

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

United States Courts  
Southern District of Texas  
FILED  
NC MAR 03 2003  
Michael N. Milby, Clerk

In Re Enron Corporation, Securities, Derivative  
& "ERISA" Litigation

MARK NEWBY, ET AL.,

Plaintiffs

Vs.

ENRON CORPORATION, ET AL.,

Defendants

PIRRELLI ARMSTRONG TIRE  
CORPORATION RETIREE MEDICAL  
BENEFITS TRUST, Derivatively On Behalf of  
ENRON CORPORATION, ET AL.,

Plaintiffs

Vs.

KENNETH LAY, ET AL.,

Defendants

PAMELA M. TITTLE, on behalf of herself and a  
class of persons similarly situated, ET AL.,

Plaintiffs

Vs.

ENRON CORP., an Oregon Corporation, ET  
AL.,

Defendants.

Consolidated Civil Action  
Number:  
H-01-3624

MEMORANDUM

Judge: Melinda Harmon

MEMORANDUM OF POINTS AND AUTHORITIES

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MEMORANDUM OF POINTS AND AUTHORITIES

#1262

Comes now Robin D. Hosea, propia persona, and presents the following Memorandum of Points and Authorities in support of her Motion for Contempt and Alternatively for Order to Show Cause, which is organized as follows:

- I. Professional Misconduct
- II. Breach of Fiduciary Duty
- III. Harm to the S.E.E.C. Class

#### **I. Professional Misconduct**

From the Preamble to the Texas Disciplinary Rules of Professional Conduct (TDRPC) are the following comments:

- A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
- A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.
- In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent.
- A lawyer should maintain communication with a client concerning the representation.
- A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Texas Disciplinary Rules of Professional Conduct or other law.
- In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from apparent conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyers own interests.
- The desire for the respect and confidence of the members of the profession and of the society, which it serves, provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of the respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit no compromise. *Id.* at paragraphs 1, 3, 7, and 9. See e.g. Rules 1.01(a)(1) and (b)(2), 1.03, 1.05(c)(3), 1.06(a)(2),(c), 1.14 (a), 1.15(b)(1) and (d), 3.04(a), 8.04(a)(3), TDRPC.

Professional misconduct that amounts to neglect and incompetence, breach of confidentiality, abandonment of representation and failure to return

client property has particular impact on the individual client. Rules 1.01 (a)(1) and (b)(2); 1.05; 1.14(a) and 1.15 (b)(1) and (d), TDRPC. Likewise, professional misconduct can harm others, undermine public trust, and prevent the orderly administration of justice. Rules 1.06, 3.04(a) and 8.04(a)(3) and (9), TDRPC.

## **II. Breach of Fiduciary Duty**

Attorneys owe a fiduciary duty to clients as a matter of law. It is also recognized that while “a rule or statute regulating the conduct of lawyers does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty, . . . it may be considered by a trier of fact in understanding and applying the standard of care for malpractice or determining a breach of fiduciary duty.” *Two thirty Nine Joint Venture v. Joe, et al*, 60 S.W.3d 896, 905 (Tex.App.-Dallas 2001).

Agreeing to represent a client in a matter that is beyond a lawyer’s competence is improper. Inadequate or deficient pleading, improper filing and preparation of legal documents, and mistakes and errors that are left uncorrected often evidence lack of competence. See Rule 1.01(a), TDRPC and Comment 6. Attorneys have a duty to avoid the harm to clients that is the result of neglect that amounts to a conscious disregard of client matters. Frequently neglecting legal matters and systematically failing to complete matters undertaken reveal such a conscious disregard. See Rule 1.01(b), TDRPC and Comment 7.

When a client consults an attorney and communicates that the matters he or she is disclosing are to remain confidential, the subsequent disclosure by the attorney tears apart that confidence. As Rule 1.05(a), TDRPC points out, confidential information is that which is “privileged” and “unprivileged client information.” In general, unless subject to the mandatory disclosure requirements, confidential information must be kept secret, when an attorney is instructed not to reveal it. The attorney’s loyalty to his or her peers or partners who are not members or employees of that attorney’s law firm does not release the attorney from that duty of loyalty. “In the course of a firm’s practice, lawyers may disclose to each other and to appropriate employees information relating to

a client *unless the client has instructed that particular information be confined to specified lawyers.*" *Id.* at Comment 7 (emphasis added). Even if the attorney feels compelled by loyalty to others, without the client's consent, the attorney is not free to break confidence.

