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## Hey Walter: Do Criminal Defense Lawyers Not Owe Fiduciary Duties to Guilty Clients - An Open Letter to Retired Professor Walter W. Steele, Jr.

Roy Ryden Anderson  
*Southern Methodist University, Dedman School of Law*

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# HEY WALTER: DO CRIMINAL DEFENSE LAWYERS NOT OWE FIDUCIARY DUTIES TO GUILTY CLIENTS?

## AN OPEN LETTER TO RETIRED PROFESSOR WALTER W. STEELE, JR.\*

Roy Ryden Anderson\*\*

Dear Walter,

From time to time, as you doddle in your retirement in the piney woods, you might recall that a few years ago we wrote a couple of articles together about contract law and an attorney's professional responsibility. I can't say the tasks were fun, legal writing being as it is so hard to do. But the many conversations we had along the way were a lot of fun, at least for me. I thought at the time I was learning a lot. Now I'm not so sure I did.

I suppose now, you being retired and all, we can let the old cat out of the bag. I was the one of us we anonymously referred to who professed "little knowledge of the intricacies and nuances" of many of the rules governing an attorney's professional responsibility.<sup>1</sup> You were the one who didn't know a darn thing about contract law. Ha!

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\* I wish to thank my research assistants, Lisa Marie Antes and Paul K. Kirkpatrick, for their help in the research for this letter and in helping with the footnotes insisted upon by this publication's esteemed editors. Lisa and Paul are members of the Class of 2000. I will aver, under oath if necessary, to the editors of *U.S. News and World Report* that the "2000" is in reference to the year they anticipate leaving these hallowed halls and not to the size of their graduating class.

\*\* The letter's author professes to be a member of the faculty of Southern Methodist University School of Law (with tenure), a member of the State Bar of Texas (for the time being), and a long-time colleague, friend, and student of Walter W. Steele, Jr. (probably for always).

1. Roy Ryden Anderson & Walter W. Steele, Jr., *Ethics and the Law of Contracts Juxtaposed: A Jaundiced View of Professional Responsibility Considerations in the Attorney-Client Relationship*, 4 *GEO. J. OF LEGAL ETHICS* 791, 791 (1991). Walter, you are just going to have to excuse these footnotes. I suspect they won't bother you much. I know for a fact you never paid much attention to footnotes. I always thought it had something to do with the small print and your eyesight. Man, I've never met a man with so many pairs of eye glasses. I think you've got more peepers than boots, and that's saying something! Anyway the only way I could get this open letter to you published in this journal is to put footnotes on it. I think these guys will publish about anything if you put a footnote or two on it. I sure don't trust getting a private letter to you out in the woods. Come to think of it, do you even get mail out there? I hope so, because I'm getting the journal to send you a free copy of this issue. I'm sure they cut your subscription when you retired.

During your rational periods, and I do hope they come frequently these days, you might recall that from the get go we had a devil of a time even defining what we generally meant by “fiduciary obligation,” the most fundamental responsibility of an attorney to her client. It did give us great solace that scholars and courts have long wrestled unsuccessfully with the same problem.<sup>2</sup> If memory serves me, and I’m sorry that I do worry about yours, we didn’t completely give up the ghost, but concluded that the core essence of an attorney’s fiduciary responsibilities to her client included two basic principles: a duty of undivided loyalty to the client and a duty to disclose fully to the client all matters pertaining to the engagement that might affect the client’s interests.<sup>3</sup> I think we ultimately agreed that virtually every fundamental attorney professional responsibility rule can be traced to or from one or both of those two basic principles. Well, if I’m right about that, you are just not going to believe what our friends down in Austin have come up with in their decision in the case styled *Peeler v. Hughes & Luce*.<sup>4</sup> This one may have come down shortly before you retired. But I doubt you’ve seen it. Seems like you quit keeping up and putting out a couple of years before you walked away.<sup>5</sup> But then your students may just be telling tales on you again. Anyway, no offense intended old buddy. I may do the same myself on down the road. I mean, what are they gonna do to us?

Anyway, you might recall the day I was going to talk to you about the *Peeler* case. The day, not my doing it. It didn’t seem the right time for a serious discussion. I ran into you while you were out in the law school quad lecturing to that pack of squirrels on decorum and demeanor and the difference between the two. Man, I thought, old Steele really must miss the classroom. It was that day you were so mad, having just heard that we had us a new dean. I am glad you didn’t find him. Walter, you are just hard on deans. Anyway, now that you are retired, you are going to have to leave them alone. Besides, despite what you say, I do think it is written somewhere that law schools have to have deans. But I could be wrong about that.

But back to the *Peeler* case. Here’s what happened. First about Mrs. Peeler; she’s the one who brought the case. Well, if the record is to be believed, she got herself indicted by a federal grand jury on twenty-one counts of criminal tax violations. Now Walter, that just sounds bad, cer-

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2. See Roy Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: a Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 236, 239-43 (1994).

3. See *id.*

4. 909 S.W.2d 494 (Tex. 1995).

5. Incidentally, do you still answer your phone with “Professor Steele”? You know you can’t do that anymore. I’m sure it would violate one of those canons or codes or D.R.’s or such you’re always talking about. You might try this: “This is the professor formerly known as Steele,” but that sounds so lame. Also, I think it might be copyrighted. Anyway, the point is you can’t call yourself “professor” anymore, I don’t think. Man, if I had a name like “Steele,” I’d just say “Steele”—and let the ducks fly! So you should not feel so bad. “Professor” probably doesn’t mean what it used to anyway.

tainly not something we would wish for either of our daughters.<sup>6</sup> But think about it. I bet you and I know lots of folks (not you and me of course) those IRS people could get that many indictments on. I mean its not like she was accused of being an ax murderess, or a serial killer, or a child molester, or like that. But here's the rub. She pleaded guilty to one of those charges. And it must have been a doozy, because the Supremes kept referring to her as a "convict," which I guess she was, her having pled guilty and all. And they did convict her. She got fined, had to pay restitution, and was given a five-year probated sentence instead of jail.<sup>7</sup>

But let me tell you what the Supremes said happened before all that. It seems when Peeler, who was an officer in Hillcrest Equities, Inc., found out that the IRS was conducting a federal criminal investigation of her and some of her associates, including her husband, she went and hired a lawyer to defend her.<sup>8</sup> Mrs. Peeler paid him a \$250,000 non-refundable retainer!<sup>9</sup> But, Mrs. Peeler apparently got very good representation in return. Her attorney got her a plea bargain agreement where twenty of those twenty-one counts I told you about were dropped, as well as all charges against her husband, in exchange for her "freely and voluntarily" admitting guilt to one of the charges, something about helping one of Hillcrest's customers file a fraudulent tax return.<sup>10</sup> I don't know what all that involved, but it must have been a really bad thing to do, because as I said earlier, it branded her a "convict" in the eyes of the Supreme Court of Texas and she got five-years probation and had to pay \$250,000 as a fine and in restitution.<sup>11</sup>

Now I bet the whole Peeler family was very happy with the deal, because Mom and Dad got to stay out of prison and could be home to care for the Peeler children.<sup>12</sup> But it didn't last long. The happiness I mean. It is basic to the law of contract—now stay with me Walter—that people, even when initially thrilled with the deal they have made, tend to become much less enchanted when they start thinking they could have made a much better deal elsewhere. Well, that is just what the Court said happened here. Only three happy days passed before Mrs. Peeler heard from a journalist a rumor suggesting that her lawyer may have prevented her from getting off scot free.<sup>13</sup> The journalist told Mrs. Peeler that the United States Attorney in charge of prosecuting her had made to her lawyer a plea bargain offer earlier to the one she accepted, guaranteeing

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6. I know; I don't have one. It's just an expression.

