGUMENT

For the good of both clients and attorneys, the duties attorneys owe existing clients should be enforced, and the standards for interpreting fee agreements should be clear and predictable. In most contexts, lawyers must avoid conflicts of interest—and even

potential conflicts—with their clients. Yet "[w]hen private lawyers set and then collect fees for their professional services, they inevitably are involved in a conflict of interest between themselves and their clients," as lawyers have an interest in receiving fees while their clients have an interest in paying as little as possible.[3] This inherent conflict means that many disputes between lawyers and their clients are disputes about fees—overcharging by the lawyer, a client's unjust refusal to pay, or simply a misunderstanding. Special rules of contract interpretation and the rules of professional responsibility attempt to mediate and control the potential for conflict regarding attorney-client fee agreements. The court of appeals's decision overlooks the fiduciary duties owed by lawyers to existing clients and disregards previously settled rules for interpreting fee agreements, rendering those duties and rules less certain and increasing the chances of quarrels between lawyers and clients.

I. THE COURT SHOULD GRANT THE PETITION TO REAFFIRM THAT AN ATTORNEY-CLIENT FEE AGREEMENT NEGOTIATED AFTER THE INCEPTION OF THE ATTORNEY-CLIENT RELATIONSHIP IS PRESUMED UNFAIR TO THE CLIENT.

The record is clear that the fee agreement at issue in this case was drafted after Swonke began his work on Anglo-Dutch's case against Halliburton and Ramco. The court of appeals discusses this in its opinion, noting that Swonke decided that he wanted compensation after providing Anglo-Dutch with unpaid legal work for months. *Anglo-Dutch v. Greenberg Peden*, 267 S.W.3d at 460. The fact that Swonke did not seek compensation until after he formed an attorney-client relationship with Anglo-Dutch does

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[3] 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §8.2, at 8-5 (3d ed. 2000 & Supp. 2003).

not alter the undeniable fact that the relationship between Swonke and Anglo-Dutch existed before the fee contract was negotiated. Indeed, we know from the record that Swonke's assistance was sufficiently important to persuade Anglo-Dutch to contract for the continuation of these services.

At trial, Anglo-Dutch requested a jury instruction on the presumption of unfairness that automatically arises when an attorney contracts with an existing client. The trial court refused to give this instruction. *See* Anglo-Dutch Br. in Ct. of App. at 43-44. This was error. Texas law is clear that the presumption of unfairness arises in this situation.

> Contracts between attorneys and their clients negotiated during the existence of the attorney-client relationship are closely scrutinized. *See Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964). Because the relationship is fiduciary in nature, there is a presumption of unfairness or invalidity attaching to such contracts.

Keck Mahin & Cate v. Nat'l Union Fire Ins. Co., 20 S.W.3d 692, 699 (Tex. 2000).

The jury never received an instruction that required it to consider this presumption in evaluating the evidence. Further, the instruction requested by Anglo-Dutch on this presumption was not cumulative of other instructions and was not a comment on the weight of the evidence. The requested instruction was critical to the jury's ability to apply the law in Texas to the facts of the case, and the failure to provide such an instruction was reversible error.

As a professor and commentator on legal ethics in Texas, I cannot overstate how important I consider this presumption. Clients depend on lawyers to serve them loyally until the completion of a representation and are most vulnerable while the representation is ongoing. Renegotiated contracts pose the most danger to clients at this point, and the

presumption of unfairness that automatically arises when an attorney contracts during the course of an existing relationship protects clients precisely when they most need it. The failure of the trial court to give the instruction on this presumption and the court of appeals's refusal to see this failure as critical should not be allowed to stand unanswered. I am concerned that this case, if not corrected, will be cited as authority for asserting the presumption of unfairness is less muscular than noted in the past—a result at odds with client protection.

Although the Respondents have painted the facts in this case to portray Anglo-Dutch as being sophisticated and thus beyond any overreaching by Swonke, the facts indicate a different conclusion. These facts show that Anglo-Dutch was not able to pay some legal fees and apparently could not afford to pay lawyers on an hourly basis. Also Anglo-Dutch relied on Swonke to help it decide who to hire to pursue its claims against Halliburton and Ramco, and then asked Swonke for legal help without compensating him. This speaks of greater financial vulnerability and greater dependence on Swonke than portrayed by the Respondents or the court of appeals. Further, Anglo-Dutch was not separately represented by counsel when this fee agreement was signed, and the record contains no evidence that Van Dyke had a sophisticated understanding of contingent-fee-contract drafting.