Terminating representation in retaliation can never be excused when the client's conduct is without fault. Abandoning a client in a pending legal matter without court permission and without taking the appropriate steps to protect the client's interests is improper. See Rule 1.15 (b) and (d), TDRPC. Failing to return client property also violates an attorney's duty to his or her client as such property must be surrendered upon termination of representation. *Id.* Client property is to be "appropriately safeguarded" from loss or destruction. See Rule 1.14 (a), TDRPC.

Client-witnesses, who suffer from physical injury and financial hardship, are particularly vulnerable, notwithstanding, the further injury that is likely when their legal matters are systematically neglected and damaged by incompetence or conscious disregard. The devastation of willful neglect and incompetence that exacerbates a client's dwindling medical and financial resources is tantamount to destroying evidence or obstructing access to evidence. See Rule 3.04(a), TDRPC. "Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery . . ." *Id.* at Comment 1. See also Rule 8.04(a)(4).

The administration of justice depends on the honesty and the integrity of the attorneys, as officers of the court, who take the lead in pursuing their client's rights and interests. The justice system is as devastated as a forest ravaged by fire, when the officers of the court sink to the lowest levels of conduct by engaging in deceit, dishonesty and other behavior characterized by fraud and misrepresentation. See Rule 8.04(a)(3), TDRPC. Whether the attorney treats his or her own client, witnesses and third parties, with such disrespect is irrelevant.

Intentionally representing a course of action and committing to another, omitting or concealing relevant information, stealing away with client property without the client's consent are examples of deception that are as insidious as an undiagnosed cancer.

### **III. Harm to the S.E.E.C. class**

Conflicts of interests that infect an attorney who represents a class can only cause harm, because there is no assurance or trust in that attorney's loyalty to the client-class as a whole. The concealment of known conflicts not only raises questions of loyalty, but also the motive behind the deception and concealment. More onerous is the possibility that information and confidences revealed by class members and witnesses for the class may not be used to pursue the interests of the class with zeal and vigor rather may instead be used to lay waste to the client-class in the interest of others to whom the attorney may commit greater loyalty.

Comment 4 to Rule 1.06, TDRPC, points out:

Loyalty to a client is impaired not only by the representation of opposing parties . . . but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client *because of the lawyer's own interests or responsibilities to others*. . . the critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. (Emphasis added.)

In addition,

Notwithstanding the disciplinary rules, an attorney's duty of care includes the duty to avoid conflicts of interest that may impair the attorney's ability to exercise independent professional judgment on behalf of the client and the duty to avoid conflicts of interest is a key aspect of the fiduciary duty that an attorney owes to his client generally. When a lawyer continues representation with the possibility of a conflict without obtaining properly informed consent from the affected client, there is a breach of the duty of loyalty. Because avoiding conflicts of interest and thereby observing the fiduciary duty of loyalty is an action that a reasonably prudent lawyer

would observe in relation to the client, a lawyer can be civilly liable to a client if the lawyer breaches a fiduciary duty to a client by not avoiding impermissible conflicts of interest, and the breach is a legal cause of injury. *Two Thirty Nine Joint Venture*, 60 S.W.3d at 905-906 (citations omitted).

It would be difficult to imagine that an attorney, representing a client who is seeking to recover moneys from the client's former employer would be capable of independent professional judgment when the attorney's immediate family members are: (1) currently employed by the client's former employer; (2) employed by an auditing firm that may be implicated in the employer's corporate wrong doing; or (3) politically and publicly associated with an alleged recipient of unauthorized or illegal payments from the benefit fund moneys managed by the employer. "The lawyer's own interests should not be permitted to have adverse effect on representation of a client, even where paragraph (b)(2) is not violated." Rule 1.06 at Comment 6. Likewise, it would be difficult to imagine that any lawyer associated with the lawyer tainted by a conflict of interest could plausibly deny knowledge of the conflict or escape the taint of that conflict. See Rule 1.06(f), TDRPC; Rule 1.06(Q)(1), Texas Rules of Disciplinary Procedure.

Respectfully submitted and dated this \_\_\_\_ day of \_\_\_\_\_, 2003.

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