7. Actually I thought you had to serve jail time to be called a "convict." But I'm not up on all these technical criminal law terms. You'd know better than I.

8. See *Peeler*, 909 S.W.2d at 495-96.

9. I've never understood how come you criminal defense lawyers get such big fees. But I guess it does explain how a man your age gets to be retired.

10. *Peeler*, 909 S.W.2d at 496.

11. See *id.*

12. The Court tells us that one of the reasons given for Mom's agreeing to plead guilty was "the personal emotional struggle she experienced over her concern for the care of her young children if both she and her husband were convicted on all counts of the indictment and consequently sentenced to lengthy prison terms." *Peeler*, 909 S.W.2d at 498.

13. See *id.* at 496.

her and her husband complete immunity in exchange for cooperation in the investigation.<sup>14</sup> Walter, any initial happiness over her plea bargain apparently dissipated, because right away she brought suit against her attorney and his law firm.

She sued them for legal malpractice, violation of the Texas Deceptive Trade Practices Act, breach of contract, and breach of warranty. None of her allegations, however, questioned the competence of her legal representation. She was alleging an ethical violation, that her attorney did not disclose to her the alleged plea bargain that would have granted her complete immunity from prosecution. Nevertheless, I think you would agree that, under Texas law, her allegations stated a valid claim of malpractice. So you would think she would easily survive a summary judgment motion against her. But it was the other way around. The trial court gave summary judgment against Mrs. Peeler and in favor of her lawyer and his law firm on the ground that, since Peeler had been found guilty, the only proximate or producing cause of her damages was her own guilt regardless of anything her lawyer or his law firm did or did not do. The trial court's judgment was affirmed by the Dallas Court of Appeals, and the case went on to the Supreme Court of Texas.

Now Walter, I think you would agree that, if we put to the side any public policy concerns here, those two lower court decisions are just plain wrong. And to see that you don't have to get into any kind of sophisticated discussion about the fine distinction between proximate and producing cause. That's good, because I have never talked to anyone who could explain the difference in any meaningful way. We can all recite the gibberish, but it is just that. We can say, in a given case, there can be more than one of either or both, but that proximate cause has a foreseeability element, whereas producing cause does not. So where does that get you? I think the distinction is just one of those things you have to be a judge to understand and that it is one of those things that judges often use to square doctrine with result, leaving the litigants totally confused as to what really happened. But I digress. The important point is that both kinds of causation have a so-called "cause in fact" element; i.e., you have to show that in fact the wrong caused your loss. Both courts ruled that it was Peeler's guilt that in fact caused her loss even if she could have shown malpractice by her lawyer. That, of course, is clearly incorrect. Assuming for purposes of summary judgment that her allegations against her lawyer were true, his actions would in fact have caused her loss because she would have gone free regardless of her guilt had she accepted the alleged plea bargain. All she would have had to prove at trial, other than the existence of the offer, was that she would have accepted it had she known of it. Were I on the jury, I don't think it would have taken much for her to convince me of that by a preponderance of the evidence. She did, after all, accept a much less advantageous deal later on. Of course, it may well be that she might not have accepted any offer that

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14. *See id.*

required her to cooperate against her other business associates. But all this simply raises fact issues, clearly material ones, and those issues without a doubt make summary judgment against her claims wholly improper.

Anyway, her case went on to the Supreme Court of Texas. Along the way, she had dropped her claims for breach of contract and warranty, leaving before the Court only those for malpractice and violation of the Texas Deceptive Trade Practices Act. I think that was a dumb move for all kinds of reasons I won't get into here. Dropping those things I mean.

Well, it turns out that the case was really about public policy more than causation and that it presented the Supreme Court of Texas with an issue of first impression. Walter, let me tell you that you do not have to read further than the first three sentences of the Supremes' opinion to know just how the issue is going to come out. They said: "Carol Peeler committed a federal crime. She now sues her attorney because she was indicted, convicted, and punished for that crime. We are asked to decide whether Texas law permits her to do so."<sup>15</sup>

I think that what we have here is the Court posing a rhetorical<sup>16</sup> question. I mean, how many different ways are you gonna answer that one without getting shot? Which, incidentally, is another rhetorical question. I mean, isn't all this a pretty good example of what we try so hard to teach our students; i.e., that how you frame an issue for argument often has a determinative effect on its outcome? I mean what if the issue had been framed this way:

Does the general public policy of this state that prohibits allowing guilty clients to sue their attorneys for simple malpractice override this Court's fundamental responsibility for policing the legal profession when the client's allegations, if proved, demonstrate both a fundamental violation of our profession's time-honored ethical standards and that the client would not otherwise have been found guilty of the crime of which she was charged?<sup>17</sup>

I bet most unbiased folks would find that question pretty easy to answer as well, and I bet it would be opposite to the answer to the issue as posed by the Court.

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15. *Id.* at 495.

16. Excuse me, but I do realize "rhetorical" is a big word to be using in a letter one friend to another. In fact you will find me using several big words here and there. Walter, this is intentional and meant for your benefit. I bet you still remember most of these words. But also remember that if you "don't use 'em, you lose 'em," and I know for a fact you don't hear them or get to use them much out where you are. So keep with me on this and feel free to sling a few of your own back at me whenever you get the notion.

17. Walter, I realize that these are a lot of words all in one sentence. You might be looking for the verb in all this. Walter, there are lots of them. Verbs I mean. I think word 21 is the most important one, but I may be wrong about that. Another good one is word 66. My favorite one is word 27 just because you don't get to use it that often. Now in doing your count remember that I am counting "time-honored" as just one word, not two. But you can count it as two if you want to. But then you have to add one to the count of some of the counts referred to above to find the right word, if you know what I mean, and I think you do.

Now Walter, at this point I have to make what I think is a very important point. Because Mrs. Peeler is appealing a summary judgment rendered against her, for the sake of argument, we, as did the Court, must assume that all of the allegations in her complaint against her lawyer were true. Her complaint did include a sworn affidavit from the prosecuting Assistant United States Attorney stating that he had made to her lawyer "a definite, unambiguous offer" of immunity for all alleged wrongs pertaining to the matters at issue "from the beginning of the world until the end of time."<sup>18</sup> Now that kind of evidence might have bothered the Court a bit, but then it may have thought that the prosecutor just had it in for her lawyer. I mean the lawyer did get his client off with no jail time and got twenty out of twenty-one counts completely dismissed. Seems like he gave that prosecutor a real hard time. On the other hand, the prosecutor's affidavit was supported by the sworn testimony of two IRS agents.<sup>19</sup> I bet the Court found the testimony of the IRS folks to be at least facially plausible. I mean those guys have a long and proud history of doing right. Or is it the FBI I'm thinking about? But anyway, my point is that, as we shall see, little things like logic, evidence, and facts mattered not at all to our Supremes.