In any event, the application of the presumption of unfairness that attaches to contracts negotiated during the course of an attorney-client relationship should not turn on the particular characteristics of the client. If this were to happen, then some lawyers would be tempted to create unfair contracts with current clients, knowing that if such

contracts were challenged later, the attorney could cite this case to support the conclusion that certain clients are not necessarily entitled to the protection created by the presumption of unfairness. A bright line test is a better standard than one driven by the identity of the client. It serves to reduce temptation for lawyers, better protects clients, and gives trial courts a clear standard to use in instructing a jury. The Court should grant the petition in order to make it abundantly clear that all contracts negotiated during an existing attorney-client relationship are presumed unfair to the client.

II. THE COURT SHOULD GRANT THE PETITION TO REAFFIRM THAT AS A FIDUCIARY AN ATTORNEY MUST COMMUNICATE TO A CLIENT WHEN CIRCUMSTANCES OF THE REPRESENTATION MATERIALLY CHANGE.

The trial court erred by concluding that, for some matters Swonke had not breached the fiduciary duty he owed Anglo-Dutch. The evidence presented by Anglo-Dutch established, as a matter of law, that Swonke breached the fiduciary duty he owned Anglo-Dutch. *See* Anglo-Dutch Br. in Ct. of App. at 46-48. At a minimum, the case should be remanded for a new trial on Anglo-Dutch's breach-of-fiduciary-duty claims.

Important to my position on this issue is Swonke's failure to inform Anglo-Dutch about material changes in his representation of Anglo-Dutch. The record is clear that Swonke never discussed with Anglo-Dutch the consequences of his move to McConn & Williams from Greenberg Peden. He never informed Anglo-Dutch of his private agreement with McConn & Williams and never explained to Anglo-Dutch that he personally would receive no compensation from the contingency fee agreement between McConn & Williams and the company. The failure to disclose these material facts is further exacerbated by the appearance created after Swonke joined McConn & Williams.

To the outside world, including Anglo-Dutch, Swonke appeared to be a McConn & Williams attorney. He officed in the McConn & Williams office space, used the firm's letterhead and email accounts and billed by entering his time on the firm's billing software. And McConn & Williams billed Anglo-Dutch for Swonke's hourly time on McConn & Williams invoices. Anglo-Dutch was certainly reasonable in concluding that Swonke was a McConn & Williams lawyer who would be compensated under the contingency fee agreement between Anglo-Dutch and McConn & Williams for the work Swonke did after he joined the firm.

It is particularly important that Swonke moved to a law firm that had its own contingency fee agreement with Anglo-Dutch. And it is particularly important that Anglo-Dutch knew that Swonke knew of this preexisting agreement. Under these circumstances, Anglo-Dutch was reasonable in assuming that, following Swonke's change of firms, he would be paid for his work under the McConn & Williams contract. Anglo-Dutch would have no reason to assume otherwise since it never received any information from its lawyer to alert it to any unusual circumstances arising from Swonke's move to the new law firm. It would be unnatural to assume that Swonke would not be compensated under the McConn & Williams contract. Indeed, even Swonke and McConn & Williams felt the need to have a separate agreement to cover this compensation exclusion, precisely because it was an unusual exclusion. Further, it would have been unnatural for Anglo-Dutch to assume that Swonke would be compensated under both contingency fee contracts—the one with McConn & Williams and the one signed when Swonke was with Greenberg Peden. According to the record, Anglo-Dutch

had no information on how Greenberg Peden's dissolution and Swonke's move affected contracts with clients or affected the "of counsel" agreement between Swonke and Greenberg Peden. Given these facts, any reasonable lawyer would have known that Anglo-Dutch was very likely to have assumed that Swonke would now be compensated under the McConn & Williams contingency fee agreement.