But, like the Court, we are assuming from this point on that her allegations are true even though they may not have been. Now Walter, that may not be a fair assumption, but it is one we have to make to appreciate how awful the Court's opinion really is. I mean the Supremes' decision leaves wrongly accused lawyers squarely on the horns of a conundrum, if you know what I mean, and I think you do. The old "good news-bad news" thing, Walter. The good news is that we can avoid trial on very serious charges, the kind of charges of egregious wrongdoing that in and of themselves both taint the accused and make people mad. The kind of people who sit on juries, Walter. Jury trials, fraught as they are with the unknown, are in themselves scary things. So I think a lot of us lawyers are glad to hear that we will not have to run the risk and expense of jury trials when angry clients wrongly accuse us in these kinds of cases.

But the bad news about the *Peeler* decision is that it does not GIVE lawyers a REALISTIC opportunity to clear the air by refuting ostensibly plausible evidence even when we are wrongly accused. But I'd still take the summary judgment in a heartbeat even if I thought the evidence against me was readily refutable. Wouldn't you? It'd be my luck to get a jury that just didn't like lawyers.

But this conundrum is not the worst of the matter about the Court's decision. When on that unhappy day, the Supremes had done their duty for yet another day, and taken off their black robes, turned off the lights, and, along with the other lawyers, the parties litigant, and everyone else, gone on home, they sure left behind one malodorous mess with which the rest of us have to deal. Those of us, like me Walter, who believe that the

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18. *Peeler*, 909 S.W.2d at 500, n.1 (Hightower, J. concurring).

19. *See id.* at 496, n.1.

*Peeler* case represents one of the worst decisions regarding legal ethics ever written.<sup>20</sup> I think you will agree that what makes the Court's decision so bad is both the nature of the allegations, since if proven true it would have been her lawyer's wrong and not her alleged guilt that caused her conviction, and the fact that the allegations were supported by facially credible summary judgment evidence. So to criticize the Court's decision I must emphasize both those things even though Mrs. Peeler's allegations may not have been in fact true.

Walter, it puts me in mind of that television show "Law and Order," which must be very popular because, best I can tell, it is on some channel most every night. So you must have seen it because I am sure these days that channel surfing has become a very big part of your life. Anyway, I have only seen it a time or two, me still being a working stiff and all, but the ones I've seen go something like this. The first half of the show concerns the crime and concentrates on the police gathering the evidence and catching the alleged perpetrator. Walter, I'm telling you, when the first half of the show is over you KNOW who did it. The evidence against the alleged perpetrator is overwhelming. But that's just when the good stuff starts, the second half of the show I mean. The second half focuses on the trial and you get to watch the accused's lawyers pick apart the state's case. To make a long story shorter, because I suspect you are well ahead of me at this point, it usually turns out that the accused was innocent and that all those facts either pointed in a different direction or were not true.

So I think that's the kind of thing we may have here in the *Peeler* case. Heck, we don't even have the kind of summary judgment where the defendant has to admit all the factual allegations just for the sake of argument. In fact, speaking of facts, the fact is he vehemently denied them. It was the Court that didn't care a whit what the facts were, other than the fact of Peeler's admitted guilt. It decided the case purely on the basis of public policy.

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20. But even that is not the worst of it. Walter, I think this *Peeler* case may be with us a long, long time. You know, if you are a court and you render a decision that makes fair-minded folks cup their hands over their mouths and leave the room, there is some danger those same folks may want to come back and discuss things further. Well, I think our Dallas court (remember that is the one that wrote the *Peeler* case our Supremes sustained) has made certain that is not likely to happen. Virtually as we were going to press on this letter, the good court ruled that a cause of action by a found guilty client against his attorney for legal malpractice was "frivolous" litigation as a matter of law, cited the *Peeler* case, and sustained a sanction against the client and in favor of his poor attorney in the amount of \$1,000. Fortunately, the client was representing himself as a "pauper" or his new attorney, if he could afford one, might have been in the soup as well. Now I'm not saying that we lawyers lack gumption, but don't you think it is going to take a real special one of us to challenge that *Peeler* case in the future? Which gets me to thinking, I may well be doing something unethical here myself—criticizing the *Peeler* case, I mean. Walter, do me a favor; go ahead and destroy this letter after you have read it! Oh, you want to know what case I'm talking about? Take a look at *Barnum v. Munson, Munson, Pierce & Cardwell*, 998 S.W.2d 284 (Tex. App.—Dallas 1999, no pet. h.).



You know Walter, as a contracts lawyer, I can think of lots of ways both sides of the *Peeler* case could have been telling the truth as they understood it to be. So I don't even think we necessarily have the proverbial lying contest going on here, if you know what I mean and I think you do. I think you will agree that plea bargains are contracts and that courts all across this country have long held that the basic rules of contract law apply to them just like to any other contracts. And contracts often are the product of lengthy and complex negotiations. I'll bet you, Walter, the negotiations were not simple in the *Peeler* case. I mean it involved difficult issues of tax fraud, conspiracy, and that sort of stuff. Also, I think I mentioned there were twenty-one separate indictments against Mrs. Peeler alone! In that kind of setting, it is not hard to see that negotiations between opposing counsel may have been ongoing and that what was or was not "still on the table" could have varied from day to day. And things that were conditional on one day, may have been intended by one side to be unconditional the next. And vice versa. And so on. Walter, I think you get my drift.

Well, if you do (get my drift, Walter), you will not be surprised to hear that the law books are filled with cases in which no contract was found because there was no common understanding. One side may have honestly intended to make an offer and may honestly have understood a deal was made, but the other side was honestly of a different understanding. So that is part of my drift. The rest of it (my drift again, Walter) is that, for all these reasons, when I say we must assume Peeler's allegations are true it is solely for the sake of argument and should cast no inference beyond that limited purpose.

We also may never know whether Mrs. Peeler was really guilty even though she did admit guilt as part of her plea bargain. I could be wrong, Walter, but I think lots of innocent people would plead guilty of a lesser offense to avoid the possibility of conviction when circumstantial evidence of a much greater offense is stacked heavily against them. I mean some of us are just plain risk averse. Also, I just bet there are a bunch of economists out there who would applaud as "efficient" (i.e., "intelligent") a decision to plead guilty in such circumstances despite one's innocence. And I bet they could put it all on graph paper for us! But we don't have to worry about all that here. However, the Court makes much of the facts that, not only did Peeler never assert her innocence of the charge to which she pled guilty, she also admitted in deposition her guilt as to many of the acts for which she was indicted.<sup>21</sup> So, for the sake of argument, we will assume she was not only a "convict" but a guilty one at that. But that doesn't mean we should consider her some demonic threat to society who escaped incarceration only through the superb negotiating skills of her lawyer. It turns out that the plea bargain she agreed to included "a relatively short prison sentence," and indeed that is what the prosecutor rec-

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21. *See id.* at 498.

commended to the criminal trial judge.<sup>22</sup> It strikes me as of some importance that the trial judge, nevertheless, decided to give her probation instead. Charlotte Manson here we have not!

Walter, there is not a whole lot to say about the Supremes' opinion, which was, by the way, a vote of five to three with one judge not sitting. As I said earlier, after the first three sentences it was not in doubt how the case was going to come out. But I do bet you're wondering how the court was going to get around the problem that even Elmer Fudd could see that in this case, if Peeler's allegations are taken as true, her lawyer's alleged wrongdoing would have caused her conviction and any accompanying damages. I bet you are thinking that once again the Court would blow us away with the customary brilliant legal reasoning and judicial eloquence. Nope! It just made very clear from the very beginning that the very simple facts of the case were not going to leave it very confused for very long. The Court said that, regardless of the facts, it was against the public policy of the great State of Texas for a convict who had not subsequently proved her innocence to assert that the cause in fact of her predicament was anything other than her own guilt. Now Walter, that may not make a lot of sense, and it may not be right, but it is darn sure effective. I mean who gets to say what the public policy of the GREAT STATE OF TEXAS is? Case closed. I think you have to go to the legislature and get a statute passed to get around the Court's decision as to public policy. You darn sure aren't going to get anywhere with logic or pleading to their better side, at least not in this kind of case. The Chief Justice and two other judges on the Court tried mightily, but to no avail. But more about that later.

Back to this public policy thing. The Court said that, in a malpractice suit by a guilty client against her attorney, public policy demanded that her criminal conduct be, as a matter of law, the cause in fact of her sorry state because otherwise she might shift responsibility for her crime away from herself, perhaps even profit from her own wrong, and such a result "would indeed shock the public conscience, engender disrespect for courts and generally discredit the administration of justice."<sup>23</sup> Now Walter, I do not want to anger you here, you being a staunch Democrat and me maybe not having quite seen the light, but I generally agree with the Supremes' sentiment, although I do doubt that, given recent events at the national level, there is very much that would "shock" what little is left of the public conscience. But as usual the Chief Justice made the crucial point as well as anyone could. He said that, if we allowed any other rule, "most criminal convictions might simply be a prelude to a civil malpractice suit."<sup>24</sup> Boy do I agree with that! And I'm against it. The prelude thing I mean. In fact, I think most incarcerated criminals would other-

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22. *Id.* at 496.

23. *Id.* at 497. This last part was not the Court's own words. It was quoting from *State ex rel O'Blennis v. Adopf*, 691 S.W.2d 498, 504 (Mo. App. 1985), which was in turn quoting from *In re Estate of Laspy*, 409 S.W.2d 725, 737 (Mo. App. 1966). You with me?

24. *Peeler*, 909 S.W.2d at 501 (Phillips, C.J., dissenting).

wise give suing their lawyer a shot as a last resort no matter what. I mean, why not? They probably have little else to do with their time, and if they happen to hit the big ole litigation "lottery," they might be in candy and cigarettes and other prison "essentials" for the remainder of their sentence. But more to the point, even if the convict's attorney did mess up by doing some malpractice, who is to say that the jury would not have found guilt even if the case had been perfectly tried? I like to think that juries do have an uncanny ability to ferret out the truth no matter how bumbling the lawyers on either side of a case happen to be. So that's part of where me and the Chief Justice are coming from, and boy am I proud about being able to say that. Being together with the Chief Justice I mean. But there's more. The Chief Justice also points out that, of all the cases relied on by the majority opinion from at least ten different jurisdictions, not one of them was like Mrs. Peeler's case. Not one of them involved a situation where the "convicted" person OFFERS TO show that the actual "cause in fact" of her predicament was her attorney's alleged fault and not hers!

Well Walter, he unfortunately was wrong about that. So this is where I get a bit concerned. I did mention, didn't I, that I am on the Chief Justice's side on this one? It turns out one of those cases cited by the majority Supremes was almost right on point with the point they were making and the decision they were reaching. But they didn't single it out, and I think, as good lawyers, they would have had they known it. More importantly, I don't think the Chief Justice knew it either, or, as an honorable man, he would not have said what he said. Walter, it gets worse. One of the cases cited by the majority Supremes is also directly on point, but also directly against them. It seems real clear to me that they did not know that, or I am sure they would have mentioned it. That same case, of course, is directly on point for the Chief Justice's position, and yet he does not mention it at all. Am I missing something? Is this not a case of first impression in the Supreme Court of Texas on a provocative and important issue of great concern, not only to lawyers, but to the general public as well? And yet we have opinions on both sides of the case that reflect rather clearly that the good judges haven't carefully read the cases they are making reference to. Does that concern you, too? Now, I do not want to get "holier than thou" on all this. I have not read all those cases either. Forgive me, but I think I have more productive things to do. And if I do, I feel sure that the good judges certainly do. Have more productive things to do, I mean. I don't read a lot of cases. My research assistant does. Now he has told me what they are all about in this case and what they all had to say. But, bless him, I do not think that he had any idea of the ramifications of what he was telling me. My point is simply this. Who is researching cases for our judges down in Austin? I bet it is not SMU graduates. So, there you go.

All right Walter, I never could fool you. I am not a bit concerned. But I am a little embarrassed. How about you? Let me tell you about those

two cases. In *Glenn v. Aiken*,<sup>25</sup> the court applied the majority rule that the criminal defendant must first prove his innocence before he may maintain a cause of action against his attorney for simple malpractice. In dictum, however, the court opined that the rule might not apply to a situation where it is clear that, regardless of the client's actual guilt, the attorney's malpractice was the actual cause of the conviction. The situation contemplated by the court was one in which the attorney had negligently failed to plead the running of a statute of limitations on the charge against his client. The court correctly noted that that would be a situation completely different from the one before it, and it reserved for the future judgment on that issue. The court did note, however, that it might "be difficult to defend logically a rule that requires proof of innocence as a condition of recovery, especially if a clear act of negligence of defense counsel was obviously the cause of the defendant's conviction of a crime."<sup>26</sup> Well Walter, I think our good Court kinda misled us by citing this case in support of its decision. Clearly, the court in *Glenn* reserved judgment when the issue was one like Mrs. Peeler's. However, I can't say I blame our own Court very much. The issue posed by the court in *Glenn* involved only simple malpractice, the failure to plead a statute of limitations defense. Heck, that could happen to anybody. I didn't even know they had statutes of limitations on crimes. Whose idea was that anyway? I mean, it is not like the attorney in the hypothetical did anything like the allegations Mrs. Peeler was making. But I may be wrong about that. I think I told you I tend to vote Republican.

The other case disturbs me much more, if you even care, which I think you do. The case is *Krahn v. Kinney*.<sup>27</sup> It is especially surprising that the Chief Justice did not make a big deal of it in his dissenting opinion in the *Peeler* case, because the facts were so similar to, and it supported so strongly, the position he was taking. In *Krahn*, the attorney had failed to communicate an offer by the prosecutor to dismiss all charges against Krahn in return for her willingness to testify against another defendant. Now the majority Supremes do make reference to the case, but as an example of the minority rule, and they pooh pooh the case for not addressing the policy considerations of the majority of courts that impose an innocence requirement. Now Walter, aren't they being a little unfairly nasty here? I mean, why would that other judge address policy considerations of cases he thought completely different from the one he was considering? I mean, that was his point. His case was different from the

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25. 569 N.E.2d 783 (Mass. 1991).