Therefore, Swonke should have disclosed to Anglo-Dutch the facts of his relationship with McConn & Williams and made clear the unusual compensation exclusion he had with the new firm. This is a material fact necessary for the client to fully understand the effect of Swonke's move. It was Swonke's fiduciary duty to make this disclosure even if he thought he would continue to be paid under the October 16, 2000 contract signed while he was with Greenberg Peden. A reasonable fiduciary acting in good faith had to know that a client would not fully understand the possibility of the continuing nature of the October 16, 2000 contract unless the client also knew that Swonke would not be compensated for his Anglo-Dutch work under the McConn & Williams contract. A fiduciary has an obligation in this situation to provide the client with accurate information about these material changes in the representation.

This obligation to communicate is found in Texas Disciplinary Rule of Professional Conduct 1.03, requiring a lawyer to fully and completely communicate with a client on matters that are necessary to permit the client to make informed decisions regarding the representation. The disciplinary standard echoes this Court's decisions. *See Keck,* 20 S.W.3d at 699 (stating the burden is on the fiduciary to establish a client

was informed of all material facts). Further, this duty to communicate is an affirmative duty that exists even if the client does not request the information.

On a lawyer's duty to communicate, Texas is in accord with the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §20. The duty to adequately inform the client is considered a fiduciary duty. *Id.* This fiduciary duty goes beyond just answering questions. "The lawyer must, when appropriate, inquire about the client's knowledge, goals, and concerns about the matter . . . ." *Id.* §20, cmt. c. It can be argued that the duty to communicate and to adequately inform the client of all material matters is the key to any ethical representation. Advising the client of problems and new data, providing information on possible conflicts and disclosure of confidential information, and addressing the issues important to the client all allow an attorney to follow fiduciary duty principles without worry in most situations.

As a matter of law, Swonke breached his fiduciary duty to Anglo-Dutch by not fully informing Anglo-Dutch of the effect Swonke's move to the new firm would have on his compensation. The record provides no evidence to support a defense to this failure to keep Anglo-Dutch adequately informed. Further, at the very least this case should be remanded for a trial on this and other breaches of fiduciary duty that the jury was not asked to consider. The law of legal ethics provides the client with this important right—the right to receive information important to the representation and necessary to make informed decisions. When a lawyer fails to abide by law of fiduciary duty and fails to explain to a client a matter of significant importance, the courts should not ignore this failure. Lawyers and clients will be served well by the Court's clear statement that it will

not tolerate or ignore a breach of the fiduciary duty to keep a client adequately informed about material matters.

III. THE COURT SHOULD ANNOUNCE APPROPRIATE STANDARDS SPECIFICALLY RELEVANT TO INTERPRETING ATTORNEY-CLIENT AGREEMENTS.

The court of appeal's legal analysis fails to apply rules of construction that are specifically relevant to attorney-client fee agreements. This dispute is between a lawyer and his client about the meaning of a fee agreement drafted by the lawyer. This Court has recognized that contracts are construed "from a utilitarian standpoint bearing in mind the particular business activity sought to be served" in determining what is reasonable in a specific context. *See Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987). In the context of attorney-client fee agreements, special rules of interpretation apply to safeguard the highly fiduciary nature of the relationship and to minimize attorney-client disputes, which undermine faith in the legal system. *See, e.g., Hoover Slovacek, LLP v. Walton*, 206 S.W.3d 557, 565 (Tex. 2006); *Wampold v. E. Eric Guirard & Assocs.*, 442 F.3d 269, 273 (5th Cir. 2006).

Public policy considerations argue in favor of holding that true ambiguities about attorney-client contracts be resolved against lawyers and in favor of clients. *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §8.9, at 8-24 (3d ed. 2000 & Supp. 2003); *see also* Anglo-Dutch Br. in Ct. of App. at 32 & n. 20. Unfortunately, the court of appeals analyzed the doctrine of *contra proferentem* as a device of last resort and acknowledged no need to consider this doctrine in a different light when the contract is between an attorney and client. In reaching this conclusion, the

court of appeals stated that this doctrine has not been applied in Texas in "a blanket fashion to all ambiguities in attorney-client fee agreements." *Anglo-Dutch v. Greenberg Peden*, 267 S.W.3d at 469.