26. *Id.* at 787 (footnote omitted). However, the court opined that it might follow the "innocence rule" regardless. The court then cited to a law review article that noted that requiring proof of innocence in such cases "just about destroys criminal malpractice as an actionable tort in the very type of situation where the lawyer's incompetence is most flagrant and its consequence most easily demonstrable." See O.M. Kaus & R.E. Mallen, *The Misguiding Hand of Counsel - Reflections on "Criminal Malpractice"*, 21 UCLA L. REV. 1191, 1205 (1974). I wouldn't have mentioned the article at all Walter, except I know how you like hyperbole.

27. 538 N.E.2d 1058 (Ohio 1989).

majority ones. Anyway, that other judge did point to the following policy consideration in the case before him (and our Supremes ignore that policy consideration, so that makes the judges even in my mind, how about in yours?):

The inequity of requiring a plaintiff to obtain a reversal of his or her conviction before bringing a malpractice action is apparent from the facts in the present case. [The attorney's failure to communicate the plea bargain offer forced his client] into the situation of having to plead to a more serious charge or risk a still greater conviction and sentence . . . . As aptly stated by the court of appeals, the injury in such a situation "is not a bungled opportunity for vindication, but a lost opportunity to minimize her criminal record."<sup>28</sup>

Now Walter, I do not want to get bogged down in a lot of detail concerning this court said this and this other court said that.<sup>29</sup> I just thought it was interesting that the judges who wrote the opinions in the *Peeler* case did not much care what the other courts actually said either. But, in this case, I kinda agree with that kind of attitude. Something else I agree with, and this may surprise you. *I agree with the Supremes that the case should have been decided on a public policy basis.* It's just that I think they were enforcing the wrong public policy. I realize a little policy discussion at this point may bore you to tears, but I think it, along with the few footnotes below, may just ensure that this letter to you gets published. Law review editors *love* policy discussion in law review articles. But, you take those same editors, put them in a classroom, and they hate it like the dickens. Go figure.

Now assuming for purposes of summary judgment that *Peeler's* allegations against her lawyer were true, such behavior by a criminal lawyer would certainly be a very unethical and bad thing to do to a client. And Walter, I think you would agree that the matter would be much less problematic if the plaintiff alleged only that the attorney just forgot about the alleged plea bargain offer. And if that was the case, then that would be very negligent of him and would certainly be malpractice. But I don't have any big policy concern about that. You, however, may feel differ-

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28. *Id.* at 1061 (footnote omitted). Now Walter, I do not want to get real serious all of sudden here. But I am not sure I am making clear enough a very important point. Although the Court would have us believe that it is following the strong majority rule in the *Peeler* case, it is not. Quite to the contrary, the Court's decision is the only one I have been able to find in which the "innocence rule" was applied to protect an attorney where the attorney's alleged wrongdoing would clearly have caused the client's conviction. I think the "innocence rule" is a very good rule that should have no application to such a case. The two cases I have been talking about are the only two I have found that address the narrower issue, one by way of dictum, and both of those cases sure seem to agree with me.

29. But I do need to mention one more case. I'm putting this one in because it ought to just about guarantee that the law review will want this letter in their journal. I mean it's a brand new case out of the California Supreme Court. The Court, in a case of first impression for it, adopted the "innocence" rule I have been talking about. *See Wiley v. County of San Diego*, 966 P.2d 983 (Cal. 1998). I found it reported in 14 ABA/BNA Lawyer's Manual on Professional Conduct #14, pp. 573-574 (Dec. 1998). Don't bother reading it or the case, Walter. Same old, same old.

ently being a Democrat and all. And I can see your point. What does it matter if he just forgot, when in all logic that forgetfulness would have been the cause in fact of his client's conviction? Walter, this is another rhetorical question, except this time I think it's yours. It would certainly be illogical in a case like that to hold, as a matter of law, that the cause in fact of his client's conviction was her own guilt. But let's not beat that dead horse. The Supremes, at least most of them, have already considered the point, and I guess I will go along with them.

But this apparently was not a case of failed memory, Walter. Her lawyer adamantly maintained that he was never told about the offer for his client by the prosecutor.<sup>30</sup> The allegations by Peeler acted to refresh no recollection. Walter, that is what makes this case so disturbing, don't you think? I mean, what has been alleged here is not a simple case of malpractice like where lawyers make mistakes because of oversight or forgetfulness. You know, Walter, the sort of things that tends to happen to retired folk. What we have here, if anything, is an egregious violation of the fiduciary duty to disclose a plea bargain offer for a client. Now normally such an allegation is patently absurd because there is no reason a criminal lawyer will not happily communicate to his client an offer of complete immunity from prosecution. But Mrs. Peeler did actually suggest a plausible reason. Remember I told you that at least one other defendant in the matter was represented by another member of her lawyer's law firm.<sup>31</sup> She alleged that her lawyer purposefully did not tell her about the offer of a plea bargain because he was being loyal to the other defendants and, I suppose, to any colleagues or friends who were representing them.<sup>32</sup> It seems that about the time of the immunity offer for Mrs. Peeler, her lawyer and the rest of them were trying to get together

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30. See *Peeler*, 909 S.W.2d at 500 (Hightower, J., concurring). See also, *Peeler v. Hughes & Luce*, 868 S.W.2d 823, 826, n.1 (Tex. App.—Dallas 1993, writ granted).

31. See *Peeler v. Hughes & Luce*, 868 S.W.2d 823, 826, n.2 (Tex. App.—Dallas 1993, writ granted). Now Walter, isn't this fact in and of itself bothersome? I mean, does not Rule 1.06 of our Texas Disciplinary Rules of Professional Conduct, dealing as it does with conflict of interest, counsel against a law firm representing multiple defendants in criminal litigation? Comment 11 to Rule 1.06 even lists fraud as a type of action to which the rule should apply. So I do not think that the law firm representing multiple defendants was a good idea. However, the rule does make exception for cases in which all the clients consent to the representation after full disclosure. Also, Comment 17 of the rule says that: "In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants." But the spirit of the rule, its rationale, is clearly articulated (another big word, Walter) by Comment 3:

An impermissible conflict [of interest] may exist or develop by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. [Emphasis added.]

Boy Walter, it sure seems to me our ethics rule makers were thinking about the *Peeler* kind of situations when they wrote Rule 1.06.

32. See *Peeler*, 868 S.W.2d at 826.

on a tactic known as the "Gideon Initiative."<sup>33</sup> Walter, I suppose you being a criminal lawyer and all, you know right away what that means. But in case you don't, it has to do with sending a representative to D.C. to see if you can sweet talk the IRS into prosecuting the case against the various defendants as a civil rather than a criminal matter. Now I don't know if that is or was a good idea or not. But I do know anyone with both oars in the water would prefer a deal for complete rather than partial immunity.