In so doing, the court of appeals did not give sufficient weight to a line of cases decided by this Court in recent years. *See Hoover Slovacek*, 206 S.W.3d at 559; *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 93 (Tex. 2001); *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 859 (Tex. 2000). These cases strongly suggest—and indeed some would argue hold—that the highly fiduciary nature of the attorney-client relationship materially affects how courts should construe contracts between lawyers and their clients. This line of cases supports the conclusion that ambiguities in such contracts should be strictly construed against the lawyer and in favor of the client. The Court should grant the petition here to make it crystal clear that this is the law in Texas.

Several jurisdictions have taken this position. *See, e.g., Mello v. Davis*, 182 S.W.3d 622, 624 (Mo. Ct. App. 2005); *Shaw v. Mfrs. Hanover Trust Co.*, 499 N.E.2d 864, 866-67 (N.Y. 1986); *Guerrant v. Roth*, 777 N.E.2d 499, 504 (Ill. App. Ct. 2002); *Arabia v. Siedlecki*, 789 So. 2d 380, 383-84 (Fla. Dist. Ct. App. 2001); *Gorton v. Hostak, Henzl & Bichler, S.C.*, 577 N.W.2d 617, 623 (Wis. 1998); *Grace & Nino, Inc. v. Orlando*, 668 N.E.2d 864, 866 (Mass. App. Ct. 1996); *Cohen v. Radio-Elecs. Officers Union*, 679 A.2d 1188, 1196 (N.J. 1996). Policy factors weigh in favor of such a decision. First, it has always made sense to interpret an ambiguous contract against the drafter. Indeed, the doctrine of *contra proferentem* is centuries old. Second, it becomes more important to follow this interpretation doctrine when the drafter is a lawyer—one

schooled in the law of contracts and whose profession is well-versed in the use of language. Third, most clients have no training or resources to protect themselves from in artful drafting. Fourth, a client who advances an unreasonable construction of the contract will not prevail because the contract will not be ambiguous in such a case. This will prevent purely self-serving claims of ambiguity. Fifth, the profession will be better served by such a rule. It will cause lawyers to be more careful in drafting, and it will persuade less honorable members of the profession to see little advantage from drafting a poor contract. Further, such a holding will clarify what this Court has already strongly suggested.

"The matter of fees is important, far beyond the mere question of bread and butter involved. Properly attended to, fuller justice is done to both lawyer and client." 2 ABRAHAM LINCOLN, COLLECTED WORKS OF ABRAHAM LINCOLN 82 (Roy P. Basler ed., 1953). The petition for review provides the Court the opportunity to "properly attend[] to" the important duty of promoting predictability and certainty in fee agreements and in the attorney-client relationships that are so important to our system of justice.

IV. THE APPELLATE COURT'S LENIENT AMBIGUITY STANDARD CREATES INTOLERABLE UNCERTAINTY FOR LAW FIRMS AND CLIENTS, AND IT UNDERMINES CONFIDENCE IN THE LEGAL SYSTEM.

I am not going to address in detail the problems with the lenient ambiguity standard used by the court of appeals in this case. This has been addressed adequately in other briefing. I do note, however, that this lenient standard, if not reversed, will create a host of problems in the future for lawyer-client relationships. The court of appeals

attempts to treat this case as being unique on its facts, but the reality is that, by readily reading ambiguity into a seemingly straightforward engagement letter, the court's decision will increasingly raise questions among clients, law firms, lawyers, insurance carriers, and others:

- Who owes fiduciary duties to the client, the law firm or merely the lawyer who signs the engagement letter?
- Can law firms count on receiving the benefit of the fees agreements memorialized on their letterhead?
- Who is obligated to clients in the event of malpractice?
- Will insurance companies begin to use "ambiguity" in engagement agreement to refuse malpractice coverage?

The answers to those questions, which are fundamental to the profession and practice of law, are less clear now than they were before the court of appeals decision.