Walter, remember that I mentioned earlier that my recollection is we decided that the hallmark responsibilities of an attorney to his client are undivided loyalty and full disclosure. Well, if the Court is going to let criminal lawyers get away with concealing offers of immunity from their clients, it seems to me that sort of blows both those ideas out of the water. And, to continue the nautical metaphor, hasn't our good Court given attorneys who have sold their clients down the river one heck of an incentive to go ahead and sink the boat they put their clients on? I mean, once an attorney has messed up that badly, isn't it in his own best interest to make every subtle effort to make sure that his client is ultimately found guilty so that he will be immuned<sup>34</sup> from liability to his client?

Now leaving that kind of behavior unpunished must itself be against some kind of public policy. So, what I think we have here is two competing public policies: the one that justifies the "innocence" rule in criminal malpractice cases and one that requires the courts to police lawyer behavior, particularly with respect to egregious violations of our standards of professional ethics. I know you remember that just a few years ago we wrote an article together suggesting to the courts that it was a big mistake to "lump" all kinds of non-contract actions by clients against attorneys under the broad rubric "malpractice." It seems to me that the *Peeler* case is a good example of why we were right. And I know for a fact that other folks and courts are beginning to think along the same lines.<sup>35</sup> In fact, the Supreme Court of Texas is presently considering doing just that. The Court is considering the question of whether to affirm a judgment requiring an attorney to forfeit back to his client his fee where his malpractice,

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33. *See id.* at 826, n.2.

34. I'm not sure "immuned" is the right word here, Walter. But I'm sure our editors will pick it up, if it is not.

35. For example, you and I are cited, with apparent approval, in the draft of the new Restatement of the Law of The Law Governing Lawyers § 71, Reporter's Note (Tentative Draft No. 8, 1997). It trumpets that there are "different approaches to the classification of claims for breach of fiduciary duty." It refers to both our article on the "Legal Malpractice Puzzle" I mentioned earlier, and to *David Welsh Co. v. Erskine & Tulley*, 250 Cal. Rptr. 339 (Cal. Ct. App. 1988) (claim for misuse of confidential information described as breach of fiduciary duty and thus not subject to malpractice statute of limitations). Also, I found a couple of other cases that deserve mention. *See Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537, 543 (2d Cir. 1994) (strict "but for" causation of damages not required to prove breach of fiduciary relationship); *Arce v. Burrow*, 958 S.W.2d 239 (Tex. App.—Houston [14th Dist.] 1997, *aff'd in part & rev'd in part*, 997 S.W.2d (Tex. 1999). (client entitled to remedy of fee forfeiture for breach of fiduciary duty even though no proof shown that breach caused financial loss).

although it did not cause his client any provable monetary loss, represented a breach of fiduciary duty.<sup>36</sup> I sure wish the Court would have considered that kind of distinction when it took on the *Peeler* case. I think it might have led it to the right result, a conclusion that the public policy of punishing fundamental violations of a lawyer's ethical standards does after all transcend the public policy reflected in the "innocence" rule. Instead, what we have in the *Peeler* case is yet another example in what I think is a growing line of recent examples of our Court failing to make fine distinctions in cases in which justice requires that fine distinctions be made.

Walter, if I am following all of this, the Supremes are cutting some ethical slack for criminal defense lawyers when, if the case was about the other kind of lawyer, the lawyer's insurance carrier might be writing Mrs. Peeler one big check. Should not it be the other way around? I mean it ought to be, if anything, that the criminal lawyer is expected to act with a higher degree of ethical conduct and, if he does not, his client can nail his financial hide to the wall. If the other kind of lawyer, like I am, allows his client to be sold down the river, it is only the financial river, Walter. But, if a criminal lawyer does that to his client, we are talking about the client's life, liberty, and the pursuit of a good name. Even if the client doesn't wind up incarcerated or, even worse, get to meet "Old Sparky," the client is branded a criminal for life (or death). Which, incidentally, is exactly what happened to Mrs. Peeler. So, it seems to me that criminal defense lawyers should have more expected of them, not less. I think we have here what you call an irony, Walter.

I think, for most folks, one of the scariest things that can happen to you is to get involved as an accused in the criminal justice system, particularly the federal one. I know it would scare the heck out of me, and I am a lawyer; it is just that I am the other kind of lawyer. Man, I would get for me the very best criminal defense lawyer I could find, and I would close my eyes, cross my fingers, and put my trust completely in her. I mean, if she said jump and whistle, Walter you would be seeing a very funny sight,

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36. This is the *Arce* case I mentioned in the footnote right above.

And lo and behold, Walter. Darned if they did not do just that about the time this old letter was going to press. On July 1, 1999, the Court held that an attorney who breaches his fiduciary obligation to his client may be required to refund to the client all or part of his fee whether or not the client can show that the breach has caused him any actual damages. Justice Hecht put the rationale quite eloquently:

The rule is founded both on principle and pragmatics. In principle, a person who agrees to perform compensable services in a relationship of trust and violates that relationship breaches the agreement, express or implied, on which the right to compensation is based. The person is not entitled to be paid when he has not provided the loyalty bargained for and promised.

*Burrow v. Arce*, 997 S.W.2d 229, 237-38 (Tex. 1999). Now Walter, you may think that our Supremes have gone and undermined the whole philosophy of the *Peeler* case. But I don't think so. I don't think the lawyer's insurance company is liable here at all. I don't think a malpractice policy covers fee refunds, but just damages caused by the malpracticing lawyer. But I could be wrong about that.



because I don't do either one of those very well anymore, if you know what I mean and I think you do.

Also, if I happened to be a righteous criminal defense lawyer, I would be ticked at this *Peeler* case, because I would think I was a special kind of lawyer and I would think most people thought I was too. I mean think about it. Walter, if you made up a list of the top ten lawyers of all time, or the present time, that you regard as heroes, I bet you that almost all of them, maybe all of them, would be criminal defense lawyers. And my list would look about the same. And I think the same would be true for most people. I mean the great criminal defense lawyers are the "knights" of our profession. If I was one of them, I would not be a bit happy with the Supreme Court of Texas for not holding our esteemed selves to the highest of standards.

Now, Walter, don't let me leave you with the impression that the Court in the *Peeler* case condoned the type of wrongdoing alleged by Mrs. Peeler. One judge even referred to it, if true, as "reprehensible and unconscionable."<sup>37</sup> And the majority opinion made the specific point that nothing in the opinion "should be construed as relieving criminal defense attorneys of their responsibility to maintain the highest standards of ethical and professional conduct."<sup>38</sup> It was the view of five good justices, however, that a convicted criminal defendant's only appropriate recourse would be to file a grievance against her lawyer with the appropriate State Bar disciplinary committee. AS IF! I mean, what are the odds? And what would be in it for the convicted client other than righteous vindication? Walter, these are rhetorical questions again. It seems to me that for the client to pursue the matter further would be throwing good money after bad, metaphorically speaking. The emotional cost alone would surely prove enormous. You can bet any lawyer in this kind of case would vigorously defend himself at any disciplinary hearing, and that his defense without doubt would include hammering again and again on all the alleged wrongdoing of his client and generally making things as hard as he could for that client. I kind of doubt a client would want to put up with all of that unless some kind of monetary award was at least a possibility. You know, the big ole litigation lottery.

Also, I can see where at this point a client in Mrs. Peeler's shoes might be inclined to a rather dim view of getting any kind of justice from lawyers against lawyers. I mean, Peeler had pursued redress for her alleged injuries through three different Texas courts. And she not only lost, she got "poured out" by a summary judgment that refused to allow her the right to present the claim to a jury of her peers. Do you suppose the courts, all three of them, may have been worried about allowing those peers to hear the case? I mean would you want to let the "public" decide important things like public policy? Me neither.

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37. *Peeler*, 909 S.W.2d at 500 (Hightower, J., concurring).

38. *Id.*

It is my opinion that, next to law professors, judges are about the most esteemed kind of lawyer in the public's mind, but I may be wrong about that. If I am not though, then I think it is fair to say that the whole process really put a damper on Mrs. Peeler's enthusiasm for our justice system. I mean, if my head count is right, she talked to twelve different judges in three different courts and nine of them poured her out. Walter, that is almost three out of every four! Truth be known, I think even "convicts" think highly of judges, at least when comparing them to other kinds of lawyers. So, what kind of chance do you think Mrs. Peeler thought she had of successfully pleading her case to a disciplinary committee composed of just regular kinds of lawyers? Walter, that might be my last rhetorical question.

So I think we can assume that Mrs. Peeler has been put right out of the picture. But where does that leave us? I mean we have been having to assume all along for the sake of argument, as did the Court, that Mrs. Peeler's accusations were true. Walter, those kinds of facially plausible allegations on the public record of a Supreme Court of Texas opinion are not good for our profession. Our profession needs help here and, as you know, we as lawyers are encouraged, and sometimes bound, to give that help if we have knowledge of possible violations of our ethical rules of professional conduct.<sup>39</sup> But nobody I know likes this "snitch" rule very much, and I certainly do not. It is sometimes called the "squealer" rule or the "whistle blower" rule. But I call it the "snitch" rule, because I think to call it the "squealer" rule is an insult to pigs, which do make good family pets, and to little children, and to call it the "whistle blower" rule is an insult to people who blow whistles but do not "snitch." But it is one of our Texas rules of professional responsibility even though probably most of us are reluctant to follow it, and I would surely admire and respect another lawyer who did see fit to abide by it. Walter, has it occurred to you how many different lawyers were involved directly and indirectly in the *Peeler* case, many of them wearing black robes? I do not think it stretches things to say that many lawyers had knowledge that allegations of ethical misconduct had been made against a member of our profession. Do you think that, out of all of those lawyers, some of them wearing black robes and others not, at least one of them saw fit to bring

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39. Rule 8.03 of the Texas Disciplinary Rules of Professional Conduct provides: "... a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authorities." Tex. Disciplinary R. Prof. Conduct 8.03(a) (1990). *See also* Canon 3 of the Texas Code of Judicial Conduct, which requires a judge who has "knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules" to take appropriate action or inform the appropriate agency of the State Bar. These rules are far from clear, particularly regarding what constitutes "knowledge" for their purposes. So I think it is arguable who, if anyone, was "required" to refer the allegations in the *Peeler* case. Nevertheless, our ethical rules state only minimum standards of conduct, and I think it fair to say these particular rules did *encourage* many of the lawyers close to the *Peeler* case to have taken action.

to the attention of the appropriate agency the accusations against the attorney? Or am I just being naive?

Well Walter, if that did not happen, I think I may know why that unfortunately is. I think the Supreme Court of Texas has, maybe without intention, put a further "chilling effect" on a lawyer's reluctant willingness to snitch on another lawyer. I say "reluctant willingness" because I think a lawyer knows that, when he does decide to snitch on another lawyer, that other lawyer, all his lawyer friends, and maybe lots of other lawyers are going to be real mad at the snitching lawyer. So, unless it is that he just has it in for the lawyer he is reporting, I think any lawyer who snitches on another lawyer does so reluctantly. I also think he knows what he is getting into when he does it. Lots of lawyers being mad at him, I mean. But I also think that he supposes that the Supreme Court of Texas and the State Bar of Texas will protect him from retaliation by other lawyers for his doing his ethical duty.

The Supreme Court of Texas has recently made clear, however, that the two of us are real dummies, me for thinking that and the "snitcher" for supposing that. The case I have in mind, Walter, is *Bohatch v. Butler & Binion*.<sup>40</sup> Well, what happened in that case is that Ms. Bohatch thought, apparently in good faith, that one of her partners in the law firm was overbilling his clients. Bohatch, however, did not immediately run to the nearest State Bar disciplinary committee making hysterical accusations against her partner. Instead, she quietly brought it to the attention of the "powers that be" in her law firm. The law firm conducted an investigation and found, thank goodness, that no overbilling occurred. Now, Walter, that is plenty good enough for me. But, with no offense intended either to the firm or to foxes, isn't that kind of like a pack of foxes determining that all those chickens died of very bloody, natural causes? But I do think institutionalized lawyer overbilling is even rarer than chronic chicken nosebleed.

You are probably ahead of me on this, but the "snitcher" was fired by the law firm. She, in turn, sued the firm, alleging that it had no right to discharge her for doing what she in good faith believed to be her ethical duty. Well, the Court quickly put a "quietus" on that idea. It said that, regardless of Bohatch's good faith and even regardless of whether her allegations against her partner turned out to be true, she had no cause of action against other lawyers who retaliated against her for her ethical "snitching."<sup>41</sup> Well, how can that be, you might ask. Walter, public policy again. The Court reasoned that any policy in favor of protecting ethical "snitchers" was outweighed by a policy against forcing lawyers to remain with each other in untenable relationships, which might result if they

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40. 977 S.W.2d 543 (Tex. 1998).

41. Walter, if you are really interested, you can find a fuller discussion of the case in the following very helpful article: Bruce A. Campbell, *To Squeal or Not to Squeal: A Thinking Lawyer's Guide to Reporting Lawyer Misconduct*, 62 TEX. BAR J. 22 (1999). Or you could just read the case, which I know you will not.

could not retaliate with impunity against ethical “snitchers.” I mean can you think of anything much worse than having to work every day with another lawyer you do not like, particularly one who is a “snitcher”? I for one am very glad that the Court took the time to bring that policy to my attention. Walter, and I guess I can say this proudly now, over the past thirty years or so there have been, on occasion, members of this faculty at SMU who I just did not like, if you know what I mean, and I think you do. I do think most of them are long gone for other reasons, but if I did think hard about it, which I won’t, there still may be one or two around. I am glad to hear that there is a public policy that says that I do not have to put up with that. However, I am somewhat concerned that, over the years, there may have been one or two faculty members who just did not like me. I know, Walter, but just suppose. But I do feel sure that, if there ever were, they are long gone, or at least I hope so. Walter, I know that you, being now retired, no longer have a dog in this fight. The Dean has told us, as part of this appreciation law journal issue to you, that we are all supposed to say that we all like and miss you. And I know, in reply, you will say that you like and miss all of us.