In this case, the court of appeals held the fee agreement to be ambiguous, allowing an individual attorney to claim the contract for himself, despite being printed on firm letterhead, despite the appearance of the firm's name in the signature block, and despite a contemporaneous confirmation by the client that the agreement was with the firm. The court of appeals, anticipating the potentially toxic consequences of its opinion, noted that its "conclusion should not be misconstrued as a holding that any appearance of personal pronouns in an engagement letter or fee agreement creates ambiguity about whether the client hired a law firm or an individual lawyer." *Anglo-Dutch v. Greenberg Peden*, 267 S.W.3d at 468. It cited the particular history between Greenberg Peden and Anglo-Dutch as a limit on its holding, but that contention overlooks the fact that most firms and their

clients will have *some* history and that concerns about billing are common. Further, the court of appeals declared without citing any authority or empirical support that "[i]t will usually be clear when a client hired a law firm with an expectation that particular lawyers at the firm would work on a particular matter." *Id.* Such assurances are unsatisfying.

Law firms, attorneys, and clients need to know with a high degree of certainty whether a fee agreement is with a firm or whether it is with individual attorneys. Law firms need to know whether they are entitled to fees in order to budget their expenses and organizational strategy; firms need to know how much, and what scope of, malpractice insurance to purchase; they need to know who their clients are in order to analyze potential conflicts of interest; and firms need to know what matters are theirs in order to staff them appropriately and ensure their clients' interests are protected.

A permissive ambiguity analysis also increases the risk for mischief and the likelihood of litigation between lawyers. Given the unsettled standards for interpreting fee agreements, a law-firm attorney may be tempted to build Swonke's "ambiguity" into fee agreements and then cherry-pick the best cases for himself or herself on the way out the door. Under that scenario, a firm might recover its fair share of the award against the departing attorney, but the uncertainty about who owns the recovery increases the risk of litigation between a lawyer and his or her former partners. Such disputes between lawyers often throw clients into a tug-of-war not necessarily arising out of the client's particular legal matter. Few things are more damaging to the legal profession than when lawyers air their dirty linen in public or, worse yet, cause their clients unnecessary anxiety, expense, and delay solely as a result of personal issues arising between them.

There are other reasons why certainty in fee agreements is vital to clients. They need to know they can depend on the firm they thought they hired to represent their interests. When there is uncertainty about a firm's or attorney's responsibility for a matter, there is a real risk that loyalty to that client will become watery. And if disputes arise about fees or other issues, clients need to know who has ultimate authority to negotiate the issue, firm management or just the attorney working on the matter.

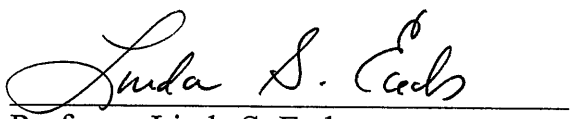
Having rules of construction that reduce the number of ambiguous fee agreements is in the best interests of individual attorneys. Granted, in a particular dispute (such as the one in this case), ambiguity about a fee agreement may favor the lawyer. But in other cases, lawyers will want the certainty that their law firm stands behind them, that the firm's malpractice carrier will defend them if necessary, and that the fee agreements they draft will be interpreted to avoid readings that would involve violations of the rules of discipline. Further, in cases in which the existence of an ambiguity appears to favor the lawyer, allowing a lawyer initially to benefit from the ambiguity might not be a good thing, even for the lawyer. By suing a former client, the lawyer's reputation often suffers. And if the ambiguity was drafted by the lawyer, Texas courts will have to decide how to handle malpractice claims based on poor draftsmanship of the fee agreement.

The holding of ambiguity, supported by legally insufficient facts, makes it impossible in many instances for a law firm to know whether it has a client and for a client to know whether it has a firm—or whether the engagement is with the individual attorney negotiating the fee. That uncertainty is harmful to clients, detrimental to law firms and individual lawyers alike, and corrosive to the legal system as a whole.

PRAYER

For these reasons, *amicus curiae* asks the Court to grant Anglo-Dutch's petition for review, reaffirm the fiduciary nature of the attorney-client relationship and provide clear standards for interpreting attorney-client agreements.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached Brief of Amicus Curiae has been forwarded to counsel of record by Certified United States First Class Mail, return receipt requested, in accordance with the Texas Rules of Appellate Procedure on this the 9th day of April, 2009, as follows:

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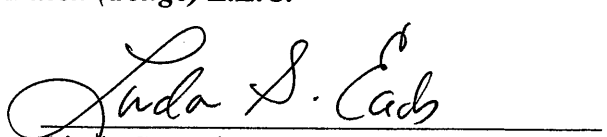

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