So, maybe this is not such a bad public policy for our Court to establish. But Walter, the thing I do not like about the public policies found by the Court in the *Peeler* and *Bohatch* cases is that they sure seem calculated to protect bad lawyers and their insurance carriers. Which gets me to thinking. Walter, when is it that was the last time a lawyer or an insurance company lost a case in Austin brought against them? I do think it has been a good while, but I could be wrong about that. In case you think I might be being unduly harsh here, Walter, let me tell you about just one more case.<sup>42</sup> Think of it as just another example of what I am talking about. But Walter, it is as good an example as examples get. Now I will be brief because this letter is already getting too long and because the case probably deserves a whole letter itself. The case involves a bunch of sophisticated contract law, which I am not going to get into and which I am just going to ask you to take on faith. The issue before the Supremes in this case<sup>43</sup> was whether an attorney is liable to third parties, who his client intended to benefit under a testamentary instrument, if the attorney negligently drafted the instrument so as to deprive the third parties of the intended benefit. Walter, trust me, to a contracts lawyer that question almost answers itself. The answer is “yes.” This is even true under Texas contract law, which at times can be pretty weird. We call these third par-

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42. Also in defense of my apparent cynicism, let me mention that *Bohatch* did get to the jury in her case. What was the trial judge thinking? Result? A jury verdict for \$307,000 actual damages and \$4 million in punitives! Walter, I think we may have been a little correctly concerned earlier about there being danger in letting these juries hash out these public policy things. So, there’s your trouble. Also, I’m a little troubled that the snitcher was a she and not a he. Walter, you insensitive so and so, that just raises all kinds of issues I’d just rather not get into right now, if you know what I mean, and you probably don’t. A bunch of us around here have not forgotten your being the first, and only, recipient of the “Barbie” award given by our women law students.

43. The case is *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996).

ties “donee” or “intended” beneficiaries.<sup>44</sup>

Although the issue was one of first impression for the Supreme Court of Texas, most, but not all, other jurisdictions have considered the question and almost all have answered it affirmatively in favor of liability. Most of these jurisdictions justify the result by simply applying basic contract law principles.<sup>45</sup> However, when on occasion these courts talk about policy, they say that allowing a cause of action to the third party is the very best way, perhaps the only way, to carry out the client’s intent. Walter, the client is dead by the time the mistake is discovered in these cases, and so he is not about to sue his negligent attorney. The representative of his estate is not likely to do so either, because in most cases the estate has suffered no loss attributable to the attorney’s negligence. It is just the beneficiaries that got hurt. Nevertheless, about five states in all these United States do deny a cause of action to the third party.

Now Walter, you might think that our Court, being as proud as it thought it was in going along with the majority of states in the *Peeler* case, would go right along with the majority here. Particularly when it is a much greater majority than in the *Peeler* situation and when, unlike in the *Peeler* situation, the majority cases are not distinguishable from the case before it. Nope. Why not you say? Public policy, Walter. Are you paying attention? The Court said that it believed “the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent.”<sup>46</sup> Now I can recall a situation or two when I have had some cause for doubt, but I do believe that most all people, mostly all the time, are in favor of the greater of two goods. And I will count myself, and you too Walter, right along with them. It’s just that I think most people, non-lawyers and lawyers—but not will-writing lawyers - would think our Court in Austin is not a very good picker of goods. I mean one good here is the one the court picked—protecting lawyers who malpractice and the insurers who underwrite them. The other good, the one the Court did not pick, is to hold an attorney responsible for losses he causes to the beneficiaries of his client’s wishes in the exceptional situation where the client himself is no longer *ideally situated* to hold that attorney responsible. Walter, as the poets, ministers, and therapists love to say - “It is an ill wind that blows

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44. See RESTATEMENT (SECOND) OF CONTRACTS § 133 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

45. Walter, the courts use these basic contract principles to determine whether or not a duty is owed to the third party. Once that is established, whether that duty is violated is determined by the usual negligence/malpractice standards, if you know what I mean, and you probably don’t.

46. *Barcelo*, 923 S.W.2d at 578. Walter, if you think I’m being a little hard on the court here, you should read Justice Cornyn’s wonderful dissenting opinion in the case. He says he thought the Court had dedicated itself in recent years to aligning itself with the “mainstream of American jurisprudence” and that he finds inexplicable the Court’s refusal in *Barcelo* to follow “the rule in the overwhelming majority of jurisdictions.” *Id.* at 579-80. I bet Justice Cornyn would have been unhappy to learn that the decision in the *Peeler* case was not exactly “mainstream” either.

no good!” And here we have two goods to choose from, if you know what I mean, and you might not.

You know, Walter, I read somewhere recently that about sixty percent of Americans don't like and don't trust lawyers. Now, I think that is just wrong information. I don't know where they get the people that answer these polls. I think it's the same sixty percent that think Clinton ought to be kept in office. The people I talk to never seem to match the polls. I talk to a lot of different people, and I would say about ninety percent don't care much one way or another about lawyers, but if it gets down to the lick log, they think lawyers are alright, not great. About all of them also think that Clinton ought to be hung by his thumbs. But, regardless, decisions like that in the *Peeler* case and these other cases sure don't do lawyers much good in the public eye in my opinion. What do you think?

I am going to close now. I think you may be happy to hear that. I also think you will be happy to hear that we might have been onto something with this distinction between breach of fiduciary duty and simple malpractice. You and me have been singled (doubled?) out a time or two for being country “yahoos,” if you know what I mean, and I think you do. I am not sure why, but I hope this open letter sets the record straight on that score. I mean we may be “yahoos,” Walter, but we're pretty smart “yahoos,” aren't we? I mean us being right on top of this fiduciary malpractice thing and all.

Walter, please let me hear from you about all this during one of those hopefully frequent periods when most of your remaining faculties are operating roughly simultaneously and when you get your land legs back.<sup>47</sup> In the meantime, keep a tight line and remember, after casting your topwater, wait until all the ripples die, and count to three before beginning chugging.

Your Friend,

*Roy Ryden Anderson*  
*Still Professor of Law\*\*\**

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47. I am sorry to disturb you with all these questions during your retirement. I bet you were thinking that there are other professional responsibility teachers on the faculty to whom I could turn. Well, one of them I can't because she went to work for one of the judges who sided with the majority Supremes in the *Peeler* case. I am sure, though, that the case had nothing to do with the judge deciding to do something else. You're going to laugh, but what he decided to do was become some kind of prosecutor for the public. I asked the other two ethics professors on our faculty, Bridge and Moss, but they won't give me any answer without an up-front retainer. Walter, you have certainly left your mark on your colleagues! Now I know you won't charge me in appreciation for all of the things I could have said about you in this open letter but did not. I told you they were safe with me, old buddy.

\*\*\* The sense and nonsense that is the above is dedicated with respect and affection to Walter W. Steele Jr. SMU, this place where I work, is not the same place since Steele retired. I do not think it is as good a place. But it is still a pretty good place, and some of that is because of Walter, if you know what I mean, and I think you do.

